IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Case Number: 16-cv-00704-MSK-STV

FOUR WINDS INTERACTIVE, LLC,

Plaintiff,

v.

22 MILES, INC.,

Defendant.

Proceedings before SCOTT T. VARHOLAK, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 2:08 p.m., March 22, 2017, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

JOHN POSTHUMUS, ESQ., PATRICIA YIH-TING HO, ESQ.
Appearing on behalf of the Plaintiff.

RYAN KOPPELMAN, ESQ., TIMOTHY R. WATSON, ESQ.
Appearing on behalf of the Defendant.

DISCOVERY HEARING

P R O C E E D I N G S

(Within, the electronically recorded proceedings are herein transcribed pursuant to order of counsel. Due to incomplete speaker identification in the FTR log notes, speaker identification in this transcript in some cases may be inaccurate.)

THE COURTROOM DEPUTY: All rise. Court is in session.

THE COURT: Please be seated. This is 16-cv-704. Can I have entries of appearance, please?

MR. POSTHUMUS: Good afternoon, Your Honor. John Posthumus of the law firm of Sheridan Ross. I'm here with my colleague Patty Ho. In the gallery here is the associate counsel for my client, Daniel Barker. And I also have here the CEO of Four Winds Interactive, David Levin.

THE COURT: Good afternoon.

MR. KOPPELMAN: Good afternoon, Your Honor. Ryan Koppelman with Alston & Bird on behalf of the defendant, and with me is Tim Watson, also, with my firm.

THE COURT: Good afternoon. So I've received the joint statement that has been submitted to us regarding the dispute.

Before we begin there. I can let the

parties know that I anticipate getting a recommendation out on the motion to dismiss potentially as early as this week, certainly by early as next week. So you should have all -- have that soon. Ultimately, it's a recommendation, though, and Chief Judge Krieger will make the ultimate determination. So I don't think it impacts any of the discovery disputes because it's not going to change anything other than be my recommendation to Chief Judge Krieger.

So let's turn to the discovery disputes. What I have is, I have the defendant's statements regarding discovery that they think that the plaintiff has not responded to. And then I have plaintiff's statement regarding, in particular, the -- the issue with respect to the source code. I don't have -- at least I don't see -- plaintiff's response to the defendant's portion of the discovery dispute, or at least what defendant claims it needs or has not been provided in plaintiff's response to that, unless I'm -- unless I'm missing something here.

MR. POSTHUMUS: Your Honor, you're referring to, kind of, our position with regard to what we haven't provided --

THE COURT: Right. That's exactly --
MR. POSTHUMUS: -- in response to there --
THE COURT: Right. Right. That's exactly right.
MR. POSTHUMUS: Okay. It's not part of this document. We haven't submitted that to the court. We've obviously been meeting and conferring --
THE COURT: Okay.
MR. POSTHUMUS: -- on those issues and --
THE COURT: Okay.
MR. POSTHUMUS: -- I'm prepared to talk about those, yes.
THE COURT: Okay. Well, then why don't we begin -- we'll just go in order. Why don't we begin with the defendant's portion of this, or at least what they're claiming has not been produced. And the first thing is the failure to produce documents in response to the first set of requests for production. So why don't I hear each side's position on that. Go ahead.
MR. KOPPELMAN: Thank you, Your Honor. With respect to defendant's RFPs, this is, I think,

one of the simpler issues for today. Those requests were submitted about eight months ago and no documents have been produced. We haven't heard a reasonable excuse for delay, and at this point it's -- you know, discovery closes in almost a month and it's prejudicial. And we need an order, I think at a minimum, setting a date certain when that production has to happen.

We've received estimates at various times. They thought they were going to do a production and we still don't have one. And the current estimate, at least as I understand it, is supposed to be at the end of this month.

THE COURT: And which documents, in particular, are being sought here? It may be a broad range of documents, but I -- I mean, I'm just trying to get a sense of why it's taking eight months to get -- to get these turned over.

MR. KOPPELMAN: I don't have an answer to that.

THE COURT: Okay.

MR. KOPPELMAN: At least my understanding of the current dispute is they're no longer standing on the objections. They said they'd produced everything responsive. They said they'd do

a privilege and a relevancy screen. We don't know what to do about a relevancy screen, in general, about what would actually be screened out, but that's what we've heard --

THE COURT: Okay.

MR. KOPPELMAN: -- from plaintiff. So that's --

THE COURT: Okay. Let me ask plaintiff, why haven't these been turned over to this point?

MR. POSTHUMUS: Well, Your Honor, I think there's probably several reasons. First, let me give you, kind of, the current status of where we're at.

THE COURT: Okay.

MR. POSTHUMUS: And then I can kind of maybe explain how we've gotten to this point.

So we're undertaking a review right now. It's been electronically, you know, transported with our ESI service provider. We're reviewing the documents both for privilege and for relevancy. We're going through --

THE COURT: How many documents are we talking about, roughly?

MR. POSTHUMUS: The total grouping that

we're going through right now is about 7,000 documents.

THE COURT: Okay.

MR. POSTHUMUS: And so we are -- we anticipate that we will complete that review and make that production available by March 31st. We expect to make a production, actually, this afternoon of things that we've already completed. We expect to have this complete -- production completed by March 31st.

THE COURT: Why did it take so long? I mean, 7,000 documents does not sound like an inordinate amount to do a privilege review. I mean, it's not nothing, and if we had been at, you know, the two-month point I -- I might sit there and say, Okay, well, you know, it's 7,000 -- but eight months to review 7,000 documents seems like an inordinately --

MR. POSTHUMUS: Right.

THE COURT: -- long period of time.

MR. POSTHUMUS: Well, Your Honor, I think, in part, it's -- the delay there has been, in large part, to our frustration with regard to defendant engaging us in discovery and kind of a --

THE COURT: But that's not -- that's

not an answer. I mean, to the extent they violate the discovery rules -- and I'm not saying they have. We'll turn to them in a moment, but if they violated the discovery rules that doesn't give you permission to violate the discovery rules. I mean, that means you come to me and say, Hey, they violated the discovery rules, and here's the sanction. It's not, in response, neither side complies with discovery obligations.

MR. POSTHUMUS: Right. Right. I'm just telling you, you know, kind of the atmospherics of being around all of this, right. And there have been -- you know, obviously, we transitioned as counsel. There have been meet-and-confers with regard to the production. There has been a motion to stay that was granted -- or filed during the -- kind of the middle part of this discovery -- these discovery issues and, you know, we're -- we're producing it now. And -- but we've been very frustrated with regard to seeking a source code review and very frustrated with regard to scheduling a 30(b)(6) deposition.

We've been wanting to, you know, try to, you know, use this as motivation to get them to come over and get those things scheduled and get

those things done as well.

THE COURT: And none of those are an answer. I mean, that's -- honestly, that sounds like gamesmanship. Again, I'll turn to what their obligations are in a moment, but, essentially, what you're saying is they're playing games with us so we're going to play games with them. And that's -- that's not how federal court works.

MR. POSTHUMUS: Right.

THE COURT: So let me ask plaintiffs. If I order it by March 31st, I mean, that's nine days from now, does that -- I know you wanted it earlier but if I order it by March 31st, does that give you sufficient time to review it? And then if you need to amend the scheduling order based upon what you receive, you can move to amend, and I likely would find good cause given the delay in it.

MR. KOPPELMAN: Under the circumstances, I'm not sure we're in a position to ask for much more than March 31st.

THE COURT: That's fair.

MR. KOPPELMAN: We did meet and confer on this back in October, early November. There were search terms we provided. We followed the ESI stip. We included search terms, custodians. We talked

about those search terms way back then. And at the time, plaintiff said that they were going to do some test searches and see. They couldn't really -- they didn't like our search terms, but they thought, you know -- you know, maybe they're not that bad. And then nothing happened from November until now. And, you know, from my perspective we're going to do the best we can with what we get and we may need, based on this delay, some additional time --

THE COURT: That's --

MR. KOPPELMAN: -- but it's -- it doesn't seem like there's an excuse. And under Rule 37, when there's not a substantial justification, some sanction is appropriate. And I don't have a proposed sanction now. I don't know if the court is willing to entertain that at this point, but I haven't heard a reason why there's been this delay.

THE COURT: No, I haven't heard a great one either. What I'm going to do at this point is I'm going to order the plaintiff to produce the documents by March 31st. Based on that production, if, at that point, the defendants need additional time or need to amend the scheduling order or -- I mean, we can't say what's going to happen based on

stuff we don't know is out there, but follow my discovery procedures. If you seek to amend the scheduling order, you can file a motion. It will get referred to me and I likely will grant it given that you're receiving this a month before the discovery cutoff.

MR. KOPPELMAN: I appreciate that, Your Honor. The thing that goes hand in hand with this is a privilege log. Typically, you would give a little extra time, but there's already been eight months. I mean, and with only a month left, I think we need the privilege log with the production.

THE COURT: I agree. I'm going to order the -- I'm going to order the privilege log by that --

MR. KOPPELMAN: Okay.

THE COURT: -- deadline too.

MR. KOPPELMAN: Okay.

THE COURT: So let's turn -- let's turn, then, to the second one, which is the interrogatory response. And I -- I don't know what the easiest way to go through this is. Maybe it's interrogatory by interrogatory. That's probably the easiest way to go through it, so let's -- let's begin with Interrogatories 1 and 2.

MR. KOPPELMAN: Sure. Your Honor. We've sort of grouped those together in the joint statement and that's how I'd propose to address them now.

So plaintiff has either evaded a direct response to these or just refused to answer substantial portions of it. These rogs seek information about what portions plaintiff's works are copyrightable, what defendants are alleged to have copied, and, you know, what substantial similarities exist between plaintiff's and defendant's works.

On page 25 of plaintiff's opposition to their motion to dismiss -- we had cited this -- plaintiff stated, quote, Notwithstanding, FWI's knowledge deficit at this stage, FWI has specified that 22 Miles is accused of copying multiple protectable aspects of FWI software, including; modules, algorithms, data structures, source code, object code, program structure, architecture, user interface.

On the previous page there's a statement that relates to this where plaintiff's stated, and I quote, 22 Miles will have every opportunity to vet the merits of these allegations through discovery. The amended complaint more than

sufficiently alleges that 22 Miles copied protectable elements of FWI's copyrighted works.

THE COURT: But doesn't this, now, get into the issue of source code? Where -- what we discussed, my recollection is, at the last hearing was the difficulty that plaintiff has in pointing to a specific algorithm, program structure, object code, data structure, module, without seeing the source code first. And that what they are alleging through the complaint is that the output -- what they're seeing as an output suggests that the source code has been copied, but without going into the source code itself they can't point to the specific source code that has been copied.

So it seems like what you're asking them to do in their response to the interrogatories is to identify the particular source code, but they're alleging -- and this all gets wrapped up together -- that you're not permitting them to see the source code and -- so, therefore, I'm not sure how they can respond to this without first seeing the source code to say this is the particular thing that is being infringed on.

MR. KOPPELMAN: I hear you, Your Honor. I'm not sure how they make these specific allegations

without facts to back them up. And they oppose a motion to dismiss based on these very specific allegations with no facts.

THE COURT: Well, I'm not sure about that.

MR. KOPPELMAN: How is that possible?

THE COURT: Well, here -- I mean, here's how it's possible, is -- and my technological illiteracy is probably going to come out in my response to this question. But if, for example -- I'm trying to take a simpler technology than this, but if, for example, the allegation was -- take a video game. Okay. My son plays Xbox. And you had one Madden football game that plays -- it does everything that it does. And then you had a second football game that was ident -- the product, that what you were seeing on the screen was identical and what was being done was identical, you may not know the source code, but you can allege that the actions of it, that what you are seeing on the screen is identical to the first one and, therefore, have a valid basis at a -- at a motion to dismiss stage or to allege -- to survive a Rule 11 that -- that it is copyrighted; that something has been taken and stolen.

That's, in essence, what they're alleging with the copyright component of this, is that what they can see is a product that does the same exact thing as their product does, and based upon the additional allegations in there that someone claimed that they had seen their software on one of your computer screens, that that was enough, at least at a Rule 11 or Rule 12(b)(6) stage, to allege sufficient of the copyright infringement.

Now what they're saying is, but we need to get into the source code to say whether or not it is, indeed, stolen or whether you found a new way to do virtually the same thing but through a different source code.

MR. KOPPELMAN: If -- I think you're being rather charitable to their allegations. If, in fact, our software was so identical, then they should have no problem identifying those similarities. And we don't have it. And, furthermore, it's -- what they cite in their complaint is 22 Miles, the defendant software that predates their copyrights. And there's case law we cited in the joint statement that when it predates, you can't just assume it infringes. The similarity doesn't then trump, right.

Yeah, you could say this Madden game

looks like this other football game, but if you find out that the other football game came before it, you can't allege copyright infringement.

THE COURT: Well, but that --

MR. KOPPELMAN: You're going to have to be very specific as to what was stolen, what came later, such that it could have been copied. And --

THE COURT: But how are they going to know that if they can't get into the source code?

MR. KOPPELMAN: I don't think they can -- this is why I don't think they can -- they have a Rule 11 basis to bring these claims. If they can't know it, then they're just merely guessing and suggesting when the facts don't bear it out. That's -- that's the problem.

THE COURT: Let me hear from plaintiff on this.

MR. POSTHUMUS: Your Honor, I think you've identified the correct issue, and the reason we haven't been able to respond is because we haven't seen the source code yet. We have given them an amended response that I think identifies a number of aspects of similarity with regard to the user interface, and we have presented that to them.

I would also point out, and this is a

case from the Tenth Circuit. It's the Gates Rubber case.

THE COURT: Do you have the citation to it?

MR. POSTHUMUS: Yes. It's a 9 F.3rd 823, and then it's at star 11 -- double star 11 it starts. But there's a -- this particular case talks about, generally speaking, that it's essential to kind of -- in cases of copyright infringement, to gather, kind of, all the facts before you start assessing what's copyrightable subject matter, what's substantially similar, all of these things.

And this is a direct quote from the case, We agree with the district court's conclusion that it is far preferable, especially in the area of legal and technological sophistication as complex as this area of copyright protection, to draw upon a larger arsenal of facts in order to design or derive the appropriate, legally significant facts. Once these are gathered and expert testimony is heard --

THE COURT: Where are you?

MR. POSTHUMUS: -- the court can analyze --

THE COURT: I'm sorry. What headnote are you at?

MR. POSTHUMUS: I'm sorry.
THE COURT: Or -- or page number?
MR. POSTHUMUS: 1508. I'm sorry. I see the double star -- or triple star here at 1508. Does that help?
THE COURT: Give me the cite again. I thought you said 9 F.3rd, 823.
MR. POSTHUMUS: 9 F.3rd, the 823.
THE COURT: Okay. And then the page number can't be 1528. That would get us -- that would be a 700-page opinion.
MR. POSTHUMUS: That must be the Lexis. Let me see here. Let me see what the page number is.
MS. HO: I think it's 831.
MR. POSTHUMUS: It's right after footnote 7, if that helps.
THE COURT: Yeah. That will help. Okay. Okay. Go ahead.
MR. POSTHUMUS: Okay. The court in that -- it says -- do you see where I'm reading: We agree with the district court's conclusion that it's far preferable, especially in the area of legal and technological sophistication as complex as this area of copyright protection, to draw upon a larger arsenal of facts in order to design or derive the

appropriate, legally significant facts. Once these are gathered and expert testimony is heard, the court can then analyze which portions of the program, according to expert testimony, infringes the protected expression.

And so I think ultimately what they're getting at here is, it's like you need to do the comparison. You need to get into it. There's even a reference here talking about unprotectable elements, and why that's important that you look at that. Because, certainly, that may be indicative -- maybe have probative value as to whether or not copying occurred.

And so all of that needs to occur, but that can't occur because we haven't seen the source code. And that's ultimately -- and in order to fully respond to Interrogatories 1 and 2, we need to see the source code.

THE COURT: Go ahead.

MR. KOPPELMAN: Your Honor, at least with respect to FWI source code they should be able to tell us what's protectable and what's not protectable in it. What portions they actually originated; what portions came from a source -- a source code library they pulled or open source or

that was, you know, some other source. What's protectable? What are they claiming protection over in their own code? They don't need to see our code to tell us what's protectable in their own code, and they haven't given us that and they won't.

And, then, furthermore, the UI. They don't need to see our source code to figure out what 2D aspects of the user interface are supposedly copied.

And the current supplement that we just got last week, finally, after seven and a half months of waning, does do some comparison to UI, but it doesn't link it -- it doesn't say what's actually protectable and what's linked to -- they have five different copyright registrations. What is -- what are -- which copyright registrations are they actually referring to? And it's hard to even follow what they're talking about.

So what they've given us is deficient. It's not intelligible and, you know, they should at least be able to tell us what's copyrightable in their own code.

THE COURT: But wouldn't it be much cleaner -- and we discussed this at the last hearing, back in January, I believe it was, maybe even earlier

than that. I think it was earlier than that, we discussed the issue of source code. And my recollection of the hearing, and it's probably not as good as either side's recollection of the hearing because I have so many of these, but my recollection was that at that hearing it was discussed that source -- that if the stay was not granted, which it wasn't, that the source code was going to be reviewed.

It seems to me that it would be much more efficient if they review the source code, compare it to FWI source code, and then can sit there and say whether or not anything is infringed or not infringed. And it seems like that may answer the lawsuit as a whole. If it's not infringing in any way, wouldn't that end the lawsuit? And so I don't understand -- and I know we're jumping now to their allegations with respect to the source code, but it doesn't seem to me that the objections here are all that well-founded.

I mean, the first one is -- well, we agreed to an ESI procedure, but I agree with the plaintiff that the purpose of ESI is to limit -- is to try to find a way to limit large volumes of discovery that are electronically stored such as

emails. When there's 10,000 emails, we find some way to -- to limit that.

If they asked, I mean, months ago for -- for the source code, and if the objection is only, Well, why didn't you go through the ESI procedure, that doesn't seem to me like -- that seems to me like something that could be worked out between the parties and not take eight months and require judicial intervention on that.

If the objection is relevance, again, it seems directly relevant because it seems that this will answer both the patent and the copyright portion of this case which are the two big portions of the case.

Now, again, there may be other defenses beyond that, such as whether this is a patent eligible product, but even so, it seems like that would -- if it's not infringing in any way, if the source code is completely different, that ends this lawsuit. And so I don't know why we're eight months down the road just getting to this question. Go ahead.

MR. KOPPELMAN: Well, Your Honor, there's a few issues you've raised. They've -- I guess the defendant's perspective is they've never

properly asked for it. When we met and conferred on the ESI stip, they represented that those RFPs were only for paper. And that was included in our objections and responses back in July that we understood it was only seeking paper, didn't comply with ESI, and we weren't producing source code.

THE COURT: Well, Request for Production Number 1 requests, quote -- I'm assuming this is quoted correctly in the joint statement -- Source code for all software identified in 22 Mile's response to plaintiff's interrogatories Numbers 1 and 2.

I'm assuming that's the source code for the product here. And how else would it possibly -- how could it be done in paper? I mean, it's an electronic document. How -- I can't -- I can't fathom that it would be on paper.

MR. KOPPELMAN: Well, they issued that RFP before we entered the ESI stip. So what they should have done to perfect the request, is after the ESI stip when they said that, Yeah, those only -- those requests aren't compliant with the stip we just entered, that's only paper issuing a request. Which they never did. They're not diligent. And they waited until after the deadline to finally issue an

ESI request. They don't have a proper request outstanding.

THE COURT: Is the ESI --

MR. KOPPELMAN: That is not the -- that is not the defendant's fault that they never properly requested it. The ESI stipulation governs all electronic discovery. And our objections and responses memorialized the representation they made to us that it was only seeking paper. And now they want to go back on it because they weren't diligent, and they want to blame us for the fact that they weren't diligent.

THE COURT: So the request for production was sent --

MR. KOPPELMAN: In May.

THE COURT: -- before the ESI stip.

MR. KOPPELMAN: Correct.

THE COURT: What were the discussions regarding following this ESI stip which, in paragraph 2, states: The parties are aware of the importance the court places on cooperation and commit to cooperating in good faith throughout the matter consistent with the court's guidelines for the discovery of ESI?

What discussions have occurred between

June, when this was entered, and today regarding source code and whether source code would be turned over?

MR. KOPPELMAN: On July 28th, the day the ESI stip was entered we had a meet and confer and it was represented that is only paper. We served our objections and it memorialized that. In --

THE COURT: And in those objections, what was said about source code? Specifically, in the objection to Request for Production Number 1, what was stated?

MR. KOPPELMAN: I'll quote it for you.

THE COURT: Okay. Yep.

MR. KOPPELMAN: This is on page 5 of defendant's objections and responses to the first set of RFPs. This is a specific objection laid out specifically to Request for Production Number 1: 22 Miles objects to the extent FWI is seeking electronically stored information without serving proper requests under the stipulated order regarding discovery. Electronically stored information, DI46.

During meet and confer on the scope of that order, counsel for FWI indicated that it would apply to its pending request, such that they only sought paper documents. 22 Miles has, accordingly,

not searched ESI in response to this request.

THE COURT: And then what was the -- what was the response? What were the further discussions after that was -- after that objection was filed?

MR. KOPPELMAN: We had a meet-and-confer in October with opposing counsel. They raised concerns about our interrogatory responses. We fixed those interrogatory responses. They said that we had objections based on those interrogatory responses and we needed to amend this response to RFPs, which we did.

On November 11th, 2016, we served an amended and supplemental response. And, specifically, with respect to Request for Production Number 1 we stated on August 29th, 22 Miles amended its responses to Plaintiff's Interrogatory Number 1 and 2. In light of these amendments, 22 Miles responds as follows: Subject to and without waiving the foregoing objections, 22 Miles has not identified any non-ESI responsive to this request.

After this, we never heard anything about this response. We got a letter in December asking for source code under the local patent rules, and under the local patent rules only. We had the

hearing on the motion to stay. We got a follow-up letter in early February, and we had a meet-and-confer on February 16th, and I asked counsel specifically, you know, You guys identified local patent rules. Are you also seeking source code under the RFP, because there's an ESI order and we objected to it and you guys have never raised it? And they said, Let me look at it. The next day they confirmed, Yes, we're seeking it under RFP 1, 2, and that day --

THE COURT: And what date was that?

MR. KOPPELMAN: That was -- the meet-and-confer was on February 16th, and they confirmed back on February 17th. They were, in fact, seeking it under RFP 1, and they issued a supplemental ESI request on that date, two days after the -- the date expired for issuing such requests --

THE COURT: Okay.

MR. KOPPELMAN: -- in the scheduling order.

THE COURT: But did you realistically have any doubt, especially given the last hearing where this was discussed, that -- at least since that first request for production, that plaintiff was seeking the source code? I don't. I mean, I was at

the last hearing, and my -- again, unless my recollection is completely wrong, this was one of the big arguments in the motion -- in -- in the argument over the motion to stay was -- was the issue of source code, and -- and over the issue of sufficiency of the allegations was their -- them saying, We need to get to the source code; we need to get to the source code; we need to get to the source code.

And my recollection may even be that there was some discussion as to whether everything but the source code should be stayed. And, again, I may be wrong because this is months ago, but that's my recollection of the hearing was we even discussed potentially staying all other aspects of the discovery except for the source code.

So if that's the case -- the purpose of an ESI protocol is a couple-fold. One, it's to protect inadvertent disclosures. Because, obviously, whenever we're talking about things such as 10,000 emails, there is the danger that somewhere in there something privileged is going to be produced. And one of the purposes of an ESI protocol is to assure that something privileged doesn't accidentally get produced, and it gives the greatest clawback that you can give to that.

MR. KOPPELMAN: Yep.

THE COURT: The second protocol is to try to limit the cost of -- of electronic discovery, in that what is trying to be done is to come up with search terms and other things so that rather than going through 10,000 or 100,000 emails, reading each one and seeing whether or not it's relevant, we can enter a search code or a search term and if it doesn't hit one of those terms, we assume it's not relevant, even though we may be missing some documents. But it saves the cost. Neither of those seem applicable here to --

MR. KOPPELMAN: They are. They are, Your Honor.

THE COURT: How?

MR. KOPPELMAN: Because the same issue applies with respect to source code. If you just dump all -- and they've requested all -- of defendant's source code, it's millions of lines of code that no one could possibly read. It's a huge data dump of electronic discovery. They don't need all of it.

THE COURT: So how would you do -- how would you limit it down? How would you limit the review?

MR. KOPPELMAN: Search terms is certainly one way to do it. Identifying the relevant code. Like, here's the functionality that we think you copied. We need the code related to this functionality. This functionality you copied. We need the code related to this functionality.

That's how it's typically done, and -- and they've refused to do that. They just want blanket code. They just want to be able to rummage around in all of our code and just find things they think might be similar to -- to have a case, and that's not the right way to approach this and it's not --

THE COURT: Let me ask -- let me ask plaintiff. Why can't you limit it down in -- and this is now going back to the interrogatories. Why can't you limit it down to saying, We believe that it is this portion of FWI source code that has been infringed upon? And A) that may limit the review -- the source code review, and B) it will at least give an answer to the questions that they're seeking, which is, What is it that you allege are being infringed? It seems like you could limit it that way.

For example, if what we believe is

being infringed upon is the -- the wayfaring aspect of this that we can --

MR. POSTHUMUS: Wayfinding.

THE COURT: Wayfinding, that we can limit it to just that. So why can't you limit it that way in interrogatory responses, and then, to the extent I order a source code review, then they can, in turn, limit what they turn over to you?

MR. POSTHUMUS: I -- I -- I certainly think we -- I think we've done that already. Have we limited it to the wayfinding function? The source code? If not, Your Honor, then, certainly, we can meet and confer. And I think we've talked about, like -- I think your recollection of the hearing is 100 percent accurate. Because one of the things we even talked about the hearing in January was talking about getting -- starting with the source code that existed as of the date of the filing of the complaints.

And, clearly, the focus here is on the wayfinding function. I think it certainly goes way beyond us having to identify variable names and elements, and things like that, that they can search the code and say, Well, it's here or it's not here. That's a guessing game for us. Because if they took

our code, what they would have done is they would have tried to look at it, build it out and then -- and then look at their variability, the variables and terms and things that they use and then build it back in. Right? Kind of make the changes and kind of work their way back into the code that they would have taken.

Now, we don't know if that occurred, but we need to look at the source code to do that. And I think the wayfinding function is the -- you know, is the critical function that we believe has been taken. That's the function of the copyright.

Now, with regard to -- right. Yeah. So -- and as Patty just pointed out to me, it's an integrated platform, right. You know, I think we are more than open to meeting and conferring, specifically identifying, you know, portions of code. We're not interested in seeing millions of lines of code, right. Nobody is. And we're willing to target and try to move, but we don't know what's -- you know, how they break it up or what they do with regard to their code. That's something that, you know, obviously, we're hoping to find out a little bit in the Rule 30(b)(6) deposition that's coming up in April, but, you know, that's something we need to

meet and confer and -- and we can, to make sure that it's, you know, an efficient review.

THE COURT: Well, here's -- here's what I think should happen, and then I'll hear from either of the parties. I do think that plaintiff should be given some opportunity to review source code here. The objections to it are, first, that they didn't pursue it through the ESI protocol which, of course, only matters, in reality, if it doesn't also fall under the local patent rules. The objection to that, largely, being relevance, and I think it is relevant. There may be some way to limit the review as both sides seem to be suggesting today, but I do think that it's relevant.

To the extent that they -- that even if it weren't -- didn't fall under the court's local patent rules, the only objection now, at least -- at least as far as the timing of it, is it's two days late. Even if I were to conclude that it was two days late -- the request -- the court has the ability to extend deadlines for good cause shown. And amongst the factors that the court has to consider is: Whether trial is imminent. It is not. Whether the request is opposed. It is, but it's opposed in every single one of these cases. Whether the

non-moving party would be prejudiced. I don't think that there is prejudice here. Whether the moving party was diligent in obtaining discoveries within the guidelines established by the court. Here, the initial request was made months earlier.

There appears to be some confusion as to whether it also needed to be through the ESI protocol or not. Nonetheless, I find that -- that they were diligent. The foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court. This issue of source code has been talked about in front of me at a previous hearing, so it was certainly anticipated that this would come up. And the likelihood that the discovery will lead to relevant evidence and, as I've already indicated, I find that it will.

So I'm not going to, at this point, dictate the -- the means and manner of doing the source code review because, frankly, I don't think that I'm well-suited for this. I think that the parties are better suited as they are the experts in this area. And a way to try to limit it that will hopefully be better than something that I would come up with off the top of my head. And so I'm ordering them to meet and the confer about the manner in doing

that source code.

If after that meet-and-confer they can not reach an agreeable method or way to do this, then contact my chambers and we'll do a continued discovery -- or, yeah, discovery hearing on that issue and find a way to limit it down.

I encourage plaintiff between now and then -- now and the conferral to try to delineate as best you can what portions of FWI's code you believe to be infringed because I think that will assist in trying to review the source code. And to the extent that that requires supplemental answers to interrogatories 1 and 2, then you should supplement that. But that's my ruling with respect to the source code review and Interrogatory 1 and 2.

Anything further or any clarification on either of those issues?

MR. KOPPELMAN: May I approach, Your Honor.

THE COURT: Sure.

MR. KOPPELMAN: Ryan Koppelman. I understand your court's order. In terms of the meet-and-confer, I guess from my perspective it would be helpful if we had some guidance at least at the level of should it be portions of code? Because

that's been the dispute. We -- we sent a letter back in February saying we were open to -- to producing portions if they could help us identify any, and they said they want it all. And if we come back and meet and confer, I'm concerned that we just -- we're right there back at that.

THE COURT: It may -- what is -- let me ask each side. From your perspective, what is the harm -- especially if it were under an equivalent of an attorneys'-eyes-only or expert-eyes-only review -- what is your concern about producing the entire source code? I get if you produce your source code and FWI's principals get to look at it that the concern is they learn something from your source code or they do something that could harm you as a competitor. But if it were under a -- again, the equivalent of attorneys' eyes only or -- because it's probably an expert who's going to do the review as opposed to the attorney themselves -- under an expert eyes only, what's the harm of doing an entire -- of producing the entire source code?

MR. KOPPELMAN: It's not so much a harm issue as -- it's just overbroad discovery beyond what's really relevant just to give everything as opposed to what's at issue. But, you know, if Your

Honor thinks that -- that it's -- that all -- it should be all. Then I think that sort of simplifies the meet-and-confer, frankly, if that's the guidance of what we should be meeting and conferring on. If the meet-and-confer is supposed to be intended to come to some --

THE COURT: Right.

MR. KOPPELMAN: -- you know, agreement about what portions are actually relevant and appropriate for review, you know, then that would be helpful for the parties to understand when they go into the meet-and-confer.

THE COURT: Let me hear from plaintiff as to -- as to their view as to how it may be narrowed.

MR. POSTHUMUS: Well, Your Honor, I would have to talk to, you know, my client to get some better ideas here in terms of how it would be narrowed, but we can certainly try. And we're not, like I said before -- this is John Posthumus, by the way. We're certainly not interested in looking at millions of lines of code, right. That's just not -- but at the same time, it's really hard to kind of -- we don't know what their code is and we don't -- you know, we haven't seen it, so it's almost a little bit

of a shot in the dark in terms of trying to define parameters.

I suspect that we can work through and define some broad parameters that make it reasonable and efficient in order to assess, you know, the strength of the copyright infringement claim, and -- and that is, you know, really the ultimate goal here.

THE COURT: Okay.

MR. POSTHUMUS: We don't see any harm, and, certainly, you know, one of the things that Mr. Koppelman -- you know, he mentioned a little bit earlier with regard to our source code, right, the FWI source code, we have been more than willing to make that available -- the source code that we believe to be infringed under the -- pretty much the identical, you know, limitations that they're going to make their source code available.

So there's a balance here in terms of -- you know, that certainly guides the parties because we can't say, Well, you get to see only this part of ours, but we get to see everything over here. It's a balance component that, I think, will, you know, certainly give us some momentum towards an agreement without having to approach Your Honor again on this issue.

THE COURT: What -- what I'm going to do is I'm going to have the parties meet and confer. If we're back here again, especially since defense is -- is coming in from out of town, I'll allow you to participate by phone at that hearing. And that's (indiscernible) for any of these discovery hearings. You don't have to fly in from Palo Alto every -- for every one of these.

But I think that -- I think that some conferral on this would be helpful. If, at the end of the day, it can't be done without a complete review of source -- of the entire source code, and if there really is no harm in that, especially, again, under parameters, I'd be inclined to do it but it sounds like there may be a way to limit this down. It sounds like you might have some ideas on how to limit it down and it sounds like their client may have some ideas on how to limit it down, and I think that's a discussion that needs to take place.

MR. KOPPELMAN: Fair enough, Your Honor. Two points. One is, this is important to my client, that's why I'm here.

THE COURT: Sure.

MR. KOPPELMAN: My client is not able to attend. The other client is (indiscernible).

THE COURT: Right.

MR. KOPPELMAN: This is important to both parties and that --

THE COURT: No, I appreciate that.

MR. KOPPELMAN: -- is why I'm here in person. I appreciate your offer to attend telephonically, but this is important to the clients.

THE COURT: And I appreciate that.

MR. KOPPELMAN: And then in terms of harm, you know, what -- what my colleague said touches on it, right. So if because this is going to be reciprocal. There's going to be two co-productions. There's going to be ours and theirs, which they've withheld based on -- because we -- this is sort of the gamesmanship we've talked about. We've never seen their code because they say, Well, we're not going to give it to you until you give it to us.

But if they give us their code and they give us everything and we have to give everything, there's this massive, huge review that comes back on us. So limiting it down does limit the burden on the defendant in terms of what we'd have to review in terms of reciprocal code from the plaintiff.

So that's at least one reason why it

makes sense to limit it down instead of just having it be everything from both sides.

THE COURT: Well -- and I think that makes sense. And what they're saying is, they may be able to do that and so that's why -- I'm acting, you know, in a bit of a vacuum here because, like I say, I'm not familiar with either -- either set of codes and so I don't have any way to sit here and intelligently say here's how you limit it down because I don't have any idea --

MR. KOPPELMAN: Right.

THE COURT: -- because I don't have either code. But I do think it makes sense for the parties to discuss this and see if there is a way to limit it down to limit the expense on it. And so -- so that's what I'm going to order --

MR. KOPPELMAN: Okay.

THE COURT: -- the parties to do on that.

MR. KOPPELMAN: Okay.

THE COURT: What --

MR. KOPPELMAN: There are a few other issues.

THE COURT: Go ahead. I --

MR. KOPPELMAN: (Indiscernible).

THE COURT: I -- well, I was about to turn to Interrogatory 6, which is the next one that's listed here, which is to, quote, Identify all customers and users of FWI products that you contend practiced the asserted patent and/or are covered by the asserted copyrights.

And it appears that, at least from the allegation here, the plaintiff has refused to provide any response. So I'll ask plaintiff why, especially since -- given that the complaint alleges that there were a customer or customers, and given that -- at least one of the contentions is, is jurisdiction, why haven't you identified any of the customers to this point?

MR. POSTHUMUS: Well, Your Honor, I don't know if it's identifying any. I think they want to identify all customers. We have a customer list that exceeds 5,000 companies or licensees. So you're -- you're -- in theory what they're asking for, and we've talked about this, is that they want the specific identity of each one of those 5,000. We don't think that that's necessary.

We're certainly willing to, you know, provide some on the list if they're willing to kind of narrow that, you know, why -- you know, what they

need it for. And, certainly, our, you know, corporate witness will be available. We'll have individuals that will be deposed in the next month or two, and they can be deposed on the allegations in the complaint as well with regard to the customers.

THE COURT: Let me ask the defendant. Why do you need their entire customer base?

MR. KOPPELMAN: Well, it's -- it's not their entire customer list, it would be the ones that practiced the asserted patent and practiced the copyrights. And this goes directly to what the value of the patent is. Consumer demand, consumer preference of what these customers think and care about and who they are and how much they buy it for.

All of this stuff is relevant to damages. And they've put it at issue by putting into the complaint. They've mentioned 5 -- we've got 5,000 customers. They've put that at issue. And so, either they're not allowed to introduce this to support their case or we're entitled to discovery on it.

THE COURT: Explain to me how it's relevant to damages. In other words -- well, I'll leave it up --

MR. KOPPELMAN: So patent -- so one of

the key aspects of patent damages is whether there's consumer demand for the patented feature versus non-infringing alternatives. And if their customers buy alternative products from them that don't have the patented feature in it and pay more money, that's relevant to damages.

What the -- what their customers, whether they even -- whether they even -- whether there's any demand for the patented feature matters. And also, they still have an unfair competition claim in this case that they've sort of lost customers, they've lost business. These allegations are still in the complaint.

THE COURT: But wouldn't that go to --

MR. KOPPELMAN: We think they're preempted.

THE COURT: Wouldn't that go to -- to the extent it survives a motion to dismiss, wouldn't that go to any customers lost as opposed to customers that they have?

In other words, what you're getting at is a customer list, doesn't that issue go to customers lost as opposed to customers that they've retained?

MR. KOPPELMAM: Well, we would want to

know both and understand -- be able to -- when we take the deposition -- he's saying we can ask these questions at deposition, but without an interrogatory response. There's no way I can ask in a deposition, Who are your 5,000 customers? You know, and being able to -- these -- you know, these customers are no longer buying from you, you know, why? That kind of data is highly relevant, and they've put it at issue. And I'll just say, I think defendants are entitled to discovery on it.

THE COURT: Let me ask plaintiff. What is the specific objection to this? I mean, if its burden -- I can't -- my guess is your client has a customer list somewhere that's readily accessible. I can't imagine it's much of a burden to produce it. What -- what's the specific objection?

MR. POSTHUMUS: Well, I think the specific objection, I think, is several-fold. I'm not sure it's burdensome. I think they can probably create a list and produce it. I think a lot of it is driven by relevancy, and this concept of an interrogatory request that says, Give me all of your customers. And why is that necessary?

I -- I would disagree with Mr. Koppelman with regard to the argument on

relevancy but, in any event, I think the allegations that are in the complaint can be tested other ways, right, other than, you know, give me a list showing 5,000 customers.

I think they can be tested through deposition testimony. They can certainly be narrowed. You know, we'd like to see -- if it's for personal jurisdiction purposes, show me the customers in a, you know, particular geographic area or whatever. We're willing to work with them on that, we just find that this request to identify all customers to -- to be overbroad, and --

THE COURT: Go ahead.

MR. KOPPELMAN: Your Honor, briefly. If they go -- if they come to trial and they're allowed to say to the jury, We have 5,000 customers that buy our patented products, we should be able to have ammunition to cross-examine and test that -- that. Whether, in fact, there are 5,000. Whether, in fact, each of them -- whether they have 5,000 customers in general. How many of those actually bought patent-practicing products?

THE COURT: Well, what's the relevance of that statement, though? I mean --

MR. KOPPELMAN: They're making it sound

like they have a product that's in high demand. Lots of people buy it; therefore, it's a valuable invention. That's -- that's at least my interpretation of why they're going to make it. That would be the impression on the jury, and we should be able to cross-examine it and get to the facts of whether this is, in fact, true.

Who are these customers? Did they actually buy patent-practicing products or did they buy something else? Did they actually buy products that are covered by the copyrights or did they buy something else? And just making these blanket statements without us getting behind it and seeing if it's true or not is not fair. We should be able to test it.

THE COURT: Let me ask --

MR. KOPPELMAN: With -- with the details behind it.

THE COURT: Let me ask plaintiff this: Isn't -- let's say that you provide this list of 5,000, and they go out and they speak to a representative sample of 100 of them, and 90 of them say, Oh, no, we didn't buy this for this copyrighted feature, we bought this because we didn't know there was another company that sold this out there because

-- who knows, but not because of this copy -- because of some other feature with it, because -- because we don't care about the wayfaring aspect of this, we just think the map of it looks nice and that's why we bought it. Wouldn't that be relevant to damages, and if the burden -- if there really is no burden here, which you're telling me there's not, and the only objection, really, is relevance, it seems that that's relevant.

MR. POSTHUMUS: Well, I -- you know, I think it has this appeal that it is relevant, right. I think it's also -- they're asking a lot of information -- you know, a lot of critical information from my client that's not publicly known.

They're going to go talk to these folks and then they're going to -- you know, it would seem to me if we were going to say something -- and we haven't said this, but that client X, Y, and Z has the product, right, then, you know, certainly that would open that part up for discovery and to get into it. But to -- really, there's kind of a dangerous component that -- in the scenario that you raised, which is, you know, they have the ability to start independently contacting these companies and to start, you know, potentially, harass them, right, and

to say, you know, we want to know this.

And, you know, are they going to take 30(b)(6) -- or subpoena each one of these companies and take depositions? Are they going to call them? Are these calls going to be dismissed because of that? You know, if we talk about specifics, right, I think we can provide -- if they narrow their request, we're more than willing to provide a specific response, but something that says, Identify all customers, we continue to say -- or believe it's over broad.

THE COURT: Well, how would you limit it?

MR. POSTHUMUS: Well, I think there's a natural limitation from the standpoint of -- you know, obviously, if Mr. Koppelman wants something specific we can provide that. You know, for instance, the personal jurisdiction issue or whatever, we can certainly tailor the response to that.

If there is, you know, some mechanism to, you know, differentiate between sizes, right. You know, we're talking about we want to see your customers that have a -- you know, that are of a certain, you know, physical size or volume or

whatever --

THE COURT: How many customers in Colorado do you have?

MR. POSTHUMUS: One moment, Your Honor.

THE COURT: Sure.

MR. POSTHUMUS: And this is just an estimate --

THE COURT: Right.

MR. POSTHUMUS: -- but 50 to 100.

THE COURT: All right. What I'm going to initially do is I'm going to grant Number 6 and limit it to Colorado. One, because I can't -- I honestly can't fathom that defendant will actually interview all 5,000 people to see whether or not -- if it's a representative sample of somewhere between 50 and 100, which is what's being represented to me, seems like an initial starting point to get at what defendant is trying to get to.

If after that representative sample -- if it's either not 50 to 100 and it turned out to be five, then I'll consider expanding that beyond Colorado. If -- if after that initial sample they speak to 50 people and it turns out that 48 of them, or some number along that line, say, No, this had nothing to do with the -- we didn't purchase this for

any of the reasons set forth in -- in the copyrighted material, we did it for -- as I said, we liked -- the maps look nice, then I'll consider expanding it at that point too. But initially, I'll limit it to Colorado.

That turns us to Interrogatory Number 8. Give me a moment here. And I don't think I have exactly what Interrogatory 8 says, so why don't we start with the defense. You can quote for me exactly what Interrogatory 8 says and then --

MR. KOPPELMAN: Sure, Your Honor.

THE COURT: -- and then where we stand currently on this.

MR. POSTHUMUS: Your Honor, to be efficient, could I just give the court an update --

THE COURT: Sure. Sure.

MR. POSTHUMUS: -- I think, and then maybe we can work through this.

So plaintiff has provided supplements to Interrogatory 8, and we did not realize that there was a continuing concern on the defendant's counsel's part with regard to the supplementation until we saw the draft of the joint statement. And we are currently working to supplement the response to raw dates to include the requested information.

THE COURT: Okay. Then I'll order that that be -- that that supplement be completed by the March 31st deadline that I set for -- for the others. And, again, if it's still insufficient at that point, contact my chambers and we can -- you know, we can have a hearing. But it sounds like they're going to comply with what's requested, unless you think differently.

MR. KOPPELMAN: I -- I appreciate the representation. This goes back to October, November. They promised to supplement. There wasn't even much meet-and-confer on them. They just quickly admitted, Yeah, we need to give you more on that, and then they never did. And then we met and conferred on it again in February, and, like, Yeah, we're going to get that to you. And they gave a date and then the date was blown. And then we finally got it last week right before the stip was due, and they didn't really -- they added, I think, three sentences. They added virtually nothing to it.

So this general statement that, We're going to supplement, we've heard before and it doesn't give us much comfort. If the court's going to order it we can proceed that way, but there are glaring deficiencies with it.

THE COURT: What is it, exactly, that you are you seeking?

MR. KOPPELMAN: Well, there are multiple things in the request, and I can read the request to you here if you --

THE COURT: Yeah, that would be great.

MR. KOPPELMAN: The interrogatory. Sure. Separately for each asserted claim of the asserted patent -- there's only one claim, so there's only one claim -- describe in detail all facts concerning its conception and reduction to practice, including the date of conception, the date of reduction to practice, any steps showing reasonable diligence, the date of first public use, date of first offer of sale, date of first sale, including any documents corroborating such facts, and persons you may rely on to corroborate such facts.

Plaintiffs in patent cases often try to get an early invention date because, then, defendants have to find prior art before that early date.

THE COURT: Okay.

MR. KOPPELMAN: But in order to claim that early date they've got to show a whole bunch of stuff. They've got to show a conception date, which they still haven't given us, and show all the steps

they took to reduce it to practice. You know, when they first commercialized it. These things. And this is -- this basic. This is something we requested back in July and we still don't have. And I don't think there's a good excuse for it.

And I appreciate Your Honor being willing to order it. I think each of these things we need specificity on and we don't have it yet.

THE COURT: I am --

MR. KOPPELMAN: And the patent --

THE COURT: I am going to order that they provide the dates by March 31st. I agree that I'm not sure why this wasn't provided sooner, other than what I heard earlier, which is something that sounds awful close to gamesmanship, which is, You're not providing us what we want and so we're not going to provide you what you want. And that's not federal court. So I'm going to order it by March 31st. If it's not produced or it's incomplete, then -- you know, then contact my chambers and then, you know, we'll look at what remedies under Rule 37 are available at that point.

MR. KOPPELMAN: Thank you, Your Honor.

MR. POSTHUMUS: Your Honor, if I may just quickly address -- I think Mr. Koppelman, kind

of, wants a specific date of conception, right. You know, April so-and-so, you know, 2011, 2000 -- whatever, right. You can't present that. There's -- there's -- we're going to be providing a complete response, but it's like conception occurred during a certain time period, you know, and it might be a few months or kind of that type of thing. It's not going to be, you know, in one year.

But I would prepare Your Honor for the -- you know, that these types of responses are not necessarily susceptible to an exact date and time, you know, that they occurred. And, certainly, that's subject to deposition testimony as well.

THE COURT: Go ahead.

MR. KOPPELMAN: There's a corresponding issue with the conceptual reduction to practice which is, the local patent rules with the infringement contentions there's supposed to be a whole production of documents showing conceptual reduction to practice. And we don't -- we don't have that either. That goes hand in hand with this interrogatory. And their interrogatory asked for identification of documents corroborating these dates.

THE COURT: Right.

MR. KOPPELMAN: All these things, and

we don't have that either.

THE COURT: Well, I'm assuming, maybe wrongfully so, that that's coming in the production that's coming on the 31st of this month. But as you read the request, it certainly includes documents that -- that show that certain documents exist.

I think the last one is Interrogatory 9, communications with third parties about defendant or the allegations in the amended complaint. And the response to this -- the defense maintain that the response to this is incomplete. What -- why don't you update me on this one.

MR. POSTHUMUS: One moment, Your Honor. Yeah, I'll address the court.

All right. Your Honor, John Posthumus. With regard to Rog Number 9, we had a meet-and-confer and defendant's counsel provided kind of a checklist, if you will, of the communications they were looking for supplementation on on March 3rd, I believe, and we've been working through that checklist and will provide an updated response by March 31st.

THE COURT: Okay. Does that satisfy the defense on that? I mean, you may not know it until you see the supplement, but --

MR. KOPPELMAN: Your Honor, I guess, I

may sound like a broken record, but this stuff we asked for back in July. This is stuff that's in their complaint and we can't get responses on it. I appreciate the willingness to supplement, but this is after multiple meet-and-confers over months just to hear the same thing today that we've been hearing is, We'll supplement, We'll supplement.

So I appreciate the court's willingness to order, but there's somewhat of a pattern here that's frustrated my client to, say the least.

THE COURT: And I can understand that. And -- and I am ordering it today because, frankly, by making it an order of the court if it's not produced by the 31st, it gives me more options as to what I can do in response to that failure to do it. So it will be an order of the court today that that interrogatory be supplemented too.

MR. KOPPELMAN: I appreciate that, Your Honor. There's -- there's one other issue --

THE COURT: Okay.

MR. KOPPELMAN: -- we raised, and I don't know if you had it sort of on your checklist, that I would like to discuss with you.

THE COURT: Go ahead.

MR. KOPPELMAN: That's the deficiencies

in their infringement contentions. It relates to source code. We've already covered source code, but it's also independent of source code as to their obligations under the local rules of what they're supposed to disclose in their infringement contentions. And I can be brief about this.

THE COURT: Okay.

MR. KOPPELMAN: So the rules require that plaintiff serve contentions to identify, quote, The specific location of each element of the asserted claim within each accused instrumentality. That's Local Patent Rule 4(b), and the plaintiff hasn't done this.

Claim 1 requires two text entry fields for entering two customized instructional phrases to show the supposed location in defendant's software of these text boxes for entering customized instructional phrases. The plaintiff's contentions on page 4 -- and I can hand you up a copy.

THE COURT: Yeah. That would be great.

MR. KOPPELMAN: May I approach?

THE COURT: Yeah. Thank you.

MR. KOPPELMAN: So on page 4 they point to a screenshot of defendant's software. That screenshot on page 4 has been logged as being on

defendant's website, public website since at least July 14th, 2011, which is more than a year before the patent -- the plaintiff filed their patent application.

THE COURT: So this is -- this is page 4 of the exhibit, correct? Because it's not -- there's Exhibit 1. It looks like it's page 4 of Exhibit 1.

MR. POSTHUMUS: That's correct, Your Honor. Do you need a copy?

MR. KOPPELMAN: Yes. Yes, page 4 of Exhibit 1, Your Honor.

THE COURT: Okay. Okay. Go ahead.

MR. KOPPELMAN: So as a result, plaintiff is accusing defendant's prior art software for that limitation. And that's not a proper infringement contention.

In addition, Claim 1 explains, quote, Path segments have directional aspects defined by directions of travel relative to a map location. And then it further explains that the customized instructional phrases are supposed to, quote, Explain the directional aspects of the path segments.

And then, lastly, the claim requires a first customized instructional phrase explaining

direction of travel along the path segment toward a first map location. And then a second customized instructional phrase explaining traveling in a different direction along the path segment away from the first location.

That's what Claim 1 says. And to show a customized instructional phrase, plaintiffs contentions point to a single phrase between reception and entrance. But "between reception and entrance," that phrase, it merely describes the location between two things and not a direction. The phrase "between reception and entrance" is void of any directional aspect. It doesn't explain a direction of travel relative to map locations. It does not describe traveling from A to B nor B to A. And this is clear from page 5 of plaintiff's contentions.

If you look on page 5 there's a screenshot, and there's a 1, 2, 3 list from defendant's software. And next to 1 it says, quote, You are here, colon, office centerhouse one, level 3 between reception and entrance. That's the starting location for the directions. And then next, 2 and 3, there's some directions of travel, but those are the preprogrammed type that the patent excludes.

And so that screenshot makes clear that the phrase "between reception and entrance" only describes the location on a map and not, as the patent requires, directional aspects defined by directions of travel relative to map lotions. And in the end, plaintiff has not identified two text boxes in defendant's software for entering two different customized instructional options, which explain two different directions of travel relative to a map location. It's not there. And --

THE COURT: Well, but wouldn't -- I'm just reading this now, obviously. But wouldn't the phrase "start left" and then "go left" --

MR. KOPPELMAN: Right.

THE COURT: -- contain the directional aspects of it?

MR. KOPPELMAN: Yes. And those are -- this is exactly what their patents exclude, and that's not what they've accused of infringement. Because the start left/go lefts are the basic -- those aren't customized instructional phrases. That's the -- that's the standard ones.

THE COURT: Right.

MR. KOPPELMAN: Go left, start left. What they're saying the custom -- what they've

accused is that location.

THE COURT: Is go past the Starbucks, make a left at the Starbucks and then go to Sears, and make --

MR. KOPPELMAN: Right.

THE COURT: -- a right at Sears.

MR. KOPPELMAN: From A to B.

THE COURT: Right.

MR. KOPPELMAN: And then another one from B to A. And this phrase "between reception entrance" is not that. It's plainly not that. And they shouldn't be able to point to a location on a map and call it a direction of travel and say they've complied with the patent local rules. That's our position and we think they should be ordered to comply. And I'm not sure they can. I also think this is an issue in terms of their inability to actually find in our software what actually corresponds to their patent.

THE COURT: And ultimately, this only goes to the patent portion of the case and not the copyright portion, correct?

MR. KOPPELMAN: Correct.

THE COURT: Okay.

MR. KOPPELMAN: Correct.

THE COURT: Let me ask -- let me ask plaintiff on this. It's -- it does seem like if what you are alleging the violation of the patent is, is the customizable phrase, the example I just used, go past the Starbucks, make a left. This doesn't say that. This says start left and then go left. So where's the -- where's the infringement on here?

MR. POSTHUMUS: So, Your Honor, I think there's a little bit of -- what I hear Mr. Koppelman arguing is his client's non-infringement position. And I hear him making a reference to prior art, which is, I think, a red herring in this context. But I also heard him say, In defendant's software, which we haven't seen yet.

And certainly there's -- and I believe the deadline for supplementing interrogatory -- or infringement contentions is 28 days after the claim construction order. And so we certainly envision, I think, that we will be supplementing -- generally supplementing these infringement contentions after we get some discovery, after we see their source code, after we do the things that we've been wanting to get and that Your Honor is going to -- to order today.

So I don't think that -- this is a little bit of a cart before the horse. I think

there's certainly an initial -- you know, these are the initial infringement contentions that were presented pursuant to the local rules. They were presented, I think -- I'm just looking for the date, Your Honor -- July 12th, 2016. And certainly we envision we're going to supplement as discovery -- you know, as we obtain discovery from -- from defendant.

THE COURT: Let me ask defendant. Ultimately, doesn't this -- isn't -- ultimately, doesn't this potentially go to a summary judgment motion?

In other words, if what you're saying is they can't even identify in -- if they can't even identify in their infringement contention something that actually infringes, isn't that really a summary judgment issue that judge what they've identified as an infringement -- and this would be for Judge Krieger once she refers it to me, is what they've identified as an infringement doesn't really infringe?

MR. KOPPELMAN: In the cases we cited in the joint statement, courts have held that failure to give adequate infringement contentions means that your case shouldn't go forward at that point. It's a

threshold matter. And it's a little bit higher than pleading. You've got what you have to put in a pleading, but then you need to show your cards and you need to have a viable infringement theory.

And we can debate noninfringement arguments, and, yes, the fact that our, you know, products don't have these features, yes, that is a noninfringement position. But the issue here is they need to have an infringement position. And I haven't heard from the plaintiff what their infringement position is with respect to how "between reception and entrance" could possibly be a customized instructional phrase within the patent. That's not an adequate allegation, and I haven't heard him defend it. And I don't think it's defensible. That's the problem. I think that's why we didn't hear a defense of it.

And it's -- it's -- you know, the patent local rules say you have to identify each and every, and there should be consequences for not being able to do that. You shouldn't just be able to go, All right, well, we'll get some discovery and we'll fix it and then, you know, eventually -- eventually we'll get it right in our final contentions and then you can later move for summary judgment.

In order to move forward with one of these cases, at least in the Northern District of California and -- and the Southern District of New York it said this is sort of a gating issue, and you need to be able to identify, you know, where in the defendant's products these elements are satisfied. And the Fed Circuit has said this is a Rule 11 issue.

THE COURT: Well --

MR. KOPPELMAN: The Fed Circuit has very clear Rule 11 law about comparing the claims and every element of the claim to the accused instrumentality. And the contentions are supposed to buttress that Rule 11 law of the Federal Circuit and it's -- it's not there, and that's the issue for us.

THE COURT: Let me ask plaintiff because I think they virtually conceded, but I think your response was that there will need to be supplementation on this. How quickly can you supplement it, to the extent the patent claim survives a motion to dismiss?

MR. POSTHUMUS: Sure. And I think the -- we would like to supplement after we see their source code.

THE COURT: And when -- I know the

parties may not know the answer to that.

MR. POSTHUMUS: So I anticipate -- it's hard to -- I know that you're asking -- I think, Your Honor, maybe you're suggesting kind of how quickly can we supplement?

THE COURT: Right.

MR. POSTHUMUS: After we see the source code, and I think 30 days probably would be appropriate because of -- you know, working with our technical expert and, you know, working through what we need to work through in order to supplement.

THE COURT: Let me ask the defense. How -- how quickly do you anticipate being able to -- especially since the parties are still working out the source code component -- how quickly do you anticipate being able to provide source code, or when do you think this will occur? And I know you may not know the answer because there needs to be the meet-and-confer first, but --

MR. KOPPELMAN: It's difficult to estimate at this point.

THE COURT: Okay.

MR. KOPPELMAN: I don't anticipate a lengthy delay. We would need some time to meet and confer --

THE COURT: Right.
MR. KOPPELMAN: -- figure out what's actually going to get produced, get our hands on it, put it on a computer for them to see pursuant to the protective order. You know, ideally, we can be able to meet and confer very soon. I'd like to start that today, so there's not unnecessary delay. The defendant would like to stick to our discovery deadline. We don't want this to just be --
THE COURT: Right.
MR. KOPPELMAN: -- litigation that expands forever. So we'd like to do this fast.
THE COURT: What --
MR. KOPPELMAN: And we've tried to be diligent.
THE COURT: What is the discovery deadline at this point? Is it --
MR. KOPPELMAN: It's May 1st.
MR. POSTHUMUS: That's fact discovery.
MR. KOPPELMAN: Fact discovery is May 1st.
THE COURT: Here's what I'm going do. I'm going to order a supplement within 30 days. I will consider an extension, if necessary, if there's delay in providing the source code. Again, to the

extent that any of this ultimately survives -- whether, at least the patent -- I (indiscernible) to the patent whether that's survives the motion to dismiss.

The parties will have my recommendation well before that 30-day period, and that may impact decisions that are made by -- you know, by counsel as to whether or not to -- whether or not this is necessary at that point. To the extent there are any objections, I doubt, seriously, you'll have answers -- a ruling from Chief Judge Krieger within that, because even if I get this out on Friday, 14 days from there is cutting us, you know, within only two weeks into the 30-day deadline. But I'm going to order the supplementation within 30 days.

Again, I'll entertain a continuance of that depending on how long it takes to get the source code and depending on the recommendation that I get out and where the parties are at that point. Okay?

MR. KOPPELMAN: Okay. Thank you, Your Honor.

THE COURT: All right.

MR. KOPPELMAN: My client thanks you for your time and attention to the case.

THE COURT: Oh, absolutely. Is there

anything further that -- that we can do on any of these here today?

MR. KOPPELMAN: There's -- there's two issues, one of which -- I mean, one of which we've asked for deposition dates and we're waiting on those. I hope we'll get those soon. But we need to get docs and we need to get those scheduled so we can try to get things done by May 1st. That's hanging. And then we got new discovery responses last night that we're going through.

THE COURT: Okay.

MR. KOPPELMAN: The thing that we noted in them is the -- the responses to the RFPs, even the ones that say they're producing docs, they don't say when. And Rule 34 says that you're supposed to specify time for production and that's not there. So that's sort of open-ended at this point of when we'll actually get docs responsive to the last set of RFPs we served. We can meet and confer with them --

THE COURT: Okay.

MR. KOPPELMAN: -- on that, but that is out there.

THE COURT: Okay. And I'd encourage that to be produced sooner rather than later, especially with the May discovery cutoff at this

point. This case has been pending for quite sometime at this point and, you know, I don't want it to get off the tracks here. Okay?

MR. POSTHUMUS: Your Honor, we did raise an issue with regard to kind of the timing of the Rule 30(b)(6) deposition. It's now scheduled for April 6th, but it was certainly envisioned -- we initially requested it in October and wanted a November deposition date. We had a meet-and-confer on that. We gave them an amended notice to meet and confer on, on December 9th. That's the actual notice that we're going to be deposing a corporate witness of defendant on April 6. But the timing of it is such that it, essentially, pushed us to the end of the -- you know, near the end of the discovery period, and we were hoping to do this Rule 30(b)(6) toward the start -- you know, toward the -- much earlier than where we're at in terms of the discovery schedule at this point.

Now, I know Your Honor has said that you're -- you know, we have a lot of things going on. A lot of --

THE COURT: Right.

MR. POSTHUMUS: -- moving parts but, certainly, one of the things that we would want to

have considered is a short extension of the fact -- the close of fact discovery deadline to account, you know, for kind of the delay in providing their Rule 30(b)(6) witness.

THE COURT: Here's what I'm going to do on that. I want the 30(b)(6) to go forward on April 6, barring something coming up in between. You'll have my recommendation by that point, which may or may not impact the parties' views on -- on discovery.

They'll have their documents by that point and, if after all of that, if after April 6th, once they've got their documents and you've had your chance to depose, if there's good cause to extend the scheduling order, whoever seeks it should file, at that point, a motion to extend the scheduling order and then I'll entertain it at that point.

I'm virtually certain it will be referred to me and I'll entertain the extension at that point once we have a clear picture of why it needs to be extended, if it does need to be extended. Okay?

MR. KOPPELMAN: Your Honor, real quick. You had earlier, I believe, perhaps, ruled that there was good cause to do a modification.

THE COURT: Only -- I haven't ruled that.

MR. KOPPELMAN: Okay.

THE COURT: What I said is if -- if, after you get your documents on March 31st, it's determined that you can't go forward because you just got 7,000 pages of documents that should have been produced earlier, then I'd likely find good cause for your extension of it. But I just want to see what -- when the documents come in. I know you want to keep the deadline, so I don't want to make a ruling right now --

MR. KOPPELMAN: Okay.

THE COURT: -- on whether or not there needs to be an extension. I want to see what comes in on March 31st, whether you need it because of the delay, whether they need it based upon the April 6, 30(b)(6) and see where we are at that point. And so what I'm saying is, any motion for extension should be filed after April 6.

MR. KOPPELMAN: Okay. Okay.

THE COURT: I think what I said was, likely -- if you get 7,000 pages of documents on March 31st, that should have been produced earlier, I'd likely find good cause on your behalf to extend

the scheduling order, the discovery deadlines. But I want to see where we are at that point.

MR. KOPPELMAN: Thank you --

THE COURT: Okay.

MR. KOPPELMAN: -- for that clarification, Your Honor.

THE COURT: All right. Anything further we can do?

MR. POSTHUMUS: Not for your -- for the plaintiffs.

THE COURT: Okay. We'll be in recess, then. Thank you.

MR. KOPPELMAN: Thank you, Your Honor.

THE COURTROOM DEPUTY: All rise.

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(The within hearing was in conclusion at 3:33 p.m. on this date.)

I certify that the foregoing is a correct transcript, to the best of my knowledge and belief (pursuant to the quality of the recording), from the record of proceedings in the above-entitled matter.

/s/ Kelly Mair March 30, 2017

Signature of Transcriber Date