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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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NTP INC.,

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Plaintiff;

06

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v.

CIVIL ACTION

08

3:01CV767

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RESEARCH IN MOTION, LTD.,

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Defendant.

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HEARING ON DAMAGES AND INJUNCTION

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February 24, 2006

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Richmond, Virginia

14

9:00 a.m.

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BEFORE:

HONORABLE JAMES R. SPENCER

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United States District Judge

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APPEARANCES:

JAMES H. WALLACE, JR., ESQ.

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JOHN B. WYSS, ESQ.

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MAYA M. ECKSTEIN, ESQ.

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KEVIN P. ANDERSON, ESQ.

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Counsel for Plaintiff;

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HENRY C. BUNSOW, ESQ.

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MARTIN R. GLICK, ESQ.

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HERBERT L. FENSTER, ESQ.

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ROBERT M. TYLER, ESQ.

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Counsel for Defendant.

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JEFFREY B. KULL

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OFFICIAL COURT REPORTER

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

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THE CLERK: Case Number 3:01CV767: NTP

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versus Research In Motion, Ltd. Mr. James H. Wallace,

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Jr., Mr. John B. Wyss, Mr. Kevin P. Anderson and Ms.

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Maya M. Eckstein represent the plaintiff. Mr. Robert

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M. Tyler, Mr. Henry C. Bunsow, Mr. Herbert L. Fenster,

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and Mr. Martin R. Glick represent the defendant. Mr.

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John J. Fargo and Mr. Robert P. McIntosh represent the

08 interested party, United States of America. Are
09 counsel ready to proceed?

10 MR. WALLACE: Plaintiff is ready.

11 MR. BUNSOW: Research In Motion is ready to
12 proceed, Your Honor.

13 MR. FARGO: The United States is ready.

14 THE COURT: All right. Mr. Wallace?

15 MR. WALLACE: Good morning, Judge Spencer.

16 THE COURT: Good morning. Let me make sure
17 that you have understood the format. We are going to
18 let you talk about the issue of damages and the impact
19 of the Federal Circuit opinion. And then you will
20 discuss injunction, the other side, RIM, will do
21 likewise, and then we will let the United States come
22 forward and you will have an opportunity to reply.

23 MR. WALLACE: Thank you. My partner, John
24 Wyss, and I will do precisely that.

25 THE COURT: One more bit of direction. I

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01 need to hear from you about how to deal with the funds
02 in the escrow account, because the non-adjudicated
03 products comingle with adjudicated products, something
04 I told you not to do, but you did it anyway. But I do
05 need to hear about that, a practical solution that does
06 not involve the Court in perpetuity.

07 MR. WALLACE: Of course. Hopefully not the
08 lawyers in perpetuity.

09 THE COURT: All right.

10 MR. WALLACE: Thank you, Your Honor. As Your
11 Honor recalls, when we filed the complaint in this
12 lawsuit RIM had about 40,000 users in the United
13 States. By the time of the jury verdict in November of
14 2002, they had, I think, a little over 100,000. By the
15 time of the injunction, they had roughly 300,000. And
16 at every step of the way, when the jury and when Your
17 Honor and when the Federal Circuit and the Supreme
18 Court told them that they were infringing, it was
19 improper and willful, they redoubled their efforts and
20 now here we are today where they have close to four
21 million U.S. BlackBerry users, and their position is
22 the damages are so high we don't want to pay them; and
23 the infringement is so extensive, it will be very
24 difficult to bring it to a halt. Which is a rather
25 perverse position.

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01 Your Honor, the mandate of the Federal Circuit is
02 quite clear, we submit, that the mission of this
03 proceeding is rather limited. As Your Honor knows, the
04 method claims were thrown out because of the fact that
05 part of the operation of the system was in Canada. The
06 Federal Circuit modified three of the claims relating
07 to originating processors. But one thing was clear:
08 In vacating the prior relief, the Court did not mandate
09 a new trial, nor did it mandate de novo injunction
10 review. Similarly, the Federal Circuit did not open
11 the door to rehash prior histories.

12 With your permission, I have some notebooks with

13 some flip charts. Those are all identical, Your Honor,
14 local copies for the Court's convenience. If you turn
15 to Page 2 of Tab 1, we have set forth where we stand on
16 the adjudicated claims. As I said, the six method
17 claims are out; three originating processor claims were
18 modified in the claim construction from Your Honor's
19 earlier ruling. The parties have addressed these three
20 modified claims, and the parties are in agreement from
21 reading their briefs that Claim 15 of the '960 patent,
22 the infringement of that is unaffected by the Federal
23 Circuit's modification. And that, of course, is a
24 significant claim because that is the earliest-to-issue
25 patent and that covers the entire BlackBerry system.

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01 So all the damages are supported by that claim alone.

02 The parties are similarly in agreement in reading
03 the briefs that Claim 40 of the '592 patent is
04 unaffected. That leaves us Claim 8 of the '670 patent.
05 And while we believe that claim is infringed as
06 modified, we will concede that the factual record
07 developed at trial does not support a finding of
08 infringement of Claim 8 of the '670 patent. Both sides
09 agree on that. We are not asking for a new trial on
10 that. We will, for the purpose of these proceedings,
11 disregard that claim.

12 Therefore, where does this leave us with the
13 Federal Circuit's decision and mandate? We still have
14 nine claims that are final, fully affirmed, and
15 conclusive as to infringement and validity.

16 Given the fact that the parties are in agreement
17 on the impact of the Federal Circuit's modification of
18 three claims, the question is whether the nine fully
19 affirmed willfully infringed claims support the damage
20 award and support injunctive relief. And the answer,
21 we submit, Your Honor, is clearly yes.

22 Now, the points that we will address responsive to
23 the format set forth by Your Honor, my partner, John
24 Wyss, will discuss why the jury's award of Claim 15 of
25 the '960 patent alone will support the prior damage

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01 award with regard to both the litigated and the
02 stipulated models of BlackBerry. He will also address
03 how the damage award can be updated using Your Honor's
04 methodology that Your Honor used in entering the final
05 orders in the summer of 2003 to update the damages from
06 the jury's award of \$23 million to some 50-some-million
07 dollars at that point. Therefore, with regard to the
08 litigated and stipulated models, the case is ripe for a
09 final award of damages.

10 Then I will address, Your Honor, the injunctive
11 issue, and we will explain why the arguments of RIM
12 raising hypothetical public harm scenarios are
13 baseless. They are completely belied by RIM's own
14 work-around, which, Your Honor, if you go to the RIM
15 website, we did this two days ago, they explain,
16 although they are telling Your Honor perhaps a
17 different story on Page 46 and 47 of their January 17th

18 brief, they are telling the public and the investment
19 community, and we have it attached, the last page of
20 Tab 1, that users will not see any changes; service
21 providers, system administrators will see no changes in

22 the BlackBerry service or its administration.

23 Now, we have not seen the work-around, so I make
24 no representation as to whether it does or does not
25 infringe. But they are telling Your Honor and the
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01 investment community that they have a work-around which
02 is not infringing, and that users and system
03 administrators will not know, recognize any impact.

04 Finally, Your Honor, Mr. Wyss will address the
05 government's interest under 1498, how the government
06 can be fully protected from a shutdown of the other
07 non-governmental BlackBerry users. So I'll now turn
08 this over, Your Honor, to Mr. Wyss to discuss the
09 damages award.

10 THE COURT: All right.

11 MR. WYSS: Good morning, Your Honor. I will
12 be using the slides that appear after Tab 2 and I'll
13 try to direct you to the slides as I go through them.
14 The issue I'm going to address is the one that the
15 Federal Circuit remanded concerning damages.
16 Essentially, the issue that they sent back to you, Your
17 Honor, is to determine what Impact, if any, would there
18 be on the jury's damages verdict from the elimination
19 of the method claims and Claim 8 of the '670 patent.
20 They intended that you conduct your analysis based on
21 the trial record in this case, based on the damages
22 proofs that were actually offered at trial, based on
23 Your Honor's carefully-crafted and unappealed jury
24 instructions, and on the jury's special verdict
25 findings that are also a matter of record.

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01 If we will go down to the next slide, Your Honor.
02 RIM, however, takes slightly a different view. What
03 they argue is that the Federal Circuit's decision
04 necessarily requires you to hold an entirely new
05 damages trial. They don't cite any record support for
06 that. They don't discuss any of the damages evidence
07 or Your Honor's instructions. They have a bunch of
08 conclusory assertions, but they don't give any specific
09 facts. The Federal Circuit could have ordered a new
10 trial if they thought that was necessary. They did not
11 do so. Instead, they sent it back to Your Honor
12 because Your Honor was there; we were all there. We
13 know exactly what was put in the record. We know what
14 the testimony was. Your Honor knows exactly what those
15 instructions were that you crafted and how you
16 instructed the jury to decide these issues. And so the
17 only question that comes down is based on the trial
18 record: Can Your Honor determine the claim basis of
19 the jury's award based on the trial record.

20 Going on to the next slide, Your Honor, we believe
21 the answer is clear. The damages testimony and the

22 exhibits, those are all in the record. The damages
23 evidence was presented on a claim-by-claim basis. And
24 I have in your notebook, Your Honor, the next slide,
25 which is one of our trial exhibits that you may recall,

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01 which is where NTP's expert got up and went through,
02 claim by claim, patent by patent, product by product,
03 all of that was put in the record.

04 In addition, the proofs were very clear by our
05 expert that the jury could not cumulate damages. They
06 could only award it under one claim. Then if they went
07 on and there was an additional claim that was infringed
08 and it covered the same types of products and services,
09 no more damages, no cumulation.

10 Even more important, Your Honor incorporated all
11 of these principles in the instructions. Your Honor
12 directed the jury to make a set of discrete factual
13 findings so that when we come back today, we can
14 determine precisely what it was they did in following
15 Your Honor's instructions.

16 So let's look at that series of instructions, Your
17 Honor. I'm moving on to Slide Number 4 down at the
18 bottom. And the first step that Your Honor told the
19 jury that they had to do was they had to find out which
20 claims were infringed. Your instructions were clear.
21 They had to award damages if at least one of the claims
22 was valid and infringed. You then instructed the jury
23 to go through independently, look at each claim, make a
24 decision whether or not it is valid, make a
25 determination of whether or not it is infringed. Your

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01 Honor's Special Verdict Form had the jury step through,
02 put checkmarks by each of those. We have now been up
03 to the Federal Circuit. We have been up to the Supreme
04 Court. We are now in a position where we have nine
05 separate claims that are fully affirmed, final, and
06 conclusive. There is nothing left to appeal on those
07 nine claims.

08 The second factual issue, and I'm going on now to
09 Slide Number 5, Your Honor, was, you told the jury that
10 they would have to determine a reasonable royalty
11 rate. Your Honor may recall that NTP's expert, Mr.
12 Musika, testified at length about that, as did RIM's
13 expert, Mr. Donaldson. Both of them presented evidence
14 asserting that there should be only a single, universal
15 royalty rate that would apply across the board for all
16 products and services and for all claims. Neither
17 expert ever suggested that that rate, the reasonable
18 royalty rate determination, would be impacted one way
19 or the other based on the number of claims that were
20 found to be infringed.

21 Likewise, Your Honor gave very specific
22 instructions on the reasonable royalty rate, directing
23 the jury to apply the GEORGIA PACIFIC factors. Some
24 twelve factors, I think, were listed in your
25 instructions. Again, none of those factors in any way

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01 depend upon the number of claims that are being
02 presented. And I think, as we pointed out in our
03 briefs, Your Honor, if the rule were anything else,
04 every single patent trial would be 100 or 200 claims.
05 Nobody would ever give up a claim because, "Oh, my God,
06 somebody is going to reduce the rate or do something if
07 I don't throw them all in." That's not the way it
08 works. The way this was presented by the experts at
09 trial, the way Your Honor instructed the jury, was to
10 come up with one rate that applied for each of the
11 claims that applied across all the products.

12 Your Honor, the jury followed your instructions.
13 Moving on to the next slide, Number 6, the jury issued
14 its verdict on what the reasonable royalty rate would
15 be. They came up with 5.7 percent. That rate, based
16 on your instructions and based on your evidence, was
17 not affected by the number of claims that were
18 involved. RIM did not appeal that factual
19 determination. The CAFC's decision has no effect on
20 that factual determination. That 5.7 percent
21 reasonable royalty rate is the law of the case.

22 Now I'm going to go on, Your Honor, to the third
23 discrete factual issue that you asked the jury to
24 decide that's shown on the next slide, Slide Number 7.
25 The third discrete issue concerned the infringing

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01 revenue base; what is the size of the infringing sales
02 that should be covered; how much of the U.S.-derived
03 revenue did RIM derive for each of the individual
04 infringed claims. Again, the evidence at trial as we
05 saw that in that earlier section set this forth, broke
06 it down claim by claim, product by product, service by
07 service.

08 In addition, Your Honor instructed the jury and
09 the expert testimony agreed that there were some
10 differences timewise between the different claims.
11 There was the '960 patent and a couple other early
12 patents that would cover a time period from May, 1999
13 up to the time of trial. The later patents, the '451
14 patent and the '592 patent, were issued later so they
15 had slightly shorter time periods. The key point is,
16 Your Honor, there was no factual dispute about those
17 time periods, about the revenues that were encompassed
18 by each of those time periods. And in particular,
19 there was no factual dispute that RIM's total U.S.
20 revenues from May of 1999 up through the time of trial,
21 which would be covered by that '960 patent, was a total
22 of some \$405 million.

23 There was, however, one issue of factual dispute
24 the jury had to decide in terms of the revenue base,
25 Your Honor. And that's shown on the next slide, Slide

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01 8. And this was a factual dispute as to how much of
02 that revenue, the \$405 million, should be attributable
03 to the damages of each claim. NTP's expert, Mr.
04 Musika, he testified that all of the U.S. revenues,
05 including the revenues from handhelds, from software,

06 and from the monthly services, should all be covered by
07 basically all of the claims. He explained several
08 times how you don't buy a handheld and then sit and
09 look at it. You buy the handheld because you are then
10 going to get the service and you are going to use it.
11 It is sold as a single integrated system. He went
12 through that in considerable detail.

13 Both he and our expert, Dr. Rhyne, also testified
14 that Claim 15 of the '960, the very first claim, is one
15 that by its terms covers the entire system: all of the
16 parts, all of the software, all of the services that go
17 with it.

18 RIM's expert, Mr. Donaldson, took a much different
19 view. This is where we had the sharp contrast. He
20 said, "Nope, no matter which claim we are talking about
21 it should only be the handhelds. That's the only thing
22 you should assess damages based on." He never really
23 gave any real technical explanation for that position.
24 As I recall his testimony, that was his view of what
25 industry practice should be, just the handhelds, not

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01 the service.

02 Significantly, however, Mr. Donaldson did not
03 dispute that Claim 15 covers the entire system. Nor
04 did he dispute, in fact he admitted on
05 cross-examination, that RIM does receive revenues from
06 the sale of handhelds, from the sale of software at
07 \$10, month after month after month; that's what RIM
08 gets, and that is all part of operating the RIM
09 system.

10 On the next slide, Slide 9, Your Honor, we
11 addressed the fact that the jury did resolve these
12 issues. As part of the Verdict Form, they were called
13 upon to define what was the revenue base. The revenue
14 base they found on the Special Verdict Form was the
15 \$405 million figure. This corresponds exactly to the
16 total system revenue for handhelds, software, and
17 services covering the entire period from May of 1999 up
18 to trial, which is precisely the time period Your Honor
19 directed they had to consider with respect to Claim 15
20 of the '960 patent.

21 RIM did not appeal that factual determination.
22 The CAFC decision does not affect the jury's factual
23 finding in this regard. The \$405 million system
24 revenue, again, is the law of the case. We are now on
25 then to what basically is the final factual step that

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01 the jury had to decide, and that was to come up with
02 the damage award calculation. There were two things
03 that Your Honor told the jury that they had to do.
04 One, they had to multiply the royalty rate, multiply
05 that times what they found to be the infringing revenue
06 base, and they had to do that basically claim by
07 claim. At the same time, however, Your Honor made very
08 clear that they could not -- we call it the
09 anti-stacking rule -- they could not do any double
10 counting; they could not cumulate damages. This was

11 the testimony of Mr. Musika, and it was also
12 incorporated in Your Honor's instructions, that "Jury,
13 if you find infringement," you even used Claim 15 of
14 the '960 as an example, "if you find that as infringed
15 and whatever damages you award for that, you can't give
16 any more if there are any additional claims that are
17 infringed. That's the maximum amount. By contrast, if
18 you found that one of the later claims of the '592
19 patent, one of the smaller amounts was infringed, and
20 at the same time you found that one of the earlier ones
21 was infringed, again, you can't double count. You
22 always go back to the highest number."

23 So that was the testimony of the experts at
24 trial. And that was the instruction that Your Honor
25 gave the jury. And in fact, you gave the jury a very

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01 specific instruction directed specifically at Claim 15
02 of the '960 patent. You told the jury that with
03 respect to that claim, they had to include the entire
04 time period from May of 1999 up to the time of trial.
05 That's the period that corresponds exactly to what they
06 found to be the \$405 million. The jury, in fact,
07 followed your instructions. And on the next slide,
08 Your Honor, they awarded \$23 million, approximately, in
09 compensatory damages. That verdict, Your Honor, is
10 compelled by infringement of Claim 15 of the '960,
11 applying Your Honor's very, very specific
12 instructions.

13 Claim 15 is now final, conclusive. They are not
14 affecting that. It has been up, it has been down. It
15 is conclusive. There is nothing left to appeal on
16 that. The Claim 15 damages evidence is also all in the
17 record, as are Your Honor's instructions. Claim 15
18 infringement supports the entire \$23 million award all
19 by itself.

20 Equally important, Your Honor, under the
21 anti-stacking instruction that Your Honor gave where
22 you couldn't duplicate, you couldn't count, additional
23 awards, whether or not the jury thought we should get
24 additional money on any of the method claims or Claim
25 8, could not affect that verdict in any way. Your

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01 instruction told them it could not.

02 So accordingly, Your Honor, the CAFC's decision
03 which affected these method claims in Claim 8 does not
04 have any effect on the \$23 million compensatory damages
05 award, and that entire award is supported, indeed
06 compelled, by Claim 15 of the '960 and should be
07 reentered.

08 So the question is, what is left to do now? I'm
09 going on to the next slide. The only thing that is
10 really left to do is just to update that award in the
11 exact same way that Your Honor did back in August of
12 2003. Your Honor recognized that at the time of trial
13 we tried the period May, 1999 up to the time of trial.
14 Judgment didn't get entered until seven or eight months
15 later. Your Honor recognized that there were

16 additional infringing, willfully infringing sales going
17 on thereafter. So what Your Honor did was two things.
18 First of all, you said, "RIM, every quarter I want you
19 to report on the infringing models. Tell us what the
20 sales are. And then the parties, NTP and RIM, I want
21 you to get together and come up with a methodology, a
22 joint one, an agreed methodology, so we can figure out
23 what to do with these post-trial sales and how they can
24 be appropriately incorporated into the judgment." The
25 parties did that, Your Honor. We put together a joint

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01 statement setting forth an agreed methodology. It had
02 a computer spreadsheet attached which showed exactly
03 how the calculations would be made. The Court used
04 that agreed methodology, used the data that RIM
05 reported, and included that in its final judgment back
06 in August of 2003. Significantly, RIM did not appeal,
07 did not challenge, did not object in any way to that
08 procedure.

09 Going on to the next slide, Your Honor. In order
10 to make that procedure work, you directed RIM to file
11 verified quarterly reports of their infringing sales
12 each month. Your order was very clear, Your Honor. It
13 said "products and services determined by the jury to
14 be infringing." That's what you told them to report.
15 In addition, later on we have this question about the
16 four stipulated models, the 600 series models. RIM
17 stipulated to the infringement of those. RIM
18 stipulated that they would include those as part of the
19 quarterly reports. RIM did not appeal your order on
20 the verified reports. It did not challenge it. And in
21 fact, it then filed quarterly reports that Your Honor
22 used to update the judgment that it entered in August
23 of 2003. And after that, they then filed a series of
24 ten quarterly reports, verified, under oath, setting
25 forth the quarterly sales of the products and services

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01 determined by the jury to be infringing, as well as the
02 stipulated models all the way up through November of
03 last fall. Those are all in the record. They are all
04 attached to our original declaration.

05 What then are we left with? I'm now going on to
06 Slide 14, Your Honor. What we are left with is simply
07 a straightforward mathematical calculation. Your Honor
08 can use, and we request you to use, the exact same
09 agreed update methodology that the parties used when
10 they submitted their joint statement to Your Honor
11 pursuant to Your Honor's direction back in the summer
12 of 2003. In fact, we used the exact same computer
13 spreadsheet. We just added more columns to it and
14 additional years. And we plugged in the numbers right
15 out of the verified data that RIM submitted for the
16 quarterly reports, the issues you told them to address,
17 the infringing models, the service, the software, and
18 the additional stipulated models. All of those numbers
19 are right in those reports. You can pull the numbers
20 out of the reports; you can put them in the

21 spreadsheet. It does the math. You push the button
22 and you get a mathematical computation. It is all set
23 forth in Tab 6 and 7 of the Anderson declaration. We
24 put that in as part of our original submission, Your
25 Honor. RIM in its response brief has not challenged

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01 any of the calculations or anything that we did with
02 respect to that.

03 What do they do? Well, I'm going on to the next
04 slide, Your Honor, Slide 15. Basically, at this very
05 late date they try to inject two totally new and
06 different issues. First of all, they seek now
07 apparently to try to disavow those verified quarterly
08 reports. And they put in an affidavit in this last
09 go-around about somebody who says, "Well, gee, maybe if
10 I really thought about it, Your Honor, although we
11 don't track it, we don't have any records that would
12 tell us, I think I can come up with a calculated,
13 guesstimated calculation of things I didn't put in my
14 verified reports but now, in 2006, I want Your Honor to
15 give me a whole new trial on." Your Honor's order was
16 absolutely clear. Report for the infringing products,
17 the infringing services, and the stipulated models.
18 That was the entire purpose of having those reports: so
19 that we would have reliable data when we come back in
20 2006 that we would be able to use via the same agreed
21 update methodology to come up with the final monetary
22 judgment. It did not object to that; it did not appeal
23 that. It cannot run away from its own verified
24 reports, Your Honor.

25 The only other argument they raise now is, "Well,

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01 some of the stipulated models had some additional
02 features. We have telephones. At trial, we had a
03 telephone with an integrated voice thing on it. And we
04 have got some additional features that come in. And
05 therefore, we want a new trial on all of those." Your
06 Honor, this is an example of another one of these
07 Johnny-come-lately issues that was not raised at trial,
08 and was therefore waived.

09 At trial, we had plenty of testimony about the
10 different features. We had the models that we tried,
11 the adjudged models. All of them had wireless e-mail.
12 That was common. Some of them had calendars. Some of
13 them had addresses. One had a telephone. Some had
14 short message texts, a whole bunch of other features
15 that were involved as well. Mr. Donaldson, RIM's
16 expert, never suggested that the royalty rate or the
17 revenue base would vary in any way based upon which
18 features were on a particular model or which weren't.
19 He could have raised that issue at trial. He could
20 have put in evidence in the record and said, "Oh, we
21 have to look at the features. We have to have a
22 separate and distinct royalty rate that would apply
23 depending on which features were there." They did not
24 do so. And they waived the trial and waived it by not
25 raising it there.

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01 The jury's 5.7 percent royalty rate was determined
02 under Your Honor's instructions, under the evidence
03 presented, to apply across the board, just like Mr.
04 Donaldson said. In fact, Your Honor actually asked Mr.
05 Donaldson just as he was leaving the stand. "Well,"
06 you said -- his number was 1.5 percent. You said,
07 "Well, that's for handhelds. What about these other
08 things?" He said, "Oh, yeah, 1.5 percent applies to
09 handhelds, applies to services, applies to the
10 software." He was very clear. One number all across
11 the board, all products, everything.

12 To be sure, Your Honor, in one of your orders,
13 because RIM had raised this back when we were fighting
14 about the stipulated models and what they had to report
15 and not report, Your Honor in one of your orders
16 allowed RIM an opportunity. You said, "You are going
17 to have to make -- you stipulated to infringement. You
18 are going to have to make your deposits. You are going
19 to have to make your quarterly reports on those.
20 However, I will give you an opportunity, if you want,
21 to come to me and you can make a good faith application
22 to show that you should cease or somehow modify your
23 reports, modify your deposits based on these
24 non-infringing things. You can do that and I will
25 think about it prospectively." You gave them that

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01 opportunity back in the summer of 2003. RIM never
02 availed itself of it. They never came in and said,
03 "Oh, we want to raise this issue that we have got
04 tucked away that we want to bring back that we didn't
05 raise at trial." Your Honor, their verified reports
06 and the data in those reports stand. That's what they
07 submitted to you under oath and that's what they can't
08 run away from now.

09 Your Honor, the next slide is simply a summary
10 slide, Slide Number 16, which is basically the same as
11 the proposed monetary judgment that is attached to our
12 original opening brief. This is what we request Your
13 Honor to enter. This applies the agreed methodology
14 that we used back in the summer of 2003. It takes
15 RIM's verified data, plugs it into the spreadsheet, and
16 all of these numbers fall out just like that. This is,
17 again, what we attached to our opening brief. And RIM,
18 in its response brief, has not attacked any of the
19 calculations, any of the numbers that are in there.

20 So Your Honor, we would ask you to enter a
21 monetary judgment for the total award of about \$126
22 million, which would cover all of the adjudicated and
23 stipulated models up through November of last year.

24 We urge you to do this, enter this judgment, Your
25 Honor, as soon as possible. This issue was clearly

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01 separate from anything we are going to be talking about
02 for the injunction. There is no reason to delay entry
03 of that monetary judgment. This is based on claims
04 that they have been up to the Supreme Court and back.

05 There is nothing left for RIM to appeal on this. The
06 judgment should be entered and should be paid without
07 delay.

08 Your Honor, that would normally conclude what I
09 would do about damages because that's what the CAFC
10 asked you to do. RIM, however, has injected three
11 additional issues in its brief. And I'm going on to
12 the next slide. These were issues that were really not
13 raised at trial and in our view are not properly part
14 of the remand. But these are the issues about escrow
15 funds, enhanced damages/willfulness, and implied
16 license. I'll just touch on those briefly because you
17 indicated you wanted to hear something about the escrow
18 payments in particular.

19 In our view, none of these are properly part of
20 the remand proceeding and all of them have no legal or
21 factual support.

22 Turning to Slide Number 18, Your Honor, which is
23 the one about escrow funds, we believe the whole
24 question of the escrow funds, besides not being part of
25 the CAFC remand, is premature at this time. That

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01 escrow, the funds that are in that, are clearly part of
02 the security that we need for the \$125 million, \$126
03 million judgment that we are asking Your Honor to
04 enter.

05 That judgment does not cover the models that RIM
06 introduced afterwards, and so those escrow funds will
07 continue to be needed to be security for whatever we
08 figure out what we have to do with those additional
09 models that were not tried and were not stipulated. So
10 if anything, we would urge Your Honor basically to do
11 nothing about the escrow now, merely reconfirm that RIM
12 should keep making its deposits, keep making its
13 quarterly reports. RIM never appealed that order. And
14 depending on what RIM does afterwards, after we are
15 done here and after Your Honor deals with the
16 injunction issue, that's when we come back and deal
17 with it. Because if Your Honor enters an injunction,
18 there might be a lot of things that could happen. RIM
19 could take a license, in which case we will never have
20 to deal with that. We will release it. That will all
21 be part of a settlement. RIM could do its work-around,
22 which will then put an end or cap on things, or may or
23 may not depending on what the technical details are.
24 But that will affect it one way. Or RIM could keep
25 right on litigating and fighting us and making us file

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01 a new lawsuit every time they bring out a new model.
02 We won't know that. So what we are saying is, Your
03 Honor ought to really focus in on what the CAFC
04 directed you on its remand: Do the damages, do the
05 injunction. After those are entered, after the
06 monetary judgment is satisfied, after the injunction
07 which we hope Your Honor will enter becomes effective,
08 that's when we can come back and talk about what to do
09 with the escrow funds.

10 The second issue that RIM has raised or tried to
11 inject concerning damages, and I'm going on to Slide 19
12 at this time, Your Honor, is the question of
13 willfulness and enhanced damages. Nothing in the CAFC
14 remand involves that at all, Your Honor. The
15 willfulness/enhanced damages judgment is conclusive.
16 There are only two choices. Either RIM did not appeal
17 it and they waived it and it is final, or RIM appealed
18 it and the CAFC rejected it and it is final. Either
19 way, there is no basis for this Court now to go back
20 and revisit that.

21 RIM does cite a new Supreme Court case, the
22 KNORR-BREMSE case, which involves a totally different
23 issue. It involves drawing adverse inferences from
24 failing to produce a written opinion of counsel. It
25 has absolutely nothing to do with and is no excuse to

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01 reopen this. I think the easiest way is to point Your
02 Honor to the Federal Circuit's decision in the GOLDEN
03 BLOUNT case. We have copies of the slip opinion. It
04 came down about a week ago. It is exactly on all
05 fours. You have the exact same situation, where a
06 defendant was found to be a willful infringer.
07 KNORR-BREMSE came along and they go running up to the
08 Federal Circuit and say, "Oh, we have got new law;
09 overturn the decision on the willfulness." The Federal
10 Circuit makes very clear, it says, "No, no,
11 KNORR-BREMSE is a decision that deals with drawing
12 adverse inferences from failure to produce a written
13 opinion. You in your case put on evidence. You put
14 your people on the stand. You told about what you did,
15 the opinions you did. You told about the things you
16 looked at, and the jury didn't believe you.
17 KNORR-BREMSE has nothing to do with this."

18 That's exactly what happened in this case, Your
19 Honor. As you will recall, Mr. Lazaridis got on the
20 stand and talked about hundreds of hours of
21 investigation and how they looked at things, that it
22 was all headed by Gary Mousseau, the guy up in Canada
23 who helped put together the demonstration. We then
24 played for the jury the testimony of Mr. Mousseau. He
25 says, "I wasn't involved. I never even saw the

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01 patents." There is nothing in your instructions where
02 you asked the jury to draw any kind of inference one
03 way or the other. It was squarely put up to the jury.
04 You said, "You evaluate the credibility of the
05 testimony. You make a decision whether it is willful."
06 The jury did it.

07 If anything, Your Honor, we believe that if you
08 were going to revise the enhancement at all, the only
09 factor that is critical here is the fact that RIM has
10 been willfully infringing and continues to willfully
11 infringe day after day after day and to fight and to
12 engage in scorched-earth ethics. If there is going to
13 be any consideration of enhancement, it should go up,
14 Your Honor.

15 Finally, let me touch on the last issue that RIM
16 raises, and that's the alleged implied license issue.

17 THE COURT: I really don't need to hear
18 that.

19 MR. WYSS: Your Honor, I'm finished with my
20 section. Thank you very much.

21 THE COURT: Thank you. Mr. Wallace?

22 MR. WALLACE: Thank you, Judge Spencer. If
23 we can turn to the injunction issue. Your Honor
24 entered the injunction in August of 2003. The
25 substantive basis of that injunction was not impacted
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01 by the CAFC decision in any way whatsoever. The Court,
02 when you entered the injunction in 2003, in no way
03 relied on the number of infringed claims in granting
04 that injunctive relief, as is properly so. Any one of
05 the claims before the jury, indeed, one of the claims
06 on remand, the '960 adjudicated willfully infringed
07 valid claims, willfully support an injunction to shut
08 down the U.S. operating system.

09 There has been no change in the law. The RIM
10 briefs make a big to-do about the MERCEXCHANGE v. E-BAY
11 case which is pending before the Supreme Court, a case
12 which grew up in this district, I believe, in the
13 Norfolk Division. What happened in the Federal Circuit
14 in the E-BAY case, the Federal Circuit said, "We are
15 just going to engage in the traditional presumption
16 that if there is infringement, there is irreparable
17 harm to the patentee and there is no need to go through
18 the traditional balancing of hardship test, the more
19 rigorous test."

20 Now, Your Honor in 2003 did not engage in a
21 presumption such as the Federal Circuit endorsed in
22 E-BAY, which may or may not get modified by the Supreme
23 Court. Your Honor, in contrast, weighed the balancing
24 of hardships test and that is what we are inviting Your
25 Honor to do again. RIM's conduct continues in the face
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01 of the jury verdict, in the face of Your Honor's
02 injunction order and final judgment, in the face of two
03 decisions by the Federal Circuit affirming the validity
04 and willful infringement, and in the face of being
05 rebuffed by the Chief Justice and by the entire Supreme
06 Court in denying cert.

07 It is interesting that somewhere between 90 and 95
08 percent of the U.S. handheld BlackBerries have been
09 sold by RIM since Your Honor confirmed that such
10 conduct was a violation of NTP's rights.

11 RIM continues to use the NTP technology despite
12 the fact that it is trumpeting to the investment
13 community that it has a work-around that will totally
14 preserve current BlackBerry functionality; that users
15 and carriers and system administrators will not know
16 the difference. They have elected, even though they
17 proudly trumpet the fact that they have what they claim
18 is alternative, non-infringing technology, as they tell
19 the investment community and their customers not to

20 worry, "We have got it covered," they still prefer to
21 use the NTP technology to this day.

22 Well, what do they argue? They argue that there
23 should be no injunctive relief because NTP is not a
24 manufacturer of competing products. Well, there is no
25 legal support for such a proposition, Your Honor. If
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01 that were a valid principle, no university -- and many
02 of our patents, finest patents in the United States,
03 flow out of universities -- would ever be able to get
04 an injunction.

05 RIM lobbied furiously on Capitol Hill to cause
06 Congressman Lamar Smith to introduce legislation that
07 would have expressly provided that non-manufacturing
08 patentees are not entitled to an injunction. That
09 legislation did not succeed. And if it had succeeded,
10 it undoubtedly would have been ruled unconstitutional.

11 Patent rights are established by making an
12 invention, not by manufacturing the invented products.
13 NTP invented this technology. Mr. Campana, the late
14 Mr. Campana, invented this technology some five years
15 before RIM started its BlackBerry business. The
16 Constitution says we are entitled to the exclusive
17 rights, and that is what the Court should do.

18 Unlike some countries, like in Canada, where there
19 is compulsory licensing, that's simply not part of the
20 U.S. Patent system. NTP should not be ousted from its
21 exclusive rights: its property right and its right to
22 determine who should use it and on what terms. To have
23 mandatory licensing would remove from the marketplace
24 the decision on what price a user of that technology
25 should pay.

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01 The irreparable harm is undeniable. Your Honor
02 made findings in the summer of 2003 balancing the
03 hardships, weighing the irreparable harm. Your Honor's
04 factual findings were not even the subject of appeal to
05 the CAFC. RIM has already taken up six years of the
06 remaining twelve years of NTP's patents. They engage
07 in a process of coming out with new models -- "This one
08 has a color screen rather than a black and white
09 screen" -- saying, "Well, it is a new model. It
10 doesn't infringe." The color of the screen has got
11 absolutely nothing to do with the use of the NTP
12 technology.

13 RIM engages in scorched-earth litigation tactics.
14 They are bankrolled by enormous sums of money, and are
15 doing everything they can to drive NTP into the
16 ground.

17 Now, there is no harm to RIM from an injunction.
18 This is a self-inflicted situation. As I say, some 90
19 to 95 percent of what they are doing today is what they
20 voluntarily elected to do in the face of the jury
21 verdict and in the face of Your Honor's August, 2003
22 final judgments. They have voluntarily elected to
23 continue to use the NTP technology despite their claim,
24 repeated claim, and claims they have publicly made

25 since their statements on Page 46 and 47 of their
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01 January 17th brief, that they have this work-around.
02 If they get enjoined, it will be business as usual.
03 Thus, the balance of harms between NTP and RIM are just
04 overwhelmingly in NTP's favor.
05 Now, RIM has submitted some two volumes of
06 declarations and affidavits, including some statements
07 signed by companies not under oath, just signed
08 Cingular Cellular, L.L.P. They have submitted all
09 these as support that the world will come to an end
10 without BlackBerries. They even have an economic
11 expert who says that some \$50 billion of the U.S.
12 economy is being generated because of BlackBerries. We
13 wish we had known about that at the time we were
14 presenting evidence as to the reasonable royalty.
15 There is no evidence that the work-around will not
16 satisfy the first responders, the federal government,
17 or anybody else who insists on using their BlackBerries
18 in all their public meetings.
19 We have to believe what they are telling the
20 investment community. As Your Honor knows, as a public
21 corporation, they have to be squeaky clean in their
22 statements to the investment community. They are
23 advised on their securities issues by the Skadden, Arps
24 law firm of New York. They know what they are doing.
25 They are making precise, careful, calculated, repeated
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01 statements that the work-around will solve all the
02 problems. So they should not be heard that there will
03 be some horrible harm to the American economy or RIM
04 should they be enjoined from further use of the NTP
05 technology.
06 Moreover, unlike when Your Honor made the
07 balancing test in 2003, Your Honor may recall RIM was
08 pretty much the only kid on the block with the workable
09 wireless e-mail devices. Now, every time you open up
10 the paper you see somebody else is coming out with one
11 which they claim is even better. So we have got the
12 work-around, you have got the competing devices. The
13 world, we suggest, will not come to an end if Your
14 Honor enjoins the further willful, improper conduct of
15 RIM.
16 But moreover, although NTP has the right granted
17 by the Constitution to demand the exclusive rights, NTP
18 could demand "BlackBerry, you should be off the air.
19 Let's stop it, stop it now. I choose to license other
20 people and not license you." We have not taken that
21 position. As Your Honor knows from reading our January
22 17th opening brief, we said, "RIM, we are willing to
23 short circuit this whole injunction issue if you just
24 pay up. We will give you a license, the money in the
25 bank for the past willful infringement, which of course
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01 Your Honor set at 8.5 five percent, for future
02 infringement, we are willing to take it at the
03 reasonable royalty of 5.7 percent which was found by

04 the jury, which was not appealed to the Federal
05 Circuit." So it is the law of the case, 5.7 percent
06 is a reasonable royalty. We didn't just come up with
07 that arbitrarily. The jury spoke. RIM didn't appeal.

08 In their public statements, they say, "Oh, this
09 offer of a license from NTP is not realistic." Mr.
10 Balsillie said, "It is theatrics because it wouldn't
11 cover our carriers. They could turn around and sue our
12 carriers for transmitting the BlackBerry signals." If
13 Your Honor looks at Attachment C to our January 17th
14 brief, you will find my December 1st letter to Henry
15 Bunsow and Marty Glick saying, "Look, guys, we are
16 willing to license you." And I expressly say, "Our
17 proposal addresses RIM's business need to provide
18 protection for RIM as well as its customers, business
19 partners, suppliers, distributors, and wireless
20 carriers. It is fair to both NTP and RIM." Yet they
21 claim we are not going to cover their carriers for
22 carrying the BlackBerry signals.

23 Well, if you look at that proposed license, on
24 Page 5, we have a Covenant Not to Sue. I won't read
25 the whole thing, but it says: "NTP hereby covenants

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01 that it will not make or assert against RIM, its
02 business affiliates, wireless carriers, and Internet
03 service providers to the extent that they are providing
04 communications services as part of RIM's services on a
05 RIM network and RIM's authorized sales agents and
06 dealers and so forth. RIM, if you sign this license
07 and you agree to pay 5.7 percent, we are going to cover
08 you and we are going to cover the guys who work with
09 you to provide the BlackBerry service." If we did
10 that, we wouldn't have a problem with the government,
11 we wouldn't have to worry about work-arounds. Mr.
12 Laffer's calculation that BlackBerries are contributing
13 \$50 billion a year in U.S. dollars to the U.S. economy
14 would still stand. All those people making the \$50
15 billion could continue.

16 So while we have the absolute right to an
17 injunction, we have said, "We want to keep you in
18 business. It is just time to pay up."

19 Basically what we have, Your Honor, is we have got
20 a squatter. The squatter is in your nice house, says,
21 "I really enjoy squatting here because it is very
22 comfortable. It has a swimming pool and everything
23 else that we like. And no, I don't want to leave, even
24 though it is not mine. And no, even though you have
25 offered to rent it to me, I don't want to pay. I just

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01 want to continue to be a non-paying squatter."

02 Therefore, Your Honor, we suggest that the Court
03 should enter the injunction which is attached as
04 Attachment A to our January 17th brief. We tweaked the
05 exemption paragraph in consultation with the Department
06 of Justice and modified the exemption paragraph in the
07 Attachment A to our February 1st brief. And we suggest
08 that that is a way to wrap it up.

09 We have also provided in Attachment B to our
10 February 1st brief. To the extent Your Honor is
11 persuaded, and we suggest you should not be, persuaded
12 that there may be some time-consuming issues for RIM to
13 figure out who their customers are, as suggested by the
14 Department of Justice and by RIM, certainly there is no
15 need to hold up enjoining new sales of BlackBerries to
16 non-exempt customers. That's what we have proposed as
17 Exhibit B. And the Department of Justice agrees with
18 us and RIM apparently does, too, that any issues
19 relating to governmental or exempt users should not
20 hold up enjoining the sales of new BlackBerry handhelds
21 to other folks.

22 There are some issues regarding implementation.
23 My partner, John Wyss, has worked very closely with the
24 Department of Justice and I would like him to briefly
25 address those.

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01 MR. WYSS: Thank you, Your Honor. I'm moving
02 on now to Tab 4 in the slides. I'd just like to
03 briefly address the issue of the implementation of the
04 exemption paragraph in the injunction. As Mr. Wallace
05 points out, you don't get to that if RIM were to
06 implement its work-around, if RIM were to take a
07 license, or if commercial users switched over to other
08 alternatives. But this is in case -- if Your Honor is
09 required to enter an injunction, we have agreed that
10 there should be an express exclusion that would fully
11 protect the United States Government.

12 As Mr. Wallace points out, we tweaked the
13 exemption paragraph slightly after a consultation with
14 the government. So we would urge you to, when you are
15 considering the form of injunction, to use the form of
16 injunction in Attachment A to our opening brief, but
17 look at the exemption paragraph, pluck that out from
18 Attachment A to the response brief. That would be the
19 proposed form we would ask you to do.

20 The exclusion paragraph, as modified in talking to
21 the Department of Justice, is clear. It is
22 unambiguous. It fully conforms and protects the United
23 States Government pursuant to Section 1498. In
24 addition, it goes well beyond what the statute requires
25 and it permits RIM that it can continue to give its

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01 BlackBerry services to state and local governments as
02 well as to bona fide first responders.

03 Moving on to the next slide, Your Honor, the
04 exclusion is there. But what RIM does with it is
05 totally up to RIM. RIM is the only party that can
06 determine what it is going to do in response to that
07 exclusion. It can pick up its marbles; it can refuse
08 to continue service and leave those exempt users high
09 and dry. That's one choice. Another choice is that
10 they can serve all their customers, including the
11 government and all the exempt customers, by using their
12 work-around which, as Mr. Wallace points out, they keep
13 telling the financial community has the exact same

14 functionality of their current system. Thirdly, the
15 third alternative, is if RIM wants to, it can implement
16 that exclusion by passing e-mails from exempt users and
17 blocking e-mails from non-exempt users.

18 As far as we are concerned, I'm going on to the
19 next slide, Your Honor, Number 3, the decision of
20 whether or not Your Honor should enter an injunction,
21 this whole question about the implementation is really
22 an extraneous issue to that decision. Neither NTP nor
23 Your Honor should be dictating to RIM how they go about
24 implementing that exemption. This is exempt conduct.
25 We shouldn't be telling them. There are probably an
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01 infinite number of ways they could implement that.
02 Some are costly, some are efficient, some are more
03 effective. That's why it is RIM. RIM knows how to do
04 it. RIM and its customers working together will pick
05 the best way. We shouldn't have courts, and certainly
06 shouldn't have NTP, who doesn't have any of this
07 information, dictating to them the way they do that
08 implementation. We believe Your Honor should enter the
09 injunction. The exemption paragraph is nice and clean
10 and neat. Then it is up to RIM to make it work.

11 RIM and the government, however, have come in and
12 said, "Gee, what if that injunction, including that
13 nice paragraph, what if that makes it impossible for
14 the U.S. Government to continue to use BlackBerry?"
15 Well, the impossibility defense in this kind of thing
16 is squarely on RIM. They have to come in and show in
17 detail, very detail, that they cannot do it and they
18 have to show that they cannot do it using all
19 reasonable efforts, using all of their utmost diligence
20 and bearing all the necessary costs. They have not
21 made that showing. They haven't even tried.

22 In fact, Your Honor, if you look at the two
23 volumes of dozens and dozens of affidavits, you will
24 not find one affidavit where anybody says, "We cannot
25 do this, that it is not technically possible." What
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01 you get is, "Oh, it is going to be administratively
02 inconvenient; it might be costly; it might take time."
03 But nobody says it is not possible. And in fact, going
04 on to the next slide, Your Honor, Number 4, there is no
05 dispute that it is possible. RIM already maintains a
06 white list database of SRP numbers and PIN numbers up
07 in Canada. How do we know that? If you don't pay your
08 bill, they turn you off. How do they know to turn you
09 off? By the SRP numbers and the PIN's in every
10 message. This isn't a question of whether they can do
11 it or not. This is a question of whether RIM is
12 willing to cooperate.

13 They have not lifted a finger over the last
14 several years to collect the SRP numbers and the PINS,
15 to update that database to make it work for exempt
16 users. They haven't even come forward and proposed any
17 implementation procedures as part of the briefing we
18 have done here. Worse yet, when they originally went

19 to the Department of Justice back on November 8th, they
20 gave them an affidavit which in our view is criminally
21 misleading and did not reveal the information that was
22 available to them, as I'll discuss in just a minute.

23 We submit that RIM has been using this entire
24 implementation issue as a red herring, strictly for
25 purposes of delay. It is not an issue that goes into

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01 whether or not you enter the injunction. You put the
02 exemption in, it is clean, conforms with the statute,
03 and you don't have to waste time talking about what you
04 shouldn't be talking about. But in any case, there is
05 no question, I'm on to Slide 5, that RIM, its own
06 affidavits concede that it can pass exempt traffic and
07 it can block non-exempt traffic. That's in the Belgard
08 affidavit. It is in the Clarke affidavit.

09 Every message that goes from the United States up
10 to RIM has a code on it that tells you whether it is
11 PIN to PIN. All these affidavits, "Oh, we have PIN to
12 PIN. We need our PIN to PIN." Those are
13 identifiable. They can pass every one of those
14 messages. Every message that goes up has an SRP number
15 of the associated BES, that's the e-mail system. It
16 identifies the e-mail system, the software that sits at
17 the corporation or the investment bank or the law firm,
18 and says these messages are coming from an investment
19 bank or a law firm or the federal government. The SRP
20 numbers are on every message. They can inspect those,
21 pass those from exempt BES's, block from non-exempt.

22 The third information is the PIN number. Every
23 handheld has the PIN number which is part of the
24 message which RIM can expect. If it is an exempt user,
25 it gets passed. If it is a non-exempt user, it gets

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01 blocked.

02 RIM has essentially, moving on to the next slide,
03 Number 6, has essentially adopted a posture of really
04 self-induced non-compliance. Three years ago, almost
05 to today, back in February of 2003, we were here in
06 this Court arguing about whether or not an injunction
07 should be entered. RIM's lawyer, Mr. Ayer, from the
08 Jones, Day law firm at that time, stood up here and
09 said, "Oh, you have to have an exemption for the
10 government. It can't apply to the government." This
11 isn't something that's come out of the woodwork at the
12 very end. They knew about it three years ago. In the
13 last three years, they haven't taken a single step.
14 I'll explain that they already have most of this
15 information. But if they were really truly concerned
16 about this, for three years they could have been
17 collecting all this information, as they had it. As
18 Mr. Wallace points out, 95 percent of their customers
19 today have all been added after this issue came up.
20 Likewise, RIM was well aware about this government
21 issue when you entered the first injunction, took no
22 action, has done nothing to do it. In fact, the
23 evidence in the record shows Your Honor that RIM

24 already has basically all the information it needs to
25 protect the United States Government.

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01 Going on to the next slide, Your Honor, it is a
02 simple fact that we have asked the government, they
03 acknowledge this, that government employees who have a
04 BlackBerry handheld and who are authorized to receive
05 official e-mail on their BlackBerry handhelds, are
06 associated with a government BES. In other words, one
07 of these e-mail systems that has an SRP number
08 identifying it. All you need is the SRP number. You
09 don't need all of the individuals' handhelds to protect
10 the government. All you need is the SRP numbers of
11 those BES software installations and the government is
12 fully protected.

13 How can RIM get those? RIM already has those,
14 Your Honor. There are numerous sources from which they
15 can get those SRP numbers. Installation information,
16 it is additional purchaser. Every time, when you first
17 buy a BES, the government administrator has to sit down
18 at a terminal and has to send information up to RIM
19 that says, "I'm the U.S. Government. Here is my SRP
20 number, here is my license. I'm the U.S. Government."
21 RIM gets that information.

22 In addition, when you first buy a BES, 20 users
23 get thrown in for free. The government has a lot more
24 than 20 users on each BES. They may have hundreds.
25 Every time you want to get a new license to add ten

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01 more users you have to go get a license from RIM. We
02 will show the invoices of what you get when you do
03 this. On these invoices there are tax codes.
04 Everybody is assigned a tax code. Our firm is a
05 commercial enterprise. We pay taxes: federal taxes,
06 state taxes, et cetera. The federal government does
07 not. Most state and local governments do not. So
08 these tax codes that RIM has that appears on all the
09 RIM invoices, those are things they can do.

10 The next couple slides I'd like to go through
11 quickly and just show you, explain what it is. The
12 next slide, Slide 8 at the bottom, these are excerpts
13 from the RIM BES Installation Manual. This was
14 attached to the government's brief, some of the
15 excerpts from that. And basically what it says is that
16 when you went to install it, you have got to give us
17 your SRP identifier, and you have to give us your SRP
18 authentication key. I'm down at the lower left hand
19 corner, Your Honor. You have to type those in in order
20 to activate your product. If you look at the
21 right-hand side of the slide, you even see the screen
22 shot of how you do this online where you fill in
23 something that is the name of the organization or the
24 company. In order to make your BES work and install it
25 in the first place, you have got to give all that

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01 information up to RIM.

02 Let me ask you now to move on to the next slide,

03 which shows you the invoice. If you go on to the next
04 slide, Your Honor, it is an example or shows you the
05 invoice that you get when you purchase a new BES. This
06 is the one our law firm got. We purchased it from
07 RIM. And as you will see on there, RIM assigns an
08 account number to us. They know our name, our
09 address. You will see there is a tax code there which
10 clearly identifies and segregates out commercial people
11 from other people. I think we paid about \$4,000 for
12 our BES. And as you will see down there, it includes
13 the 20 users that go with that, and down below there is
14 an SRP number. We have blanked that out because we
15 don't want people reading our e-mail. But it goes
16 with -- every invoice coming from RIM has SRP numbers
17 and it is all the information when you install it.

18 Let me ask you to look at the next slide. This is
19 what I talked about getting additional users. 20 users
20 wasn't enough for our law firm. We needed to get
21 additional users. So when you do that you get -- we
22 got a different invoice from RIM. This adds ten more
23 users. Once again, it has an account number on it, tax
24 code, gives them our name, tells them everything about
25 us.

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01 I think equally important, the next slide, Your
02 Honor, especially important, is an excerpt from a
03 document that was a trial exhibit in this case. This
04 was Plaintiff's Exhibit 145 introduced at trial. It is
05 the RIM Relay Reference Guide, which tells or talks
06 about specifically what you do when you set up and
07 implement a new BES system and what information RIM
08 has. As you will see, Your Honor, when you look at
09 this, when you have to set it up you have to create a
10 key, a special key. And the SRP number is part of that
11 key. The company name is part of what goes into that.
12 And the key itself is there.

13 If you then look down, I'm pointing at it on the
14 Elmo, if you look at that line, that shows you what is
15 sitting in the database up at RIM. In this case it has
16 an SRP number, six-digit SRP number, identifies the
17 company, in this case, AetherJade, and it then has the
18 full license key sitting right in the database right up
19 there, Your Honor. This is why, you know, we have
20 suggested, we are concerned that RIM was not fully
21 candid with the Department of Justice when they first
22 got into this. As you will recall, I think it is about
23 100 days ago, RIM went to the Department of Justice and
24 gave them a Mr. Clarke affidavit where he talked about
25 the different things that were available and where you

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01 could get the information. The government quickly
02 attached that to their statement of interest and
03 submitted it to Your Honor. And what they had, the
04 portion they had, Your Honor,, what they told the
05 government, I talked a little bit about it, was this
06 section about the BES connection with RIM's NOC,
07 N-O-C.

08 What they are saying is that we are not talking
09 about installation here, Your Honor. They didn't tell
10 the government about installation. What they are
11 saying is when the BES sends a message up there, golly,
12 at that time it doesn't give the customer
13 identification number information. Of course it
14 doesn't. They already have it. It is in the database
15 up there. It is just like with the telephone. You
16 make a telephone call, the number goes through. Some
17 people with Caller ID can find your number. But the
18 phone company also has in its database your number,
19 your name, your address, and all the information they
20 need to sort through that kind of stuff. So RIM, you
21 know, it was not fully candid, we believe, in telling
22 them about what they already have on the BES
23 information. Particularly for the government, the
24 government is fully protected just by getting those BES
25 numbers, a couple thousand of them we are advised, and

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01 that would take care of it.

02 If that wasn't enough, there are additional bases
03 for RIM to find out about the government and first
04 responder BES systems. All of these are supposedly
05 these vital systems. I'm going on now to Slide Number
06 13, Your Honor. And these are what we referenced in
07 our brief about the paid support contracts. RIM, if
08 you pay them money, they will offer to give you
09 upgrades. They will keep your BES tuned up. They will
10 give you a staff of personnel up in Canada who will
11 answer your questions. If any there are technical
12 defects, they will do that.

13 Well, Your Honor, all the vital BES systems that
14 we are concerned about here are highly likely to have
15 those kind of paid support contracts. I know our firm
16 certainly has one. And the next slide shows the
17 invoice that we get. When you get one of these paid
18 support contracts, once again, you will get -- it
19 clearly identifies the SRP numbers. RIM has the SRP
20 numbers. It identifies the account, it identifies the
21 company, it has the tax code, and here it even
22 highlights the fact that certain charges are subject to
23 federal and state taxes, which of course the government
24 doesn't pay. So clearly, the tax code is going to be
25 the way that they could punch a button and get this

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01 information virtually overnight.

02 Going on to the next slide, Your Honor, and we are
03 close to the end, is the question of government
04 contractors that's been raised by RIM. First of all,
05 we have asked the Department of Justice to identify any
06 specific contract that would actually require somebody
07 to use only BlackBerry products and you can't switch to
08 any other commercially available alternatives. So far
09 we haven't been able to identify one of those.
10 Secondly, all contractors can continue to use their
11 PIN-to-PIN service. That's not affected. That doesn't
12 go through the e-mail system. Your Honor's injunction

13 does not affect PIN to PIN service at all. Thirdly,
14 there are numerous alternatives. If it is really
15 important for the government contractors to have a
16 plain old standard BlackBerry. If it is that
17 important, the government can give them one. It is
18 common practice. I'm not an expert in government
19 contracts, Your Honor, but I'm told by the people who
20 are that there is something called government-furnished
21 equipment. If the government really wants you to have
22 something and it is so important for the contractor,
23 they give it to them. Of course, they charge it or
24 make it part of the thing, but they can do it that
25 way.

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01 Alternatively, RIM again will keep coming back to
02 the work-around. If government contractors need to
03 have BlackBerry service, RIM has stated that it has the
04 work-around, that it has the exact same functionality.
05 Thirdly, if the government contractors don't want RIM
06 and don't want the work-around, can't use RIM because
07 of the injunction and don't want the work-around, there
08 are plenty of other people, Visto, Good, the Trio
09 products that are out there that can be alternative
10 products for them. Finally, in spite of all of this,
11 we have suggested to the government that if this is an
12 issue and there is any concern about it, it can all be
13 done with a very simple self-certification process.
14 Government contract officer writes a letter, gives it
15 to the contractor, and says, "We are taking
16 responsibility. Now you have the authorization and
17 consent. We are going to take on that liability. You
18 are now certified to go and get that." They send that
19 up to RIM, send it under penalty of perjury. It is all
20 certified. It is all done very simply, very
21 straightforwardly. There is nothing magic about that.

22 More fundamentally, Your Honor, going to Slide 16,
23 the whole suggestion that somehow that RIM and its
24 carriers don't know who their customers are is just not
25 credible. RIM's carriers, agents every month get \$40 a

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01 month from every one of these subscribers. RIM itself
02 gets a \$10 cut of that every month from those
03 subscribers. If a subscriber doesn't pay his bill, RIM
04 and the carriers block further service. How do they do
05 that? They delete the PIN's and the SRP's out of the
06 existing white list database that they have already got
07 up there. And that's all we are asking them to do
08 here, Your Honor, is to update that and that is the
09 simplest, most straightforward way to implement the
10 exclusion in the injunction.

11 Finally, Your Honor, I'm on Slide 17, if there
12 were any concern about not having information or
13 somehow not getting it, there is a very simple way for
14 them to do that. All RIM has to do is to send an
15 e-mail notice to every BlackBerry. I sat down a couple
16 days ago and scratched out one. It is the next page in
17 your -- in the book. It is simple, it is

18 straightforward. Every BlackBerry user in the United
19 States will get a message which says, "Whoa, there is
20 an injunction. It is going to become effective.
21 Contact your e-mail system administrator right away.
22 In 30 days, we are only going to be supplying exempt
23 users. If your system administrator thinks he falls
24 into one of these categories, have him go online to the
25 RIM website." You know, setting up a website, I know

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01 high school kids who can set up a website where all you
02 have to do is get on, sit down, type in your SRP
03 number, type in your PIN number, it all comes in
04 automatically. It all goes right into the database.

05 So Your Honor, these suggestions about we can't do
06 all this stuff, there are innumerable ways to do it,
07 but it is not for you and not for NTP to tell RIM how
08 to do it. There are plenty of ways for them to do it.
09 What this Court should do is simply enter that
10 injunction and then it is up to RIM to make it work.

11 So in conclusion, Your Honor, on this aspect of
12 the injunction, we believe that there are many sources
13 on the implementation for the RIM white list. They can
14 update -- it is not really creating a new white list.
15 They will simply update the existing database and SRP
16 numbers and PIN's that they already have. We believe
17 that 30 days is ample time. If they and the carriers
18 and customers got together and made any kind of a
19 reasonable effort, it would be done like that. If
20 there is any question about this, if Your Honor wants
21 to add an additional paragraph that says, "RIM and the
22 government, report back to me in 15 days. Tell me if
23 you have got the work-around done yet. Tell me what
24 you have done about the SRP list. Come back to me in
25 28 days. If there is any kind of concern, it can be

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01 done then." But it is not a reason not to get the
02 injunction with a nice, clean exemption entered up.

03 Your Honor, let me just wrap up. We would ask
04 Your Honor to complete the remand proceedings
05 consistent with the CAFC's directive by entering two
06 orders. The first order is the monetary judgment,
07 Attachment B to our opening brief, for the \$126
08 million. It covers all the damages. It is a separate
09 and distinct issue from the injunction. There is no
10 reason to delay it. It should be done as soon as
11 possible. The second issue, we ask Your Honor to enter
12 the injunction, again in the form as attached to our
13 original opening brief Attachment A with the exemption
14 paragraph from the reply brief. That form of
15 injunction will immediately halt the new sales of
16 BlackBerry products. It will fully protect the
17 government and non-governmental first responders. And
18 it will give existing commercial users 30 days to go
19 make alternative arrangements. By these two orders,
20 Your Honor, the Court will complete its work under the
21 CAFC's mandate. It will bring this to a close. Thank
22 you, Your Honor.

23 THE COURT: All right. Defendant?
24 MR. BUNSOW: Thank you, Your Honor. Mr.
25 Glick will address the damages aspect of the remand
0055
01 issues and then I will address the injunction.
02 MR. GLICK: Thank you, Your Honor. May it
03 please the Court, as Mr. Bunsow indicated, he will
04 address the injunction issue. I appreciate the
05 opportunity to address the Court and examine with you
06 the key sections of the trial transcript that
07 demonstrate why we submit that a new trial on the
08 royalty rate is appropriate here. Does Your Honor have
09 the notebook that looks like this, it is --
10 THE COURT: I have it.
11 MR. GLICK: It will also be up on the screen
12 as we proceed for your convenience. There is not a
13 difference among counsel as to the change in
14 circumstances. That's clear. The trial was conducted
15 on 16 claims of a patent, and they covered both systems
16 and methods. All six of the method claims have been
17 set aside as not infringed. And, as have agreed
18 between the papers of the parties, as to Claim 8 of the
19 '670 patent based on the originating processor
20 definition that's no longer in the case. Therefore,
21 that was the sole claim of that patent, that patent is
22 no longer in the case either. So there are three
23 patents remaining.
24 The mandate to this Court, I think we all
25 agree, from the Court of Appeals is straightforward.
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01 Because the jury verdict did not specify damages by
02 individual patent claim, the District Court is then
03 charged, as Your Honor is doing today, with determining
04 what effect that has, those changes on damages and the
05 effects on the royalty rate tried in this Court in the
06 original trial.
07 The CAFC, in its opinion, provided further
08 insight, we submit, Your Honor, in their Note 4 on page
09 11 of their remand. There they were pointing out part
10 of the order where inadvertently Claim 287 of the
11 '592 patent had not been listed. And they observed it
12 was before the jury and presumptively was factored into
13 the jury's calculation of damages.
14 We submit, Your Honor, in that presumption
15 that claims are factored into award of damages, and
16 particularly the calculation of the rate as this case
17 was tried is supported by the record. That that
18 presumption is borne out here with the reversal
19 particularly of the six method claims.
20 At the trial, Your Honor, NTP took frequent
21 and full advantage of the method claims present in this
22 case in making their argument to the Court and to the
23 jury about the appropriate rate. They methodically
24 took the jury through each claim and each type of
25 claim.
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01 So as we turn to that evidence, the damages

02 expert, Mr. Musika, postured how should RIM pay. How
03 should this royalty rating be established. They began
04 with his assumptions. We assume that these patents
05 are, these patents, all the patents are valid and
06 infringed. And then he turned to the hypothetical.
07 The hypothetical is, of course, Your Honor, having
08 tried many, many patent cases, the hypotheticals about
09 the rate is a willing licensor sitting down at the time
10 of the beginning of the practice of the patent and a
11 willing licensee having a negotiation about what that
12 rate should be.

13 And he indicated that he assumed that the
14 system claims and the claims relating to the method of
15 operating the overall system were also valid and
16 infringed as a fundamental basis of the analysis that
17 was presented to the jury.

18 In NTP's closing to the jury, as indicated,
19 we quote here, they emphasize the point about each
20 claim. They told the jury, "Dr. Rhyne walked you
21 through each element of the claims asserted, and he
22 showed you element by element how it could be found in
23 RIM's products and services, and he took you through
24 each claim of the patent claim by claim as it related
25 to devices, systems and to the methods of operating

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01 those systems. And then he again emphasized the
02 presence of the method claim systems and methods. And
03 that was the theme, Your Honor, throughout the trial.

04 That damages expert, if you turn to the next
05 line, or it is right on your screen, gave further
06 testimony aimed at establishing what the appropriate
07 rate should be.

08 Different claims of different patents cover
09 different aspects of RIM's BlackBerry business. Is
10 there a problem with the monitor, Your Honor?

11 THE COURT: Yes. But, I have the slides.

12 MR. GLICK: Should we take a moment? What's
13 your preference?

14 THE COURT: If we can get it done quickly.
15 If not -- why don't you go ahead?

16 MR. GLICK: Your Honor, if you turn in the
17 book to the chart that has at the top NTP's Examination
18 of Mr. Donaldson, so that Your Honor is on the same
19 page as the rest of us.

20 THE COURT: All right.

21 MR. GLICK: Thank you, Your Honor. In the
22 cross-examination of Mr. Donaldson, very tellingly, the
23 number and character of the patent claims was stressed
24 for this hypothetical negotiation.

25 "Would you agree with me," Mr. Donaldson was

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01 asked, "that licensees are more willing to accept a
02 license when several patents are involved since the
03 perceived risk is higher?" "Logic would say that's
04 true," Mr. Donaldson responded. "And would you agree
05 with me that one reason that this is true is because
06 defeating a single patent is generally not as daunting

07 as trying to defeat several?" "Yes." Then, most
08 important, "Would you agree with me that where the
09 patentee is confronted with a large number of claims,
10 where there is claims that go to systems, methods,
11 apparatus and computer programs, that that's a more
12 daunting task than claims that go to just one type?
13 That is, if I had a patent claim on a single apparatus
14 or a patent claim on a single method?" "Certainly
15 could be. Depends on the facts," was the answer. That
16 was agreed between Mr. Donaldson and between the
17 questioner.

18 Court of Appeals said each claim is
19 presumptively figured, and that's the exact point that
20 counsel was making to the jury in the cross-examination
21 of the expert about the presence of many claims
22 covering methods, covering systems.

23 On the point that was revisited with Mr.
24 Musika on redirect examination, Your Honor may recall
25 that in Mr. Donaldson's testimony on direct he talked

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01 about the Echo Star case, that was the Direct TV
02 program guide case. And the point made on direct
03 examination, Your Honor, was a point about how you
04 figure losses. And both Mr. Musika and Mr. Donaldson
05 happened to both be experts in that case and there was
06 some testimony. So counsel for the plaintiff wanted to
07 distinguish those patents in his response.

08 Keep going?

09 THE COURT: Keep going.

10 MR. GLICK: So he put up Mr. Musika, and he
11 said are the facts in the Echo Star comparable with the
12 facts in this case. Mr. Musika said not even close.
13 Well, why was that? What I just said, only to
14 summarize in this case, there were five patents. The
15 patents in this case cover apparatus, methods and
16 systems." What was there in the Echo Star case he's
17 referring to was three patents, three method patents,
18 no similarity whatsoever.

19 So it is like comparing apples and oranges.
20 One case with five patents that include methods and,
21 and systems, and another case with just three method
22 claims. Exactly was the response given. And the
23 response, of course, was presented to the jury to
24 establish the very point that the calculations for
25 royalty rate in this case is apples and oranges, it is

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01 important, and was stressed to the jury the presence of
02 those method claims.

03 Question 22 to the jury, as was pointed out,
04 and as Your Honor no doubt recalls, the testimony of
05 the two experts about how to establish the claim was
06 quite different. Mr. Musika, taking into account these
07 arguments, the claims and all of the points that he
08 advanced through the Georgia Pacific Factor, said the
09 right rate, ladies and gentlemen of the jury, is 7.13
10 percent." Mr. Donaldson said to the jury, based on
11 standard licenses in the industry, and the other points

12 that he mustered, said, "No, the rate in our view is
13 1.5 percent."

14 Now the jury chose a rate advocated by the
15 plaintiffs. We are not here to question that. They
16 took it to the end. But, the rates are a very
17 different question. The jury didn't choose either 7.13
18 percent, nor did they chose 1.5. The jury in
19 deliberations in its own way, considering all of the
20 points and all of the arguments and all of the claims
21 as the Court of Appeals presumes, came to the
22 conclusion that that rate, based on that record in this
23 case, was 5.7 percent. And they did it in a single
24 question, "What is the reasonable royalty rate you have
25 determined for the infringement of the NTP patent as a
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01 group?" And the reasonable royalty rate that they
02 arrived at, as we know, is 5.7 percent. But, again,
03 based on the way the case was tried.

04 So we respectfully submit to Your Honor that
05 a retrial of the rate, based on this record as the
06 Court of Appeals asked your honor to analyze, should
07 occur as part of what we believe are the supplemental
08 proceedings. And Your Honor has asked the question
09 about that. And in just a moment, with the
10 information, I will address our view in connection with
11 that. But, to conclude this portion, clear reliance in
12 this case by plaintiffs, their lawyers, their experts,
13 their testimony and their arguments on the number of
14 claims, but more important, the diversity of the claims
15 in this case in asking the jury how to establish the
16 rate.

17 Then I turn with Your Honor to the issue
18 regarding enhancement. We submit, Your Honor, that
19 there are key changes that had and have a significant
20 effect on that issue since the time of trial. In the
21 Court of Appeals there has been a major change
22 affecting infringement and how infringement was
23 presented to the jury at the trial.

24 There has been a very major change, of
25 course, regarding validity in connection with actions
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01 in the Patent and Trademark Office. I will touch on
02 those briefly. Mr. Bunsow will speak more directly to
03 those, with Your Honor's permission, and I will address
04 the one impact I think that our Ramsey opinion has on
05 the matters before Your Honor. Principally, they are
06 about infringement and they are about validity.

07 In any willfulness consideration, the
08 backdrop is what is willfulness really about. And the
09 seminal case of Reed v. Portech where the origin is, of
10 course, the Reed Factors. The Court talked about when
11 is willfulness or enhancement justified. They said
12 when an infringer's actions are in wanton disregard of
13 a patentee's patent rights. Enhancement is a deterrent
14 to blatant, blind, willful infringement of a valid
15 patent. They went on to put forth the factors that the
16 Court weighs.

17 In closing argument to the jury, and that's
18 your next slide if you have that there, Your Honor, I
19 don't know if your screen is working yet or not.

20 THE COURT: It is going.

21 MR. GLICK: Argued to the jury in the context
22 of willfulness, was, as I say, we now have seen in this
23 trial that RIM apparently is not even contesting
24 infringement at this point. A key part of the argument
25 to the jury as to why they should find willfulness was
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01 the absence of an infringement defense. And, of
02 course, in Your Honor's own analysis regarding the
03 closeness of the case, that no doubt was an important
04 consideration. Well, RIM had an infringement defense.
05 Argument based on the location of the system control in
06 Canada was precluded at that time based on Your Honor's
07 ruling so the jury never heard it, it didn't know it
08 existed and couldn't have factored it in.

09 The CAFC in two different opinions, the first
10 one and then upon rehearing the second one, wrestled
11 for more pages than I care to read, but of course I
12 have, with this very issue. And they found that, in
13 fact, as to the six method claims, not only did RIM
14 have an infringement defense, as the jury would have
15 been told in a different circumstance, but that it was
16 a winning defense. It was a correct defense to those
17 six claims. And the Court of Appeals went on to say,
18 as to the application of the extraterritorial factor of
19 infringement to the system claims, that it is unclear
20 from the statutory language how the territory
21 requirement limits direct infringement. To put it
22 mildly, that is a dramatically different contest if one
23 can imagine being here and having that issue presented
24 by RIM in its arguments regarding infringement and
25 including an instruction from your Your Honor, I

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01 instruct you as to these six infringements that the
02 defense is valid, and coupling that with the fact that
03 Your Honor did give as to the infringement you found on
04 the two claims as part of Your Honor's summary judgment
05 rulings. That presents a very different picture to a
06 jury and wouldn't have allowed counsel for the
07 plaintiff to argue there is no infringement claim here.

08 Before I reach -- let me say one word, the
09 only point we tried to make on the KNORR-BREMSE,
10 however one pronounces that, opinion, the first point
11 is to how to understand how it came about. That that
12 Court considered massive amicus briefs from a large
13 number of parties because the situation in the industry
14 was that, based on the existing world, that you need to
15 go to outside counsel to get a written permit opinion
16 to protect yourself from infringement, and a vast
17 number of letters that were coming into companies. The
18 companies were confronted with, and, of course Your
19 Honor knows in this case, hundreds and hundreds,
20 thousands of claims. But, many, many letters. And
21 having in each case to go out and hire a lawyer, get an

22 permit opinion to protect yourself, or face perhaps a
23 courtroom and a problem where you didn't get a letter
24 from outside counsel.

25 So counsel has talked about one aspect of the
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01 KNORR-BREMSE opinion. But, in this aspect the Court
02 declared you don't have to get an outside counsel
03 opinion. The only direct impact that had when, Your
04 Honor did the Reed Factor analysis here, you mentioned
05 as a factor, among many in your carefully reasoned
06 opinion on that issue, that RIM didn't get an outside
07 counsel opinion. That particular piece is no longer a
08 part of the analogy.

09 That brings me to this willfulness analysis
10 validity. On validity NTP relied heavily throughout
11 the case on the pre-PTO presumption. They did it in
12 their opening, they did it in their closing, and they
13 did it throughout the case. Your Honor has that slide?

14 THE COURT: I have it.

15 MR. GLICK: Okay. They argued RIM has
16 additional defenses. The patent office made mistakes.
17 Essentially, saying to the jury you got to believe what
18 RIM is telling you that there were 16 mistakes here,
19 all five patents were wrong. They argued that on
20 opening. And in closing they said RIM is suggesting
21 that the patent office made not one mistake, but 16
22 mistakes, one for each of the claims of the patent, and
23 these arguments were used both to establish willfulness
24 as well as validity.

25 Well, the patent office and trademark office
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01 has issued office actions finding each claim of each of
02 the remaining patents in suit invalid. As to the '592
03 patent, which Your Honor knows is the director
04 initiator or ex parte reviews, that affects six
05 remaining claims, the action closing prosecution based
06 on a finding of invalidity was issued by the Patent and
07 Trademark Office on February 1st. And that was based
08 not only on art, but also upon RIM's invention of the
09 BlackBerry system. I think Your Honor knows that this
10 lawsuit was commenced the day after the '592 patent was
11 issued, a patent in process while one could look at
12 RIM's BlackBerry system. And now the patent office has
13 said that that patent is invalid based on RIM's own
14 invention. The '451 director-initiated review at the
15 patent office and lost two remaining claims. And two
16 days ago the U.S. Patent and Trademark Office went
17 final with its rejection of that claim as a not valid
18 claim. The examination, as Your Honor knows, which the
19 patent office by statute takes a look at in this case,
20 is asked to by the director to determine whether they
21 were improperly issued. I'm informed that today on the
22 website of the United States Patent and Trademark has
23 gone final also on the final patent in this case, the
24 '960 patent. I believe we have or will have shortly
25 the appropriate paper. I'm sure Your Honor believes me

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01 that it is on the website.

02 So far from -- this will be discussed in the
03 injunction. Here where we are talking about wanton,
04 willful, blind, which is the test for what ought to
05 constitute an enhancement. In fact, RIM had a
06 substantial infringement defense. In fact, the patents
07 lack validity, or at the very least they are in the
08 process where three examiners have raised very serious
09 doubts about their validity, and the damages verdict
10 would have been vacated in its entirety when it was sent
11 back to the Court. The Court needs to make a
12 redetermination. And procedurally what we would
13 suggest, Your Honor, the Court to do in light of these
14 factors on the willingness and enhancement factor is to
15 take another look at enhancement, and based on all this
16 evidence, decide that enhancement is not warranted in
17 this case. That doesn't require any retrials or
18 anything else.

19 As to the supplemental, two last points, Your
20 Honor, and then I'll yield to my colleague, the
21 supplemental proceedings, or the three groups, if you
22 will, of the adjudicated products, the stipulated
23 products, and then those products introduced after May
24 of 2003. I have taken to list them here as might be
25 convenient, the forward model, the two DataTAC and two
0069

01 Mobitec models that were tried in the case and the one
02 GPRX Model 5810 and the associated software used with
03 those models is what's adjudicated, it is what the
04 numbers are based on, it is what the calculations are
05 based on. Your Honor has those numbers and there is no
06 dispute amongst the parties. As to the stipulated
07 products, there are the four models and associated
08 software that go with that. And, Your Honor,
09 finally -- and they are the 17 models that have not
10 been adjudicated at all.

11 In Your Honor's order, you indicated that as
12 to the stipulated products, a piece of the stipulation
13 was that RIM could make a showing that the products and
14 services contained substantial non-infringing
15 functionality under the Court's claim construction.
16 You also indicated that we could indicate
17 non-infringement. But, that's not what's in mind here.
18 There are substantial non-infringing functionality in
19 the stipulated products that were reservations provided
20 under the Court's order. NTP argues well, you had to
21 come back to this Court during the pendency of the
22 appeal, and failure to do that in some way now
23 precludes RIM from making that showing in the
24 appropriate supplemental proceeding.

25 Well, if you turn to the next page, Your
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01 Honor, what you said about the non-adjudicated products
02 was that should NTP believe that a new product does
03 infringe or is not colorably different from those found
04 to infringe at trial, it should alert the Court so that
05 appropriate action may be taken. So the burden of

06 proof was placed on NTP. If NTP says RIM failed to
07 come forward on stipulated products, well, NTP failed
08 to come forward on the non adjudicated products.

09 The reality, Your Honor, as to these products
10 was the case was on appeal, as is in the record that
11 we've provided, letters went back and forth between
12 counsel. To the extent that what we did in those
13 letters was inconsistent with what Your Honor hoped
14 for, I certainly apologize for that. But, what the
15 parties agreed to was rather than come back to Court
16 and engage Your Honor in further proceedings before we
17 knew what direction we would get from the Court of
18 Appeals, what RIM will do, and has done, is report and
19 pay into the escrow on the stipulated products, on the
20 adjudicated products, and on each and every one of the
21 non-adjudicated products, and that includes not only
22 the products themselves, but the service on those
23 products. And so faithfully, accurately, and
24 consistently, and those reports are completely
25 accurate, we are not as counsel suggesting away from

0071
01 them. This was the whole point, to have the money
02 there so it would be secured when we got back to Your
03 Honor's Court. So those payments were made and we have
04 challenged the calculation provided by plaintiffs.
05 Indeed their calculation would include service monies
06 on products that are stipulated and non-adjudicated.
07 So I'm confident, once Your Honor tells us how you want
08 to ultimately handle that, we can sit down and in
09 probably four to six hours with plaintiff's counsel
10 make that segregation and provide Your Honor in
11 whatever way you might like the absolutely accurate
12 information of all the monies faithfully and correctly
13 paid into escrow on those products.

14 And so the supplemental proceeding, Your
15 Honor, as we see it, since all these dollars are in
16 escrow, would be to adjudicate the appropriate royalty
17 rate, to handle and reconsider enhancement, and we urge
18 the Court to determine the non-infringing features of
19 the stipulated and the non-adjudicated products, which
20 you never passed on the non-adjudicated products, and
21 then to determine any infringement of those
22 non-adjudicated products, the products sold since May
23 of 2003, and of course we would be guided by whatever
24 Your Honor suggests is the appropriate way to address
25 that.

0072
01 One last point, if I may, Your Honor, in the
02 damages section, I'm mindful of Your Honor's
03 instruction regarding argument, I would like to address
04 this to Your Honor, consideration of the scope of an
05 injunction if you decide to enter one in this case.

06 An injunction to stop service to the three
07 million or so RIM BlackBerry handhelds for which NTP
08 has been or will be compensated fully, and I will talk
09 about fully here in a moment, in the tens of millions
10 or hundred millions as indicated here, are for the full

11 life of the patents, that was the testimony at the
12 trial as I will point out here in a moment, the full
13 life of the handhelds, the full life of the service on
14 those handhelds, would be unfair and unnecessary to
15 fully compensate NTP to enter an injunction that shuts
16 down service to those fully paid for devices that are
17 in the hands of consumers.

18 In a typical case Your Honor would try, a
19 calculator case, and calculators would have been sold
20 to the public, and Your Honor found there was
21 infringement, damages would be paid for what was sold,
22 an injunction would preclude future sales. Same with a
23 stint or the similar product that are ordinarily in
24 these cases. In fact, Storage Tech was a system, but
25 it was fully implemented system through transport of
0073

01 storage tapes from libraries to tape players. And
02 there the Court declined to enter an injunction and
03 went back in time to affect those devices.

04 In this case, and technically now that the
05 method claims are eliminated and the Court of Appeals
06 made it clear these are all system claims that are
07 remaining, stated consistently throughout its opinion,
08 and counsel for plaintiff argued to Your Honor just a
09 few moments ago something that's absolutely accurate,
10 it is a single integrated system, it is composed of
11 handhelds, of the redirector software for those
12 handhelds and for the service. This is not a typical
13 case here because those handhelds and that redirector
14 software are useless without the service that makes
15 them continue to run.

16 Now, there is no doubt, as I said, how the
17 damages were calculated for those handhelds and the
18 software. And that takes us back to, I believe, our
19 last slide. Mr. Musika's testimony about the
20 hypothetical negotiation. It is the next to last and
21 last one, Your Honor. The next to last is his expert
22 report. And he said, I have assumed -- two things he
23 said that are important -- first, I assumed the license
24 would be for the duration of the patents, as the
25 patents all still had significant time remaining. And

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01 that that had a positive effect, this was a Georgia
02 Pacific factor as Your Honor will recall, that had a
03 positive effect in his testimony to the jury on the
04 royalty rate. It kicks the rate up. And he
05 re-emphasized that in his testimony, Your Honor, at the
06 trial, five patents, many, many years to run, well, of
07 course, the useful life of a product is far less than
08 many, many many years left to run. RIM understands
09 that absent the stay, which Your Honor has declined, it
10 has to pay damages, it is in full agreement to complete
11 the full compensation as you would in the ordinary case
12 of the calculator or the stint or the system in the
13 Storage Tech case. It needs to continue to pay for the
14 service to complete these single integrated system
15 claims going forward in the future on these Legacy

16 products.

17 Whatever else, we would submit, that Your
18 Honor decides on future sales and manufacture, which my
19 colleague will address, the jury rate as it is
20 established, or will be established, at the 5.7 or
21 whatever rate, is the appropriate rate for the
22 remaining service for the Legacy products, and to avoid
23 a double hit of both payment and then rendering those
24 systems as non-usable and, Your Honor, the aspects of
25 the system, the PIN or the Internet access had nothing

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01 to do with the calculation of this royalty as counsel
02 has pointed out, so we respectfully submit, and thank
03 Your Honor for your time, that any injunction should
04 not affect the Legacy products. Thank you.

05 THE COURT: Thank you.

06 MR. BUNSOW: Good morning again, Your Honor.
07 Henry Bunsow for Research In Motion. NTP's request for
08 an injunction in this case should be denied for the
09 most fundamental reason, it will frustrate the public
10 interest. In addition, the traditional factors that
11 Your Honor used in August of 2003 to decide whether or
12 not you would issue an injunction in the first place
13 today, when weighed against the current record, all
14 fall in favor of denial of an injunction in this case.

15 Your Honor should have a hearing book with
16 our slides, it is a black binder. In addition, we've
17 added some supporting materials. I'm going to start on
18 Slide 5 where we talk about the factors that we are
19 told from the Court of Appeals to consider on whether
20 or not an injunction should be issued in this case.

21 There is a general rule which NTP relies
22 heavily on, the general rule providing that there is a
23 general injunction rule in patent cases when the patent
24 has been found valid and infringed. However, that
25 general rule must and does give way to public interest

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01 factors, it must consider equities and balance of the
02 hardships, and it must consider the feasibility of the
03 injunction that's being sought in this case in
04 particular.

05 The general rule clearly is acknowledged to
06 give way to the public interest. NTP in its briefing,
07 we quote from their brief on Slide 6 and 7, 6, 7 and 8.
08 Slide 6 is a quote from NTP's brief, Slide 7 consists
09 of quotes from most recently the CAFC's EBAY case, that
10 clearly provides that where there is an important
11 public need for the invention, such as the need to use
12 an invention to protect public health, the injunction
13 must give way.

14 NTP agrees with this. I quote under the
15 standards set forth for the CAFC. In its recent EBAY
16 decision, NTP is entitled to an injunction unless RIM
17 can demonstrate that injunctive relief, and here's the
18 key phraseology, frustrates an important public need
19 for the invention such as the need to use an invention
20 to protect public health.

21 This Court previously found in August of 2003
22 that that was exactly the situation on our motion to
23 stay at that time. This Court found, among other
24 factors justifying the stay, "Issuance of the stay is
25 in the public interest, and the public has demonstrated

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01 an increasing use of the products and services involved
02 in this litigation." Absolutely true, the correct
03 finding then, the correct finding now.

04 There is a strong public interest in the
05 continuation of the BlackBerry service undisturbed and
06 unfettered in this country. There are strong public
07 and private health and safety interests, there are
08 strong state and local government interests, there is,
09 of course, the 1498 issue, there are overarching public
10 and private economic and practical considerations and,
11 of course, the U. S. Government itself has indicated
12 its interest in this case by intervening.

13 The vast majority of all these interests are
14 not served by the injunction proposed by NTP. And I'll
15 discuss that in detail a little bit later in the
16 presentation. But, fundamentally, on the question of
17 whether an injunction should issue or not, or whether
18 NTP should have the benefit of its remedy at law, all
19 of these considerations dictate that the public
20 interest should result in denial of an injunction
21 today.

22 The BlackBerry today is used by police, it is
23 used in the infrastructure of this country, the 13
24 infrastructure categories by workers for communication
25 both publicly and privately. It is used in hospitals,

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01 not only for first responders, but physicians, private
02 physicians, it is used by firefighters, paramedics, it
03 is used in schools, it is used by banks and brokers.

04 These uses are not exempted by NTP in any
05 way, shape or form. Mr. Wallace just told you in his
06 early remarks, I wrote down exactly what he said, he
07 said, "We want an injunction to shut down the U. S.
08 BlackBerry system." That would include all of these
09 uses. With the exception of the 1498 uses.

10 In virtually every critical infrastructure
11 section established by the United States government in
12 this country, the BlackBerry plays a crucial role and
13 we have brought evidence to you proving that.

14 On Slide 13 I've listed some of the
15 evidence. We have brought you declarations from local
16 governments, the Florida Department of Health, Alachua
17 County, we have brought you declarations from the
18 private sector involved in the public health, Harvard
19 Medical School, the Health and Nursing Associations in
20 Florida. We have brought you evidence from first
21 responders and volunteers that use their BlackBerrys.
22 The Eaton declaration. We have brought you
23 declarations from utilities. NTP talks about exempting
24 a small segment. In fact the Linn declaration, the
25 American Gas Association, establishes the critical

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01 nature of continuing these services using the
02 BlackBerry.

03 Were they able to do these things before the
04 BlackBerry? Yes. They were able to do these things
05 less efficient, less efficiently and less directly and
06 with more mistakes and with more problems to the public
07 health. The reality is today that there are over three
08 million BlackBerry users in the United States, many of
09 whom are embedded in the infrastructure of this
10 country. And we have brought you, I would submit, Your
11 Honor, compelling evidence of that. I'm going to go
12 through some of these.

13 In response, on the next slide, 14, I've
14 listed NTP's countervailing public evidence. And I
15 don't mean to make a joke out of this. But, there is
16 no NTP countervailing evidence that's been presented to
17 this Court at all. Not a single declaration.

18 The amicus curiae interests in this case is
19 substantial and supports all of those public interests
20 that are being brought to this Court. Ascension
21 Hospital, for example. I'll talk about Skadden, Arps,
22 who is on the black list in a few minutes, and SAIC who
23 is on NTP's blacklist.

24 But, what does the evidence establish? The
25 Liscouski declaration, he states effective and

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01 efficient communications, and this is critical, not
02 only within the public sector, but also within the
03 private sector and between the two sectors, is crucial
04 for the safeguarding of the critical infrastructure of
05 the United States. BlackBerry technology plays a
06 special role in that communication effort.

07 So we're talking about not only
08 government-exempt communications, but those
09 communications going into the private sector. It is
10 all of those that NTP would have, Your Honor, shut down
11 in the United States. So all of those communications
12 between private physicians, all of those communications
13 between volunteers, all of those people's screens would
14 go dark if the NTP injunction is entered.

15 Millions of BlackBerry devices are used in
16 private industry throughout the country. The Alachua
17 declaration details that these include energy, health,
18 transportation, telecommunications and defense.
19 They use them for critical communications in times of
20 crisis as an integral part of the response systems and
21 business continuity plans.

22 We have been accused of trotting out a lot of
23 declarations from customers and business partners
24 apparently to integrate their significance. In fact,
25 many of the declarations come directly from the

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01 Department of Defense. Dr. Henriques' declaration was
02 submitted to the Court from the Department of Justice.

03 BlackBerry devices serve a critical function
04 in disaster response, emergency preparedness and

05 day-to-day public health and medical operations. It is
06 that day-to-day public health and medical operations
07 that is at risk if the NTP injunction is put into
08 place. Dr. Halamka from Harvard University Medical
09 Center, also from the Beth Israel Deaconess Medical
10 Center, "Although I am aware of other wireless devices,
11 none that I am aware of have the unique security and
12 redundant reliability as BlackBerry communications. We
13 rely on BlackBerry devices for secure communications
14 during emergencies when other communications are
15 inconvenient or impossible. Dr. Halamka will lose this
16 capability if the NTP injunction is imposed and the
17 BlackBerry system is shut down in the United States.

18 Dr. Yermus states MCS's software, which is a
19 drug physician interactive application, was developed
20 in 2003, first used in 2004, DPIA Leverages features
21 that are available through Research In Motion's
22 BlackBerry handheld and therefore can't function on any
23 other wireless device. This is the critical
24 interaction between prescription drugs that physicians
25 check frequently on a time sensitive basis when they

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01 have a patient, for example, in the hospital or on the
02 operating table. And this is a program that can only
03 function on the RIM wireless device in the current
04 structure. These are uses that will be lost
05 potentially if injunction is entered in this case.
06 The Copas declaration talks about transplants. Clearly
07 a very, very time sensitive requirement.

08 It is not possible to offer MDB with the
09 functionality on other existing wireless platforms. As
10 a result, I believe organ and tissue donation efforts
11 in these areas would suffer if the BlackBerry ceased
12 operation in the United States of America.

13 Those BlackBerrys in their current
14 configuration that are being used for this application
15 will cease operation if NTP's injunction is granted in
16 this case.

17 Bioweapon response, clearly there was
18 extensive BlackBerry use throughout, people involved in
19 protecting this country, energy, the American Gas
20 Association declaration that we submitted to Your
21 Honor, referring to the BlackBerry, "this technology is
22 a crucial communication tool for managing business and
23 operations on a daily basis. In addition to its use
24 during office hours, the BlackBerry technology is also
25 an effective tool for on-call responsibilities in all

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01 areas including the management of emergency
02 conditions."

03 Remember the test here, would an injunction
04 frustrate the public interest? That is the test NTP
05 agrees on, that is the test the Court of Appeals for
06 the Federal Circuit set forth in the EBAY decision, and
07 I submit to you that we have brought to this Court, and
08 the Department of Justice has brought to this Court,
09 multiple examples of exactly that. On Homeland

10 Security, you have the letter from Congressman Weiner,
11 "BlackBerrys are crucial tools for police, fire,
12 medical and other emergency personnel in the event of a
13 terrorist attack. No legal dispute should jeopardize
14 emergency response in the event of a terrorist attack."

15 Concerning the critical infrastructure, the
16 Liscouski declaration talks about the Los Angeles and
17 New York Police Departments, for example, use
18 BlackBerry devices to communicate in performance of
19 enforcement and protective operations as well as in
20 response and recovering planning execution.

21 BlackBerry devices often were the only
22 reliable communication source both for public and
23 private entities just as during the events of 9-11.
24 The BlackBerry was essential for securing and
25 safeguarding the nation's critical infrastructure.

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01 That's the capability, that is the embedded capability.
02 As it stands today, when you're considering an
03 injunction today, I think we need to look at the
04 current situation under the current legal tests. And
05 the situation today is that the BlackBerry device is
06 embedded as is described in these declarations.

07 In the finance industry, the Securities and
08 Exchange Commission, and their members use BlackBerrys.
09 And as to replacement, the Hammerman declaration
10 states, "Furthermore, our members have told us that
11 currently no other two-way mobile e-mail service
12 appears to have the same proven communication of
13 security, functionality and global reliability that the
14 BlackBerry communications employed." Security is a
15 very important part of this whole thing. And the
16 security in the BlackBerry system is not matched by any
17 of the alternatives that NTP would like to trot out
18 here as potential replacements for it. They don't have
19 it, they won't work.

20 State emergencies, we provided you with many
21 declarations from the state of Florida, Georgia, as
22 well as others. Mr. Belcuore states during the time of
23 the hurricanes, I was only able to communicate with the
24 State of Florida EOC in Tallahassee on other emergency
25 responders in the field using the e-mail and radio

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01 functions of my BlackBerry wireless device. It works
02 better, it works more directly and it has been adopted
03 for that reason by the public.

04 Local governments, I'm on Slide 27 from the
05 city and county management association, local
06 governments are able to rely heavily on the
07 capabilities of BlackBerry devices for e-mail,
08 telephone and paging communications. These are not
09 exempt users. These are users that would be precluded
10 from NTP's injunction. We also included some e-mails
11 that were received by RIM after some disasters. I'm on
12 Slide 28. As far as we are concerned, using his
13 BlackBerry saved my father's life. It was a lifeline
14 to the outside. These are not exempt users. These

15 will be precluded users under NTP's injunction. If my
16 cousin didn't have access to a BlackBerry her family
17 wouldn't have known if she was alive, thank God for the
18 BlackBerrys.

19 NTP is proposing alternatives, but they do so
20 without really identifying realistic alternatives that
21 are available. For example, Ascension Health's amicus
22 in this case has addressed that question. In their
23 brief at pages four and five, Ascension Health has
24 investigated the possibility of switching from the use
25 of BlackBerry devices to a different service for
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01 instant access to e-mail. To date, Ascension Health, a
02 not-for-profit health system, has not found a feasible
03 economic alternative, nor has an exception health aware
04 of any other emergency health care entity that has
05 devised such an alternative.

06 And then they go on, the cost to implement a
07 widescale plan that would involve replacing 650
08 BlackBerry devices and 10 servers would far exceed
09 those preliminary estimates. And this is a key point,
10 because the technology that has not been proven may
11 ultimately be worthless. That is the burden on the
12 public that NTP is asking you to impose with an
13 injunction in this case.

14 The Boucher declaration makes it clear that
15 the BlackBerry solution is the only one that offers the
16 federal government the security that it demands and the
17 ease of use and operations that it covets. The federal
18 government may be exempt under 1498, as I will
19 demonstrate in a couple of minutes, there are numerous
20 government contractors, private organizations, that
21 will not be exempt. And if NTP's injunction is entered
22 will be subject to losing the BlackBerry service and
23 losing the very communications that the exempt entities
24 find so important.

25 The Bade declaration test, although I am
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01 aware of other wireless devices, none that I am aware
02 of have the unique security, reliability and robustness
03 as BlackBerry communications. BlackBerry is a unique
04 and very special combination of features including PIN
05 to PIN messaging for emergency uses. That is a
06 functionality part that NTP concedes is not infringing.
07 However, nobody is going to make, sell or buy a PIN to
08 PIN only device. It is an integrated device that has
09 all of these unique security features. It handles
10 third-party applications like the applications for
11 organ donation. It is reliable and manageable from a
12 single vendor system. All of these critical features
13 if lost will frustrate the public interest.

14 Slide 32 contains a listing of the extensive
15 evidence that we presented to the Court that there
16 simply are no reliable alternatives to the current
17 BlackBerry system. The alternatives on page 33 that
18 NTP suggests are not alternatives at all. NTP talks
19 about Visto and Good Technology. They are embroiled

20 currently in their own patent infringement case, one or
21 both of them could end up losing their systems.
22 Microsoft is currently being sued by Visto. We asked
23 NTP if they would agree that there are any substitutes
24 out there that are non-infringing. And they declined
25 to do so. So the question here is are we going from

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01 one infringing substitute to another or from one
02 infringing to another infringing substitute? NTP won't
03 say.

04 They submitted the Visto declaration. Well,
05 the facts are the following. Only 14 of the 70 devices
06 in the Visto declaration are available in the United
07 States, and only eight of those support wireless
08 encryption. The critical infrastructure users of this
09 country, including the government and government
10 contractors, need that encryption. Visto is not FIPS
11 certified. You need only log on to the government
12 website that I put on Slide 33 to see that the Visto
13 device is not FIPS certified, and that is a requirement
14 to be used for government applications. Good
15 Technology, another supposed alternative, is not DoD
16 8100.2 security compliant.

17 These are not disputed facts. There are no
18 alternatives. Microsoft Messaging that NTP mentioned
19 in its opening brief is not even available, and there
20 is no release date in sight for it.

21 So let's talk now, if I could turn your
22 attention to the proposal that NTP makes for an
23 injunction, the so-called white list. We have shown to
24 Your Honor in our briefs and in our submittals that it
25 is wholly impractical, it doesn't cover the public

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01 interests affected, it ignores business structures and
02 practices, it's unclear who fits the exempted
03 categories and how far they go, and it is unclear how
04 it is to be implemented.

05 On Slide 37, I have a chart that shows the
06 federal government users that would be exempt in the
07 middle of the chart. There are over 3 million
08 BlackBerry users. And what I've demonstrated in the
09 circles all around the 1498 exempt users, are all of
10 the people who interact on a daily basis, the public
11 interest, the commerce of this country, the way this
12 country works. The vast majority of these would not be
13 allowed given NTP's proposed injunction. There are at
14 least one million exempt users. A third of the users
15 in the United States are exempt anyway. So what are
16 you really accomplishing by taking the other two-thirds
17 out of the stream of communication? What you're
18 accomplishing is making those million hamstrung in
19 their communications.

20 BlackBerry users include federal government
21 personnel, critical infrastructure, state and local,
22 first responders, non-governmental organizations, users
23 in every industry and profession, state and local
24 governments who are not currently here before the

25 Court, but they have some exemptions and they also have
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01 a lot of needs. Remember that most of the, a lot of
02 the public function is done in states and local
03 governments through volunteers. These are not being
04 sent to people under NTP's proposal. These would be
05 banned people under NTP's proposal.

06 There is no infrastructure to identify who
07 the 11th amendment users are. There's no way to
08 identify municipal contractors and providers. Who will
09 maintain this dynamic list? Who will update it on a
10 timely basis? We have, and this is not just RIM
11 telling you this, Your Honor, we've submitted
12 declarations from the service providers and the
13 government itself has raised its own questions about
14 this.

15 On Slide 41, question number three, questions
16 about a company-wide exemption, how is this injunction
17 supposed to work. There are hundreds of users on a
18 single BES with a single SRP number. Some will be
19 exempt because they are involved in government
20 contracts. Some will not. BES? Who's to know. Who's
21 to make the decision? Who is to make sure that some
22 are cut off and some are not. In an organization, for
23 example, Skadden, Arps who submitted an amicus brief,
24 some of the Scadden attorneys are working on sensitive
25 government contracts, presumably they would be exempt

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01 under 1498. However, not necessarily according to
02 NTP.

03 Your Honor, I have a letter I would like to
04 hand up, if I may. Mr. Wyss said that they are working
05 with the government to decide how to implement this.
06 This is a letter that was written on February 9th by
07 Mr. Wyss. And in the second paragraph he tells the
08 government, "First, could you please provide us with a
09 copy of any U. S. government contracts that specifies
10 that the government's contractor shall use BlackBerry
11 products and services? And then he goes on, "Second,
12 could you please provide us with a copy of any U. S.
13 government contract that requires the government's
14 contractor to use BlackBerry products and services and
15 permits the use of no other products or services.

16 That is the kind of rigorous requirement that
17 NTP intends to insist on in the implementation of the
18 injunction that they are telling Your Honor can be so
19 reasonably implemented.

20 I believe that the government attorney, Mr.
21 Fargo, will tell you that it is not their practice to
22 identify BlackBerrys as a sole exempted use in the
23 contracts that they have with their government
24 contractors. Nonetheless, they should be exempted. So
25 before this injunction is even implemented, before

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01 we're out of the blocks, we have a major problem on who
02 is exempt and who's not exempt and what are the
03 conditions and do we need actual documents that say

04 BlackBerry on them or do we need documents that say
05 your I am approved and certified to perform functions
06 on behalf of the government, which is all that should
07 be required.

08 What NTP offers by way of injunction is no
09 relief at all.

10 The first responder definition is broad,
11 covers volunteers and others, all of these would be
12 precluded by NTP under their scope of an injunction.
13 The scope of the NTP injunction is overly broad. If
14 you look at the first injunction order that they
15 submitted as Exhibit A to their opening brief, it is
16 overly broad in terms of products and services covered.
17 And it would apply against most of the infrastructure
18 and the public interest.

19 Now, they apparently realized that because
20 with their second brief they submitted a white list,
21 blacklist proposal. But, it is no better. It is not
22 manageable, it does not go nearly far enough to ensure
23 that the public interests will not be frustrated by an
24 injunction in this case.

25 The Department of Justice asked for a
0093 formulation, and I'll let Mr. Fargo speak to that
01 issue, there have been discussions with NTP. So far as
02 I know, there has been no commitment from NTP on any
03 particular plan that the government feels comfortable
04 could be implemented. NTP's selection of SAIC, another
05 amicus who is now before this Court, is a good example
06 of NTP's failure to recognize the significance of what
07 it's asking for here. SAIC ended up on the blacklist
08 and, in fact, it is a government contractor. The SAIC
09 brief states that it appears NTP made little or no
10 efforts to determine the impact on the government or
11 the public of the injunction it proposes. And it sure
12 seems that way.

13 But, the white list proposal is not only a
14 problem for RIM, Your Honor. It is a problem for Team
15 Mobile, for Sprint, for Cingular and for Verizon. I
16 would commend to Your Honor a reading of the Cingular
17 letter that goes into detail and explains some very
18 interesting things that NTP wants to gloss over with a
19 very broad brush.

20 First of all, the providers do not want RIM
21 to have the identity of their customers. That would
22 allow RIM to go directly to the customer, solicit the
23 customer. Just good business practice is you don't
24 tell people the names of their customers. Conversely,

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01 Cingular and the other providers don't have have the
02 identity of the PIN numbers in the RIM handheld
03 devices. So we don't have a structure existing today
04 that can do what NTP wants to us do. Can we create
05 it? We can create it. It will take a lot of time, it
06 will take a lot of effort, and the government has
07 addressed that issue, and we may be able to create most
08 of it. The reality of it is even if we do that, we're

09 not going to be 100 percent. In fact, we're going to
10 be substantially less than 100 percent. And we're
11 going to have constant dynamic monitoring requirements,
12 and we're going to have constant disputes between NTP,
13 RIM, the service providers and the users as to who
14 should be in, who should be out, when, why and how. It
15 will be never ending. So let's talk about NTP's
16 alternative, the blacklist.

17 Interestingly, NTP listed a lot of law firms,
18 but not its law firm. NTP's law firm continues to use
19 the BlackBerry device today in spite of telling this
20 Court that there are more than adequate reasonable
21 alternatives available in the marketplace. In fact,
22 they expanded their use. You saw those invoices a few
23 minutes ago. This device is important to NTP's law
24 firm, it is important to financial institutions, it is
25 important to this economy. And when you look at the

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01 blacklist that NTP proposed, you find that over 24 of
02 the blacklisted entities on their list are government
03 contractors, entities that they would enjoin from
04 further use of the BlackBerry device, thereby not only
05 frustrating the public interest, but directly impacting
06 the 1498 uses allowed by the government.

07 Public health companies are listed on the
08 blacklist. Pfizer, for example. Defense industry
09 contractors are listed on the blacklist. SAIC, you
10 have an amicus brief from them. IBM, you have a letter
11 from IBM. ChoicePoint, just to make a few. The
12 banking and financial industries would all be adversely
13 impacted.

14 The reality of it is that the proposed
15 blacklist injunction would adversely impact 1498
16 entities, it is overly broad, even as proposed by NTP.
17 It would create chaos and neverending Court
18 intervention if it is allowed.

19 And let me talk a minute about the burden of
20 proof. The idea that all we need is to show
21 entitlement to an injunction and then the enjoined
22 party can figure out how to do it. They haven't cited
23 any case for that proposition. Any injunction issued
24 by this Court should be reasonable, it must be clear,
25 it can't be vague and ambiguous, and it must be capable

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01 of being implemented. NTP has cited no cases, the
02 NAPSTER case is not that case. The NAPSTER case is not
03 a public interest case. There is no case that we know
04 of in which a public interest showing like this, that
05 is being brought before this Court, can be disregarded
06 in favor of an injunction and then the burden put on
07 RIM or the government or providers to make it work.

08 When you granted the injunction in August of
09 2003, I put up on the screen a portion of your
10 injunction grant. In that order you found as follows:
11 One, NTP will be irreparably harmed if an injunction is
12 not issued. Two, NTP has no adequate remedy at law.
13 Three, an injunction in this case is in the public

14 interest as it promotes protection of the rights gained
15 through the patent process, a key part of your
16 consideration that I'm going to talk about now. And,
17 four, the balance of hardships between NTP and Research
18 In Motion weigh in favor of NTP.

19 Those are the traditional elements of
20 consideration for injunctive relief. They are
21 reiterated in the EBAY case as the traditional elements
22 of the relief. They are likely the result, if you read
23 the commentators of what the Supreme Court is going to
24 do with the EBAY case, which is to weigh these factors,
25 an injunction is not automatic particularly when we are
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01 talking about a patent holder that doesn't make
02 anything. That's the likely outcome of the EBAY
03 decision.

04 Let's talk about adequate remedy at law. NTP
05 says it has no adequate remedy at law. Well, it has
06 been granted three licenses since the trial. One of
07 them within the last 60 days. Granted a license to
08 Good Technology, Nokia and Visto. It says in its
09 papers we're being inhibited from further licenses,
10 But, why is that? Is it perhaps because the United
11 States Patent and Trademark Office has said in no
12 uncertain terms that all of these patents and all of
13 these claims are invalid and, as of today, Your Honor,
14 as of this morning, in fact, the United States Patent
15 Office has issued final actions finding all of the '960
16 claims invalid, finding all of the '452 claims invalid,
17 finding all of the '451 invalid and finding all of the
18 '592 patent claims invalid.

19 But, NTP is not being deprived of a remedy
20 here. Because RIM has since the time of trial paid
21 royalties, albeit into an escrow account. Nonetheless,
22 it is paying royalties and continues to pay royalties,
23 there is a clearly cognizable, recognized, sufficient
24 legal remedy in this case.

25 Will NTP suffer irreparable harm if an
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01 injunction is not entered? In the words of Your
02 Honor's injunction order in August of 2003, the
03 question is will an injunction promote the patent
04 process. And I submit to Your Honor, in light of the
05 status of these patents at the patent office, an
06 injunction enforcing these patents will not promote the
07 patent process.

08 The patent office has said these patents are
09 invalid. Denying an injunction of rejected patents is
10 not irreparable harm to the patent owner.

11 In fact, issuing an injunction in this case
12 may turn out to be issuing an injunction where it
13 should never have been issued on patents that are
14 invalid. Issuing an injunction could result in
15 monopoly rights. Monopoly rights are never favored.
16 Patent laws are an exception. And an injunction in
17 this case could very well, in a very short period of
18 time, turn out to be the grant of improper monopoly

19 rights to NTP in this case. And we know that because
20 the patent office has been very clear in its rejection
21 of these patents.

22 Now, NTP tells you in their brief that there
23 is a high percentage of patent office examiner
24 rejections before the Board of Patent Appeals and
25 Interference. I call Your Honor's attention to page 40
0099 of the NTP response brief.

02 What they don't tell you is that these
03 statistics are not for director initiated
04 re-examinations. And, in fact, there has never been a
05 board of patent appeals or CAFC reversal of an
06 injunction in a director-initiated re-examination. And
07 with the exception of the '960 patents, these are all
08 director initiated re-examinations.

09 The test on appeal will be whether there is
10 substantial evidence to support the patent office and
11 the patent examiner's determination. And these
12 examinations, these re-examinations, follow the new
13 procedure of the patent office. Three senior examiners
14 came to these conclusions. It is a compelling
15 situation, Your Honor.

16 The patents at this point, if this were a new
17 lawsuit, would not be enforceable in the face of a
18 motion to stay.

19 The next argument that NTP makes is that RIM
20 and the public have somehow put themselves in this
21 position. That they did this to themselves. Well,
22 first of all, RIM did not copy the NTP patents.
23 There's never been any evidence of that. So when they
24 talk about RIM as a pirate, for example, it simply
25 doesn't fit the facts. RIM was granted a stay of the
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01 injunction that was issued in August of 2003, and that
02 stay explicitly acknowledged that there was going to be
03 a continuing use of the products, and indeed there has
04 been a continuing use of the products. But, more
05 importantly, RIM began mediating immediately after
06 that, we continued to do so before Magistrate Judge
07 Dohnal, we entered into what we thought was a
08 settlement in March of 2005 which could have resolved
09 this case, we believe should have resolved this case.
10 It turns out the appeals we were pursuing were
11 well-taken. We've been diligently working on a design
12 around during the interim period. And the patent
13 office in its actions has consistently said that these
14 patents are invalid.

15 I put a time line up on page 63 of my
16 presentation. And what this time line shows is that
17 virtually during the entire time period from your
18 ruling on the post-trial motions, during the entire
19 time period from August of 2003, we have either been
20 pursuing appeals that were taken in good faith and that
21 we substantially succeeded on, we were in mediation, we
22 thought we had a settlement agreement. To say that
23 under those circumstances we should have thrown out

24 this system when the patent office is telling you us
25 that the patents are no good I think simply defies

0101

01 reality.

02 But, let's look at the equities. What is
03 NTP's own stated purpose for seeking an injunction in
04 this case? Let me quote. We get a lot of bargaining
05 power if an injunction is awarded. Sooner or later
06 we're going to be back before Spencer and we're going
07 to get the injunction. All I need is one of my 16
08 claims to shut them down and I'm going to shut them
09 down. It is a quote from Mr. Wallace. They don't have
10 one of their 16 claims anymore. They lost seven of
11 them on appeal and they've just lost the last one,
12 Claim 15 of the '960 patent this morning when the
13 patent office issued its final rejection. The patent
14 office says these claims are invalid and their office
15 actions have been unanimous and they have been direct.

16 And even beyond that, for the '592 patent
17 claims, the patent office has found that NTP is not
18 entitled to those inventions, RIM is entitled to those
19 inventions. RIM was the first inventor. And yet
20 that's one of the patents that NTP wants you to issue
21 an injunction. In other words, they want you to enjoin
22 RIM from practicing the invention that the patent
23 office says that RIM owns. That's how convoluted this
24 is.

25 Now, I know NTP doesn't like to talk about

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01 the patent office proceedings. But, they are the ones
02 that injected the proceedings into this case. They
03 told the Court time and time again they were entitled
04 to a patent, to a presumption of validity, because of
05 the patent office prosecutions, they told the jury
06 that, they said that the jury had to find that the,
07 that the patent office had made mistakes. And I
08 suggest to you that their statements should be taken
09 into consideration in considering the equities of this
10 case.

11 Mr. Glick pointed out the transcript in their
12 closing argument basically, and they have got
13 additional defenses, the patent office made mistakes,
14 all five of the patents, all 16 claims. Well, the
15 patent office has clearly told us now that they made
16 1900 mistakes because that's how many claims are in
17 these NTP patents. 1900, even though the average
18 patent only has 20. And they found that RIM is the
19 inventor of the '592 patent.

20 NTP would like you to disregard the
21 re-examinations, but in prior times, of course, they've
22 embraced them. On June 24 NTP said renewed
23 re-examinations is the best thing that ever happened to
24 us. On December 29th they said we're not trying to
25 slow it down, Mr. Stout said our view is let's get on

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01 with it, we want to go as fast as as possible. In
02 fact, just the opposite. NTP has been trying to slow

03 these re-examinations down. And I know Your Honor
04 doesn't have a lot of tolerance toward discussion of
05 the details of the re-examination procedure, so let me
06 just cut to the chase here.

07 NTP has done everything they could think of
08 to frustrate the patent office in doing its work and,
09 nonetheless, because of the new rules that were enacted
10 during the pendency of this case, the patent office has
11 gone forward, they have labored forward and they have
12 brought to Your Honor their best determination, final
13 office actions finding all of these claims and all of
14 these patents invalid.

15 NTP argues to the Court that those
16 determinations can have no effect after a trial has
17 been held and a verdict rendered in the case. Flat out
18 wrong. We presented to Your Honor the STANDARD HAVENS
19 case, that's a case in which the rejections in the
20 patent office supported a stay. It was after a jury
21 verdict and after entry of judgment. We also cited to
22 you the Magna Systems case. That was after summary
23 judgment of infringement and entry of a permanent
24 injunction.

25 When we brought our motion to stay, NTP
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01 cited to you, and you relied upon, the case to deny
02 that stay. NTP told that you the VISKASE case said
03 that re-examinations couldn't be used to support a
04 stay. What they didn't tell you that the VISKASE case
05 had a claim that had been confirmed patentable during
06 the re-examination, totally different than the
07 situation before us. The STANDARD HAVENS case tells us
08 that when all the claims are rejected, as they are
09 here, taking action in the District Court that would
10 adversely affect the public or the parties for that
11 matter, should not be done.

12 Moreover, STANDARD HAVENS points out if the
13 re-examination decision of unpatentability is upheld,
14 the injunction would thereby immediately become
15 inoperative and the same law applies here.

16 If you issue an injunction effective in 30
17 days as sought by NTP, the high probability, in fact,
18 based on it having never happened before, the high
19 probability is that these patent claims will be finally
20 declared invalid at the conclusion of NTP's appeals,
21 you will have issued an injunction which dissolves, but
22 the damage will have been done. NTP's customers will
23 either be shut off, have to switch to an alternative
24 that doesn't work as well, or RIM will have to modify
25 its system with a workaround that it doesn't want to
0105
01 implement that is not easy, and it shouldn't have to
02 do.

03 NTP has accused us of having two bites of the
04 apple. That deals with that concept, and we have
05 included it in our materials, the provision does not
06 apply to director-initiated reexaminations, it does not
07 apply to exparte reexaminations, those are both

08 director initiated reexaminations and exparte
09 re-examinations, It also explicitly doesn't apply to
10 claims that were not adjudicated. And here we have
11 over 1900 claims in these patents that weren't
12 adjudicated. And it doesn't apply when there is new
13 prior art. And the new prior art in this case is
14 compelling. The patent office has relied directly on
15 the Telnor prior art. Telnor is not TekNow, Your
16 Honor, even though there's been some blending of those
17 names in the briefing. Telnor is new prior art that
18 was discovered, unfortunately, after the trial in this
19 case, it was never before Your Honor, it was never
20 before the jury, and it forms the key reference and the
21 fundamental rejection for all, all of the NTP patents.
22 This two bites at the apple argument does not work. It
23 is not provided for, and the patent office itself has
24 rejected it when NTP has brought it up.

25 Mr. Wallace talked about making a public
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01 offer. The concept that we "hold the keys to our own
02 jail." We looked at the public offer, and don't think
03 we didn't consider it, because we did. We considered
04 it a long time. And we submitted to Your Honor the
05 declaration of Roger Milgrim, an expert in licensing,
06 because this is no offer at all. They claim that it
07 would protect our businesses from going forward. Just
08 the opposite. It will guarantee that there is
09 substantial, continuing and ongoing litigation going
10 forward. It is not a license that any commercial
11 property can deal with. And Mr. Milgrim tells you the
12 license offered is illusory and no lawyer advising RIM
13 could counsel acceptance of this proposal.

14 And why is that? Because it is NTP that
15 wants to keep these proceedings going. It is NTP that

16 wants to sue others. They want to sue our service
17 providers if they want to start providing BlackBerry
18 service themselves. In spite of the fact that it comes
19 from us, they want to sue other people in the industry
20 that tag off of our system. Other people that would
21 use our handhelds, that would use all of our devices.
22 And that's simply NTP's goal is to have continuing
23 litigation obviously to collect hundreds of millions of
24 dollars.

25 On the balance of the hardships question,
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01 Your Honor, I would ask is an injunction required to
02 remedy any identifiable wrong? Is it really necessary
03 in this case? NTP is not in the wireless business at
04 all. They make no products. They provide no services.
05 NTP is in the licensing business. They want money.
06 There is a question about how long the injunction would
07 last. I'm unclear how long the patent office
08 proceedings will last, but clearly long enough to
09 damage the public and to damage RIM.

10 Notwithstanding, RIM has been willing to pay
11 money. There is an adequate remedy at law here. We

12 offered to pay \$450 million dollars. The patent
13 statute itself provides that NTP is entitled to not
14 less than a reasonable royalty. And we propose that
15 that is the solution that Your Honor had in 2003, and
16 that is the solution that should pertain today,
17 particularly when the public is at risk.

18 Other problems with NTP's proposed
19 injunction, it wasn't mentioned by NTP, but one of the
20 provisions is that they are allowed to monitor our
21 research and development. And that the burden will be
22 placed on us to come forward with new products and
23 prove that they are not infringing in order for us to
24 release them to the marketplace. NTP has already
25 improbably disclosed redesign information. We went to

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01 them and disclosed a workaround to them. We then found
02 that they had submitted new claims to the patent office
03 and the re-examinations that track those workarounds.
04 There's no reason why we should be required to carry
05 that burden of proof, nor is there any reason why we
06 should be required to allow NTP to impose upon our, to
07 be injected into our business relationships that way.

08 In fact, this Court has already considered a
09 similar concept on Slide 86, I quote from Your Honor's
10 June 23rd '03 order, the argument there was that RIM
11 products should be considered to be infringing going
12 forward, and you said, "No. The Court will not direct
13 RIM to make escrow deposits for all new products it
14 develops without a showing that the products and
15 services are not colorably different from those found
16 to infringe at trial." That is the burden of proof
17 that Your Honor applied in the escrow accounts, that's
18 the burden of proof that should be applied going
19 forward with respect to any forward looking injunction.
20 NTP's efforts to shift the burden of proof is improper.

21 Let's talk about the work-around. We do have
22 a work-around, we can implement it. It is not
23 something that can be done overnight. In fact, it will
24 take quite awhile. It is estimated, for each
25 BlackBerry Enterprise Server, and for each handheld in

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01 the United States, that the time, the time of the
02 technician to implement the work-around will be about
03 two million hours. That's the burden that NTP says is
04 the excuse for issuing an injunction. An injunction
05 that the Court of Appeals can set aside based on the
06 patent office rejections or that at the end of the
07 appeal period could be set aside automatically because
08 the patents will be void ab initio if the patent office
09 decisions are upheld. And they have always been upheld
10 in the past. The public costs of implementing the
11 work-around are extensive. It would be a de facto
12 incursion on the 1498 exemption of the government
13 because it would not be impractical to run two separate
14 systems. So in spite of the fact that the government
15 has an exemption to use the current BlackBerry system,
16 it would become obsolete fairly quick. It would

17 guarantee continuing proceedings in this Court because,
18 make no mistake about it, NTP's goal is to shut down,
19 as I quote, "Shut down the U. S. BlackBerry system."
20 So we will be before Your Honor time and time again,
21 first on contempt, and then no doubt on a new case with
22 NTP contending that the work-around is not good enough.
23 NTP's proposed injunction is too broad, it
24 contains products and services sold to date. Mr. Glick
25 alluded to this, we have paid damages for those

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01 products and services. They should be considered free
02 of injunctive relief going forward. To grant
03 injunctive relief against products and services that
04 we've already paid for would be nothing more than two
05 bites of the apple that NTP says would be improper.

06 The injunction NTP proposes would cover
07 non-infringing uses of the products and services. And
08 it would cover products sold outside the United States.
09 There is no provision for excluding any of those
10 categories. And I call your Your Honor's attention to
11 Slide 89.

12 Any forward-looking injunction must exclude
13 the installed base for which RIM has already paid
14 compensation. It can only be forward-looking applying
15 to the adjudicated and stipulated Legacy products, it
16 can't apply to new products, and RIM should not be put
17 to the burdens of proving the negative. So it must be
18 particularly limited.

19 The solution, Your Honor, here is the
20 solution that you came to in 2003. Deny the injunction
21 and continue ordering royalty payments to NTP on the
22 infringed claims so long as any of the infringed claims
23 survive. We are willing to do that and we've been
24 doing that and we've been doing it without objection.
25 It is a system that has been proven to work. Denying

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01 the injunction accommodates the public interest, it
02 accommodates the exempted users, it accommodates the
03 realistic situation of these patents before the patent
04 office, and their weakness and their frailty and their
05 likely demise very soon. The demonstrated public
06 interest that we have brought to you is extraordinary
07 and compels denial of an injunction. And most
08 importantly, Your Honor, NTP has presented nothing in
09 rebuttal to our showing on the public interest.
10 Nothing.

11 Your Honor, when you take into account the
12 public interest, the problems with NTP's proposed
13 injunctions, the frailty of the patents in this case,
14 and the adequacy of a damages royalty remedy, and you
15 balance them against the only thing that would come of
16 NTP's proposed injunction, and that is increased
17 leverage in bargaining against RIM, I submit, Your
18 Honor, that the balance of equities tips sharply in the
19 direction of opposing an injunction in this case. And
20 we ask you to do that.

21 THE COURT: Thank you. Let me hear from the

22 Government.

23 MR. FARGO: Thank you. I will be much more
24 brief than the other two parties for a number of
25 reasons. As we set forth, our interest is primarily in
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01 ensuring in the language of an injunction and also
02 ensuring that there is a very clear idea of how this is
03 carried forward.

04 Just to step back a moment, we have seen two
05 parties with two very different ideas how to
06 accommodate the public interest. I'm not going to
07 purport to repeat what each one has done. I think the
08 most useful thing the government can do is to step
09 through the process of implementing an injunction,
10 assuming one is in the final analysis entered. So that
11 we have a clear record, as NTP has said, we have this
12 clean language.

13 The problem is that there has to be a record
14 of what constitutes compliance, what each party is
15 responsible for doing, should we get into a dispute,
16 and sadly from what we're hearing in the last couple of
17 hours, it does seem to be certainly a possibility that
18 has to be taken seriously.

19 The injunction in terms of the language has
20 gone through at least substantial revisions since, I
21 believe, 2003, to contain an exception for the federal
22 government, the exception in terms of the federal
23 government is meant to parrot Section 1498. Use by the
24 United States, use for the United States with
25 authorization and consent. We will talk about that a
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01 little bit later if you don't mind.

02 Of course, there is no doubt that BlackBerrys
03 are used extensively. One thing I did want to mention
04 before we get into what we see is the mechanics of what
05 NTP has proposed in terms of its white list plan, the
06 government's filing in the EBAY case, assuming we file
07 a merits case, would be, I believe on March 10. Should
08 this matter be under submission, we'd be happy to
09 provide, to seek leave and provide a copy of that
10 relief. Because that's important in terms of the
11 government's stated position.

12 NTP's proposed plan, and we were a little
13 uncertain, I have to say, when we stepped into the
14 courtroom, I think we may be a little more certain what
15 it is, seems to call for what's essential, what I'm
16 going to refer to as server level identification of the
17 authorized users. And then supplemented programs by
18 PIN, a PIN list for users who aren't associated with
19 the BlackBerry Enterprise Server.

20 We have conferred with NTP regarding
21 exemptions necessarily, according to 1498, the language
22 we just talked about. We've made some isolated
23 requests for non-governmental organizations,
24 principally the regional federal reserve banks that do
25 communicate closely with the government Federal
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01 Reserve. That's important for monetary supply,
02 particularly in a time of crisis. We've also conveyed
03 comments regarding exemption for utility repair that we
04 heard from some of the wireless carriers when we talked
05 to them.

06 But, as we emphasize, it doesn't mean a whole
07 lot unless this can be implemented.

08 What the term white list is, I think is one
09 that probably came out of our discussions with RIM just
10 as a way, handy term to use for authorized users. What
11 we understand to be on the table is the, as I said,
12 server level identification, the backup, just so we all
13 understand, BlackBerry devices, the handheld devices,
14 can be used associated, as I understand, three
15 different basic ways. Many are used with a BlackBerry
16 Enterprise Server, whether you keep calling it BES,
17 that server sits alongside the enterprise e-mail server
18 and receives any e-mail that's going to be redirected
19 to BlackBerry handhelds. The BES has a unique number.
20 The server relay protocol number, the SRP, it is the
21 one that the Court was shown on the installation
22 guides.

23 The advantage of looking at the BES is you
24 pull together chunks of users. Generally, just to give
25 the Department of Justice, my own part of the civil

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01 division as an example, there are a number of users
02 whose pins will then be entered into the BES so they
03 will receive their e-mail pushed through that. So
04 this, while there may be several hundred thousand
05 different PIN numbers within the federal government
06 itself, our estimate, partly from information RIM has
07 given us, is probably on the order of maybe 1300 to
08 1500 BES servers.

09 Now, we were told that RIM can, perhaps has
10 this information, our concern is that if RIM is 85
11 percent accurate in identifying government BES numbers
12 or SRP numbers, it is probably going to take longer to
13 fill in the gaps than it would be to do this ourselves.
14 What we envision in the federal government is we would
15 need to flow down a command, there was an exhibit that
16 was attached to our February 1st brief which was a
17 listing of various government agencies, it is probably
18 obvious that's a mail merge template. It is part of a
19 mail merge list. To take one, but to understand it,
20 one of those entries, I think the first one was the
21 Department of Army. From there we'd have to flow down,
22 probably from the chief information officer, down to
23 every base and every command within the army. That's
24 just to pick up the different server ID numbers. That
25 information, it seems to be the best idea we've seen,

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01 would have to flow down and flow back up.

02 We would then want to aggregate that so that
03 there is first a limited number of places information
04 is being submitted to RIM so that it is known to be
05 authentic. We do have an issue that if you're going to

06 be constructing a white list, you do want to make sure
07 the information coming from an authorized source, I'm
08 sure RIM wants say do that because it wants to comply
09 with an injunction, not be held in contempt, the
10 federal government wants to make sure the right numbers
11 are on the list. So it would probably have to come
12 through and be aggregated. And this will play into
13 what we think is going to be required as a grace
14 period. But, that process has to happen.

15 We've heard the statement that all government
16 employees use a BES. We believe most of the employees
17 use a BES. There may be some exceptions. There's two
18 other ways, the other ways the BlackBerry redirect
19 desktop redirector, you could conceivably have a
20 BlackBerry where e-mail is pushed through your desktop
21 to the handheld. And there was something called a web
22 client or BlackBerry Internet server. We are looking
23 into some information on use of those two
24 instrumentalities by the federal government. We think
25 it is fair, going to be fairly small, but we are not

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01 there yet. I think it is true to say most, and the
02 vast majority, are going to be associated with an
03 enterprise server.

04 There was also the statement that paid
05 support is purchased. I think our information,
06 sometimes you do, sometimes you don't. Within my own
07 civil division, we don't have a paid support contract.
08 The rational was these things really don't go down that
09 often. It wasn't there, wasn't a need for it. I think
10 we have received some information that the figure is
11 perhaps a little under 50 percent in terms of which
12 federal customers have paid support contracts.

13 So I guess what this is going to ultimately,
14 is I think that we are going to have to collect all
15 this information ourselves to be assured that it flows
16 up. The best way to do it securely, because we do not
17 want, as someone mentioned, , I believe NTP mentioned,
18 they don't want other people reading their e-mail by, I
19 guess, finding the SRP number and using some way of
20 hacking, neither do we. So this would have to be, I
21 think, first aggregated so you can't trace it back to a
22 specific BES organization's BES and also transmit it
23 securely.

24 What we understand to be then on the table,
25 and I would hope that NTP can confirm this, is

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01 basically a three-stage validation check that would
02 have to occur at RIM. Would check to see if it is a
03 PIN to PIN message, because they don't infringe and
04 that also means that the existing database of RIM's
05 PINS should not be purged. Because those are necessary
06 in order for PIN to PIN communication should somebody
07 wish to continue to use that. It is the user's choice.

08 If it is not a PIN to PIN, one would be a
09 white listed server number, these would be the probably
10 several thousand to determine if that's in the white

11 list. If the server name's number is on the white
12 list, the message passes, the e-mail is used. If it
13 fails that, we'd suggest a secondary, what I'm going to
14 call a PIN save list, just to --

15 THE COURT: Say that again?

16 MR. FARGO: Save list as opposed to a white
17 list just to provide, I guess, a little bit of
18 differentiation where people can use different terms
19 for the same term that can mean very different things.
20 That could take into account anyone who for some reason
21 isn't associated with a BES. If the number is on that
22 save list, the message passes as well. The traffic
23 passes.

24 A couple of things -- I want to back up. I
25 am under the implicit assumption in doing this is you
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01 look at the identity of the user in terms of whether
02 they are exempt from the injunction. There is no way
03 that I think anyone has put on the table that you can
04 actually look at the e-mail and do the e-mail by e-mail
05 determination. You have to assume if it is the federal
06 government, if it is a government user, if there is an
07 e-mail home, it is not going to, you're not going to
08 block that selectively and just pass certain ones. I
09 don't think anyone thinks that's impractical. But, I
10 did want to state that explicitly. I don't think
11 anyone thinks that's practical.

12 One other thing I did want to back up and
13 mention as well, it really should be the government's
14 decision under 1498 as to whether it wants to use an
15 alternative, whether it wants to use a workaround,
16 assuming that RIM does offer a full standard mode and
17 what I'm going to call a workaround mode.

18 THE COURT: I think that's true.

19 MR. FARGO: Okay. So we won't belabor that
20 point. There was reference to using a broadcast
21 message. That could cause more problems than it
22 solves. Again, let's take a look at it from just as a
23 microcosm, the 400 or so BlackBerry handhelds that are
24 administered by our IT person. If that person then
25 gets, has 10 percent of the users sending e-mails, or
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01 30 percent of users or something he is already doing,
02 it is really just going to create more chaos. A
03 broadcast that just the enjoined users use might be
04 useful. But, that would presuppose that you already
05 have a pretty good white list. And that may not be,
06 may or may not, it may be possible, something to work
07 out in terms of, at least on a server level, sending it
08 to identify customers saying we've got you down for
09 being enjoined.

10 THE COURT: As opposed to going to --

11 MR. FARGO: Going to everyone I think would
12 create chaos. Absolutely. We have a major apparent
13 disagreement with NTP on what use for the United States
14 with its authorization for consent means. The United
15 States, and we specified this a little in our last

16 paper on the reply on the motion to intervene, the
17 United States confers authorization consent normally
18 using two provisions. It is very rare for an
19 authorization consent clause to specify any specific
20 centrality, the clause normally used in a research and
21 development contract specifies that the government
22 confers its authority to the contractor to use any
23 intervention in performance of its contracts. That's
24 the broad clause. The narrower clause would apply
25 first to anything delivered to the government. That's

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01 not what we are talking about here. But, it also
02 provides that authorization consent for any manner of
03 performance directed by the contracting officer. So
04 the contracting officer does have the authority to
05 direct performance.

06 We don't think that it would comport with
07 1498 to say that this only permits contractors to use
08 BlackBerrys where we can show them a contract that says
09 you have to use a BlackBerry. Under the broad clause,
10 I think it may well be that there is an exemption for
11 that particular contractor or business unit performing
12 that contract. If it is a narrow one, the contracting
13 officer has to make a call, that's in his discretion.
14 In other words, to use the Skadden, Arps example, the
15 contracting officer for that contract has to cite do we
16 need realtime BlackBerry communications to perform this
17 contract reasonably. If we do, there are consequences,
18 you know, to bring somebody under the umbrella, the
19 1498 umbrella, but it is a decision a contracting
20 officer is given the authority to make. There may be
21 others where they say no, e-mail is fine for our
22 purposes. But, that's the way that this would have to
23 work.

24 There was, I believe, a letter, a form letter
25 that NTP provided as an attachment to their brief which

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01 would be the type that would have to be used
02 particularly in the narrow, the broader situation,
03 where the contracting officer provides a verification
04 that this contractor is using BlackBerrys with our
05 authorization and consent, and that would be necessary
06 then for the contractor to take back to RIM to say
07 please don't turn off our service.

08 The one point I want to make on that is it
09 does, because this does impact when we call the server
10 level identification, is it is going to likely cut
11 fairly broadly. Our understanding, of course, is that
12 is that BlackBerry's tend to be organized sort of in
13 natural units. Department of Justice, again, I'll use
14 that as an example because it's the one I'm probably
15 the most familiar with, we have about 21 BES's within
16 the main Justice Department. And their civil division
17 has one, the antitrust has another and so on. And at
18 the U.S. Attorneys office, there's probably 94. One
19 for each district, one for each office. Because
20 usually these are things the IT people handle and they

21 are not consolidated. That may take -- that may end up
22 having a contractor who's performing a contract have a
23 portion, you know, it may provide some type of business
24 group or natural separation.

25 But, on the other hand, we think NTP is
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01 assuming or willing to assume the risk that this may
02 cover some employee who's, for example, in the payroll
03 department of the organization that's say working on
04 that, wrong example, a contract where there is a need
05 for BlackBerry communications or aware there is a broad
06 research and development type authorization consent
07 clause. So it might cut a little bit broadly. We
08 understand that that seems to be okay with NTP. But,
09 if it is not, that's something that has to be checked
10 on, worked out.

11 Now, we've talked quite a bit about all these
12 things in terms of the federal government. And there
13 is a reason for that. Because contrary to maybe some
14 implications today, we haven't been just sitting around
15 doing nothing since we entered this case. We have
16 devoted a lot of time to thinking through, trying to
17 figure out just how would you do this, how would you
18 make this type of a split.

19 The problem that can easily occur, I think,
20 and this is something that we will raise for the
21 Court's consideration, while we've done some thinking,
22 we have talked to some of the major departments and
23 talked to some IT people and got some idea of how we
24 can maybe flow this down and flow this up. I don't
25 know that any of this has been done on a state and

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01 local government level. The one thing it could cause
02 considerable amount of disruption is the information is
03 just coming in from all kinds of sources. That is
04 something that we don't know what you do with. And I
05 just raise that. First responders, I think the purpose
06 that we had for submitting the declaration of Dr.
07 Henriques, is there may be some considerable needs for
08 this expense in the health care field. I think there
09 are a number of, and RIM will certainly provide that
10 there are a number of places we may need to have some
11 type of -- we initially discussed this particularly
12 with the national disaster medical services, we
13 discussed this preliminarily with NTP about finding
14 some way to identify that chunk for an exemption.

15 One big question mark, I don't know if the
16 other type worked, the other side, on this. And it is
17 assuming we have all of this white list assembled, and
18 we have all of this, we have gone through all of this,
19 one concern we had is how to get the carriers queued
20 in. Because one real fear we have is if we have done
21 this, we do not want the carriers to shut off our
22 service there. There is two places you could block
23 service to implement an injunction, block it at RIM,
24 and we've concluded after looking at any other
25 alternative, that makes the most sense, or you could

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01 block it at the carriers. The carriers want to make
02 sure they are not held in contempt of an injunction.
03 So they -- we are concerned, I guess, unless there is
04 some type of understanding, that they can pass any
05 traffic and will be blocked by RIM or by the reliance
06 on RIM's compliance with the injunction, we are
07 concerned about having them say well, you have to tell
08 us, too, because you just doubled at least the work
09 that has to be done.

10 Finally, we think if there is this type of
11 injunction issued, there should be a 90 day grace
12 period at least. We would suggest reporting, but on a
13 30 day scheme, for two status reports from the
14 government and RIM. And we're willing to certainly
15 tell the Court and tell the parties what we've been
16 doing. But, that would be our suggestion. Obviously
17 the Court, if there's further management of the
18 process, maybe he magistrate court could validate it,
19 and I'm sure it is probably not happy about me
20 suggesting that, but it could be delegated there and it
21 may make a lot of sense.

22 THE COURT: Sounds good to me.

23 MR. FARGO: Finally, a couple of other points
24 I wanted to make. With regard to the workaround, as I
25 said, it should be the federal government's right under

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01 1498 to decide, as we understand, it is going to
02 require at least validation. I don't think it's been
03 completely tested by all of the carriers. That is
04 another factor that plays in the time. Finally, what
05 I'm going to address is what's been referred to, what
06 I'll refer to as a list of targeted entities as opposed
07 to the blacklist. As we've noticed, certainly SAIC is
08 a major government contractor and they are probably
09 operating under authorization of a consent law in some
10 contracts. Bechtel we believe to be one, too. IBM may
11 be one, we haven't verified it. In the 30 day period
12 proposed by NTP, there ought to be at least some
13 ability to come forward and identify some of these, if
14 they are government contractors and are entitled to the
15 exemption. So there's not a, as it is written now,
16 they are to be blocked regardless. And certainly the
17 SAIC, Bechtel and probably IBM are right off the list
18 right off the bat. In any event, there ought to be
19 some authority.

20 Now, to conclude this, as I said, we are left
21 with the litigants, there are substantial arguments
22 this Court has heard for the last couple of hours over
23 whether an injunction ought to be issued at all or what
24 should be done. But, these are steps we think that if
25 you resolve in favor of NTP have got to be done.

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01 THE COURT: Thank you very much. Brief
02 rebuttal.

03 MR. WYSS: With Your Honor's permission, I
04 would like to do just the damages things and we will

05 divvy it up the way we did before. With Your Honor's
06 permission I would like Mr. Anderson to address very
07 briefly about the PTO proceedings so we have a response
08 on the record.

09 THE COURT: If you must. I think that's a
10 waste of time. I won't stop you.

11 MR. WYSS: Let me start with the damages
12 argument. In our brief we have set forth all the
13 testimony, all exhibits, all of your instructions, we
14 have laid it all out. In Mr. Glick's argument today,
15 he does not address the exhibits that Mr. Musika put
16 in, he does not address Your Honor's instructions, he
17 does concede, though, I think I wrote it down, that
18 all of the software, the hardware and the services are
19 all covered. He made that concession today.

20 All he did was put up some transcripts and
21 picked and chose. There was no testimony, and they are
22 unable to site it, where the reasonable royalty rate
23 depended upon the number of claims to be infringed.
24 Mr. Musika did not so testify, Mr. Donaldson did not so
25 testify. In fact, Mr. Donaldson said just the

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01 opposite, as we cited in our brief, and most
02 importantly, Your Honor, instructions would not have
03 permitted them to do that.

04 With respect to willfulness that was brought
05 up, the KNORR-BREMSE case and the discussion of that,
06 we direct Your Honor and your clerks to the GOLDEN
07 BLOUNT case, we think that handles it completely. That
08 was issued by the federal circuit on February 15th,
09 just a week ago.

10 And with respect to the issue about the
11 services of the verified reports and what went in, Your
12 Honor, Your Honor's order again was very clear. I
13 think I would like to put on the Elmo, just to see what
14 they indeed did file. These are the reports they put
15 in. These are all attached in the Exhibit 2 of the
16 Anderson declaration, Your Honor.

17 In response to Your Honor's orders that they
18 have to identify each of the adjudged models, each of
19 stipulated models and the service and the software,
20 This is what they submitted, Your Honor. This is what
21 they verified. They included, in addition, this
22 additional column called the other BlackBerry models.
23 These are the models introduced afterwards. We are
24 not -- that's not part of this. We are relying only on
25 the things they responded to pursuant to your order

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01 which they did not challenge, we are not getting those
02 at this time. That's something we are going to have to
03 wait and see what happens when and if an injunction is
04 ordered and when and if the workaround goes on, whether
05 we will go forward to do more on that. While I'm up
06 here, could I just respond very briefly to some of the
07 implementation issues?

08 THE COURT: Go ahead.

09 MR. WYSS: First of all, with respect to the

10 Department of Justice and the exclusion language that
11 ought to go into the injunction order, the expense
12 language, as I pointed out, we revised from brief one
13 to brief two that language based on our discussions
14 with the Department of Justice. We have invited the
15 Department of Justice to give us, we included in there
16 everything they had given us as of that date, we
17 invited to give us any more questions they have. If
18 there are questions of health care, we are happy to
19 work with that and get that in. That's not our
20 purpose. Our purpose is to work with them and we have,
21 I think, been working very well throughout all of this.

22 With respect to the actual question of
23 implementation, I think Mr. Bunsow admitted it is
24 possible there is no question that it is possible, it
25 is not for Your Honor, and it is not for NTP to tell
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01 RIM exactly how to do it. That's something that the
02 government and RIM and the customers, those are the
03 people who have the information. The government came
04 up with a good suggestion today, send the broadcast
05 e-mail, don't send it to the government servers, you
06 already know who we are, send it to everybody else.
07 These are the types of things that Your Honor enters in
08 the injunction language, that's when the people who are
09 affected by it work out the best, most efficient way to
10 do it.

11 There was a suggestion that there may be a
12 difference between us and the government about the
13 scope of authorization and consent. There is not, Your
14 Honor. There is a well-developed body of law about the
15 federal government getting to use patented inventions
16 and government contractors working with the
17 authorization to consent get to use it. We don't
18 dispute that. In fact, we have put in and suggested a
19 form letter that can be used by the government
20 contracting officer. He hands it to the contractor,
21 the contractor then puts it in and he's exempt. So
22 that's a non-issue. Our exemption language tracks
23 exactly what the statute says and, we are happy to work
24 with the government to make sure that they --

25 THE COURT: Let me ask this. What about this
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01 business, there's been some argument from RIM as well
02 as the government relating to your letter inquiring as
03 to whether or not BlackBerry, I thought you were
04 defending another point with that, but they have
05 indicated that restricting --

06 MR. WYSS: We are not. All we are doing -- I
07 am not a government contracts expert. My people two
08 floors up in the office said well, ask them, let's look
09 and see what the contracts are. We don't dispute it.
10 If they have a contracting officer that says this
11 contractor must have it, he issues the certification
12 letter, he hands it to him, it's all taken care of. We
13 are not fighting over it. Will there be some fraud on
14 the certification? It's possible. We, NTP, are

15 definitely willing to accept the fact that there may be
16 some over-inclusiveness. Additionally, if there's true
17 fraud, and people are putting things under penalty of
18 perjury, administrators of a law firm that have
19 absolutely nothing to do to do with anything, we will
20 deal with those in due course. But, the procedures and
21 ways to do that are there and straightforward.

22 The big thing, Your Honor, what we come down
23 to is that RIM has told you they are not going to do
24 anything until an injunction is ordered. They are
25 simply not going to even start on this process until

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01 Your Honor enters an injunction. And we urge you, Your
02 Honor, to get that in with the expense, reporting
03 requirement, whatever we can do to get it worked out,
04 but until it's done, we are just going to be sitting
05 here forever. Thank you, Your Honor.

06 THE COURT: All right.

07 MR. WALLACE: Your Honor, I will make the
08 briefest presentation of the day. As far as the PTO is
09 concerned, we will rely on what's in our briefs.

10 Significantly, Your Honor, nobody from RIM or
11 the government has made any argument whatsoever that
12 there should not be an immediate injunction against the
13 sale of new BlackBerrys to non-exempt entities. So
14 there's no need to hold that up, if there's any problem
15 sorting out who the government's BES numbers are.

16 With regard to the public interest, Mr.
17 Bunsow waxed on for sometime about the money RIM is
18 paying, and that's been a very satisfactory system.
19 Your Honor, NTP hasn't gotten one penny from RIM. And
20 how long is this freeloading going to be permitted?
21 With respect to the workaround, I was shocked to hear,
22 and I'm sure all the BlackBerry users and financial
23 community was shocked to hear, that it is going to take
24 two million hours to implement this. I again refer,
25 Your Honor, you can go to their website, not only do

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01 they say nobody is going to notice the difference, they
02 say that, as a special note for the BlackBerry
03 enterprise server administrators, and I'll just
04 paraphrase, it is all going to be done automatically,
05 you don't have to do anything. And there's no
06 affidavit or representation from anybody with knowledge
07 that it is going to take two million hours to do that.
08 All of these lines about Dr. Yermus, about the critical
09 software, and the stuff about the transplants, Your
10 Honor, that's not even e-mail. That is what they call
11 mobile date, it is not infringing. It won't be covered
12 by Your Honor's injunction. Lots of other
13 affidavits that Mr. Bunsow read from are from people
14 who are clearly exempt organizations.

15 They said we didn't cite anything about who
16 has the burden on sorting out compliance with the
17 injunction. I'll refer to you page 30 of our response
18 brief.

19 And a final note, Your Honor, when they say

20 our offer to license is illusory because we are going
21 to turn around and sue T-Mobile for carrying service, I
22 don't know how we could have clearer English than to
23 say NTP hereby covenants that it will not make or
24 assert against RIM and its affiliates or wireless
25 carriers if they carry the BlackBerry service.

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01 So here are the equities, Your Honor. They
02 have been adjudicated as willful infringers. Under the
03 appropriate law, we are entitled to an injunction.
04 We're saying if you'll just pay us, we won't insist on
05 the injunction. We have publicly announced it. We
06 have presented the full license for them and for the
07 public to know that that is our position. All this
08 hardship that they are claiming is hardship because
09 RIM, like the squatter, wants to continue to use the
10 technology, but not pay one penny. And, Your Honor, we
11 suggest they need to make a choice. Pay the reasonable
12 royalty or go off the air. Except for these exempt
13 users, of course. Thank you.

14 THE COURT: Thank you. All right. Anybody
15 else want to be heard? That's it.

16 MR. WYSS: We will rely on our briefs, we did
17 discuss that in there, about the PTO proceedings.

18 THE COURT: All right. The hallmark of
19 sanity is that one remains firmly tethered to reality.
20 And one unfortunate reality for RIM, and one that they
21 would just as soon forget or ignore, is that in this
22 very courtroom there was a trial, a jury was selected,
23 a trial was carried out for a period of weeks, and
24 evidence was received, and the jury heard arguments
25 from some of the best legal talents that money can buy.

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01 And when all was said and done, they decided that RIM
02 had infringedcal NTP's patent, and that the
03 infringement was willful.

04 The jury consisted of 12 men and women, tried
05 and true citizens of this district, and I can assure
06 you that the citizens of this judicial district and the
07 Commonwealth of Virginia are not foolish or frivolous
08 when it comes to the matter of fixing legal liability.
09 After all of the appeals, the petitions, the politics,
10 the lobbying, this central truth, this reality of the
11 jury verdict has not changed in any essential or
12 substantive way.

13 So here we are on remand with very clear
14 direction from the federal circuit. Two legal issues
15 to be resolved, damages in light of the Federal
16 Circuit's opinion, and whether or not injunctive relief
17 is appropriate; and a sub-issue was is what is the
18 appropriate scope of such injunctive relief.

19 And I think at least every lawyer sitting in
20 here today understands the rules and standards that
21 must be applied by the Court to come to a legal
22 conclusion regarding these legal issues.

23 And I have been doing this for almost 20
24 years, and my approach will be no different in this

25 case than any other cases I have had to similarly
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01 resolve.

02 I must say I am surprised, absolutely
03 surprised, that you have left this incredibly important
04 and significant decision to the Court. I've always
05 thought that this, in the end, was really a business
06 decision. And yet you have left the decision in the
07 legal arena, and that's what you're going to get, a
08 legal decision.

09 I can discern from reading the pleadings and
10 preparing for this hearing that a legal decision, a
11 Court imposed solution, will be imperfect. The legal
12 squabbling will continue, RIM's business will continue,
13 in plain words the case should have been settled. But,
14 it hasn't. So I have to deal with that reality.

15 I must admit I was somewhat surprised at
16 RIM's argument, which seems to me to be inconsistent on
17 the one hand, that if the Court was to impose an
18 injunction, that it would have a catastrophic effect
19 and the very foundation of western civilization would
20 be shaken by wireless e-mail or the absence of it.

21 And then, on the other hand, from some of the
22 stuff that I've read, it's a minor convenience they
23 have got a workaround. Nobody will even know that a
24 stone was cast into the sea.

25 I'm going to take the matter under advisement
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01 and I will issue a decision as soon as reasonably
02 possible. I'm thinking that probably the damages order
03 may come out quicker than the decision on injunction.
04 That requires a little bit more thought. And if, I say
05 if because I have not decided, if an injunction is
06 ordered by the Court, I want to make very sure that
07 these exclusions and exemptions are appropriate. That
08 the government and its needs are met.

09 And so I thank you all for your time and
10 attention this morning. We will be in adjournment.

11 (Proceedings adjourned at 12:33 p.m.)

12 CERTIFICATE OF REPORTER

13 I, Jeffrey B. Kull, CP, RPR, certify that the
14 foregoing is a correct transcript from the record of
15 proceedings in the above-entitled matter.

16

17

18

19 _____
JEFFREY B. KULL, CP, RPR

20

21 _____

22 DATE

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