

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner

v.

138 EAST LCD ADVANCEMENTS LIMITED,
Patent Owner.

IPR2024-00958
Patent 8,482,638 B2

Record of Oral Hearing
Held: October 30, 2025

Before KRISTEN L. DROESCH, GEORGE R. HOSKINS, and
KEVIN C. TROCK, *Administrative Patent Judges*.

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The above-entitled matter came on for hearing Thursday, October 30, 2025, commencing at 1:00 p.m. EDT, at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

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

1:00 p.m.

JUDGE DROESCH: Good afternoon, we're here for oral arguments for IPR 2024-00958. The issue at hand is patentability of proposed substitute Claims seven through twelve for Patent Number 8,482,638.

I'm Judge Droesch. Joining me for this hearing remotely are Judge Hoskins and Judge Trock, as you can see on the screens here.

We're going to start with appearances for both parties. So please identify yourselves and then anyone who is attending in person or remotely that will not be speaking, please identify them as well. For example, in house Counsel or a corporate representative that's attending.

We'll start with the appearances for Petitioner.

MR. RODKEY: Good afternoon, Your Honor. Kevin Rodkey for Petitioner, Google. With me is Alissa Green and Lead Counsel Erika Arner. And we're joined by Mishima Alam, in-house Counsel for Google.

JUDGE DROESCH: Okay. Great. Thank you, very much.
Counsel for Patent Owner?

MR. CARMAN: Yes. Derrick Carman of Robins Kaplan for Patent Owner. And my client rep is in a car on their way here, but will hopefully be joining by the public line.

JUDGE DROESCH: Okay.

MR. CARMAN: And his name is Steve Shin.

JUDGE DROESCH: Okay. Thank you very much. All right. All righty. So per the oral -- per the order regarding the oral hearing, Petitioner is allotted 60 minutes for his presentation. And Petitioner will go first.

1 Petitioner may reserve some of his time for rebuttal, but that cannot exceed
2 30 minutes.

3 Following Petitioner's initial presentation, Patent Owner will make its
4 presentation and will also have 60 minutes, and may reserve some of your
5 time as well to respond. And that also cannot exceed 30 minutes.

6 Before we begin, we have a few reminders. To aid in the preparation
7 of the hearing transcript, please identify your demonstratives by the slide
8 numbers, and remember that your argument should be limited to only those
9 arguments that were presented in your briefs.

10 And during your presentations please make it clear which challenges
11 and claims you are addressing at all times. And we also ask for the parties to
12 hold any objections that you may have regarding opposing Counsel's
13 arguments until it is your time at the podium and then you can note your
14 objections at that time.

15 Counsel for Petitioner, would you like to reserve some of your time
16 for rebuttal?

17 MR. RODKEY: Yes, Your Honor, 15 minutes please.

18 JUDGE DROESCH: Fifteen?

19 And Counsel for Patent Owner, would you like to reserve some of
20 your time?

21 MR. CARMAN: Yes, Your Honor, also 15 minutes.

22 JUDGE DROESCH: Okay. All right. I'm going to run the clock here
23 that you'll be able to see behind here. I am going to try to give you a five-
24 minute warning before the time that you allotted for your primary arguments
25 and your rebuttal arguments.

1 The only thing else I want to mention before we start is, when we're
2 done with the hearing make sure you stay in the room and answer any
3 questions that the court reporter may have as far as your name spellings or
4 any of the references or any other items that were missed.

5 So Counsel for Petitioner, you may begin your presentation when you
6 are ready.

7 MR. RODKEY: Good afternoon, Your Honors. Kevin Rodkey for
8 Petitioner, Google. And I want to begin with Slide 2.

9 So we are here to discuss the '638 Patent. The '638 Patent is directed
10 toward creating a composite image from two other images in order to
11 enhance some feature of the main image.

12 And this is shown in Slide 2 in the excerpt from Exhibit 1001. The
13 '638 Patent, column 7, lines 18 to 32, and also Figure 8. I want to focus on
14 Figure 8 first, and just describe what the '638 Patent is claiming in the
15 substitute claims, particularly Claim 7. And then how that works before we
16 discuss the prior art because prior art teaches essentially the same thing.

17 In Figure 8 on Slide 2 you can see that there is a blue bounded box
18 labeled Main image GM. This is the primary image that the '638 Patent tries
19 to enhance. It does that by also collecting a sub-image, GS, in the orange
20 box, and deciding which part of the main image it wants to enhance.

21 In this particular example, it's the child's face. Maybe the child's face
22 is in shadow, maybe it's blurry because they moved. And the '638 Patent
23 wants to put a clearer image of the child's face onto the main image so that
24 you have a nice, clean image all the way through.

25 It does that by extracting a portion of that sub-image, which is the red
26 box, or Partial image GSp, and then it essentially places it on top of the main

1 image in the blue box in the child's face in order to get a better overall
2 image.

3 And the process by which it does that replacement is called alpha
4 blending, or superimposing which is merely laying one image on to of
5 another and deciding how you want that image to look as you lay it on top.

6 Turning to Slide 4, there are four grounds of unpatentability at issue in
7 this proceeding. All four of them challenge substitute Claims 7, 8, 10, 11,
8 and 12. And they're all based on obviousness.

9 For all four grounds the primary reference is Parulski, and then we
10 have various combinations of the Safonov reference, the Johnson reference,
11 and the Hoshino reference. There's no dispute that the Parulski references
12 teaches every part of substitute Claim 7, or the dependent Claims 8, 10, 11,
13 and 12 with the exception of what the Patent Owner has called mixing
14 pixels, which as we just saw is alpha blending.

15 Turning to Slide 3, you can see substitute Claim 7. It's rather long and
16 like I said, it's not in dispute that Parulski teaches basically every part of this
17 claim except for the highlighted portion on the right side of Slide 3, the
18 language of which is superimposing the partial image on the main image by
19 mixing pixels of the partial image with pixel values of the main image.

20 And really, the only dispute within that limitation is the mixing. That
21 mixing, as I, as we just saw from the '638 Patent is alpha blending which is
22 taught by the prior art, it's taught by Safonov, and it's taught by Johnson.

23 So I want to turn to Ground 1. I'm on Slide 9 now, then moving to
24 Slide 10. This shows the combination of Parulski and Safonov in graphical
25 form. Where everything is taught by Parulski, and Safonov is brought in

1 simply for that combination using alpha blending for the main and sub-
2 images.

3 Then the excerpt from Figure 26 of Parulski, the blue box labeled
4 1816 captures a primary image in Parulski which is the capturing the main
5 image, that blue box that we saw on Figure 4 of the '638 Patent. And then it
6 also captures that sub-image. That's the orange box labeled 1818, what
7 Parulski calls the augmentation image, or the enhanced image that you're
8 trying to add to the primary image.

9 And the green box, that then produces what it calls an enhanced image
10 from the primary and augmentation images, or in the language of the '638
11 Patent, it generates a composite image from the main image and sub-image.

12 So it teaches everything except for how do we do that combination
13 that Parulski already describes. Safonov which is, describes a well-known,
14 decades old process of alpha blending to make that combination to enhance
15 Parulski's composite image.

16 And the sole dispute, it's not disputed that Safonov teaches alpha
17 blending, it's not disputed that Parulski teaches all the other steps. So the
18 sole dispute is whether it would be obvious to use Safonov's alpha blending
19 and the combination of Parulski.

20 Turning to Slide 11, we're going to discuss one of two motivations
21 that Patent Owner's, or Petitioner's expert provided in his declaration for
22 why a person of ordinary skill in the art would have used Safonov's alpha
23 blending when combining Parulski's images.

24 In the first one, it's to improve the dynamic range and contrast. Both
25 Safonov and Parulski explain that when they're combining their images,
26 they're both doing it for the same purpose. And that's to enhance shadows or

1 highlights, and pull out more detail in those regions that may be washed out
2 or darkened in the main image by inserting a second image that has good
3 detail and good contrast in those shadows or highlights.

4 We can see that in paragraph 31 on the left from Parulski where it
5 talks about in the middle, modifying the dynamic range of the primary
6 image. Going to the very last two lines, to obtain a modified image with
7 relatively low noise and good sharpness.

8 Parulski goes on to explain this in paragraph 140 where it talks about
9 dynamic range, as you can see on the right. And as I mentioned before, it
10 does it both for shadows and highlights. So the top part talks about if the
11 highlights are blown out, meaning their essentially all white because their
12 highlights, then that second image, you can under expose to get good detail
13 in those highlights. And if the shadows are darkened because you, it's too
14 dark to pull out the details, you can over expose the second image.

15 And then the last part of Parulski 140 says, the modified image or the
16 enhanced image that it creates with the broadened dynamic range replaces
17 those washed out or darkened areas of the main image with the good contrast
18 detailed images from the second image.

19 Turning to Slide 12, Safonov teaches the same thing. It just teaches
20 that the way you do that, the way you do Parulski's replacement, is by alpha
21 blending too.

22 So we have an excerpt from Safonov, page 7. And you can see in the
23 very first line, some photos, such as those affected by backlit defects, have
24 low dynamics in shadow and/or highlight areas. The same problem that
25 Parulski has.

1 Safonov then comes to the same solution. It says, therefore it is
2 necessary to increase local contrast in the shadow and highlight areas,
3 increase the luminescence within the shadow, and decrease luminescence in
4 the highlights.

5 Safonov cures this problem the same way. In the second paragraph on
6 Slide 12 Safonov says, so let's take a "detailed image" D_s with local contrast
7 in the shadows, high local contrast in the shadows, and a "digital image" D_h
8 with high local contrast in the highlight area. And then it blends those. It
9 alpha blends them into the main image to create that enhanced image.

10 Turning to Slide 13 we can see how Safonov does that, and it does it
11 with exactly this alpha blending that we see in the '638 Patent. And it
12 explains that the alpha channel is given values close to zero or close to one
13 depending on which one of the two images you want to see more of when
14 you're doing this blending. And from that you use this equation four that has
15 the alpha values highlighted to create your final or your enhanced image.

16 Petitioner's expert said we have the same problem, we have the same
17 solution, and Safonov teaches you how you would do this combination of
18 Parulski. You'd do it by alpha blending. It's been known for decades, and a
19 person of ordinary skill in the art would have known that, and would have
20 applied that for this reason.

21 Turning to Slide 14, Petitioner's expert provided a second independent
22 reason for why a person of ordinary skill in the art would use alpha blending
23 on Parulski's enhanced image. And that's to smooth the edges.

24 So if you remember what we saw, you have your main image which is
25 the big image, and then you have your sub image which is the small image

1 that you're placing on top of the main image to enhance shadows or sharpen
2 features.

3 Well there's got to be some variation between those images, either in
4 the colors, or in the contrast, or in the level of detail, so you don't want this
5 to look like a bad photoshop. And Petitioner's expert explained that you do,
6 the way you smooth this out, the way you make it look natural is you alpha
7 blend that edge so that one image blends seamlessly into the other. And we
8 can see those excerpts from his third declaration which is Exhibit 1024,
9 paraphs 76 and 83.

10 JUDGE TROCK: Counsel, this is Judge Trock. Can you hear me?

11 MR. RODKEY: Yes, Your Honor.

12 JUDGE TROCK: I just wanted to clarify one thing. So in respect to
13 Ground 1, your point of view is that there's only one dispute here and that's
14 the rationale to combine?

15 MR. RODKEY: Yes, Your Honor.

16 JUDGE TROCK: Okay. Thank you.

17 MR. RODKEY: Turning to Slide 15 we can see that Petitioner's
18 expert also explains why a person of ordinary skill in the art would have
19 expected this success using alpha blending. And that's because it's been
20 known from at least the mid-1980's, 1984 at least with the Porter and Duff
21 paper.

22 We can see that from paragraph 76 of Petitioner's expert's third
23 declaration which teaches alpha blending as a mathematically simple way to
24 seamlessly combine images by using the alpha channel with respect to
25 partial pixel coverage, and that alpha blending, or alpha channel has a value

1 between zero and one depending on which of the images you're combining
2 or you want to see more of.

3 Turning to Slide 16 we can see the support for that, that Petitioner's
4 expert cites to. In the top two excerpts we have two excerpts from Yadav
5 that are cited to by Petitioner's expert in that paragraph 76 we were just
6 talking about, both of which explain that the alpha blending allows for this
7 translucency or transparency in order to create a better looking image.

8 And the bottom excerpt from the video matting reference again
9 explains that this alpha channel has a value between zero and one. And that
10 last line is somewhat important because it says when that value's between
11 zero and one the pixels are called mixed. Right? That's what we saw in the
12 claim, mixing the pixels.

13 And video matting makes clear that estimating this value for the
14 mixed pixel is essential for getting good separation between the two images
15 you're combining, the foreground and the background, so that you get a
16 natural looking image in the end.

17 If there are no further questions on Ground 1, I'd like to proceed
18 briefly to Grounds 2 and 3.

19 JUDGE HOSKINS: This is Judge Hoskins. Can you hear me?

20 MR. RODKEY: Yes, Your Honor.

21 JUDGE HOSKINS: So can you give me one more level of detail
22 when you're combining those images what the alpha level, what the alpha is
23 doing? So like I'm assuming it's like for one image the alpha might be .25,
24 and the other image the alpha might be .75 so they add up to 1.0. Do I have
25 that right or am I not understanding the alpha part of it correctly?

1 MR. RODKEY: No, so the alpha, it's a multiplier. So I'm on Slide 13
2 Judge Hoskins. And I'll give you the formula here from Safonov because
3 that's the ground. But I'll show you a better example from Johnson that our
4 expert put together.

5 So on Slide 13 you can see the highlighted alphas. What you do is
6 you take that alpha, the value from zero to one, and you multiply it by the
7 pixel of the image that you want to be translucent. One is fully opaque, zero
8 is fully translucent so you see what's underneath. So when you paste --

9 JUDGE HOSKINS: So it's applied to one of these two images, not
10 the other?

11 MR. RODKEY: Yes.

12 JUDGE HOSKINS: When you're combining them?

13 MR. RODKEY: It's applied to one when you're laying it on top. And
14 you can see that here, where -- if I can get my laser to work. Okay. So
15 yeah. So you have your alpha here, and it's multiplied by in this case the
16 shadow image, and in this case the highlight image. And then you add that
17 into your source image.

18 So when the alpha changes, when it's one then that shadow image is
19 fully opaque, or that highlight image is fully opaque. So that's what you see
20 in the portion of the image that's been enhanced. And when it's zero, you
21 see fully the background image, that main image that you don't want to
22 change. And when the alpha is somewhere in between you get a level of
23 mixing of the two pixels where the colors kind of blend together.

24 And Petitioner's expert explained, and we saw in the references from
25 Porter and Duff, from video matting and from Yadav, and Safonov that that
26 in between value is what lets you have this nice, natural image because you

1 get a smooth transition between the new part of the image and the original
2 image.

3 JUDGE HOSKINS: Thank you.

4 MR. RODKEY: Turning to Slide 20, I think this may answer your
5 question as well Judge Hoskins in visual form. Petitioner's expert, in his
6 third declaration, paragraph 156, annotated what this looks like.

7 So in the Johnson reference, you have your main image in the blue
8 square at the top right, that's the one that's your base image. And then you
9 have your sub-image from the orange box on the top left. And what Johnson
10 explains in its example is you have a person with closed eyes in the blue
11 image, and you want them to be open eyes so that everyone's eyes are open.
12 It cuts out the open eyes from the sub image and then it blends them in, it
13 alpha blends them in to the main image so that this person's eyes are open.
14 And you can see that in the image that Petitioner's expert drew.

15 And so for your example, right, in the middle here, those are going to
16 be solid or close to one so that you see the open eyes. And then you fade
17 that down to zero back into the main image so that you have the rest of the
18 image as everyone else who has their open eyes. That's what the alpha
19 blending does Judge Hoskins.

20 Turning to Slide 21, Petitioner's expert again explained why someone
21 would use this alpha blending, in particular Johnson's alpha blending with
22 Parulski. And they would have been motivated to implement this process in
23 order to blend the preferred cut out portion, those open eyes in the example
24 back into the main image which aligns with Parulski's goal of having a
25 preferred image in the end, a preferred composite image where you have an
26 enhanced portion that looks like what you want the image to look like.

1 In Parulski maybe it's sharper, maybe it's clearer, maybe it has better
2 detail because of those highlights and shadows, or Johnson putting in the
3 open eyes so everyone eyes are open, you have a nice, clear, image of
4 everyone.

5 If there are no further questions on Ground 2, I'll proceed to Ground 3.
6 Ground 3 is just a combination of Parulski, Johnson, and Safonov. So what
7 this particular combination adds is Safonov's explicit use of that alpha
8 blending in order combine the images of Parulski and Johnson when you're
9 trying to make that enhanced image and you have your main image, your
10 preferred cutout, and you're just placing that in and trying to smooth it so
11 you get a nice, clean final composite image.

12 JUDGE TROCK: Counsel, this is Judge Trock.

13 MR. RODKEY: Yes, Your Honor.

14 JUDGE TROCK: What's the exhibit number for Johnson's third
15 declaration?

16 MR. RODKEY: Stevenson's third declaration is 1024.

17 JUDGE TROCK: All right. Thank you.

18 MR. RODKEY: Ground 4 is Parulski and Hoshino, and I'm moving
19 on to Slide 25. And there's no dispute that the combination of Parulski and
20 Hoshino renders obvious Claims 7, 8, 10, 11, and 12.

21 The only dispute is really whether Hoshino's prior art. And that
22 particular question is raised in Petitioner's motion to exclude because Patent
23 Owner did not meet its burden to establish priority back to its Japanese
24 application to get that priority because they don't have a proper certified
25 translation.

1 From our perspective we believe we can rest on the briefs here,
2 because it's just a simple issue for the Board to decide. But if there are
3 questions, I can certainly take questions on that.

4 JUDGE DROESCH: I don't believe there are any additional
5 questions.

6 MR. RODKEY: If there are no further questions I will rest and
7 reserve I guess 30 minutes of my time.

8 MR. CARMAN: Good afternoon, Your Honors. Derrick Carman on
9 behalf of Patent Owner, 138 East LCD Advancement, LTD.

10 I'd like to start just by giving a quick run-down of the topics I hope to
11 cover. Although I'm of course, open to any questions that the Board has.
12 I'm willing to address those in real time.

13 I'll start with a quick background of the '638 Patent. While I don't
14 think that my colleague said anything wrong about the '638 Patent, I think he
15 did leave out some details that are worth covering just to provide the Board
16 with the whole context of the invention.

17 As we discussed and the Board knows, there's a non-contingent
18 motion to amend here, so the only issues are whether the proposed substitute
19 claims are rendered obvious by the four grounds that Petitioner has
20 identified. And we'll look at the proposed substitute claims, and the main
21 dispute, I agree, is around super imposing a partial image on a main image
22 by mixing pixel values.

23 Next I'll walk through the four grounds. As Petitioner noted, they're
24 all based on Parulski as a primary reference. With Ground 1 and Safonov,
25 there's no motivation to combine those references. And we'll see exactly
26 why. We heard a lot about alpha blending, but Petitioner didn't really talk

1 about any of the rest of Safonov. And I think that that's all important context
2 for how a person of ordinary skill in the art would read these two references
3 together.

4 Ground 2 Parulski and Johnson, we'll see that there's no mixing of
5 pixel values whatsoever described in either of those references. Ground 3 is
6 Parulski, Johnson, and Safonov and it suffers from the same shortcomings as
7 Grounds 1 and 2. And then finally I'll talk about Ground 4, and why
8 Hoshino is not prior art.

9 So jumping in to the '638 Patent background, the goal here is to
10 generate a composite image in which two images are superimposed. And
11 the way the '638 Patent does that is it starts by capturing two images with
12 two different image capture units. So you can see there highlighted in blue
13 and green in steps S100 and S110 on Slide 4 of Patent Owner's
14 demonstrative. And here on Slide 5 in Figure 1 the two imaging stages, blue
15 and green.

16 And these two imaging stages have different focal lengths, and that
17 results in some beneficial properties of the two images, and some not so
18 beneficial properties of the two images that the '638 Patent seeks to
19 overcome.

20 One of the not so beneficial properties is that the two images are
21 different sizes, they have different magnifications. And so what that does is
22 it makes it difficult to combine those images together because they aren't the
23 same size. If you try to combine two different size images you end up with
24 mismatches, clear lines, and it's not going to be a good final image.

25 So the '638 Patent, part of it is trying to overcome this magnification
26 problem. We can see here that the main image is labeled GM. This is on

1 Slide 7 of Patent Owner's demonstratives, which includes an image from
2 Figure 6. The main image, GM is slightly larger than the sub image, GS,
3 although they're of the same scene. And so that difference in size needs to
4 be overcome.

5 The second issue that the '638 Patent needs to address is when you cut
6 out a portion of an image, how do you stitch it together with the main image.

7 And so we have a cut out rule that sets a position, cuts out a partial image
8 from the sub images, and then superimposes it onto the main image. And
9 this is described on Slide 8 of Patent Owner's demonstratives, and on Figure
10 7 at steps S160, S170, and S180.

11 Shown here on Slide 9 of Patent Owner's demonstratives and Figure
12 8, we can see the sub image, GS, a cutout image from the sub image that's
13 labeled GSp that goes through a size adjustment to overcome that
14 magnification difference between the main image and the sub image.

15 And the '638 Patent says that since the adjustment, magnification B is
16 set by referencing the magnification rule Rb using the focal length f, the
17 subject appearing in the size-adjusted partial image GSp is of the same size
18 as the subject appearing in the main image GM.

19 And finally we get to the composite generating step here on Slide 10
20 of Patent Owner's demonstratives. It's step S190 in Figure 7 of the '638
21 Patent where we generate a, what's called a view finder image in this figure
22 GF.

23 And here we can see that final view finder image GF that's in focus,
24 everything is appropriately sized, and it all fits together nice to make a final
25 image without any clear issues.

1 And the '638 Patent tells us how you do this. You have a synthesis
2 processing unit. It's in part of the image processor, and it uses alpha
3 blending whereby a coefficient alpha indicating the transparency of the
4 image to be superimposed on top of the image is used to mix the pixel values
5 of the bottom image with the pixel values of the top image to generate pixel
6 values of a composite image. So we're adding these pixel values together
7 based on this transparency coefficient to get a final pixel value.

8 Patent Owner proposed amending original Claim 1 in proposed
9 substitute Claim 7. And the bulk of the amendments relate to the composite
10 image generating unit.

11 I've shown here the changes with additions underlined and omissions
12 in brackets. And so we can see that the original claim recited a composite
13 image generating unit configured to generate a composite image by
14 combining the main image and the sub-image. That was the original
15 limitation.

16 Now it recites that the composite image generating unit configured to
17 determine a cutout region in the sub-image, cut out a partial image from the
18 cutout region, magnify the level of magnification at least one of the main
19 image and the sub image, and generate a composite image by superimposing
20 the partial image on the main image by mixing pixel values of the partial
21 image with pixel values of the main image.

22 And then highlighted in yellow is the primary limitations that are
23 under dispute between the parties.

24 On motion to amend it remains Petitioner's burden to prove by
25 preponderance of the evidence that any proposed substitute claims are
26 unpatentable. And part of that, in an obviousness determination. is that

1 Petitioner needs to address how the specific references could be combined,
2 which combinations or elements in specific references would yield a
3 predictable result, and how any specific combination would operate or read
4 on the asserted claims. And that's what Petitioner fails to do here.

5 So we'll start with Ground 1, Parulski and Safonov. There's simply no
6 motivation to combine these references. And the combination is based on
7 impermissible hindsight reasoning.

8 As Petitioner noted during their presentation, they offered two
9 independent motivations to combine. One is to blend seams between the
10 two images. There's simply nothing in any of the references, whether they
11 be the asserted references or the references cited outside of the combination
12 that state that should be a motivation to combine that a person of ordinary
13 skill in the art would understand. This is something that their expert asserts
14 without providing the basis for that assertion.

15 JUDGE TROCK: Counsel, this is Judge Trock.

16 MR. CARMAN: Yeah. Yes, sir.

17 JUDGE TROCK: I want to clarify, so does the rationale to combine
18 have to be in the references?

19 MR. CARMAN: The rationale to combine does not have to be in the
20 references, but it does have to be something that a person of ordinary skill in
21 the art would recognize.

22 JUDGE TROCK: So it could be a potential problem that people of
23 skill in the art are aware of at the time. Is that right?

24 MR. CARMAN: It could be, yes.

25 JUDGE TROCK: Okay. Thank you.

1 MR. CARMAN: So looking at Parulski here. Parulski teaches
2 replacing portions of a primary image with portions of a secondary image.
3 And this was an issue that actually came up during Patent Owner's original
4 motion to amend. And in the preliminary guidance the Board interpreted
5 replacing as pixels in a portion of a first image completely take the place of
6 pixels in a corresponding portion of a secondary image. And we think that's
7 right. We think that that's a fair reading of what replacing means. Replacing
8 is a normal word, and it means to take the place of. So it means complete
9 replacement.

10 Safonov is encountering an entirely different issue. Safonov teaches
11 filtering and blending within a single image. So we have this mathematical
12 operation here that's a little long, and we'll break it down piece by piece so
13 that we can show how each and every piece of this method is dependent on
14 the fact that you have one initial starting image. That's where Safonov
15 starts, and that's different from Parulski which starts with two images and
16 seeks to combine them together.

17 But generally what Safonov is seeking to do is correct highlights and
18 shadows within a single source image to start. The way it does that, is it
19 converts from a RGB color space to a luminance channel for that single
20 source image. Then it performs a step of bi-lateral filtering. It actually
21 performs two steps of bi-lateral filtering, one specific for shadows and one
22 specific for highlights. And it uses that to create intermediate, what it calls
23 digital images. It's a little confusing because it refers to detail images and
24 digital images as two different things, but then collectively refers to them as
25 digital images.

1 But the important thing about these is that these are intermediate, just
2 filtered versions of the original source image. They're not two different
3 images that were captured for example, by different devices as in Parulski or
4 as in the '638 Patent, or in Johnson. Well we'll see Johnson actually captures
5 at two points in time from one image.

6 JUDGE TROCK: Counsel, this is Judge Trock again.

7 MR. CARMAN: Yep.

8 JUDGE TROCK: Can you explain to me what difference it would
9 make whether we're working with one image or two images to somebody of
10 ordinary skill in the art?

11 MR. CARMAN: So it makes a big difference. Because one, if you're
12 working with filtered versions of a single image you don't have to worry
13 about these sharp lines. Everything already lines up.

14 So remember with the for example, '638 Patent, you can collect two
15 images from different angles. They are slightly off. They're off center, they
16 are different sizes. And so you have other hurdles that you have to
17 overcome. Whereas, if you have a single image and you're simply filtering
18 that one image, then you don't have to worry about any of those differences.
19 That's one issue.

20 The other issue is, if I've got two images, if I'm starting with two
21 images in Parulski, which of those images do I run the bi-lateral filter on
22 from Safonov to get my alpha coefficients? How do I know where to start?
23 Petitioner doesn't tell us which image you should use. Petitioner's expert
24 doesn't tell us which image you should use. We have no way of knowing
25 how you could apply Safonov's alpha blending method in the context of
26 Parulski's dual images.

1 They say well, just use alpha blending, it doesn't matter what the
2 coefficients are. Well, it does matter what the coefficients are because that's
3 what's going to affect the quality of the final image.

4 So I'd like to walk through the math of Safonov here because I think
5 it's important because it demonstrates this exact point, that everything in
6 Safonov depends from the fact that you have an initial starting source image.

7 So here we have --

8 JUDGE TROCK: Counsel.

9 MR. CARMAN: Yes.

10 JUDGE TROCK: I'm sorry. I hate to keep interrupting you, but I
11 have questions.

12 MR. CARMAN: Sure.

13 JUDGE TROCK: So these two problems that you articulated here,
14 did you cross examine Johnson?

15 MR. CARMAN: Stevenson, Your Honor??

16 JUDGE TROCK: Sorry, yes. Stevenson.

17 MR. CARMAN: I don't believe we talked about this particular issue,
18 no Your Honor.

19 JUDGE TROCK: So you never proposed these problems to him to
20 see what his position would be on it?

21 MR. CARMAN: I did not propose those issues to him. Although the
22 Petitioner bears the burden here of establishing their case, so.

23 JUDGE TROCK: No, I understand. But your argument here is that
24 this wouldn't work because you have these two problems. I was wondering
25 whether or not you approached their expert and asked them about this.

1 MR. CARMAN: I did not ask them, although he did submit three
2 declarations, so I would submit that he's had ample opportunity to correct
3 any issues that he's seen in his testimony throughout this process.

4 JUDGE TROCK: Okay. Thank you.

5 MR. CARMAN: Yes. So as I said, I'd like to walk through the math
6 in Safonov because I think it demonstrates that this method is fully
7 dependent on having a single source image to start. And that source image
8 in Safonov is called I . The (r,c) there refer to row and column. Those are
9 the coordinates for the pixels in the image I .

10 That appears in three different places in this equation that gives us our
11 final blended together image that we get output in Safonov. We have -- we
12 use it as our foundation all the way on the left there, in the middle, that red,
13 green, and blue box in the middle, those are for correcting shadows. And
14 then all the way on the right the red, blue, and orange box are for correcting
15 highlights. So we're kind of doing the same operation twice and then adding
16 it together with our original source image.

17 So Safonov talks about having a detailed image, D_s , with high local
18 contrast and shadows, and a digital image, D_h , with a high local contrast in
19 the highlight area. Well, how do we get those images?

20 Safonov only collects a single image, it starts with one source image.
21 What it does is called bi-lateral filtering. And these are the equations that it
22 gives for bi-lateral filtering.

23 Again, we're starting with the source image shown in blue here. For
24 both D_s and D_h , they're derived from the source image. We also have a
25 secondary term here, that is the filtered source image, $I_{\text{sub-f}}$. But we've got
26 equations for that too. And $I_{\text{sub-f}}$ --

1 Yes, Your Honor.

2 JUDGE TROCK: I'm sorry. Could you please identify the slides that
3 you're on when you're referring to them?

4 MR. CARMAN: Yes, Your Honor. My apologies. That's Slide 19.

5 Turning to Slide 20 we have the equations for $I*f$. These are the
6 filtered images. And again, we can see that they depend, all the way on the
7 right, in both the numerator and the denominators of these equations, they
8 depend on the original source image I .

9 Now these steps are important in Safonov because this is where the
10 alpha coefficients come from. You can see there at the bottom, this is from
11 page 10 of Safonov, and shown on slide 20. Image $I*f$, so the filtered
12 version, filtered by bilateral filter can be used as an alpha-channel, alpha
13 sub-s. The negative of $I*f$ can be used as an alpha-channel, alpha sub-h.

14 The alpha coefficients that Petitioner wants you to use are dependent
15 on having a source image. You have to have a single source image to use
16 Safonov. You can't just say well, it teaches alpha blending and therefore it
17 would have been obvious. That's finding the pieces in the prior art and then
18 just asserting that it's obvious. And that's what the federal circuit in KSR
19 tells us we can't do. We have to have a motivation.

20 JUDGE DROESCH: Counsel, I have a question for you regarding
21 what you have highlighted here at the bottom of Slide 20. Image $I*f$ filtered
22 by a bilateral filter can be used as an alpha-channel alpha sub-s. And similar
23 for alpha sub-h. Are there any other teachings in this reference about you
24 know, using an alpha-channel between zero and one and not necessarily
25 dependent on I sub-f or I itself?

1 MR. CARMAN: Safonov generally said, when it talks about alpha
2 blending, notes that alpha coefficients are values between zero and one, but
3 it doesn't mention any other way of generating the alpha values that are used
4 in its equations.

5 JUDGE DROESCH: So is it your position that what you have
6 highlighted at the bottom of Slide 20, is that the only way that the alpha-
7 channels can be generated as far as that coefficient?

8 MR. CARMAN: That's the only way that Safonov discloses
9 calculating the alpha-channels. Now whether alpha values could be
10 calculated in a different way, there's nothing in the record that says yes or
11 no. We just know that their numbers between zero and one, and Safonov's
12 specific teaching of this way of calculating them.

13 JUDGE DROESCH: Okay. Thank you, Counsel.

14 MR. CARMAN: So to summary on Ground 1, Petitioner wants to just
15 pluck out the parts of Safonov that it likes, the discussion of alpha blending
16 generally, and wants to ignore the rest of Safonov as well as all the math in
17 Safonov, and ignore the differences between Safonov and Parulski.

18 But those are important differences because a person of ordinary skill
19 in the art is going to read these references for their entirety for their
20 teachings all together. They're not going to pluck out just one part that
21 sounds like the claim. That's hindsight.

22 In Parulski we can see combines two different images, and it has no
23 single source image. Safonov corrects highlights and shadows using a
24 filtered version of a single source image. Parulski doesn't use any filtering at
25 all. Parulski has no alpha coefficients, and it completely replaces a portion
26 of one image with a corresponding portion of another image.

1 Safonov on the other hand, uses bilateral filters to create what it calls
2 digital images, which are just filtered versions of its single source image.
3 And through that process of bilateral filtering it derives alpha coefficients
4 from the single source image. Finally, it alpha blends filtered versions of the
5 source image together to create a corrected image.

6 We heard a lot that alpha blending was generally known. And Patent
7 Owner doesn't contend that it invented alpha blending with the '638 patent.
8 But it's black letter law that a patent composed of several elements is not
9 proved obvious merely by demonstrating that each of its elements was
10 independently known in the prior art.

11 I'd also like to quickly discuss the Yadav paper that Patent Owner, or
12 that Petitioner raised during their presentation. Yadav is, and particularly a
13 case that they cite in their surreply which is Lynk Labs.

14 Petitioner asserts that they can rely on Yadav to demonstrate what a
15 person of ordinary skill in the art would understand because it qualifies as
16 prior art under Section 102(e). So Yadav is what's commonly known as
17 secret prior art. It was filed before the '638 Patent was filed, but it didn't
18 publish until after the '638 Patent was filed.

19 And in the footnote of Petitioner's surreply, it's on page 7, footnote 2.
20 They said that Yadav is prior art under 102(e) as of its filing date for
21 disclosing a POSITA's knowledge and motivations to combine for
22 obviousness. And they include a parenthetical after the Lynk Labs citation
23 that says, applying Section 102(e) reference for obviousness and motivation.

24 Lynk Labs doesn't discuss motivation to combine at all. The issue in
25 Lynk Labs was whether a reference -- what was the prior art date of a
26 reference that qualified under 102(e) for purposes of an IPR challenge. And

1 I'd like to point the Court if I may, to some cases since this was first cited to
2 Patent Owner in the surreply and we haven't had a chance to address this
3 case particularly.

4 But I would like to point the Court to Application of Glass which is,
5 the citation is 492 F.2d 1228. That is a Court of Customs and Patent Appeal
6 decision from 1974 that says, as a matter of common sense it is clear that the
7 contents of a patent application which may be available as prior art under
8 Section 102(e) to show that another was the first inventor may not have been
9 known to anyone other than the inventor, his attorney, and the patent office
10 examiner, and perhaps the assignee if there was one until it's issued as a
11 patent.

12 As of its filing date, it does not show what is known generally to any
13 person skilled in the art. And more recently, a district court cited
14 Application of Glass approvingly for that purpose in, this case is In re:
15 Aflibercept Patent Litigation.

16 It has not been reported in supplemental reporter, but the West Law
17 citation is 2024 WL 4958308. And there, the district judge was discussing a
18 reference called Gokarn, and noted that Gokarn was not publicly available
19 on June 16, 2006 when Regeneron filed its application for the '865 Patent.
20 Accordingly, as of the filing date of the application for the '865 Patent
21 Gokarn does not show what was known generally to any person skilled in
22 the art.

23 So we would submit that any reliance on Yadav is improper because it
24 was secret. It wasn't known to anyone other than the inventor, their patent
25 attorney, the examiner, and perhaps the assignee if there was one.

1 I'll turn now to Ground 2, Parulski and Johnson. And I think this
2 should be a pretty straightforward application because there's nothing in
3 either of these applications that talks about mixing pixel values.

4 We didn't see any of it in Petitioner's presentation. They're discussion
5 of mixing pixel values was derived entirely from their expert's testimony.
6 There's no discussion in Johnson about mixing the pixel values. What
7 Johnson says is blend. That's the word that's used in Johnson.

8 But everywhere that Johnson discusses blending, it's not talking about
9 blending pixel values. It's talking about blending images. And so what we
10 see here in Figure 4 shown on Slide 24 of Patent Owner's demonstrative, in
11 Johnson you take the eyes from, it's called Subject C in Image 1 on the left,
12 and you take the remainder of Image 2 on the right, and you just drop the
13 eyes into Image 2 to get the final image where all of the individuals have
14 their eyes open.

15 Johnson doesn't say mix with alpha blending or anything like that.
16 This is what it says, the region of each eye from Subject C 32 is blended --
17 so we're blending a region, not pixels. It doesn't say anything about pixels --
18 into the content of the second image, which effectively replaces -- okay,
19 we've got that word replace again which is exactly what we have in Parulski
20 -- the closed eyes of Subject C, creating a single final image where all
21 subjects have open eyes.

22 If you're mixing pixel values, you're going to see both open eyes and
23 closed eyes because some of the open eye pixels are going to be transparent
24 and you're going to see beneath them the closed eyes. Johnson never says
25 anything about pixels. It doesn't even use the word pixel. It doesn't use the
26 word mix, mixed, mixing. It doesn't discuss alpha blending. None of that is

1 present Johnson. This is their expert just pontificating on what he thinks
2 Johnson would mean with the benefit of hindsight and the '638 claims in
3 front of him.

4 Turn quickly to Ground 3. Parulski, Johnson, and Safonov. This
5 combination suffers from the same shortcoming as Grounds 1 and 2. It's just
6 combination of the same references. So we'll look at a familiar table here.

7 Parulski and Johnson essentially teach the same thing. They combine
8 two different images, and they have no single source image which is what
9 you need to use Safonov's method. There's no filtering, no alpha
10 coefficients, and you completely replace a portion of one image with a
11 corresponding image of another image in Parulski and Johnson.

12 Safonov on the other hand uses bilateral filtering to create digital
13 images from a single source image. It derives its alpha coefficients from
14 that bilateral filtering process, and then it alpha blends the filtered versions
15 together to create a corrected image.

16 Finally, I'll quickly turn to Ground 4, Parulski and Hoshino. On the
17 left here on Slide 30 we see that the priority date for the '638 Patent is
18 December 25, 2009. The effective prior art date for Hoshino is March 19,
19 2010 several months later.

20 This is just an excerpt but on Slide 31 in Patent Owner's revised
21 motion to amend we set forth a table on pages 4 through 10 that shows
22 where in the priority documents support can be found for each of the
23 limitations in the revised -- sorry -- in the proposed substitute claims.

24 And the fight here is really about the certification of translation.
25 Petitioner's issue is that the certification of translation wasn't signed by a

1 person who had personal knowledge of the translation, and that it was signed
2 effectively on information and belief.

3 The Board has encountered this question before in Globus. And they
4 stated in no uncertain terms that our rules require a translation, but do not
5 require the certification to be signed by someone with personal knowledge
6 of the translation. And when that's the case, it's an issue of weight.

7 The Board says although the certification uses the phrase, to the best
8 of my knowledge, just like the certification in our case, suggesting that the
9 Appellant's making the statement on information and belief. This statement
10 goes to the weight of the evidence.

11 Petitioner for their part, had not submitted any evidence that the
12 translation is unreliable. They didn't have their own translation done to
13 submit. They had the opportunity to question a representative of the
14 translation company that did the translation. It was a very short deposition.
15 They asked whether that person spoke Japanese and whether the person that
16 signed the certification spoke Japanese and then ended the deposition shortly
17 thereafter.

18 So there's no evidence in the record that the translation is unreliable or
19 inaccurate here, and the Board should find that the certification is acceptable
20 under the Board's rules because it has held that before in Globus.

21 Just to quickly conclude. Ground 1 fails because there's no motivation
22 to combine Parulski and Safonov. It is critical in Safonov that you have a
23 single source image. Parulski does not have a single source image. You
24 can't just drop Safonov's alpha blending into Parulski. It doesn't work that
25 way. And a person of ordinary skill in the art would have read those

1 references in their entirety, and read those teachings completely, not plucked
2 out just one part and dropped it into Parulski.

3 Ground 2 fails because there's no mixing of pixel values whatsoever
4 in either Parulski or Johnson. Ground 3 fails for the same reasons as 1 and
5 2. And Ground 4 fails because Hoshino is not prior art.

6 The Board should grant the revised motion to amend, and find that the
7 claims are not unpatentable. If there are no further questions I'll reserve the
8 remainder of my time.

9 JUDGE DROESCH: It doesn't look like there are any additional
10 questions. Thank you.

11 MR. CARMAN: Thank you.

12 MR. RODKEY: Okay. I just have a couple quick rebuttal points.
13 Patent Owner made a number of arguments about Safonov and Johnson,
14 most of which are entirely immaterial.

15 On Patent Owner's demonstratives 21 and 28, they make a big deal
16 about how Safonov gets its high contrast, good detail shadow and highlight
17 images. That doesn't matter, because it's undisputed that Parulski already
18 has those. It gets it from the second camera, like the '638 Patent.

19 Patent Owner then says that Safonov calculates its alpha coefficients
20 in a particular way. But there's no dispute that the alpha coefficient is just a
21 number between zero and one, and it's always just been a number between
22 zero and one ever since 1984.

23 And to your question, Judge Droesch, does Safonov teach another
24 way to get alpha coefficients, Safonov actually tells you what the alpha
25 coefficients should be when you're combining the highlight images and the
26 main image as in Parulski. And it does that on page 7, moving on to page 8.

1 I'm on Slide 11. And we can see where it does that. It says for the
2 pixels, the alpha S, which is the shadow alpha-channel, permeability is close
3 to one in the bright area, and close to zero in the dark area. That's what we
4 use for Parulski as well.

5 So Safonov actually doesn't -- it actually tells you what the alpha
6 should be, close to zero here and close to one here. It gets the same answer
7 for the highlights in the second paragraph on Slide 13, and says the alpha-
8 channel, alpha H is the permeable alpha-channel having a value close to zero
9 in the bright area, and close to one in the dark area.

10 So it actually tells you what the alpha coefficient should be. A person
11 of ordinary skill in the art could have easily put those in. And it's also
12 undisputed, there's really no challenge, that a person of ordinary skill in the
13 art knew how to use alpha-channels because they are just a number between
14 zero and one.

15 And there's no response to Patent Owner -- or Petitioner's expert who's
16 explaining this in, as Patent Owner noted, three separate declarations all of
17 which are unchallenged.

18 Patent Owner tries to raise a question about, in the Johnson Ground,
19 you know they say that a person of ordinary skill in the art, and Petitioner's
20 expert is plucking this out of thin air. But he's not.

21 The question about how we read prior art is based on the person of
22 ordinary skill in the art. Petitioner's expert provides this. And one example
23 of that is at paragraph 156 of his third declaration. It's Exhibit 1024 where
24 he explains that when read in context, a POSITA would have understood
25 that effectively replace does not mean replacement without mixing.

1 Again, because we're using the word blending. Think about a blender
2 at home, right? If you're blending food, it's two foods going together, right?
3 You don't pull one out and put one back, you blend them. And that's what
4 Johnson says. It says the region of each eye from the Subject C 32 is
5 blended, 84 into the content of the second image 36.

6 Petitioner's expert explains that a person of ordinary skill in the art
7 would have understood that Johnson's blending is alpha blending. Again, it's
8 a multi-decade old technology. It's indisputably well known, and that a
9 person of ordinary skill in the art knew how to do this alpha blending is well
10 within their skill.

11 JUDGE TROCK: Counsel, where are you reading that from?

12 MR. RODKEY: Sorry, I'm reading that from Slide 20 Your Honor.
13 But it's an excerpt from Dr. Stevenson's third declaration, Exhibit 1024 at
14 paragraph 156.

15 JUDGE TROCK: Thank you.

16 MR. RODKEY: And I think it's also important to note, Patent
17 Owner's put a lot of emphasis on well, how do we get this alpha-channel?
18 What is the value of this alpha-channel? The alpha blending is a by note in
19 the '638 Patent. It just says we're alpha blending. It doesn't tell you how to
20 get it. It doesn't tell you what those alphas should be.

21 You know, it's basic law that prior art only has to teach as much as the
22 claims. The claims don't require any particular value. They don't require
23 any particular method of getting the alpha-channel, and the alpha value in
24 the '638 Patent doesn't provide either of those.

25 If there's no other questions on the substance, I do just want to hit on
26 one point regarding the Yadav reference. We have two new cases here of --

1 obviously we haven't had a chance to get to those, but Lynk Labs case is one
2 about obviousness.

3 The federal circuit affirmed the Board's finding of obviousness.
4 Obviousness as a matter of law must have a motivation to combine and a
5 reasonable expectation of success. If the 102(e) reference couldn't be used
6 for those purposes, the federal circuit could not have affirmed it as a matter
7 of law.

8 Regarding the -- well, even if you know, we don't even need the
9 Yadav reference because Petitioner's expert also relied on the teachings of
10 Safonov which is indisputably prior art. The teachings of the Porter and
11 Duff reference, and the teachings of the Video Matting reference. All of
12 which teach the same thing. So you have multiple redundant references.

13 Regarding the -- if there's no other questions on that particular
14 substance, I will just briefly address Ground 4 and the Globus case. So the
15 Globus was a previous teaching case in which the Board accepted a
16 particular declaration because there hadn't been an opportunity to object.
17 There hadn't been an opportunity to cure, and the burden is lower at that
18 point because it's simply a reasonable likelihood of success.

19 I will note that two other cases that we cited in our briefing, the
20 Square case and the Adobe case, both precede a past institution were
21 deficient, and the Board excluded the translation or the reference and
22 declaration later at final decision for having failed to meet the requirements
23 of the Board's rules.

24 If there are no other questions, that's all I have.

25 JUDGE DROESCH: Thank you, Counsel.

1 JUDGE TROCK: I have a question, Counsel. Sorry. I have a
2 question.

3 MR. RODKEY: Yes, Your Honor.

4 JUDGE TROCK: So you mentioned that in Square and Adobe,
5 translations were excluded because of failing to meet Board rules. Which
6 rules were those?

7 MR. RODKEY: One moment, Your Honor. So in Adobe it was the
8 rule that requires a declarant to be made available for cross-examination
9 which is exactly what happened here. We were never afforded the
10 opportunity to depose the declarant.

11 And to be clear, I believe that one was about establishing public
12 availability of prior art. That one is not a translation issue.

13 JUDGE TROCK: Counsel, sorry to interrupt. But I thought I heard
14 Patent Owner's Counsel say that you deposed someone and just asked them
15 whether they could understand Japanese and then closed the deposition?

16 MR. RODKEY: Well, we -- that's not quite accurate, Your Honor.
17 We did, so here's the full sequence of events.

18 So Patent Owner filed the original translation, they didn't have a
19 certification with it. We objected. They then filed a certification from a
20 declarant who is not competent to testify to the accuracy of a translation
21 because they didn't speak Japanese.

22 We asked to depose that person. Patent Owner said, no we're not
23 going to let you depose that person, but here's that persons manager. So we
24 actually ended up deposing a different person other than the declarant,
25 taking the opportunity that was afforded to us.

1 And we asked that person, Mr. Wu, and the exhibit is 1023, that's the
2 deposition transcript. We asked Mr. Wu if he spoke Japanese and he said
3 no, so he couldn't answer any questions that we had about the translation.
4 And then we asked him about the actual declarant's knowledge, Mr. Ojeda,
5 and said does Mr. Ojeda the project manager speak Japanese, and he said he
6 does not.

7 We went back and forth on that a little bit. And then we ultimately
8 asked you know, did Mr. Ojeda translate the exhibit into English, no he
9 didn't. And we asked, so would Mr. Ojeda -- so Mr. Ojeda would not know
10 if there were inaccuracies in the translation. And the person we deposed,
11 Mr. Wu, said as far as specific linguistic inaccuracies I would not believe
12 that he would be able to determine that himself.

13 So we have one person who doesn't know if a translation's accurate
14 signing a declaration. We were not allowed to depose them to ask questions
15 about that, and then we got a manager who also said he couldn't answer
16 questions about the substance of the translation and told us that the original
17 declarant couldn't either.

18 So why would we waste everyone's time by asking questions about
19 the substance of a translation when they already told us they don't know the
20 answers.

21 JUDGE TROCK: Let me ask you this, who is the person who did the
22 translation? What was their name?

23 MR. RODKEY: We don't know. And neither does Mr. Ojeda or Mr.
24 Wu. That's also part of the transcript.

1 JUDGE TOCK: And your statement today is that Patent Owner's
2 Counsel did not make this person known to you or available to you for
3 deposition. Is that what you're saying?

4 MR. RODKEY: So they didn't make the translator available. And
5 they also didn't make the original declarant available. Yes.

6 JUDGE TROCK: Okay. Thank you. And what about the other case,
7 the Square case?

8 MR. RODKEY: Square was a translation case. And it found that, so
9 it was related to a computer translation. There wasn't an attached
10 declaration that was competent. And that was found to be okay pre-
11 institution because of the opportunity to cure post-institution.

12 That was never cured post-institution, so the Board excluded the
13 computer generated translation. So that would be Rule 4263 for a lack of
14 proper translation.

15 JUDGE TROCK: Do you have a motion to exclude here?

16 MR. RODKEY: We do, yes Your Honor.

17 JUDGE TROCK: Do you have that paper number?

18 MR. RODKEY: Yes. Just one moment. The motion to exclude is
19 paper, paper 34. The opposition is 36, and the reply is paper 38.

20 JUDGE TROCK: Okay. Thank you, Counsel.

21 MR. RODKEY: Thank you, Your Honor.

22 MR. CARMAN: Just a few quick points in surrebuttal. First, I heard
23 Petitioner's Counsel say that Safonov tells you exactly what the alpha
24 coefficient should be, something close to one. Well, what does close to one
25 mean? Their expert doesn't tell us what a person of ordinary skill in the art
26 would understand close to one to mean. And also applied to which image?

1 There are two images in Parulski. What image are we supposed to apply
2 that to? Again, we don't know. Their expert doesn't tell us.

3 They said that alpha blending has been around since the 1980's, and
4 an expert would just know, or a person of ordinary skill in the art would just
5 know how to apply alpha blending. But that's exactly the problem here. It's
6 not enough to show that something was known, there's got to be a
7 motivation based on something.

8 And then just very quickly on the issue of Hoshino, Petitioner never
9 asked to depose the person who did the translation. They asked to depose
10 the person who signed the declaration. And that person was not available so
11 we provided them with that person's manager.

12 Patent Owner hired a translation company, Morningside Translations,
13 the same translation company that was at issue in Globus, and provided a
14 representative of that company to testify as to the circumstances of the
15 declaration.

16 They could have asked questions about how translators are selected,
17 what their qualifications are, whether those processes are followed in the
18 ordinary course of business. They didn't ask any of those questions. They
19 just asked if they spoke Japanese and shortly thereafter closed the
20 deposition.

21 But ultimately, I think the question here comes down to what does the
22 rule require. Does the rule require a certification to be signed by the
23 translator? Or can it be signed by somebody who, based on information and
24 belief, who doesn't have personal knowledge of the translation?

25 Globus answers that exact question. It says that you don't need to
26 have personal knowledge. And the fact that Globus is pre-institution played

1 no role in the Court's decision there. They make definitive statements about
2 what the rules are. They don't say that well post-institution, Rule 1.6 -- I
3 believe it's 1.68 -- says this, and pre-institution says that.

4 No. The rule is consistent throughout the proceeding. It doesn't
5 change over time.

6 JUDGE TROCK: Counsel, Judge Trock.

7 MR. CARMAN: Yes, Your Honor.

8 JUDGE TROCK: I find this discussion about this translation to be
9 troubling. And here is why. Correct me if I'm wrong, but is it true that the
10 declarant was not made available for deposition?

11 MR. CARMAN: That is true, Your Honor.

12 JUDGE TROCK: Do you know why they were not made available?

13 MR. CARMAN: I know that they were not available when we
14 reached out to Morningside and contacted them to ask about their
15 availability. We were told that they are not available for deposition and Mr.
16 Wu was, who is their supervisor, was available for deposition.

17 JUDGE TROCK: Did they explain to you why this individual was
18 not available?

19 MR. CARMAN: I do not have their explanation Your Honor, no.

20 JUDGE TROCK: Okay. My question was did they explain to you,
21 not whether or not you have it.

22 MR. CARMAN: No, Your Honor.

23 JUDGE TROCK: They did not explain to you why they were not
24 available.

25 MR. CARMAN: They did not.

1 JUDGE TROCK: They just told you they weren't. They just told you
2 they weren't available?

3 MR. CARMAN: Yes, Your Honor.

4 JUDGE TROCK: Did you press them on that?

5 MR. CARMAN: I did not, Your Honor.

6 JUDGE TROCK: These communications that you had with this
7 company, were they by, were they written communications or were they
8 verbal?

9 MR. CARMAN: They were verbal over the phone, Your Honor.

10 JUDGE TROCK: Are there any written communications relating to
11 the availability of this declarant?

12 MR. CARMAN: I would have to check my records. I don't -- I'm not
13 sure, Your Honor.

14 JUDGE TROCK: Would you please do that for us? I would
15 appreciate it. If there are written communications with this translating
16 company about the availability of this declarant, if there are such written
17 communications I would request that you make those available to us, and put
18 them in the record as exhibits so that when we look at this motion to exclude
19 we can have a complete record.

20 MR. CARMAN: I will investigate that, Your Honor, and to the extent
21 that they are not privileged we will file them as exhibits. I'll have to satisfy
22 myself that they're not privileged communications. I don't know one way or
23 the other standing here, but I would want to check that.

24 JUDGE TROCK: Well, how could they possibly be privileged? This
25 is an outside company, you're not representing them, I don't understand how
26 privilege would enter in to this.

1 MR. CARMAN: Well, if they're substantive statements related to the
2 contents of documents they could certainly fall under work product. I mean,
3 they're a vendor that's hired by attorneys for the purpose of our
4 representation of our client.

5 And again, I'm not saying Your Honor that I definitively think they
6 are privileged. I'm not sure. I will have to do some research and satisfy
7 myself to that. But you know, to the extent that they are not privileged we
8 are more than happy to file an exhibit on the docket.

9 JUDGE TROCK: And I know this is your rebuttal, but if I could get
10 Counsel for Petitioner up at the mic at the same time, I would appreciate it.

11 Mr. Rodkey.

12 MR. RODKEY: Yes, Your Honor.

13 JUDGE TROCK: Are there written communications back and forth
14 between Counsel here about making this witness available for deposition?

15 MR. RODKEY: Yes, Your Honor. I believe it's Exhibit 1027.

16 JUDGE TROCK: All right. Is there anything missing from the
17 record that would assist us in deciding this motion to exclude with respect to
18 written communications between Counsel?

19 MR. RODKEY: I don't believe so, Your Honor.

20 MR. CARMAN: I think you submitted the entire thing.

21 MR. RODKEY: Yeah, I believe we did Your Honor. I believe you
22 have the whole chain between us.

23 JUDGE TROCK: Okay. Thank you, very much

24 MR. RODKEY: Thank you.

25 MR. CARMAN: If there are no further questions, I'll conclude there.

1 JUDGE DROESCH: I don't believe there are any additional questions
2 at this point.

3 MR. CARMAN: Thank you.

4 JUDGE TROCK: One last point, Counsel.

5 MR. CARMAN: Yes, Your Honor.

6 JUDGE TROCK: How long would you think it will take you to check
7 your files and see whether or not there's any additional written
8 communications to be submitted?

9 MR. CARMAN: I could have it submitted by the end of the week,
10 certainly.

11 JUDGE TROCK: Okay. I appreciate that. Thank you.

12 MR. CARMAN: Yes, Your Honor.

13 JUDGE DROESCH: All right. I don't think there's any additional
14 questions at this point in time. Thank you for your presentations today
15 Counsel. We're adjourned, and please stay in the room and answer any
16 questions for the court reporter. Thank you.

17 (Whereupon, the above-entitled matter was concluded at 2:13 p.m.)

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