

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ZENIMAX MEDIA INC. and ID) 3:14-CV-1849-K
SOFTWARE LLC)
Plaintiffs,)
)
VS.)
) DALLAS, TEXAS
)
OCULUS VR, LLC, PALMER)
LUCKEY, FACEBOOK, INC.,)
BRENDAN IRIBE and JOHN)
CARMACK,)
Defendants.) June 20, 2017

TRANSCRIPT OF POST-TRIAL MOTIONS HEARING
BEFORE THE HONORABLE ED KINKEADE
UNITED STATES DISTRICT JUDGE

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1 POST-TRIAL MOTIONS HEARING - JUNE 20, 2017

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

3 THE COURT: All right. We're back on the ZeniMax
4 Media, Incorporated, and others versus Oculus VR, Inc., and
5 others.

6 And we've got Mr. Anthony Sammi here from Skadden.
7 And you're ready for this post-judgment hearing; is that
8 correct, sir?

9 MR. SAMMI: Yes, Your Honor, I am.

10 THE COURT: And we've got Mr. Hemr back. Where is
11 Mr. Hemr?

12 MR. HEMR: Yes, Your Honor.

13 THE COURT: Always good to see you. Nice haircut.

14 MR. HEMR: Thank you, Your Honor.

15 THE COURT: And Mr. Altman is here representing the
16 Plaintiff. Good to see you, Mr. Altman.

17 MR. ALTMAN: Thank you, Your Honor.

18 THE COURT: And Mr. Philbin from Haynes and Boone is
19 somewhere. There you are.

20 MR. PHILBIN: Good morning, Your Honor.

21 THE COURT: Good to see you. I couldn't miss you in
22 that purple tie.

23 MR. PHILBIN: Thank you, Your Honor.

24 THE COURT: All right. Good to see you.

25 All right. Where's that tall fellow that's on

1 y'all's side? There he is.

2 MS. LISY: Our percipient witness, Your Honor? Good
3 morning, Your Honor.

4 THE COURT: Oh, good. Nice to see you.

5 All right. And then we've got Mr. Dawson. How are
6 you, sir?

7 MR. DAWSON: Fine, Judge.

8 THE COURT: Did you get me affirmed at the Fifth
9 Circuit recently?

10 MR. DAWSON: Well, I'd like to claim credit for that
11 myself, but it was my trusty sidekick here who did that.

12 THE COURT: He did?

13 MR. DAWSON: Yes, sir.

14 THE COURT: Okay. You don't get any extra leg-up for
15 that. Do you understand?

16 MR. DAWSON: I understand.

17 THE COURT: Okay. Ms. Wilkinson, how are you? Good
18 to have you back.

19 MS. WILKINSON: Great to be back, Your Honor. Nice
20 to see you.

21 THE COURT: And you're ready?

22 MS. WILKINSON: Yes, sir.

23 THE COURT: And Mr. Falconer?

24 MR. FALCONER: Good morning, Your Honor.

25 THE COURT: Well, thanks for your work on that, and I

1 appreciate that.

2 Let me know when I can start flying on Southwest
3 Airlines again.

4 Okay. And Mr. Smith. Is Mr. Smith here today?

5 MR. SMITH: Right here, Your Honor.

6 THE COURT: Hi, how are you, sir?

7 MR. SMITH: I'm well. Thank you.

8 THE COURT: And then Ms. Ryan, you're here somewhere?

9 MS. RYAN: Yes, Your Honor.

10 THE COURT: There you are. Good to see you.

11 MS. RYAN: Good morning.

12 THE COURT: And I'll never get this right.

13 Ms. Stameshkin? Am I even close?

14 MS. STAMESHKIN: You're very close, Your Honor.

15 THE COURT: What is it?

16 MS. STAMESHKIN: Stameshkin.

17 THE COURT: Stameshkin.

18 MS. STAMESHKIN: Very close.

19 THE COURT: I'm assuming that's eastern European
20 somewhere?

21 MS. STAMESHKIN: Yes.

22 THE COURT: Okay. Okay. Good to have you good.

23 MS. STAMESHKIN: Good morning.

24 THE COURT: And then Ms. Rubenstein, you're here?

25 MS. RUBENSTEIN: Good morning, Your Honor.

1 THE COURT: And Mr. Stojilkovic?

2 MR. STOJILKOVIC: Good morning, Your Honor.

3 THE COURT: Good to see you, sir.

4 MR. STOJILKOVIC: Good to see you, Your Honor.

5 THE COURT: And Mr. Rosenthal?

6 MR. ROSENTHAL: Yes, sir.

7 THE COURT: Good to see you.

8 I see Mr. Ho.

9 MR. HO: Good morning, Your Honor.

10 THE COURT: Are you on the Fifth Circuit yet?

11 MR. HO: I am not, sir.

12 THE COURT: When do I have to start sucking up to
13 you?

14 MR. HO: Never, Your Honor.

15 THE COURT: Not yet. Not yet. Okay. Good to have
16 you.

17 All right. And then Paul Grewal?

18 MR. GREWAL: Good morning, Your Honor.

19 THE COURT: Good to see you.

20 MR. GREWAL: Good to see you as well, sir.

21 THE COURT: I counted on you to get this case
22 settled.

23 MR. GREWAL: I'm working hard, Your Honor.

24 THE COURT: I'm giving you the -- that's the evil
25 eye.

1 MR. GREWAL: I recognize that look, sir.

2 THE COURT: That's right. It's the eye I used to
3 give my kids.

4 Okay. All right. And then Mr. Tangri, you're here?
5 There you are. Good to see you again.

6 MR. TANGRI: Good morning, Your Honor.

7 THE COURT: All right. Who have I left out? Did I
8 leave some out on y'all's side? I didn't mean to.

9 Okay. All right. So I'm ready to hear what you've
10 got. I want to hear what you think I should do with the
11 judgment. And I've got your motions.

12 I want to tell you, both sides did such a good job on
13 your briefing. I don't know who writes these briefs. Not --
14 I'm not going to say it wasn't you, Mr. Sammi or Ms. Wilkinson,
15 but I'm guessing it was Mr. Hemr or someone else down the row a
16 little bit.

17 MR. SAMMI: Lawyers far smarter and better than me,
18 Your Honor.

19 THE COURT: Okay. All right. And on your side,
20 Ms. Wilkinson, similar?

21 MS. WILKINSON: Absolutely. We have the dream team,
22 Your Honor, with Gibson and our firm and Mr. Tangri, the whole
23 group.

24 THE COURT: Okay.

25 MS. WILKINSON: Everybody but me.

1 THE COURT: Okay. Well, I'm ready to hear, you know,
2 whatever you've got.

3 Mr. Sammi, do you want to go ahead? Since it's your
4 verdict so far, kind of help me with it, okay?

5 MR. SAMMI: Yes, Your Honor.

6 THE COURT: By the way, I will say this. It's not in
7 the record, but I have noticed that Mr. Luckey is working on
8 border security now. I don't see him back there. He's not
9 here today, is he?

10 He's not here today?

11 MS. WILKINSON: No. The individual clients aren't
12 here, Your Honor.

13 THE COURT: Okay. All right.
14 Here we go.

15 MR. SAMMI: Good morning, Your Honor. It's a
16 pleasure to be before you again.

17 THE COURT: It's my pleasure. I've got -- both sides
18 have such good lawyers, and it's such a joy for me. Really,
19 really I mean that. I don't mind saying that for the record.

20 MR. SAMMI: Thank you, Your Honor.

21 THE COURT: Including Skadden Arps.

22 MR. SAMMI: That's great.

23 I have a presentation today, Judge, that I would like
24 to share with Mr. Hemr, mindful of our time, and we'll go
25 through that.

1 THE COURT: Okay. Are there slides?

2 MR. SAMMI: They're just slides, just a PowerPoint.

3 THE COURT: Will you give me a copy of those when
4 you get -- either now or when you get through?

5 MR. SAMMI: Absolutely.

6 THE COURT: I'm glad just to look at it now, and then
7 you can give me a copy, okay?

8 MR. SAMMI: Sure. Sure.

9 THE COURT: Okay.

10 MR. SAMMI: We'll do.

11 Before I get into that presentation, or before we
12 start looking at slides, Your Honor, I would just like to set
13 the table if I might for the Court as to how we got here today.

14 THE COURT: Good.

15 MR. SAMMI: Three years, three weeks, three days.
16 Three years of litigation --

17 THE COURT: Is that kind of your "if it doesn't fit,
18 you must acquit"?

19 MR. SAMMI: Yeah, that is mine. That's right.

20 THE COURT: That is good. Three years --

21 MR. SAMMI: Three years, three weeks, three days.
22 Three years of litigation, three weeks of trial, three days of
23 deliberation.

24 During those three years of litigation, eight law
25 firms for Defendants, 78 depositions, 1.8 million pages of

1 documents, six terabytes of source code, and 1,000 docket
2 entries or more by now.

3 During those three weeks of trial, 55 hours of
4 testimony, 300 exhibits, eight videos, and six experts.

5 During those three days of deliberation, nine
6 upstanding men and women of this jury pain-stakingly reviewed
7 90 pages of instructions, carefully weighed all of what they
8 heard and saw, and came to a verdict.

9 Everyone at these tables got what they wanted in that
10 respect, a trial by jury, and the defendants lost. They don't
11 like it. I wouldn't like it. But they lost. That is how the
12 table is set today, Your Honor.

13 what do the Plaintiffs want? we request entry of
14 judgment on that good verdict that we believe we are entitled
15 to.

16 what do Defendants want? They want to literally wipe
17 it all away, all of it. And if they can't get that, they want
18 a do-over. But this wasn't a pick-up game of basketball; first
19 to 11 wins, and if I lose how about we go two out of three.
20 That was it.

21 And I would like to consider for a moment, Your
22 Honor, how difficult should it be to wipe away a jury verdict,
23 how difficult should it be to scrap an entire trial and have a
24 do-over. It should be incredibly difficult, and it is. The
25 law tells us it is, and it should be.

1 Under the Rule 50 standard, the Supreme Court tells
2 us that we may not make credibility determinations or weigh the
3 evidence. The Fifth Circuit tells us that we need no more than
4 a mere scintilla of evidence in the record to support the
5 jury's verdict.

6 Under Rule 59, for a new trial, the Fifth Circuit
7 tells us that a new trial should be granted only if the verdict
8 is against the great weight of evidence.

9 It is an extraordinary remedy, both of these, Your
10 Honor, after all that has been and done and had in this
11 courtroom. But it is clear in our view, Your Honor, that none
12 of these incredibly rare and extraordinary burdens have been
13 met by Defendants.

14 what flows from the jury's verdict? we would like
15 entry of the judgment.

16 THE COURT: I'm assuming one or more of those cases
17 were cases out of here.

18 MR. SAMMI: Yes, Your Honor.

19 THE COURT: They were my cases?

20 MR. SAMMI: Yes.

21 THE COURT: So you're going to use my own words?

22 MR. SAMMI: No, Your Honor. I'm just looking at the
23 standard as to how difficult it should be.

24 THE COURT: You ought to use my own words. I think
25 that's good.

1 MR. SAMMI: Thank you.

2 Copyright infringement: \$50 million.

3 Breach of contract: \$200 million.

4 False designation: \$250 million.

5 And conversion.

6 Attorneys' fees.

7 Pre- and post-judgment interest: approximately
8 \$125 million. Mr. Hemr will touch on that. We will go through
9 these in more detail.

10 THE COURT: Okay.

11 MR. SAMMI: Entry of a permanent injunction, Your
12 Honor, to prevent the continuing, willful tort of copyright
13 infringement and to stop the continuing breaches of our
14 contract.

15 Defendants show no intention to change their ways.

16 That's where I would like to start today, if I might,
17 Your Honor, with the preliminary injunction -- the permanent
18 injunction.

19 THE COURT: Okay.

20 MR. SAMMI: This is our requested form of judgment, a
21 summary slide. We can skip over this. It's in our papers,
22 Your Honor, how we would like this verdict to be entered as a
23 judgment.

24 THE COURT: Okay.

25 MR. SAMMI: Let's begin with the permanent

1 injunction, if we could.

2 Your Honor, a permanent injunction is the presumed
3 remedy under the Copyright Act for copyright infringement,
4 which the jury expressly found here.

5 The Copyright Act authorizes Courts to grant
6 temporary and final injunctions on terms as a Court may deem
7 reasonable to prevent or restrain infringement of a copyright.

8 Now, the first and most -- one of the most important
9 pieces of evidence in this regard is the non-disclosure
10 agreement that the parties agreed to, the non-disclosure
11 agreement that was Plaintiffs' Exhibit Number 1.

12 The parties, Oculus, expressly agreed that an
13 injunction was an appropriate remedy for a breach, and the jury
14 found a breach of this NDA.

15 The Plaintiffs ask the Court to enforce this
16 contract. And if we may read it, just a portion, "The
17 receiving party" -- these are the Defendants -- "acknowledges
18 the insufficiency of money damages as a remedy for any breach
19 of this agreement and that any such breach would cause the
20 disclosing party" -- that's ZeniMax -- "irreparable harm.
21 Accordingly, the receiving party agrees" -- that's Oculus --
22 "that the disclosing party, in addition to any other remedies
23 available at law, shall be entitled to specific performance and
24 injunctive or other equitable relief as a remedy for such
25 breach."

1 That is what they agreed to back then, because they
2 needed and wanted our technology. But now they've changed
3 their mind, even though this jury found that they have breached
4 this NDA.

5 This Court should enforce this contract, Your Honor,
6 not allow the Defendants to rewrite it. They've agreed that
7 injunction is the proper remedy. But this NDA is one piece of
8 evidence among many that supports a permanent injunction.

9 we'll follow the eBay factors, Your Honor, about
10 whether an injunction should be granted.

11 we believe ZeniMax is entitled to injunctive relief
12 because all four factors are met: ZeniMax is suffering
13 irreparable injury; money damages are inadequate; an injunction
14 is appropriate considering the balance of hardships; and the
15 public interest is not disserved.

16 If I might start with the first, irreparable injury.
17 we have discussed that the parties expressly acknowledged and
18 stipulated that ZeniMax would suffer irreparable injury.

19 what is that injury? Oculus is illegally competing
20 with ZeniMax by continuing to use the proprietary computer code
21 that it stole from ZeniMax. ZeniMax is in the position of
22 having to compete against its own technology that was stolen
23 from it.

24 Dr. Dobkin testified that he found copyright
25 infringement in all versions of Oculus's product.

1 Mr. Giokaris, just a sample of some of the evidence
2 the jury heard, cut and pasted our code into the code base at
3 Oculus.

4 ZeniMax continues to be injured so long as Oculus's
5 products contain its proprietary information.

6 Now, this verdict, Your Honor, was -- this verdict
7 was arrived at by this jury about five months ago. Three weeks
8 ago -- three weeks ago John Carmack gave a speech at the
9 University of Missouri where he said about current technology
10 at Oculus that, "We can do time warp tricks. What if instead
11 of rendering your hand into the main scene we render the hand
12 to a whole separate layer? It's an image by itself. Then we
13 can do time warp tricks."

14 And let's pause on that just for a moment, time warp
15 tricks. Time warp is one of the seven technologies that this
16 jury found was contained in copyrighted computer source code
17 that belongs to ZeniMax and is infringed by Oculus. Five
18 months after the verdict, this is John Carmack, the chief
19 technology of Oculus -- chief technology officer of Oculus
20 telling the world he's still using time warp tricks.

21 Now, ZeniMax has a right to stop this continuing tort
22 of copyright infringement, and we believe that a permanent
23 injunction is the only remedy that would stop this.

24 And it's interesting to note, Your Honor, that
25 Mr. Luckey is no longer with Oculus. Mr. Iribe is no longer

1 the CEO of Oculus. But the one gentleman who really represents
2 ZeniMax's technology and what's incorporated in copyright -- in
3 our copyrighted source code, Mr. Carmack, he's still there,
4 because they need him and they need that technology.

5 Permanent injunction. Why are money damages
6 insufficient, Your Honor? Again, ZeniMax is being forced to
7 compete in the market against its own technology.

8 We were here after the verdict was read, and believe
9 we were still at the table and Your Honor was with the jury,
10 back with the jury, and Ms. Sheryl Sandberg, the COO of
11 Facebook, was telling the public -- I believe it was an
12 earnings call and this was reported on CNBC that, "This verdict
13 is not material to our financials." This is moments after the
14 verdict.

15 Now, Facebook and Oculus may be able to find
16 \$500 million in their couch cushions, but Facebook is literally
17 telling the world quite literally that this figure of damages
18 means nothing to them. It's no incentive to stop.

19 Let's take a look at the hardship, the third factor
20 in eBay, Your Honor. And this is in my view, Your Honor, very
21 important. All of this is important, but let me just pause on
22 this for a second. It's either one or the other. If Oculus is
23 honest, this injunction should be nothing to them.

24 They brought two experts here to this stand,
25 Professor Howe, Professor Balakrishnan. And I cross-examined

1 both, and they said, "This technology is nothing. We can write
2 distortion correction again in two hours. We can do chromatic
3 aberration correction in 21 hours."

4 If you add this time up, Your Honor, of all the
5 people that Oculus has hired and all the smart and wonderful
6 coders that they have, if you have four people working on this
7 technology that is subject to our copyrights and contained in
8 our computer source code, it will take them one week to redo
9 it. One week.

10 And now here comes Oculus saying, "A permanent
11 injunction would be manifest hardship to us." It's one or the
12 other. How is it manifest hardship? Either they could do it
13 in a week in which they -- I asked them about it at trial, and
14 the jury saw all of this, why hasn't anybody done anything?
15 You could rewrite it three times during this trial.

16 It's been five months since the verdict. They can't
17 rewrite it, so they misrepresented that to the jury. And now
18 they're telling Your Honor the hardship is too great.

19 So what's the other scenario? If it's -- if it's not
20 easy, Your Honor, it demonstrates -- it demonstrates that
21 irreparable harm to ZeniMax.

22 If it's not easy for them to excise this technology
23 from their code, they're still using it, and ZeniMax has a
24 right for them to stop using it.

25 Courts routinely state that enforcing a contract --

1 I'm now on the fourth factor, Your Honor, about the public
2 interest being not disserved by entry of a permanent
3 injunction.

4 Oculus contracted for it, that this would be an
5 appropriate remedy. But setting that aside, it's always in the
6 public interest for the Court to enforce a contract that was
7 entered into by the parties.

8 Also, the injunction is narrowly drawn. Now, Oculus
9 would have us -- come to this Court and say, the Defendants
10 say, "You know what? This injunction is so broad, this
11 proposed injunction, that we can't sell anything." No, you can
12 sell whatever you want as long as it doesn't contain the
13 copyrighted and proprietary technology and information of
14 ZeniMax. We have a right to maintain that. We have a right to
15 prevent the continuing tort of copyright infringement, Your
16 Honor.

17 They may sell whatever they like. And they say,
18 "well, you know what? We're not a -- ZeniMax isn't a
19 competitor, so why should an injunction be drawn?" Of course
20 they're a competitor.

21 The id Five, if we recall those employees that left,
22 when they left they went directly to Oculus. They weren't put
23 on an assembly line making hardware. They were placed in front
24 of computers to write source code.

25 And miraculously, at a hardware company like Oculus,

1 the chief technology officer is a man who's done software
2 coding for his entire career. They are obviously competitors,
3 and they are using our technology. And now they say, "well,
4 we're not competitors."

5 Mr. Carmack -- the jury heard evidence that
6 Mr. Carmack himself, when he secretly was emailing Brendan
7 Iribe with an address that wasn't his work address, was
8 concerned about his noncompete before going to Oculus. why
9 would he be concerned about his noncompete if Oculus was apples
10 and we were oranges?

11 The injunction, Your Honor, is narrowly drawn and we
12 believe should be granted.

13 Let me turn now to the verdict and mindful of my
14 time. Thank you, Your Honor, for allowing me to present this
15 argument.

16 Let's turn to the verdict, if we can.

17 THE COURT: May I ask a question?

18 MR. SAMMI: Yes, Your Honor.

19 THE COURT: When you talk about your request for the
20 injunction and the copyrighted material, can you just pull out
21 a certain amount of code and say, "This is our" -- as to each
22 of those things and go, "This has to come out. This has to
23 come out," or are you just not able?

24 I'm not a code expert. That's why I'm asking.

25 MR. SAMMI: Sure, Your Honor.

1 The -- our expert, Professor Dobkin and Mr. Gleicher,
2 testified as to the seven technologies that are embodied in
3 Oculus's code and are copied non-literally. Those need to be
4 excised. Now, they told the jury they can do it in hours, I
5 mean, literally hours.

6 So if Your Honor issues a permanent injunction and
7 gives a lead time, say, "Oh, okay. You know, we'll issue a
8 permanent injunction and you have three weeks to comply," they
9 should be back here next Wednesday.

10 THE COURT: Why can't you do it?

11 MR. SAMMI: We don't have access to their code.

12 THE COURT: But you know what was copyrighted.

13 MR. SAMMI: We know what we copyrighted. We have a
14 look at their source code. The expert says they're using it
15 to -- in every version. Mr. Carmack is talking about it three
16 weeks ago.

17 THE COURT: You just can't pull it out like that?

18 MR. SAMMI: They have to prove -- they have to show
19 this Court that they're no longer utilizing our technology and
20 our information in their products, and they go and sell
21 whatever they want.

22 Ours is ours. And we sat here for three weeks going
23 through code, and Mr. Dobkin went through terabytes of source
24 code for two years to identify those seven technologies that
25 were stolen and copied. And we saw evidence, email after

1 email, about "When can I get this code? How do I locate this
2 code?"

3 The chief software architect of Oculus, whom they
4 didn't bring to trial, was saying, "The first thing I need to
5 do was look at the code." And that technology is in their
6 products today.

7 THE COURT: And you can't just give me a list and
8 say, "We need this out"?

9 MR. SAMMI: We can give you, Your Honor, our -- the
10 modules of code that we believe are incorporated literally and
11 non-literally into Oculus's code. And they need to excise
12 that.

13 THE COURT: I'm just saying, it seems like you could
14 be more specific, what you're asking. Maybe not.

15 MR. SAMMI: It depends upon -- first of all, it
16 took -- it took quite some time for Professor Dobkin to isolate
17 and identify all the ways non-literally in which they utilized
18 the propriety and protectable information in our code and
19 converted it.

20 We saw evidence, Your Honor, the jury did, of code
21 that was cut into Oculus and then changed, used as a benchmark,
22 and new code was written. And that code reflects the
23 information and technology that's protectable of ZeniMax. It's
24 non-literally copied.

25 That's not -- I mean, it's an equitable argument as

1 well as anything else. It's just not right. It's not fair
2 that they can continue to infringe and continue to commit this
3 tort of copyright infringement while we sit here after a jury
4 verdict finding copyright infringement.

5 THE COURT: Okay. But my question was, can you be
6 more specific, and the answer is no?

7 MR. SAMMI: We could, Your Honor. We could be more
8 specific. I have to -- we have to take a look at what -- I
9 have to go back and --

10 THE COURT: Pull Dr. Dobkin's testimony, it seems to
11 me, maybe.

12 MR. SAMMI: Yes.

13 THE COURT: Maybe I'm wrong.

14 MR. SAMMI: No. We --

15 THE COURT: I'm just saying, you know, in this code
16 it would always be helpful to be as specific as we possibly can
17 be.

18 MR. SAMMI: Sure.

19 THE COURT: Because there is code that's yours and,
20 even from what you're saying, code that's not yours that's in
21 this. And, you know, it would help me.

22 But, anyway, go ahead.

23 MR. SAMMI: We -- Your Honor, we surely can be as
24 specific as we can to the Court, and we could put submissions
25 in to the Court.

1 THE COURT: But you're saying not where there's
2 non-literal? It's harder to do that where it's non-literal?

3 MR. SAMMI: It is harder to do that, particularly
4 when the fellow who was found to have converted and stolen the
5 information is their chief technology officer. He can't
6 rewrite it. He's using it and he's putting it everywhere in
7 that code.

8 THE COURT: Okay.

9 MR. SAMMI: Your Honor, if I might continue with the
10 verdict.

11 THE COURT: Sure. I didn't mean to --

12 MR. SAMMI: No, no.

13 THE COURT: -- cut you off.

14 MR. SAMMI: Of course, Your Honor.

15 The jury's verdict was supported by substantial
16 evidence, Your Honor. The Defendants cannot meet the
17 extraordinary burdens of Rule 50 or of Rule 59.

18 Defendants would like to substitute their views for
19 the jury's findings, and that's not right. There was no error
20 that they point to in the instructions to the jury either.

21 I would like to touch on all of these, and I'll just
22 begin with copyright.

23 The jury found that Oculus infringed ZeniMax's
24 copyrights and awarded \$50 million for that infringement. Yes,
25 \$50 million.

1 The jury heard substantial evidence of copyright
2 infringement. I have gone through much of it already. Very
3 quickly, Professor Dobkin, two years, non-literal and literal.
4 He testified.

5 They had Ms. Frederiksen-Cross who testified.
6 Basically, her entire testimony is "Everything that guy said
7 was wrong." And the jury weighed all of the evidence,
8 including this testimony, and decided to find copyright
9 infringement.

10 Dr. Dobkin went through the AFC, Abstraction
11 Filtration Comparison test, every step. The jury had code in
12 the jury room. They don't like it. That's the verdict.

13 Not only the testimony of the experts, the jury saw
14 documentary evidence as well where Defendants admitted to
15 having source code shared by Carmack.

16 That first one is the counteroffer that Mr. Iribe
17 made to ZeniMax indicating, "We want a license to the source
18 code that's already been shared with us."

19 The jury saw dozens of emails discussing Oculus's use
20 of ZeniMax's code.

21 "It's becoming important to get access to any source
22 code that John Carmack can provide."

23 This is just a sample, Your Honor, of extensive,
24 extensive trial testimony and evidence that the jury found.

25 The jury properly awarded damages resulting from that

1 infringement.

2 ZeniMax offered the expert testimony of Mr. Dan
3 Jackson who estimated that ZeniMax suffered \$400 million in
4 damages from Defendants' copyright infringement.

5 Defendants did not provide any expert testimony on
6 damages or any rebuttal. That was a choice by Defendants.
7 They had an expert on the witness list. Never called him.

8 Mr. Jackson's testimony is unrebutted.

9 The jury awarded \$50 million, not the full amount
10 that we would like, and that's the jury's prerogative.
11 Quintessentially, it's the jury's prerogative to decide how
12 much to award.

13 Let's continue with the contract claim, Your Honor.
14 We think the copyright claim is eminently supportable, of
15 course, as well as the damages figure.

16 The jury found that Oculus breached the NDA.

17 Now, the NDA, again, was Plaintiffs' Exhibit
18 Number 1. The jury found that Oculus breached the NDA and
19 awarded \$200 million for that wrongful conduct.

20 Interestingly, the jury found that Oculus was bound
21 to that NDA under every theory presented as a mere continuation
22 of Palmer Luckey that Oculus manifested acceptance to that
23 contract and under quasi estoppel. Yes, yes, yes.

24 They found a breach. Did Oculus fail to comply?
25 Yes.

1 The jury awarded \$200 million under the contract
2 claim.

3 Sufficiency of evidence which the Defendants say is
4 not there. The record is replete with evidence, overwhelming
5 evidence that Oculus used ZeniMax's proprietary information to
6 compete against ZeniMax and disclose it to third parties.

7 These are some samples.

8 Mr. Luckey, during that time period, he's building
9 Oculus and he's using our confidential technology obtained
10 under the NDA.

11 "What other companies did you go to?"

12 "We went to Unity, Epic, Valve.

13 There was the flight path demonstrative with the
14 underlying testimony that the jury heard from their own
15 interrogatory responses showing everywhere they took our
16 proprietary information that they only received under that NDA
17 and used it to compete against us.

18 Here's an example from Mr. Iribe. "Just curious, I
19 found the attached shader in Carmack's Rage test level. I
20 assume you've seen this and we're doing the same?"

21 The NDA prohibits competing against us by using our
22 own confidential technology. And that's exactly what he's
23 doing.

24 "I assume you've seen this and we're doing the same?"

25 Yes, you want to compete using our own proprietary

1 information where you promised not to do that and you promised
2 to keep it confidential.

3 This is, again, just a sample.

4 ZeniMax proved substantial damages resulting from the
5 breach.

6 ZeniMax's contract damages reflect the lost value of
7 ZeniMax maintaining exclusive control of the technology, the
8 lost value of that technology's continued confidentiality.

9 The jury assigned \$200 million to that value.

10 The jury -- ZeniMax offered the expert testimony of
11 Mr. Jackson. He estimated that ZeniMax suffered \$2 billion in
12 damages.

13 The fact that Oculus immediately sold its business
14 based upon our technology that was arrived at through the
15 breach of this contract for \$2 billion is objective evidence
16 supporting that opinion of the jury. It is the jury's job to
17 evaluate how much damage occurred.

18 Defendants did not provide any expert testimony on
19 damages.

20 Let's stay with the damages for just a moment for
21 contract. Defendants do not dispute that the jury was properly
22 instructed on contract damages. We know from the Fifth Circuit
23 that if the jury is properly instructed the Court should
24 presume that the jury's award reflects the correct method.
25 There's the instruction. Damages, which naturally and

1 necessarily flow from the breach, and any consequential damages
2 that are natural, probable, and foreseeable. And the jury
3 found those.

4 we are not looking, as Defendants argue, for
5 disgorgement of profits here. But Texas law recognizes, Your
6 Honor, that the jury can consider what additions to ZeniMax's
7 wealth was prevented by the breach.

8 Another way of saying that is, there is a value that
9 the jury put on the proprietary and confidential nature of
10 ZeniMax being able to control its own information, and they put
11 that value at \$200 million. It's not a substitute for some
12 speculative contract that we would have entered into. It's a
13 value of the confidential nature and what's that worth to
14 ZeniMax. The jury heard testimony -- the jury heard much
15 evidence on this.

16 Now, Defendants say, "Oh, you know, the NDA is
17 unenforceable." They say the NDA is unenforceable. It is a
18 standard non-disclosure agreement, and the Defendants say,
19 "well, a proper purpose is not defined."

20 Proper purpose. First of all, let's just look at the
21 title again, non-disclosure agreement. The proper purpose, do
22 not disclose and you agree to not disclose.

23 But let's look at the contract itself. "The
24 disclosing party" -- that's ZeniMax -- "has already or may
25 provide certain highly confidential and proprietary information

1 to the Defendants regarding our proprietary computer
2 entertainment software, and for such other purposes as the
3 parties may agree in writing (each, a 'Proper Purpose')."

4 Of course proper purpose is defined. The proper
5 purpose is to maintain the confidentiality of our information.

6 The NDA doesn't require any additional purposes
7 besides this.

8 Oculus could also be found in breach -- there are
9 clauses of their obligations in this contract, Your Honor, and
10 this is in our briefs, that don't refer to proper purpose at
11 all. For instance, don't use our proprietary information to
12 compete against us. There is no -- there is no issue there as
13 to what a breach would look like. A breach would look like
14 exactly what it would look like in this case, which is using
15 our information to compete against us.

16 They -- the Defendants would have us throw out this
17 contract once and for all.

18 There's no basis for that, Your Honor, particularly
19 under the extraordinary standards of Rule 50 and Rule 59. By
20 the way, that was never argued to the jury either.

21 Let's talk about false designation, if we can, Your
22 Honor. The jury found that Iribe, Luckey, and Oculus were
23 liable for false designation.

24 Now, I want to pause here just for a moment. These
25 are the jury questions: "Did ZeniMax prove that Defendants

1 Brendan Iribe, Palmer Luckey, or Oculus are liable for false
2 designation?" Yes, yes, yes.

3 what is more, the jury found when asked a question,
4 "Did any Defendant intentionally and knowingly engage in the
5 false designation?" Answer: Yes, yes, yes, Oculus, Luckey,
6 and Iribe, both intentionally and willfully, knowingly engaged
7 in false designation.

8 what did the jury find as a result? \$50 million
9 against Oculus, \$50 million against Palmer Luckey, and \$150
10 million against Brendan Iribe.

11 Now, if -- I'll come back to these numbers in a
12 second, Your Honor, because they were -- we submit they were
13 not pulled out of a hat. They are proportional to the evidence
14 and the behavior that the jury saw under false designation.
15 But there are a lot of attacks the Defendants make on false
16 designation. Let's start with the act itself. And if we can
17 take this just a little slowly so we can all understand.

18 This is the Lanham Act, and it says, "Any person who
19 uses in commerce any word, term, name or symbol or combination
20 thereof, or any false designation of origin," -- yes, there's
21 the word origin -- "false or misleading description of fact, or
22 false or misleading representation of fact which is likely to
23 cause confusion, mistake or deceive as to the affiliation,
24 connection, or association of such person with another person,
25 or as to the origin, sponsorship, or approval." The statute

1 prohibits many things.

2 Let's take a look in this case and keeping in mind
3 the words affiliation, connection, and association to our
4 complaint. This is from the complaint in this case three years
5 ago, two and a half years ago.

6 This is what we alleged. "The conduct of Luckey,
7 Oculus, and Iribe is intended to and is likely to cause
8 confusion and to cause the relevant public to mistakenly
9 believe that Defendants' products and services emanate from,
10 are authorized, endorsed, sponsored, or licensed by, or
11 connected or affiliated in some way with ZeniMax." That tracks
12 the Lanham Act.

13 what was the jury's instruction? The Court's
14 instruction on false designation, which the Defendants did not
15 dispute, says, "Confusion as to that person's affiliation,
16 connection, or association is false designation."

17 Let's turn to what the jury heard in this regard.
18 And it was not limited to the Kickstarter video, Your Honor.
19 Oculus first and foremost under the claim of false designation
20 was built from the ground up by causing confusion as to
21 Oculus's association, affiliation, and sponsorship and
22 endorsement by ZeniMax.

23 By their association with us, they built their entire
24 business. That is how they got off the ground and that is how
25 they kept going, all the time falsely associating themselves

1 with us, with ZeniMax, id, Bethesda.

2 These are some samples, and I would like to dig into
3 a few. Luckey's July 4th secret meeting where he's in the
4 hotel room. He's using our property, Rage, without telling
5 anyone at id, affiliating himself with us. That's how we got
6 Iribe in the first place. He's affiliating himself with us.
7 False designation, false affiliation.

8 Unauthorized use of IP in the Kickstarter video.
9 False endorsement, false affiliation.

10 False references to ZeniMax in investor
11 solicitations. And I'll go through those. False endorsement,
12 false affiliation.

13 Unauthorized road show using our property with
14 potential customers and investors. They went to Valve, they
15 went to Epic, they went to Unity, all using our demo so that
16 everyone they went to knew or thought that they, Oculus, were
17 affiliated with ZeniMax. That's what got them off the ground.
18 That's what got them on the map in the first place. And
19 everything, all that unjust enrichment, stems from that.

20 Here's some evidence of the Kickstarter video. Now,
21 why is this important? Luckey asked Carmack if Oculus could
22 use his clip because "your reputation has really helped the
23 credibility of the project and would make a big difference."
24 He's asking for an endorsement, an affiliation.

25 And I'll get to Dastar and how this is not the origin

1 of the goods. We'll deal with the Defendants' argument in just
2 a second on that.

3 But he's asking for an endorsement. Carmack writes,
4 "It's very important that you not use anything that can be
5 construed as ZeniMax property in the promotion of your
6 product," an explicit instruction not to use it. And what does
7 he do? What does Oculus do? They intentionally use it anyway.
8 This is why the jury found intentional and knowing false
9 designation.

10 Brendan Iribe, the ringleader of all this, the man
11 who was hit with the largest verdict under this cause of
12 action, \$150 million, the jury sought Brendan Iribe to Nate
13 Mitchell, "We must put that in. It must scream play Doom 3 BFG
14 in VR." The jury requested this evidence in deliberations.

15 But this is not all, Your Honor. It does not hinge
16 solely on this.

17 How about slide decks, logos to investors, to the
18 public, going around using our logo saying that we are an
19 endorser, we are giving them praise, we are endorsing their
20 products.

21 This is months, Your Honor, after all negotiations
22 between ZeniMax and Oculus ceased. Months. That's why the
23 jury knows it's false. It's obviously false. You can't say
24 that you're being endorsed by ZeniMax and you get so much
25 benefit out of it. You get notoriety. You get people like

1 Marc Andreessen willing to invest in you. You get Mark
2 Zuckerberg willing to buy you for \$200 billion. You get
3 enriched, Iribe by \$400 million, Luckey by \$200 million,
4 Carmack by \$100 million because of this.

5 This -- and the last example on this slide -- and,
6 again, there's more, but the last example on this slide is
7 really important.

8 THE COURT: How many more slides?

9 MR. SAMMI: I only have just a few. This is the very
10 end, Your Honor. I apologize.

11 THE COURT: Okay.

12 MR. SAMMI: At the very end, this is Brendan Iribe
13 saying in a note on this slide deck "Zenimax, a high profile
14 game company, is onboard." That is Brendan Iribe saying that
15 in false designation, and that is why the jury found false
16 designation.

17 Let me pause briefly on Defendants' arguments, if I
18 may, Your Honor. They say, "well, you know, the endorsement is
19 true." That's not a defense to false designation.

20 If I'm Burger King and I put up a billboard with
21 Michael Jordan and a whopper, and Michael Jordan says, "well, I
22 didn't endorse Burger King," my response can't be "well, I know
23 that Jordan likes whoppers, so it's true." That's not a
24 defense, because he didn't explicitly endorse it, never wanted
25 to.

1 THE COURT: I get the point.

2 MR. SAMMI: Your Honor, Dastar -- Defendants'
3 reliance upon Dastar is misplaced. And I'll deal with this
4 briefly, but Dastar concerns the origin of goods.

5 Now, surely Defendants falsely suggested that they
6 were the originator of the technology, but this is not the
7 underlying basis for this cause of action. The jury found
8 copyright infringement and breach of contract. And Dastar only
9 concerns the origin of the goods. ZeniMax's claim is premised
10 on association, affiliation, sponsorship, approval and
11 endorsement.

12 THE COURT: I need to let the other side make some
13 argument. We'll run into the noon hour.

14 MR. SAMMI: I'm sorry, Your Honor.

15 Actual confusion -- I will end now. Actual confusion
16 is not required to prove liability. Actual confusion, the
17 Fifth Circuit says it's settled in this circuit that it's not a
18 prerequisite to award money damages.

19 Again, the unjust enrichment, Your Honor, was taken
20 into account under false designation. Iribe, \$427 million;
21 \$206 million for Luckey; \$2 billion for Oculus. And the jury
22 came with that award.

23 Last slide I have, Your Honor, is after three weeks
24 of evidence the Court should draw all reasonable inferences to
25 ZeniMax's favor. Defendants must establish that there is more

1 than a scintilla.

2 Your Honor, we would love -- we would like entry of
3 this verdict on all cases as I've described. I turn it over to
4 Mr. Hemr briefly to discuss a few other issues very briefly.

5 THE COURT: Well, I've got to let the other side go.
6 Otherwise, he can come up after they do, okay?

7 MR. SAMMI: Yes, Your Honor.

8 THE COURT: All right. Here we go.

9 MR. DAWSON: May it please the Court.

10 THE COURT: Yes, sir.

11 MR. DAWSON: I'm going to -- I'm going to touch on
12 the three findings that resulted in money numbers.

13 with respect to false designation, I'm going to try
14 to flip through it pretty fast, but my goal here is to attempt
15 to convince the Court that this is JMOL, not new trial. This
16 is a judgment as a matter of law that should be entered here
17 based on the Plaintiffs' own evidence and based on the law.

18 I put this slide up just to show that --

19 THE COURT: To argue that, you've got to say there's
20 no evidence.

21 MR. DAWSON: Yes, sir.

22 THE COURT: Okay.

23 MR. DAWSON: I'm arguing no as opposed to new
24 trial --

25 THE COURT: Okay.

1 MR. DAWSON: -- if I may. If not, I'll go on. I
2 don't want to waste the Court's --

3 THE COURT: No, I'm glad for you to argue that.
4 Okay.

5 MR. DAWSON: I just put this up because Dan Jackson
6 gave no testimony on false designation. There's no fact
7 evidence on it. There was no closing argument on it. In fact,
8 Mr. Jackson wasn't even designated on this point.

9 This is one of his slides that he talked about
10 various things, but there's nothing under Lanham Act, and he
11 wasn't even designated on it. So if we had a retrial on it, I
12 don't -- I don't know how that would be. They just have no
13 evidence on it.

14 I'm going to kick through their early arguments that
15 it was false because it was -- didn't give them credit for it
16 or the origin of the idea. Dastar says no, and they say
17 they're not doing that.

18 This is in their executive summary. They say that
19 it's not premised on misrepresentation of the origin of the
20 virtual reality technology. They say it's premised on
21 Defendants' intentional efforts to cause confusion. And,
22 incidentally, there is no evidence of confusion, so that's --
23 that would be their method of trying to prove proximate cause,
24 which is one way to prove proximate cause, is confusion.
25 There's absolutely no evidence on it, factually or expert, as

1 to Oculus's association or affiliation with or sponsorship,
2 approval, and endorsement by ZeniMax. That's their -- that's
3 their current theory.

4 The problem with that not only is that they have no
5 evidence of confusion, which would be their method of proving
6 proximate cause, which is required, but the statements they
7 rely on are their statements, their own statements.

8 See, they can't claim their own statements were
9 untrue. They don't claim that. And they can't blame us for
10 their statements.

11 Let me just click through them quickly. These are
12 the kinds of things -- this is Mr. Carmack, who was then with
13 ZeniMax. "What I've got now is I honestly think the best VR
14 demo probably the world has ever seen." He said that publicly
15 at this E3 conference I think early June of 2012.

16 Is that right, Russ?

17 He continued. "We're certainly going to take this
18 into our future projects."

19 They're saying, well, it creates a false impression
20 of an association or what ZeniMax is going to do. These are
21 their words that describe that.

22 And then he says, "The most exciting thing I'm
23 showing here is the Oculus Rift, which is a kit-built head
24 mount display." You see it's taped together with duct tape.
25 That's the one part of the technology I understand.

1 "When we decided to rerelease Doom 3," he went on to
2 say, "with the BFG Edition, I thought, you know, this is
3 actually a really interesting idea. Normally people aren't
4 going to be excited about an eight-year-old game," a video game
5 here, "no matter how good it was or how we improve it."

6 So what they're saying is, is that they're trying to
7 benefit themselves from this -- from this -- what they call an
8 association, or they're going to work on it, or they're going
9 to take it into their products.

10 They say, look -- this is now February. Mr. Altman,
11 he's quoting from a New York Times article that reports on
12 these statements. And the article, according to Mr. Altman,
13 makes clear how significant it was to have John Carmack work on
14 and endorse this project. They're saying we somehow caused a
15 false impression that they endorsed when their own words are
16 they endorsed.

17 It goes on, the article, quoting from the New York
18 Times, who incidentally had a First Amendment right to report
19 what the Plaintiff was saying. And, incidentally, we have that
20 same First Amendment right as well.

21 It says, "Mr. Luckey's biggest break came when he
22 struck up an online conversation last year with John Carmack,
23 the game programmer behind Doom and Quake. He sent a prototype
24 of Oculus Rift, which used Oakley ski goggles straps and was
25 held together by silver duct tape" -- we saw that in the video

1 just a moment ago -- "to Mr. Carmack, who took it to the E3
2 games conference and used it to demonstrate one of his games to
3 a small group of attendees."

4 Here's a fellow then, Michael Abrash, who's
5 apparently with Valve, who said that gave Mr. Luckey's headset
6 instant credibility.

7 This is a report on things that they said.

8 Here's an internal communication by Mr. Hines, who is
9 with one of their subsidiaries to Mr. Carmack, who's with them
10 at that time. He said, "The notion that we created a business
11 for them is silly. We partnered with them for one main
12 reason." And I guess this would be their purpose. There's an
13 issue about what's a proper purpose. Their purpose was -- "One
14 main reason: we used their tech to show off Doom 3 BFG and got
15 a ton more press and attention for that game than we ever would
16 have."

17 These are their statements. They're saying somehow
18 we created a false something or other. I don't know if it's an
19 endorsement or designation or something or other. But it's
20 they who are doing it.

21 Here's another one. Here's Mr. Altman. He's --
22 February 19, talking to Mr. Carmack, who is both with ZeniMax.
23 "The basic problem here stems from two factors: Our working
24 with" -- these are his words. We are working with him and
25 "third parties on tech without any prior understanding of the

1 future business relationship and then promoting" -- these are
2 his words -- "we're promoting their company."

3 And then Mr. Carmack says in response, because he's
4 referring here to the fact that ZeniMax had invited -- I guess
5 it was Mr. Luckey to come and talk at their convention.
6 QuakeCon is a convention. And he says, "Yes, the talks at
7 QuakeCon promoted Oculus."

8 They're mad at us because somehow we created an
9 impression they promoted us, but that's what they're saying.
10 And I'm making the argument this is -- this is the evidence.
11 This is why it's, I think, a judgment as a matter of law. At
12 least that's what I'm trying to convince the Court of.

13 "Promoted Oculus, but the idea was always that the
14 VR" -- virtual reality -- "association was beneficial to us."

15 They did it for their own purposes.

16 And what they were required to do but did not do, and
17 thus we're entitled to JMOL on this issue, is they've got to
18 show a clear line of causation from the act to the injury.
19 They did not do that. Mr. Jackson didn't do it. He wasn't
20 designated on this cause of action. He didn't testify about
21 it. There's no closing argument on it. But the streamline
22 Fifth Circuit case which came out April 14, this year, 2017, at
23 851 F.3d 440, makes clear that that was required, and it was
24 not done.

25 There's got to be some proximate cause proof, and

1 there was none. There was no -- and there are various ways to
2 do it. I think it's correct that causation is the typical way
3 of doing it. Confusion is the typical way of doing it. But
4 there was no evidence of consumer confusion at all. There
5 was -- and, of course, no expert testimony on it. There was no
6 evidence of any investor confusion and, of course, no expert
7 testimony on it. There was no evidence of what a reasonable
8 endorsement fee for this sort of thing would be. But, of
9 course, what it was used for was a Kickstarter was used to try
10 to raise \$2 million or so. I don't know. There was no
11 testimony about any of that. There was no testimony about any
12 way that's permissible to prove proximate cause. But we know
13 that the -- and, of course, Mr. Jackson didn't. We know that
14 they did not do that and do not deserve the ability to retry
15 that. That -- they had their opportunity to put that on and
16 did not, and it should be a judgment as a matter of law.

17 The second issue where there was a finding to which
18 dollars were attached is the contract claim. And, again, I'm
19 saying no evidence. There was no evidence of harm to the
20 Plaintiff. And the court charged them that it's harm to the
21 Plaintiff, because that's Texas law. It's harm to the
22 Plaintiff, not benefit to the Defendant for a contract claim
23 under Texas law.

24 And they only argued through their testimony and
25 expert benefits to Defendant and reasonable royalty for this

1 contract claim. They did not argue the third bucket, which
2 Mr. Jackson, their damage expert, acknowledged that is a
3 bucket, Plaintiffs' actual loss. This is his slide Number 6.
4 We wrote that at the top. The rest of it is his.

5 He said that's a bucket, but when he started
6 testifying his first words went to Number 2. He never -- he
7 never gave any opinion, because there was no evidence to base
8 an opinion on. He never gave an opinion on actual harm to the
9 Plaintiff, which is all that's recoverable under Texas law for
10 a contract claim.

11 This is the Fifth Circuit case, Hoffman, 2016, that
12 we cite. "The value of the benefits each defendant received in
13 connection with the transaction does not reflect a proper
14 measure of contract damages. Given Texas courts' singular
15 focus on compensating a plaintiff for its losses, we conclude
16 the Supreme Court of Texas would not follow this approach in a
17 Texas breach-of-contract case."

18 The same is true for reasonable royalty. This is a
19 Fifth Circuit case in 2009 that addresses this point straight
20 on. "CQ," plaintiff, "contends that Texas law allows the
21 recovery of a hypothetical royalty when a party breaches a
22 confidentiality agreement. We disagree. Under Texas law,
23 contract damages are defined by the plaintiff's actual loss."

24 There was not one ounce of testimony or evidence that
25 they lost a sale of a video game, for example. There was

1 nothing like that.

2 "A hypothetical licensing agreement based on
3 speculation and conjecture cannot be said to reliably
4 measure" -- the Plaintiff here -- "CQ's actual loss from a
5 breach of the confidentiality contract."

6 Then -- so they come up in their post-trial argument
7 about this, and they say -- this is their statement. This is
8 just a sort of "we say it's so, so it's so." "The jury was
9 entirely well founded in determining that Oculus's misuse of
10 the confidential information that it received under the
11 agreement, NDA, deprives ZeniMax of at least \$200 million, a
12 sum that ZeniMax would" -- here it is -- "would have otherwise
13 received if ZeniMax had been able to make commercial use of
14 that information (instead of Oculus)." That's their current
15 thinking.

16 And the problem with that is, is it runs head-on into
17 the Horizon Health Corp. case decided I think the day or the
18 day after our reply was due, May 26, 2017, that says the
19 obvious in Texas, you can't just say it in a brief. When it
20 comes time to have a trial, you have to put on evidence. You
21 have to have evidence. You have to have -- "To recover lost
22 profits from a contract with a third party as damages, the
23 plaintiff needed to present evidence showing that this third
24 party would have entered into a contract with it. Without that
25 evidence, it is pure speculation to conclude the plaintiff

1 would have earned profits on a future contract."

2 There is no evidence that meets these standards that
3 would support a money judgment or any judgment on contract.

4 And then the third one is copyright. And then I'll
5 try to give some time back to the Court.

6 I want to cover here that what happened in this jury
7 award is a \$50 million lump-sum royalty, and that has legal
8 impact.

9 They presented it this way, that a royalty is what
10 you pay. This is one of Mr. Jackson's slides, 18. We wrote
11 the "Jackson Slide 18" at the top, but the rest of it is his --
12 "Is what you pay for the right to use intellectual property."

13 The Court described it this way with respect to their
14 copyright infringement claim. "A reasonable royalty would
15 measure the royalty that would have resulted from a
16 hypothetical arm's length negotiation between a willing buyer
17 and ZeniMax and id Software" -- and here's the language -- "to
18 obtain a license to copy and use ZeniMax and id Software's
19 copyrighted works."

20 In the lower right-hand corner I have put up just an
21 excerpt from email exchanges between the two parties
22 contemporaneously at that time, which is the time they say
23 there was first infringement. So we're in a September
24 timeframe, I think is when they say, of 2012, if I'm
25 remembering correctly, Judge.

1 And what -- and what was being negotiated was a
2 worldwide exclusive perpetual right and license to source code.
3 That's what they were talking about. So they were talking
4 about something along the same lines as the Court's
5 instruction.

6 Mr. Jackson put up this slide 23. The highlighting
7 in the upper right-hand corner is ours. Actually, this yellow
8 "20 percent royalty" is his where he's saying in this
9 hypothetical negotiation one of the things they would be able
10 to do is use the trade secrets to attract investors. That's
11 what he's talking about, of course talking about trade secrets.
12 But he says a 20 percent royalty would be what would be called
13 for.

14 And he describes that in his slide 24 and in his
15 testimony as a lump sum, \$400 million, 20 percent of the
16 \$2 billion. So that's the lump sum.

17 He acknowledges, "we could have done it on the basis
18 of revenues, like the Defendants' revenues, but we've not done
19 that." So we know it's just a lump sum based on that amount.
20 That's the way Plaintiff argued it in closing.

21 I think this is the entirety of the closing argument
22 on copyright damages: "Mr. Jackson told us there's a floor,
23 there's a negotiation. What would the parties reach? What
24 agreement would they reach?" And he argues a lump sum. "\$400
25 million. We urge that for question Number 14."

1 And in question 14-1, this is the one about actual
2 damages, it was \$50 million, a lump sum.

3 Now, I want to put that in context. \$50 million -- I
4 mean, a lot of big numbers were thrown around here. You know,
5 people just got sort of desensitized to numbers. And it
6 strikes me, of course, brings me back to reality when I try to
7 get a buck 75 to go through the toll road, but it's -- this \$50
8 million is more than the entire enterprise value of Oculus
9 based on what they were trying to raise money on, which, of
10 course, is the hoped-for value of Oculus was approximately \$40
11 million.

12 And these are emails between the parties talking
13 about that value. I'm just putting that in context with this
14 number of \$50 million. It's just mind-numbing that it would be
15 \$50 million when the company was worth less than that.

16 But what does it mean when you have a lump sum? This
17 is a Prism case we cite. It says, "The evidence presented by
18 the parties is consistent with the district court's finding
19 that the jury awarded damages for past, present, and future
20 infringement. In particular, the evidence can be understood as
21 suggesting that a hypothetical negotiation would have resulted
22 in a one-time lump-sum payment." This is a case that we cited
23 to the Court in our brief.

24 And the Lighting Ballast case is one out of Judge
25 O'Connor's court here in the Northern District which bounced

1 around a fair amount in the federal circuit and ultimately was
2 affirmed, correct? where the Court finds there was ambiguous
3 language in the way the verdict form read, that, "The ambiguous
4 damage verdict of \$3 million should be construed to represent a
5 lump-sum royalty payment, which would grant defendant a license
6 to use" -- this particular patent -- "the '529 patent from the
7 date of entry through the expiration of the patent."

8 The Lighting Ballast case went on to say that,
9 "Pursuant to the Court's finding that the damages verdict of
10 \$3 million represents a lump-sum royalty agreement, then their
11 request for permanent injunction is denied."

12 The same thing is true, of course, with respect to
13 injunction. "When a patentee requests and receives such
14 compensation, it cannot be heard to complain that it will be
15 irreparably harmed by future sales." And that's the most
16 important eBay factor.

17 And, additionally, it's a -- there's no running
18 royalty. There's no additional damages permitted.

19 Cognizant that fools rush in where angels fear to
20 tread, I would like, because I'm here --

21 THE COURT: Are you quoting Rick Nelson?

22 MR. DAWSON: No, no, not -- it might have been
23 Willie, but -- I don't know about Rick, but --

24 I'm going to try to give you -- and I will give you
25 all the disclaimers in the world on this, because, as you know,

1 I'm from Tulia and I don't understand much. But this is sort
2 of my understanding of the situation with respect to the
3 liability finding on copyright, because what we believe is the
4 proper thing is a judgment -- is a take nothing judgment as a
5 matter of law. And this copyright issue is necessary to
6 discuss that in order to try to convince the Court of what we
7 think is right.

8 There are two kinds of copyright infringement as I
9 understand it. You can have literal copying and you can have
10 non-literal. So we've got two different types.

11 There was testimony about they found seven lines -- I
12 think somebody had emailed seven lines of code, and they found
13 that in the data repository or something, so they say there was
14 seven lines of this code that was literally copied out of -- I
15 think it's approximately 42 billion -- is that the record? --
16 lines.

17 No one disputes that's not quantitatively
18 substantial. And, of course, it has to be substantial. The
19 Court instructed the jury on that about the substantial -- it
20 has to be substantial and you do it with this side-by-side
21 comparison between the two works. And that's the Plaintiffs'
22 burden.

23 I don't think they dispute that that seven lines is
24 not quantitatively substantial. What they say, it's
25 qualitatively substantial. But there is also no dispute that

1 none of those lines appears in the Oculus SDK, the software
2 development kit.

3 So what we've got on this seven lines, that doesn't
4 support a copyright infringement finding.

5 And then you go to non-literal. And there it's got
6 to be a protected expression. Your Honor was very clear with
7 this on them. It said, you know, function -- and here,
8 frankly, is the problem. Dr. Dobkin got up and was trying to
9 convince the jury that they copied the functional aspects of
10 it. He had these boxes and that sort of thing. He
11 affirmatively said they did it a different way, in a different
12 order, different environment, but he said that some of the
13 functions came out the same way.

14 well, I don't -- I can't comment on that, but for
15 copyright that's not copyright protectable.

16 He described the level of abstraction at which he
17 found copying as the choice of functions and procedures, the
18 algorithms -- you can't copyright an algorithm -- operating on
19 these. He was describing the functions. Those are not
20 protectable by copyright.

21 He was asked questions like this: "Let's take a
22 look. I'm absolutely certain that Oculus copied and used
23 ZeniMax's code."

24 But you instructed the jury that in making the
25 determination that not all similarities give rise to copyright

1 infringement. Copyright protection does not extend to any of
2 the ideas, procedures, methods of operation, concepts. They
3 talk about they stole our technology. We've heard that
4 repeatedly. These concepts, procedures, operations, principles
5 embodied in a work are not protected. It's only the particular
6 form.

7 And Dr. Dobkin said that that's not what he was
8 saying about it. It's not the form. He said they did it in a
9 different way, they did it in a different order, in a different
10 environment. He was talking about functions, which are not
11 protectable.

12 You said, "Thus, while the original expression of an
13 idea may be protected, the idea itself is not. Anyone is free
14 to copy the idea, so long as they do not copy the author's
15 original way" -- and Dr. Dobkin said they didn't. They did
16 it -- he had these charts, these blocks. They did it in
17 different order, for example -- "the author's original way of
18 expressing the idea, but develop their own form of expression.

19 "Likewise, similarities that serve a functional
20 purpose or that are due to external factors do not give rise to
21 a copyright infringement."

22 He was asked this question:

23 "Did you find any instances, sir, of literal copying
24 in this case?"

25 "I did."

1 "And would you consider this an example of copying?"

2 "I would consider this an example of copying."

3 "Okay. Is this protectable expression?"

4 "I believe it is."

5 This is literal copying. These are the seven lines
6 which are not quantitatively --

7 THE COURT: Your microphone got switched off. Is it
8 green no longer?

9 MR. DAWSON: It is green. No. Sorry.

10 THE COURT: There you go.

11 MR. DAWSON: "I would consider this protectable
12 expression." But he said this is as to literal copying, the
13 part that everyone would agree is -- doesn't meet the
14 substantial requirement.

15 And he was -- and he was not asked this question with
16 respect to non-literal. His testimony was to the opposite. It
17 would have been hard for him to say, oh, well, it would be --
18 the expression would be there, but, no, because he had said
19 these things that were the opposite of that. He was talking
20 about function, because he had his eye on a different claim, a
21 different ball.

22 So our request, Your Honor -- and I know it's a steep
23 hill to climb, but my request would be enter a judgment -- a
24 take nothing judgment as a matter of law.

25 Thank you.

1 THE COURT: Thank you.

2 Mr. Hemr.

3 MR. HEMR: I've got just a couple of things to say,
4 Your Honor, and then --

5 THE COURT: It's good to have you back, Mr. Hemr.

6 MR. DAWSON: Ms. Wilkinson reminds me that she has an
7 argument on the sanctions that she would like to make at the
8 appropriate time.

9 THE COURT: Okay. I'll hear her.

10 Go ahead, Mr. Hemr.

11 MR. HEMR: Could we go to page 35 of the deck?

12 Mr. Sammi left me with all the glamor topics to
13 cover, so I'll do those real quickly.

14 THE COURT: Somehow I doubt that.

15 MR. HEMR: I think you'll be impressed, Your Honor.
16 This is --

17 THE COURT: I will? Okay. I've got a feeling you
18 and Mr. Lisy get the cleanup job. I might call that latrine
19 duty.

20 Go ahead.

21 MR. HEMR: I'm going to proceed.

22 Do we have the -- are we going to switch over to --
23 Okay. Oh, Mr. Jacobson will do that.

24 Oh, my goodness, pre-judgment interest. This is
25 fascinating. Judge, Your Honor --

1 THE COURT: Can you hear me snoring? Go ahead.

2 MR. HEMR: Well, you know, there's a fair amount of
3 money here. You see that figure at the bottom.

4 THE COURT: Now you've got me back interested again.

5 MR. HEMR: That's pretty good. That's real money
6 even to people like you and me around here.

7 THE COURT: Yes, sir.

8 MR. HEMR: On contract claims, that's Texas state
9 law, very straightforward. We put in a little chart with our
10 memo that's 959-1.

11 Let's flip forward one slide. Oh, I have the slide.
12 On the copyright and false designation, the weight of authority
13 is that we're entitled to pre-judgment interest on those. The
14 question is the rate. They have suggested why not use the
15 post-judgment interest rate. And I will give you the quick
16 answer as to why that's wrong.

17 After Your Honor enters the judgment, we're no longer
18 at risk. They either have to pay us or they have to put up a
19 bond. The pre-judgment interest rate while we're still at risk
20 is more. We think 5 percent for copyright, because the
21 copyright is tied in with the NDA, so you should use the State
22 law rate. And for false designation, the Courts that have
23 applied it use the rate that's from the Lanham Act. That's all
24 set forth in the briefs.

25 THE COURT: Those aren't just set amounts?

1 MR. HEMR: Those two statutes are silent on
2 pre-judgment interest. The weight of authority is that you
3 grant it.

4 THE COURT: How much? On how much, I mean?

5 MR. HEMR: The rates, yes.

6 THE COURT: Yes.

7 MR. HEMR: Yeah, the rates for the Lanham Act, that
8 comes from the statute. For copyright, we have the authority
9 in our briefs that, you know, when it's tied in with a contract
10 it's essentially a royalty and you do it that way.

11 THE COURT: Okay. I get it.

12 MR. HEMR: Attorneys' fees provided for the NDA. And
13 the proper procedure here is that we would put those in and we
14 would do motion practice on that.

15 THE COURT: Yes, sir.

16 MR. HEMR: False designation --

17 THE COURT: It's up to \$40 million?

18 MR. HEMR: Yeah, \$40 million, Your Honor.

19 THE COURT: So far?

20 MR. HEMR: So far.

21 THE COURT: That's real money, Mr. Hemr.

22 MR. HEMR: I like to think so.

23 THE COURT: Yes, sir.

24 MR. HEMR: It's my line of work.

25 On false designation, there are a number of factors

1 to be weighed in determining whether to enhance those damages.
2 This is the big one, intentionally and knowingly. And you can
3 see that the Courts -- where it's intentional and knowing, the
4 Courts have enhanced that.

5 And there are the factors. Those are set forth in
6 the brief.

7 Very briefly on the points that were raised, just a
8 couple of the points that were raised by Mr. Dawson.

9 THE COURT: Okay.

10 MR. HEMR: They've gone through -- I think they've --
11 on false designation they've somewhat gone through and
12 cherry-picked, "We think this statement is true. This
13 statement is true." They're not all true.

14 Certainly, when Mr. Iribe said months after
15 negotiations had broken off that ZeniMax was onboard, that
16 wasn't true. In any event, the jury could have -- you know,
17 that evidence was all before the jury. They could sort it all
18 out.

19 THE COURT: You're saying that there were some
20 endorsements that they were talking about where they weren't
21 true?

22 MR. HEMR: They weren't true.

23 THE COURT: Okay. I get it.

24 MR. HEMR: And, you know, whether one was true, one
25 wasn't true, that's for the jury to sort that.

1 THE COURT: That's for the jury to make that
2 decision. I get it.

3 MR. HEMR: Exactly. And the jury can find the
4 proximate cause.

5 with regard to damages, that was the damages argument
6 that we didn't get in closing from the Defendants. And, you
7 know, the jury had the whole history of Oculus from the very
8 first meeting to the sale to Facebook. There was a lot of
9 evidence in the record that they could have made inferences
10 about causation and value and what the benefit of this false
11 designation was to them.

12 On contract, you know, we're not asking for just
13 enrichment. We're not asking for a reasonable royalty. We're
14 asking the benefit of keeping this technology confidential at
15 ZeniMax. That was the purpose of the non-disclosure agreement.
16 We were deprived of that. And you can see the value of it,
17 because Oculus turned around, they sold that technology for
18 \$2 billion.

19 And then finally, on copyright, there was never any
20 discussion in the record of whether this was a lump sum. You
21 remember the little slide that showed, well, you know, a lease
22 is kind of like a license? well, leases are not perpetual
23 either. You know, you pay a certain amount, you rent for a
24 certain amount of time. Likewise, you can pay a certain amount
25 of royalty for a certain amount of time. And that all makes

1 sense.

2 Finally, on copyright, Mr. Dawson's comments on
3 copyright, I think all of that was presented to the jury and
4 the jury was able to sort all that out. They had the testimony
5 from two experts.

6 Your Honor made the question -- raised the question
7 how did they know which modules that they need to rewrite.
8 Those are listed in Mr. Dobkin's report. And those modules
9 from one version of the code -- he testified as to all, but the
10 modules from one version of the code are in evidence at PX 301
11 and 391.

12 THE COURT: Okay.

13 MR. HEMR: So there's a list of modules.

14 THE COURT: Why I'm mentioning that is, when you were
15 asking about the injunction, it sure makes it easier if it's
16 very specific. And that's what I was talking about earlier
17 when I was talking about that.

18 MR. HEMR: Yeah. It --

19 THE COURT: More specific, the easier it is --

20 MR. HEMR: If we --

21 THE COURT: -- and I don't make some sort of mistake
22 and make it too broad.

23 MR. HEMR: Yeah. And we could provide the Court with
24 a list of those modules.

25 THE COURT: I'm just suggesting that you make it as

1 specific as you can, as you're able, whatever that is. And,
2 you know, get your experts to kind of help you with that, you
3 know.

4 I'm just telling you that in this kind of area where
5 you have -- you're not claiming all of it, everything that
6 Oculus has is yours. It just makes it's easier if you will
7 just be very specific about what came -- as much as you're
8 able. And just say, "well, we can't here because it's
9 non-literal and it's mixed in" or whatever.

10 whatever the answer is, just give me that. I'm just
11 saying, what you gave me so far, I need more, okay?

12 MR. HEMR: My understanding of the way this is done
13 is the code has, you know, like, chapters of a book. And we
14 can identify the chapters and we can give that to Your Honor.

15 THE COURT: My suggestion is that you get it down to
16 portions of the chapter, page and line, like we do as lawyers
17 on depositions.

18 MR. HEMR: Chapter and verse, Your Honor.

19 THE COURT: If you're able. If you're not able,
20 Mr. Hemr, just say, "Judge, this -- we can only give you
21 chapters and that's the best we can do." Okay. And that may
22 be it. And just make sure I understand it, okay?

23 MR. HEMR: Understood, Your Honor.

24 THE COURT: It's always good to have you back,
25 Mr. Hemr. I hope you'll come back again.

1 MR. HEMR: I look forward to it, Your Honor.

2 We have some comments on the sanctions motion, but
3 for purposes -- it's the Defendants' motion. We'll let them
4 speak on that.

5 THE COURT: Okay. Mr. Lisy, you aren't going to make
6 an argument?

7 MR. LISY: Doesn't look that way, sir, unless you'd
8 like to hear from me.

9 THE COURT: It's always good to hear from you, sir.

10 MR. LISY: Thank you, Your Honor.

11 THE COURT: Always good to hear from you.

12 Okay. Go ahead, Ms. Wilkinson. You're going to talk
13 about the sanctions?

14 MS. WILKINSON: Yes, sir.

15 THE COURT: All right. I'm ready to hear it.

16 MS. WILKINSON: Good morning again, Your Honor.

17 THE COURT: Yes, ma'am.

18 MS. WILKINSON: As you know, during the pretrial
19 briefing of this case and throughout the trial, Plaintiffs
20 tried to present this case as a version of sinners versus the
21 saints. And they were the saints and they turned, you know,
22 corners, square corners, over and over again. We heard that
23 from Mr. Altman. They were the great people who did everything
24 right, and we were the sinners.

25 THE COURT: I do like that argument. It's -- both of

1 y'all have come up with good quotes, good quotable quotes.

2 So --

3 MS. WILKINSON: It's the influence of Mr. Dawson on
4 me, Your Honor.

5 THE COURT: Well, let me -- no, let me say this.
6 When I'm teaching law school, I tell my kids that the -- if it
7 doesn't fit, you must acquit, Johnnie Cochran, that he would
8 probably turn over in his grave and be glad to hear y'all
9 coming up with great -- I just think it's always good to do
10 that. And I'm going to remember both of those arguments,
11 saints and sinners, and then 30 --

12 MR. SAMMI: Three years, three weeks, three days,
13 Your Honor.

14 THE COURT: All right. I've got it.
15 Go ahead.

16 MS. WILKINSON: So as you know, that's how they
17 painted -- that's how they tried the case. Other than focusing
18 on trade secrets, which was unilaterally rejected by the jury,
19 they said we engaged in all this improper behavior, bad
20 discovery, you know, we destroyed evidence. They didn't know
21 what they were going to do. They put up that little chart.
22 You remember he used to stick up all those boards as much as he
23 could to say -- you know, and ask every single witness, "Wasn't
24 it wrong for them to do this and do that and destroy evidence
25 and not produce evidence?"

1 Now, what we didn't know at the time was they were
2 engaging in discovery abuse. They were failing to follow the
3 court orders. And they continued to this day to fail to follow
4 your order, Your Honor. Because from the very beginning of
5 this case in discovery, we asked them for documentation about
6 valuation. And as early, I think, as April 5, 2016, they were
7 ordered specifically to produce any valuations from 2006 to the
8 present.

9 They made a motion in limine in front of Your Honor,
10 and they said none of that should come in. Your Honor denied
11 it. And I said very explicitly why we wanted to use it. I
12 said there were two reasons. One, we wanted to show that they
13 didn't take care of the supposed trade secrets that they said
14 were so valuable and, two, we wanted to attack the credibility
15 of Mr. Altman. And that's exactly what we did with the
16 information that we had.

17 But what you saw with your very own eyes was
18 Mr. Altman refused to answer question after question. You had
19 to order him 16 different times at least to answer my questions
20 on cross-examination. And he sat on the jury stand [sic] and
21 said that there was information about the valuation of his
22 company.

23 we told you that that had been ordered, they had been
24 compelled to produce that. And you told them they better
25 produce it or they're going to face grave consequences from

1 you.

2 They produced some information the morning of
3 closing. And I told you it was too late, I couldn't review
4 that information with experts. I said I would like an
5 instruction that -- the same kind of instruction they got, that
6 you gave them on discovery that they failed to produce it. You
7 said, "No, I will not give you that."

8 You were wrong, Your Honor. But you were wrong --

9 THE COURT: What?

10 MS. WILKINSON: Yes, sir. As they say, most
11 respectfully. They always say that right before they're going
12 to say you're wrong.

13 You were wrong because you believed them. You
14 believed them when they told you, as they have every single
15 time -- and they have said it again today -- that they are in
16 full compliance. But they weren't. They lied to the Court.
17 And they told you that.

18 We were all right in this courtroom. There was no
19 misunderstanding of what you told them to do. And you told
20 them they better do it. And they produced -- I don't know --
21 72 pages before closing, told them they couldn't make the
22 argument, I couldn't have the instruction.

23 And then, Your Honor, when we made the motion to
24 compel them to produce the documents again, you didn't change
25 the order except to add for metadata. You told them the same

1 thing, produce all of the valuation documents from 2006 to
2 present. And lo and behold, we got 1,300 -- 2,000 pages and
3 1,300 pages we say are new pages.

4 So there's no dispute that they failed to comply with
5 your order and that they lied to the Court. So I'm going to
6 use another one of Mr. Dawson's phrases. You know, we do this
7 with our children. You can tell them to go to hell or you can
8 put them in hell.

9 And you've told them many times, but now they should
10 be punished for what they did. And it had a material impact on
11 this case, because I didn't get to cross-examine Mr. Altman in
12 all the ways that I would have liked to, and Your Honor knows
13 that I would have, because I used that information and I told
14 the Court from the beginning to the end that I needed that
15 information.

16 Mr. Altman's credibility was front and center because
17 he was the only real witness, fact witness who vouched for
18 everything that the company was saying. We crossed -- I
19 crossed him for hours. And as you know, he wouldn't tell the
20 truth unless you put a document in front of him.

21 He sat there at the beginning of his testimony and
22 told the Court and told the jurors that he had been involved
23 and interested in VR for a long time. I had to pull out -- he
24 said one of his people had been involved. I had to pull out
25 the magazine cover to show that that person was on the cover of

1 a magazine when he didn't work for Mr. Altman.

2 THE COURT: May I stop you?

3 MS. WILKINSON: Please.

4 THE COURT: I want you to be as specific -- I know in
5 your motion -- be as specific as you can be about what they
6 failed to produce and why would it make a difference. Make
7 sure in your -- if you hadn't filed something else, okay? I
8 know what you filed, but just be as specific as you can be to
9 make that argument.

10 MS. WILKINSON: Yes, Your Honor. We --

11 THE COURT: That's sort of the same sort of thing to
12 them. I want it to be "Look, here it was. If I had this and I
13 had this, had that" --

14 I get it. I get your argument. I just want to make
15 sure that you've included every kind of specific thing --
16 excuse me -- that Mr. Stojilkovic has prepared every exhibit.

17 MS. WILKINSON: Correct. Correct. And because it
18 was him, you know we have included all the detail, but I will
19 review it.

20 THE COURT: I want all the detail.

21 MS. WILKINSON: We will --

22 THE COURT: Whatever there is, I want all the detail.
23 And, you know, I had y'all limited on some of it. The same
24 thing I'm asking them about -- in a different way about the
25 code, being very specific, okay?

1 MS. WILKINSON: So on April 5, 2016, the Court
2 ordered them based --

3 THE COURT: I was here. I remember.

4 MS. WILKINSON: well, this is before the trial even
5 started, asking --

6 THE COURT: I remember.

7 MS. WILKINSON: Right.

8 THE COURT: I was here.

9 MS. WILKINSON: You were here.

10 THE COURT: I remember the orders I've issued. I
11 remember those conversations you mentioned. If you want to
12 beat me over the head with them, I'm okay with that.

13 MS. WILKINSON: And they failed to produce at least
14 2,000 pages. I think they failed to produce more because we
15 wrote a letter to them after this most recent production and
16 said, "we can see that you've excised some."

17 THE COURT: Okay. Let's -- just for argument's sake,
18 let's concede you're right. How much sanctions do you want?

19 MS. WILKINSON: well, I believe first that you should
20 hold Mr. Sammi in contempt. He's in charge of the case. He's
21 made the representations to the Court. We get all kinds of
22 glory being the lead trial lawyer. He deserves the
23 responsibility. He deserves to be held in contempt, and sadly
24 for Mr. Hemr, so does he.

25 I don't think it was very fair that you and I were

1 here when Mr. Sammi didn't want to argue this that day of
2 closing. We waited, remember, about 20 minutes for Mr. Hemr to
3 have to show up. And you said to Mr. Hemr, "How did you -- how
4 did you get the short stick?"

5 And he said, "I wasn't in the room."

6 But he is an officer of the Court, and he sat here
7 and he told you, "We produced everything and we're in
8 compliance," and he was not telling you the truth. So he
9 should be held in contempt.

10 ZeniMax should be held in contempt. And I believe
11 Mr. Altman should because he knows and we know that he runs
12 this entire case. And he knows what documents need to be
13 produced. He was here when Your Honor made that ruling
14 pretrial. He was here when you made the ruling during the
15 trial after his testimony. And we still didn't get those
16 documents even after you directly ordered them orally and on
17 the record. So all of those people should be held in contempt.

18 There needs to be a severe monetary sanction, and it
19 can't just be the briefings of the discovery. This is far too
20 extreme for that, and that wouldn't punish these folks, as you
21 say.

22 Your Honor has a lot of discretion. I think they
23 shouldn't be entitled to their attorneys' fees that you may or
24 may not be considering giving them, because that's the only way
25 to punish them, because they cheated. They got this weird

1 verdict, Your Honor, that doesn't make a whole lot of sense
2 unless you realize that they were able to tilt the scales,
3 because on the facts that they were trying to win on, they
4 lost. They got the jury inflamed about that we didn't produce
5 documents. They called out lawyers by name to try and tarnish
6 us. And so they got the jury angry. And so where the jury
7 heard no evidence like on false designation, they returned a
8 large amount. So they got a benefit while standing up and
9 saying they were the good guys and we were the bad guys. So
10 they shouldn't get their attorneys' fees for winning when it
11 wasn't fair.

12 And we should get a judgment as a matter of law on
13 the false designation not only because it's true as a matter of
14 law but because, Your Honor, you're going to reward them by
15 giving them a new trial on something where they presented no
16 evidence and where they cheated. They're going to get another
17 try? That's the rule that you want to teach your kids? You
18 want to teach lawyers who come to this courtroom that if you
19 don't follow a judge's order over and over again and you hold
20 the documents back till the trial is over, the worst thing
21 that's going to happen to you is you're going to get a new
22 trial?

23 So those are our requests, Your Honor. Those are the
24 things we think are appropriate based on this extreme conduct.
25 And it's in Your Honor's discretion. So, you know, ultimately

1 it is obviously always what you think is appropriate, but
2 that's what we are requesting.

3 THE COURT: Okay. All right. Do you want anything
4 else on that, Mr. Hemr?

5 MR. HEMR: I'll just say very briefly, Ms. Wilkinson
6 says we've been asking for that from the beginning. Well,
7 respectfully, she wasn't here.

8 We go through in our brief what the back and forth
9 was with the Cooley firm before Judge Stickney back in
10 September of 2015, April 2016. And there was something
11 specific that they were asking for: How are you valuing this
12 technology on the books of your company?

13 And this is an issue that, you know, on the benefit
14 of that discovery record Ms. Wilkinson pursued at trial. She
15 said, "Is there a piece of paper where you valued this
16 technology at \$2 billion?" And that's what was being pursued
17 then.

18 The question of what is the value of your company was
19 never asked to Mr. Altman. It was never asked to the CFO. The
20 people at Cooley know there are things like stock purchase
21 agreements and other things. They never asked for them.

22 And we try to be mindful of these things. And when
23 we're sitting here and this question was posed to Mr. Altman,
24 "what's the value of your company?" he wasn't prepared for it
25 and he testified truthfully.

1 And lawyers at the table are going, "where are we
2 going with this? This is new."

3 And Your Honor granted that relief. We turned
4 documents around overnight. We produced documents since then.
5 By the end of the day, I think Ms. Wilkinson got up and said,
6 you know, "I can make the arguments that I want to make if Your
7 Honor gives this instruction limiting what Mr. Sammi can
8 argue." And he abided by that instruction.

9 And, finally, as to the suggestion that the jury was
10 so inflamed by the spoliation of evidence, I would say the
11 evidence about spoliation pointed to one fellow, John Carmack.
12 There's other evidence in the record, but mostly John Carmack.
13 And who's the Defendant who didn't get tagged with liability
14 here? John Carmack. I don't think they were inflamed by that.

15 THE COURT: Thank y'all.

16 Is that everything from everybody?

17 Okay. Good. All right. Just for the record, let me
18 just say this. I hope y'all --

19 MS. WILKINSON: Your Honor, I just forgot one thing.

20 THE COURT: Okay.

21 MS. WILKINSON: And this is indicative of the problem
22 we see here. We submitted an additional pleading to you or
23 supplement where Plaintiffs have been out talking to some -- I
24 didn't even know there was such a thing, but a Video Gaming Bar
25 Association meeting.

1 And they put a presentation together talking about
2 this case, and included in it was a slide showing a document
3 that was marked confidential and under seal by Your Honor. It
4 was the indemnity agreement. There's no excuse for showing
5 that to third parties.

6 And what Plaintiff said again when we asked them --
7 this is the kind of arrogance. They said, "well, we discussed
8 indemnity in open court." Of course we did, just like we
9 discussed their code. And do you think if I put a picture of
10 their code up and showed it to people they wouldn't be in here
11 screaming and yelling?

12 And instead of just saying, "We made a mistake.
13 We're sorry. You know, we'll pull it down," they don't do any
14 of that. I mean, they write letters to us and emails that are
15 condescending, like, "We can do it. It was talked about in the
16 courtroom."

17 Your Honor went out of his way to say that is
18 excluded. You gave them 15 different chances where they tried
19 to open the door themselves to the indemnity agreement, but you
20 kept it out. They know that document is not in the record.
21 They know it's not a public document. And yet they put it into
22 a presentation and then act like your court order, the
23 protective order, is no big deal.

24 So it's just indicative, and we would like that also
25 for them to make a representation to you that they're not going

1 to show that ever again and that they understand that what they
2 did was wrong.

3 THE COURT: Okay.

4 MR. SAMMI: Your Honor, may I respond briefly?

5 THE COURT: Yes.

6 MR. SAMMI: Your Honor, that presentation -- we've
7 submitted our papers to the Court, Your Honor. That indemnity
8 was discussed in open court. They never made any motion to
9 seal the courtroom during that testimony. It was argued before
10 Your Honor with reporters. It was picked up in a news article
11 without any prompting during the trial.

12 This was a CLE presentation talking about trying to
13 teach folks about the vagaries of litigation and how you have
14 to -- things don't go your way and sometimes they do. There
15 was no intention of violating anything.

16 we've cited where we've talked about it in the --
17 talked about the indemnity in the courtroom transcripts that we
18 have. Ms. Wilkinson talks about copyright and whether they
19 would show our code. They --

20 THE COURT: You talked about your code in open court.

21 MR. SAMMI: Yes, we did.

22 THE COURT: So now the code -- if your argument is
23 right, the code is all going to come out. I'm going to publish
24 it.

25 MR. SAMMI: The code has --

1 THE COURT: Did you hear me?

2 MR. SAMMI: Yes, Your Honor.

3 THE COURT: You talked about it in open -- if that's
4 the argument, then all the code comes in and everybody in the
5 world is going to see it.

6 MR. SAMMI: Yes, Your Honor. We lost that argument
7 to you when we wanted to keep that part of the trial record
8 under seal and they moved to open that, and the Court has
9 opened that.

10 THE COURT: So you're fine with me showing that to
11 everybody in the world?

12 MR. SAMMI: That's open, Your Honor. And I apologize
13 for the presentation for -- at a CLE. I flipped through a
14 slide, and that's --

15 THE COURT: Let me tell you, just don't use that
16 anymore.

17 MR. SAMMI: I will not.

18 THE COURT: Don't use that anymore. That's a goose
19 and gander argument. That's going to bite you a whole lot
20 harder than it bites them. You don't want that out there.

21 I understand it's in open court, and I get all that.
22 But you -- the same was true of the code. I mean, we tried to
23 be as careful as we could be about that, and people -- but they
24 talked about it in here, talked about it a lot. Those experts
25 talked about it. But we tried to be very careful with that.

1 It's the same. I want you to be careful of theirs, something
2 that's important to them.

3 Okay. Enough about. I've heard all about that I
4 want to.

5 MR. SAMMI: Yes, Your Honor.

6 THE COURT: Anything else?

7 MR. SAMMI: That's all, Your Honor. Thank you very
8 much.

9 THE COURT: All right. Okay. Let me tell y'all, I
10 hope y'all understand I am not a split-the-baby kind of judge.
11 There are clear winners, clear losers. That's the way it is.
12 If you don't like that, you should have gotten George Bush to
13 appoint somebody else, because I'm not that guy. That's not
14 going to happen. Ask -- I can give you a list of people to ask
15 about that that have had cases in here.

16 So I have encouraged y'all and continue to encourage
17 y'all to try to resolve this. This is a big business dispute,
18 and both of y'all are in big business and you ought to think
19 about that. I mean, it's okay with me. It doesn't affect me.
20 I'm happy to do it. I will resolve this. But I think you
21 should -- both sides continue to talk, as you both have.

22 You both have a lot to lose. I guess -- you know,
23 whatever. Yes, you have things to gain. I agree with that,
24 but you also have things to lose, both monetarily and
25 reputationally and a lot of other things.

1 So, anyway, y'all keep talking. Am I looking at you
2 appropriately over the top of my glasses? You get it? I hope
3 you do.

4 Anyway, I'm not trying to lecture you like how you
5 ought to handle your business. These are both very successful
6 businesses. Nothing to do with that. All I have to do is
7 resolve this big hairy fight that occurred. And I am pretty
8 good at that. So I'm going to resolve the heck out of that if
9 y'all don't. And I will do it sooner rather than later, so I
10 would not sit on my haunches. Look that word up.

11 You know what that word is from Tulia?

12 MR. DAWSON: I do, Your Honor.

13 THE COURT: Thank you, sir. You got any Tulias over
14 here?

15 Mr. Hemr, you're going to have to get you a Tulia
16 kind of helper, okay? That is not -- at Harvard y'all wouldn't
17 use that word, haunches, I don't think. But, anyway, work on
18 that, okay?

19 MR. HEMR: I'm familiar, Your Honor.

20 THE COURT: It should be Mr. Philbin, but he's too
21 citified, too.

22 MR. PHILBIN: Having grown up in the great state of
23 Oklahoma, Your Honor, I feel qualified to translate for him.

24 THE COURT: There we go. Thank you. Help Mr. Hemr
25 with that. All right. Well, good.

1 Again, it was just such a pleasure to have y'all back
2 here. I'll shake your hands as y'all leave. And I look
3 forward to seeing you again on the next case.

4 I don't know if I'll ever get this group here again,
5 but it was a real pleasure.

6 Thank y'all very much.

7 SECURITY OFFICER: All rise.

8 (Hearing adjourned)

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1 I, TODD ANDERSON, United States Court Reporter for the
2 United States District Court in and for the Northern District
3 of Texas, Dallas Division, hereby certify that the above and
4 foregoing contains a true and correct transcription of the
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 20th day of June, 2017.

7
8
9 /s/Todd Anderson

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