

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FORESIGHT DIAGNOSTICS INC.,) IPR 2023-00224
)
PETITIONER,)
)
VS.)
)
PERSONALIS, INC.,)
)
PATENT OWNER.)
)

REPORTER'S REMOTE

TRANSCRIPT OF PROCEEDINGS

FEBRUARY 22, 2024

TECKLA CLAY, CSR 13125
STENOGRAPHIC COURT REPORTER

APPEARANCES:

FOR PETITIONER: IRELL AND MANELLA LLP
BY: ANDREW KRAUSE
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ALSO PRESENT: ROBERT A. POLLOCK, JUDGE
TIMOTHY GENE MAJORS, JUDGE
ULRIKE W. JENKS, JUDGE

TRANSCRIPT OF PROCEEDINGS

FEBRUARY 22, 2024

11:01 A.M.

THE COURT: Good afternoon. This call is for IPR 202300224 and 00317. I am Judge Pollock. On the line with me are Judges Jenks and Majors. Who do we have on the line for petitioner Foresight Diagnostics?

MR. KRAUSE: For petitioner you have Andrew Krause from Irell and Manella.

THE COURT: Good afternoon. Who do we have on the line for patent owner Personalis.

MR. LUMAN: Your Honor, this is Nate Luman on behalf of patent owner.

THE COURT: Good afternoon Mr. Luman. We have a court reporter. Do we have a court reporter on the line?

COURT REPORTER: Good afternoon, this is Teckla Clay.

THE COURT: Good morning Teckla. The parties shall submit the transcript as an exhibit in both cases and will constitute the record of this conference.

I understand petitioner seeks authorization to file motions to strike exhibits 2178, 2181 and 2183 in the 00224 IPR and exhibits 2178, 2181,

1 2185 and 2186 in the 00317 IPR as well as the
2 corresponding portions of patent owner's sur-replies.

3 Mr. Krause, would you please explain why
4 these exhibits arguments do not respond to arguments
5 raised in the reply as permitted are under 37 CFR
6 42.23(b). You have the floor.

7 MR. KRAUSE: Thank you, your Honor. Yes our
8 position on this is that 37 CFR 42.23(b) in connection
9 with the surreply authorizes as proper surreply
10 evidence deposition transcripts of the
11 cross-examination of reply witnesses. And so we're not
12 objecting to the submission of the second Quackenbush
13 deposition transcript which is Exhibit 2188.

14 But we're seeking relief with respect to
15 the other exhibits mentioned as exceeding the scope of
16 that rule. And certainly we're aware that there are
17 some Board decisions which have allowed the submission
18 of additional exhibits when needed to clarify or
19 understand a deposition transcript.

20 But that is largely not the case here.
21 And this is only one exhibit where that's arguably the
22 case.

23 THE COURT: The Chicago Manual of Style you're
24 referring to.

25 MR. KRAUSE: Correct the Chicago Manual of Style

1 is discussed in the context of some deposition
2 testimony. However, to address that one first, Dr.
3 Quakenbush explains that it's an exhibit that opposer
4 likely wouldn't have seen. And so therefore it's not
5 really necessary to understand the testimony if it's
6 being used to bolster one of Patent Owner's substantive
7 arguments.

8 The remaining exhibits which are 2181,
9 2183, 2185 and 2186 when those are raised in the
10 surreply there's no corresponding discussion of any
11 deposition testimony whatsoever there being used as
12 substantive evidence to support merits arguments.

13 And if they wanted to submit those, they
14 could have submitted them earlier. All of these
15 exhibits existed when the petition was filed. To now
16 then, they're simply untimely on surreply, when we
17 don't have an opportunity to fully respond to them.

18 And I think, you know, one of the issues
19 here we think kind of as a procedure of how this comes
20 up in these proceedings is prejudicial to the
21 petitioner because patent owner for example sought
22 authorization and leave to submit these exhibits in
23 advance. It's unlikely in that posture that the motion
24 would be granted.

25 Here under this approach patent owner can

1 engage in sort of self help. And the onus is on the
2 petitioner to enforce the requirements of Rule 42.23
3 limiting the evidence of the reply witness deposition
4 transcript.

5 So for those reasons we think these are
6 all untimely new exhibits. And that's why we're
7 requesting the authorization to strike those. And
8 unless there are further questions, we thank the Board
9 for the time and consideration and request the
10 authorization for the motions.

11 THE COURT: All right. Mr. Luman, would you
12 please respond. And note I'm particularly interested
13 in your justification with respect to Exhibits 2181 and
14 2183. As I read your surreply they're very tenuously
15 connected to anything in the reply. So please let me
16 know what you think about this.

17 MR. LUMAN: 2183 and 2185, your Honor?

18 THE COURT: 81 and 83.

19 MR. LUMAN: Thank you. Thank you, your Honors.
20 So the exhibit that petitioner wants to strike they
21 were introduced into the proceedings during the
22 cross-examination of petitioner's expert Dr.
23 Quackenbush. And we learned important things when we
24 asked Dr. Quackenbush about each of these exhibits.

25 And so first Dr. Quackenbush's reply

1 declaration didn't identify any instance where PCR
2 primers were used as capture probes. Instead he
3 identified a few instances where the word capture was
4 used at the same instance as PCR. And one of those
5 instances had the word capture in quotes.

6 So during cross-examination we presented
7 Exhibit 2178. That's the excerpt from the Chicago
8 manual style about these quotes. We asked Dr.
9 Quackenbush about that exhibit in connection with the
10 word capture being in quotes and what the quotes
11 designate.

12 And that deposition transcript spans
13 several pages of these, and we cited the relevant
14 portions of the transcript in the surreply including
15 his testimony about placing the word capture in scare
16 quotes.

17 The second with respect to whole GM
18 sequencing we asked Dr. Quackenbush during his
19 deposition about Exhibit 2183 and that's one that your
20 Honors asked about. That's a publication by Leary from
21 the year 2012. And this publication was cited in Dr.
22 Quackenbush's reply declaration, Exhibit 1225 at
23 paragraph 32.

24 And petitioner did not file Leary 2012 as
25 an exhibit with it's reply brief. So we asked Dr.

1 Quackenbush about it during his deposition which only
2 seemed fair since he cited it in the first place. And
3 the article in the first instance where the Leary Group
4 used the term whole genome sequencing span page 209 to
5 217 of the deposition transcript.

6 And we can take the other remaining
7 exhibits together that's Exhibit 2181, 2185 and 2186.
8 These are publications that were authored by the
9 scientific professors that founded petitioner's
10 company. They're not new exhibits to petitioner
11 because patent owner cited them in the related matters
12 of IPR 2023-00545 and 546.

13 And we asked Dr. Quackenbush about these
14 exhibits during his deposition. And we learned that
15 Dr. Quackenbush had not seen these articles before. So
16 these exhibits impeached Dr. Quackenbush's credibility
17 because it revealed petitioner's bias in the materials
18 that it made available to it's expert.

19 And so it's expert's testimony aren't
20 based on sufficient facts and they're not the product
21 of reliable principles because petitioner withheld
22 those articles that were authored by it's own founders
23 from the expert witnesses. And so their shielding of
24 these experts from the exhibits is an example of
25 petitioner's efforts to avoid the teachings of it's

1 founders statements that are discussed in the patent
2 owner response and the surreply.

3 And if the Board would like pin cites of
4 the exact transcript that's at pages 141 to 144 and 256
5 to 266. Now with respect to Exhibits 2181, that is
6 where their founders talked about hybrid capture
7 workflows having long turnaround times. And that's an
8 example of why a person stealing the art would not
9 change from using PCR primers over to capture probes
10 and the relevance there that petitioner did not allow
11 their expert to see the founders statements about
12 hybrid capture workflow.

13 And now patent owner believes that these 5
14 exhibits are not new evidence. It's under rule
15 42.53(f)3 which is the rule that governs deposition
16 exhibits. It says that exhibits used during the
17 deposition shall be accepted pending any Board decision
18 on objections raised by the other party.

19 So we believe that the exhibits became
20 part of the proceeding through their use to
21 cross-examine Dr. Quackenbush under the rule that
22 governs deposition exhibits. And rule 42.53 has it's
23 own built-in mechanism for a party to oppose deposition
24 exhibits which is to file a motion to exclude.

25 And so petitioner is pointing to a

1 different rule, Rule 42.23 to exclude the deposition
2 exhibits. But that rule shouldn't be interpreted
3 contrary to rule 42.53 because patent owner they need
4 to be able to introduce exhibits during
5 cross-examination to test petitioner's witness.

6 Otherwise the patent owner would lose the
7 ability to effectively cross-examine petitioner's
8 expert. I'll mention here that petitioner did not meet
9 and confer with patent owner before reaching out to the
10 Board with this evidentiary dispute.

11 And what I wanted to say was that here the
12 Board has already preauthorized petitioner to file a
13 motion to exclude in this proceeding and that's in the
14 scheduling order. And so patent owner would not object
15 to petitioner briefing its objections to the exhibits
16 through that previously authorized motion. We're not
17 trying to preclude petitioner from voicing their
18 objections.

19 But a motion to exclude is the mechanism
20 provided by Rule 42.53 for deposition exhibits. And
21 that's what patent owner believes should be allowed
22 here. And that option was not explored by the parties.
23 But just last night petitioner did serve objections to
24 evidence on those exhibits indicating that it does
25 intend to file a motion to exclude.

1 So allowing petitioner to brief their
2 position in a motion to strike and then again in a
3 motion to exclude that would present multiple briefs on
4 overlapping issues which I don't think would be a good
5 use of the parties or the Board's resources.

6 Because --

7 THE COURT: Mr. Luman, aside from the Chicago
8 Manual of Style why weren't these exhibits raised in
9 the patent owner response? Why wait until now? Why
10 wait until the surreply?

11 MR. LUMAN: Well we didn't know what Dr.
12 Quackenbush was going to raise in his declaration in
13 his reply declaration. So, for example, he brought up
14 the Leary 2012 reference which is Exhibit 2183 in his
15 declaration, but didn't provide a copy of it. So we
16 felt that it was important since they brought it up for
17 us to be able to make some comments.

18 And same thing with the other exhibits,
19 that the Exhibits 2181, 2185 and 2186 we wanted to know
20 if they had allowed Dr. Quackenbush to review those
21 references and in fact he hadn't. And so that was
22 important information to us because it shows that they
23 have been shielding their witness from these types of
24 exhibits.

25 And I wanted to mention that if the Board

1 would authorize a motion to strike that would be up to
2 6 rounds of briefing with there being an opening
3 motion, opposition and a reply on a motion to strike
4 and a motion to exclude.

5 So if the Board were going to authorize a
6 motion to strike I think that the briefing could be
7 done succinctly and that petitioner should not be
8 allowed to do overlapping arguments in motions to
9 exclude. I did want to emphasize that patent owner
10 wants to comply with the Board's determination
11 regarding these exhibits.

12 We believe that they were properly
13 introduced into the proceedings through the
14 cross-examination of petitioner's expert and that we
15 learned important things through questioning the expert
16 with this exhibit.

17 If the Board sees things differently then
18 patent owner will promptly comply with the Board's
19 instructions on how to proceed. Thank you.

20 THE COURT: Mr. Krause, we've heard some very
21 interesting context regarding these exhibits. Do you
22 have any responses?

23 MR. KRAUSE: Yes. I'll begin by noting, I'll
24 start with the allegation that we did not meet and
25 confer. That is not true. We met and conferred with

1 them at the deposition and then obviously met and
2 conferred with them via e-mail in advance of requesting
3 the conference call. That's point 1.

4 Point 2 is I think there's a conflation in
5 the arguments that we heard about a motion to strike as
6 opposed to a motion to exclude. And this has come up
7 in other cases addressing the issue of untimely
8 surreply evidence where the petitioner is faulted for
9 not seeking authorization to move to strike the
10 untimely evidence. And a motion to exclude would
11 address issues relating to the admissibility of the
12 evidence.

13 So there's I think some, and we're happy
14 to file a single brief on this and keep it short and
15 probably not even need a reply on it, but just to be
16 clear on the issue of briefing, we're trying to follow
17 the precedent that's out there.

18 On the issue of the Leary 2012 exhibit I
19 will note that the reason that that is addressed in Dr.
20 Quackenbush's reply declaration is because Dr. Furnow
21 raises it in paragraph 107 of his declaration Exhibit
22 2031 when he discusses Newman and he flags some
23 footnotes.

24 And in his reply declaration Dr.
25 Quackenbush relies on the title of that to explain what

1 the reference is about. And I'll also note that for
2 Dr. Quackenbush's reply declaration all of the exhibits
3 cited, they did not object in anyway for completeness
4 or missing exhibits. So those exhibits were all filed
5 and no objection came from petitioner on any basis
6 there.

7 On the other documents I think the
8 allegation that he was shielded from seeing these
9 exhibits is incorrect. And I think they came up at
10 deposition. However, they were not a record in these
11 proceedings. And I think that argument is a little bit
12 of a misdirection.

13 And certainly they were all available for
14 them to file at a prior time. And notably all of those
15 documents post date are the priority of these patents.
16 I believe that hits the points, unless your Honors have
17 further questions.

18 THE COURT: I do not at the moment. But let me
19 confer with my colleagues and I'll put you all on hold
20 for a minute.

21
22 (Recess)

23
24 THE COURT: This is judge Pollock. Mr. Krause,
25 are you there?

1 MR. KRAUSE: I am here, your Honor.

2 THE COURT: And Mr. Luman?

3 MR. LUMAN: Yes, your Honor.

4 THE COURT: Wonderful. All right. The panel
5 has conferred and I think we're unanimous in that we're
6 not going to authorize the motion to strike. However,
7 in the interest of fairness we're going to allow
8 petitioner to file a 3 page response to the arguments
9 concerning those exhibits due in 5 business days. Any
10 questions or comments?

11 MR. LUMAN: No, your Honor. To confirm that
12 would be next Thursday essentially.

13 THE COURT: That sounds good. Close of business
14 next Thursday, is that acceptable?

15 MR. KRAUSE: I apologize, this is Andrew Krause.
16 That is acceptable. Thank you, your Honors.

17 MR. LUMAN: Same, Nate Luman. Thank you, your
18 Honors.

19 THE COURT: Given that we have these additional
20 exhibits to deal with, do both parties still want 45
21 minutes for the oral hearing?

22 MR. LUMAN: Patent owner side --

23 THE COURT: I'm sorry I didn't get that.

24 MR. LUMAN: Sorry your Honor, from patent owner
25 that would be preferable. There's 2 proceedings we

1 think 45 minutes would be a fair amount of time.

2 THE COURT: Petitioner, is 45 minutes still
3 sufficient?

4 MR. KRAUSE: Yeah and for petitioner 45 minutes
5 is still sufficient. This is Andrew Krause.

6 THE COURT: All right. Is there anything else
7 before we conclude?

8 MR. KRAUSE: Not from petitioner, your Honor.

9 MR. LUMAN: Not from patent owner, your Honor.

10 THE COURT: All right. Thank you gentlemen.
11 We're now off the record.

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13 (Proceedings concluded at 11:22 a.m.)

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BEFORE THE PATENT TRIAL AND APPEAL BOARD.

FORESIGHT DIAGNOSTICS INC.,) IPR 2023-00224
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PETITIONER,)
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PATENT OWNER.)
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I, TECKLA CLAY, CSR NO. 13125, OFFICIAL
REPORTER OF THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY
CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH 17
COMPRISE A FULL, TRUE AND CORRECT REMOTE TRANSCRIPT OF
THE PROCEEDINGS TAKEN IN THE ABOVE ENTITLED
CAUSE ON FEBRUARY 22, 2024 THIS 29TH DAY OF JUNE,
2024.



TECKLA CLAY, CSR NO. 13125

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California Code of Civil Procedure

Article 5. Transcript or Recording

Section 2025.520

(a) If the deposition testimony is stenographically recorded, the deposition officer shall send written notice to the deponent and to all parties attending the deposition when the Original transcript of the testimony for each session of the deposition is available for reading, correcting, and signing, unless the deponent and the attending parties agree on the record that the reading, correcting, and signing of the transcript of the testimony will be waived or that the reading, correcting, and signing of a transcript of the testimony will take place after the entire deposition has been concluded or at some other specific time.

(b) For 30 days following each notice under subdivision (a), unless the attending parties and the deponent agree on the record or otherwise in writing to a longer or shorter time period, the deponent may change the form or the substance of the answer to a question, and may either approve the transcript of the deposition by signing it, or

refuse to approve the transcript by not signing it.

(c) Alternatively, within this same period, the deponent may change the form or the substance of the answer to any question and may approve or refuse to approve the transcript by means of a letter to the deposition officer signed by the deponent which is mailed by certified or registered mail with return receipt requested. A copy of that letter shall be sent by first-class mail to all parties attending the deposition.

(d) For good cause shown, the court may shorten the 30-day period for making changes, approving, or refusing to approve the transcript.

(e) The deposition officer shall indicate on the original of the transcript, if the deponent has not already done so at the office of the deposition officer, any action taken by the deponent and indicate on the original of the transcript, the deponent's approval of, or failure or refusal to approve, the transcript. The deposition officer shall also notify in writing the parties attending the deposition of any changes which the deponent timely made in person.

(f) If the deponent fails or refuses to approve the transcript within the allotted period, the

deposition shall be given the same effect as though it had been approved, subject to any changes timely made by the deponent.

(g) Notwithstanding subdivision (f), on a seasonable motion to suppress the deposition, accompanied by a meet and confer declaration under Section 2016.040, the court may determine that the reasons given for the failure or refusal to approve the transcript require rejection of the deposition in whole or in part.

(h) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition under this section, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

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VERITEXT LEGAL SOLUTIONS

COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the deposition officer. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the deposition officer and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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