

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD
4

5 CLOVER NETWORK, LLC

6 Petitioner

7 v.

8 CLOUDOFCHANGE, LLC

9 Patent Owner
10

11 TELEPHONIC HEARING IN THE FOLLOWING MATTERS:

12 IPR2023-00232

13 IPR2023-00287

14 IPR2023-00288

15 Friday, February 3, 2023
16 11:30 a.m.

17 B E F O R E:

18 HON. LORIN

19 HON. PLENZLER

20 HON. DEFRANCO
21
22
23

24 Reported stenographically by

25 JOSHUA B. EDWARDS, RDR, CRR, CRC

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A P P E A R A N C E S

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2 JUDGE PLENZLER: This is a conference call
3 for IPR2023-00232, dash 00287, and dash 00288.
4 I'm joined on the call by two other judges on the
5 panel, Judge Lorin and Judge DeFranco. Sounds
6 like we do have a court reporter on the call; is
7 that correct?

8 THE COURT REPORTER: Yes, your Honor, that's
9 correct.

10 MR. CAVANAUGH: That's correct, your Honor.

11 JUDGE PLENZLER: Okay. Who arranged for the
12 court reporter?

13 MR. CAVANAUGH: The, petitioner, Clover, your
14 Honor. And consistent with our prior practice, we
15 can submit the transcript when it becomes
16 available.

17 JUDGE PLENZLER: All right, perfect. That
18 was what I was just going to mention to you all.
19 So I guess if we could start out just by having
20 the parties introduce themselves. We will start
21 with petitioner. And I'm just going to refer to
22 these proceedings as the 232 proceedings to
23 simplify things, and the earlier instituted trials
24 that you are attempting to join as the 779
25 proceeding. I understand that we have three

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2 different cases here and we have three different
3 cases that were instituted. But just for
4 simplicity, let's specify the specific
5 differences, I will refer to this as the 232 and
6 the petition to be joined in 779.

7 So with that, can we start with the
8 petitioner. Who is on the call for petitioner for
9 the 232?

10 MR. CAVANAUGH: Your Honor, this is Dave
11 Cavanaugh. And with me is Amy Mahan and Jason
12 Kipnis, all of whom are from Wilmer Hale and all
13 representing Clover.

14 JUDGE PLENZLER: All right. Mr. Cavanaugh,
15 will you be the one speaking for petitioner today?

16 MR. CAVANAUGH: I will be, your Honor, yes.

17 JUDGE PLENZLER: Okay, all right. And who do
18 we have on the call for patent owner?

19 MR. YATES: Thank you, your Honor, this is
20 Jay Yates with the law firm of Patterson Sheridan.
21 I'm joined by my colleagues Todd Patterson, Kyrie
22 Cameron, and Edgar Gonzalez. And we are on behalf
23 of patent owner CloudfChange, LLC.

24 JUDGE PLENZLER: All right. And Mr. Yates,
25 will you be speaking on behalf of patent owner

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2 today?

3 MR. YATES: Yes, your Honor.

4 JUDGE PLENZLER: Okay, thank you. And then
5 finally, who do we have on the call for petitioner
6 from the 779 proceeding?

7 MR. GRAY: Good morning, your Honor, this is
8 Joseph Gray from Slayden Grubert Beard Gruber on
9 behalf of petitioner, Lightspeed Commerce.

10 JUDGE PLENZLER: Okay. And you will be
11 speaking on behalf of petitioner in that
12 proceeding?

13 MR. GRAY: That's correct, your Honor.

14 JUDGE PLENZLER: Okay, perfect. So just by
15 way of background here, this call is initiated as
16 a result of motion for joinder. And the first
17 thing that I guess I would like to discuss,
18 Mr. Cavanaugh, I know that you note the
19 requirements the Trial Practice Guide in your
20 e-mail.

21 One thing that complicates things pretty well
22 here for us is the fact that you filed your motion
23 back I believe in November, November 21st, the 232
24 proceeding. And what the Trial Practice Guide
25 mentions is contacting the Board within five days

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2 of filing the motion. So we are almost two months
3 beyond that right now. So what happened?

4 MR. CAVANAUGH: Your Honor, we recognize that
5 the briefing was ongoing with regard to the
6 opposition to the motion. And we wanted to have
7 the briefing completed before the motion was
8 heard. And that's the delay. I think if there
9 was no opposition, we would have contacted the
10 Board immediately.

11 JUDGE PLENZLER: Okay. Well, I mean, I think
12 one of the things that patent owner notes is
13 that -- Mr. Yates, I will let you chime in in a
14 minute here -- but with respect to the 779
15 proceeding, for example, we are already beyond the
16 patent owner response in that case, the deposition
17 of petitioner's expert in that case. And we are
18 looking at I think a preliminary response due date
19 in this 232 case, middle of March, and then
20 subsequently a DI being issued with a due date in
21 June.

22 And even if it was looked at far before that,
23 I think in the 232 case, we are already past
24 petitioner's reply, mid-April. I'm seeing some
25 trouble here with timing in view of the two-month

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2 delay, and particularly because it looks like you
3 want to use a different expert. I see that your
4 petition is basically identical, but now you have
5 a different expert which causes other problems as
6 far as depositions for patent owner in that
7 matter. So can you help me understand why that's
8 not going to be an issue?

9 MR. CAVANAUGH: Yes, your Honor. You know,
10 as an understudy role, we would only be active,
11 and as we said both in our motion and our reply,
12 responding to what the patent owner had argued.
13 You know, we will only be active in this
14 proceeding should the other petitioner settle out
15 the case. And, you know, given the fact that the
16 POR is kind of — timing is arriving, like it
17 seems unlikely that that is going to be an issue
18 for the POR if there's no settlement, you know,
19 there is no issue because our expert, the person
20 that we file, our declarant, the person that we
21 filed the petition — filed the declaration that
22 we filed with the petition, it won't be operative
23 in the proceeding.

24 JUDGE PLENZLER: Let me interrupt real quick.
25 Why do we need to have a different declarant for

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2 the 232 petition, right? Other situations where
3 things are a lot smoother and more streamlined
4 where there's joinder involved where someone is
5 taking an understudy role, they will basically
6 agree to accept the earlier proceedings' expert
7 should the matter settle. So why do we need to
8 have a separate expert?

9 MR. CAVANAUGH: I don't know that there is a
10 concrete reason other than, you know, we have, you
11 know, identified this expert and walked through
12 the positions are nearly identical, if not
13 identical. If your Honors would want us to have
14 our expert adopt -- sign a statement adopting the
15 other petitioner's declarant's positions, we could
16 do that and would do that.

17 You know, in this case, I'm not sure it would
18 be, you know, needed because the positions are the
19 same. We are not arguing different grounds. We
20 are not arguing different claims. We are
21 certainly kind of very much aligned.

22 JUDGE PLENZLER: Right. I understand that.
23 Let me stop you though, because the issue that I
24 see is not that your petition is any different,
25 not that the declaration is any given, right.

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2 It's a matter of patent owner being able to depose
3 an expert, right. And so with the timing of these
4 two proceedings being involved and having a
5 different expert, let's say, that petitioner's 779
6 proceeding drops out and now you want to have your
7 expert take over, what happens with the
8 deposition?

9 MR. CAVANAUGH: Let's say that -- just so I
10 understand your scenario, your Honor, so the
11 petitioner, the first petitioner drops out after
12 the POR is filed, and what would happen with the
13 reply?

14 JUDGE PLENZLER: Right. Like in the 779
15 proceeding, the patent owner response has already
16 been filed. And patent owner has already deposed
17 petitioner's expert in the proceeding; is that
18 correct?

19 MR. CAVANAUGH: Yes, that's my understanding,
20 your Honor.

21 JUDGE PLENZLER: Let's say we institute trial
22 and we go forward with joinder in this 232
23 proceeding, for example. And now we are after the
24 petitioner's reply if petitioner and patent owner
25 settle in the 779 proceeding. So now you move up

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2 from your understudy role, but you have a
3 different declarant. Now unless there's some kind
4 of deposition that happens just as a just-in-case
5 type thing, what do we do with the patent owner's
6 ability to depose your witness and have the patent
7 owner respond?

8 MR. CAVANAUGH: In the scenario where, I
9 think because the expert, if the other expert
10 drops out, like, our expert would shoehorn in.
11 And we've done that in other proceedings without
12 much, you know, without much ado. To the extent
13 that your Honors would want an adoption of the
14 earlier declaration, we are certainly willing to
15 do that. And as part of the understudy role, we
16 are kind of adopting, if you will, kind of the
17 declaration testimony of what the earlier expert
18 has provided.

19 If your Honors would find it helpful, what we
20 could do, and I would need to kind of think
21 through some of the process here, but if you want
22 our expert to adopt what the earlier declarant has
23 said in a statement, I think we could do that
24 because the statements are the same.

25 And therefore there would be no difference

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2 other than a new expert that's already adopted the
3 entire proceeding, very similar to how a joinder
4 circumstance would exist. There's no requirement
5 that it be the same expert in the joined petition,
6 because sometimes experts are not available to
7 both parties because of other commitments.

8 JUDGE PLENZLER: Is that the case here? Is
9 there any reason why you would not be able to
10 join, use what the petitioner in 779 has including
11 their expert should they drop out?

12 MR. CAVANAUGH: I'm not aware of any
13 restriction on that in this case.

14 JUDGE PLENZLER: Okay.

15 MR. CAVANAUGH: And I would need to ask my
16 colleagues to confirm that.

17 JUDGE PLENZLER: Okay. And I will ask,
18 Mr. Gray, petitioner in the 779 proceeding, are
19 you aware of any issue, as far as should you drop
20 out, of the availability of your expert?

21 MR. GRAY: I'm not aware of anything that
22 would impede our expert's ability to proceed in
23 the 232 matter if we were to settle and drop out.

24 JUDGE PLENZLER: Okay. And I will ask
25 Mr. Cavanaugh again, if the expert in the 779

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2 proceeding were available, would you be willing to
3 basically -- if petitioner in 779 drops out,
4 proceed with the case that they had going
5 including their expert and no longer rely on
6 yours, just relying on their petition and their
7 expert and their filings?

8 MR. CAVANAUGH: Yes, your Honor, I think we
9 could do that. I'm not aware of any restriction
10 on the declarant's ability to support our
11 petition. And presuming that is the case, I think
12 we would rely on that.

13 JUDGE PLENZLER: Okay. Mr. Yates, being
14 counsel for patent owner on both proceedings, if
15 it that were the case and we had petitioner in the
16 232 proceeding as well as the others that are
17 looking for joinder, it seems like that removes
18 the issues that you were concerned with; is that
19 correct?

20 MR. YATES: Your Honor, it substantially
21 helps. Also the briefing may have helped,
22 although this hearing may be an opportunity to
23 clarify. Clover's position as an understudy based
24 on their motion includes that they would be
25 jointly responsible for certain filings and

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2 arguments, as well as that there would be
3 consolidated filings which is not at least our
4 typical understanding of an understudy role that
5 an understudy is truly an understudy.

6 And in their motion, on its face deals with
7 consolidated filing joint responsibility. So that
8 is part of our opposition as well, is that
9 understudy actually means understudy. And then
10 secondarily, the issue of I think you just worked
11 through the idea that we shouldn't have Dr. Mowry,
12 the expert for Clover, not for Lightspeed but in
13 the secondary proceedings, really show up at all
14 given the advanced stage of discovery with respect
15 to the 779 and related proceedings.

16 JUDGE PLENZLER: Okay.

17 MR. CAVANAUGH: Your Honor, I can address I
18 think both of those with the understudy.

19 JUDGE PLENZLER: Mr. Cavanaugh?

20 MR. CAVANAUGH: Yes.

21 JUDGE PLENZLER: Okay, go ahead.

22 MR. CAVANAUGH: I'm sorry, I should have
23 introduced myself as I was beginning speaking.
24 With regard to the understudy role, as we've
25 characterized it and kind of in response to the

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2 opposition, I think clarified to the extent that
3 it was needed, our understudy role is that of an
4 understudy.

5 When we talk about joint responsibility for
6 papers, that is, like, and maybe I am going to do
7 another kind of bullet point underneath what I
8 just a second ago said, to the extent that the
9 reason for the understudy role is to make sure
10 that the patent owner has a single paper to
11 respond to and that there is consolidated filings,
12 you know, that is what our understanding of the
13 understudy role is. And that is what we are
14 committing to. And that's consistent with not
15 only what the panels have said in other joinder
16 proceedings, but also with I think the rules with
17 the Trial Practice Guide provides.

18 To the extent that there's any unclarity or
19 lack of clarity with regard to what the joint
20 responsibility is, it's just the recognition that
21 once joinder occurs, you know, to the extent that
22 there is kind of a working together in the
23 petitioner, we just want to make sure that the
24 record provides that that is likely going to
25 occur. And to the extent that we're trying to be,

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2 you know, open and kind of just going to say that
3 there is a joint responsibility, some people are
4 going to perhaps take a larger role, some less so.

5 But with a joinder like this, you know, we
6 just want to clarify that, you know, there are
7 going to be the petitioners addressing the various
8 issues. But that doesn't change the understudy
9 role in the sense that there is a single filing
10 that is going to be made and that there is a
11 single consolidated paper that the patent owner
12 would have to work with.

13 JUDGE PLENZLER: So are you saying that you
14 would, even if you disagree with something that
15 Mr. Gray was filing in the 779 proceeding, you are
16 basically bound by you are not going to try to say
17 I think this is maybe patent owner's concern?

18 Correct me if I am wrong when I'm done here,
19 Mr. Yates, but you might want to file something
20 different if you disagree with the position taken?
21 Can you clarify that?

22 MR. CAVANAUGH: Yes. I mean, that's not our
23 understanding of an understudy role that we would
24 be able to take a different position.

25 JUDGE PLENZLER: Okay. That's what I

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2 thought. I just wanted to clarify.

3 Mr. Yates, does that help clarify what
4 petitioner meant by consolidated filings, just
5 that they are basically going to have the papers
6 filed by the 779 petitioner?

7 MR. YATES: Yes, sir, I think so, although
8 the notion of joint responsibility in consolidated
9 filing is still somewhat strange to us. But I
10 think I understand that they are being an
11 understudy as most of us understand the term
12 "understudy." So thank you for the clarification.

13 JUDGE PLENZLER: Okay. And if we should
14 decide to join proceedings, I will do my best to
15 make everything as clear as possible as far as the
16 agreement. And it's helpful we will have a
17 transcript of this call, too.

18 So just to sum up initially here, and I will
19 ask you, Mr. Yates, if we do end up with an
20 agreement from Mr. Cavanaugh, petitioner in the
21 232 proceeding, that understudy is just
22 understudy, they are going to rely on everything
23 filed by the petitioner in the 779 proceeding, it
24 might work with them, but the 779 petitioner's
25 papers, and also declarant in the 779 case will be

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2 the only one, nothing from the 232 declarant will
3 be used after institution?

4 If that were the case and if petitioner in
5 the 232 is joined simply as a party with nothing
6 different evidentiary– or argument–wise, would you
7 have any issue at all with that?

8 MR. YATES: The only — the only remaining —
9 the only remaining sort of two points are, one,
10 Lightspeed in the initial proceeding offered a
11 stipulation that Clover has not adopted that has
12 ramifications in the district court. And so we
13 would like Clover to be bound by that same
14 stipulation. We think that stipulation was
15 important as part of the institution decision.

16 And then secondarily, our point is that we
17 don't believe patent owner should be asked to
18 waive its rights with respect to a patent owner's
19 preliminary response. We haven't filed patent
20 owner's preliminary responses. We think we may be
21 more persuasive in the patent owner's preliminary
22 response convincing the Board not to institute on
23 this proceeding. And we think the proper time to
24 deal with joinder is after — only after there
25 would be an institution decision.

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2 And based on standard practice, the
3 institution decision we believe would come in
4 mid-June, sort of after the close of discovery in
5 the Lightspeed proceedings. And therefore it may
6 make working through the second expert under the
7 understanding we have today, may make that
8 actually easier because we would already be
9 through the close of discovery in the Lightspeed
10 proceedings, and therefore the question of
11 depositions of second experts and other things
12 would be moot without some sort of scheduling
13 change.

14 So again, our motion, without waiving our
15 right to a patent owner's preliminary response and
16 without some sort of accelerated action taken from
17 the Board, we think this decision is much more
18 proper in June when we have more information at
19 the close of discovery in all three of the
20 Lightspeed proceedings.

21 JUDGE PLENZLER: Okay, thank you. That
22 answers one of my questions that I was going to
23 ask about waiving the preliminary response. So I
24 understand your position there. If you could,
25 it's been a little while in the earlier

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2 proceedings, can you refresh my memory on the
3 stipulation that you mentioned. What that was?

4 MR. YATES: Yes. This is Mr. Yates. And
5 what I am trying to pull up in front of me will be
6 the Lightspeed petition dealing with the 00779.
7 And the petition there includes a stipulation.
8 See if I can find the right page. It's on page 10
9 of paper 1, the petition. And it says,
10 "Petitioner stipulates not to pursue in the
11 district court any ground raised or that could
12 have been reasonably raised in IPR (under section
13 102 or 103) based on prior patents or printed
14 publications alone."

15 And this importantly is if the IPR is
16 instituted and since it remains precedential at
17 the time of the institution. What's different
18 than the statutory estoppel is that the
19 stipulation applies on institution. It doesn't
20 deal with a stipulation at the end of the
21 proceedings. And so that stipulation by
22 Lightspeed was more aggressive than the statutory
23 estoppel, but will have effect at the district
24 court litigation. And that was part of the
25 briefing dealing with the patent owner's petition

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2 as well as the — I believe the preliminary
3 response.

4 JUDGE PLENZLER: Okay, all right.

5 Mr. Cavanaugh, is that something that you would be
6 willing to stipulate to?

7 MR. CAVANAUGH: Your Honor, maybe to take a
8 step into a little bit of the different procedural
9 histories of Lightspeed and Clover, Lightspeed was
10 sued first and currently has — earlier had a
11 trial date in June, now September of 2023. I
12 guess discovery had started and has been
13 proceeding. Clover, in contrast, doesn't yet have
14 discovery proceeding as well as doesn't have a
15 trial date until April of 2024.

16 And so, you know, it seems that as we all
17 know and as the director has recognized, in the
18 interim guidance just having the trial identified
19 doesn't necessarily mean that that's when it's
20 going to occur. And so I think that given the
21 different circumstances, different postures of the
22 cases, you know, what might have been appropriate
23 for Lightspeed and the Board to consider on
24 institution incentive, we would be happy to brief
25 it, your Honor, but we think the incentive doesn't

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2 apply in the same way.

3 JUDGE PLENZLER: Okay. So I will take that
4 as a no, then, that you would not be willing to
5 stipulate?

6 MR. CAVANAUGH: Well, not without some
7 additional briefing, your Honor, just so you have
8 the recognition. So yes, at this point we are
9 unwilling to stipulate to that. To the extent
10 that there's briefing that you or the patent owner
11 would like to do, we would be happy to do it. We
12 think the incentive as it's currently contemplated
13 is not applicable to Clover's situation. And
14 we're happy to brief that.

15 JUDGE PLENZLER: Okay, all right. Trying to
16 think is there anything else that you would like
17 to raise before we adjourn the panel?
18 Mr. Cavanaugh?

19 MR. CAVANAUGH: Yes, one last thing about the
20 patent owner's suggestion in terms of proposal,
21 but a suggestion to wait for the decision on
22 institution. You know, not quite sure that that's
23 what joinder is contemplating. They were
24 identifying that we delayed letting the Board know
25 and that that was something that was allegedly

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2 inept to prejudice.

3 I'm not quite sure given everything we've
4 talked about how that prejudice would either, A,
5 exist; or B, is not addressed by the circumstances
6 that we have been talking about, adopting the
7 Lightspeed expert's position, you know, if there's
8 a settlement we would use Lightspeed's expert.
9 And so I'm not quite sure the genesis of the
10 suggestion of the patent owner, but I'm not sure
11 that it's really applicable or appropriate here.

12 JUDGE PLENZLER: Okay. Mr. Yates, do you
13 have anything else you wanted to add?

14 MR. YATES: Your Honor, only that with
15 respect to that last point, we had recently filed
16 the patent owner responses in the Lightspeed IPRs
17 through December and January is when we have taken
18 depositions. And what may have been in an
19 alternate universe would have been a pushing back
20 of some of those deadlines to facilitate some sort
21 of joinder, but this call didn't happen at that
22 time and we were further down. Fortuitously, the
23 institution decision on the Clover matters at
24 current force and speed without some sort of
25 acceleration would take place after the close of

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2 the discovery of the Lightspeed matters. And they
3 moot some of the concerns.

4 JUDGE PLENZLER: Okay. Mr. Gray, you don't
5 have anything further, do you?

6 MR. GRAY: I do not, thank you.

7 JUDGE PLENZLER: All right. I am going to
8 put everyone on a brief hold and confer with my
9 panel, and I will be back shortly. All right.

10 (Brief pause.)

11 JUDGE PLENZLER: All right. Judge Plenzler
12 back on the call here. Mr. Cavanaugh, you still
13 with us?

14 MR. CAVANAUGH: I am, your Honor.

15 JUDGE PLENZLER: All right. Mr. Yates?

16 MR. YATES: Yes, sir, your Honor.

17 JUDGE PLENZLER: All right. Mr. Gray?

18 MR. GRAY: Yes, your Honor.

19 JUDGE PLENZLER: All right. Thanks,
20 everyone, for the time this morning. I think what
21 we have to do right now is just wait. As
22 Mr. Yates mentioned, there's still time to file
23 the preliminary responses in the three proceedings
24 at issue here. And so we will wait for those to
25 come in. And if we do need additional briefing

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2 and something comes up, for example, where we
3 decide to institute and allow joinder and we need
4 some sort of statement from petitioner in the 232
5 and other proceeding that they will follow what we
6 talked about today with respect to using the 779
7 proceeding's declarant, we will go ahead and reach
8 out to you and try to get that moving. But
9 otherwise, it seems like we are just going to have
10 a little bit of time to wait here to see how this
11 all plays out.

12 Before I terminate the call, do we have
13 anything else from Mr. Cavanaugh?

14 MR. CAVANAUGH: Nothing from me, your Honor.
15 Thank you.

16 JUDGE PLENZLER: Okay. Mr. Yates?

17 MR. YATES: Nothing further. Thank you, your
18 Honors.

19 JUDGE PLENZLER: Okay. Mr. Gray?

20 MR. GRAY: Nothing further. Thank you, your
21 Honor.

22 JUDGE PLENZLER: Okay. And Mr. Cavanaugh, I
23 think you said that you arranged for the court
24 reporter, correct?

25 MR. CAVANAUGH: We did, your Honor.

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2 JUDGE PLENZLER: Okay.

3 MR. CAVANAUGH: I guess we can file it in the
4 232, the 288, 287 proceedings. That way you have
5 the benefit of it.

6 JUDGE PLENZLER: Right, yeah. We appreciate
7 that. And it was very helpful to have a court
8 reporter today. So thank you for arranging that.
9 And with nothing else, this call is adjourned. I
10 thank everyone, and have a good weekend.

11 (Hearing concluded at 12:02 p.m.)

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C E R T I F I C A T E

I, JOSHUA B. EDWARDS, a Notary Public for and
within the State of New York, do hereby certify
that the above is a correct transcription of my
stenographic notes.



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