

1 UNITED STATES PATENT AND TRADEMARK OFFICE

2 MURRAY & POOLE ENTERPRISES, LTD.,

3 PETITIONER,

4 V.

5 INSTITUTE DE CARDIOLOGIE DE MONTREAL,

6 PATENT OWNER,

7 CASE IPR2023-01064

8
9 CONFERENCE CALL RE: DECLARATION OF

10 NADIA BOUABDALLAOUI, M.D. Ph.D.

11 Thursday, May 30, 2024

12 1:30 p.m.

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20 Job No: 540055

21 Pages: 1-28

22 Reported by: Tracy Obering, RPR/CCSR

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A P P E A R A N C E S

ALL PARTIES PRESENT VIA TELEPHONE CONFERENCE

THE HONORABLE JUDGE ULRIKE W. JENKS

THE HONORABLE JUDGE SHERIDAN SNEDDEN

ATTORNEYS ON BEHALF OF THE PETITIONER:

KEVIN LAURENCE, LAURENCE & PHILLIPS IP LAW

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MATTHEW PHILLIPS, LAURENCE & PHILLIPS IP LAW

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ATTORNEYS ON BEHALF OF PATENT OWNER:

MATTHEW WILKERSON, ARENTFOX SCHIFF, LLP

SAILESH PATEL, ARENTFOX SCHIFF, LLP

KEVIN NELSON, ARENTFOX SCHIFF, LLP

1 JUDGE JENKS: Good morning or good
2 afternoon. This is Judge Jenks on the line. This
3 is a conference call in Case IPR2023-01064.

4 Today's date is May 30th, 2024. Again,
5 like I said, I'm Judge Jenks and I'm joined by
6 Judge Snedden in the phone call.

7 Who do I have on the call and who will
8 be speaking?

9 MR. LAURENCE: Hi. This is Kevin
10 Laurence. I'll be speaking for Petitioner. And
11 I'm joined by my co-counsel, Joanna Brougher, Tom
12 Siepmann of BioPharma Law, and my partner, Matt
13 Phillips.

14 JUDGE JENKS: Thank you so much. Who do
15 we have on the call for Patent Owner and who will
16 be speaking?

17 MR. WILKERSON: Good afternoon, Your
18 Honor. This is Matthew Wilkerson of ArentFox
19 Schiff. I'll be doing the speaking. And also on
20 the call is Counsel Kevin Nelson and Sailesh Patel
21 of the same firm.

22 JUDGE JENKS: So I heard there was a

1 court reporter on the line, so can I request that
2 whoever hired the court reporter will file the
3 transcript as an exhibit once it is available?

4 MR. LAURENCE: This is Kevin Laurence.
5 I requested the court reporter. I will file the
6 transcript as an exhibit.

7 JUDGE JENKS: Thank you so much.

8 Petitioner you requested this
9 conference. There seems to be a dispute with
10 respect to the deposition of Dr. B. I'm not going
11 to pronounce her full name.

12 So you requested this call. Let's hear
13 from you. What's going on?

14 MR. LAURENCE: All right. Well, thank
15 you and appreciate the opportunity to further
16 address the issues that were discussed on the May
17 9th call.

18 You may recall prior to that call,
19 opposing counsel questioned our need to depose Dr.
20 B at all and wanted her to submit interrogatories.
21 So thank you for your help to overcome that
22 roadblock.

1 The paper that was authored by Dr.
2 Bouabdallaoui, Exhibit 1005, it lists 24 authors.
3 And Patent Owner chose to only offer declaration
4 from Dr. B. And while her declaration is short,
5 it relates to inventorship and that's a
6 complicated issue that's not well understood by
7 lay people.

8 And we won't necessarily discuss with
9 her all 50 claims of the patent. Additionally,
10 her paper is not simple and we're entitled to go
11 over all parts of it with her to understand what
12 she contended in that paper.

13 We think she's the genesis of certain
14 claim limitations. For example, the 0 to 3 day
15 limitation is not in the provisional with Dr.
16 Tardif, nor does it appear in the COLCOT protocol,
17 which is authored by Dr. Tardif. Instead, the 0
18 to 3 day limitation appears for the first time in
19 the Bouabdallaoui paper, which is the post-talk
20 analysis of a COLCOT study.

21 We strongly suspect that those 0 to 3
22 day limitations came from her, not Dr. Tardif.

1 And her brief declaration is an iceberg,
2 because there is so much under the surface. And
3 we're willing to preview our lines of questioning
4 with Your Honors in camera if needed.

5 Dr. B works for the patent owner and
6 worked for or with Dr. Tardif. And we need to
7 understand those relationships. And because
8 inventorship is a dispositive issue and she's a
9 key witness, we need to depose her fully and
10 fairly.

11 So with the need for translation, we
12 would be justified to ask for more than the
13 standard seven hours. We offered to depose her
14 for only five hours with the translator, but
15 Patent Owner refused. We tried to settle on four
16 hours, but were again denied. And this was the
17 outcome of our generous offer to travel to
18 Montreal, when we could have required the
19 deposition in the U.S. Patent Owner only agreed
20 to make her available for three hours and that's
21 simply inadequate.

22 Patent Owner has informed us that Dr. B

1 has retained her own counsel, separate from the
2 team representing Patent Owner and plans for her
3 Canadian attorney to attend her deposition. And
4 we do not object to the Canadian attorney
5 attending, as long as the attorney merely
6 observes. Otherwise, the arrangement could
7 further complicate the deposition.

8 In that same spirit, we have not
9 objected to negotiating with Mr. Wilkerson, even
10 though he still has not complied with your order
11 of March 29th or your reminder of May 10th.

12 And started discussing scheduling this
13 deposition with Patent Owner six weeks ago on
14 April 19th. And the possible date for her
15 deposition is moved until, now it's quite late,
16 and moved recently to June 25th.

17 Whether intentional or not, Patent Owner
18 has strung out negotiations and eaten into our
19 time for due date two of July 2nd. So we
20 discussed moving due date two and due date three
21 back. And we don't know who is the source of the
22 roadblock, Patent Owner's counsel, Dr. Tardif, Dr.

1 B or her counsel, but someone doesn't want us to
2 have adequate time.

3 Now, as Your Honors stated in the prior
4 decision, page 56, this is an issue that will
5 benefit from development during trial. But we
6 can't develop the record if we're hamstrung.

7 As Your Honors noted in our last call,
8 the deposition is inherently self-limited by the
9 scope of the declaration. And that should
10 suffice.

11 On May 28th, Petitioner informed Patent
12 Owner that we withdraw our concession and that we
13 were done negotiating time limits since that has
14 been a dead end and a waste of time.

15 Petitioner is still willing to go to
16 Montreal for the convenience of Dr. B. If she
17 wants a translator, then we will have a
18 translator. And we will swear her in according to
19 protocol for doing so in a foreign country in a
20 U.S. proceeding.

21 But as you know, depositions are dynamic
22 and some lines of questioning evolve. I'm not

1 subject to debate the time limits, because we're
2 the only ones who know what the questions will be
3 and we're not going to further preview those lines
4 of questions before Patent Owner.

5 It will be interesting to ask Dr. B how
6 long she prepared with counsel for the deposition,
7 when counsel told us she was so busy that she
8 could not be available for us for more than three
9 hours.

10 We are willing to provisionally agree to
11 five hours, but if the pace is glacially slow due
12 to the translation or we uncover information
13 meriting further cross-examination, then we need
14 to be able to come back to this panel on the day
15 of the deposition and ask for more time. It's
16 important that we are able to fully and fairly
17 depose this witness. Due process requires that.
18 We tried our best to work it out, but Patent Owner
19 only offered roadblocks.

20 If Patent Owner cannot agree to make Dr.
21 B available for a deposition that's at least five
22 hours long, then we request authorization to file

1 a motion to strike her declaration.

2 I understand that during the call on May
3 9, you indicated that you would give her testimony
4 little to no weight in the absence of a
5 deposition. We think that that could cause
6 confusion.

7 If Patent Owner is unwilling to make the
8 doctor sufficiently available, then the issue
9 needs to be a motion to strike. We need to know
10 if her declaration will be considered at all. And
11 we think it's prejudicial for such in untested,
12 un-crossed declaration to be part of record.

13 While Patent Owner has moved from
14 offering interrogatories to offering Dr. B for
15 three hours with translation, Patent Owner still
16 seeks to prevent petition from adequately testing
17 the veracity and underlying basis of her
18 testimony. And that would constitute denial of
19 Petitioner's due process rights.

20 If Dr. B is too busy or Patent Owner
21 failed to advise her she might be deposed for
22 seven hours in the U.S., Petitioner should not be

1 penalized and Patent Owner should not rewarded.

2 In conclusion, we request that the board
3 authorizes Petitioner to file a motion to strike
4 if Patent Owner cannot agree right now to make Dr.
5 B available for at least five hours.

6 And we propose filing the motion to
7 strike on due date two, petition on due date
8 three, and a reply on due date four. We also
9 propose that the length of the motion, opposition,
10 and reply, be set at ten pages and five pages.

11 JUDGE JENKS: Thank you so much. I
12 understand your position.

13 Patent Owner, obviously, you have
14 something to discuss. What's your opinion?

15 MR. WILKERSON: Yes, Your Honor. This
16 is Matt Wilkerson. Thank you.

17 So I think the first thing that is very
18 important for the board to understand is here,
19 there is no need for a longer deposition than what
20 the witness has offered and what we've been
21 willing to do. And we've consistently been
22 striving to accommodate and compromise and come to

1 something that is reasonable. However, the
2 demands from Petitioner are nothing more than a
3 harassing, fishing expedition.

4 It's really important to note and
5 understand that the declaration from Dr.
6 Bouabdallaoui, which is slightly more than two
7 pages in length, really only came about as a
8 result of Petitioner's baseless, and without
9 evidence claim, that she may be an inventor.
10 There was nothing to substantiate that claim. And
11 as a result, we filed a very brief and
12 straightforward declaration from Dr.
13 Bouabdallaoui.

14 Dr. Bouabdallaoui is on the list of
15 authors, which has become known as the
16 Bouabdallaoui reference Exhibit 1005. However,
17 she is not the lead author. She's a co-author.
18 She's a contributing author. It's really more
19 appropriately referred to as the Tardif reference,
20 who is also the sole named inventor in this matter
21 for the 063 Patent.

22 The 063 Patent is Dr. Tardif's very

1 surprising and improved discovery of a treatment
2 regimen with colchicine, the results of the COLCOT
3 trial that Dr. Tardif conducted, really are the
4 basis for the 063 Patent. And namely, there is no
5 basis at all or any facts or evidence to support
6 Petitioner's speculative belief that Dr.
7 Bouabdallaoui is somehow really the inventor of
8 the 0 to 3 day limitations in some of the claims;
9 when in fact, Dr. Tardif's provisional patent
10 application that predates the Bouabdallaoui
11 reference, have the overlapping claim and
12 description in the specification of 0 to 5 days.

13 So, you know, the patent says within
14 three days. The provisional said within five
15 days. And somehow, Petitioner has now drawn that
16 to mean that they can have seven hours of
17 harassing and fishing for some sort of testimony
18 from Dr. Bouabdallaoui. Really, all they can get
19 from her is very simple things spread out across
20 two pages in her declaration.

21 We very consistently have been as
22 accommodating as possible. We have offered

1 alternatives. We've also offered now three hours
2 per the board's guidance during the last
3 conference on this issue. We've already moved up
4 to that three hours. As the board may recall,
5 during our last discussion, the board had
6 initially suggested that one hour should be
7 sufficient. However, directed the parties to meet
8 and confer and come to resolution based on the
9 need for a translator.

10 We then went back to Petitioner and
11 initially said we will make her available for two
12 hours. And Petitioner said, "No. We need the
13 full seven." She's an extremely busy doctor.
14 She's not the Patent Owner and has her own lawyer,
15 that also has taken time to negotiate. There's
16 been no purposeful stalling tactic or anything of
17 that nature. And any claims of that are purely
18 speculative and without basis.

19 Eventually, we agreed and went back and
20 she was again willing to be accommodating and make
21 herself available for three hours. Seemingly now,
22 we're surprised to hear that Petitioner demanded

1 five hours, after just last week they said they
2 could complete this deposition in four hours,
3 which again, we still think that is far too much.
4 I don't see what could possibly be unpacked that
5 would not be far out of reach of this very narrow
6 declaration. And I understand counsel is going to
7 preview some of that.

8 But again, I think the key here, Your
9 Honor, is this witness is going to be able to,
10 from her declaration, right, responding to the
11 speculation from the beginning, say no, there is
12 no basis in fact to say that I am the inventor. I
13 was not the head author. I was not involved in
14 the COLCOT study.

15 We just really are at a loss for why we
16 are unable to reach an agreement based on Patent
17 Owner's very reasonable offer of three hours.

18 And, Your Honor, pending any questions,
19 I don't really think there's anything else for us
20 to continue going around in circles here on.

21 JUDGE JENKS: All right. Again, I think
22 I understand the parties' position. You guys hold

1 for a moment so I can confer with my co-counsel.

2 (Pause in proceedings)

3 JUDGE JENKS: I have a quick question
4 for Patent Owner.

5 MR. WILKERSON: Yes, Your Honor. This
6 is Matt Wilkerson.

7 JUDGE JENKS: Did you agree to five
8 hours? Did I hear that correctly or was that
9 not --

10 MR. WILKERSON: No, Your Honor. We had
11 not. We had offered three hours. And in response
12 to that, last week, I believe or earlier this
13 week, one or the other, Petitioner's counteroffer
14 was, four hours.

15 JUDGE JENKS: So as I see it, the
16 testimony here appears to have been produced for
17 this proceeding and as such, we're not following
18 the routine discovery. And based on routine
19 discovery, they are entitled to ask for seven
20 hours.

21 I understand right now that you are
22 saying that Dr. B is a fact witness for one issue

1 and one issue only and that is -- I can't even
2 remember from her declaration, whether or not she
3 felt that she was the inventor. So I would agree
4 that -- what was it, the facts are a very limited
5 issue, I guess, issue in that respect. And five
6 hours is less than the seven that they are
7 entitled to. So I just, I'm not -- I'm at a point
8 where I don't understand why you guys are still
9 having this issue.

10 So is there a way you can agree to five
11 hours?

12 MR. PATEL: Your Honor, may I jump in
13 here? This is Sailesh Patel on behalf of Patent
14 Owner.

15 As Mr. Wilkerson mentioned, Dr. B has
16 her own lawyer. And she's not totally within our
17 control. So she has offered three hours as well.
18 And we need to go back to her and her attorney to
19 find out if she's available for longer than that.

20 This is a very narrow issue on whether
21 or not she's an inventor. And she's a very busy
22 doctor, treating terminally ill patients and she's

1 made herself available for three hours to respond
2 to this baseless accusation from Petitioner that
3 she may be an inventor. They haven't provided any
4 evidence other than she's a named author on an
5 article that Dr. Tardif is the corresponding
6 author on.

7 And I want to go back to the first
8 hearing, Your Honor, where I think you recognize
9 that this is a very narrow issue and you asked
10 Petitioner's counsel if they could get it done
11 within an hour. And they said that they needed
12 more time and then they came back with four hours.
13 And we said two. And then we met in the middle at
14 three. And now they are going back at five.

15 So, you know, to us, it seems like this
16 is just a -- we don't understand why they need
17 this much time. They are crying wolf before even
18 having asked her the questions.

19 We think that an attorney should be able
20 to ask these questions to get a deposition done
21 within the three hours that we provided. But
22 there is a complication, because she's not, you

1 know, she has her own attorney and she's a
2 Canadian citizen. She's not a U.S. citizen.

3 JUDGE JENKS: To that point, Petitioner,
4 do you have a response here?

5 MR. LAURENCE: Yes. You know, the fact
6 there is going to be a translation, definitely
7 complicates the issue. She's going to have her
8 own attorney there. It is a short declaration,
9 but there are significant issues that have to be
10 unpacked. And inventorship is very complicated.
11 We need to go through her paper. She has also
12 authored other papers that have a similar focus.
13 And, you know, we need an opportunity to explore
14 these issues.

15 Based on the position that Patent Owners
16 have taken when they've said this pretty
17 repeatedly, you know, why can't we just accept
18 their position, you know, as if there is no point
19 to a trial. And as you said, this is something
20 that needs to be developed. We can't develop it
21 in three hours with translation. And we feel like
22 they are being unreasonable. We're entitled to

1 depose her for seven hours and we're willing to
2 compromise.

3 MR. PATEL: Your Honor, if I may --

4 MR. LAURENCE: We need five hours to
5 explore this. They've just continuously tried to
6 prevent us from deposing this person the way that
7 allows us to explore the issues that need to be
8 explored.

9 MR. PATEL: Your Honor, if I may just
10 say something. I think counsel just indicated
11 something there when they said, you know, they
12 need to explore her other articles that she's
13 written. Those are not even in her declaration.
14 And so now we are seeing that, you know, they are
15 just doing a fishing expedition here even though
16 her declaration is very narrow of two pages. I
17 don't understand why they would need to go to her
18 other articles and her whole cv and start asking
19 about --

20 MR. LAURENCE: I don't need to tell you
21 exactly what we're going to say, but I think
22 that --

1 MR. PATEL: I don't understand why you
2 need --

3 MR. LAURENCE: I don't think you need to
4 understand it now. You'll see it in the
5 deposition.

6 MR. PATEL: Well, then, in that case,
7 you know, let's take the deposition and see if you
8 need more time. We will see if there is fishing
9 going on at that time.

10 MR. LAURENCE: That's the offer that
11 we've have made. Five hours, and if we need more
12 time, we will contact the board during the
13 deposition.

14 MR. PATEL: Our offer is three hours.
15 If you need more time, we can take it up. She's a
16 very busy doctor.

17 MR. LAURENCE: All these people are
18 busy, so are we. And we've offered to come to
19 Montreal.

20 MR. PATEL: We're attorneys.

21 MR. LAURENCE: We're entitled to make
22 her come to the United States.

1 JUDGE JENKS: Okay. Patent Owner, you
2 put the declaration in. You need to make her
3 available. Please make her available. Five hours
4 going forward, going to Canada seems to be more
5 than reasonable.

6 Again, I don't think you are going to
7 need five hours. But I mean, in her declaration
8 she presented that she felt that she wasn't an
9 inventor. And Petitioner is allowed to question
10 her on that. They didn't put that paragraph in.
11 I mean, that's what it says. I think it's
12 paragraph 4. I think that's what it is.

13 MR. WILKERSON: Your Honor, we can offer
14 her for three hours. We just don't have the
15 authorization to say here that we can commit her
16 for five hours. We have to go back and speak to
17 her lawyer and see if, you know, we can
18 accommodate that. And that is why we proposed we
19 go with three hours that she offered and, you
20 know, if counsel is saying that they will need
21 more time, you know, they are just anticipating
22 they will need more time. But we can go ahead and

1 ask her.

2 MR. PHILLIPS: Your Honor, this is
3 Matthew Phillips for the Petitioner. May I just
4 make one observation?

5 JUDGE JENKS: Yes.

6 MR. PHILLIPS: The fact that Dr. B has
7 her own attorney and only wants to sit for three
8 hours is not our problem. It's the Patent Owner's
9 problem. And it should have been a problem that
10 was addressed with her and her attorney at the
11 time she submitted the declaration in this case.

12 And I don't know if that conversation
13 took place, but if it didn't, then that's not our
14 problem. It's their problem. And I think you can
15 understand our level of frustration just from the
16 exchange we're having during this call.

17 We know what we want to ask. We know
18 the scope rules. We know it's going to take more
19 than three hours, but yet, that is all that
20 they -- that she is willing to do, we are at an
21 impasse. We need your help, Your Honor.

22 JUDGE JENKS: I cannot make her sit for

1 the deposition. I can make, you know, take into
2 consideration if you are not able to depose her,
3 what weight to give the declaration, which would
4 be basically zero, if you can't properly depose
5 her.

6 On the other hand, I'm also not granting
7 Petitioner, right now, a motion to strike the
8 declaration, because I don't see it being
9 necessary at this point in time.

10 So I would like you guys, if you have
11 three hours available, take the three hours, see
12 what you can get. If you still need more, then
13 have a discussion with Patent Owner that you feel
14 like you need more time. Start making her
15 available.

16 At this point, I think everybody has
17 been, you know, cognizant about everybody's time
18 in this case. Petitioner is willing to fly up to
19 Montreal to depose Dr. B. It should not be a
20 problem.

21 So my final thing is, I would start with
22 the three hours. Three hours is not an order. We

1 are not going to grant Petitioner today to file a
2 motion to strike.

3 MR. LAURENCE: So you are saying we
4 depose her for three hours and if we need more
5 time, we call?

6 JUDGE JENKS: I think you need to have a
7 discussion with Patent Owner side.

8 MR. LAURENCE: I don't think it's going
9 to be a productive discussion, Your Honor. Your
10 Honor, we've had those discussions for the last
11 six weeks. I mean, it's just nonstop stalling.

12 MR. WILKERSON: Your Honor, I don't
13 appreciate that. And, you know, I believe that
14 there could be some progress made. We were
15 discussing things in a vacuum where there have
16 been no questions asked. Now we're talking about,
17 you know, a meet and confer, post a deposition,
18 when there is already been a record and questions
19 have been asked and answered.

20 So we think there could be some progress
21 made. And I don't appreciate opposing counsel's
22 suggestion that we are just stalling and not

1 trying to make progress here.

2 MR. LAURENCE: We have made progress
3 from interrogatories to three hours, but it's
4 taken us six weeks to get there and we don't think
5 three hours is enough with a translator.

6 MR. PHILLIPS: And again, this is
7 Matthew Phillips. What do we do if we've
8 exhausted the three hours. We come back to the
9 floor, because Dr. B is unwilling to stay any
10 longer?

11 MR. WILKERSON: Make a motion to strike,
12 I guess, if you want. Anyway, I don't want to
13 speak on your behalf.

14 JUDGE JENKS: Well, here I am sitting
15 and Petitioner has a right to direct examination
16 here for seven hours. I think I'm at a point
17 where I'm going to say, make her available for
18 five. That seems reasonable. Petitioner seems in
19 agreement to that. That is less than seven.

20 And I'm, at this point, not granting you
21 permission to file motion to strike.

22 And that would be the end of my

1 discussion today. So as far as I'm concerned,
2 they get five hours of deposing Dr. B. You make
3 it happen. And this would end the call from me
4 today.

5 MR. LAURENCE: Thank you, Your Honor.

6 MR. WILKERSON: Thank you, Your Honor.

7 JUDGE JENKS: Mr. Wilkerson, just for a
8 moment?

9 MR. WILKERSON: Yes, your Honor.

10 JUDGE JENKS: Could you be so kind to
11 have Patent Owner file the updated mandatory
12 notices?

13 MR. WILKERSON: Yes, Your Honor. We
14 will get that on file.

15 JUDGE JENKS: Thank you so much. It's
16 been an enlightening conversation today.

17 MR. WILKERSON: Thank you, Your Honor.

18 MR. LAURENCE: Thank you, Your Honor.

19 (Conference Call concluded at 2:05 p.m.)

20 * * *

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1 CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

2 I, Tracy Obering, the officer before
3 whom the foregoing conference call was taken,
4 do hereby certify that the foregoing
5 transcript is a true and correct record of
6 the testimony given; that said testimony was
7 taken by me stenographically and thereafter
8 reduced to typewriting under my direction and
9 that I am neither counsel for, related to,
10 nor employed by any of the parties to this
11 case and have no interest, financial or
12 otherwise, in its outcome.

13 IN WITNESS WHEREOF, I have hereunto set
14 my hand and affixed my notarial seal this 3rd
15 day of June, 2024.

16 My commission expires:

17 December 31, 2024

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19 

20
21 NOTARY PUBLIC IN AND FOR

22 THE STATE OF MARYLAND

Transcript of Conference Call (Patent Office's Board)

Conducted on May 30, 2024

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able 9:14, 9:16, 15:9, 18:19, 24:2 about 12:7, 20:19, 24:17, 25:16 absence 10:4 accept 19:17 accommodate 11:22, 22:18 accommodating 13:22, 14:20 according 8:18 accusation 18:2 across 13:19 additionally 5:9 address 4:16 addressed 23:10 adequate 8:2 adequately 10:16 advise 10:21 affixed 28:14 after 15:1 afternoon 3:2, 3:17 again 3:4, 6:16, 14:20, 15:3, 15:8, 15:21, 22:6, 26:6 ago 7:13	agree 9:10, 9:20, 11:4, 16:7, 17:3, 17:10 agreed 6:19, 14:19 agreement 15:16, 26:19 ahead 22:22 all 2:2, 4:14, 4:20, 5:9, 5:11, 10:10, 13:5, 13:18, 15:21, 21:17, 23:19 allowed 22:9 allows 20:7 already 14:3, 25:18 also 3:19, 11:8, 12:20, 14:1, 14:15, 19:11, 24:6 alternatives 14:1 analysis 5:20 answered 25:19 anticipating 22:21 any 13:5, 14:17, 15:18, 18:3, 26:9, 28:10 anything 14:16, 15:19 anyway 26:12 appear 5:16 appears 5:18, 16:16 application 13:10	appreciate 4:15, 25:13, 25:21 appropriately 12:19 april 7:14 arentfox 2:14, 2:15, 2:16, 3:18 around 15:20 arrangement 7:6 article 18:5 articles 20:12, 20:18 asked 18:9, 18:18, 25:16, 25:19 asking 20:18 attend 7:3 attending 7:5 attorney 7:3, 7:4, 7:5, 17:18, 18:19, 19:1, 19:8, 23:7, 23:10 attorneys 2:7, 2:13, 21:20 author 12:17, 12:18, 15:13, 18:4, 18:6 authored 5:1, 5:17, 19:12 authorization 9:22, 22:15 authorizes 11:3 authors 5:2, 12:15	available 4:3, 6:20, 9:8, 9:21, 10:8, 11:5, 14:11, 14:21, 17:19, 18:1, 22:3, 24:11, 24:15, 26:17
			B
			back 7:21, 9:14, 14:10, 14:19, 17:18, 18:7, 18:12, 18:14, 22:16, 26:8 based 14:8, 15:16, 16:18, 19:15 baseless 12:8, 18:2 basically 24:4 basis 10:17, 13:4, 13:5, 14:18, 15:12 because 6:2, 6:7, 9:1, 18:22, 24:8, 26:9 become 12:15 been 8:14, 11:20, 11:21, 13:21, 14:16, 16:16, 23:9, 24:17, 25:16, 25:18, 25:19, 27:16 before 9:4, 18:17, 28:2 beginning 15:11 behalf 2:7, 2:13, 17:13, 26:13

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

IPR2023-01064
Murray & Poole v. MHI
M&P Ex. 1050

Transcript of Conference Call (Patent Office's Board)

Conducted on May 30, 2024

30

being 19:22, 24:8 belief 13:6 believe 16:12, 25:13 benefit 8:5 best 9:18 biopharma 2:9, 2:11, 3:12 board 11:2, 11:18, 14:4, 14:5, 21:12 board's 14:2 bouabdallaoui 1:10, 5:2, 5:19, 12:6, 12:13, 12:14, 12:16, 13:7, 13:10, 13:18 brief 6:1, 12:11 brougher 2:9, 3:11 busy 9:7, 10:20, 14:13, 17:21, 21:16, 21:18	19:17, 19:20, 24:4 canada 22:4 canadian 7:3, 7:4, 19:2 cannot 9:20, 11:4, 23:22 cardiologie 1:5 case 1:7, 3:3, 21:6, 23:11, 24:18, 28:11 cause 10:5 ccsr 1:22 certain 5:13 certificate 28:1 certify 28:4 chose 5:3 circles 15:20 citizen 19:2 claim 5:14, 12:9, 12:10, 13:11 claims 5:9, 13:8, 14:17 co-author 12:17 co-counsel 3:11, 16:1 cognizant 24:17 colchicine 13:2 colcot 5:16, 5:20, 13:2, 15:14	come 9:14, 11:22, 14:8, 21:18, 21:22, 26:8 commission 28:16 commit 22:15 complete 15:2 complicate 7:7 complicated 5:6, 19:10 complicates 19:7 complication 18:22 complied 7:10 compromise 11:22, 20:2 concerned 27:1 concession 8:12 concluded 27:19 conclusion 11:2 conducted 13:3 confer 14:8, 16:1, 25:17 conference 1:9, 2:2, 3:3, 4:9, 14:3, 27:19, 28:3 confusion 10:6 consideration 24:2 considered 10:10 consistently 11:21, 13:21 constitute 10:18	contact 21:12 contended 5:12 continue 15:20 continuously 20:5 contributing 12:18 control 17:17 convenience 8:16 conversation 23:12, 27:16 correct 28:5 correctly 16:8 corresponding 18:5 could 6:18, 7:6, 9:8, 10:5, 15:2, 15:4, 18:10, 25:14, 25:20, 27:10 counsel 3:20, 4:19, 7:1, 7:22, 8:1, 9:6, 9:7, 15:6, 18:10, 20:10, 22:20, 28:9 counsel's 25:21 counteroffer 16:13 country 8:19 court 4:1, 4:2, 4:5 cross-examination 9:13 crying 18:17 cv 20:18
C call 1:9, 3:3, 3:6, 3:7, 3:15, 3:20, 4:12, 4:17, 4:18, 8:7, 10:2, 23:16, 25:5, 27:3, 27:19, 28:3 came 5:22, 12:7, 18:12 camera 6:4 can't 8:6, 17:1,			

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

IPR2023-01064
Murray & Poole v. MHI
M&P Ex. 1050

Conducted on May 30, 2024

D	24:4, 24:19, 25:4	dispute 4:9	end 8:14, 26:22, 27:3
date 3:4, 7:14, 7:19, 7:20, 11:7, 11:8	deposed 10:21	doctor 10:8, 14:13, 17:22, 21:16	enlightening 27:16
day 5:14, 5:18, 5:22, 9:14, 13:8, 28:15	deposing 20:6, 27:2	doing 3:19, 8:19, 20:15	enough 26:5
days 13:12, 13:14, 13:15	deposition 4:10, 6:19, 7:3, 7:7, 7:13, 7:15, 8:8, 9:6, 9:15, 9:21, 10:5, 11:19, 15:2, 18:20, 21:5, 21:7, 21:13, 24:1, 25:17	done 8:13, 18:10, 18:20	enterprises 1:2
de 1:5	depositions 8:21	dr 4:10, 4:19, 5:1, 5:4, 5:15, 5:17, 5:22, 6:5, 6:6, 6:22, 7:22, 8:16, 9:5, 9:20, 10:14, 10:20, 11:4, 12:5, 12:12, 12:14, 12:22, 13:3, 13:6, 13:9, 13:18, 16:22, 17:15, 18:5, 23:6, 24:19, 26:9, 27:2	entitled 5:10, 16:19, 17:7, 19:22, 21:21
dead 8:14	description 13:12	drawn 13:15	even 7:9, 17:1, 18:17, 20:13, 20:15
debate 9:1	develop 8:6, 19:20	due 7:19, 7:20, 9:11, 9:17, 10:19, 11:7, 11:8	eventually 14:19
december 28:17	developed 19:20	during 8:5, 10:2, 14:2, 14:5, 21:12, 23:16	everybody 24:16
decision 8:4	development 8:5	dynamic 8:21	everybody's 24:17
declaration 1:9, 5:3, 5:4, 6:1, 8:9, 10:1, 10:10, 10:12, 12:5, 12:12, 13:20, 15:6, 15:10, 17:2, 19:8, 20:13, 20:16, 22:2, 22:7, 23:11, 24:3, 24:8	direct 26:15		evidence 12:9, 13:5, 18:4
definitely 19:6	directed 14:7		evolve 8:22
demand 14:22	direction 28:8		exactly 20:21
demands 12:2	discovery 13:1, 16:18, 16:19		examination 26:15
denial 10:18	discuss 5:8, 11:14		example 5:14
denied 6:16	discussed 4:16, 7:20		exchange 23:16
depose 4:19, 6:9, 6:13, 9:17, 20:1, 24:2,	discussing 7:12, 25:15		exhausted 26:8
	discussion 14:5, 24:13, 25:7, 25:9, 27:1		exhibit 4:3, 4:6, 5:2, 12:16
	discussions 25:10		expedition 12:3, 20:15
	dispositive 6:8		expires 28:16
			explore 19:13, 20:5, 20:7, 20:12
		E	
		earlier 16:12	
		eaten 7:18	
		else 15:19	
		employed 28:10	

Transcript of Conference Call (Patent Office's Board)

Conducted on May 30, 2024

32

explored 20:8 extremely 14:13 F fact 13:9, 15:12, 16:22, 19:5, 23:6 facts 13:5, 17:4 failed 10:21 fairly 6:10, 9:16 far 15:3, 15:5, 27:1 feel 19:21, 24:13 felt 17:3, 22:8 file 4:2, 4:5, 9:22, 11:3, 25:1, 26:21, 27:11, 27:14 filed 12:11 filing 11:6 final 24:21 financial 28:11 find 17:19 firm 3:21 first 5:18, 11:17, 18:7 fishing 12:3, 13:17, 20:15, 21:8 five 6:14, 9:11,	9:21, 11:5, 11:10, 13:14, 15:1, 16:7, 17:5, 17:10, 18:14, 20:4, 21:11, 22:3, 22:7, 22:16, 26:18, 27:2 floor 26:9 fly 24:18 focus 19:12 following 16:17 foregoing 28:3, 28:4 foreign 8:19 forward 22:4 four 6:15, 11:8, 15:2, 16:14, 18:12 frustration 23:15 full 4:11, 14:13 fully 6:9, 9:16 further 4:15, 7:7, 9:3, 9:13 G generous 6:17 genesis 5:13 give 10:3, 24:3 given 28:6 glacially 9:11 go 5:10, 8:15,	17:18, 18:7, 19:11, 20:17, 22:16, 22:19, 22:22 going 4:10, 4:13, 9:3, 15:6, 15:9, 15:20, 18:14, 19:6, 19:7, 20:21, 21:9, 22:4, 22:6, 23:18, 25:1, 25:8, 26:17 good 3:1, 3:17 grant 25:1 granting 24:6, 26:20 group 2:9, 2:11 guess 17:5, 26:12 guidance 14:2 guys 15:22, 17:8, 24:10 H hamstrung 8:6 hand 24:6, 28:14 happen 27:3 harassing 12:3, 13:17 head 15:13 hear 4:12, 14:22, 16:8 heard 3:22 hearing 18:8 help 4:21, 23:21	here 11:18, 15:8, 15:20, 16:16, 17:13, 19:4, 20:15, 22:15, 26:1, 26:14, 26:16 hereby 28:4 hereunto 28:13 herself 14:21, 18:1 hi 3:9 hired 4:2 hold 15:22 honor 3:18, 11:15, 15:9, 15:18, 16:5, 16:10, 17:12, 18:8, 20:3, 20:9, 22:13, 23:2, 23:21, 25:9, 25:10, 25:12, 27:5, 27:6, 27:9, 27:13, 27:17, 27:18 honorable 2:4, 2:5 honors 6:4, 8:3, 8:7 hour 14:6, 18:11 hours 6:13, 6:14, 6:16, 6:20, 9:9, 9:11, 9:22, 10:15, 10:22, 11:5, 13:16, 14:1, 14:4, 14:12, 14:21, 15:1, 15:2, 15:17, 16:8, 16:11, 16:14,
--	--	---	--

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

IPR2023-01064
Murray & Poole v. MHI
M&P Ex. 1050

Transcript of Conference Call (Patent Office's Board)

Conducted on May 30, 2024

33

16:20, 17:6, 17:11, 17:17, 18:1, 18:12, 18:21, 19:21, 20:1, 20:4, 21:11, 21:14, 22:3, 22:7, 22:14, 22:16, 22:19, 23:8, 23:19, 24:11, 24:22, 25:4, 26:3, 26:5, 26:8, 26:16, 27:2 however 12:1, 12:16, 14:7	interest 28:11 interesting 9:5 interrogatories 4:20, 10:14, 26:3 inventor 12:9, 12:20, 13:7, 15:12, 17:3, 17:21, 18:3, 22:9 inventorship 5:5, 6:8, 19:10 involved 15:13 ip 2:8, 2:10 ipr 1:7, 3:3 issue 5:6, 6:8, 8:4, 10:8, 14:3, 16:22, 17:1, 17:5, 17:9, 17:20, 18:9, 19:7 issues 4:16, 19:9, 19:14, 20:7	judge 2:4, 2:5, 3:1, 3:2, 3:5, 3:6, 3:14, 3:22, 4:7, 11:11, 15:21, 16:3, 16:7, 16:15, 19:3, 22:1, 23:5, 23:22, 25:6, 26:14, 27:7, 27:10, 27:15 july 7:19 jump 17:12 june 7:16, 28:15 justified 6:12	16:12, 25:10 late 7:15 laurence 2:8, 2:10, 3:9, 3:10, 4:4, 4:14, 19:5, 20:4, 20:20, 21:3, 21:10, 21:17, 21:21, 25:3, 25:8, 26:2, 27:5, 27:18 law 2:8, 2:9, 2:10, 2:11, 3:12 lawyer 14:14, 17:16, 22:17 lay 5:7 lead 12:17 least 9:21, 11:5 length 11:9, 12:7 less 17:6, 26:19 let's 4:12, 21:7 level 23:15 limitation 5:15, 5:18 limitations 5:14, 5:22, 13:8 limited 17:4 limits 8:13, 9:1 line 3:2, 4:1 lines 6:3, 8:22, 9:3 list 12:14 lists 5:2
I		K	
iceberg 6:1 ill 17:22 impasse 23:21 important 9:16, 11:18, 12:4 improved 13:1 inadequate 6:21 indicated 10:3, 20:10 information 9:12 informed 6:22, 8:11 inherently 8:8 initially 14:6, 14:11 instead 5:17 institute 1:5 intentional 7:17	J jenks 2:4, 3:1, 3:2, 3:5, 3:14, 3:22, 4:7, 11:11, 15:21, 16:3, 16:7, 16:15, 19:3, 22:1, 23:5, 23:22, 25:6, 26:14, 27:7, 27:10, 27:15 joanna 2:9, 3:11 job 1:20 joined 3:5, 3:11	known 12:15 L last 8:7, 14:2, 14:5, 15:1,	

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

IPR2023-01064
Murray & Poole v. MHI
M&P Ex. 1050

Transcript of Conference Call (Patent Office's Board)

Conducted on May 30, 2024

34

little 10:4 llp 2:14, 2:15, 2:16 long 7:5, 9:6, 9:22 longer 11:19, 17:19, 26:10 loss 15:15	mentioned 17:15 merely 7:5 meriting 9:13 met 18:13 middle 18:13 might 10:21 moment 16:1, 27:8 montreal 1:5, 6:18, 8:16, 21:19, 24:19 more 6:12, 9:8, 9:15, 12:2, 12:6, 12:18, 18:12, 21:8, 21:11, 21:15, 22:4, 22:21, 22:22, 23:18, 24:12, 24:14, 25:4 morning 3:1 motion 10:1, 10:9, 11:3, 11:6, 11:9, 24:7, 25:2, 26:11, 26:21 moved 7:15, 7:16, 10:13, 14:3 moving 7:20 much 3:14, 4:7, 6:2, 11:11, 15:3, 18:17, 27:15 murray 1:2	name 4:11 named 12:20, 18:4 namely 13:4 narrow 15:5, 17:20, 18:9, 20:16 nature 14:17 necessarily 5:8 necessary 24:9 need 4:19, 6:6, 6:9, 6:11, 9:13, 10:9, 11:19, 14:9, 14:12, 17:18, 18:16, 19:11, 19:13, 20:4, 20:7, 20:12, 20:17, 20:20, 21:2, 21:3, 21:8, 21:11, 21:15, 22:2, 22:7, 22:20, 22:22, 23:21, 24:12, 24:14, 25:4, 25:6 needed 6:4, 18:11 needs 10:9, 19:20 negotiate 14:15 negotiating 7:9, 8:13 negotiations 7:18 neither 28:9 nelson 2:16, 3:20 nonstop 25:11	notarial 28:14 notary 28:21 note 12:4 noted 8:7 nothing 12:2, 12:10 notices 27:12
M	N		O
made 18:1, 21:11, 25:14, 25:21, 26:2 make 6:20, 9:20, 10:7, 11:4, 14:11, 14:20, 21:21, 22:2, 22:3, 23:4, 23:22, 24:1, 26:1, 26:11, 26:17, 27:2 making 24:14 mandatory 27:11 march 7:11 maryland 28:22 matt 3:12, 11:16, 16:6 matter 12:20 matthew 2:10, 2:14, 3:18, 23:3, 26:7 mean 13:16, 22:7, 22:11, 25:11 meet 14:7, 25:17	nadia 1:10		obering 1:22, 28:2 object 7:4 objected 7:9 observation 23:4 observes 7:6 obviously 11:13 offer 5:3, 6:17, 15:17, 21:10, 21:14, 22:13 offered 6:13, 9:19, 11:20, 13:22, 14:1, 16:11, 17:17, 21:18, 22:19 offering 10:14 office 1:1 officer 28:2 okay 22:1 once 4:3 one 14:6, 16:13,

PLANET DEPOS

888.433.3767 | WWW.PLANETDEPOS.COM

IPR2023-01064
Murray & Poole v. MHI
M&P Ex. 1050

16:22, 17:1, 23:4 ones 9:2 only 5:3, 6:14, 6:19, 9:2, 9:19, 12:7, 17:1, 23:7 opinion 11:14 opportunity 4:15, 19:13 opposing 4:19, 25:21 opposition 11:9 order 7:10, 24:22 other 16:13, 18:4, 19:12, 20:12, 20:18, 24:6 otherwise 7:6, 28:12 out 7:18, 9:18, 13:19, 15:5, 17:19 outcome 6:17, 28:12 over 5:11 overcome 4:21 overlapping 13:11 own 7:1, 14:14, 17:16, 19:1, 19:8, 23:7 owner 1:6, 2:13, 3:15, 5:3, 6:5, 6:15, 6:19, 6:22, 7:2, 7:13, 7:17, 8:12, 9:4, 9:18, 9:20, 10:7, 10:13,	10:15, 10:20, 11:1, 11:4, 11:13, 14:14, 16:4, 17:14, 22:1, 24:13, 25:7, 27:11 owner's 7:22, 15:17, 23:8 owners 19:15 P pace 9:11 page 8:4 pages 1:21, 11:10, 12:7, 13:20, 20:16 panel 9:14 paper 5:1, 5:10, 5:12, 5:19, 19:11 papers 19:12 paragraph 22:10, 22:12 part 10:12 parties 2:2, 14:7, 15:22, 28:10 partner 3:12 parts 5:11 patel 2:15, 3:20, 17:12, 17:13, 20:3, 20:9, 21:1, 21:6, 21:14, 21:20 patent 1:1, 1:6, 2:13,	3:15, 5:3, 5:9, 6:5, 6:15, 6:19, 6:22, 7:2, 7:13, 7:17, 7:22, 8:11, 9:4, 9:18, 9:20, 10:7, 10:13, 10:15, 10:20, 11:1, 11:4, 11:13, 12:21, 12:22, 13:4, 13:9, 13:13, 14:14, 15:16, 16:4, 17:13, 19:15, 22:1, 23:8, 24:13, 25:7, 27:11 patients 17:22 pause 16:2 penalized 11:1 pending 15:18 people 5:7, 21:17 permission 26:21 person 20:6 petition 10:16, 11:7 petitioner 1:3, 2:7, 3:10, 4:8, 8:11, 8:15, 10:22, 11:3, 12:2, 13:15, 14:10, 14:12, 14:22, 18:2, 19:3, 22:9, 23:3, 24:7, 24:18, 25:1, 26:15, 26:18 petitioner's 10:19, 12:8, 13:6, 16:13, 18:10	ph 1:10 phillips 2:8, 2:10, 3:13, 23:2, 23:3, 23:6, 26:6, 26:7 phone 3:6 place 23:13 plans 7:2 please 22:3 pllc 2:9, 2:11 point 17:7, 19:3, 19:18, 24:9, 24:16, 26:16, 26:20 poole 1:2 position 11:12, 15:22, 19:15, 19:18 possible 7:14, 13:22 possibly 15:4 post 25:17 post-talk 5:19 predates 13:10 prejudicial 10:11 prepared 9:6 present 2:2 presented 22:8 pretty 19:16 prevent 10:16, 20:6
---	--	--	--

preview 6:3, 9:3, 15:7 prior 4:18, 8:3 problem 23:8, 23:9, 23:14, 24:20 proceeding 8:20, 16:17 proceedings 16:2 process 9:17, 10:19 produced 16:16 productive 25:9 progress 25:14, 25:20, 26:1, 26:2 pronounce 4:11 properly 24:4 propose 11:6, 11:9 proposed 22:18 protocol 5:16, 8:19 provided 18:3, 18:21 provisional 5:15, 13:9, 13:14 provisionally 9:10 public 28:1, 28:21 purely 14:17 purposeful 14:16 put 22:2, 22:10 Q question 16:3, 22:9	questioned 4:19 questioning 6:3, 8:22 questions 9:2, 9:4, 15:18, 18:18, 18:20, 25:16, 25:18 quick 16:3 quite 7:15 R reach 15:5, 15:16 really 12:4, 12:7, 12:18, 13:3, 13:7, 13:18, 15:15, 15:19 reasonable 12:1, 15:17, 22:5, 26:18 recall 4:18, 14:4 recently 7:16 recognize 18:8 record 8:6, 10:12, 25:18, 28:5 reduced 28:8 reference 12:16, 12:19, 13:11 referred 12:19 refused 6:15 regimen 13:2 related 28:9 relates 5:5	relationships 6:7 remember 17:2 reminder 7:11 repeatedly 19:17 reply 11:8, 11:10 reported 1:22 reporter 4:1, 4:2, 4:5 reporter-notary 28:1 representing 7:2 request 4:1, 9:22, 11:2 requested 4:5, 4:8, 4:12 required 6:18 requires 9:17 resolution 14:8 respect 4:10, 17:5 respond 18:1 responding 15:10 response 16:11, 19:4 result 12:8, 12:11 results 13:2 retained 7:1 rewarded 11:1 right 4:14, 11:4, 15:10, 15:21, 16:21, 24:7,	26:15 rights 10:19 roadblock 4:22, 7:22 roadblocks 9:19 routine 16:18 rpr 1:22 rules 23:18 S said 3:5, 13:14, 14:11, 14:12, 15:1, 18:11, 18:13, 19:16, 19:19, 20:11, 28:6 sailesh 2:15, 3:20, 17:13 same 3:21, 7:8 say 15:11, 15:12, 20:10, 20:21, 22:15, 26:17 saying 16:22, 22:20, 25:3 says 13:13, 22:11 scheduling 7:12 schiff 2:14, 2:15, 2:16, 3:19 scope 8:9, 23:18 seal 28:14 see 15:4, 16:15, 21:4, 21:7,
--	---	--	--

21:8, 22:17, 24:8, 24:11 seeing 20:14 seeks 10:16 seemingly 14:21 seems 4:9, 18:15, 22:4, 26:18 self-limited 8:8 separate 7:1 set 11:10, 28:13 settle 6:15 seven 6:13, 10:22, 13:16, 14:13, 16:19, 17:6, 20:1, 26:16, 26:19 sheridan 2:5 short 5:4, 19:8 shorthand 28:1 should 8:9, 10:22, 11:1, 14:6, 18:19, 23:9, 24:19 side 25:7 siepmann 2:11, 3:12 signature-b7fzp 28:19 significant 19:9 similar 19:12 simple 5:10, 13:19	simply 6:21 since 8:13 sit 23:7, 23:22 sitting 26:14 six 7:13, 25:11, 26:4 slightly 12:6 slow 9:11 snedden 2:5, 3:6 sole 12:20 some 8:22, 13:8, 13:17, 15:7, 25:14, 25:20 somehow 13:7, 13:15 someone 8:1 something 11:14, 12:1, 19:19, 20:10, 20:11 sort 13:17 source 7:21 speak 22:16, 26:13 speaking 3:8, 3:10, 3:16, 3:19 specification 13:12 speculation 15:11 speculative 13:6, 14:18 spirit 7:8	spread 13:19 stalling 14:16, 25:11, 25:22 standard 6:13 start 20:18, 24:14, 24:21 started 7:12 state 28:22 stated 8:3 states 1:1, 21:22 stay 26:9 stenographically 28:7 still 7:10, 8:15, 10:15, 15:3, 17:8, 24:12 straightforward 12:12 strike 10:1, 10:9, 11:3, 11:7, 24:7, 25:2, 26:11, 26:21 striving 11:22 strongly 5:21 strung 7:18 study 5:20, 15:14 subject 9:1 submit 4:20 submitted 23:11 substantiate 12:10	suffice 8:10 sufficient 14:7 sufficiently 10:8 suggested 14:6 suggestion 25:22 support 13:5 surface 6:2 surprised 14:22 surprising 13:1 suspect 5:21 swear 8:18 T tactic 14:16 take 21:7, 21:15, 23:18, 24:1, 24:11 taken 14:15, 19:16, 26:4, 28:3, 28:7 talking 25:16 tardif 5:16, 5:17, 5:22, 6:6, 7:22, 12:19, 13:3, 18:5 tardif's 12:22, 13:9 team 7:2 telephone 2:2 tell 20:20
---	--	---	--

ten 11:10 terminally 17:22 testimony 10:3, 10:18, 13:17, 16:16, 28:6 testing 10:16 th 3:4, 7:11, 7:14, 7:16, 8:11 thank 3:14, 4:7, 4:14, 4:21, 11:11, 11:16, 27:5, 27:6, 27:15, 27:17, 27:18 thereafter 28:7 thing 11:17, 24:21 things 13:19, 25:15 think 5:13, 10:5, 10:11, 11:17, 15:3, 15:8, 15:19, 15:21, 18:8, 18:19, 20:10, 20:21, 21:3, 22:6, 22:11, 22:12, 23:14, 24:16, 25:6, 25:8, 25:20, 26:4, 26:16 three 6:20, 7:20, 9:8, 10:15, 11:8, 13:14, 14:1, 14:4, 14:21, 15:17, 16:11, 17:17, 18:1, 18:14, 18:21, 19:21,	21:14, 22:14, 22:19, 23:7, 23:19, 24:11, 24:22, 25:4, 26:3, 26:5, 26:8 through 19:11 thursday 1:11 time 5:18, 7:19, 8:2, 8:13, 8:14, 9:1, 9:15, 14:15, 18:12, 18:17, 21:8, 21:9, 21:12, 21:15, 22:21, 22:22, 23:11, 24:9, 24:14, 24:17, 25:5 today 25:1, 27:1, 27:4, 27:16 today's 3:4 told 9:7 tom 2:11, 3:11 took 23:13 totally 17:16 tracy 1:22, 28:2 trademark 1:1 transcript 4:3, 4:6, 28:5 translation 6:11, 9:12, 10:15, 19:6, 19:21 translator 6:14, 8:17, 8:18, 14:9, 26:5 travel 6:17	treating 17:22 treatment 13:1 trial 8:5, 13:3, 19:19 tried 6:15, 9:18, 20:5 true 28:5 trying 26:1 two 7:19, 7:20, 11:7, 12:6, 13:20, 14:11, 18:13, 20:16 typewriting 28:8 U ulrike 2:4 un-crossed 10:12 unable 15:16 uncover 9:12 under 6:2, 28:8 underlying 10:17 understand 5:11, 6:7, 10:2, 11:12, 11:18, 12:5, 15:6, 15:22, 16:21, 17:8, 18:16, 20:17, 21:1, 21:4, 23:15 understood 5:6 united 1:1, 21:22	unpacked 15:4, 19:10 unreasonable 19:22 untested 10:11 until 7:15 unwilling 10:7, 26:9 updated 27:11 V vacuum 25:15 veracity 10:17 via 2:2 W want 8:1, 18:7, 23:17, 26:12 wanted 4:20 wants 8:17, 23:7 waste 8:14 way 17:10, 20:6 we're 5:10, 6:3, 8:6, 9:1, 9:3, 14:22, 16:17, 19:22, 20:1, 20:21, 21:20, 21:21, 23:16, 25:16 we've 11:20, 11:21, 14:1, 14:3, 21:11, 21:18, 25:10, 26:7 week 15:1, 16:12, 16:13
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Transcript of Conference Call (Patent Office's Board)

Conducted on May 30, 2024

39

weeks 7:13, 25:11, 26:4 weight 10:4, 24:3 went 14:10, 14:19 whereof 28:13 whether 7:17, 17:2, 17:20 whoever 4:2 whole 20:18 wilkerson 2:14, 3:17, 3:18, 7:9, 11:15, 11:16, 16:5, 16:6, 16:10, 17:15, 22:13, 25:12, 26:11, 27:6, 27:7, 27:9, 27:13, 27:17 willing 6:3, 8:15, 9:10, 11:21, 14:20, 20:1, 23:20, 24:18 withdraw 8:12 within 13:13, 13:14, 17:16, 18:11, 18:21 without 12:8, 14:18 witness 6:9, 9:17, 11:20, 15:9, 16:22, 28:13 wolf 18:17 work 9:18 worked 6:6	works 6:5 written 20:13 z zero 24:4 0 01064 1:7, 3:3 05 27:19 063 12:21, 12:22, 13:4 1 1 1:12, 1:21 10 7:11 1005 5:2, 12:16 19 7:14 2 2 27:19 2023 1:7, 3:3 2024 1:11, 3:4, 28:15, 28:17 24 5:2 25 7:16 28 1:21, 8:11 29 7:11 2nd 7:19 3 30 1:11, 1:12, 3:4	31 28:17 3rd 28:14 5 50 5:9 540055 1:20 56 8:4 9 9th 4:17	
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