

In the Matter of:

Omega Liner Company, Inc. Buergofol GmbH

Conference Call

September 17, 2024

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1 UNITED STATES PATENT AND TRADEMARK OFFICE

2
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD

4
5 OMEGA LINER COMPANY, INC.

6 Petitioner,

7
8 v.

9
10 BUERGOFOL GmbH,

11 Patent Owner

12
13 Case IPR2023-01372

14 U.S. Patent 9,657,882

15
16
17 CONFERENCE CALL

18 BEFORE JUDGE GRACE KARAFFA OBERMANN

19
20 September 17, 2024 11:01 a.m.

21
22
23 Pauline L. Bailey

24 Professional Reporter

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Hearing

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EXHIBITS

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(No exhibits offered)

1 THE COURT: Good morning again. This
2 is Judge Grace Obermann, and I'm going to
3 handle this interlocutory matter on my own
4 today. But I do have on the line with me a
5 board patent attorney, David Wood. Again,
6 this is a conference call on IPR2023-0132.

7 We have before us a request from
8 patent owner's counsel related to discovery,
9 and I would like to start by asking who we
10 have today on the line for patent owner.

11 MR. DARIEN WALLACE: Good morning,
12 Your Honor. This is Darien Wallace for
13 patent owner, Buergofol. I am the one who
14 wrote the e-mail requesting this call.

15 THE COURT: Thank you, Mr. Wallace.
16 Do you have anyone else with you?

17 MR. WALLACE: Yeah, my name is Lester
18 Wallace, and I am also counsel.

19 THE COURT: Okay. So, we have two
20 Mr. Wallaces. And will the first Mr.
21 Wallace be doing the speaking today, or will
22 you be back and forth?

23 MR. DARIEN WALLACE: No, I will be
24 doing the speaking. I thought also there

1 might be a third attorney for Buergofol.

2 MR. DOODY: Yes, yes, this is Patrick
3 Doody, D-O-O-D-Y, for Buergofol.

4 THE COURT: Thank you, Mr. Doody. Do
5 we -- who do we have on the line for
6 Petitioner?

7 MR. MCKEOWN: Good morning, Your
8 Honor. Scott McKeown of Wolf, Greenfield
9 and Sacks for Petitioner, Omega Liner. I'm
10 joined today by Mike Neustel of the Neustel
11 Law Firm and Monty Bond of the same law
12 firm. I will be doing the speaking today.
13 We also have a court reporter, and we'll
14 submit that transcript in due course, as is
15 typical.

16 THE COURT: Thank you, Mr. McKeown.
17 Okay. With that I'm going to ask counsel
18 for patent owner to begin, since this
19 request was lodged by patent owner.

20 MR. DARIEN WALLACE: Thank you, Your
21 Honor. Patent owner would like to submit
22 some letters that Petitioner's counsel has
23 written with various allegations. For
24 example, allegations of falsity; accusations

1 of violations of the duty of candor;
2 accusations of inequitable conduct during an
3 interparties' review; and fraud before the
4 USPTO. And these are serious allegations.
5 And Buergofol believes that it has -- is
6 entitled to bring those to the attention of
7 the board and to respond to them, and
8 indeed, perhaps we even have the obligation
9 to disclose those to the tribunal. That
10 would be under 37 CFR 11.30383. So, we
11 would like authorization to submit the
12 documents. Those are three letters from
13 Petitioner's counsel with the accusations,
14 and then a letter that the patent owner's
15 counsel with our responses.

16 We asked for this conference in
17 August but Petitioner requested first to
18 meet and confer, which we did on September
19 5th. So, we would like to submit a
20 transcript of that meet and confer as well.

21 And then along with that, the
22 documents that Petitioner claims have
23 inconsistent statements in them,
24 inconsistent with the declarations that were

1 submitted in the IPR, and with the patent
2 owner's response. And those are customer
3 complaints a decade ago, and also a quality
4 agreement, and we would like to submit those
5 under seal.

6 I'm not -- not sure whether we need
7 authorization for a motion to file under
8 seal, under 37 CFR 42.14, but if we do, then
9 we're requesting authorization here. And
10 then those would -- all of those documents
11 would be attached then to our response to
12 the declaration.

13 And then we would also request that
14 Petitioner not be permitted to take any
15 additional cross-examinations about the
16 information we're submitting because the
17 Petitioner noticed three cross-examinations,
18 one of our -- in Washington, one of our
19 experts. But then two of the inventors --
20 one of the inventors is an Apex deponent,
21 the head of the company, which we flew from
22 Europe to Washington and put up in a hotel
23 for several days. And then on the evening
24 before the cross-examination of the lead

1 inventor, that -- the deposition was
2 canceled, and as well as the other one of
3 the Apex deponent. But at the deposition or
4 the cross-examination of our expert,
5 Petitioner didn't ask a single question
6 about grounds for unpatentability that are,
7 in this case of three references, Hummel,
8 Nagai, and Shuman didn't ask a single
9 question. And then cut that cross-
10 examination short, canceled the other cross-
11 examinations.

12 But these are the issues and these
13 accusations could have easily been handled
14 if the Petitioner's counsel had simply
15 cross-examined the two deponents, Dr.
16 Boutrid and Gregor Schleicher, they could
17 have asked all of the questions that they
18 have just, you know, claimed are -- are
19 false statements. They could have cleared
20 those up, but they didn't. So, they
21 shouldn't be able now to hold any -- any
22 cross-examinations of Dr. Boutrid or Gregor
23 Schleicher. That's -- that's my
24 introduction.

1 THE COURT: Okay. Thank you. Thank
2 you, Mr. Wallace, I have a few questions.
3 The first one is, you want to introduce
4 three letters from Petitioner's counsel as
5 well as your responses; is that correct?

6 MR. DARIEN WALLACE: That's correct.
7 We have one --

8 THE COURT: How many letter responses
9 are we talking about?

10 MR. DARIEN WALLACE: Just one.

11 THE COURT: Just one. So, that's
12 four documents?

13 MR. DARIEN WALLACE: Yes.

14 THE COURT: And you mentioned a rule
15 that you thought permitted you to introduce
16 these. It was 37 CFR something, which I
17 missed.

18 MR. DARIEN WALLACE: Yes, 37 CFR
19 11.303A3. And that rule says that if
20 material evidence has been offered and it
21 comes to the practitioners, or the
22 practitioner becomes aware that of -- its
23 falsity, then the practitioner has a duty to
24 disclose that to the tribunal.

1 In this case, obviously we're not
2 aware of its falsity, but there have been
3 many allegations of falsity. So, we think
4 that we have to submit that to the tribunal.
5 And in the Spectrum versus Longhorn vaccine
6 decision that was paper 107, that in that
7 decision, it said that the practitioner
8 shall disclose these -- these documents
9 under 11.303. So, that's why we believe we
10 actually have a duty to disclose these
11 documents.

12 THE COURT: Thank you, Mr. Wallace.
13 And you mentioned Spectrum versus Longhorn.
14 Is that an IPR?

15 MR. DARIEN WALLACE: Yes, that's IPR
16 2021-847. And it was paper number 107.

17 THE COURT: 847?

18 MR. DARIEN WALLACE: Yes, 847.

19 THE COURT: Paper 107?

20 MR. DARIEN WALLACE: Yes.

21 THE COURT: Okay. Thank you. And I
22 also heard you mention that you want to
23 introduce the transcript of a meet and
24 confer that occurred on September 5th?

1 MR. DARIEN WALLACE: Correct.

2 THE COURT: And then documents that
3 may be inconsistent with statements made
4 under our routine discovery rule?

5 MR. DARIEN WALLACE: Yes, yes. And
6 those are the documents referred to in the
7 three letters from Petitioner's counsel, and
8 that would be --

9 THE COURT: I understand. You also
10 mentioned that you -- oh, I'm sorry?

11 MR. DARIEN WALLACE: No, no, that
12 would be under 42.51, B13. So --

13 THE COURT: Yes.

14 MR. DARIEN WALLACE: -- documents
15 that are inconsistent.

16 THE COURT: Or potentially
17 inconsistent.

18 MR. DARIEN WALLACE: Potentially --

19 THE COURT: And then you mentioned
20 that, you mentioned that there would be a
21 declaration involved, and who would that be
22 from?

23 MR. DARIEN WALLACE: Well, we would
24 file a response and potentially a

1 declaration from, for example, Dr. Boutrid,
2 the -- the people who are alleged to have
3 made inconsistent statements or false
4 statements, we would then submit
5 declarations from them clarifying any
6 inconsistency or actually stating why their
7 statements were not inconsistent and were
8 not false.

9 THE COURT: And you would anticipate
10 that this declaration would be submitted as
11 an exhibit to an additional brief that
12 you're asking for?

13 MR. DARIEN WALLACE: That's correct.

14 THE COURT: What would this brief be
15 called?

16 MR. DARIEN WALLACE: A response for
17 example, because it's a response to the
18 allegations of falsity.

19 THE COURT: Okay. So, it would be a
20 new brief that's not permitted by our rules,
21 which we're allowed to do. We have great
22 deal of discretion to do that. But you
23 would want to do that without offering Dr.
24 Boutrid for a deposition, which they're

1 entitled to generally under our routine
2 discovery rules. And your reason for that
3 is because you've already produced him?

4 MR. DARIEN WALLACE: Yes, we already
5 flew him from Europe, and he sat in a hotel
6 for several days in Washington, waiting for
7 his cross-examination. And it wasn't
8 canceled until 6:30 the previous evening
9 before his -- his cross-examination. So, I
10 believe it was to keep information away from
11 the board. So, we appeared at the noticed
12 time the following morning, and I took some
13 direct examination to provide some of the
14 information that the previous day
15 Petitioner's counsel had claimed to be
16 incorrect.

17 For example, in this case, it was the
18 percentage content of a component whether,
19 in this case, the EBS wax, whether there was
20 100 percent or 20 percent or five percent,
21 or whatever, of this EBS wax in a master
22 batch. I didn't see why it was so
23 important, but since Petitioners thought it
24 was important and led -- and led to their

1 allegations of falsity, Dr. Boutrid then
2 testified that there was 20 percent of this
3 component in the master batch. But -- but
4 Petitioner's counsel didn't want to cross-
5 examine him and canceled it.

6 THE COURT: When was that deposition?
7 When did you fly him out?

8 MR. DARIEN WALLACE: I believe that
9 was the 8th of August. So, the 7th of
10 August was a Wednesday I believe, and that
11 was the cross-examination of our expert.
12 The 8th was scheduled to be the deposition
13 of Dr. Boutrid, who's the technical head of
14 Buergofol, but also the inventor. And then
15 Friday, the 9th, was Gregor Schleicher,
16 who's the general manager or the CEO -- CEO
17 of the company. But he's also an inventor
18 of the 882 patent. And -- Schleicher --

19 THE COURT: And did they depose any
20 of those three gentlemen?

21 MR. DARIEN WALLACE: The -- yes, the
22 expert on the 7th, I believe that was a
23 Wednesday. But then at the end of that,
24 they left that deposition early without

1 questioning our expert about any of the
2 references, Hummel, McGire, Schumann. And
3 then -- and then waited until 6:30 p.m. and
4 then canceled the cross-examination of Dr.
5 Boutrid the following day and of Gregor
6 Schleicher on Friday.

7 THE COURT: Okay. And at the time
8 that you produced Dr. Boutrid and Gregor
9 Schleicher, had you already submitted
10 declarations from those two gentlemen?

11 MR. DARIEN WALLACE: Yes, yes.

12 THE COURT: Okay. So, that's why you
13 produced them at that time.

14 MR. WALLACE: Exactly, with our
15 patent owner's response.

16 THE COURT: Okay. And I just have
17 one more question for you before I turn it
18 over to Petitioner's response. How do you
19 envision this playing out from -- is there
20 any, you know, prejudice here? Because I
21 realize that you all have agreed to push out
22 Petitioner's reply deadline to October 8th.
23 That's not far away. What does this do to
24 the discovery schedule? Because Petitioner

1 is now, you know, if we allow this to come
2 in, they're going to probably want to have
3 some discovery of this information. What is
4 your position? Or I guess I can ask
5 Petitioner whether that's an issue first,
6 and then I'll get it from you. But do you
7 have any initial thoughts on how this would
8 affect the schedule?

9 MR. DARIEN WALLACE: Well, the
10 discovery, I assume, is -- would only be the
11 depositions or cross-examinations of Dr.
12 Boutrid and Gregor Schleicher. I do not
13 know what other discovery Petitioner could
14 -- could ask for.

15 THE COURT: Okay. And do you have a
16 position on, other than your duty of candor
17 to the board, do you have any position on
18 whether and how this additional information
19 is relevant or would promote the resolution
20 of the case?

21 MR. DARIEN WALLACE: The document --

22 THE COURT: In other words, does this
23 have anything to do with the merits of the
24 case?

1 MR. DARIAN WALLACE: I don't believe
2 so. I think that some of this, for example,
3 whether there's 100 percent EBS or 20
4 percent EBS has to do with an enablement.
5 And it's, it doesn't mean that the invention
6 isn't enabled, but enablement isn't an issue
7 before the board. So, I don't -- I don't
8 think that any of this information affects
9 invalidity.

10 THE COURT: Okay. Is there co-
11 pending litigation?

12 MR. DARIEN WALLACE: Yes, yes.

13 THE COURT: Does enablement, are
14 these issues before the District Court?

15 MR. WARREN: No, but I assume they
16 will be, this is -- litigation has been
17 going on for two years.

18 THE COURT: I see. So, your position
19 is that you want, correct me if I'm wrong.
20 Your position is that you want to submit
21 three letters; one response; a transcript of
22 the meet and confer; documents including
23 customer complaints; quality agreement under
24 seal that may be inconsistent with

1 statements made in this proceeding; at least
2 one declaration. Are you talking about a
3 declaration from Dr. Boutrid as well as the
4 other gentleman, Gregor?

5 MR. DARIEN WALLACE: Schleicher.
6 Perhaps. But probably only Dr. Boutrid.

7 THE COURT: Okay. And then you want
8 to prohibit the Petitioner from cross-
9 examining Dr. Boutrid. And the only reason
10 you want to enter this stuff into our record
11 is because you want to satisfy your duty of
12 candor to the board?

13 MR. DARIEN WALLACE: Yes, and respond
14 to the serious allegations, and show that
15 they are baseless.

16 THE COURT: Okay. At this point I
17 think I will turn it over to Petitioner to
18 respond. Mr. McKeown?

19 MR. MCKEOWN: Thank you, Your Honor.
20 I don't know why we're talking about
21 depositions here. There was no meet and
22 confer on that topic. I suspect the reason
23 that we're talking about it is for the
24 reason we're having this call is that the

1 patent owner is trying to get out in front
2 of some -- some very serious issues.
3 They've already filed a brief, and now they
4 want to file a consecutive brief, which
5 would include a seven-page, single space
6 letter that they drafted, which is
7 essentially a brief. Then on top of that,
8 they want another brief, and then on top of
9 that, they want a declaration where we don't
10 get to cross-examine their witness.

11 I don't know that we need to talk
12 about the depositions too much. It's
13 afield of the purpose of this call. But the
14 reason we're talking about it is we had
15 three witnesses come in. We questioned the
16 first one. It was clear from the
17 questioning of the first witness that there
18 were serious issues here and violations of
19 the duty of candor. So, we certainly were
20 not going to give them, you know, overnight
21 to rehabilitate the other witnesses to come
22 in and try to fix that. So, we canceled
23 those witnesses. It's not about keeping
24 anything from the tribunal. In fact, what

1 patent owner did here, which was entirely
2 improper, is once we canceled that
3 deposition and canceled the court reporter,
4 they went out and got another court reporter
5 and conducted an ex-parte deposition of that
6 witness without anyone present to try to
7 rehabilitate the record. So, this has
8 nothing to do with us hiding from anything.

9 All of this is about them trying to
10 get out in front of these issues. And just
11 to go into the meet and confer issue here,
12 because I have some very serious concerns
13 with the representations made in those e-
14 mails, and made it again here today. And I
15 don't take these accusations lightly. I've
16 had the fortune, good fortune of being
17 counsel in over 400 proceedings. I've never
18 had to go into what I'm about to go into.
19 But there's a history here that the board
20 needs to be aware of. The patent owner has
21 been sanctioned seven times in the last nine
22 months alone on the litigation side. Five
23 of those times we were awarded fees, two
24 motions were dismissed for failing to follow

1 proper meet and confer guidelines. We need
2 to avoid this conduct from coming over here.
3 And for what I'm about to get into, the
4 relief should be denied outright, in
5 addition to all of the reasons that it has
6 nothing to do with what we're talking about
7 here.

8 We sent them a letter on August 23rd
9 outlining concerns we had with statements
10 made in cross-examination that seemed to
11 directly refute representations that were
12 made in the declaration. They tried to come
13 to the board immediately and ask for the
14 relief they're asking for today without a
15 meet and confer.

16 Given that these are serious
17 problems, and we want to give them every
18 benefit of the doubt to fix them, we
19 notified them that a meet and confer was
20 appropriate. We held that meet and confer
21 on September 5th. At that time, we were
22 told that it was going to take a number of
23 days to get back to us. It did. It took a
24 week. We got that seven-page, single space

1 letter on Wednesday, September 10th, at 8:36
2 p.m. in the evening. They asked for a
3 response within 24 hours, within less than
4 24 hours, by close of business the next day,
5 which, given that they had two weeks to
6 respond, was unreasonable. We told them in
7 an e-mail that we were working on that
8 response. And at the same time, we were
9 scheduling other meet and confers on the
10 litigation side.

11 And here's where the really
12 concerning part comes in. Mr. Neustel is on
13 the line, informed Mr. Wallace that he was
14 going out of town for a family event with
15 his daughter last Friday, and he would not
16 return until late Monday. On Friday, we get
17 an e-mail at 2:00 in the afternoon demanding
18 response by 4:30, otherwise they were going
19 to unilaterally request this call, knowing
20 Mr. Neustel, who is the lead counsel here,
21 was in transit. We didn't, of course,
22 respond, because Mr. Neustel was
23 unavailable. So, they sent that unilateral
24 e-mail. And in that e-mail, they asked for

1 this call on Monday, also knowing Mr.
2 Neustel was not going to be available. We
3 notified them and reminded them of that on
4 Saturday. And demanded that they withdraw
5 the letter, because this was just a blatant
6 misrepresentation and abuse of the process.
7 And what they sent late Sunday night was a
8 statement, and I'm quoting direct from the
9 e-mail, "It has come to the attention of
10 patent owner's counsel that one of
11 Petitioner's attorneys will be out of the
12 office on Monday." They knew that on
13 Thursday before they sent any of the e-
14 mails.

15 I can also read you a direct quote
16 from Mr. Neustel's e-mail to both of the
17 Wallace brothers. "I leave town tomorrow
18 morning for a family matter and will not
19 return until late Monday." So, in addition
20 to completely short-circuiting this meet and
21 confer, which by the way, as you pointed
22 out, Your Honor, we stipulated to an
23 extension of our date because we are waiting
24 on translations, German translations,

1 because this issue involves representations
2 made in the declarations that are proven
3 false by third parties. We've had to go to
4 third parties because they won't give us the
5 complaints that they have. So, that's
6 what's going on here. And so, outright,
7 this should be denied for abuse of the meet
8 and confer process, for terminating before
9 it's done. We've tried to give these guys
10 every benefit of the doubt, and we still are
11 trying to do that.

12 And we just had new documentation
13 come in this morning that was translated.
14 So, just that aside, turning to their
15 request, again, they didn't even mention 11
16 303 in their e-mail, it was 4251. 4251
17 relates to service of documents. Certainly
18 we were previously served with letters that
19 were party to, with transcripts we
20 participated in. We have these exhibits.
21 We haven't submitted them earlier because
22 they're attorney's eyes only. And when we
23 asked them in August to de-designate them or
24 allow us to submit them under seal, they

1 denied it.

2 So, now that we've informed them that
3 there's this serious problem, they want to
4 get out in front of it. They want to file a
5 consecutive brief. They already have a
6 brief coming to them after we file. The
7 PTAB has no jurisdiction over inequitable
8 conduct issues. If they're concerned about
9 coming clean on a duty of candor issue, they
10 can take this entire package of materials
11 and they can send it to OED right now.

12 That's making the patent office aware of it.
13 What -- what should be done is submitting
14 these papers now as additional briefing.
15 It's not ripe. We're trying to crystallize
16 these issues. We were in good faith trying
17 to come to some kind of recent conclusion.
18 We've asked them to redact the declarations,
19 just the parts that are offending. They're
20 arguing with us. We think we have
21 additional information that came in today
22 that, once again, makes those arguments
23 moot. And we thought that from the
24 beginning.

1 These are very serious concerns.
2 We're taking them serious. We mentioned to
3 them that we may have to seek sanctions in
4 this instance. We have not done that. We
5 need to serve them with that motion, as
6 you're aware, Your Honor, before we come to
7 the board.

8 So, what is going on here is an
9 attempt to get out in front of issues in a
10 course of conduct that's now being carried
11 over from the litigation. So, just in
12 short, the meet and confer process was
13 abused here. There were direct
14 misrepresentations in those e-mails. There
15 is no basis in the rules to provide
16 consecutive briefing and to allow what is
17 essentially a bad actor to leverage their
18 own misconduct to our detriment. And so for
19 all of those reasons, we would oppose the
20 relief requested.

21 THE COURT: Thank you, Mr. McKeown.
22 I have just a few questions. I can tell
23 that you know this is a serious issue. You
24 mentioned something about a withdrawal

1 letter. Is this the letter that you're
2 talking about where they were insisting that
3 you do it, you know, with a few hours, that
4 was in response to, I want to make sure I
5 understand it. There are three letters they
6 want to submit that are from you or your
7 firm, and then they have one response that
8 was a seven-page brief type thing I think
9 you mentioned, and then they wanted you to
10 respond to that?

11 MR. MCKEOWN: So, we sent them a
12 first letter on August 23rd outlining the
13 issues. Not only did we outline the issues
14 that are going on with the PTAB with respect
15 to the duty of candor, we also mentioned
16 inequitable conduct issues on the district
17 court side. We sent a -- we sent a follow-
18 up letter, a second letter on September 3rd,
19 which was additional detail and additional
20 explanation. The only letter we got back
21 from the patent owner was dated September
22 10th, so that would be their seven-page,
23 single spaced letter where they were
24 responding to everything in our letters,

1 which is essentially a brief in and of
2 itself. It's argumentation that they
3 authored that they want to get into the
4 record here. On top of the brief they want
5 to reference that letter. So, essentially,
6 you have the brief that they already filed,
7 their principal brief. They want to file
8 this letter, which is essentially a brief,
9 and then they want another brief on top of
10 that. And then they'll have their fourth
11 brief as a matter of right, come in after we
12 respond in October. They -- they already
13 have a brief.

14 Once we crystallize these issues, and
15 that was the reason that we pushed back our
16 brief. Once we get these translations, once
17 we continue with the meet and confer, maybe
18 they'll decide to pull these back. Maybe
19 they won't. At that time, we will file that
20 information, all of it, and they can say
21 whatever they want in their brief.

22 THE COURT: So, you're saying you'll
23 file it with your reply?

24 MR. MCKEOWN: I don't know that we

1 will file the letters, just frankly because
2 they're more about inequitable conduct. And
3 we are going to focus on what's in the, you
4 know, what's in the declarations and what's
5 in the cross-examination. So, those letters
6 are not something that we will likely file
7 in this proceeding. But certainly some of
8 the argumentation, again, should that not be
9 simplified or somehow resolved here in the
10 next couple of weeks, but the letters
11 themselves are not exhibits that we
12 anticipated filing, just substance of the
13 issue as it relates to the declarations.

14 THE COURT: What is the stuff that
15 you need to have translated?

16 MR. MCKEOWN: So, because we can't
17 get -- so, these relate to customer
18 complaints. They've made representations in
19 their declarations that there were no
20 complaints. There -- there are numerous
21 complaints out there presumably, a lot of
22 them are on the privilege log in the
23 litigation. They have not been produced.
24 So, because they haven't been produced,

1 we've had to go to third parties. These
2 would be customers of the patent owner, and
3 had to get them, right, the hard way, and
4 have them translated. And we're still
5 getting those.

6 THE COURT: I see. And you mentioned
7 that you wanted to file something with the
8 board that contained patent owner's
9 allegedly confidential information, and they
10 refused to de-designate those. What was
11 that that you were trying to file?

12 MR. MCKEOWN: That is the exhibits
13 they referenced in their e-mail that -- that
14 now they would like to file first, before,
15 right, we get a chance to file it. So,
16 we've gone to them with -- with our concerns
17 and their representations. We've tried to
18 work with them to resolve this issue. And
19 they're asking the board to set a precedent
20 where, when parties try to be reasonable and
21 do that, the other party can just short-
22 circuit it and file it with the board.
23 Right, if we wanted to be bad guys, we could
24 have just filed all of this without notice

1 in our response. But what we're trying to
2 do here is, you know, these ethical
3 violations are serious, and we don't want to
4 do that. We're -- we're trying to come to a
5 resolution here. And again, just going back
6 to the meet and confer, it's really not
7 appreciated when that's short-circuited and
8 there's just blatant misrepresentations put
9 in those e-mails. Because, you know,
10 ultimately we're trying to do the right
11 thing here, and, you know, we're -- we're
12 being made out to be the bad guy.

13 THE COURT: I understand, and you
14 mentioned that in the future you may come to
15 the board with a request for sanctions,
16 depending on how all this plays out; is that
17 correct?

18 MR. MCKEOWN: Right. Yes, that's
19 right, Your Honor. And I think, assuming we
20 get to that date, and we hope we don't, you
21 know, there perhaps the letters become
22 relevant. And there it's squarely before
23 the board where, right now, you know, these
24 issues are more in the realm of inequitable

1 conduct, which, of course, the board has no
2 jurisdiction over.

3 THE COURT: Okay. I want to make
4 sure I understand your position in terms of
5 the relief that it is appropriate at this
6 stage, Mr. McKeown. I have not read
7 Spectrum versus Longhorn. They cited this
8 case, and they are -- their position is that
9 they -- they need to alert the board under
10 11.303A3 of allegations of fraud, falsity,
11 duty of candor. Your position is that there
12 is no requirement for them to do that, but
13 that they should go directly to OED.

14 MR. MCKEOWN: My argument there is,
15 in that Lone Star case, the documents
16 clearly were false, right. They directly
17 refuted representations made in those
18 proceedings, and so they argued with the
19 board and the other side that they didn't
20 have to produce them. The board determined
21 otherwise, and that was a violation of the
22 duty of candor.

23 Mr. Wallace stated that these
24 documents are not false, they're -- so

1 therefore that rule is not triggered. And
2 again, if it is triggered, the appropriate
3 remedy there would be to notify the office
4 of Enrollment and Discipline.

5 MR. DARIEN WALLACE: Your Honor --

6 THE COURT: Okay. Thank you. They
7 also -- this is for -- I'd like to complete
8 Mr. McKeown, and then I'll go back to you,
9 Mr. Wallace.

10 MR. WALLACE: Okay.

11 THE COURT: Documents that may be
12 inconsistent with statements made, these
13 customer complaints, quality agreement under
14 seal, why, Mr. McKeown, should I not allow
15 them to produce those without any of the
16 other extraneous stuff, if they are truly
17 routine under our -- under our routine
18 discovery rule?

19 MR. MCKEOWN: well, because, Your
20 Honor, it's an incomplete set. It's -- it's
21 a handful of letters of a long list of
22 letters that they -- they designated on the
23 litigation side. So, if they want to submit
24 something, then submit all of them, right.

1 Don't pluck out the ones that you think
2 support your case. And what they told us is
3 well, you don't need those other letters
4 because they don't say what you think they
5 say. Well, given the course of conduct here
6 and the track record, we can't rely on them
7 for that. So, if they want to produce
8 letters, we're all for it, but -- but
9 produce all of them.

10 THE COURT: When you say letters,
11 you're referring your -- your friend, Mr.
12 Wallace referred to documents that may be
13 inconsistent with statements made in this
14 proceeding. He referred to customer
15 complaints, a quality agreement. I think
16 those were the two things he mentioned. I
17 didn't hear him mention letters.

18 MR. MCKEOWN: Right. Yeah, sorry,
19 Your Honor.

20 MR. DARIEN WALLACE: Were there --

21 MR. MCKEOWN: I meant -- I meant to
22 refer to correspondence between customers,
23 whether it's customer agreements or
24 complaints. So, I was using letters

1 generally there.

2 THE COURT: So, your concern is that
3 they're handpicking inconsistent statements
4 and that there's no way to police whether
5 they're giving you everything.

6 MR. MCKEOWN: That's correct, Your
7 Honor. And then we've consistently asked
8 them for all of the documentation, and we've
9 had to go out and get it one letter, sorry,
10 one -- one complaint or one agreement at a
11 time from their customers. Which is why
12 it's taking us so much time, because they're
13 all in German, and we have to have them
14 translated.

15 THE COURT: Is there any relief that
16 you want from the board today, other than to
17 deny this request in total?

18 MR. MCKEOWN: The relief that I would
19 request is that the request be denied
20 outright for what is essentially an abuse of
21 the meet and confer process and the
22 misrepresent -- plain misrepresentations in
23 e-mail. If the board would like us to
24 submit the e-mails where Mr. Neustel stated,

1 "I leave town tomorrow morning for a family
2 matter and won't return until late Monday."
3 And then Mr. Wallace, you already have the
4 e-mail he sent close to midnight on Sunday
5 saying, "It has come to the attention of
6 patent owner's counsel." That's the only
7 relief I request.

8 THE COURT: Okay. And is abuse of
9 meet and confer the only reason that you're
10 providing for denying this request, or is
11 there something more in terms of, you know,
12 whether this is relevant to any issue that
13 can be resolved by the board or anything
14 else?

15 MR. NEUSTEL: So, in addition to the
16 abuse of process as I mentioned, it's not
17 ripe. We're still working through this. As
18 I mentioned, we just got additional
19 correspondence today from Germany that was
20 translated, that we think we can work with
21 the patent owner to maybe budge them off
22 their position. So, it's unripe as a second
23 one, and there's no basis in the board's
24 rules.

1 Certainly, there are rules that apply
2 to the entire Patent Office relating to the
3 duty of candor, but there was no submission
4 to OED and Lone Star. Had that have -- had
5 that been done, then that would have
6 satisfied the issue. But just submitting an
7 incomplete set of exhibits is not something
8 that the board can do anything with.

9 THE COURT: Okay. Anything else, Mr.
10 McKeown, before I turn it back to Mr.
11 Wallace?

12 MR. MCKEOWN: No, I think that's it.

13 THE COURT: Thank you very much. Mr.
14 Wallace, you may reply.

15 MR. DARIEN WALLACE: Thank you, Your
16 Honor. Regarding the notion that they are
17 handpicked documents or they're not
18 complete, those are the documents and -- and
19 there are hundreds of pages of those. I
20 think one document was 14 megabytes and the
21 other one was eight megabytes. Those
22 documents are the basis for the allegations,
23 the false allegations in the three letters.
24 And the three letters aren't just one page.

1 Petitioner's counsel said that the patent
2 owner's letter was like a brief. It was
3 seven pages. Well, the letters from
4 Petitioner's counsel are about 20 pages,
5 single spaced.

6 And those allegations are based on
7 these customer complaints that Buergofol has
8 produced as attorney's eyes only in the
9 litigation. So, if those customer
10 complaints were sufficient to write the
11 letters alleging falsity and violations of
12 duty of candor, then they're certainly not
13 handpicked. And then to say that, well,
14 this isn't ripe yet it's exactly true. The
15 Petitioner has -- has written letters
16 threatening, well, demanding that we
17 withdraw the case, and threatening to file a
18 motion for sanctions, and all based on
19 baseless accusations. And we believe that
20 Buergofol is entitled to show that they are
21 baseless. And so, the reason that, you
22 know, the statement that well, that's just
23 handpicked documents isn't -- isn't true.
24 There -- there are over 20 megabytes of

1 those that we would like to submit under
2 seal.

3 Then for the second point that
4 Buergofol is using as --

5 THE COURT: Just before you move on
6 to the second point, Mr. Wallace, I have a
7 question there. Did I hear you say that you
8 agree that the issues are not ripe on duty
9 of candor, and fraud, and all this?

10 MR. DARIEN WALLACE: Well, the
11 Petitioner has not made a case of -- they've
12 just made these wild allegations. And the
13 reason that Petitioner's counsel said it was
14 not ripe is because he realizes that the
15 documents that they have don't show that
16 there's any falsity. There's just
17 allegations of falsity. But -- but they've
18 made the allegations, serious allegations
19 anyway, and -- and they don't want it to go
20 forward, because it will become evident that
21 they shouldn't have written these letters.

22 THE COURT: Talk to me about your
23 alleged abuse of the meet and confer
24 process, because we do take that very

1 seriously here at the board. We don't want
2 games. And you, if you have not reasonably
3 met and conferred, you should not be in
4 front of the board. Address Mr. McKeown's
5 allegations with respect to that issue,
6 please.

7 MR. DARIEN WALLACE: So, back in
8 August, we requested this call, and the
9 Petitioner requested a meet and confer
10 first. So, we did meet and confer on
11 September 5th. And then they -- there were
12 some letters going back and forth. But it
13 is certainly untrue that Buergofol ever gave
14 Petitioner's counsel 24 hours to respond.
15 There was no response necessary in the
16 requested, or even desired. Buergofol
17 responded with its seven-page letter, and at
18 the end of the seven-page letter, we
19 requested that Petitioner's counsel provide
20 us with this alleged smoking gun affidavit
21 in which Dr. Boutrid had received customer
22 complaints. Complaints, I guess, of a
23 problem that related to the invention.
24 There is no such affidavit, we believe. And

1 we gave Petitioner's counsel until the
2 following day at 5:00 p.m. to send us that
3 affidavit that he claimed was so bad. And
4 Petitioner's counsel never did that, never
5 even responded to that.

6 Another thing we requested is that to
7 know whether they still seek to file a
8 motion for sanctions. They also didn't.
9 So, really what this was is Petitioner's
10 counsel wanting another bite of the apple to
11 respond and to have this -- this so-called
12 meet and confer process go on and on, so
13 that we would not be able to have this call
14 with the board, and to prevent us from, as
15 Petitioner's counsel said, get out in front
16 of this, and -- and show that these
17 allegations are baseless.

18 So, the bit about Mr. Neustel going
19 on a vacation, that is beside the point.
20 There was, there was no necessity for Mr.
21 Neustel to do anything other than to send us
22 this letter that he claimed, this affidavit
23 that he claimed he had.

24 And actually on that Friday, we had a

1 meet and confer set up for that Friday that
2 supposedly he was gone. And I sent an e-
3 mail asking him on Friday afternoon to
4 please give us the time, because we had all
5 blocked our schedules for Friday, waiting
6 for this meet and confer. And he hadn't
7 given a time for it. And then in the
8 evening, he sent that e-mail saying, oh, you
9 should have known I'm going to be out of
10 town on Friday and coming back on Monday.
11 It is true when I read that I -- I missed
12 the word late, and I knew that he was coming
13 back on Monday. But I didn't realize that
14 late Monday meant he's not going to be here
15 on Monday. But that has, you know, nothing
16 to do with not meeting and conferring on
17 Friday, because we never thought that there
18 would be any meeting and conferring in this
19 case. We thought there would be meeting and
20 conferring in the district court case. So,
21 when I was informed of that on Saturday, I
22 wrote the e-mail on Sunday, saying please do
23 not schedule this call for Monday, because
24 Mr. Neustel is out of town.

1 THE COURT: Okay. Do you have
2 anything else?

3 MR. DARIEN WALLACE: I --

4 MR. LESTER WALLACE: I have one
5 thing, Your Honor. My name is Lester
6 wallace. Can you hear me?

7 THE COURT: Yes, yes, I can.

8 MR. LESTER WALLACE: In one of these
9 letters, which is an accusation, this is the
10 September 3rd letter, and this is signed by
11 Michael Neustel, there is an allegation of
12 breach of the duty of candor of its counsel,
13 of Buergofol's counsel, namely me. I take
14 it as me. And so my request to the board is
15 that if I'm being accused personally of, you
16 know, misconduct, such as a breach of the
17 duty of candor, well, first of all, if I'm
18 not, then I don't -- I don't care. But if I
19 am, then I think that -- that I am entitled,
20 by basic fairness and due process to be able
21 to defend myself from these accusations from
22 this guy in clear fashion before being
23 condemned. So, I would request that if it
24 is the case that counsel, namely me

1 personally, is being accused of a breach of
2 duty of candor that I have the opportunity
3 to brief that issue.

4 THE COURT: Okay. Anything else from
5 patent owner?

6 MR. LESTER WALLACE: And if you would
7 like, I can read that paragraph of the
8 letter that makes the accusation against
9 counsel. It says, "The similarity between
10 the facts in Spectrum Solutions and in this
11 case are beyond striking. Here however,
12 Buergofol and its counsel have made no
13 effort" underlined "To correct the record at
14 the TTAB -- PTAB for almost one month now,
15 despite being aware of the false
16 statements." And it goes on. There are no
17 false statements.

18 THE COURT: Okay. Anything else?

19 MR. DOODY: Just a few things, Your
20 Honor. This is Patrick Doody. One is a
21 procedural issue. I'm the designated lead
22 counsel for Buergofol in this case, but I've
23 developed a health-related issue that I
24 don't want to get into with a court

1 reporter. But it's something that's going
2 to require me to step away, and I'm assuming
3 that I can do so by an updated mandatory
4 notice with designating a new lead counsel
5 from the firm of Pillsbury. Unless that's
6 not the appropriate avenue, if -- if
7 there's, it's not the whole firm, nobody's
8 withdrawing from the case. So, I don't
9 think we need to file a motion, and I'm
10 hoping that it's just a matter of a
11 mandatory notice, an updated mandatory
12 notice.

13 THE COURT: Okay. Well, we will
14 need, you know, a new lead counsel. And you
15 know how that works, Mr. Doody. So, do what
16 you need to do.

17 MR. DOODY: Correct, and so I'll do
18 that --

19 THE COURT: Anything else from patent
20 owners? I'm sorry?

21 MR. DOODY: Yeah, I just -- I just
22 wanted to clarify a few things. I mean,
23 it's obvious that there's, you know, the
24 litigation tactics are spilling over here

1 into the PTAB. And I'm not involved in
2 litigation. I don't believe Mr. McKeown is
3 either, although he may be. In any event,
4 I'm stuck in the middle of it,
5 unfortunately.

6 But I can say that the August 23rd
7 letter from Petitioner's counsel did allege
8 misconduct on my part, on Buergofol's
9 counsel part, and outright threatened us
10 with sanctions unless, and demanded, not
11 requested, not kindly, nicely wanted to
12 resolve the issue. It was an outright
13 demand that we disclaim this patent, that we
14 disclaim an unrelated patent, that we remove
15 and withdraw all of our affidavits, and that
16 we fix the inconsistent statements in the
17 patent owner response, which I think is a
18 little over the line. And that's why they
19 don't want those letters to get in front of
20 you.

21 And Petitioner's counsel, Mr.
22 McKeown, is absolutely correct. When a
23 party is accused of something like this,
24 your natural reaction is to get in front of

1 it. That's exactly what we want to do, and
2 we want to put it behind us. And they were
3 told that in August 29th when we requested a
4 conference call with the board, they
5 demanded a meet, confer. And we held that,
6 no -- no resolution was made.

7 And in the September 10th letter that
8 was sent to them, we also requested their
9 availability for a call with the PTAB, not
10 only in that letter, but in the e-mail. And
11 we never got a response. So, I think the
12 characterization of sandbagging Petitioner
13 at the last minute by requesting this
14 conference with the -- with PTAB is a little
15 untoward. They'd had three or four days,
16 they didn't just have two hours. And they
17 didn't respond. So, we had no idea what
18 they were doing, whether they were going to
19 respond.

20 Admittedly, I was not aware of Mr.
21 Neustel's absence, probably wouldn't have
22 sent that request, but it was sent in any
23 event. I probably would have sent the
24 request today for -- for a conference call.

1 But I don't think there's been any -- been
2 any abuse of any meet and confer. We
3 already met and conferred, and there's no
4 resolution.

5 THE COURT: Thank you, Mr. Doody.
6 Anything else from patent owner?

7 MR. DARIEN WALLACE: No, Your Honor.

8 THE COURT: Mr. McKeown, do you want
9 to reply here?

10 MR. MCKEOWN: Yeah, just quickly. I
11 mean, due process is not an issue here. We
12 sent them a letter. They haven't been
13 accused of anything here, so that there's no
14 due process considerations. They've had an
15 opportunity to send a letter back. They
16 mentioned that this will probably be
17 litigated. They can produce those letters
18 in the litigation and -- and their defense
19 is there. I've never gotten an e-mail on a
20 PTAB matter that demanded a two-hour
21 response, especially after giving the other
22 side as much as two weeks to prepare their
23 -- their letter.

24 we do believe, and we stand by all of

1 those accusations in those letters. The
2 reason we're saying they're not ripe is
3 because the arguments that we received back
4 are viewing the issue very, very narrowly.
5 And so we've now gone out and got -- gotten
6 new correspondence that was translated that
7 refutes even those positions. So, that's
8 what I mean by it's not ripe. It's not as
9 though anything we said in those initial
10 letters are, you know, somehow untrue.

11 And then finally, you know, as I
12 pointed out, these -- these letters don't
13 need to be submitted here. We don't intend
14 on relying on them. This is more issues for
15 the inequitable conduct on the litigation
16 side. I suspect the real reason that they
17 want to get these letters in here is to try
18 to take, you know, advantage of the PTAB
19 protective order, which states that, like
20 evidence under seal that's as filed pursuant
21 to that protective order, can't be used
22 elsewhere. So, they're trying to perhaps
23 shield these letters from the -- from the
24 litigation side. So, this is just a lot and

1 it's -- it's matters that don't necessarily
2 concern the PTAB. Again, we have not even
3 filed our brief. We're trying to focus and
4 narrow all these issues.

5 So, having all of this information
6 injected into the file and additional
7 briefing, and allowing the patent owner
8 repeated briefing is just, you know, talking
9 about due process, that's not fair to the
10 Petitioner, where we've gone out of our way
11 to try to resolve these issues amicably.
12 We've extended our filing date. We're going
13 out and doing the work. We're getting these
14 translations. And admittedly, patent owner
15 is talking about getting out in front of
16 things that just don't concern the PTAB and
17 are unripe and may not be. Who knows if we
18 can get some kind of agreement here carried
19 forward into Petitioner's brief in the first
20 instance. So, we -- so we oppose for all of
21 those reasons.

22 And just quickly on the meet and
23 confer, when you ask for a response within
24 less than 24 hours or two hours, whether you

1 consider that to be a further meet and
2 confer or whatever response, I don't think
3 that rebuttal is fooling anyone. They
4 short-circuited this process, and they made
5 representations in an e-mail that were
6 false. They certainly knew Mr. Neustel was
7 unavailable the entire time. That's why
8 they sent that e-mail on a Friday. And so,
9 for all those reasons I would request that
10 the relief be denied.

11 THE COURT: Thank you, Mr. McKeown.
12 I'm going to give patent owner one last
13 chance before I rule. Do you have anything
14 to say responding to what Mr. McKeown just
15 said?

16 MR. DARIEN WALLACE: Yes, well,
17 again, to repeat what I said, that the bit
18 about the two hours to respond is untrue.
19 We never asked for a response. We asked for
20 Petitioner's counsel to send us the
21 affidavit that he claimed he had. That's
22 all. We never requested or desired any
23 response from Petitioner's counsel. So,
24 there was no response required within two

1 hours.

2 THE COURT: Okay. Thank you very
3 much, Mr. Wallace. I am prepared to rule at
4 this point. I'm going to deny the request
5 of patent owner's counsel for the reasons
6 stated by Mr. McKeown on the record, with
7 the sole exception that I'm not convinced
8 necessarily that there's been an abuse of
9 the meet and confer. I do want you guys to,
10 you know, be very careful with the meet and
11 confers. I want you to, you know, obviously
12 there's a lot of animosity on the sides, but
13 I agree with Mr. McKeown that this is a
14 developing situation. It's spilling over
15 from the litigation. And I am sensitive to
16 his concerns about that. And I especially
17 am sensitive to the concern that this is a
18 very serious issue and it's not yet ripe.

19 If patent owner's counsel feels that
20 they have a duty of candor to report to the
21 office on allegations of inequitable conduct
22 or other wrongdoing you can go to OED. You
23 can file there. But I am very sensitive to
24 the idea that you are trying to inject

1 things into this proceeding that are not
2 relevant to any issue on the merits. And I
3 don't think that it's going to facilitate
4 the speedy, efficient and cost effective
5 resolution of this matter, to allow the
6 requested relief. We've opened the option
7 that once this has developed, if there's no
8 agreement on these issues, that Mr. McKeown
9 has the option of filing a motion for
10 sanctions in this proceeding. And at that
11 time, these issues may be briefed. But I
12 agree with Mr. McKeown that it's not ripe.
13 And I'm going to deny the requested relief
14 on that basis. Basically, for his sum up, I
15 agree with everything that was in the final
16 concluding paragraph of Mr. McKeown, with
17 the possible exception of the abuse of the
18 meet and confer process. So, that's the
19 ruling. There will be no order, since we
20 have a court reporter on the line. The
21 record, Mr. McKeown, thank you for agreeing
22 to file the transcript in due course. That
23 will be the official record of this call,
24 including the ruling. I'll start with

1 patent owner, since you have the -- me on
2 the line, do you have anything else to
3 address today?

4 MR. DAMIEN WALLACE: Pat?

5 MR. DOODY: I guess we will conclude,
6 then, from -- from that, then that we have
7 no current obligation to correct any false
8 statements with the PTAB, alleged false
9 statements. Am I right in that
10 understanding?

11 THE COURT: I will submit that those
12 issues are not ripe, and that if you can
13 reach some kind of agreement with your
14 opposing counsel to resolve those
15 allegations prior to a motion for sanctions,
16 this is the time to do it. But yes, based
17 on the record presented here, I don't think
18 that you have a duty to submit these things
19 at this time, the things that were mentioned
20 at today's hearing.

21 MR. DOODY: Thank you.

22 THE COURT: Petitioner, I'll ask you,
23 do you have anything to add, or do you have
24 anything else that you'd like to have

1 addressed at this point?

2 MR. MCKEOWN: I would just add that
3 there's no -- there may be no duty to submit
4 them here, but if there are concerns that
5 the Office of Enrollment and Discipline is
6 always an option, as you pointed out, Your
7 Honor. But nothing else from Petitioner.

8 THE COURT: Okay. Yes, and I agree
9 with that, if patent owner is concerned
10 about their duty of candor to the office,
11 yes, office -- OED is your option right now.
12 So, with that, we will conclude this, this
13 teleconference. Thank you, Counsel, for
14 your time.

15 MR. DARIEN WALLACE: Thank you.

16 MR. MCKEOWN: Thank you.

17 MR. DOODY: Thank you.

18 MR. NEUSTEL: Thank you.

19 MR. LESTER WALLACE: Thank you.

20
21 (Proceedings concluded at 12:01 p.m.)
22
23
24

1 I, PAULINE L. BAILEY, Notary Public,
2 do hereby certify that on the 20th day of
3 September, 2024 the foregoing transcript is
4 a true and accurate transcription of my
5 voice-writing notes, to the best of my
6 ability.

7
8 WITNESS MY HAND, this 26th day of
9 September, 2024.

10
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18 Pauline L. Bailey

19
20 PAULINE L. BAILEY

21 Notary Public

22 My commission expires:

23 September 29, 2028
24

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