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Transcript of Teleconference

Date: June 20, 2024

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WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

1 UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD
3

4 SONY INTERACTIVE)
5 ENTERTAINMENT LLC,)
6 Petitioner,)
7 vs.)
8 QUANTUM IMAGING LLC,)
9 Patent Owner.)
10 _____
11

12 CASE NUMBER IPR2023-00954
13 U.S. PATENT NUMBER 8,458,028
14 CASE NUMBER IPR2023-00995
15 U.S. PATENT NUMBER 10,846,941
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1 [Proceedings occurred as follows:]

2

3 JUDGE: Good morning. I heard there was a
4 court reporter. Can the parties please identify
5 themselves?

6 MR. TUTTLE: Good morning. This is Kevin
7 Tuttle on behalf of the Patent Owner, Quantum Imaging,
8 with Spencer Fane. We arranged for the court
9 reporter, Planet Depos. Also on the call are my
10 colleagues Homayoon Rafatiyo and Pat Dunn from
11 Spencer Fane, and colleague Ann Robl from Dunlap
12 Coddling.

13 MR. RAFATIJO: Good morning, Your Honor.
14 I apologize.

15 JUDGE: That's okay.

16 MR. ARJOMAND: Good morning, your Honor.
17 This is Mehran Arjomand and my colleague Bryan
18 Blumenkopf with Morrison & Foerster for Petitioner.

19 JUDGE: Great. And just so the record is
20 clear, this is a conference call in the matter of
21 IPR2023-00954.

22 Patent Owner, as you requested this call,

1 can you please let us know what you want to talk
2 about?

3 MR. TUTTLE: Correct, Your Honor. This is
4 the correct IPR, and my colleague Homayoon will speak
5 to our issues.

6 MR. RAFATIJO: Good morning, Your Honor.
7 This is Homayoon Rafatijo from Spencer Fane
8 representing Quantum Imaging.

9 We are here before you, Your Honor, for two
10 overarching reasons. One is our request to file -- to
11 get authorization to file a motion to strike certain
12 exhibits and arguments based on the exhibits that are
13 presented in the reply for the first time.

14 And the second reason we are here before
15 you, Your Honor, is that Petitioner has exceeded the
16 5,600 word limit in the reply by about 8 percent, and
17 therefore we would like to ask for some recourse to
18 have the same number of words in our surreply.

19 So I'll start with the first issue for
20 which we are before you, Your Honor. Patent Owner
21 believes that Petitioner has belatedly introduced new
22 evidence, and this evidence is a 1,000-page-long

1 textbook co-authored by Dr. Medvidovic and was
2 published seven years, Your Honor, seven years after
3 the priority date of the '028 patent. The '028 patent
4 priority date is 2002. This textbook was published in
5 2009.

6 And Petitioner is using this textbook to
7 establish the state of the art in 2002 and the
8 knowledge of a POSITA back in 2002. To be clear, Your
9 Honor, they are not using these textbooks for any
10 impeachment or credibility purposes.

11 In other words, they are not pointing to
12 any language in this textbook that said -- that show
13 that Dr. Medvidovic offered an opinion in 2009 about
14 the state of the art in 2002 or earlier that is
15 different from his opinion in this proceeding.

16 Patent Owner believes that the fact
17 warrants a motion to strike for two reasons that I'm
18 going to discuss shortly, but alternatively, we
19 request that the Board order that no party rely on
20 these textbooks or any testimony or argument that's
21 based on these textbooks during the oral argument.

22 Now, the first reason, Your Honor, for the

1 motion to strike is prejudicial if evidence was -- is
2 belatedly submitted. And that's beyond dispute.
3 Petitioner had access to this book when they filed the
4 petition, but they did not present it as an exhibit in
5 this -- in this proceeding when they filed the
6 petition.

7 Now, the prejudice on Patent Owner to
8 review some thousand-page-long textbook and address
9 the arguments is substantial. As a matter of fact,
10 the Board has, in the past, struck evidence that is
11 submitted at the reply stage based on the same kind of
12 prejudice.

13 For example, in IPR2019-01278, Paper 26,
14 the Board said, you know, you are using a new -- the
15 Board admonished Petitioner saying that Petitioner is
16 using new evidence to present new arguments and now
17 Patent Owner needs to depose, their expert needs to
18 review this new evidence. And on top of that, the
19 most important burden on us is the fact that they are
20 shifting the burden of proof.

21 They present an evidence that's from 2009,
22 that's published in 2009, and they try to establish

1 the state of the art in 2002, and now we have to go
2 out there and find evidence to rebut what they're
3 doing.

4 So essentially this burden of proof
5 shifting is very prejudicial and the Board has
6 previously rejected submission by argument --

7 JUDGE: I don't --

8 [Simultaneous Speaking]

9 JUDGE: I guess I'm struggling a little bit
10 with how this is shifting the burden of proof. I
11 mean, it sounds like your argument was this evidence
12 shouldn't get weighed. I mean, why is this -- why is
13 this shifting of the burden of proof?

14 MR. RAFATIJO: But, Your Honor, they are
15 using this 2009 textbook to say that a POSITA in 2002
16 knows whatever is in this textbook in 2009. And now
17 it --

18 JUDGE: Well, why is that --

19 MR. RAFATIJO: Sure, Your Honor.

20 JUDGE: -- an argument to strike an
21 exhibit? This sounds like a motion to exclude to me.

22 MR. RAFATIJO: Well, Your Honor --

1 JUDGE: I mean, a strike -- a motion to
2 strike is usually in arguments that are -- exceed the
3 scope of the reply or are untimely. So why is this --
4 why is this untimely? Does it not respond to your
5 arguments?

6 MR. RAFATIJO: Sure. Sure, Your Honor.
7 That's the second reason that I am asking for a motion
8 to strike that is even more important than the first
9 one. That's a new argument essentially changing the
10 grounds of unpatentability presented Petitioner.

11 They are -- the grounds on patentability of
12 the petition was Angles in view of the knowledge of
13 POSITA and Robinson in view of knowledge of POSITA.
14 And you, Your Honor, understood the knowledge of
15 POSITA is the knowledge of POSITA as of 2002.

16 They are using this textbook as essentially
17 equivalently an alternative of the knowledge of POSITA
18 in 2002. And the Board, in another decision, says,
19 well, essentially, Petitioner's implicitly framing the
20 new reference as an alternative to the prior art
21 asserted in the petition.

22 So they are -- they are changing the

1 grounds of unpatentability from Angles in view of
2 knowledge of POSITA to Angles in view of this
3 textbook.

4 So this is a new grounds of unpatentability
5 that was not presented to us in the petition. And
6 relying on a 2009 textbook to establish that the state
7 of the art in 2002, as specifically was discussed in
8 another Board's -- I mean, relying on new evidence
9 establishes state of the art was specifically
10 discussed in another decision by the Board where the
11 Board struck the evidence as untimely, and also the
12 argument based on that evidence.

13 So I'm more than happy to provide you a
14 list of all examples where I've drawn the reply and
15 supplemental declaration where they rely on these
16 textbooks to establish the state of the art.

17 And to answer your question, Your Honor,
18 finally -- and I'm going to end on this point for our
19 first issue -- is that what we are using in our
20 replies about a POSITA in 2002, never argued about a
21 POSITA in 2009. So we -- for this patent, we are in
22 the world of pre-2002 and they are exceeding the scope

1 of the reply by relying on a 2009 textbook to
2 establish the state of the art in 2002.

3 JUDGE: Okay, let's hear from the
4 Petitioner on this -- on this point, on the motion to
5 strike.

6 MR. ARJOMAND: Thank you, Your Honors. And
7 thank you for having this call today. As we explained
8 to the Patent Owner --

9 JUDGE: Can you identify yourself? I'm
10 sorry, could you identify yourself?

11 MR. ARJOMAND: I'm sorry, Your Honor.

12 Yes, this is Mehran Arjomand of Morrison &
13 Foerster, Your Honor.

14 JUDGE: Thank you.

15 MR. ARJOMAND: So as we -- yes, as we
16 explained to Patent Owner in the meet and concur, we
17 didn't think that this call to the Board was the
18 proper use of the Board's resources.

19 A motion to strike is a very exceptional
20 remedy that's very clear from the Consolidated
21 Practice Guide in 2019. As you indicated, Your Honor,
22 it's used for situations where the party has gone

1 beyond the scope of the briefing to raise something
2 that's new or that is, you know, not proper in the
3 proceeding.

4 Here, a big issue in the case is whether a
5 web browser can be considered a game application, and
6 what we provided in our reply was numerous pieces of
7 evidence supporting why a web browser can be a game
8 application, including from the prosecution history
9 and including from Dr. Medvidovic.

10 So Dr. Medvidovic testified in his
11 deposition about this textbook. He indicated -- and
12 this is in his deposition -- that he thought that a
13 person of ordinary skill in the art would consider his
14 textbook, on page 85 of his deposition.

15 And we asked him, Would a person of
16 ordinary skill in the art consider this textbook?

17 And he said, "Ordinary skill in the art as
18 of 2002 as I defined in my declaration. Such a person
19 may find this book useful."

20 And we provided this testimony in our reply
21 for the Board to see. In addition, the passages that
22 we're relying on in the textbook, this is from one

1 chapter, primarily, and that one chapter we provided
2 testimony from our expert, Mr. Crane, that indicated
3 that what's described in that textbook is concepts
4 that were known as of 2002. So everything that we
5 were pointing to in the textbook, we established in
6 Mr. Crane's testimony was already known.

7 We are not submitting the textbook as a
8 piece of prior art, but rather an indication of what
9 was known in 2002. And that's clear both from
10 Dr. Medvidovic's testimony and from our expert's
11 testimony.

12 So we think that the textbook is proper for
13 being introduced in the case because it goes to one of
14 the issues that is present in the '028 IPR, and even
15 if Your Honors don't think that it's proper, I think
16 you're -- you explained correctly that this is an
17 issue that goes to the weight of the testimony, one
18 that can be definitely addressed by you in your final
19 written decision. The Board is very well equipped to
20 consider evidence and give it the proper weight.

21 And, two, in the unusual case that the
22 Board believes that the -- a piece of evidence is not

1 proper, they can always exclude it from the hearing
2 via a proper motion to exclude.

3 So we don't think that this is a proper
4 request to the Board and we believe that there should
5 not be any authorization for a motion to strike.

6 JUDGE: Thank you.

7 MR. RAFATIJO: Your Honor, if I may
8 respond.

9 JUDGE: Yes, you may respond.

10 MR. RAFATIJO: Sure. Your Honor, first,
11 they are using -- my learned friend on the other said
12 that the issue -- the Court issue in this case is
13 whether a browser can be considered a game
14 application.

15 Your Honor, I refer you to the decision,
16 the institution decision, page 17 to 20, and also the
17 petition. This is a new theory they are advancing.
18 As Your Honor stated in decision at page 17 [as read]:
19 Petitioner contends that a person having ordinary
20 skill in the art would have understood that the
21 browser residing on a local computer makes the
22 accessed game application locally execute.

1 So the issue -- or Your Honor even also
2 said that [as read]: Petitioner contends that the
3 consumer -- that the consumer accesses the online game
4 using a browser running in the consumer computer.

5 So there's always an understanding that the
6 game application and browser are two different things.
7 They're not the same. And Your Honor says that they
8 are just using browser to access the online game.

9 Now, they are changing position. They
10 advanced this new theory based on this textbook. And
11 my friend also said that this is only one issue. No.
12 They are also using this textbook, a hypothetical
13 example in this textbook, to establish that in 2002
14 the POSITA was the bearer of the hypothetical
15 established in 2009 -- that was published in 2009
16 textbook for the ground two argument. It's not just
17 the first -- I mean, it's not just they're using this
18 textbook for ground one, but also for ground two.

19 Regarding the deposition, when they
20 introduced the evidence at the deposition I objected
21 and I preserved that right that this is not -- beyond
22 the scope, this is not in the evidence. And

1 Dr. Medvidovic only said that a POSITA in 2002 may
2 find this useful. Never said that a POSITA would be
3 aware of everything discussed in the book.

4 And on top of that, Your Honor,
5 Dr. Medvidovic also explained that, you know, there
6 are stuff that he believes today that he didn't
7 believe in 2009, and showing that the state of the art
8 has evolved significantly, exponentially, every year.
9 So how can people believe that the state of the art
10 has not changed from 2002 to 2009, and all of a sudden
11 a 2009 textbook establishes the knowledge of POSITA in
12 2002?

13 And one last point, Your Honor, the bottom
14 line here is, the grounds of unpatentability was
15 Angle's in view of the knowledge of a POSITA. They
16 are using these books to replace for the knowledge of
17 POSITA. They are using -- they are now essentially
18 saying, the grounds of unpatentability is Angles in
19 view of this textbook. And that's why, Your Honor, I
20 would like --

21 JUDGE: Well, they're not -- I mean,
22 they're not. Right? Everybody agrees the textbook

1 isn't prior art. I mean, the textbook -- in the
2 Federal Circuit, there is -- there are cases that say
3 that, you know, post file a date -- you know,
4 references from a -- references or books from after
5 the priority date can be extrinsic evidence about the
6 knowledge of skill in the art.

7 I mean, I think your arguments go more to,
8 you know, the weight that we should give this evidence
9 and -- or whether it's, you know, relevant and
10 therefore subject to a motion to exclude. Not -- I
11 mean, it does sound like it's responding to your
12 argument, and I don't understand why you can't -- if
13 you contend that it is a new argument, why you can't
14 just address that in your surreply, why we need to
15 have a motion to strike to do that.

16 MR. RAFATIJO: Well, Your Honor, because we
17 are prejudiced. We have to find out evidence from
18 2002 and earlier that shows that actually this -- what
19 they are contending based on a 2009 textbook is not
20 true. And that's what I was getting at with the
21 burden of proof shifting. And it's now -- you know,
22 we have to do all the legwork to find evidence

1 responsive to rebutting their point.

2 JUDGE: Well, first of all, I'm not sure
3 that you -- I'm not sure that you can submit evidence
4 of your surreply without permission, so I'm not sure
5 that that's correct.

6 I mean, what you're describing as prejudice
7 is something that happens in basically any reply where
8 there's additional evidence submitted. Right?

9 MR. RAFATIJO: Well, I mean, they have
10 changed, essentially, their position, and if this
11 textbook was available to them back in -- back in 2023
12 when they filed the petition, I think they would use
13 it. And they're not responding to any of our
14 argument.

15 As I mentioned, Your Honor, they never
16 argued in the petition that a browser is a game
17 application. I read your quote from you, Your Honor,
18 it was always an understanding that the browser -- you
19 know, accessing the game application with the browser
20 makes the game application locally exec.

21 JUDGE: Well, you know, I haven't read all
22 of the materials in awhile so I'm not going to rule on

1 whether that's a new argument or not. A new
2 argument -- you know, that -- let's put that aside for
3 a moment. I understand that, and that's something
4 that you can raise in your -- I guess I'm just failing
5 to understand why this isn't something that you can
6 raise in your surreply that it's a new argument, and
7 then we can address it in the hearing or in the final
8 written decision.

9 I guess I'm not -- I'm just not really
10 seeing the need for a motion to strike based on what
11 you described.

12 MR. RAFATIJO: Well, Your Honor, in the
13 trial guidelines in circumstances that prompt a need
14 for a motion to strike is when they raise new argument
15 or something belated, untimely evidence, and I think
16 we have both of those. I mean, we need to preserve
17 our right because, again, the prejudice on us to rebut
18 these points are great.

19 JUDGE: Okay. I think we'll take this
20 under advisement. We'll try to issue an order in the
21 next couple weeks about whether we authorize this
22 motion or not.

1 Why don't we talk about the second point,
2 the reply word count.

3 MR. RAFATIJO: Sure. So Your Honor, when
4 we met and conferred we provided the other side one
5 case as an example of why exceeding the word limit by
6 virtue of not counting the words in the images is not
7 normal practice. As a matter of fact, it's a practice
8 that the Board reprimanded parties for doing so.

9 So they are exceeding the word limit by 380
10 words, and that's almost 8 percent of what they get
11 because they did not count the words in the images.
12 They put, I guess, eight or nine images in the reply
13 and those images have words. And in the past, the
14 Board has authorized the Patent Owner to have to
15 recoup that number of words, the same exact number of
16 words, with their surreply.

17 When we offered Petitioner -- I mean, the
18 Board also took some extreme measure that it has
19 expunging the reply altogether for repeat offenders,
20 but we just ask for to have the same number of word
21 count that they -- that they exceeded the limit with,
22 to have for our surreply, but they decline our offer

1 of compromise.

2 JUDGE: Okay. The Petitioner?

3 MR. ARJOMAND: Thank you, Your Honor. This
4 is Mehran Arjomand again. We again believe that this
5 request was not worthy of the Board's resources.
6 There's no dispute that if you use a word counting
7 tool, such as the Microsoft Word program, that our
8 word count is within the limit of the -- of the reply.
9 The only issue is that Patent Owner has then
10 additionally gone beyond and counted every word in the
11 figures.

12 So, for example -- I don't know if Your
13 Honors have the reply in front of you --

14 JUDGE: I'm looking at it right now.

15 MR. ARJOMAND: Yeah. I'm taking a look at,
16 for example, page 2 of the reply, and it -- we had put
17 in the reply Figure 1 of Angles and Figure 9 of
18 Angles. And, for example, in Figure 1, Element 20 is
19 defined as "communication medium." They are counting
20 that as two additional words.

21 We don't think that the way they're
22 approaching the word count issue is proper. We have

1 not used these figures to try to circumvent the word
2 count. We are just using these figures for
3 illustrative purposes.

4 We explain the figures in our -- in our
5 text. We are not just dumping the figures into the
6 reply and moving away from them. We actually use our
7 word count to try to explain to the Board why, you
8 know, the issues relating to this proceeding are
9 associated with these figures and why it would be
10 helpful for the Board to see the figures in making the
11 arguments.

12 We did not provide any kind of annotations
13 to these figures. If you just scroll through,
14 specifically no textural annotations. We might have
15 highlighted a portion of a figure with the -- you
16 know, some kind of border, but we never put any kind
17 of textural annotations.

18 And if you just scroll down, we -- none of
19 the figures are blocks of text or a portion of
20 deposition testimony that, you know, arguably would be
21 considered, you know, something that should be counted
22 in the word count, it's that they're just figures to

1 help the Board understand the concepts that we're
2 describing or addressing in our narrative text.

3 So we took a look at the cases that Patent
4 Owner -- you know, Patent Owner just gave us one case,
5 and we looked at some additional cases that the Board
6 has addressed this -- you know, addressed on this
7 issue, and in our view we think that our situation
8 doesn't meet those cases where the Board has gone to a
9 violation of the word count and it's that it's
10 consistent with those cases where the Board has found
11 the reply to be proper.

12 Specifically, as I just mentioned, the
13 figures are only for illustrative purposes. There are
14 no textural annotations, there's nothing to indicate
15 that we're trying to circumvent the word count, and we
16 have used our word count to actually describe the
17 figures and we're not just providing the block of, you
18 know, text or deposition testimony as a way to
19 circumvent the word count.

20 So we don't think that Patent Owner's
21 request is proper and we think that they should abide
22 by the word count just like we did for the reply.

1 MR. RAFATIJO: May I respond, Your Honor?

2 JUDGE: Thank you.

3 Yes.

4 MR. RAFATIJO: Your Honor, the counsel's
5 view in this case, the first counsel to file a
6 petition as a matter of fact, actually counted all the
7 words in the figures and images in the petition toward
8 the word count, so there was this understanding that
9 the Petitioner --

10 JUDGE: So, wait. So I'm like looking at
11 page 7 and 8. So are you saying that just because it
12 says [as read]: mystery, adventure, sports, sci-fi,
13 future, education, future, that should count?

14 MR. RAFATIJO: Your Honor, it's not me
15 saying that, it's --

16 JUDGE: And page 8 where it says -- I'm
17 sorry. And at page 8 where it says, you know, [as
18 read]: First Church, Street, Boston -- I can barely
19 read it -- and whatever any -- I don't even know what
20 it says for that -- can be inserted, blah, blah, blah.

21 So all those -- you want to count all those
22 words?

1 MR. RAFATIJO: Your Honor, the Board and
2 the rules are clear that if it's not in the Table of
3 Contents, to be counted. The Board in the past, in
4 this same exact situation, said for 187 words over the
5 limit. And the Board -- the Board says that the
6 Petitioner should have known that they should count
7 the words in the images, and the images were only used
8 for illustrative purposes, and even the Board said in
9 that case that we provided to the other side that the
10 remedy is not to just removing these numbers that
11 are -- that are put on the images for illustration, so
12 they cannot redact the numbers because that would
13 confuse the Board. The remedy is you just count all
14 the words and give us the correct number of the words.
15 And, again, Petitioner's understanding when
16 they filed the petition is that they have to count all
17 these words. And, Your Honor, for example, look at
18 page 12. I mean -- I mean, the two examples that you
19 showed us, Your Honor, agreed, do not have too many
20 words, but like page 12, the image that they used for
21 making substantive argument has a lot of words in it.
22 I mean, they can simply [inaudible] the record instead

1 of putting this image here and not counting the words
2 in it.

3 So, Your Honor, we think the rule is very
4 clear that they get only 5,600 words limit for the
5 reply. The Board has repeatedly configured this issue
6 in the past and all the Board granted Patent Owner the
7 same exact number of words for the surreply.
8 Otherwise, you know, there's no other remedy for us
9 that's equivocal.

10 MR. ARJOMAND: Your Honor, may I just
11 briefly address the final comment that he just made?

12 JUDGE: Sure.

13 MR. ARJOMAND: And, again, I don't believe
14 this is a proper use of the Board's resources and I'm
15 aware that, you know, we're continuing this call, but
16 if you look at the Trial Practice Guide, I don't think
17 that the way that the counsel for Patent Owner's
18 presenting the rule is proper at all.

19 It says "Excessive words in figures,
20 drawings, or images, deleting spacing between words,
21 or using excessive acronyms or abbreviations for word
22 phrases, in order to circumvent the rules on word

1 count, may lead to a party's brief not being
2 considered."

3 I don't think we're in that category at
4 all. We haven't used excessive words. We've used
5 eight or nine figures, as Patent Owners. Counsel has
6 indicated for illustrative purposes. They are meant
7 to help the Board understand the issues rather than
8 having to go to yet an exhibit and look at the
9 figures, they can just look at the reply and try to
10 understand the points that we're trying to make.

11 We -- as I mentioned, we haven't annotated
12 the figures. We haven't provided block quotes. These
13 are just figures, Your Honor, that are meant to help
14 the Board understand the issues, so we think that
15 Patent Owner's request for additional words is not
16 proper at all.

17 MR. RAFATIJO: One last statement, Your
18 Honor, from Patent Owner, please.

19 JUDGE: Okay.

20 MR. RAFATIJO: Your Honor, in the case that
21 we cited, provided to the Petitioner, the word limit
22 was 14,000 words, and Petitioner exceeded the word

1 limit by only 187 in images that were there for
2 illustrative purposes, and the Board said that this is
3 not okay because per 37 C.F.R. Section 42.24, there
4 are only certain items that they can exclude in the
5 word count. Images, everything else, they need to be
6 counted toward the word limit.

7 And with that, Your Honor, I'll be -- we
8 will finish our argument for the second issue.

9 JUDGE: Thank you.

10 I'd like to thank the parties. I'd also
11 like to tell the parties that, you know, we've had a
12 number of these calls where I can only describe it as
13 some kind of failure between the counsel to
14 communicate effectively, and I'd really like to tell
15 you, going forward, please try to work some of these
16 out.

17 You know, I'm not -- you know, we're here
18 to decide things so we kind of count on the parties to
19 kind of filter out the disputes to the ones that are,
20 you know, worth our time and everybody's time. I
21 mean, there's like nine people on this call, you know,
22 and it's a substantial burden on everybody to have to

1 do these. So, you know, in going forward, I'd really
2 like it if the parties would try to work really hard
3 to cooperate and, you know, resolve some of these
4 things before we have to have a discussion about them.

5 With that, you know, we're not going to get
6 a decision on the word count today. We're going to
7 take it under advisement and we'll issue an order with
8 deciding both issues about the authorization for the
9 motion to strike and about the -- this word count
10 issue in a -- in a week or two.

11 Do the parties have anything else they wish
12 to discuss?

13 MR. RAFATIJO: Yes, Your Honor. We have a
14 deadline to file our surreply on July 8, so we would
15 hope to have a decision of the word count by then so
16 that we know that we can have that extra number of
17 words in our surreply.

18 And, Your Honor, I agree with you
19 100 percent. I appreciate the Board's time. For
20 instance, you said communication between the parties.
21 We have reached out to them the day after this
22 five-day reply to ask for their witness, their

1 declarant's availability for a deposition. Five times
2 we did followup and they have not got back to us. We
3 are not able to even notice the deposition because
4 they are not giving complete information to us.

5 So, Your Honor, we are anticipating to come
6 before you yet another time because they are not
7 responding to us. We just sent an email before the
8 call, Please get back to us [inaudible] Central time
9 so that we do not burden the Board by constant
10 requests, but they are not addressing any of our
11 communications.

12 So at this point, Your Honor, we anticipate
13 to come before you yet once again because they are
14 refusing to give us information to notice the
15 deposition for the declarant.

16 MR. ARJOMAND: Your Honor, I need to
17 respond to that. This is -- this is -- this is not --
18 this is not a proper point to raise to the Board, nor
19 is it proper use of the Board's resources.

20 Your Honor, this relates to Mr. Crane's
21 deposition associated with the supplemental
22 declaration and '028 reply.

1 We agreed to a time and place for the
2 deposition. It's going to be in Sacramento. Morrison
3 & Foerster does not have an office in Sacramento. We
4 are trying to find a place for the location for the
5 deposition. Everything has been set in terms of the
6 time of the deposition. It's going to be at 9:00 in
7 Sacramento. It's -- the date has been set. It's
8 July 1st. We are trying to find a location for his
9 deposition.

10 They -- you know, we've responded to them,
11 indicating that we are going to provide them with a
12 place for the deposition. So I just don't understand.
13 And I am just as exasperated as I believe Your Honor
14 is with these kinds of issues. I don't understand why
15 they need to raise this with the Board. So I --

16 MR. RAFATIJO: Well, Your Honor --
17 [Simultaneous Speaking]

18 JUDGE: One second. Wait. Has the date
19 been set?

20 MR. RAFATIJO: Yes.

21 MR. ARJOMAND: It's July --

22 JUDGE: Did you agree on a date?

1 Oh, no, I'm not talking to you. I'm
2 talking to him.

3 MR. RAFATIJO: Well, Your Honor, the
4 date --

5 JUDGE: Wait. Wait. I am asking you a
6 question. I don't want to hear -- at first I want to
7 hear the answer to my question and then you can make
8 your speech. Okay?

9 My first -- my question is, is he correct
10 that the date -- that you've agreed on a date and time
11 for the deposition and you're only looking for a place
12 for it?

13 MR. RAFATIJO: Correct, Your Honor.

14 JUDGE: Okay. So why is that a -- why is
15 that a Board problem?

16 MR. RAFATIJO: Because, Your Honor, we need
17 to give them -- we need to file a notice of deposition
18 and the rules require that we specify the place of the
19 deposition and the location for a proper notice. And
20 now we are within less than ten business days prior to
21 the deposition. It's July 1st. So basically we need
22 to ask the Board for a waiver of the ten-day rule. So

1 they --

2 JUDGE: The parties can agree -- the
3 parties can agree on that. I mean, or you can send an
4 email. I think you kind of misrepresented what's
5 going on and I didn't appreciate that.

6 MR. RAFATIJO: I mean, Your Honor, we --

7 JUDGE: You know, I -- you know, there are
8 failures to communicate and then there are failures to
9 communicate, and then there's you trying to
10 misrepresent what's going on, which is not
11 appreciated.

12 So, you know -- you know, if the parties
13 are working on it, if the date has been set, the time
14 has been set, and you're just trying to find a hotel
15 in Sacramento, you know, maybe work together on that
16 or, you know, figure -- you know, figure that out.

17 I mean, this is not -- this is not
18 something that should be raised on a call with us.

19 MR. RAFATIJO: Your Honor, we asked them to
20 waive the ten-day rule and we haven't even heard
21 anything back, so, you know, we need to -- and, you
22 know, it's the first time that I'm hearing about a

1 hotel in Sacramento. We constantly ask them to let us
2 know where is the location so that we can notice this
3 deposition properly, not in violation of the rules,
4 and they haven't even agreed to waiving this ten-day
5 notice requirement.

6 And I was not trying to misrepresent
7 anything to you, Your Honor. I said we have
8 incomplete information so that we are not able to
9 notice the deposition. And so I did not misrepresent
10 anything, Your Honor.

11 JUDGE: Well, okay. If you want to -- if
12 you want to hang your hat on that. You were trying to
13 raise this and make it sound like something bad was
14 happening and that they -- you made it -- it's just
15 very exasperating when you're raising it on a call.
16 Like, work these things out.

17 I mean, Petitioner, are you willing to
18 waive the ten-day notice requirement?

19 MR. ARJOMAND: Yes, Your Honor. I mean,
20 this is -- this is surprising to me. This was not --
21 this was not going to be an issue for discussion
22 today. The last email on this was on Tuesday.

1 Yesterday was a federal holiday.

2 Of course we're going to provide them with
3 the location of the deposition. Of course they can
4 send a pro forma, a notice of deposition. We all know
5 this deposition is going to proceed on July 1st at
6 9 a.m. in Sacramento. There's no doubt about that.

7 So, you know, I just -- I am just very
8 surprised at the way that they are constantly wanting
9 to run to the Board to raise issues that, frankly, can
10 be worked out by the parties. Or if they just look at
11 the case law and the rules, can understand that.

12 So in my opinion, you know, going back to
13 the motion to strike and the word count, these are
14 things that are very clear and set forth in numerous
15 cases by the Board. There wasn't a need for this call
16 and there really isn't a need to burn another ten
17 minutes on the location of a deposition in Sacramento.

18 So I believe that we can work on that and
19 we waive -- we waive the rule requirement, Your Honor.

20 JUDGE: Thank you. Well, I appreciate
21 that. But, I mean, I also would like it if the
22 Petitioner would try to work a little harder to

1 resolve some of these -- for example, I mean, is it
2 that crucial to fight over 384 words or 300 and
3 however many words? I mean, is it possible that you
4 can reach an agreement on that?

5 MR. ARJOMAND: Your Honor, I -- you know,
6 this -- I think if you had an opportunity to look at
7 the filings you'll understand that Patent Owner has
8 raised a number of issues in this case in their Patent
9 Owner response. It was a real challenge to try to
10 address all the issues in the reply. We did, but it
11 was difficult to do it under the word count, and I
12 think it's unfair to give Patent Owner additional
13 words when we were -- for their surreply when we were
14 limited to 5,600.

15 We don't have a problem with Patent Owner
16 using figures in the same manner that we used figures
17 for their surreply. If they want to put in a figure
18 of the Angles reference or they want to put in a
19 figure from the prosecution history that we relied
20 upon or a figure from the textbook without
21 annotations -- textual annotations, to be clear, we
22 don't have a problem with that. We won't count that.

1 If the word count program that they're
2 utilizing doesn't count that in the word count, we
3 don't have a problem with that issue. But we would
4 have a problem with them getting an additional 400
5 words. That, I don't think, is proper.

6 JUDGE: Okay. All right. Do the parties
7 have anything else they want to discuss?

8 MR. RAFATIJO: No, Your Honor. Thank you
9 for your time.

10 MR. ARJOMAND: No, Your Honor.

11 JUDGE: All right. As I said, we'll take
12 this under advisement. We'll issue an order. I mean,
13 certainly before the patent -- the due date for the
14 surreply, but I -- you know, this isn't a hurricane
15 you have it your way here. We'll do it as quickly as
16 we can and get that to everyone.

17 And thank you. And with that, the
18 conference call is adjourned.

19 (Meeting concluded at 11:42 a.m.)
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Alison C. Webster

Quantum Imaging, LLC
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