In the Matter of:

Omega Liner Company, Inc. Buergofol GmbH

Telephonic Hearing

October 24, 2024

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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OMEGA LINER COMPANY, INC.,

Petitioner,

v.

BUERGOFOL GMBH,

Patent Owner.

****

Case No. IPR2023-01372
(Patent No. 9,657,882)

****

Heard before:
THE HONORABLE GRACE KARAFFA OBERMANN,
THE HONORABLE KIMBERLY MCGRAW and
THE HONORABLE JAMES J. MAYBERRY,
Administrative Patent Judges

TELEPHONIC HEARING

October 24, 2024

1:03 p.m. to 3:01 p.m.

------ Laurie J. Berg, CCR, RPR, CRR ------

APPEARANCES:

Heard Before THE HONORABLE Grace Karaffa Obermann,
THE HONORABLE Kimberly McGraw and
THE HONORABLE James J. Mayberry

Representing the Petitioner:

WOLF, GREENFIELD & SACKS, P.C.
Scott A. McKeown, Esquire
600 Atlantic Avenue
Boston, Massachusetts 02210-2206
617.646.8000
scott.mckeown@wolfgreenfield.com

-and-

NEUSTEL LAW OFFICES, LTD.
Michael S. Neustel, Esquire
Monte M. Bond, Esquire
2534 South University Drive
Suite 4
Fargo, North Dakota 58203
701.237.0544
michael@neustel.com
monte@neustel.com

Representing the Patent Owner:

IMPERIUM PATENT WORKS LLP
Darien Wallace, Esquire
T. Lester Wallace, Esquire
315 Ray Street
Pleasanton, California 94566
925.331.8099
darien@imperiumpw.com
lester@imperiumpw.com

-and-

APPEARANCES (continued):

PILLSBURY WINTHROP SHAW PITTMAN LLP
Patrick A. Doody, Esquire
1650 Tysons Boulevard
McLean, Virginia 22102
703.770.7900
patrick.doody@pillsburylaw.com

Also Present:

David Wood, Esquire

Susan Klinger, Court Reporter

P R O C E E D I N G S

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JUDGE OBERMANN: Excuse me. This is Judge Obermann. I just got on the phone call. I was having some trouble and I don't know if you've already started without me, but I'm going to begin a call now, and I'd like you to repeat anything of substance that was stated.

This is in I -- this a teleconference in IPR2023-01372. It relates to a request we've received from Patent Owner's counsel to file a motion to strike under Rule 37 CFR 42.23(b).

I'm Judge Grace Obermann and I have with me on the call today Judge James Mayberry, as well as Judge Kimberly McGraw and patent attorney David Wood for the board.

Who do we have on the call today for Patent Owner?

MR. DOODY: Patrick Doody from Pillsbury Winthrop Shaw Pittman.

MR. DARIEN WALLACE: And Darien Wallace, also for Patent Owner, Buergofol.

MR. LESTER WALLACE: And Lester Wallace

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also for Buergofol.

JUDGE OBERMANN: And I just want to confirm then, we have three people for Patent Owner, and I understand that Patent Owner also has engaged a court reporter; is that correct?

MR. DOODY: That's correct. It --

JUDGE MAYBERRY: Okay.

MR. DOODY: I don't think --

JUDGE OBERMANN: And who --

MR. DOODY: I don't know --

JUDGE OBERMANN: -- do we have for Petitioner?

MR. DOODY: It -- I'm sorry.

MR. MCKEOWN: Thanks, Your Honor. And you didn't -- you didn't -- you didn't miss anything. We were discussing court reporters.

But Scott McKeown of Wolf, Greenfield & Sacks for Omega Liner and I'm joined today by Monte Bond and Michael Neustel of the Neustel Law Firm.

The e-mail that went out said that all parties should have a court reporter. Maybe the -- there was a typo there, but there is two court reporters on the -- on the call, and so that's what we were discussing. If it's okay with the board, I think

we'd like to proceed with two court reporters, but if that gets too -- if that's too awkward, we can drop one.

JUDGE OBERMANN: That's perfectly fine. I will ask that, after you all get your transcripts, if you can put your heads together and resolve on a single transcript to be entered as the official transcript for the call, that would be great. If you have any trouble reaching agreement, you can always call the board and we can try to resolve it. But I will expect the parties to jointly file a -- one of the transcripts as the official record in a reasonable amount of time, so please try to do that.

Okay. By my count, we have about -- at least six requests from Patent Owner for action by the board and one request from Petitioner. But since the call came in from Patent Owner, I am going to ask Patent Owner to please -- oh, before we get started, I do want to make sure that we -- that both sides have Counsel that's in good standing with the patent bar.

I -- I'm sure Mr. Doody, Mr. McKeown, I know that you both have numbers and I think that both Mr. Wallaces have patent office numbers as well. But I just want to make sure -- I'd like to get a voice

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affirmation from each counsel that's going to speak today that they are a member of the patent bar in good standing, starting with Mr. Doody.

MR. DOODY: Yes, I am.

JUDGE OBERMANN: Mr. Darien Wallace?

MR. DARIEN WALLACE: Darien Wallace, yes, I'm -- I have a registration number in good standing.

JUDGE OBERMANN: Thank you.

And Mr. Lester Wallace?

MR. LESTER WALLACE: Yes, I do.

JUDGE OBERMANN: Thank you.

And Mr. McKeown?

MR. MCKEOWN: Yes, I'm a member of the patent bar and in good standing.

JUDGE OBERMANN: Okay. Thank you very much.

With that, let's proceed to argument. First with Patent Owner, let's address Part 1 of your e-mail requesting authorization to file a motion to strike. And this is Part A based on Exhibits 1070 through 1072.

MR. DOODY: Okay. Thank you, Your Honor.

And depending on how it goes, some of these are sort of nested requests in the e-mail. So even

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though there seemed to be a lot of them, some of them are contingent upon others not being granted.

But so, for this particular issue with respect to Exhibits 1070 through 1072, there could be little doubt that these were sprung on Patent Owner at the final hour. We had no idea Petitioner had them. And in fact, Petitioner has had them for over three months. And I don't think there is any question that the document, at least Exhibit 1072, is protected by work product, at the very least, and was filed not only --

JUDGE OBERMANN: Can I stop you for a second?

MR. DOODY: Sure.

JUDGE OBERMANN: My -- excuse me.

MR. DOODY: Yes.

JUDGE OBERMANN: I'm -- is it Mr. Doody who is speaking?

MR. DOODY: Yes, that's correct. I'm sorry. I should've identified myself.

JUDGE OBERMANN: Okay. Thank you.

Mr. Doody, when did your client become aware that the documents had been shared with Petitioner's counsel?

MR. DOODY: That would have been -- well, unfortunately, I was busy and I didn't look at what was the Petitioner's reply until Wednesday. It was filed on Sunday evening, should I say Monday morning, at 2:45 a.m. And on Thursday is when I first became aware of it. So that would be --

JUDGE OBERMANN: And it was --

MR. DOODY: -- [indiscernible] --

JUDGE OBERMANN: -- it was --

MR. DOODY: -- [indiscernible] --

JUDGE OBERMANN: -- it was filed in the pub -- okay.

But it was filed in the public record on October 7th; is that correct?

MR. DOODY: That's correct. I'm sorry. That -- that's the first time it was --

JUDGE OBERMANN: And your --

MR. DOODY: -- [indiscernible] --

JUDGE OBERMANN: -- position is that you didn't look at it for almost three weeks and now we're -- and now are you trying to claw those back? Did you request --

MR. DOODY: Ye --

JUDGE OBERMANN: -- to get them returned

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to you?

MR. DOODY: That -- that's already been made. No, that's not my position. My position is the fir -- you asked when I first became aware of it. And me, personally, first became aware of it on Thursday of the week in which it was filed -- or Wednesday, I think it was, the week in which it was filed. So it was two days after the --

JUDGE OBERMANN: Okay.

MR. DOODY: -- filing of it.

JUDGE OBERMANN: Hold on a second. Please hold on a second.

I'm not really concerned with when you personally became aware of this, but I am certainly going to import to your client knowledge of these documents as of October 7th.

My question is, was anyone from Patent Owner, including Patent Owner's counsel, made aware of the i -- disclosure of these documents prior to October 7th?

MR. DOODY: No.

JUDGE OBERMANN: Okay. I'd also like to hear your -- if these are truly confidential, the proper way to go about that is to file a motion to seal that also follows, you know, our informative

decision in the Argentum case that establishes ownership of the confidential information. I would like to hear your argument on why this ar -- this is work product if Dr. Stark is no longer employed by Patent Owner.

MR. DOODY: [Indiscernible] --

JUDGE OBERMANN: He is not your client.

MR. DOODY: He -- that's correct.

There's a number of reasons why it's work product. For the same reason that a draft declaration for an expert who's not a client is work product, which was set forth in the Twitter -- what's the case -- Twitter v. Palo Alto Research, IPR2021-01298. It's a work product, at the very least, and perhaps even privileged document.

Yes, he's a former employee, but all of the evidence and all of the statements in there relate to the time of when he was employed. The inventor also -- former inventor -- or the inventor former employee also is under an obligation of secrecy to not disclose information. And that continues even after his termination from employment with the company.

And finally, Dr. Stark signed an assignment document in this case where he agreed to testify and

to sign oaths and declarations to ensure the enforceability and validity of the patent.

JUDGE OBERMANN: Is that in the --

MR. DOODY: So --

JUDGE OBERMANN: -- record, Counsel?

MR. DOODY: I don't know if the assignment document is. It may be. It may not be. I don't know if it --

JUDGE OBERMANN: You can't --

MR. DOODY: I mean, I know --

JUDGE OBERMANN: -- tell me whether it's in the record? Are you able to tell --

MR. DOODY: Uh --

JUDGE OBERMANN: -- me whether it's in the record?

MR. DOODY: Well, because it would've been filed with Petitioner's file history and I don't think it's in the file history. So no, it's not. It's in the PTO's internal records. It's a -- it's an assignment document filed at the patent office. But is it in the record in this case --

JUDGE OBERMANN: It's not --

MR. DOODY: -- [indiscernible] --

JUDGE OBERMANN: -- in the record.

Mr. Doody, just stop for a second. The moment you disclosed this to Dr. Stark, you lost any work-product confidentiality that I can see. I've looked at the cover letter that you sent. I see nothing in that cover letter indicating that Mr. -- Dr. Stark should or must maintain confidentiality over whatever you sent him.

I want to hear specifically what the basis is of confidentiality over a declaration that you sent by cover letter without any markings of confidentiality and without any indications that Dr. Stark was under a requirement to hold it confidential.

MR. DOODY: Well, I believe in one of the exhibits, which is the e-mail between German counsel. So everything in it goes through German counsel. So Patent Owner's German counsel sent the draft that was prepared by U.S. counsel, that would be Mr. Wallace, to Dr. Stark's German counsel requesting that he review and --

JUDGE OBERMANN: What --

MR. DOODY: -- sign the document.

JUDGE OBERMANN: Please --

MR. DOODY: And in that --

JUDGE OBERMANN: Please refer to --

please refer to the exhibit number.
MR. DOODY: I'm sorry. I don't have everything up in front of me. I believe it's 1070, but a --
JUDGE OBERMANN: Is it --
MR. DOODY: -- lot of these have --
JUDGE OBERMANN: -- Exhibit 1068? Is it --
MR. DOODY: Uh --
JUDGE OBERMANN: -- Exhibit 1068?
MR. DOODY: No, I think it's 1071. Let me try to find it.
MR. LESTER WALLACE: It is 1071.
MR. DOODY: 1071 is --
JUDGE OBERMANN: Where --
MR. DOODY: -- the original. And 1070, I believe, is the translation of it. So it's in German and the translation of --
JUDGE OBERMANN: I'm look --
MR. DOODY: -- this --
JUDGE OBERMANN: I'm looking --
MR. DOODY: -- document --
JUDGE OBERMANN: -- at 1070. Mr. Doody, I am looking at 1070. Show me where in this document

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you conveyed anything under an expectation of confidentiality to Dr. Stark or Mr. Stark.

MR. DOODY: At the very end, We look forward to receiving -- by June 26th we had already pointed out that Mr. Stark, as a co-inventor and former employee, is obliged to provide support and cooperation. Obliged. That --

JUDGE OBERMANN: That doesn't --

MR. DOODY: -- is not ---

JUDGE OBERMANN: -- say anything about confidentiality.

Where's the confidentiality?

MR. DOODY: Well, the confidentiality is in his employment agreement. That's not of record in this case.

JUDGE OBERMANN: Which is not in --

MR. DOODY: That doesn't --

JUDGE OBERMANN: -- the record.

MR. DOODY: -- that doesn't -- that doesn't defeat the purpose of it being confidential. We can make it of record.

JUDGE OBERMANN: You haven't established his confidentiality, Mr. Doody. I need you to --

MR. DOODY: So in --

JUDGE OBERMANN: -- establish some basis of confidentiality in order to proceed here.

MR. DOODY: Yes. So let's go to Exhibit 1068. Page 3 of that exhibit. And in the exhibit we just discussed where there was a reference to "as we pointed out previously," this is what I believe they were talking about, it says, As a co-inventor and former employee, you are obliged to support our client in her defense and to cooperate in this. This obligation is based on the duty of care and loyalty of the person who has made an employee invention and on the postcontractual requirement of good faith, citing the German employment -- I believe that's in German employment law.

JUDGE OBERMANN: I understand that and I have read that part of the paragraph and I'm still not seeing anything that even tangentially implies a duty of confidentiality. I see that you're trying to persuade Mr. Stark that he has an obligation to assist you in this proceeding.

But where in this paragraph or anywhere else did you ever tell Dr. Stark that he couldn't -- that he was under a duty to preserve any confidentiality of the -- of the draft declaration that you sent him?

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MR. LESTER WALLACE: Uh, Darien --
MR. DARIEN WALLACE: Excuse me.
MR. LESTER WALLACE: Uh --
MR. DARIEN WALLACE: This --
MR. LESTER WALLACE: This is --
MR. DARIEN WALLACE: -- is --
MR. LESTER WALLACE: This is Counsel -- this is Counsel Lester Wallace. May I -- may I -- perhaps Darien Wallace should address this issue.

There's no obligation, Your Honor, to prove that Dr. Stark was, in writing, somehow alerted that he was not at liberty to disclose work-product information. There is no such law.

And what -- there's a long history of litigation with Dr. Stark. Dr. Stark is well aware that he was contractually obligated and obligated by statute, which we can provide additional information to the patent office, if required, to clearly establish that Dr. Stark was obligated to maintain secrecy of all communications, especially a draft declaration drafted by litigation counsel in the United States.

JUDGE OBERMANN: Okay.
MR. DARIEN WALLACE: Your Honor, this

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is --

JUDGE OBERMANN: I will -- yes?

MR. DARIEN WALLACE: This is Darien Wallace.

There is a long history between Buergofol and Dr. Stark. There are over a dozen ongoing litigations against Dr. Stark in Germany. He sued back for wrongful termination, but he was terminated for theft of trade secrets and divulging trade secrets. And he is well aware of his duty not to divulge an -- any secrets.

There's an absolute duty of secrecy, and that was brought up many times in the many lawsuits, including, in the district court, this was fully briefed. And all of these issues are in the record, and that is why the magistrate judge in the district court issued an order to prevent Dr. Stark from divulging secrets because, in the record, it is shown that he had a propensity for doing that. He was terminated for divulging Buergofol's secrets to one of its major competitors.

So again, there's no obligation to, each time for each document sent to him, inform him that he had an obligation to keep it secret.

JUDGE OBERMANN: Okay. Let me -- let me approach it this way, I am looking at the reply brief. And am I correct that they cited Exhibit 1070, 1071 and 1072 only on Page 21 of the reply brief in that Paragraph 6, as well as on Page 16, I think that's where they cited Exhibit 1060 and 10 -- yeah, are these the only two places that we're talking about these documents in the reply?

MR. DARIEN WALLACE: That is possible. I haven't scoured the reply, but there are a number of instances scattered throughout the reply where petitioner has contended in the arguments, even in the merits portion in the top first six pages or so, about false testimony. And that's -- was the purpose of this document, was to somehow create the impression that our inventors had presented false testimony.

JUDGE OBERMANN: Okay. Thank --

MR. DARIEN WALLACE: So whether the -- it --

JUDGE OBERMANN: -- you.

MR. DARIEN WALLACE: It --

JUDGE OBERMANN: Is there any other --

MR. DARIEN WALLACE: It --

JUDGE OBERMANN: Okay.

MR. DARIEN WALLACE: It [indiscernible] --

JUDGE OBERMANN: I just want to make sure I have a complete record of your arguments for this particular part. Basically, I guess we're talking about motion to strike Part A and B -- no, just Part A in your e-mail to us.

MR. DARIEN WALLACE: That's correct.

JUDGE OBERMANN: Later on, you do talk about Exhibits 1060 and 1061 and Part 2 with the motion to expunge and to seal.

MR. DARIEN WALLACE: Right.

MR. LESTER WALLACE: So our main response --

MR. DARIEN WALLACE: It --

MR. LESTER WALLACE: -- is, there's nothing in the law about wiping away work-product privilege because the communication of the information was not marked in any way. There is no such law.

JUDGE OBERMANN: Well, I --

MR. DARIEN WALLACE: No.

JUDGE OBERMANN: I don't -- I don't know about that.

But did either -- did anybody go to the

district court to argue that there was a violation of that order to Document 56 from the district court? In other words, have you sought to have this material declared as work product or attorney-client-privilege protected?

MR. DARIEN WALLACE: Your Honor, this is --

MR. DOODY: Well --

MR. DARIEN WALLACE: -- Darien Wallace. We've filed a motion to hold Omega's counsel in contempt for violating that order. And there is no requirement to have the draft declaration declared as work product. It is work product under all of the precedent, which obviously was cited in our motion to hold them in contempt.

JUDGE OBERMANN: Okay. I just want to make sure I understand your arguments in relation to Exhibits 1060, 1061, 1070, 1071, 1072 and the parts of the reply that cite those documents.

Is it -- am I -- is it fair that your position is that these were -- that these are protected as confidential information and that for that reason, they shouldn't be used here? Mr. Doody?

MR. DOODY: Uh -- this is Mr. Doody.

That's part of it. That's the -- that's only the expunging-it-or-putting-it-under-seal portion of the argument.

There's additional -- a couple of additional points to be made. Expect -- with respect to the declaration -- the draft declaration, there's -- there are, and is, plenty of authority that has said, if the document on its face, which this document is, even though there's no markings of confidentiality, if it's -- on its face, is evident that it's work product, which this is, because it's been held to -- so -- to be so by the PTAB, and I have a string cite of cases pages long, then that's what it is, it is, whether you tell the person you're sending it to that it's work product, especially when it's a lawyer.

And that's what gets into the whole notion of Exhibits 1070 to 72 is that, not just Dr. Stark -- and let's just assume Dr. Stark could be free to give it away to whomever he wants -- Dr. Stark could also steal documents out of our cabinet, out of our -- out of our cabinet and give them to opposing counsel, but opposing counsel can't use them.

And in that district order, it specifically said, Must terminate the conversation as soon as it

appears that Dr. Stark was about to divulge privileged or confidential information. And they clearly didn't do that. They took it. They accepted it. They concealed it from us for three months. They used it to fashion their litigation strategy by drafting very specific document requests requesting certain items that they wouldn't have known otherwise from Dr. Stark, so they clearly got information from him, and then they sandbagged us with it at the final hour.

So that -- I mean, that segues into the very last request that I have, and it also will go into -- and I understand that -- ethical violations, and I could give you the list of the ethical rules that have been violated, but I don't know if that's proper for this call. But based on that as well, we believe it should be stricken. And I think the appropriate remedy would be to strike the entire reply.

We shouldn't have to weed through -- according to the Trial Practice Guide, neither Patent Owner or you, the Court, should have to go through and try to figure out what's proper, what's not proper, if you have a number of exhibits that have zero, absolutely nothing to do with the merits of this case. The merits are discussed in a couple of pages and the

rest of the reply is completely devoid of the merits.

And so it's all brand new, fabricated documents that they came up with that they allege show some or prove some false testimony about testimony from witnesses that they had in the room right next to them, that they had been trying to get a deposition of Dr. Boutrid for two years in the district court and they had him right next door and they cancelled it at six o'clock at night. They had every opportunity to show all of these documents to him and they didn't. And they didn't on purpose because they didn't want the answer. They wanted to sandbag us at the final hour so we had no opportunity to respond, no opportunity to submit additional evidence.

If you want to discredit a witness, you cross-examine them; put the documents in front of the witness and cross-examine them. And they didn't want to do that because they knew they wouldn't be able to get what they wanted. So the better course was, cancel him at the last minute, picket the Patent Owner and then sandbag us with it at the final hour so we don't have any opportunity respond. And then try to discredit our inventor by saying he'd submitted false testimony; see, here's this document no one's ever

seen before. That's far from doing the right thing.
That's our position.
JUDGE OBERMANN: Okay. Any --
MR. DOODY: That's why --
JUDGE OBERMANN: Thank you --
MR. DOODY: -- it should --
JUDGE OBERMANN: -- very much.
I'm sorry?
MR. DOODY: No, it -- do you want to move on --
JUDGE OBERMANN: I'm sorry.
MR. DOODY: -- to 60 and 61?
JUDGE OBERMANN: Well, no. No, no. I just wanted to hear what the last thing was that got cut off.
MR. DOODY: Oh, I don't know. I said -- I thought I ended with "that was our position."
JUDGE OBERMANN: With respect to all these exhibits or just 70 through 72?
MR. DOODY: No, the entire reply.
JUDGE OBERMANN: Okay.
MR. DOODY: You have that --
JUDGE OBERMANN: Right now --
MR. DOODY: You have it --

JUDGE OBERMANN: -- I'd like to foc --
MR. DOODY: I know. You have that inherent thor -- authority to strike a reply when it's improper.
JUDGE OBERMANN: Okay. I want just want to make sure that you are done before I turn it over to Petitioner's counsel.
Is there anything else?
MR. DOODY: Oh, no --
MR. LESTER WALLACE: There's one --
MR. DOODY: -- we still have --
MR. LESTER WALLACE: -- yeah, one thing, Your Honor. This is Lester Wallace.
Is -- is Patent Owner now being, in some way, charged with proving that Dr. Stark knew that that was work-product information and he was not entitled to disclose it to Omega lawyers? If so, then it just seems fair that Buergofol be able to provide in the record as many papers as the patent office wants to prove that, without question, the information was known to be secret.
JUDGE OBERMANN: Well, I will --
MR. LESTER WALLACE: And also --
JUDGE OBERMANN: -- tell you right now, I

haven't --

MR. LESTER WALLACE: And also that Dr. Stark had a continuing obligation to assist -- under German law, to assist the Patent Owner, his ex-employer, to enforce the patent.

JUDGE OBERMANN: I will say right now that my inclination is to require you to establish confidentiality over these documents within the contours of our informative decision in Argentum to show that you own the information that's assertively confidential and that it actually is confidential in the form of a motion to seal these documents. That is my initial inclination, but I do want to hear from Petitioner's counsel.

MR. LESTER WALLACE: So in -- so --

JUDGE OBERMANN: But before --

MR. LESTER WALLACE: -- in order to file --

JUDGE OBERMANN: -- I move to Petitioner's counsel --

MR. LESTER WALLACE: Let me ask a question, in order to file that, then we must be permitted to file supporting documents, right?

JUDGE OBERMANN: That would be a decision

to make. But normally, when you move to seal, you can -- you can append -- yes, you can -- you can add exhibits to the record.

MR. LESTER WALLACE: Thank you.

JUDGE OBERMANN: Do you have anything else before I turn it over to Petitioner's counsel on this particular issue?

MR. DOODY: Yes. So is -- this is Pat Doody. So we -- we're just stopping now on 1070, 1071 through 1072.

JUDGE OBERMANN: And 160 [sic] and 161 [sic].

MR. DOODY: Oh, okay. Yeah, because those are -- I think they're addressed later in a motion to seal. That's -- we were requesting a motion to seal for those, certainly.

JUDGE OBERMANN: My understanding --

MR. DOODY: We have --

JUDGE OBERMANN: -- is that Patent Owner called -- my understanding, based on an e-mail I received today, is that Patent Owner called the office and requested that we provisionally seal today Exhibits 1060 through 1061, as well as 1070 through 1072.

Normally, when you provisionally move to seal something, you also have a motion to seal. And I am inclined at this point to rule that, you know, all these arguments are premature until you establish that these documents, in fact, contain confidential information owned by Patent Owner.

So with that in mind, do you have anything else before I turn it over to Petitioner's counsel?

MR. DOODY: Yes, only that I believe it was -- it may have been yesterday or the day before, your clerk, Karen --

JUDGE OBERMANN: [Indiscernible].

MR. DOODY: -- [indiscernible] to --

JUDGE OBERMANN: Okay.

MR. DOODY: Okay.

JUDGE OBERMANN: Thank you.

There's one other thing I wanted to ask Patent Owner's counsel, and that's, what is the -- I understand your basis, I think, for arguing that work product was divulged to Dr. Stark.

What is your position on Exhibits 1060 and 1061? I know that you say they're confidential business information. And I have to say, I'm having some trouble because these were generated by a

disgruntled customer and I don't understand how that disgruntled customer's complaint can qualify as something that couldn't be shared with Patent -- Petitioner's counsel on the basis that it contains your confidential business information.

Can you comment on that first?

MR. DOODY: Yes. And here's what -- this is another -- and hopefully not too lengthy.

As Mr. McKeown testified during our last call, a number of customer complaints were designated in the district court action when they were produced under Attorneys' Eyes Only. And so, yes, they're confidential information that counsel can see. Counsel, to the extent they were just confidential, could file them in this proceeding but should've done so under seal and they didn't do so here.

But what you heard Mr. McKeown tell you during that last call was that because Patent Owner had designated a number of complaints Attorneys' Eyes Only, which precluded them from being submitted in this PTAB proceeding, that Petitioner was going to short-circuit the protective order in the district court and just run off to those customers on their own to get the documents from the customers and then come

back to you, the patent office, and submit them. And that's what they did here with this.

The -- this is no different than the customer complaints; the same customer, same complaints. It's a business communication between two businesses. It's clearly confidential. Whether it says it's -- whether it qualifies as Attorneys' Eyes Only, that's a matter for the district court to decide. But I don't think we can deny that it's confidential and that Petitioner should have filed it under seal.

And with respect to the other exhibits, 1070 to 1072, with the work-product documents, it also was Petitioner's obligation to seal that and to expunge it, and especially after they were put on notice of that a week and a half ago. And they never did anything.

I gave them every opportunity to expunge those documents from the record. And when they didn't do so, that's when I went to the clerk, because I knew I had to seek some -- a motion to seal. I didn't know if I could file it. I think I can file it without PTAB request, but -- or if -- authorization, but it's not entirely clear. And if you tell me I can, then we will do so immediately.

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JUDGE OBERMANN: Okay. Thank you.
Anything else before I turn it over to Petitioner's counsel?
MR. DOODY: Not on those documents, no.
JUDGE OBERMANN: On all the exhibits that are mentioned in your e-mail?
MR. DOODY: Correct.
There's -- there is another issue with respect to motion to strike, which is raising new issues that aren't relevant to the merits.
JUDGE OBERMANN: Yes, I'd like to treat that separately if it's -- if you're amenable.
MR. DOODY: Yes. No, that's fine. Thank you.
JUDGE OBERMANN: Okay. Thank you.
In that case, I will turn it over to Petitioner's counsel to respond to this first issue about Exhibits 1060, 1061, ele -- I'm sorry -- 1070, 71 and 72 and the motion to strike based on the inclusion of those exhibits in the reply.
Mr. McKeown?
MR. MCKEOWN: Thank you, Your Honor.
So just for the benefit of the court reporter, Scott McKeown of Wolf, Greenfield.

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I'm going to apologize in advance if I'm too blunt, but I don't take too kindly to being called unethical. And I think, before we get into -- and I know the Court is -- that the board is eager to get into these issues, but there's a preliminary matter that you raised, Your Honor, about the phone call yesterday that I want to just get crystal clear on the record.

And so, what happened, they called up unilaterally, they spoke to an administrator at the board and they got these exhibits they've been discussing designated Board's Eyes Only. That -- that's not my issue. Typically, you know, you would work with the other side before doing something like that, but that's not the issue.

The issue is, hours later, they turned around and they filed a motion with the district court. And I'm going to read you what they said and how they mischaracterized what happened at the PTAB.

So they said, Buergofol has already -- and I'm reading directly from Page 19 of their motion -- Buergofol has already successfully removed the confidential information that Mr. Neustel filed with the PTAB from public view in the records of the PTAB.

The very next sentence, Together these facts reveal that Mr. Neustel and Mr. Bond are both in willful contempt of the court order. The next sentence, Any impartial observer of the facts would see a clear and obvious violation of the order.

So they're implying to the district court that there was some kind of adjudication here or some kind of success or some kind of determination on the merits here when there was none. It was a call to an administrator. It's not a clerk in a district court sense. It's an administrator. They don't -- they take you at your word. The explanation given to them was that there was a call today on CBI and that it should, at least as a courtesy, be protected until this call is over.

It has nothing to do with the merits of this case. And to offer it up at the very end of that motion as the coup de gr?ce ol -- of, hey, look at this, district court, even the PTAB says these guys are bad, it's just incredibly misleading.

And so, whether it's -- at the end of this call, I res -- respectfully request the board either make it clear what that designation is and how it came about and that it wasn't a merits-based determination

or, to the extent there's a subsequent order that's issued here, to make that clear in writing.

And this next comment I don't make flippantly and I don't make freely, but again, in the -- ordinarily, in a case where you see a motion filed, that would indicate, right, some time of -- some type of credibility from the other side. Buergofol has been sanctioned seven times in the last 11 months, one of which --

MR. DOODY: Here we go.

MR. MCKEOWN: -- was just one month ago for filing a baseless motion where they had to pay $17,000 in fees. And then in another motion decision last month, the Court stated -- and this is a direct quote -- Buergofol failed to show a legitimate reason for their motion. So I'm not mudslinging here, I'm just letting you have a full view of the arguments here.

So now I'll turn to the exhibits themselves. So the argument here is that this is somehow work product. First and foremost, they sent a -- what they call a draft. They sent a declaration to this witness three days before their response was due and they said, sign it. There was no discussion. There was no

back and forth. He didn't sign it and he didn't sign it because he found it to be untruthful.

So what they then did is, they filed some additional declarations with the same top -- topics. So they never say what the work product is because it's already in these other declarations. So the -- there is no work product, just at a fundamental level, because they made these same arguments elsewhere.

Secondarily, there is no work product in Germany. These were communications between German counsel, you know. So I don't understand the argument. This is already public. They've re -- I heard Mr. Doody say there must be privilege here, and at the same time, argue they've sued Mr. Stark multiple times. They've stated in their objections filed with the board that he's adverse and he can't be trusted, but yet somehow they have an attorney-client relationship with him and they're sharing work product with him. It doesn't make any sense.

And then, later, when he decided not to sign this declaration and he started circling his reasons and provided it to us, how is that work product? That's -- that came directly from the witness. And maybe he does have an axe to grind, but it -- it's

certainly not work product. It just goes to what we've been trying to establish here for months, which is an ongoing scheme to conceal things.

And just getting back to some other of the -- you know, some of the other comments were, well, we were sandbagged, we didn't know about this stuff, but at the same time, maybe it was on a privilege log and we didn't disclose it. You have a duty of candor here; 42.51(c), right, inconsistent statements. You can't offer something in evidence that favors you, have the complete opposite statement somewhere else, and then, when it's brought up independently by an independent investigation, blame the victim.

This is exactly what happened in the Longhorn vaccine case. This is exactly what we briefed. We told these guys this and they continue to do this kind of stuff. It -- it's just -- I'm at my wits' end with the -- with these guys. I don't really know what else to say about it, right.

As to the other exhibits, it's somehow business information? It's an e-mail between a supplier. By the way, a relationship that's publicly known, they relied on in litigation at least a decade ago, that's not a secret. And they'd say, well, you

know, we offered testimony that there were no complaints. But it turns out there was an exhibit that said there were massive complaints. And we were sandbagged. We didn't know about it. Oh, but, well, maybe we did know about it because you secretly went and got it independently when we protected it, you know, on some privilege log.

Even if all of that were true, that's what the Longhorn case stands for. You don't get to do that. That's your duty of candor. You can't say A when you know it's B and then say, well, you should just believe what I say and all the inconsistent information you protected.

So I'm just going to stop talking because I don't want to start saying things that are just beyond the pale here. But I mean, that's -- that's my position here.

Everything in this e-mail is frivolous. We can go through the other issues here, but we've wasted the board's time now twice on these calls. We've been talking to these guys for months, for months, and they're complaining that somehow when we went out and got all of this information, had to get it independently, had to pay for all the translations,

and maybe they had it in the district court and weren't telling anyone, that we're the problem, that we're the unethical ones, that takes a certain amount of gall. And I'm sorry if I'm losing my temper, but I -- I've just had it.

MR. BOND: One thing I want to add, Your Honor, to clarify -- this is Monte Bond.

JUDGE OBERMANN: Who is this speaking --

MR. BOND: There is no --

JUDGE OBERMANN: -- please?

MR. BOND: This is Monte Bond, Your Honor.

JUDGE OBERMANN: Excuse me, who is speaking, please? Who is speaking?

MR. BOND: Monte Bond. Monte Bond.

JUDGE OBERMANN: Thank you.

MR. BOND: Yes. I'd like to clarify some statements that were made by the Patent Owner's counsel regarding the alleged complaints from Saertex as being confidential. Those were a series of complaints from Saertex postcritical date that they produced, but marked highly confidential. That's just allowed under the protective order. They were not listed on any type of privilege log.

Whether or not they are highly cenf -- confidential or not, has ju -- is -- has never been questioned or determined by the Court. Any party can designate anything confidential or highly confidential, so just because they designate it as such, does not mean that it is.

We sought the other information regarding complaints from Saertex and were told either they don't exist or they're not relevant. So those -- they have never produced those documents relating to any complaints from Saertex prior to -- I think it was 2012.

So I just wanted to clarify that for the record that they're not claiming privilege in those documents or anything. They just designated them under the protective order, as -- so the -- which is a standard protective order in any litigation that a party may docu -- you know, identify anything confidential or highly confidential and then are cautioned not to overdesignate. But that's common in litigation, as the Court is aware.

So I just wanted to clarify that for the Court to make sure you understood the full factual context regarding some claim of confidentiality

regarding complaints coming from one of their suppliers.

Additionally, Saertex and Buergofol were e -- extended litigation, I think, from the 2010 to maybe -- or six-, seven-year time frame. At one point in time, there was an NDA between the two at some point, but that expired long, long ago. They're no longer un -- under any duty between each other to keep anything secret between them.

So we had every right to go to a third-party customer and seek information regarding any complaints they made agai -- about their products. And that's what we did and that's what we obtained from Saertex. So I just wanted to clarify the record on what happened there and how we obtained that document.

Thank you, Your Honor.

JUDGE OBERMANN: Okay. Anything else from Petitioner on this issue?

MR. MCKEOWN: Nothing else, Your Honor.

JUDGE OBERMANN: Okay. Anything from Patent Owner before I pause the call just to consult with my other judges?

MR. DOODY: Yes, Your Honor. This is Patrick Doody.

Boy, that was just incredible. I don't think I've ever heard anything like it. And Scott, bringing up the sanctions in the district court that have absolutely nothing do with this case is shameful. Absolutely shameful. Those sanctions are irrelevant here.

With respect to whether or not there's confidential information in these documents, it's confidential information of Buergofol. Petitioner should've at least had the common decency and courtesy to inform us that they were going to file these with the patent office and give us an opportunity to sign the protective order and have them filed under seal, but they didn't. Exhibits 1060 and 1061 were sent to us Sunday morning at 2 p.m. [sic] in the morning, on the weekend, and 25 hours later, it was thrown in to the Petitioner's reply; absolutely no opportunity, no way for us to do anything.

And I don't know how this is not a work-product document. I know Mr. McKeown said it was two German counsels, but it wasn't. The German counsel letter to the other German counsel letter made it clear that it was a declaration prepared by Buergofol's U.S. counsel for this particular matter.

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So there's no question; it wasn't just two German counsels exchanging documents.

And they submitted it and they made it public. It -- you can scratch out the underlinings by the former employer/current inventor all you want, it's still work product. And they submitted it and they shouldn't have. And we told them about it and they should've expunged it and should've removed it and they didn't.

JUDGE OBERMANN: Anything else?

MR. LESTER WALLACE: Lastly, this is Lester Wallace, I want to clarify one point.

As to what law controls, whether or not Dr. Stark was under an obligation not to assist Omega and to assist Buergofol in an enforcement of patents upon which he is an inventor is a -- is an issue of German law, not U.S. law.

Second of all, I think Mr. McKeown said that there's no such thing as work-product protection in Germany. I believe that's false. But it's irrelevant because what controls whether communication here is work product is U.S. law.

JUDGE OBERMANN: Anything else from Patent Owner?

(Pause.)

JUDGE OBERMANN: Patent Owner?

MR. DOODY: I'm done; I mean, on this issue. I don't know if you were going to continue but, or if you want --

JUDGE OBERMANN: We are going --

MR. DOODY: -- us to.

JUDGE OBERMANN: -- to continue. I would like to -- we are going to -- we are going to continue, rest assured.

I would like to just pause for a second. I want to just confer with my panelmates for a moment. So please standby. I'm going to --

MR. MCKEOWN: Your Honor?

JUDGE OBERMANN: -- mute you for just a few minutes.

MR. MCKEOWN: Your Honor, sorry --

JUDGE OBERMANN: Yes?

MR. MCKEOWN: -- to interrupt.

Could I -- could I just say two sentences?

JUDGE OBERMANN: Is this Mr. McKeown?

MR. MCKEOWN: Yes, it is. Sorry, Your Honor.

JUDGE OBERMANN: Yes, sir, you may.

MR. MCKEOWN: Yes. I just wanted to point out that all of these issues are now squarely before the Court and the Court should be interpreting its order in the first instance, and so there's that.

And then, just finally, you know, to argue that we somehow should've previewed e-mails that were directly sent to your witness that said there were no problems when, in fact, there were massive problems, and then -- and then to take the position that they were unaware is just -- well, I'll just leave it at that.

JUDGE OBERMANN: I'll ask both counsel, do you have any intel on when the district court is expected to rule on that motion?

Mr. McKeown?

MR. MCKEOWN: I do not. Monte probably has more insight into that issue.

MR. BOND: Yes, Your Honor, this is Monte Bond.

The problem is -- we have with the Court in South -- South Dakota is they are overstretched, to say the least. They are missing two judges, and if past is prologue, the judge is not going to get to this probably for several months, if not at least a

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year.

JUDGE OBERMANN: Okay. Does Patent Owner have anything to add on that --

MR. DARIEN WALLACE: This is --

JUDGE OBERMANN: -- particular issue?

MR. DARIEN WALLACE: Yes. This is Darien Wallace.

I agree with Monte Bond, the Court will probably not get to this for a long time.

An additional comment, I believe that we are mixing up two issues here; one was the Exhibits 1060, 1061, and the other one was the Exhibits 1070 to 1072. What Scott McKeown brought up about, we went and got out all of this information on our own or whatever, that relates totally -- solely to a single document, that single e-mail.

So trying to bring up that issue with going to Saertex and finding all of these things, they found a single e-mail. That has nothing to do with the work-product draft declaration sent to Dr. Stark for -- the inventor, for his comments so that it could be submitted to -- in the IPR. They're two separate -- two entirely separate issues.

And finally, I have to bring this up because

I'm the one who was sanctioned $17,000 in the district court for violating a -- an order to, quote, produce all prior art.

Omega has convinced the district court judge that that was an appropriate request for production, give me all your prior art. Any Patent Owner knows that prior art is limitless. And so, then the Court was convinced, well, if patent -- if prior art is limitless, I'll just make you produce all analogous prior art. And I said, that's also limitless.

So I went and found prior art, which is listed on the face of the patent in the classes, the categories of art, and submitted 16,500 patent numbers of analogous prior art, and then I was sanctioned for doing that because I was told that was a data dump. I was supposed to give them -- you know what I mean. That's what it was, I was supposed to use my own judgement to give the analogous prior art that they actually wanted.

So this -- that is an mischaracter of justice to have been sanctioned based on the misrepresentations of Omega as to what ana -- prior art and analogous prior art is and the appropriateness of having a request for production of giving all prior

art to that -- to that -- be responsive to a request and then to have a district court judge issue an order, a discovery order, to have to do that.

Sorry for that, but that's outrageous what's happening in the district court. That's it for me.

JUDGE OBERMANN: Thank you for -- thank you, Mr. Wallace. I just want to return for a moment to your comment that the e-mail has nothing to do with Exhibits 1070 through 1072.

When you refer to "the e-mail," are you talking about the customer e-mail 1060, 1061?

MR. LESTER WALLACE: That's correct, Your Honor. That is a -- an --

JUDGE OBERMANN: Okay.

MR. LESTER WALLACE: -- e-mail from Saertex to customer complaining that some -- it was difficult to remove some film from a liner. It does not mention any tearing. It does not mention any sticking to resin. It is irrelevant to --

JUDGE OBERMANN: Okay.

MR. MCKEOWN: -- the process here, but it's also just a single e-mail.

JUDGE OBERMANN: Okay. Okay. I just want to make sure, before I pause the call for a

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moment, what you're really seeking here is to strike Exhibits 1070 through 1072 on the basis of attorney-client -- I -- or no, I'm sorry -- work product, that it should be expunged, and that at least the portions of the other reply that cite those exhibits should be struck, that with respect to Exhibit 1060 and 1061, those could be the subject -- actually should be the subject of a motion to seal to establish that they contain Patent Owner's confidential business information.

Is that fair, Mr. Doody or Mr. Wallace?

MR. DOODY: Yes.

MR. LESTER WALLACE: Yes. That's --

JUDGE OBERMANN: Okay. Let --

MR. LESTER WALLACE: -- correct. But in the -- in the importance of the issues, the 1070 and 1072 is much more important than the 1060 and 1061.

JUDGE OBERMANN: Okay. I understand.

I'm going to just put you on mute for a few minutes. Please stand by.

(Off the record at 1:57 p.m.)

(Recess taken.)

(Back on the record at 2:05 p.m.)

JUDGE OBERMANN: Counsel, it's Judge Obermann. I just want you to know that it's taking us a little bit longer, so I'm going to keep you on hold for a few more minutes.

MR. MCKEOWN: Understood.

MR. DOODY: Thank you.

(Off the record at 2:06 p.m.)

(Recess taken.)

(Back on the record at 2:23 p.m.)

JUDGE OBERMANN: Hello, counsel, this is Judge Obermann, and I still have on the phone with me Judges Mayberry, McGraw and Patent Attorney Wood.

Do we still have Patent Owner's counsel on the phone?

MR. LESTER WALLACE: Yes, Your Honor.

MR. DOODY: Uh, yes, Patrick Doody here.

MR. DARIEN WALLACE: Darien Wallace.

JUDGE OBERMANN: And we have Petition -- thank you.

And we have Petitioner's counsel as well?

MR. MCKEOWN: Yes, Your Honor.

JUDGE OBERMANN: Okay. Thank you.

I'm not going to rule on anything just yet. We have discussed the issues amongst ourselves and we

think the better course is to hear argument, in turn, on the other issues that are remaining.

So I would like Patent Owner's counsel to please address the arguments that appear in Paragraph 1(b) of their e-mail relating to allegedly new issues that should have been in the petition.

Patent Owner's counsel, please.

MR. DOODY: Yes, sure, so this is Patrick Doody.

Before I get into that, I just wanted to make a -- one point, one comment, that Mr. McKeown made actually a decent point about sending the declaration to Dr. Stark even when we knew that he was not very trustworthy.

But what isn't known to them is that Dr. Stark's German lawyer had told our German lawyer that he would be willing to cooperate and sign and fulfill his obligations under his employment assignment agreement, so that's why they were sent. It wasn't just willy-nilly thrown over the fence. All right. So I just wanted to clarify that.

Let's go to the new issue, should've been in the petition. So this is the Petitioner's reply regarding unexpected results. And our position,

Patent Owner's position, is that our evidence that was submitted was simply the data from the patent. And Petitioner -- or Patent Owner is required to do that in a declaration form. If we weren't required to do that, we could just simply rely on the data in the patent, but we can't, so we have to submit it as a declaration, as you know. And I believe it has something to do with hearsay, I can't remember from years ago when I first looked at it.

But that's what we did. Dr. Boutrid essentially repeated the examples; in fact, verbatim, cut and pasted out of the patent. The '882 patent mentions, I think, five times, that there were surprising results, and one time that the results were unexpected. So this isn't anything new.

Prior to filing the petition, Petitioner clearly was on notice that Patent Owner would be relying on unexpected results. And in fact, they even addressed it in the petition, but only with respect to the use of a thermoplastic elastomer, not any of the arguments that they're now presenting.

And so, that's the position we're taking is, all of the arguments that they presented in the reply at Pages 9 through 15 should've been in the petition,

because they're not responding to anything new, there's nothing new, no new evidence. Their arguments about being commensurate in scope, not comparing to the closest prior art, et cetera, are all arguments that they had available to them before filing the petition and they didn't file it. And they shouldn't be allowed to now do so later to support their petition -- their petition after Patent Owner points out the unexpected results, which were already in the patent to begin with.

JUDGE OBERMANN: Okay. Thank you.

May I hear the Petitioner's counsel on this issue, please?

MR. MCKEOWN: Thank you, Your Honor. Scott McKeown, Wolf, Greenfield again.

Quickly, on the point he made on the declaration, I think he said that Dr. Stark was willing to cooperate until he read the declaration, which I'm not sure is helping them.

But as to the motion to strike, I'm not aware of a single instance in the history of the PTAB when an entire Petitioner reply and exhibits have been stricken. I would expect for that first-in-time extraordinary relief that were -- that there would be

an first-in-time extraordinary reason.

What I hear Patent Owner saying is they -- they filed direct testimony in this proceeding that didn't exist previously. We cross-examined their witness and we discussed it in our reply. And somehow it was new because the witness referenced portions of their specification when explaining this theory of unexpected results with respect to their particular products. None of this testimony existed anywhere before. They have not raised secondary or any unexpected results in the litigation. But presumably, we should've anticipated this testimony, knew what it said and knew how it related to their products.

If that were the standard, then there would be new argument in every case, right? There -- there's direct testimony introduced in the case, came in after our petition. As a matter of right, we crossed-exam -- cross-examined that witness and we presented arguments. It's just a baseless argument, so there's not more to say to -- about -- other than that.

They make one other minor argument about, it's, you know, irrelevant to the case, credibility, you know, unexpected results; all of that stuff is

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always relevant to the case. So it's just a baseless request.

JUDGE OBERMANN: Okay. Thank you.

And just hold on for one second, please. I'm going to put you on mute for just a moment.

MR. MCKEOWN: Thank you, Your Honor.

(Off the record at 2:29 p.m.)

(Recess taken.)

(Back on the record at 2:29 p.m.)

JUDGE OBERMANN: Thank you, Counsel.

The board has heard enough on issue 1(b), and we are going to move on to issue 1(c); raising new issues not relevant to the merits.

Patent Owner, we'll hear from you first.

MR. DOODY: Yes. And so, this is the pet -- Petitioner's reply regarding the credibility of the co-inventors, Dr. Boutrid and Schleicher, two individuals they did not cross-examine, and they're attempting to discredit them with documents at the final hour.

This segues back to the previous call we had with respect to their letters demanding that we would disclaim our patent or withdraw our entire -- the entire declaration. Mr. McKeown testified last time

that all they were asking us to do was to redact the offending portion, and that's not what they asked us. They specifically demanded that we remove their entire declaration.

But what's troubling is, this is -- I don't know how many times now, many, many, many occasions, Petitioner, Petitioner's counsel, completely mischaracterizes what a witness says, what Patent Owner says. You heard Mr. McKeown earlier talking about how terrible we were for not submitting inconsistent testimony because we somehow testified -- our inventors testified, that there weren't any problems with our film, which is not even in the same universe as to what our inventors testified to.

And they know it. Because, in my September 10th letter to Mr. Neustel, I actually cut and pasted, which is what most people do when they qu -- they quote the exact testimony of the witness that they're trying to say was false. I quoted it to them. They have it. They know what our witnesses said. It's a very, very specific tearing problem that they were never aware of when they -- when they first became aware of it, and that's what led to this invention.

And they're been scouring the earth on a multicountry crusade after talking to our disgruntled former employee who fed them God knows what evidence to find, in quotes, any problems at first, then it changed to something else, and now, in the petition, it somehow morphed into adhesions. But there was no adhesion problem. Our inventors never said there were no adhesion problems.

JUDGE OBERMANN: Okay.

MR. DOODY: They're --

JUDGE OBERMANN: Ex -- excuse me.

MR. DOODY: They --

JUDGE OBERMANN: Excuse me. Excuse me. Excuse me. I'm sorry to interrupt, but this call is getting very long and I have an other conference call at three, so I really -- I do need to try to move this along.

Is this Mr. Doody that's speaking?

MR. DOODY: Yes, I'll get to the point.

JUDGE OBERMANN: No. No. Just -- before you get to the point, I want to stort -- sort of stay away from the weeds of what you think is the discrediting stuff.

What I want to know, really up-front, I

understand that you're upset that there's evidence that they had when they could've deposed these gentlemen, they had these documents. I don't see that there's any kind of duty that they had to examine these gentlemen. They didn't have to take their depositions. They were well within their rights to hold onto the discrediting evidence and raise it in the reply.

What I'd like to know, and I think it is -- you know, may have some merit, I'd like to have you focus on why -- what exactly you want to bring forward to the Court to try to counter that evidence. In other words, I see in your e-mail that you're asking for new declarations, and I just want to make very clear, if we allow new declarations, that's going to trigger routine discovery, and notwithstanding the fact that these gentlemen were produced with the -- with respect to their original declarations, I do think Petitioner, on this issue, would have routine discovery again and we're getting very close to the date of trial.

So I would like you to tell me exactly what you need to counter what you think is the unfair discrediting that went on in the reply brief of these

two gentlemen, what it is that you really want to put in these declarations. Or there's --

MR. DOODY: There --

JUDGE OBERMANN: -- some -- a -- narrower stuff that you can use that would get the job done, given the fact that we're so close to trial.

MR. DOODY: Yes. So again, this is Pat Doody.

I'm not sure if there's anything narrower. You know, these are documents that were -- that are known to Dr. Boutrid, who's one of our witnesses. And he could testify, but I don't know -- you know, this is my co-counsel, they deal with the German folks, but he would know and be able to explain what's going on with the documents that they sub -- one or two documents that they've submitted that they allege are inconsistent with the testimony that he's made. So it would be a short declaration.

And if they're -- and if Petitioner is permitted to cross-examine, I'm assuming that would be limited to just the new declaration. In other words, Petitioner --

JUDGE OBERMANN: Well, let's hear what --

MR. DOODY: -- wouldn't expect --

JUDGE OBERMANN: Yeah.
MR. DOODY: -- active petition [indiscernible] --
JUDGE OBERMANN: Yeah, I think that's right. We can -- we can talk it over when we return to Petitioner's counsel. But yeah, I would envision a very short new declaration.
Would it just be Dr. Boutrid or would it be Dr. Schleicher as well?
MR. DOODY: That would be up to -- but we'd have to discuss it with them. I don't know who knows what.
And I would also propose that it be done remotely since these individuals are in Germany.
JUDGE OBERMANN: Well, we'll have to see if Petitioner's counsel would agree to that, because they are entitled to cross-examination as a matter of right under Rule 51.
Okay. So -- okay. Let me turn -- do you have anything else or can I turn it over to Petitioner's counsel on this one?
MR. LESTER WALLACE: Yeah, if --
MR. DOODY: Yes.
MR. LESTER WALLACE: -- if the witnesses

are compelled to come to the United States, could we have an order that they are then deposed? Because last time they flew over here, each of them wasted five days and then, you know, Petitioner said, oh, no, we're not going to depose them. We'd like an order that they actually depose people if we force them to fly across the ocean.

JUDGE OBERMANN: Well, I'll have to think about that. But the fact of the matter is, your duty under our discovery rules is to produce these gentlemen, it's not to -- you know, you'd have to produce them whether they're deposed or not. So I'm not sure it makes sense to require that Petitioner's counsel actually depose them or whether that would even, you know, get you anywhere because they can go on the record for two minutes, ask them their names and shut it down. So I'm not really quite sure how that would look.

MR LESTER WALLACE: It would look like an --

JUDGE OBERMANN: But that's --

MR. LESTER WALLACE: -- order that they're forced --

JUDGE OBERMANN: I [indiscernible] --

MR. LESTER WALLACE: -- deposition.
JUDGE OBERMANN: I'm sorry? It would look like an order what?
MR. LESTER WALLACE: It would be an order that, if they notice a deposition that they take the deposition, as in normal federal court; if you call a deposition and then you cancel it, that you're subject to sanction for that.
JUDGE OBERMANN: Look, let's continue. Have you told me what it is that you are going to put in these declarations? You have not.
MR. DOODY: No, with the -- because I don't know.
This is Patrick Doody, I'm sorry, I forget to repeat -- introduce myself.
I don't know for sure. I have an idea of, you know, what's going on, the alleged adhesion problem in 1060, 1061 that is said to discredit their testimony about tearing due to a chemical reaction.
That adhesion problem, I believe, has to do with putting a wet film into a frozen pipe, much like Ralphie's [sic] tongue getting stuck on the frozen pole at -- in A Christmas Story. And it -- it's difficult to pull it out. And don't be baffled by the

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word --

JUDGE OBERMANN: Okay.

MR. DOODY: -- "massive," yeah, they keep saying "massive --

JUDGE OBERMANN: Okay.

MR. DOODY: -- problems." That was -- this company always called everything a massive problem to try to get a discount on the product.

JUDGE OBERMANN: Okay. Thank you very much, Mr. Doody. I'm sorry to cut you off, but I really do want to hear --

MR. DOODY: Yes.

JUDGE OBERMANN: -- from Petitioner and I really do have to go at three o'clock, so I'd like to work this out before three o'clock.

Turning it over to Petitioner's counsel, what is your position on this one?

MR. MCKEOWN: Sure. Thank you, Your Honor.

And then, so I think we started talking about the relevancy stuff, but I think we can agree that, you know, these submissions are relevant, so I'll just switch to their request for additional declaration evidence, I guess.

So 42.23(b), as the board's well aware, precludes additional exhibits with their reply, which they still have a reply coming, they still have a motion to exclude coming. They have a lot of real estate they can work with in terms of submitting argument to the office. If they want to submit declaration evidence, then there would have to be an extraordinary cause for waiving that rule. And then what I heard you say is, well, we don't even know what we would put into these declarations.

And so, much has been made about the fact that we need to depose these guys, right. We booked hotels, we planned on deposing them, and in our view, the first witness we deposed perjured himself. So we don't need to talk to anyone else after that. And so this is an effort to essentially rehabilitate that record. So that's why we didn't depose them, right. This wasn't us trying to waste time and money.

We're happy with the record the way that it is and they are unhappy with it. And so they're trying to establish this precedent that somehow this is a unique situation where the conclusions of experts and their credibility are questioned. This isn't unique. The only thing unique about it, as we've been

through, is some of the extreme conduct here.

And so we would oppose it for that reason. The rules prevent it. There's no extraordinary cause for it. And this is just routine IPR practice of questioning the other side's experts.

MR. BOND: Your Honor, this is Monte Bond --

JUDGE OBERMANN: Thank you very much. I'm going to -- yes?

MR. BOND: If you're -- I'd like to add, if we're going to open discovery and Dr. Boutrid is going to try to explain what Saertex meant in its e-mail, then we're going to have to get with Saertex and present evidence from them. I just wanted to put that in there, if we're going to reopen discovery and somehow Dr. Boutrid is going to explain away what Saertex said, we're going to have to hear from Saertex itself. We would -- we would then request and put that in -- that testimony in.

JUDGE OBERMANN: Is that what this is about, Petition -- Patent Owner's counsel? Are you actually going to be trying to have your witness address the customer complaint?

MR. DOODY: My understanding -- this is

why I -- it -- unless my co-counsel wants to chime in, I don't -- I don't deal with the client, so I don't know. But --

MR. DARIEN WALLACE: [Indiscernible] Darien [indiscernible] --

MR. DOODY: -- yeah, it was the complaint -- it --

MR. DARIEN WALLACE: -- Darien --

MR. DOODY: -- it was the complaint --

MR. DARIEN WALLACE: -- [indiscernible] --

MR. DOODY: -- through Dr. Boutrid. Dr. Boutrid knows all about the complaint, and my guess is that he's discussed it with the client. So it's not what's in the e-mail or what's not, it's, what were they talking about, what's in that -- what is -- what made it hard to pull out? Didn't say it tore, but what made it hard to pull out.

MR. DARIEN WALLACE: Yes, this is Darien Wallace.

So after the fact, Omega has introduced this Exhibit 1060 from Saertex. It's an e-mail from Saertex to Buergofol. And since it came in after the fact, we should have an opportunity to -- and the

accusation has been made that it is an inconsistent statement, that it is evidence of a specific problem, and it is not.

So we are asking for the opportunity to have Dr. Boutrid say what it is. Exactly as my co-counsel explained, it's a -- it's a temperature problem and not a chemical problem of your bare hand sticking to a cold doorknob in the winter. And that should be allowed to come in into the record.

JUDGE OBERMANN: Okay. Thank you.

Please standby for a moment.

MR. DOODY: Thank you, Your Honor.

(Off the record at 2:43 p.m.)

(Recess taken.)

(Back on the record at 2:45 p.m.)

JUDGE OBERMANN: Thank you, Counsel. We're back.

I would just like to ask, have we con -- have we addressed all of the arguments that were raised in Patent Owner's portion of the e-mail? In other words, have we heard argument on all of these or am I missing anything?

Patent Owner?

MR. DOODY: Only the final request. I

don't know to what extent you want to entertain that.

JUDGE OBERMANN: Oh, the final request. We do not refer things to Director Vidal. If you have a problem with this, you file a motion, you know, with us. If you have sanctions, you -- and if you are disappointed with anything that we do in the final written decision, at that point you can ask doctor -- Director Vidal to review our final. So I didn't see anything there.

MR. DOODY: I think we -- correct. So -- but I heard -- I thought the director had, sua sponte, jumped in for ethical reasons, but nonetheless.

So just for clarification, if a party is seeking to file a motion for sanctions that has nothing to do with 42.11(c), which is where that 21-day safe harbor comes in, then that makes sense because you should be given an opportunity to rectify it. But it has to do with the type of conduct that's happened here.

Do you still need that 21-day?

JUDGE OBERMANN: Are you talking about Petitioner's -- are you talking about Petitioner's request for authorization to file a motion for sanctions now?

MR. DOODY: No. No. No. I'm talking about, if we were to do so, could we seek authorization from you without having previously served when at -- when it -- so the question is, does the 21-day rule cover any type of motion for sanctions, or is it only limited to what's in 42.11(c), which is the inconsistent statement.

JUDGE OBERMANN: What's your position on that, Counsel?

MR. DOODY: Well, it -- 42.12 deals with situations that aren't correctable. You've already done them, right, and the record can't be corrected, and meet and confer is not going to resolve any of those issues. So, I mean, that -- that's how I believe it. I've looked at a lot of different authorities on this and I can't find anything, then the comments are -- on the proposed rule, when it was made, not entirely clear.

So you know, I don't want to seek authorization for a motion for sanctions for ethical violations under 804C, B, D, 80 -- what, 804 whatever it is, got a bunch of them, unless I -- and without having served them with a proposed motion 21 days earlier. So I don't want to do that. And if I don't

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have to, I would prefer not to, since we're getting pretty late in this case.

JUDGE OBERMANN: Petitioner, what's your position?

MR. MCKEOWN: Well, I think, you know, Patent Owner's trying to get out in front of, well, if you point a finger at us, we're going to point a finger at you, which has been their strategy all along here. Of course they have to seek authorization. It's not a motion, it's a matter of right. So whether they have to serve us beforehand, they can't just file it. And I presume that their basis for filing it would be relating to these exhibit issues, which clearly are unresolved, so that's my issue on that.

I can -- I can continue on to our motion issue if you'd like or I could wait.

JUDGE OBERMANN: Okay. Thank you.

The board is not going to figure out what rule applies to your intended sanction motion, Patent Owner. You'll have to figure that out yourself. But your opposing counsel is correct, you need to come to us and ask for permission before you file a motion for sanctions here.

And with that, I am going to turn to

Petitioner's request about waiving the 21-day safe harbor provision in this case to seek immediate authorization for a motion for sanctions.

Mr. McKeown, could you very briefly --

MR. MCKEOWN: Sure.

JUDGE OBERMANN: -- explain your position here?

MR. MCKEOWN: Yes. And so, briefly on the waiver, our position, and Mr. Doody just confirmed, that the entire point of the 21-day safe harbor is to pray talk people off the ledge and put them on notice of the issues. We've done that for months. They have a full brief from us. So they already know what we're arguing and they clearly, especially given what they've requested in this call, are not turning back away from the abyss here.

So we asked them in the meet and confer if they were willing to waive it and they just sort of came back and said, well, it's a requirement, without really answering the substance of our request, which is, but you've already had the notice, so why would you need 21 additional days. So that's what -- the request for the waiver.

And the sanctions itself, I would submit, is

more urgent than figuring out this work product because, as we've put pointed out in the Longhorn vaccine case, whether it's work product or not, if you violated the duty of candor, if you didn't meet your obligations to produce inconsistent information, whether you argue that it's one e-mail or not, there's no exception. So if that's the case here, if they did violate the duty of candor, all of that work product stuff just falls out.

So that's what we're requesting in the motion for sanctions to address what we've already identified in the briefing as clear misstatements in the record, that they've not only been aware of, but they've doubled down on now for months.

JUDGE OBERMANN: Okay. I just want to be clear, so you did not serve a copy of the motion on them and that's what's required under the safe harbor provision, right?

MR. MCKEOWN: That's correct. We've -- we're essentially arguing that because they effectively have seen our arguments in writing across letters and across other briefings that we -- we've essentially met what is a notice requirement. If we need to serve them with it, you know, we're happy to

do that as well. But we think in this case, again, given how close we are to trial and that they've known about this for months that the purpose of that provision has been met.

JUDGE OBERMANN: Okay. Thank you.

If you can just stand by for one moment.

MR. DOODY: Does Patent Owner have a response here?

JUDGE OBERMANN: If you'd like one, feel free, yes.

MR. DOODY: Yes, of course, because everything he just told you is not true.

And August 23rd, we got a letter, it was not a brief, threatened us with sanctions, listed two documents. A couple days later, we got another letter, again, threatening us with sanctions, with multiple pieces of information, all of which they say are inconsistent. A couple days later, we even got more evidence.

About a month ago, Mr. McKeown stated to you, the board, that they weren't ready, that this wasn't right, that they never served us it -- with a motion and they mi -- they might, but they haven't yet, and then freely and fully admitted that in order to do

that, we must follow the rules and serve them with a motion.

It's not knowing what a potential issue might be. I know they think we've made inconsistent statements. The point of the 21-day rule is to put us on notice of the charges that are being led --

(Noise interruption.)

MR. DOODY: -- [indiscernible]. He doesn't have a clue what documents they plan --

JUDGE OBERMANN: Okay.

MR. DOODY: -- on relying on.

JUDGE OBERMANN: Mr. -- Mr. Doody?

MR. DOODY: It's [indiscernible] --

JUDGE OBERMANN: Mr. Doody?

MR. DOODY: Yes.

JUDGE OBERMANN: Mr. Doody? Mr. Doody?

MR. DOODY: Yes.

JUDGE OBERMANN: Are you there?

MR. DOODY: Yes, I'm here.

JUDGE OBERMANN: I agree with you, and I am going to deny Petitioner's request to waive the 21-day safe harbor provision.

Mr. McKeown, you will need to comply with that. We have more than 21 days left before the

trial, so let's just do it the way that we need to. I think it is important for allegations of this nature to really be crystallized in the form of a motion, so I don't agree that your e-mail correspondence rises to that level. And I do recall that on Sep -- September 17th you were telling me that this is not right.

So I am going to not waive the 21-day safe harbor provision. You may serve your motion and comply with the one -- 21-day safe harbor pro -- provision, and I will also permit you to file a motion for sanctions when that has -- when that has been accomplished.

Any questions on that issue, Mr. McKeown?

MR. MCKEOWN: No, thank -- no, Your Honor, that's fine.

JUDGE OBERMANN: Any --

MR. DOODY: I have --

JUDGE OBERMANN: -- questions on that issue from you, Patent Owner?

MR. DOODY: Yes.

JUDGE OBERMANN: I'm sorry?

MR. DOODY: Yes, I do.

So they're going to serve us with a motion,

and when the 21-day period is over, they're automatically authorized; we don't need to come back to you to discuss authorization?

JUDGE OBERMANN: Well, may -- maybe you do.

What do you think, Mr. McKeown? What's your position?

MR. MCKEOWN: Well, our position is, you know, what wasn't right back in September was, we were basically saying we were still collecting information and they would see it when we filed our brief, which was on October 7th. If we present those arguments, essentially as they are in the brief and just layer in, right, the different statutes and rules for sanctions, then I don't know that we have to come back and have a third conversation about the same thing.

So I would think, given the history here, that that would be appropriate that if they don't decide to change their declarations, which we clearly asked them not just to pull them back, then what's the conversation going to be? And we should be able to file at that point because we're running out of time.

JUDGE OBERMANN: I think we'll be -- I think we have time for a call. Why don't we -- you

comply with the 21-day -- day safe harbor, and then just request a conference call, you know, very quickly after the 21 days have expired and we will hear argument on whether to authorize the motion for sanctions.

Anything from Petitioner on that particular issue, going -- anything else?

MR. MCKEOWN: Nothing on that, Your Honor.

But I -- just a reminder on the -- what I started out with, I would like a clarification on the change to the portal status and a clarification that that was not a substantive determination.

JUDGE OBERMANN: Yes, I understand that. Thank you for bringing that up again.

I am not going to rule on the record here on the other issues that are outstanding. I'm just going to remark that we have ruled on Number 4, which is this request to refer ethical sanctions to the director. We're not going to do that, for reasons stated earlier.

And we are also not going to waive pe -- Petitioner's, you know, requirement to comply with the 21-day safe harbor rule. We are going to permit

another phone call at the -- you know, after that's been complied with to allow Petitioner to request authorization to file a motion for sanctions, and that is going to hopefully happen soon.

I just want to clarify, Mr. McKeown, you are asking for an expression in our order -- we are going to, you know, take under advisement the arguments we've heard on everything else today; basically, Patent Owner's arguments with respect to the motion to strike Number 1(a), (b), (c), Number 2, motion to expunge seal, and Number 3, authorization to submit additional evidence, we're going to address that in an order.

And in that order -- I just want to make sure we're clear, Petitioner, you are requesting that we make clear that the decision to provisionally seal Exhibits 1060, 1061, 1072 -- 70, 1071 and 1072, that that was not a decision on the merits as to whether or not those documents, in fact, carry confidentiality; it was just a board, you know, routinely putting them under a provision -- a provisionary, you know, sealing while we wait for briefing.

Is that what you want?

MR. MCKEOWN: Yeah, correct, Your Honor.

As a minister -- a ministerial courtesy offered to Patent Owner. It was not a substantive determination. There was no judges involved, for example. It --

JUDGE OBERMANN: Okay.

MR. MCKEOWN: -- it [indiscernible] --

JUDGE OBERMANN: That's what you'd like to be ordered?

MR. DOODY: I'm sorry.

MR. MCKEOWN: Yes, Your Honor.

MR. DOODY: Is this in lieu of the motion to seal? This is Patent Owner. Is --

JUDGE OBERMANN: No.

MR. DOODY: -- this --

JUDGE OBERMANN: No.

MR. DOODY: Is --

JUDGE OBERMANN: We are going to --

MR. DOODY: Okay.

JUDGE OBERMANN: -- rule on whether you -- we are going -- yes, you --

MR. DOODY: [Indiscernible] --

JUDGE OBERMANN: -- you know, you don't need our permission to move to seal. That's one thing that you can do on your own. I don't think --

MR. DOODY: Okay.

JUDGE OBERMANN: -- you're asking us to seal the work product. You're asking us to expunge the work product.

MR. DOODY: Correct.

JUDGE OBERMANN: Is that correct?

MR. DOODY: That's correct. Yup.

JUDGE OBERMANN: So you --

MR. DOODY: But if you just -- can --

JUDGE OBERMANN: -- can and sh -- you can and should, it -- you know, pr -- prepare a motion to seal Exhibit 1060 and 1061 at any time. That's your right to do if you want to try to protect it.

But please keep in mind that we have a informative decision in Argentum versus Alcon. It's case IPR 2017-01053. It's Paper 27. And that tells you what you need to do in order to establish that these documents should be sealed. It's not like district court where you can just mark something confidential. You have to establish ownership of confidential information here.

MR. DOODY: Okay. All right. Thank you.

JUDGE OBERMANN: But that said, we are going to take this -- take the rest of the remaining matters under advisement and we are going to issue an

order in due course.

Any questions from Patent Owner?

MR. DOODY: No.

MR. DARIEN WALLACE: No.

JUDGE OBERMANN: Any questions from Petitioner?

MR. MCKEOWN: No, Your Honor. Thank you for your time.

JUDGE OBERMANN: Okay. Thank you.

So we will ask that you please get your heads together and decide which transcript you're going to put into the record, put it into the record as soon as practical, and we will issue an order resolving the remaining issues.

With that, this is -- I'll conclude the conference.

Thank you, Counsel, and thank you, Court Reporters. Take care now.

MR. MCKEOWN: Thank you.

MR. DOODY: Thank you.

(Whereupon, at 3:01 p.m., the telephonic hearing was adjourned.)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

I, Laurie J. Berg, a Notary Public in and for the Commonwealth of Massachusetts, do hereby certify:

That the hearing that is hereinbefore set forth is a true record of the testimony given by all persons present.

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of October, 2024.

Laurie J. Berg
Certified Court Reporter
Registered Professional Reporter
Certified Realtime Reporter

My commission expires:

August 30, 2030

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