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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC, *

Petitioner *

vs. *

SECURITY FIRST INNOVATIONS, LLC, *

Patent Owner *

*

*

IPR2024-00214 (Patent 11,068,609 B2) *

IRP2024-00215 (Patent 10,452,854 B2) *

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Heard before THOMAS GIANNETTI, JASON M. REPKO, and
STEPHEN E. BELISLE, Administrative Patent Judges

TELEPHONIC HEARING

March 21, 2024
1:30 p.m. EST

----- Megan M. Castro, RPR, Court Reporter -----

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1 P R O C E E D I N G S

2 - - -

3 ADMINISTRATIVE PATENT JUDGE REPKO: So
4 this is a conference call for
5 IPR2024-00214/215.

6 I am Judge Repko and I am joined by
7 Judges Giannetti and Belisle.

8 Will counsel for Petitioner please
9 state your name and the names of anyone else
10 on this call on behalf of Petitioner.

11 ATTORNEY NIEBERG: Good afternoon, Your
12 Honors -- or good morning, depending on where
13 you are.

14 My name is Greg Nieberg for Petitioner,
15 Google, and joining me is my colleague,
16 Elizabeth Hunt. We are both from the firm
17 Wolf, Greenfield & Sacks.

18 We also have a court reporter on the
19 line. I apologize I missed her name.

20 ADMINISTRATIVE PATENT JUDGE REPKO:
21 Thank you. Can you please file the transcript
22 afterwards?

23 ATTORNEY NIEBERG: Yes. Of course.

24 ADMINISTRATIVE PATENT JUDGE REPKO:

1 Will counsel for Patent Owner please state
2 your name and the names of anyone else on this
3 call on behalf of Patent Owner?

4 ATTORNEY LOWENSTEIN: Good morning,
5 Your Honors.

6 I thought there was another attorney on
7 our end who I thought might introduce himself.
8 But this is Nathan Lowenstein and I am with my
9 colleague, Colette Woo, from Lowenstein &
10 Weatherwax.

11 I believe we should soon be joined by
12 Stephen Elliott from Sullivan & Cromwell, who
13 is also on behalf of Patent Owner.

14 MR. WEATHERWAX: Also Mr. Weatherwax.
15 And my colleague, Kenneth Weatherwax,
16 too.

17 ADMINISTRATIVE PATENT JUDGE REPKO:
18 Thank you.

19 So before I turn to Petitioner's
20 counsel to explain the request for reply, I
21 wanted to cover a few ground rules for the
22 call and some guidance pertaining to this
23 proceeding generally.

24 So first, emails to the board should

1 not contain the arguments that were made in
2 the emails that you sent to us in requesting
3 this call. In the future, let's keep your
4 email communications to the board limited to a
5 short statement, the subject you want to be
6 discussed.

7 I just want to let you understand that
8 we are not going to consider any arguments
9 contained in the emails. And keep in mind
10 that your emails should confirm that the
11 parties have met and conferred before
12 requesting a conference.

13 Second, I wanted to cover the ground
14 rules for this call. The focus of this call
15 is Petitioner's request for reply. So this
16 should focus on the standard for reply to
17 preliminary response. That is, we are giving
18 you an opportunity to make your case that
19 there is good cause here or not for Petitioner
20 to file the reply. For example, it would be
21 helpful to know why these arguments could not
22 have been presented earlier.

23 So at the outset I want to note that
24 the panel is skeptical at this point that a

1 reply is needed to correct
2 mischaracterizations of facts and law that
3 were allegedly made in the preliminary
4 response. It is not an opportunity for you to
5 simply just disagree. Rather, our focus today
6 should be on why a reply is warranted here in
7 the good cause standard.

8 So with that in mind, I will turn to
9 Mr. Nieberg. Why does good cause exist for
10 the reply that you propose to file?

11 ATTORNEY NIEBERG: Thank you very much,
12 Your Honors.

13 So there is good cause for reply here
14 on the four points we addressed in our email
15 because they each, as I said, mischaracterized
16 facts or the law in unforeseeable ways that we
17 wouldn't have predicted before filing our
18 petitions. And though the facts are in the
19 record and the petitions may have the prima
20 facie case involving patentability, in various
21 places, the Patent Owner went beyond simply
22 disagreeing with our analysis and instead
23 directly mischaracterized the record and the
24 relevant law.

1 And that doesn't give Patent Owner the
2 license to mischaracterize facts and law, even
3 though Your Honors are certainly well capable
4 of figuring out the truth from
5 misstatements -- mischaracterizations.

6 ADMINISTRATIVE PATENT JUDGE REPKO:
7 Generally, mischaracterizations -- before you
8 go on, generally if you are going into the
9 details of the mischaracterizations, if we
10 were to grant a reply on that, why is that
11 different than any other case where Petitioner
12 simply just disagrees with Patent Owner? Does
13 this go beyond some disagreement? Is there
14 some new evidence that came up? Or why in
15 this case is there specifically good cause to
16 address it beyond the mischaracterizations or
17 disagreements?

18 ATTORNEY NIEBERG: Sure, Your Honor.

19 I think the difference is in that there
20 is -- obviously, there could be disagreement
21 over what a reference means. But where Patent
22 Owner, for example, in the first issue said
23 that the Foster reference doesn't disclose
24 storing content when it expressly says that

1 and we cited to that, we are concerned that
2 they are leaving the record -- that they don't
3 have license to just muddy up the record when
4 it directly flatly contradicts something that
5 there is no -- it is not a dispute.

6 They are saying we said it says X and
7 they are saying, no it doesn't say X. It is a
8 little different than disputing what the
9 reference actually means when it says
10 something.

11 And there are also several clear
12 contradicting misstatements of law and also
13 omissions of law by Patent Owner. And we
14 obviously could not have predicted the
15 infinite number of ways that Patent Owner
16 could have attempted to mischaracterize the
17 record and the law.

18 And we could not --

19 ADMINISTRATIVE PATENT JUDGE REPKO:
20 Isn't that the case in every case? Right?

21 How is that different from any other
22 case where, you know, there is always an
23 infinite number of possibilities of legal
24 disagreements or factual disagreements? But

1 wouldn't that swallow the rule if we were to
2 grant that in every case?

3 ATTORNEY NIEBERG: I think there is a
4 distinction between disagreeing over what the
5 law says and flatly contradicting what the
6 clear law is and not citing to those cases
7 that contradict the various statements that
8 Patent Owner made and leaving out cases by
9 omission.

10 So like we would like an opportunity
11 and think there is good cause for us to
12 address these cases so Your Honors have that
13 law before them when you render your
14 decisions, rather than have to seek out and
15 review the cases that Patent Owner cites to
16 identify where they are mischaracterizing it.

17 As I said, we cited law that we believe
18 was relevant and helpful and necessary for the
19 petition. But we couldn't have anticipated
20 that Patent Owner would just make up law,
21 flatly contradict clear law by the board and
22 the federal circuit.

23 ADMINISTRATIVE PATENT JUDGE REPKO: Are
24 any of those cases new? Any intervening cases

1 from the time that you filed your petition to,
2 you know, the time you were -- or now, I
3 guess, when Patent Owner made their response?

4 ATTORNEY NIEBERG: No, Your Honor, I
5 don't believe there is any change in law.
6 This law has been black letter law for several
7 years, with black letter practice by the board
8 for several years.

9 We are confident that Your Honors are
10 aware of controlling practices in law. But
11 Patent Owner has made a one-sided presentation
12 on legal issues where they did not cite
13 controlling authority and they
14 mischaracterized the cases that they did cite.

15 And that, we believe, rises to a level
16 of good cause and distinguishes this from
17 simple cases where the parties just have --
18 there is different controlling precedent or
19 the parties have dueling experts interpreting
20 facts. These are just, in our view, blatant
21 mischaracterizations of facts of law.

22 ADMINISTRATIVE PATENT JUDGE REPKO:
23 Okay.

24 Patent Owner's counsel, what is your

1 response to what you heard from Petitioner?

2 ATTORNEY LOWENSTEIN: Thank you,
3 Your Honors. This is Nathan Lowenstein.

4 So first of all, I would just like to
5 say that I think Your Honors are exactly right
6 in inserting the requisite standard, which it
7 has to be good cause. And I think Your Honors
8 are quite familiar with cases have held that.

9 Good cause is not shown when the issue
10 is entirely foreseeable. Good cause is not
11 shown merely because the Petitioner thinks
12 there is a mischaracterization of law. Good
13 cause is not shown merely because the parties
14 disagree about some law or fact.

15 What I would say is, there is a lot of
16 accusations about alleged
17 mischaracterizations, gross
18 mischaracterizations. We take some offense to
19 that, quite honestly. Our firm has handled a
20 very large number of IPRs. We are very
21 familiar with the law. We have not
22 mischaracterized the law in any regard that I
23 am aware of.

24 What seems to be going on is a series

1 of misapprehensions that Petitioner has
2 about -- I won't go so far as to say
3 mischaracterization, but I think it might be
4 generously referred to as misapprehensions --
5 concerning what our arguments are. And we can
6 go through them one by one if you would like.

7 But I think the big picture is clearly
8 there is not good cause to have four separate
9 categories of reply, all of which are about
10 the merits. This is not Fintiv. It is not
11 325(d). It is not because of some intervening
12 change in law. It is not because of some
13 intervening fact that happened at the district
14 court.

15 This is just common garden variety
16 disagreements about facts and law. And the
17 board, I think, has held again and again that
18 that does not satisfy good cause, much less
19 for four categories which actually contain
20 subcategories for something like six different
21 subjects.

22 So respectfully, Your Honors, we are
23 happy to go into -- and my colleague, Ms. Woo,
24 can speak to any particulars if that would be

1 welcome. But I think it is quite clear here
2 that good cause is not shown.

3 ADMINISTRATIVE PATENT JUDGE REPKO:

4 Okay.

5 Petitioner, how do you respond to that?

6 ATTORNEY NIEBERG: Thank you, Your
7 Honors.

8 We have also happy to go through each
9 point by point, if that would be helpful to
10 Your Honors.

11 But I just want to reiterate that this
12 is not a simple case of, there is some gray
13 areas or there is some competing authority.

14 To give one brief example, Patent Owner
15 argues that the petitions can't rely on Patent
16 Owner's arguments, unless we -- claim
17 corrections, unless we, quote, acquiesce to
18 them. And that is just flatly contradicted by
19 prior board decisions, the trial practice
20 guide, and statements in the federal register.
21 There is just no basis for Patent Owner to
22 argue that we have to acquiesce to their
23 constructions and that we couldn't argue based
24 on alternative constructions, including

1 Google's own constructions or Patent Owner's
2 constructions in litigation.

3 So that is one area where -- that is
4 just one point where we don't believe there is
5 any ambiguity in the law there. We think
6 every controlling authority favors us, so we
7 could not have imagined that Patent Owner
8 would come back and say that, not only do we
9 have to acquiesce to Patent Owner's
10 constructions, but they are telling Your
11 Honors that you can't even consider the
12 alternative arguments made from the
13 alternative construction because we had to
14 agree to their constructions as the only thing
15 we could rely on.

16 And there is cases they cite to to
17 substantiate that, and all of the law is to
18 the contrary.

19 ADMINISTRATIVE PATENT JUDGE REPKO: If
20 you were just more factual where it seems like
21 you are just disagreeing on what the teachings
22 of the reference are. Is that something
23 specific to, you know, a mischaracterization
24 that may be you couldn't have anticipated?

1 Why is that not in the original petition?

2 ATTORNEY NIEBERG: Sure.

3 So there are different -- there is
4 differences there.

5 So the first one is about Foster's
6 content and whether it is stored. And there
7 are limitations that require storage of
8 content and constructions that require
9 storage. These are limitations 1C and 1F in
10 the '609 patent, and 1B and 1D in the '854
11 patent.

12 And Patent Owner comes back in their
13 response and says that Foster doesn't say its
14 content is stored. And they cite a paragraph,
15 paragraph 008 in Foster, which they admit we
16 cited in the petition. And that paragraph
17 expressly says that Foster's content is
18 stored.

19 So we cited multiple other paragraphs
20 that teach that Foster's content is stored.

21 So we couldn't have anticipated that
22 Patent Owner would come back -- not to argue
23 that there is some ambiguity about what Foster
24 means when it says stored. It is their

1 argument that Foster doesn't even say storage
2 at all and that it had to define it in its
3 definition of the content, which is also kind
4 of a construction of a construction that we
5 never could have anticipated because there is
6 no basis for -- we couldn't have imagined
7 Patent Owner would argue that, if Foster
8 didn't define its content as being for
9 storage, then that means you could not meet
10 limitations that require storage.

11 This is not a disagreement about how to
12 interpret Foster. It is about Patent Owner
13 blatantly just mischaracterizing what our
14 petitions argued, what Foster says, and what
15 we were required to prove to show that it
16 meets the claim language.

17 ADMINISTRATIVE PATENT JUDGE REPKO: Is
18 the essentially the same argument you have for
19 Orsini, that it is that kind of the similar
20 characterization/mischaracterization?

21 ATTORNEY NIEBERG: No, Your Honors.
22 There, it is a different argument.

23 So one issue for the Orsini grounds is
24 that, Patent Owner argues that we can't use

1 property references as evidence of a person of
2 skill's background knowledge and what they
3 would have applied to modify Orsini in a way
4 that meets a claim limitation.

5 And the cases that Patent Owner cites
6 do not stand for that proposition and they
7 ignore cases such as the Philips case, 948
8 F.3d 1337, that rejected Patent Owner's
9 arguments only four years ago.

10 And the case law also rejected their
11 attempt to use the Arendi case in the exact
12 same way that Patent Owner tends to do so
13 here.

14 And we could not have foreseen an
15 argument by Patent Owner that contradicts such
16 well established law. So there is good cause
17 to reply.

18 I apologize, Your Honor, I didn't want
19 to interrupt you.

20 ADMINISTRATIVE PATENT JUDGE REPKO: I
21 am going to catch you up there.

22 So it sounds like you disagree with
23 their characterization there.

24 So you are looking for six pages. And

1 what would be the timeline for that if we were
2 to grant six pages for these four?

3 ATTORNEY NIEBERG: A week from -- about
4 a week from when, if you were to grant us a
5 reply. So for example, if you granted later
6 today or tomorrow, then the 29th, I think,
7 seems fair. But of course, you know, that is
8 Your Honors to decide.

9 ADMINISTRATIVE PATENT JUDGE REPKO:
10 Okay. Thank you.

11 So I am going to turn now to Patent
12 Owner's counsel again. I just want to give
13 you an opportunity to respond to what you
14 heard from Petitioner. And then just also in
15 terms of timeline, if we were to grant,
16 hypothetically, what would that timeline be?
17 Would you agree to a week as well?

18 ATTORNEY LOWENSTEIN: So I will say to
19 the -- I will refer to the schedule. I will
20 speak to the first of the issues. I may ask
21 Ms. Woo to refer to some of the others.

22 But from a very high level, I think it
23 is quite clear that no good cause exists here
24 because, let's take the first issue which was

1 about claim construction.

2 I heard counsel for Petitioner argue
3 that it was entirely unforeseeable that we
4 would talk about the fact that they took
5 alternative constructions, but that is not
6 quite correct. Because obviously, they took
7 alternative constructions, and they cited a
8 case, 10X Genomics that is relevant to the
9 point. They said a lot about controlling
10 authority, but 10X Genomics is not controlling
11 authority.

12 Nor, frankly, are the cases that we
13 cited. These are board decisions which are
14 not precedential. They are not informative,
15 necessarily, but they are relevant to how the
16 board has considered the issues in the past.

17 So not only is this something they
18 could have foreseen; it is something that they
19 did foresee.

20 And I don't think we are in any way
21 mischaracterizing the board's case law, which
22 the board is perfectly equipped to read their
23 cases and our cases, and the board is
24 perfectly equipped to read what the guidance

1 to the public was in the preamble from the
2 change to BRI to Philips, where it said that
3 Petitioner ought not to take conflicting
4 positions when we reach the same claim
5 construction standard.

6 So I don't think there is anything
7 unforeseeable about that. And at best, they
8 are saying we somehow mischaracterized the
9 law, even though our brief is littered with
10 direct quotes from board cases. But as we
11 discussed previously, there is no good cause
12 to address something that is foreseeable and
13 your belief that your opponent
14 mischaracterized some statement of fact or
15 law.

16 So I think this is a paradigmatic
17 instance of an issue where no good cause
18 exists.

19 And then Ms. Woo, if you can address
20 some of the issues related to Foster that were
21 raised.

22 ATTORNEY WOO: Sure. So on the first
23 point, Foster's definition of content, that is
24 a typo. We meant to cite to paragraph 37,

1 rather than paragraph 8. And if you look at
2 the POPR, I think that is clear, we directly
3 quoted from that paragraph. And that
4 quotation doesn't show up in paragraph 8. So
5 I think it is a clear typo.

6 For the second point, on the line on
7 corroborating references as evidence and
8 background knowledge, it appears we are
9 talking past each other and Petitioner has
10 misunderstood the POPR's point. Petitioner is
11 saying that the POPR is arguing Petitioner
12 cannot rely on these corroborating references,
13 but that is not what the POPR is saying.

14 The POPR is saying that Petitioner is
15 relying on these references to supply the
16 missing limitations rather than as background
17 knowledge. And we cited cases on the POPR at
18 pages 32 and 33 holding that the background
19 knowledge just can't supply on a missing
20 limitation or unasserted combinations.

21 Then the third point as to the claim
22 constructions, Mr. Lowenstein addressed.

23 And the fourth point, the
24 mischaracterization, allegedly, of Orsini,

1 again, this issue was foreseeable and should
2 have been addressed in the petition.

3 ATTORNEY LOWENSTEIN: And then in terms
4 of the briefing, again, we don't think any
5 briefing should be allowed, much less on the
6 four discreet issues. We don't believe
7 Petitioner is showing good cause for any of
8 them.

9 But if Your Honors feel otherwise, we
10 believe we would like at least one week to
11 prepare a response to their reply.

12 ADMINISTRATIVE PATENT JUDGE REPKO:
13 Okay. Thank you. I am going to discuss this
14 with my colleagues. So if you just hold on
15 for a moment and then I will return to the
16 call and let you know what we decide.

17 (Pause.)

18 ADMINISTRATIVE PATENT JUDGE REPKO: The
19 panel has decided to take the issue under
20 advisement and then we are going to issue an
21 order in due course.

22 Petitioner, when can you have the
23 transcript entered in?

24 ATTORNEY NIEBERG: The court reporter

1 that is on the line, hopefully she can let us
2 know whether she would have a transcript that
3 we could file.

4 MS. HUNT: This is Elisabeth Hunt for
5 Wolf, Greenfield. I believe we have asked for
6 a same-day transcript. So we may be able to
7 file it today or, at the latest, tomorrow, I
8 believe.

9 ADMINISTRATIVE PATENT JUDGE REPKO:
10 That sounds great. Thank you.

11 So unless either party has any
12 questions, I will end the call. Petitioner,
13 do you have any further questions?

14 ATTORNEY NIEBERG: No, Your Honors.

15 ATTORNEY ELLIOTT: Your Honor, this is
16 Steve Elliott. I am lead counsel for SFI. I
17 apologize. I had a problem with the
18 conference call. I have been on the call
19 since a few minutes after, but I didn't want
20 to interrupt the argument. But I did want to
21 let you know that lead counsel was on the line
22 for SFI.

23 ADMINISTRATIVE PATENT JUDGE REPKO:
24 Thank you.

1 Any further questions from Patent
2 Owner, generally?

3 ATTORNEY LOWENSTEIN: No, Your Honor.
4 Thank you.

5 ADMINISTRATIVE PATENT JUDGE REPKO:
6 With that, that ends the call.

7 Thank you all.

8 (Whereupon, at 1:53 p.m., the hearing
9 was adjourned.)

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1 COMMONWEALTH OF MASSACHUSETTS
2 Suffolk, ss.

3

4 I, Megan M. Castro, a Notary Public in
5 and for the Commonwealth of Massachusetts, do
6 hereby certify:

7 That the hearing that is hereinbefore set
8 forth is a true record of the testimony given by
9 all persons involved.

10 IN WITNESS WHEREOF, I have hereunto set
11 my hand on March 21, 2024.

12

13

14

Megan M. Castro

Megan M. Castro

15

Registered Professional Reporter

Certified Shorthand Reporter No. 152614

16

My Commission expires:

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July 22, 2027

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