

EXHIBIT K

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 FINJAN, INC.,) Civil Action

5 Plaintiff,)

6 v.)

7 SYMANTEC CORP.,)

8 WEBROOT SOFTWARE, INC.,)

9 WEBSense INC., and SOPHOS, INC.,)

Defendants.)

No. 10-593-GMS

10 - - -

Wilmington, Delaware

11 Tuesday, December 18, 2012

9:00 a.m.

12 Day 13 of Trial

13 - - -

14 BEFORE: HONORABLE GREGORY M. SLEET, Chief Judge,
and a Jury

15 APPEARANCES:

16 PHILIP A. ROVNER, ESQ.

Potter Anderson & Corroon LLP

17 -and-

18 PAUL J. ANDRE, ESQ.,

LISA KOBIALKI, ESQ.,

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1 APPEARANCES CONTINUED:

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15 Morris Nichols Arsht & Tunnell LLP

-and-

16 ANTHONY M. STIEGLER, ESQ., and
17 JOHN KYLE, ESQ.
Cooley LLP
(San Diego, CA)

Counsel for Websense Inc.

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Buncher - redirect

1 primarily, as they perceive the product, the product
2 reputation and its image. But if you turn their attention
3 towards features in the broadest sense, they will pick out
4 URL filtering as the most important feature that they think
5 of in terms of features when they are considering purchasing
6 the product.

7 MR. KYLE: Thank you. I have nothing further,
8 Your Honor.

9 THE COURT: Mr. Buncher, you are excused, sir.

10 THE WITNESS: Thank you very much.

11 (Witness excused.)

12 MR. KYLE: Your Honor, Websense now calls Dr.
13 Ryan Sullivan.

14 ... RYAN MICHAEL SULLIVAN, having been duly
15 sworn as a witness, was examined and testified as
16 follows ...

17 THE COURT: Do you have binders, Mr. Kyle?

18 MR. KYLE: Yes, sir.

19 DIRECT EXAMINATION

20 BY MR. KYLE:

21 Q. Good morning, sir. Could you please introduce
22 yourself to the ladies and gentlemen of the jury?

23 A. Good morning. I am Ryan Sullivan. And I am an
24 economist with the consulting firm of Quant Economics in San
25 Diego.

Sullivan - direct

1 Q. What were you asked to do in this case, Dr. Sullivan?

2 A. I was asked to determine what would be the appropriate
3 royalty that would be paid by Websense to Finjan in the
4 event that the '194 patent is found to be valid and
5 infringed.

6 Q. Before we get into the details of that, can you tell
7 the ladies and gentlemen of the jury at a high level what
8 your expert conclusions are with respect to what you were
9 asked to do?

10 A. In my opinion, the appropriate royalty would be a
11 one-time lump-sum payment for the life of the '194 patent in
12 the event that the '194 patent is found to be valid and
13 infringed. And the amount of that royalty would be one
14 million dollars.

15 Q. May we have Slide 4401, please.

16 Dr. Sullivan, can you tell the ladies and
17 gentlemen of the jury briefly about your educational
18 background?

19 A. Certainly. I have a Bachelor's degree, Master's
20 degree, and a Ph.D., all in economics, and all from the
21 University of California San Diego.

22 Q. Can you provide the ladies and gentlemen of the jury a
23 summary of your employment background?

24 A. Sure. I am the founder, president and chief economist
25 of Quant Economics, Inc. I have been performing

Sullivan - direct

1 professional economic research and analysis for 20 years
2 now, with a focus on intellectual property and technology.
3 I am also an invited member of the Economics Leadership
4 Council at the University of California San Diego. And in
5 that role, I advise the faculty on the Department of
6 Economics on the practice of economics in private industry.

7 Q. How many times have you served as an expert witness in
8 a patent case, Dr. Sullivan?

9 A. Without counting, I would say that it has been well
10 over 100 times that I have been retained in a patent damages
11 matter.

12 Q. Plaintiff's side, defendant's side, or both?

13 A. Both. It varies from time to time depending on what I
14 am working on. But it's roughly 50-50 over time.

15 MR. KYLE: Your Honor, Websense tenders Dr.
16 Sullivan as an expert in the area of economics and
17 calculation of reasonable royalty.

18 THE COURT: Any objection?

19 MR. ROVNER: No objection, Your Honor.

20 THE COURT: The Doctor is accepted as an expert
21 in those areas.

22 BY MR. KYLE:

23 Q. Let's talk about your scope of work a little bit.
24 What materials and evidence did you review in reaching your
25 opinions in this matter?

Sullivan - direct

1 A. I reviewed a great deal of documents and data.

2 This consisted of license agreements, market
3 research reports by third companies, deposition testimony,
4 as well as the data underlying the survey that was performed
5 of Websense's customers by Dr. Martin Buncher.

6 Q. Can I get Slide 33, Mr. Grimm.

7 We provided a very high-level summary of your
8 conclusions in this matter. Can you provide the jury
9 perhaps a discussion of what is displayed on this slide with
10 respect to your conclusions in the matter?

11 A. Yes. So I have implemented six different methods of
12 determining what the appropriate royalty would be here in
13 the event there is a finding of infringement. They range
14 from a low of approximately 300,000 up to a high of
15 approximately 1.2 million. And based upon the totality of
16 the economic research analysis that I performed, it is my
17 opinion that the appropriate royalty would be one million.

18 Q. That's a one-time lump-sum royalty?

19 A. Yes, that's right.

20 Q. Can you describe for the jury the methodology you
21 employed to reach these numbers?

22 A. The methods that I used isolated and measured the
23 value of the contribution of the accused functionality,
24 which is the realtime security scanning feature, RTSS, in
25 the accused product, which is known as Web Security Gateway.

Sullivan - direct

1 The first four methods you can see here are
2 based upon four of the questions from Mr. Buncher's survey.
3 I utilized there the data from the Websense customer
4 responses. I adjusted those with revenue data, profit data,
5 as well as the relative bargaining positions between the two
6 parties, to determine what the one-time lump-sum payment
7 would be. Then I corroborated that analysis with the
8 Microsoft agreement and the Trustwave agreement.

9 Q. Let's talk about that methodology in some detail. The
10 jury has heard a lot from several witnesses over the past
11 couple days about these things called the Georgia-Pacific
12 factors. Did you also employ the Georgia-Pacific factors,
13 Dr. Sullivan?

14 A. Yes, I did. All 15.

15 Q. Can I get Slide 4901, Mr. Grimm.

16 What is reflected on Slide 4901, Dr. Sullivan?

17 A. The basic methodology here is one of specifying a
18 hypothetical negotiation between Websense on the one hand,
19 Finjan on the other. The hypothetical negotiation here
20 would have occurred in the third quarter of 2008. That's
21 the time at which Websense launched their Web Security
22 Gateway product with the accused RTSS feature.

23 And there are a number of economic factors that
24 are from Georgia-Pacific that directly influence what the
25 appropriate lump-sum royalty payment would be here. Those

Sullivan - direct

1 are the commercial relationship between the parties,
2 profitability of the products at issue, contribution of the
3 patented technology, sales of nonpatented products, as well
4 as licensing and license agreements that the parties have
5 entered into.

6 Q. So you said the hypothetical negotiation would have
7 occurred in the third quarter of 2008. Why is that?

8 A. That's the time at which the Web Security Gateway
9 product was launched with the accused RTSS component to it,
10 and the damages period, and the period over which the
11 lump-sum royalty would cover for the life of the patent.
12 And the '194 patent is said to expire in November of 2017.

13 So we have a period of time going from third
14 quarter 2008 out through November 2017.

15 Q. Remind us what the world's economic condition was at
16 the time of the hypothetical negotiation in Q3 2008?

17 A. Well, I think we probably all pretty well remember
18 personally that the world was entering into a global
19 economic recession right at that time.

20 Q. Now, let's talk about some of these key factors in
21 detail and dig a little deeper.

22 Let's talk about the commercial relationship
23 first. What is your understanding of Finjan's financial
24 situation at the time of the hypothetical negotiation
25 between Websense and Finjan?

Sullivan - direct

1 A. They were in a very poor financial position.

2 Q. And you reviewed Mr. Parr's testimony, trial testimony
3 in this matter?

4 A. Yes, I have.

5 Q. And do you recall that Mr. Parr said that in his
6 opinion, Finjan's financial condition did not relate to any
7 of the 15 Georgia-Pacific factors?

8 A. I did hear that.

9 Q. Do you agree?

10 A. No, I do not.

11 Q. Why not?

12 A. The financial condition of the parties and their
13 bargaining position is directly relevant to the hypothetical
14 negotiation. Specifically, that plays into three of the
15 Georgia-Pacific factors. Georgia-Pacific Factor 5 relates
16 to the commercial relationship between the parties,
17 including their bargaining positions.

18 Factor 8 relates to the profitability of the
19 products utilizing the patented technology. Here, those
20 products of Finjan's and their profitability or really the
21 lack thereof and the lack of commercial performance of those
22 products directly influences the hypothetical negotiation
23 and is relevant.

24 And finally, Factor 15 is the hypothetical
25 negotiation construct itself. It's the outcome of that

Sullivan - direct

1 negotiation. And it is very much influenced by the relative
2 bargaining positions of the parties and where they sit with
3 the negotiation.

4 Q. Mr. Grimm, can I get Slide 9601, please.

5 What are you reflecting on Slide 9601, Dr.
6 Sullivan?

7 A. This demonstrates the distressed financial position
8 that Finjan was in. In 2007 and 2008, Finjan lost
9 approximately \$20 million in each of those two years, and
10 2008, again, being right when the hypothetical negotiation
11 would have occurred. You can see on the chart that is here
12 on the left, this is a forecast of the cash position that
13 Finjan expected to happen over the end of 2008. Again, this
14 is right at the time of the hypothetical negotiation.

15 They were going into a very precarious position
16 with their cash. In their words, they wanted to stop the
17 bleeding by cutting costs. So they were taking very
18 significant measures with their business to find a way to be
19 able to stay solvent and be able to continue as a running
20 operation.

21 Q. What do you understand about Finjan's desire to be
22 acquired by other companies at or about the time of the
23 hypothetical negotiation with Websense?

24 A. At this time, Finjan retained an investment bank known
25 as American's Growth Capital. They wanted to find a

Sullivan - direct

1 purchaser for the assets of Finjan, including their
2 intellectual property and their patents. They were shopped
3 to approximately 33 different companies, including Google,
4 Microsoft, Symantec, Websense, Trend Micro, BlueCoat, as
5 well as others.

6 None of those companies had an interest in
7 acquiring those assets of Finjan's products or their
8 intellectual property. And ultimately, then, what did
9 happen is at the end of 2009, Finjan was acquired by M86,
10 the entire company.

11 Q. What is your understanding of whether M86 has been
12 profitable selling Websense products after that act --
13 strike that.

14 What is your understanding of whether M86 has
15 been profitable selling Finjan products post-acquisition?

16 A. Deposition testimony indicates that M86 has not been
17 able to make a profit off of Finjan's products.

18 Q. So just to summarize for the jury, how would Finjan's
19 financial condition at the time of the hypothetical
20 negotiation have impacted that negotiation?

21 A. In a couple of ways it would have an impact. One, it
22 would suggest that the appropriate structure of the royalty
23 would be a one-time lump-sum payment for the life of the
24 patent.

25 This would provide Finjan with all of the

Sullivan - direct

1 royalties and all of the money up front, which would satisfy
2 their financial needs at that time, or at least partially.

3 In addition, a lump-sum royalty does not require
4 any sort of auditing or tracking of how the use of the
5 technology goes over time. That means the administrative
6 costs associated with that royalty structure is much
7 smaller. That would help Finjan conserve on their costs of
8 administering the royalty -- administering the license.

9 And, in addition, given their distressed
10 financial position, the amount of that lump-sum royalty
11 would be less than it otherwise would be.

12 Q. So let's now turn our attention to the financial
13 condition of Websense at about the time of the hypothetical
14 negotiation, in particular, the role that the accused
15 functionality played with respect to Websense products as a
16 whole. Are you with me?

17 A. I am.

18 Q. If I can get Slide 34.

19 What are you reflecting on Slide 34,
20 Dr. Sullivan?

21 A. This is a chart I put together that shows Websense's
22 revenue on an annual basis, and this goes from 2001, out
23 through 2011, and I have broken it out into two pieces.

24 The blue columns that you see are for all the
25 revenue associated for non-accused products and services,

Sullivan - direct

1 and the green pieces that you can see at the top, starting
2 in 2008 and going through 2011, that is the revenue
3 associated with the accused Web Security Gateway product,
4 and it's the, really, it's the upgrade amount, going from
5 Web Security, which is a non-accused product, up to Web
6 Security Gateway, which is the accused product.

7 So there is really two key take-aways here.
8 One, I think it's pretty obvious to see that the share of
9 overall revenue for Websense that is attributable to the
10 accused product is very small. It's a small portion of
11 Websense's business. And I think the other key takeaway is
12 that the other products and services, such as Web Security
13 and Web filtering and the URL filtering products and that
14 technology is continuing to see growth and improvement
15 throughout this time period, even after Web Security Gateway
16 was introduced and even in spite of the global economic
17 recession.

18 Q. Let's turn to the Websense product profit margin.
19 What are you reflecting on Slide 37?

20 A. The appropriate profit margin for Websense to be
21 considering here in our analysis is 10 percent.

22 Now, that's a modest profit margin, yet, it is
23 healthy. And this reflects the -- you know, profit is, of
24 course, the difference between revenue, you subtract off
25 costs, and you get profit.

Sullivan - direct

1 There is two main types of costs that need to be
2 deducted from revenue to get to profit here. The cost of
3 sales or the cost of revenue -- these are the direct costs
4 that Websense would incur -- but also the operating
5 expenses, and operating expenses that include sales and
6 marketing, research and development, and general and
7 administrative.

8 What we are looking at here is the introduction
9 of a new product with new technology. That requires
10 research and development to bring that product to market.

11 We also need to sell and market that product.

12 So these are very real costs that Websense did
13 incur and would have to incur, and, as a result, they should
14 be considered when evaluating the profit margin.

15 Additional support for doing so is recognizing
16 that those operating expenses, the components of them, R and
17 D, sales and marketing, and the like, those are all highly
18 correlated with revenue.

19 That means when revenue increases, those costs
20 increase as well, and that's another way of demonstrating
21 that those are costs that, as an economist, I should be
22 taking into account.

23 Q. So I have put up a slide that Mr. Parr used during his
24 testimony, which relates to Georgia-Pacific Factor Eight.

25 Do you agree with that slide, Dr. Sullivan?

Sullivan - direct

1 A. No, I do not. The number at the far left, the
2 87.3 percent profit margin, that's a gross margin that does
3 not account for these operating expenses I just referred to.
4 So it does not include or account for research and
5 development, sales and marketing, and the like.

6 So that would be overstating the profit margin.

7 The next box to the right, the 11.9 percent,
8 that is, albeit a little bit different, very close to my
9 10 percent, and it is the same amount that's being measured
10 there, it's, you know, it's both an operating profit, the
11 difference is just a time period, so that part is fair.

12 And then the other two numbers are excluding
13 some or all research and development expenses, and, again,
14 that would not, in my opinion, be appropriate.

15 Q. So, how does Websense's financial position, at the
16 time of the hypothetical negotiation, influence your opinion
17 with respect to that negotiation?

18 A. Given the modest but healthy profit position that
19 Websense was in, and combined with the notion that the
20 accused functionality and the accused product is a
21 relatively small component, small role within Websense,
22 Websense would be in a superior bargaining position than
23 Finjan in the hypothetical negotiation.

24 Q. And once again, you reviewed Mr. Parr's testimony.
25 You recall that he had an analogy to the Hope Diamond?

Sullivan - direct

1 A. Yes, I do.

2 Q. And do you recall him equating the Hope Diamond to the
3 '194 patent?

4 A. In essence, yes.

5 Q. What was Mr. Parr's analogy?

6 A. As I recall it, he was indicating that the value of
7 the Hope Diamond would be the same in the hand of a starving
8 bum on the street as it would be on display of a showroom of
9 a millionaire's mansion.

10 Q. Do you agree with Mr. Parr's analogy?

11 A. No, I do not.

12 Q. Why not?

13 A. Simply put, the value at which an asset is going to
14 exchange hands, the amount at which somebody buys it or
15 sells it is going to depend very much on what it is and the
16 position that they are in and what it is that they are
17 seeking to achieve.

18 Frankly, Mr. Parr's bum on the street is going
19 to demand less for the Hope Diamond than is a millionaire
20 who is sitting in their mansion, and that's -- that's basic
21 economics, but I suppose it's just common sense, too.
22 That's what happens in the real world.

23 Q. So, let's shift to another one of the factors that you
24 considered as part of the hypothetical negotiation, which is
25 contribution of the patented technology. How did you

Sullivan - direct

1 determine the contribution of the patent of the '194
2 technology, the overall value of Websense value as a whole
3 in your analysis?

4 A. I performed extensive Websense research and analysis.
5 As I stated, I looked at third-party Websense research
6 reports, I looked at financial filings, I looked at sales
7 and probability, and in particular, I also considered the
8 survey data underlying the customer responses from Websense
9 that Mr. Buncher conducted.

10 Q. In your opinion, how important is the '194 patented
11 feature to Websense's products as a whole?

12 A. The accused functionality, which is the RTSS,
13 Real-Time Security Scanning, is a relatively small component
14 of the Websense's products. There are a number of analytics
15 that are used by Websense and their Web Security labs, and
16 the Buncher survey also demonstrates that the contribution
17 of RTSS is relatively small.

18 Q. And did you see Mr. Buncher's testimony here in court?

19 A. Yes, I did.

20 Q. And did you see Mr. Buncher's slides?

21 A. I did.

22 Q. What were your takeaways from Mr. Buncher's surveys as
23 far as your work in this matter is concerned?

24 A. I think there two takeaways. One is RTSS is not a
25 primary driver of demand for the accused Web Security

Sullivan - direct

1 products here, Web Security Gateway and its other variants,
2 and the other is that the largest contributor is URL
3 filtering.

4 Q. Can I get Slide 36, Mr. Grimm. So this goes back to
5 summary of your methods.

6 Can you describe for the ladies and gentlemen of
7 the jury what you are reflecting on Slide 36, Dr. Sullivan?

8 A. Certainly. So I utilized four separate questions from
9 Mr. Buncher's survey, and I took the data on the responses
10 from Websense's customers and I converted those into royalty
11 rates. I utilized revenue data, profit data, and the
12 relative bargaining positions between the parties to
13 calculate the royalty rates that you see here that range
14 from 1.1 percent up to 3.8 percent.

15 Now, I should clarify that these rates are
16 applicable to what is referred to as an "apportioned royalty
17 base." So if you think about a particular royalty formula,
18 you have a royalty rate, you multiply it by a royalty base
19 to get the overall lump sum royalty.

20 Here, I am utilizing an apportioned royalty base
21 that is the difference in price between the non-accused Web
22 Security product and the accused Web Security Gateway
23 product, so there is a price difference between those two
24 products, and that reflects RTSS, the accused functionality,
25 as well as other functionalities, and this royalty rate is

Sullivan - direct

1 applicable to that upgrade price or that price difference
2 between those two products.

3 Q. And just to be clear, this results from before Buncher
4 survey questions that you relied on relates to Finjan and
5 Websense and what you discovered from Buncher's survey of
6 Websense products. Correct?

7 A. That is correct.

8 Q. Let's take a look at Slide 107-1, please.

9 What does Slides 107-1 reflect, Dr. Sullivan?

10 A. These are 19 separate purchasing factors or features
11 of the Web Security Gateway product, which is the accused
12 product.

13 You can see at No. 18 is Real-Time Security
14 Scanning, that's the RTSS, which is the accused
15 functionality within Web Security Gateway.

16 Q. Let's take a look at Slide 107-2. And what does this
17 reflect, Dr. Sullivan?

18 A. Well, this is the same slide with a few of the items
19 grayed out. What I am trying to convey is the difference
20 between the non-accused Web Security product and the accused
21 Web Security Gateway product.

22 So all of the grayed out items here, those are
23 all functionalities that are within the non-accused Web
24 Security product.

25 And the four items that I have left open here,

Sullivan - direct

1 Antivirus, Real-Time Content Classification, RTSS, and SSL
2 Inspection, those are the four functionalities that
3 distinguish Web Security Gateway.

4 In essence, they were added to the preexisting
5 Web Security product to get Web Security Gateway. And both
6 of those products are still being sold today, so we can
7 utilize kind of that difference between those products to be
8 able to get a measure of the contribution of RTSS.

9 Q. And DX6356, please, Mr. Grimm.

10 What's reflected on DX6356, Dr. Sullivan?

11 A. This was a document that was displayed previously.
12 You can see in the middle, the Web Security Gateway product.
13 It shows that that lists for roughly \$40. And then the
14 non-accused Web Security product, which is a URL filtering
15 product, is roughly \$30 per year. There is an upgrade that
16 can be paid by customers of roughly \$10 to go from the
17 non-accused Web Security to the accused Web Security
18 Gateway.

19 Q. So let's dig into that just a little more deeply. I
20 am going to get Slide 48, please, Mr. Grimm. And what's the
21 calculation that you are doing on Slide 48, Dr. Sullivan?

22 A. So, I dug deeper into the actual sales data and
23 pricing data for Websense, and the -- this is very similar
24 in nature, just a bit more refined and drilled down number
25 what we were looking at.

Sullivan - direct

1 So the non-accused Web Security product is at
2 about \$33.75. The Web Security Gateway product, which is
3 accused, is \$42. So that difference is \$8.25. And the
4 price difference, that \$8.25, is 19.6 percent of the accused
5 Web Security Gateway price.

6 So, another way to say that is roughly
7 20 percent of the price of Web Security Gateway is
8 attributed to features and functionality that are unique to
9 Web Security Gateway that are not in the preexisting
10 non-accused Web Security product. And this 19.6 percent
11 price difference factors into the analysis to get to the
12 appropriate royalty amount.

13 Q. Let's take a look at those four questions from Mr.
14 Buncher's survey that you used to arrive at those royalty
15 rates. Can I get 97-01.

16 What's reflected on 97-01?

17 A. This is the question that asked Websense's customers
18 what they perceived the price difference to be between a
19 product with the RTSS feature and without the feature.

20 The weighted average response is that there
21 would be a price increase of 4.2 percent. And that
22 4.2 percent is less than the actual product difference of
23 19.6 percent.

24 Now, if we recall, there is four different
25 features or functionalities that distinguish Web Security

Sullivan - direct

1 and Web Security Gateway, and RTSS is one of them. And this
2 is telling us that 4.2 percent of that price difference is
3 attributable to RTSS.

4 Q. Can I get Slide 97-02, Mr. Grimm.

5 Q. Slide 9702, Mr. Grimm.

6 Take that 4.2-percent price difference. How do
7 you carry that through the calculation, Dr. Sullivan?

8 A. That implies that 21.5 percent of the difference
9 between Web Security and Web Security Gateway is
10 attributable to RTSS. For the mathematically inclined, that
11 is simply calculated as 4.2 percent divided by 19.6 percent,
12 gives us 21.5 percent.

13 Q. Let's go on to figure out the royalty rate. Can I get
14 the next slide, 3801.

15 If you take that 21.5 percent as reflected on
16 Slide 3801, can you walk the jury through the calculation
17 that you performed, Dr. Sullivan?

18 A. Certainly. Again, for the mathematically inclined,
19 the formula is at the bottom of my slide here.

20 But I take that 21.5 percent attribution to
21 RTSS, that is the portion of the price difference
22 attributable to RTSS, yet that's on a revenues basis. For
23 something to have contribution, we would want to convert
24 that to a profit basis.

25 Here is where I take that ten-percent profit

Sullivan - direct

1 margin, and I multiply the 21.5 percent times the
2 ten-percent profit margin. That converts it to 2.2 percent,
3 which you can see in the middle circle of my chart.

4 That is the overall profit amount that is
5 attributable to RTSS. In a real-world negotiation, as well
6 as the hypothetical negotiation, that amount would be split.
7 In fact, economic principles tell us that if the bargaining
8 positions of the two parties is identical, if they are at
9 equal bargaining positions, then they would split that
10 amount 50-50. 50 percent would go to one party, 50 percent
11 to the other.

12 Here, as I have indicated, Finjan would be in a
13 weaker bargaining position compared to Websense. That means
14 an upper bound or at most Finjan would receive 50 percent of
15 that 2.2 percent.

16 So I divide it in half or multiply it by 50
17 percent, same thing. That gives us a royalty of 1.1
18 percent. And, again, that royalty rate of 1.1 percent would
19 be applicable to the revenues of that price difference
20 between Web Security and Web Security Gateway.

21 We would do that for revenues across all time to
22 give us the lump-sum one-time royalty payment.

23 Q. Let's move on to the second methodology you used to
24 calculate a royalty rate. That was based on Buncher Survey
25 Question 9.

Sullivan - direct

1 Can I get Slide 9801, Mr. Grimm.

2 What are you reflecting on Slide 9801, Dr.

3 Sullivan?

4 A. This is relating to the question in Mr. Buncher's
5 survey that asked customers to rate the essential features
6 within Web Security Gateway.

7 Here, this reveals that RTSS, the accused
8 feature, represents 34.9 percent of the difference between
9 Web Security and Web Security Gateway.

10 Q. Slide 3802.

11 You took that 34.9 percent on Slide 3802 and
12 plugged it in. Can you walk the jury through this
13 calculation?

14 A. Sure. This is going to look very similar to what I
15 just walked through. It is the same methodology.

16 So I took that 34.9 percent, again, that is on a
17 revenues basis, to convert that to a profit basis, so we
18 could get the profit attributable to RTSS, I multiplied it
19 by a 10-percent profit margin. That takes 34.9 to
20 approximately 3.5 percent. And then again, recognizing the
21 relative bargaining positions, that amount would be split,
22 such that at most half of it would go to Finjan.

23 So dividing 3.5 percent in half yields a royalty
24 rate of 1.7 percent.

25 Q. Let's move on to the third royalty rate that you

Sullivan - direct

1 calculated, which is based on Buncher Survey Question 8.

2 Can I get Slide 3803, Mr. Grimm.

3 Now you have an accused share price difference
4 of 68.3 percent. How did you derive that?

5 A. This is based upon the question from Mr. Buncher's
6 survey that asks for the single most important feature.
7 Among the four features, it distinguished Web Security
8 Gateway. Here RTSS would receive an allocation of 68.3
9 percent. I used the same methodology and calculations, and
10 convert that to a royalty rate of 3.4 percent.

11 Q. Your last rate calculation was based on Buncher Survey
12 Question 10.

13 Can I get Slide 3804, Mr. Grimm.

14 You now start with an accused share difference
15 of 76.6 percent. Can you walk the jury through how you got
16 that?

17 A. This is based upon the question from Mr. Buncher's
18 survey that asked customers to rank essential features.
19 According to these data, RTSS reflects 76.6 percent
20 allocation for the four features that distinguish Web
21 Security Gateway from Web Security.

22 Going through the same methodology and the same
23 calculations as before, that converts to a royalty rate of
24 3.8 percent.

25 Q. Next slide, Mr. Grimm.

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1 What are you reflecting on this slide on
2 lump-sum royalties, Dr. Sullivan?

3 A. These are the four questions from Mr. Buncher's survey
4 that I utilized, and the royalty rates that derive from
5 those data range from 1.1 percent to 3.8 percent.

6 Clearly, the next step in this process is to
7 determine what the royalty base is, what the accuses sales
8 are. So we will fill that in to be able to multiply the
9 royalty rate by the accused sales to get different estimates
10 of the lump-sum royalty.

11 Again, the royalty base or the accused sales
12 that we will be looking at is the revenue difference or
13 price difference between the accused Web Security Gateway
14 product and the nonaccused web Security product, and the
15 upgraded price and the revenues associated with that price
16 difference is what serves as what's called the apportioned
17 royalty base here.

18 Q. Let's get on to that royalty base calculation, that
19 apportioned royalty base calculation.

20 First of all, before we get there, you
21 understand that Mr. Parr applied, says he applied the entire
22 market value rule to his opinions as to Websense?

23 A. Yes. That is my understanding.

24 Q. Do you agree with Mr. Parr? And if not, why not?

25 A. No. I think there is abundant evidence that the

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1 accused feature and functionality, RTSS realtime security
2 scanning, RTSS, is not a primary driver of demand for the
3 accused products here, the Web Security Gateway products.

4 Q. Is Mr. Buncher's survey part of that evidence?

5 A. Mr. Buncher's survey, consumer data, looking at price
6 data, looking at profitability of Finjan's products. I
7 mean, for example, one can simply look at the fact that
8 Finjan had the technology, the '194 patent, starting in
9 1997. And here we were as of 2008, a decade later, and they
10 are still unable to make a profit utilizing that technology.

11 There is clear evidence that this particular
12 technology is not a primary driver of demand and that which
13 would be generating profit and value.

14 Q. Mr. Grimm, can I get Slide 3501.

15 What is the calculation that you are reflecting
16 on Slide 3501, Dr. Sullivan?

17 A. The key take-away here is up towards the top left,
18 where the present value of revenues going from the third
19 quarter of 2008 out through November 2017 is approximately
20 30 million dollars, more specifically, it is \$29,939,193.

21 This is calculated going from third quarter
22 2008 -- you can see the columns here for sales revenue for
23 each and every year. I used actual sales revenue where
24 available from 2008 through 2011. And then, just as the
25 parties would in the hypothetical negotiation, I have

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1 projected forward what the sales revenue would be for the
2 accused products here.

3 I have utilized a growth rate of 6.9 percent.
4 That comes straight from Websense's internal financial
5 analysis, in terms of what they were projecting going
6 forward. And I corroborated that with eight separate
7 analysts' reports from eight different investment banks
8 where their growth rates that they were projecting for
9 Websense was actually lower than 6.9 percent.

10 So if anything, the 6.9 percent growth rate
11 would have been considered an overestimate to yield a higher
12 sales base.

13 And then, due to the principle of the time value
14 of money, it is necessary to discount those to present
15 value. And there is really two reasons for that. One is
16 recognizing that one dollar received one year from now is
17 worth less than one dollar received today, and the further
18 out in time that that dollar is received, the less valuable
19 it is as of today.

20 Additionally, the future revenues are uncertain.
21 We don't have a crystal ball that tells us exactly what
22 those sales are going to be in the future. They could be
23 actually higher. They could be actually lower.

24 Because of that uncertainty, the standard
25 process that economists undertake is applying a known

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1 discount rate to be able to bring that to what's known as
2 present value. Here the discount rate that I applied is an
3 annual discount of 12.4 percent.

4 This comes from an industry standard publication
5 known as EBITDA. And I corroborated that with analysts'
6 reports from investment banks that showed that the discount
7 rates would, if anything, be higher than 12.4 percent, such
8 that if anything the overall revenue base or apportioned
9 royalty base would be even lower than what I projected here.

10 Q. So you and Mr. Parr differ on the appropriate royalty
11 base. Right?

12 A. We do. And a primary difference is that I have
13 structured this as a one-time lump-sum royalty payment that
14 does account for the revenues that would be received from
15 the time of the hypothetical negotiation all the way out to
16 the expiration of the patent in November 2017.

17 Mr. Parr, on the other hand, is only looking at
18 historical sales, and not performing a lump-sum calculation,
19 the way I have done here.

20 Q. So let's take a look at Slide 4001 and see if we can
21 sum all of this stuff up. What is reflected on Slide 4001,
22 Dr. Sullivan?

23 A. These are the calculations of lump-sum royalties under
24 each of these methods. For the sake of completeness I will
25 read these in here.

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1 Under Survey Question 11 the lump-sum royalty is
2 estimated to be 322,555.

3 For Question 9 the lump-sum royalty is 523,549.

4 For Question 8 the lump-sum royalty is
5 \$1,023,740.

6 And under Question 10 the lump-sum royalty is
7 \$1,148,858.

8 Q. So now let's go to those factors that we started
9 considering with respect to the hypothetical negotiation and
10 go to the licensing factor. Are you with me?

11 A. I am.

12 Q. So what licenses of Finjan and Websense -- strike
13 that.

14 What patent licenses of Finjan and Websense did
15 you review in forming your opinions in this matter?

16 A. There were a number of agreements that I reviewed.

17 For Finjan, there is the Microsoft M86 and Trustwave
18 agreements. For Websense there is a number of agreements.

19 The key take-aways here from my perspective is that all of
20 these agreements are structured as one-time lump-sum
21 payments for the life of the patents. And that demonstrates
22 or reveals the preferences of the parties here, that they,
23 too, would want to have one-time lump-sum payments for the
24 life of the patent.

25 That structure in a royalty is very common for

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1 software companies, because they want to be able to have the
2 ability to utilize the technology as much or as little as
3 they see fit without the need to try to track how that
4 technology is being used from one product to the next, as
5 they evolve their products to meet changing marketplace
6 demands.

7 Q. So let's turn to some agreements that you mentioned
8 corroborated what we are showing here on this slide.

9 Turn, first, to the Microsoft agreement. Did
10 you review Mr. Gunderson's testimony regarding the Microsoft
11 agreement?

12 A. Yes, I did.

13 Q. Were you in court to hear Mr. Napper testify regarding
14 the Microsoft agreement?

15 A. Yes.

16 Q. Do you concur with their analyses of the Microsoft
17 agreement?

18 A. Yes, I do.

19 Q. Let's go to Slide 22, Mr. Grimm.

20 What were your key take-aways as far as your
21 analysis with respect to the Microsoft agreement, Dr.
22 Sullivan?

23 A. Here again, the license agreement is structured as a
24 one-time lump-sum payment. It was for 8 million dollars.
25 It reveals that Finjan had a willingness to license not only

Sullivan - direct

1 the '194 patent but their entire patent portfolio to a
2 competitor.

3 The agreement included eight U.S. patents, 19
4 U.S. patent applications, 14 foreign patent applications.
5 So I think one simple and reasonable way to look at the
6 Microsoft agreement is to take the 8 million dollars, divide
7 by each of the eight U.S. patents, and that would be one
8 million dollars per patent.

9 Q. You also reviewed the Trustwave agreement in your
10 work?

11 A. Yes, I did.

12 Q. Were you in court -- did you review Mr. Gunderson's
13 testimony with respect to the Trustwave agreement?

14 A. Yes.

15 Q. Were you in court to hear Mr. Napper testify with
16 respect to the Trustwave agreement?

17 A. Yes.

18 Q. Do you concur with their analyses of the Trustwave
19 agreement?

20 A. Yes, I did.

21 Q. Can I get Slide 4201, Mr. Grimm.

22 What were your key take-aways as far as your
23 work goes and your opinions in this matter from the
24 Trustwave agreement, Dr. Sullivan?

25 A. Here again, the Trustwave agreement, structured as a

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1 one-time lump-sum payment for the life of the patents, there
2 were a total of six U.S. patents and three foreign patents,
3 so the entire patent portfolio of Finjan at that point in
4 time.

5 So this is not what would be considered a bare
6 patent license for just a single patent, which is what we
7 are hypothesizing in the negotiation between Finjan and
8 Websense for the '194 patent, because that is just one
9 patent.

10 The payment that was made here was in privately
11 held company stock. And, notably, there is no running
12 royalty in the Trustwave agreement. There is no six-percent
13 rate that was specified within the agreement. And,
14 interestingly, the six-percent rate that is used by Mr. Parr
15 in his analysis is the result of a fictional tax adjustment
16 that inflates the rate. The actual underlying rate is 3.9
17 percent.

18 Q. You said at the outset that the Trustwave agreement
19 corroborated your opinions. Can I get Slide 1051.

20 How so?

21 A. So this is a slide I prepared to show a couple
22 calculations. Recognizing that the Trustwave payment was
23 4.2 million dollars, that was made in company stock, Finjan
24 indicated that their products practiced at least the two
25 patents that have been discussed throughout the trial here,

Sullivan - direct

1 the '194 and the '1962 patent. So there is at least two
2 practiced patents. So we can divide the 4.2 million in
3 half.

4 In addition, because the 4.2 million is in
5 privately held company stock, it is considered illiquid.
6 That means it cannot be readily converted into cash. An
7 economist would perform a liquidity discount to recognize
8 the actual value of that privately held company stock.

9 According to basic economic literature, an
10 appropriate discount here for the liquidity would be 40
11 percent. So I took the 2.1 million, which is half of the
12 total amount paid, and subtracted off a 40-percent discount.
13 And that would result in then a single lump-sum payment for
14 the life of those patents of 1.26 million.

15 Q. Switching gears now to another agreement, the M86
16 agreement. You understand that Mr. Parr relied for his
17 opinions in part on the M86 license agreement?

18 A. Yes.

19 Q. And you reviewed Mr. Gunderson's testimony with
20 respect to the M86 agreement?

21 A. Yes, I did.

22 Q. And you were in court to hear Mr. Napper testify with
23 respect to the M86 agreement?

24 A. Yes.

25 Q. And do you concur with the analyses of Mr. Gunderson

Sullivan - direct

1 and Mr. Napper?

2 A. Yes, I do.

3 Q. Can I get Slide 4202, Mr. Grimm.

4 What were your key take-aways from the M86

5 agreement as far as your opinions in this matter, Dr.

6 Sullivan?

7 A. This was part of an overall asset acquisition wherein

8 M86 was acquiring all of the assets of Finjan, including

9 intellectual property. It, too, is a lump-sum payment.

10 There is no running royalty specified. And it was a payment

11 made here again in company stock, not in cash.

12 And perhaps most importantly, there is no

13 running royalty specified in the agreement. The parties did

14 not agree to a running royalty of 7.5 percent. That is not

15 an amount that was transacted or agreed upon by the parties.

16 And there have been no payments made at a 7.5 percent

17 royalty rate.

18 Q. So what is your understanding of where Mr. Parr got

19 the 7.5 percent rate?

20 A. He took that from a tax report that was prepared by a

21 mid-tier accounting firm known as Grant Thornton.

22 Q. And you considered that report as well?

23 A. Yes, I did.

24 Q. Did you review Mr. Gunderson's testimony regarding the

25 Grant Thornton report?

Sullivan - direct

1 A. Yes, I did.

2 Q. Were you in court to hear Mr. Napper testify with
3 respect to the Grant Thornton report?

4 A. Yes.

5 Q. Do you agree with their analyses?

6 A. Yes, I do.

7 Q. Can I get Slide 1401, Mr. Grimm.

8 What are your key take-aways of the Grant
9 Thornton report as far as it formed your analysis in this
10 case, Dr. Sullivan?

11 A. Grant Thornton prepared a report that was an
12 after-the-fact attribution of value for tax purposes. One
13 of the analogies that I heard used earlier was that of the
14 purchase of a house. And Grant Thornton's analysis was
15 similar to taking the purchase price of the house and
16 allocating it separately to each room of the house, how much
17 of the value attributable to the kitchen, how much to the
18 family room, how much to each of the bedrooms.

19 And the parties did not agree to those separate
20 amounts. It's just simply an allocation. And the
21 allocation is being performed under a very different
22 standard than that for a reasonable royalty that we need to
23 do here for the purchases of the patent. I think it's
24 notable that actually in the report Grant Thornton even says
25 their report is invalid for other purposes, which would

Sullivan - direct

1 include the purposes here.

2 So the 7.5 percent rate that they utilized in
3 that agreement I do not see as relevant to the interests
4 here.

5 Q. And you say relied on 22 irrelevant licenses on the
6 bottom of this slide.

7 Can I get Slide 50-01. What do you mean by
8 "relied on 22 irrelevant licenses"?

9 A. Well, there is 22 agreements that served as the basis
10 for coming up with 7.5 percent that Grant Thornton found.
11 And these are all agreements that are not comparable at all
12 to the '194 patent or the accused technology.

13 And these are software technologies, such as a
14 children's Internet browser, religious software, and other
15 things that are very different from Real-Time Security
16 Scanning, as is implemented by Websense.

17 In fact, there is no evidence that any of these
18 agreements related to patented technology. There is no
19 reference to any patents whatsoever.

20 Q. Let's wrap up everything. 50-01, please.

21 Can you summarize for the jury what your
22 ultimate opinions are with respect to the hypothetical
23 negotiation between Websense and Finjan?

24 A. The hypothetical negotiation would have occurred upon
25 the launch of the accused Web Security Gateway product in

Sullivan - direct

1 the third quarter of 2008.

2 On the one hand, Websense would look at the
3 situation and see that the real-time security feature is one
4 among many different analytics that they are using and that
5 they were in a good position financially with respect to
6 their other products and services that did not utilize that
7 technology. You know, the accused functionality and the
8 accused products is a small part of their overall Web
9 Security portfolio.

10 On the other hand, Finjan would recognize that
11 they were in dire need of cash and that they would want to
12 be able to solidify a deal as quickly as possible to be able
13 to secure those funds.

14 Q. Slide 33-01.

15 What is your ultimate opinion with respect to
16 the lump sum one-time royalty in this matter?

17 A. As I have walked through, I have used a total of six
18 different methods to calculate different estimates of what
19 the lump sum royalty payment would be. These range from a
20 low of \$322,000 to a high of 1.26 million. Based upon the
21 totality of the economic research and analysis that I have
22 performed throughout the case and all of the data that I
23 have reviewed, it's my opinion that in the event the '194
24 patent is found to be valid and infringed, then the
25 appropriate royalty is a one-time lump sum payment for the

Sullivan - direct

1 life of the '194 patent in the amount of \$1 million.

2 Q. And Dr. Sullivan, how much would Websense owe if the
3 '194 patent was found to be not infringed or invalid?

4 A. Well, then the amount would be zero.

5 MR. KYLE: Nothing further.

6 THE COURT: Thank you, Mr. Kyle.

7 Mr. Rovner.

8 MR. ROVNER: Thank you, Your Honor. May we pass
9 out the binders?

10 THE COURT: Sure.

11 (Binders passed up.)

12 MR. ROVNER: Your Honor, may I proceed?

13 THE COURT: Yes, you may.

14 CROSS-EXAMINATION

15 BY MR. ROVNER:

16 Q. Good morning, Dr. Sullivan. My name is Phil Rovner.
17 I am one of the attorneys for Finjan. We met at another
18 deposition, as I recall.

19 A. Yes. That's right. Good morning.

20 Q. Good morning. First off, I am glad that they didn't
21 teach math in law school because that was a lot of math to
22 follow.

23 Let me get down to some sort of overall
24 conclusions here.

25 You don't agree with Mr. Parr about a lot of

Sullivan - cross

1 things. Correct?

2 A. I believe that's fair.

3 Q. And you don't think -- you question a lot of what went
4 into his forming his conclusions. Correct?

5 A. I believe his conclusions in the end are incorrect.

6 Q. And you don't agree with the methodology that he used?
7 You found quite a lot of fault with it. Right?

8 A. That is true.

9 Q. What's the difference in the numbers between you and
10 Mr. Parr at this time?

11 A. As I recall, Mr. Parr has specified a running royalty
12 and a royalty amount of 1.2 to 1.5 million, and that covers
13 the historical period of time; whereas, the amount that I
14 have specified, and I have said multiple times, is one
15 million, and that covers the life of the '194 patent.

16 Q. So just so I can summarize and we can summarize for
17 the jury, you are at one million and Mr. Parr is at between
18 1.2 and 1.5 million?

19 A. That's right, recognizing the distinctions I just
20 made.

21 Q. So for all the criticisms that you had of Mr. Parr,
22 the range between the two of you is pretty small. Correct?

23 A. On a relative basis, it is reasonably small.

24 Q. Well, let's not talk in relative terms. It's one
25 million versus 1.2 to 1.5, right? We are very close?

Sullivan - cross

1 A. Well, to me, that's still a lot of money.

2 Q. It's a lot of money to me as well. We spent an hour
3 and a half going through -- your attorneys for Websense
4 spent an hour and a half going through your testimony and
5 you two were very close. Yes or no?

6 A. The numbers are what they are, I think especially
7 compared to some of the other numbers I have seen floating
8 around, yes we are much closer than others.

9 Q. There was something that struck me. You showed your
10 slides, about 29 of them -- I should be honest, I counted,
11 they were 29. You had a profit, something that went into
12 your calculations was the 10 percent profit margin. Right?

13 A. Yes, I do utilize that.

14 Q. And that profit margin that you got, that 10 percent,
15 that's not from the accused products? That's the
16 company-wide profit margin?

17 A. That's correct.

18 Q. What's the profit margin for the product at issue
19 here, the accused technology?

20 A. The 10 percent profit margin that I utilized is a
21 reasonable proxy for the profit margin associated with the
22 products at issue here.

23 Q. Why would you use a company-wide profit margin of
24 10 percent? Why didn't you get right down to the accused
25 products at issue here?

Sullivan - cross

1 A. Well, quite simply, Websense, similar to many software
2 companies, does not track, report, or attempt to quantify
3 the costs or profitability on an individual product basis.

4 Q. So you didn't have that information available to you,
5 did you, the profit margin of the accused products.

6 Correct?

7 A. There is not data at the level of the product, itself,
8 and the overall profit margin for Websense is viewed, in my
9 opinion, as a reasonable proxy.

10 Q. Just so we understand, a "reasonable proxy," what does
11 that mean?

12 A. A reasonable estimate. I suppose "proxy" is an
13 economist term.

14 Q. So you are using company-wide numbers, but you don't
15 know, sitting here today, you don't have the numbers for
16 profitability of the products that you mentioned accuse,
17 infringe the '194 patent. Yes or no?

18 A. We don't have those separate data, so we utilize
19 reasonable estimates.

20 Q. Mr. Sayers, could you go to Slide 037, and hopefully
21 we have matched these up. Okay.

22 And that's the 10 percent number that we just
23 talked about. Right? That's company-wide?

24 A. Yes. That's right.

25 Q. Could you turn to the next slide, Mr. Sayers. And

Sullivan - cross

1 these are the Georgia-Pacific Factors -- I am sorry.

2 These are the profit margins that you say

3 Mr. Parr relied on. That's his slide. Right?

4 A. This is Mr. Parr's slide.

5 Q. You have 87.3 percent, 11.9 percent, 27.4 percent,
6 19.56 percent. Those are all Mr. Parr's profitability
7 numbers. Right?

8 A. Well, these are numbers that Mr. Parr presented. They
9 are all based upon Websense's filings with the SEC, the
10 Securities and Exchange Commission, and they are
11 company-wide profit margins aggregated for the period from
12 2004 out through 2011.

13 Q. And you don't think those numbers are appropriate at
14 all? They are wildly different. 87.3 is quite different
15 than 1.9 percent?

16 THE COURT: You have asked two questions.

17 MR. ROVNER: Thank you, Your Honor.

18 BY MR. ROVNER:

19 Q. 87.3, large number, right? Large percentage?

20 A. It is a large number compared to 11.9 percent or
21 10 percent. It's represents a different type of profit
22 margin, called a gross margin.

23 Q. But you have -- you admit that it is vastly different
24 than 10 percent. Correct?

25 A. Yes, it is.

Sullivan - cross

1 Q. So Mr. Parr's profit margins, you seem to think, are
2 way too high, correct, that he is using?

3 A. The 87.3 percent is way too high. The two numbers on
4 the right are too high, the 27.4 and 19.65, because those
5 only account for either half or none of the research and the
6 development. The 11.9 percent is very similar to my
7 10 percent. It's the same measure. Both an operating
8 margin. And the difference is the time period that's
9 covered.

10 So whether one wants to look at the actual
11 damages period here, in which case you get 10 percent, or if
12 you want to look at a more expansive period, I don't think
13 that would be appropriate, but the overall number is not all
14 that different.

15 Q. That's correct. The two numbers -- all the numbers
16 that Mr. Parr used, that you find fault with, the
17 difference, again, in your conclusions, are very small.
18 Right?

19 A. The numbers are what they are.

20 Q. Well, tell us what the numbers are. It's 1 million
21 that you have, and he has 1.2 to 1.5. Right?

22 A. So to clarify --

23 THE COURT: Do we have to keep going over that?

24 MR. ROVNER: I am just trying establish --

25 THE COURT: It's been established. Come on.

Sullivan - cross

1 MR. ROVNER: Thank you.

2 BY MR. ROVNER:

3 Q. Let's go to the next-to-the-last slide, Mr. Sayers,
4 050-01, I believe.

5 This is your slide. Right?

6 A. Yes, it is.

7 Q. These are two individuals, one from Websense, one from
8 Finjan, and this is supposed to simulate the hypothetical
9 negotiation. Right?

10 A. Well, it's an illustration that I was hoping would be
11 helpful in explaining the overall analysis that I performed.

12 Q. Well, you spent some time on your direct going through
13 a lot of numbers, and, when it comes down to it, what would
14 these two individuals believe at the date of the
15 hypothetical negotiation, right? What would their goals be
16 on the third quarter of 2008. Right?

17 A. Not exactly.

18 So, there is two entities. It's not
19 individuals, although there would be individual
20 representatives from the company that would be in the
21 hypothetical negotiation. It's the corporate entity,
22 Websense, and the corporate entity, Finjan, they would meet
23 for a hypothetical negotiation, wherein they would come to a
24 reasonable agreement on what the appropriate royalty would
25 be.

Sullivan - cross

1 Q. As of 2008?

2 A. Yes, third quarter 2008.

3 Q. So what the parties thought in that third quarter of
4 2008.

5 So we have got Mr. Finjan here on the right, and
6 he says, "Financially distressed, need money." So that's
7 your characterization. Right? No one from Finjan ever said
8 that, right, that you know of?

9 A. Actually, there is a number of documents from Finjan
10 that say that in principle, some of which were the Board of
11 Directors documents that I displayed, at least in summary
12 form.

13 Q. But you don't know of anybody -- this is all
14 hypothetical, so we don't know -- that was never
15 communicated directly in the third quarter of 2008 to
16 someone from Websense. Right?

17 A. It's hypothetical in terms of the negotiation between
18 Finjan and Websense because they did not have the
19 negotiation at that point in time for the '194 patent.

20 However, it's not hypothetical with regards to
21 what Finjan's position was in Finjan's own view of its
22 financial position. There is document after document after
23 document that was created by Finjan that reflects these very
24 issues regarding its distressed financial position.

25 Q. And as evidence of that, you would -- you, I think,

Sullivan - cross

1 testified, and correct me if I am wrong, you said that what
2 the result of that would be, a Finjan that was in distress,
3 would take less money because they needed cash. Right?

4 A. It would put them in a relatively weaker bargaining
5 position, and it would also be another factor that would
6 influence the structure of the royalty, and it's another
7 reason why the royalty would be structured as a one-time
8 lump sum payment for the life of the patent.

9 Q. Is it fair to say that a distressed company would take
10 less for its technology because it needed cash. Right?
11 Isn't that the analogy you used with the Hope Diamond, that
12 a bum on the street would take less?

13 A. That is Mr. Parr's analogy, but to the point, the
14 financial position of the parties and their relative
15 bargaining positions can very much influence what the
16 outcome would be of a hypothetical negotiation just as it
17 would a real world negotiation.

18 Q. So a cash distressed company would probably take less
19 -- would take less -- they would want cash up front, I think
20 you said, and they probably would take less?

21 A. Well, all else equal, and based upon the slew of
22 documents from Finjan that reports upon their financial
23 condition to their Board of Directors, I think there is very
24 clear information as to how that would influence the
25 hypothetical negotiation here.

Sullivan - cross

1 Q. Is that a yes to my question?

2 A. Largely speaking, with the clarifications I provided,
3 that hopefully clarifies.

4 Q. Let's look at what really happened.

5 In 2009 Finjan was acquired by M86. Right?

6 A. Yes. November 2009.

7 Q. And they didn't take cash, did they?

8 A. No. They were not able to garner cash through the
9 shopping process to the 33 potential purchasers. And
10 ultimately, they were acquired by M86 and payment was made
11 in company stock, in equity.

12 Q. As you said, that stock can't be converted into cash?
13 Those were your words. I think I wrote them down correctly
14 when you testified?

15 A. I believe you are referring to my discussion of
16 Trustwave.

17 Q. I was going to get to that.

18 Both M86 in 2009 and Trustwave more recently
19 were stock deals. Right?

20 A. Yes. They were asset acquisitions, where the entire
21 company was acquired.

22 Q. Would you put that back up, Mr. Sayer.

23 What you are saying here is financially
24 distressed, need money. Yet what really happened, Finjan
25 didn't take money for their company. Finjan took stock

Sullivan - cross

1 instead. Right?

2 A. That is what they ultimately had to do.

3 Q. Well, you said they had to do. Are you referring to
4 something that -- are you referring to something in
5 particular that they had to do? Did they have to sell?

6 A. Looking again at all of those board of director
7 presentations and all of the actual information that was
8 generated by Finjan throughout this time indicated that they
9 were financially distressed, they were rapidly running out
10 of cash, and they were seeking purchasers for their assets
11 so that they could become and stay in a solvent position and
12 remain a going concern rather than the alternative.

13 Q. But no cash was exchanged, correct, in either of those
14 two deals?

15 A. There was a very small amount of cash in the M86 deal.

16 Q. So we are looking again at the third quarter of 2008.
17 And on the Finjan side, you have that bit -- that blurb,
18 financial distressed, need money.

19 Let's look at the Websense side. One lesser
20 feature among many. You are basing that on the survey.
21 Correct? Surveys?

22 A. In part. There is a variety of information that goes
23 towards it. There is various Websense documents. There is
24 third-party market research. There is deposition testimony.
25 And the survey that was performed by Mr. Buncher.

Sullivan - cross

1 Q. 2008, why didn't you just use a 2008 survey?

2 A. There was not a survey available as of that point in
3 time that was at Websense's customers that would provide us
4 with the ability to scientifically measure the contribution
5 of realtime security scanning to the Web Security Gateway
6 product relative to the nonaccused Web Security product.

7 Q. So Websense in 2008 didn't conduct surveys of its
8 customers to determine what its customers wanted. Is that
9 correct?

10 A. I would not put it that way. I would say that there
11 was not a survey available that would permit the measurement
12 of the accused functionality of realtime security scanning.

13 Q. What surveys were able available that you decided not
14 to consider here?

15 A. I considered them and I looked at the surveys. But,
16 again, even though there were surveys that were conducted by
17 Websense, there were not surveys that would focus in on the
18 realtime security scanning feature, and thus be able to
19 numerically quantify what the contribution is of RTSS.

20 Q. What surveys did they have in 2008 then?

21 A. There were a variety of surveys. I don't have all of
22 them memorized or at my fingertips. But there were surveys
23 that have been performed by Websense over time that go
24 towards evaluating customer satisfaction.

25 Q. Which ones in 2008 are you referring to? I don't need

Sullivan - cross

1 you to tell me them all. Just give me one or two examples
2 of surveys you looked at and decided not to use here.

3 A. They would fall under the category I just mentioned.
4 I would be happy to take a look at one. Perhaps there are
5 some in here.

6 Q. There are none in there because I didn't find any.
7 What surveys did you see that Websense conducted in 2008?

8 A. Again, I can't point you to an exact survey sitting
9 here. I have not tried to memorize the gazillion of
10 documents that are out there. But I do recall looking at
11 various types of survey information.

12 Q. Can you just be more specific? What type of
13 information was in those surveys that you haven't used here
14 today?

15 A. I don't know that there is any such information.

16 Q. So there are no surveys in 2008?

17 A. I would not put it that way.

18 Q. Okay. How about in 2009?

19 A. The answers really are the same. Throughout the time
20 period -- Websense has conducted various surveys, yet those
21 surveys, based upon my review and my recollection, do not
22 focus in on RTSS or the realtime security scanning feature.
23 I don't have those memorized back from when I did my
24 analysis earlier this year to be able to say there was a
25 survey that was conducted at this date with these customers

Sullivan - cross

1 and so forth. But I do recall looking at documents in that
2 regard. They were not satisfactory for being able to
3 measure what is RTSS. They were general, because those
4 surveys were conducted for a different purpose.

5 Here I looked at a scientifically valid survey
6 in my view that was conducted by Mr. Buncher. And that
7 survey provided valid information for me to in part develop
8 my analysis and my conclusions.

9 Q. Generally speaking, would a survey that was done at
10 the time of the hypothetical negotiation, assuming you had
11 one, be more reliable than one that was done years later for
12 litigation purposes?

13 A. No.

14 Q. The one that would be begun three years later for
15 litigation purposes would be more reliable?

16 A. It very well could be. Here I would say the answer is
17 yes, because it actually addresses the specific issues of
18 RTSS in looking at what it is that is driving customer
19 demand, recognizing that it is not RTSS.

20 Notably, the survey that is being performed by
21 Mr. Buncher is historical. It is looking at actual
22 customers that actually purchased Web Security Gateway, the
23 accused product.

24 So it is looking at the real actual contribution
25 that the customers viewed as to RTSS and what it provided in

Sullivan - cross

1 terms of their purchasing decision.

2 Q. In 2008, Websense is off to our meeting, that I know
3 is hypothetical. Shouldn't you have asked Websense
4 executives as to what their view of the importance of the
5 technology was? Wouldn't that have been something that they
6 might want to consider?

7 A. I did not follow that question.

8 Q. No doubt.

9 Would it be relevant for the person in your
10 example here, your hypothetical, to consider what Websense
11 executives thought about the accused technology?

12 A. There is a variety of factors that could be
13 considered. And I at least attempted to encapsulate within
14 my testimony the relevant and key factors that would
15 influence the outcome of the hypothetical negotiation.

16 Q. What you concluded was one lesser feature among many.
17 Correct?

18 A. That is one of the items that I have considered.
19 Again, this is intended to be an illustration of the
20 hypothetical negotiation that hopefully helps articulate
21 what my analysis and my opinions are.

22 Q. Could you go over to JTX-392, Mr. Sayer. I want to
23 show you an e-mail from John McCormack. Do you know who
24 John McCormack is?

25 A. Yes, I do.

Sullivan - cross

1 Q. Were you here for his testimony last week?

2 A. Yes.

3 Q. Do you recognize this document?

4 A. Yes, I do.

5 Q. If I recall correctly, you were utilizing this during
6 his cross-examination?

7 A. I was not.

8 Q. Someone from your team.

9 A. Okay.

10 Q. Have you reviewed this document previously?

11 A. I could not say for certain.

12 Q. But you were here when he did.

13 What is the date of it? It's from John
14 McCormack. And it's sent to a number of individuals. Do
15 you know who those individuals are?

16 A. I recognize some of the names.

17 Q. They are Websense people. Correct?

18 A. The names that I recognize are individuals I associate
19 with Websense.

20 Q. What is the date?

21 A. It reads August 27, 2008.

22 Q. That is third quarter 2008. Right?

23 A. Yes, that's right.

24 Q. Right dead-on on the date of the hypothetical
25 negotiation. Right?

Sullivan - cross

1 A. Generally speaking.

2 Q. And it says, Folks, attached are the slides we
3 reviewed last week. I expect this context of what we have
4 to accomplish in 2009 is used to share with your teams to
5 help them understand the context for the decisions we are
6 making.

7 Did I read that correctly?

8 A. I believe you did, yes.

9 Q. Let's turn to Page 5 of that document, Mr. Sayer.

10 Can you read that, Dr. Sullivan? It says,
11 Realtime security (aka WSG), on premise and on demand, is
12 our most important offensive weapon and our most important
13 defensive weapon.

14 Do you see that?

15 A. Loosely speaking, yes.

16 Q. Do you have any reason to disagree with that?

17 A. No.

18 Q. That was Mr. McCormack's view at the time of the
19 hypothetical negotiation. Right?

20 A. I would let Mr. McCormack speak to exactly his view.
21 But, you know, my understanding, my take-away is that they
22 did and do view Web Security Gateway as a primary component
23 of their business. It's something that they want to
24 continue to grow and develop. It's fair to okay and it's
25 doing well, as I have indicated in my financial analysis.

Sullivan - cross

1 Q. And that's the accused technology. Correct?

2 A. No. That is Web Security Gateway. That is the
3 accused product. But --

4 Q. Nothing to do -- go ahead, I am sorry.

5 A. But Web Security Gateway includes all of the features
6 that are in Web Security that are not accused as well as the
7 four additional features that distinguish Web Security from
8 Web Security Gateway.

9 One of those four features is realtime security
10 scanning. So, as I understand that slide and the
11 presentation, is Websense's view of the role of Web Security
12 Gateway. I mean, naturally, Web Security Gateway is priced
13 higher than Web Filter and Web Security. So naturally, they
14 want to try to escalate their customers from the
15 lower-priced product to the higher-priced products.

16 That is not rocket science.

17 Q. So in 2008, what accused technology were they adding?
18 What technology were they adding in 2008?

19 A. The distinction between Web Security and Web Security
20 Gateway has at least four functionalities. One is the
21 realtime security scanning, RTSS. The other three are
22 realtime content classification for the social web, SSL
23 inspection, which is security socket layer inspection, and
24 antivirus.

25 Q. What was new in 2008?

Sullivan - cross

1 A. A global economic recession.

2 Q. The hypothetical negotiation is what? That is the
3 date that the accused technology is first used. Correct?

4 A. It is based upon the launch of the Web Security
5 Gateway product, which, of course, is third quarter 2008.

6 Q. Could we go to JTX-480.

7 Do you recognize this document, Dr. Sullivan?

8 A. I believe so. I would have to take a closer look to
9 refresh my memory.

10 Q. Why don't you go ahead, if you would like. It's in
11 your binder as well.

12 (Pause.)

13 A. Okay.

14 Q. The date of this is June 10, 2008. Correct?

15 A. Yes. I see that.

16 Q. That is third quarter of 2008?

17 A. Almost. It's second quarter 2008.

18 Q. True. Why don't you go down to the third paragraph.
19 Why don't you take a look at that.

20 Have you looked at that?

21 A. Yes, I have.

22 Q. It says, The fundamental shift of web content created
23 from trusted sources to anonymous and user driven
24 collaborations such as wikis, blogs and social networking
25 has changed the threat landscape.

Sullivan - cross

1 Do you see that?

2 A. Yes, I do.

3 Q. And that is written by a research director for
4 Gartner. Correct?

5 A. It appears it was stated by the research director for
6 Gartner.

7 Q. Gartner is what?

8 A. A third-party market research firm.

9 Q. Gartner is a source of information that you have
10 relied on. Correct?

11 A. Yes, I have utilized information from Gartner.

12 Q. It says, Attackers are targeting trusted websites with
13 good reputations to circumvent traditional security measures
14 and maximize attack effectiveness.

15 You have no reason to disagree with that, do
16 you?

17 A. No, I don't. In fact, when I look at this with
18 regards to social networking sites, that to me emphasizes,
19 at least from an economic point of view, the RTCC
20 functionality, realtime content classification for the
21 social web, which is not accused here and it is one of the
22 distinguishing features between Web Security and Web
23 Security Gateway.

24 Q. Let's read the next sentence: To enable legitimate
25 business use of these sites while still protecting against

Sullivan - cross

1 inbound and outbound malware, organizations are increasingly
2 demanding secure web gateway solutions that go beyond
3 traditional URL filtering to provide realtime inspection of
4 malicious web content and granular web application control.

5 Do you see that?

6 A. Yes, I do.

7 Q. Do you understand what that means?

8 A. From an economic perspective, especially as it relates
9 to Websense, wherein they were developing the web security
10 labs and they developed a number of different analytics to
11 help them in the detection of malware and to prevent the
12 execution of malware. My understanding is that one of those
13 analytics is the accused functionality, RTSS, and there are
14 a variety of other analytics that are utilized as well.

15 Q. Now, the URL filtering is more of the traditional
16 based antivirus. Correct?

17 A. No.

18 Q. No, it's not. URL filtering is not more of the
19 traditional type of web security?

20 A. It is a traditional form of web security. I would not
21 lump it into antivirus, but, rather, it utilizes the uniform
22 resource locator, the URL, and does classification based
23 upon the URL. And that is, as we saw from Mr. Buncher's
24 survey, it is part of what is really underlying the primary
25 purchase decisions for consumers for web security products.

Sullivan - cross

1 Q. In 2008, what was Websense saying about its URL
2 filtering?

3 A. Well, this isn't a Websense press release. It's from
4 Gartner. I am not sure if you are trying to make a
5 distinction between Gartner and Websense or just what is up
6 on the screen.

7 Q. What is on the screen.

8 A. This is saying that they are looking for secure web
9 gateway solutions that go beyond traditional URL filtering.

10 Q. So in 2008, at the time of the hypothetical
11 negotiation, an organization like Gartner thought that
12 security needed to move past URL filtering. Right?

13 A. I think there has been a desire and a wish to move
14 beyond URL filtering. Websense is attempting to do that.
15 It's been observed by Gartner as well as others. That is
16 part of the reason to have a web security gateway product
17 that has additional analytics.

18 Q. And that's exactly what Websense did in 2008. Right?

19 A. In the third quarter they launched Web Security
20 Gateway with the additional functionality, one of which is
21 the accused realtime security scanning.

22 Q. Let me see if I can put this in terms that at least I
23 will understand.

24 In a business like Websense is in, they need to
25 stay current. Correct?

Sullivan - cross

1 A. I am not sure what you mean by that.

2 Q. If a competitor has proactive security, would a
3 company like Websense feel it needed to get something like
4 that, realtime security?

5 A. I think that's just too broad of a question.
6 Proactive security could mean a whole host of different
7 things. You know, clearly, Websense did introduce certain
8 types of analytics and functionality that are based on their
9 web security labs as of the time of the introduction of Web
10 Security Gateway.

11 Q. So it's true, then, that a company like Websense or
12 any company in this particular business would need to
13 continually upgrade its capabilities of detecting malware.
14 Correct?

15 A. Well, I think Websense along with other companies in
16 the securities space are always looking to innovate and
17 develop and come up with new ideas, new products, and new
18 ways to secure their clients.

19 Q. And one of those, at least, you will admit, is the
20 accused functionality here. Right?

21 A. As I understand it, realtime security scanning, which
22 is the accused functionality, is one of the analytics that
23 is utilized by Websense.

24 MR. ROVNER: Your Honor, I am going to briefly
25 move into the financial information and the 10-K's. This

Sullivan - cross

1 might be a good time to break. Then I will only have a few
2 minutes after that.

3 THE COURT: Let's take our morning break.

4 (Jury leaves courtroom at 10:55 a.m.)

5 (Recess taken.)

6 THE COURT: All right.

7 Ms. Walker.

8 (The jury enters the courtroom at 11:22 a.m.)

9 THE COURT: Okay, members of the jury, we will
10 continue. Please take your seats.

11 Mr. Rovner.

12 MR. ROVNER: Thank you, Your Honor.

13 BY MR. ROVNER:

14 Q. What's a 10-K report?

15 A. A 10-K report is a filing that public companies make
16 with the Securities and Exchange Commission so that they can
17 convey to shareholders information about their company.

18 Q. And Websense filed 10-Ks. Correct?

19 A. Yes, that's right.

20 Q. Could you tell me what are the -- are you familiar
21 with the term "Triton" with respect to Websense?

22 A. Yes, I am.

23 Q. And what is Triton?

24 A. In essence, Triton is a reporting consult that
25 consolidates some of the security and management of Websense

Sullivan - cross

1 Security products.

2 Q. Where do the accused products fall within?

3 A. There are accused products, the lowest, or the primary
4 level of the accused product is Web Security Gateway, and
5 there are various flavors of that, including Hosted Web
6 Security Gateway, Web Security Gateway Anywhere, and then
7 there is the Triton version or Triton flavor of Web Security
8 Gateway.

9 Q. Where would we find the accused products?

10 A. Those would be, you know, contained as software on a
11 server that holds the software, where the signatures that
12 are developed from the Web Security labs are pushed to those
13 servers on a very frequent basis, typically every five to
14 15 minutes, as I understand it.

15 Q. Well, would the accused products be within the Triton
16 package?

17 A. In some instances. Not always.

18 Q. But you wouldn't find the accused products in any
19 non-Triton products, would you?

20 A. Yes.

21 Q. You would find it in other non-Triton products?

22 A. Well, I am not sure the distinction you are trying to
23 draw, but Web Security Gateway is sold as Web Security
24 Gateway, not part of the Triton package, and then it is also
25 sold in other instances as part of the Triton package. So

Sullivan - cross

1 you can get it with Triton or without Triton.

2 Q. Now, what would you consider to be a Websense Web
3 Filtering product?

4 A. That is the product that is based predominantly on a
5 URL filtering technology.

6 Q. Now, in your direct testimony, you said that based on
7 what you understood from the survey, the URL technology is
8 continuing to show growth. Right?

9 A. The Web Security product, which is based upon URL
10 filtering, is continuing to show growth. So there is a
11 little bit of distinction between Web Filter and Web
12 Security. They are both predominantly based on URL
13 filtering, yet Web Security has some different
14 classifications to it as well, in that Web Security product
15 is continuing to show growth. Websense is attempting to
16 migrate customers away from Web Filter to Web Security.

17 Q. Why is that?

18 A. Simply put, Web Security product is priced higher, so,
19 again, it's common practice to try to migrate customers to
20 more expansive products that cost more, just like trying to
21 upgrade auto purchasers to take all the options.

22 Q. Are you saying that the only reason that Websense
23 tries to shift customers away from WebFiltering products is
24 because they can make more money off the other products?

25 A. I wouldn't say that's the only reason. These are --

Sullivan - cross

1 you know, as you move up the food chain, if you will, across
2 the products, those are enhanced products with enhanced
3 functionalities and enhanced technologies. That's part of
4 what underlies the very basis of my reasonable royalty
5 analysis that compares Web Security to Security Gateway and
6 the additional functionalities that are contained within
7 those products.

8 Q. Are the WebFiltering products considered a commodity
9 by Websense at this point?

10 A. I don't know if I'd use the term "commodity," but
11 largely speaking. It's not as differentiated as Web
12 Security that adds on the other element classification and
13 not as distinguished as Web Security Gateway, which, you
14 know, then there is other flavors of that that, you know,
15 adds on Triton, for example.

16 Q. Well, my question is just very specific: Does
17 Websense consider its WebFiltering products as having become
18 a commodity?

19 A. I would defer to my previous answer.

20 Q. Which was? Yes or no is what I am really looking for.
21 Do you know if Websense considers its WebFiltering products
22 as having been a commodity?

23 A. It is relatively commoditized compared to the other
24 products. I wouldn't necessarily use that word one way or
25 the other. Perhaps Websense does.

Sullivan - cross

1 Q. And what is a commodity?

2 A. A commodity is a product that is not differentiated,
3 so you can think of products that are virtually identical so
4 they do not garner much of a profit.

5 Q. Okay.

6 A. I mean, the typical examples are things like orange
7 juice and cocoa and pork bellies and things of that nature.

8 Q. Could you turn to Exhibit JTX-479.

9 Do you recognize this document, Dr. Sullivan?

10 A. This is a Form 10-K filed by Websense, and I don't
11 know that I -- oh, there we go -- for the fiscal year ending
12 December 31, 2011, which means it would have been filed in
13 the early part of 2012.

14 Q. And you have seen this document before. Correct?

15 A. Yes, I have.

16 Q. And you considered it in offering your opinions today?

17 A. Yes, I have.

18 Q. Mr. Sayers, could you turn to Page 15 of the annual
19 report.

20 Could you go to the second full paragraph.

21 I am going to read the non-italicized language.
22 It says, "Our ability to generate revenue growth depends on
23 our ability to continue to diversify our offerings by
24 successfully developing, introducing, and gaining customer
25 acceptance of our new products and services, particularly

Sullivan - cross

1 our Security Gateway offerings, as our WebFiltering products
2 have become more of a commodity."

3 Do you see that?

4 A. Yes, I do.

5 Q. And Websense regards it as a commodity. Right? You
6 have no reason to disagree with that?

7 A. I do not disagree.

8 Q. And would you go to the last line of that, the last
9 two lines, the last three, I should say, the last sentence,
10 "If we fail."

11 Reading from that same paragraph, "If we fail to
12 continue to upgrade and diversify our products, we could
13 lose revenues from renewal subscriptions from our
14 WebFiltering products as those products continue to suffer
15 from commoditization." Do you see that?

16 A. Yes. The Web Filter product is the lowest in the Web
17 Security products. As we have seen from some of the charts
18 before, it goes Web Filter, then Web Security, then Web
19 Security Gateway, which is the accused product, and then
20 there is the Triton versions of Web Security Gateway.

21 Q. You can take that down.

22 Dr. Sullivan, you also, in addition to the
23 information -- the information we have gone through so far,
24 you have also mentioned the Microsoft license. Correct?

25 A. Yes, I have.

Sullivan - cross

1 Q. And you have referred to it as eight licenses that
2 Microsoft acquired from Finjan. Right?

3 A. No. I would not put it that way.

4 Q. Did you not -- how many licenses were in the Microsoft
5 agreement?

6 A. I believe generally, there is one license for a
7 portfolio of patents that includes eight U.S. Patents, 19
8 U.S. Patent applications, 14 foreign applications.

9 Q. In listening to your answer, I realized I misspoke.

10 I meant there was eight patents in the license
11 agreement?

12 A. Eight patents and a number of applications.

13 Q. Now, of the eight patents, you said, if you just did
14 sort of simple math, you divided it by eight, you come up
15 with one million per patent?

16 A. Eight million divided by eight is one million.

17 Q. You used one of your slides to show that the Microsoft
18 license was worth a million dollars. Right?

19 A. No. That license is \$8 million, but when converting
20 that onto a per-patent basis, because on the hypothetical
21 negotiation, there is only one patent, the '194 patent, that
22 puts it at \$1 million per patent.

23 Q. Have you talked to anyone at Microsoft to see how they
24 valued the patents that they acquired?

25 A. They did not acquire the patents. They obtained a

Sullivan - cross

1 license to the patent, and no, I have not spoken with anyone
2 at Microsoft in this regard.

3 Q. Do you have any idea how Microsoft valued each of the
4 patents that it got a license for?

5 A. No. That would be an allocated process. What they
6 did is provided that single, one-time lump sum payment of
7 \$8 million for the basket of patents, including the eight
8 patents in the U.S. and U.S. applications and foreign
9 applications.

10 Q. So for all you know, Microsoft could have valued the
11 '194 patent for 4 million?

12 A. I don't think Microsoft tried to separate it out and
13 break it out on a per-patent basis. That's not what I would
14 expect. If they were to do so, they could have valued each
15 patent individually at varying values, and I am not
16 suggesting that they agreed to 4 million or one million or
17 zero.

18 Q. You have no idea. Correct?

19 A. I would defer to my previous answer.

20 MR. ROVNER: I have no further questions.

21 THE COURT: Mr. Kyle, redirect.

22 REDIRECT EXAMINATION

23 BY MR. KYLE:

24 Q. It's still morning. Good morning, Dr. Sullivan. May
25 it please the Court.

Sullivan - redirect

1 So Mr. Rovner asked you some questions about the
2 differences between your analysis and Mr. Parr's analysis.

3 Do you recall that?

4 A. Yes, I do.

5 Q. And one of those differences that your bottom line
6 conclusion for a reasonable lump sum one-time royalty in
7 this matter is \$1 million for the entire life of the '194
8 patent out to November 2017. Right?

9 A. That's right. I have attempted to be clear on that.

10 Q. And Mr. Parr, on the other hand, comes to numbers of
11 1.2 to 1.5 million, but he limits his analysis to the period
12 2008 through 2012. Isn't that right?

13 A. That's right. He goes from third quarter 2008 out
14 through August of this year, 2012.

15 Q. And can you tell the ladies and gentlemen of the jury
16 why that difference is meaningful to your analysis?

17 A. Certainly. It's utilizing a different royalty base.
18 The royalty base for the historical sales on an
19 un-discounted basis used by Mr. Parr is \$20 million. As I
20 demonstrated, a reasonable estimate for the hypothetical
21 negotiation for the present value of sales going out through
22 the life of the patent is approximately \$30 million. So
23 there is a difference in that time period and a difference
24 in the sales, and accordingly, there is a difference in the
25 overall amount.

Sullivan - redirect

1 So the \$1 million that I have calculated covers
2 the life of the patent, whereas his is just historical.

3 Q. Two final questions. Mr. Parr gets to 1.2 to 1.5
4 based on a lower royalty base. How does he get to a higher
5 number with a lower base?

6 A. I am sorry. Can you say that again? I did not follow
7 it.

8 Q. Mr. Parr gets to 1.2 to 1.5 but he gets there using a
9 lower royalty base than you used. Right?

10 A. That's right.

11 Q. How does he get there?

12 A. He uses higher royalty rates.

13 Q. What is your opinion of the higher royalty rates that
14 Mr. Parr used to get his 1.2 to 1.5?

15 A. His rates are based upon six percent to seven and a
16 half percent. Six percent, he believes, comes from the
17 Trustwave agreement. Seven and a half percent, he believes,
18 comes from the M86 agreement.

19 There is a variety of reasons to believe that
20 those amounts are overstated. Now, I went through a variety
21 of analyses utilizing data from Mr. Buncher's survey, which
22 reflects what customers for Websense actually viewed with
23 respect to RTSS. And that shows that the appropriate
24 royalty rates are considerably lower than that amount.

25 Q. Again, what is your lump-sum one-time royalty for the

Sullivan - redirect

1 life of the patent in this case?

2 A. In the event the '194 patent is founded to be valid
3 and infringed, then the appropriate royalty would be a
4 one-time lump-sum payment for the life of the patent that is
5 one million dollars.

6 MR. KYLE: Thank you. I have nothing further.

7 THE COURT: Thank you, Dr. Sullivan. You are
8 excused.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 MR. STIEGLER: Your Honor, at this time Websense
12 calls Mr. Dan Hubbard.

13 ... DANIEL HUBBARD, having been duly sworn
14 as a witness, was examined and testified as follows ...

15 MR. STIEGLER: Your Honor, we have one document
16 for Mr. Hubbard.

17 May it please the Court, the jury...

18 THE COURT: Yes, sir.

19 DIRECT EXAMINATION

20 BY MR. STIEGLER:

21 Q. Good morning, Mr. Hubbard.

22 The first question for you: Is Websense's
23 Gateway product signature based?

24 MS. KOBIALKA: Objection, Your Honor. He is a
25 fact witness.