

In the Matter of:

*Charles River Laboratories, Inc. vs
Seikagaku Corporation*

*Telephonic Conference Call
August 01, 2025*

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1 UNITED STATES PATENT AND TRADEMARK OFFICE

2
3 BEFORE THE OFFICE OF THE UNDER SECRETARY OF
4 COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR
5 OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

6
7 CHARLES RIVER LABORATORIES, INC.,
8 Petitioner

9 v.

10 SEIKAGAKU CORPORATION,
11 Patent Owner

12
13 IPR2025-00440 (Patent 11,236,318 B2)
14 PGR2025-00023 (Patent 11,959,109 B2)

15
16 TELEPHONIC CONFERENCE CALL
17 August 1, 2025
18 11:30 a.m - 12:02 p.m.

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22
23 Kristen M. Edwards
24 Court Reporter

1 APPEARANCES:

2
3 Judge Michael L. Fitzpatrick

4 Judge Zhenyu Yang

5
6 FOR THE PETITIONER:

7 WOLF, GREENFIELD & SACKS, P.C.

8 Scott McKeown, Esq.

9 Chelsea Loughran, Esq.

10
11 FOR THE PATENT OWNER:

12 MORGAN, LEWIS & BOCKIUS, LLP

13 Alexander Stein, Esq.

14 Christopher Betti, Esq.

1 JUDGE FITZPATRICK: Good morning. I
2 think I was on mute. I've just said hello.
3 I'm going to start over.

4 This is Judge Fitzpatrick speaking.
5 I have the whole panel, on and this is for
6 PGR2025-00023 and IPR2025-00440. And I'd
7 like to have an introduction of counsel
8 first to know who is on. We have multiple
9 participants that we just admitted,
10 although maybe someone will be just
11 listening. So on behalf of Petitioner, can
12 counsel introduce whoever is on the line
13 for Petitioner?

14 MR. MCKEOWN: Sure. Good morning,
15 your Honor. Scott McKeown of Wolf,
16 Greenfield and Sacks. I'm joined today by
17 Chelsea Loughran and, I believe, we have a
18 court reporter on the line as well.

19 JUDGE FITZPATRICK: Okay.

20 MS. LOUGHRAN: Good morning, your
21 Honor.

22 JUDGE FITZPATRICK: Good morning.
23 Is that it for Petitioner? I don't know
24 how to pronounce patent owner. I'm going

1 to say SKK. Patent owner, can you chime in
2 if you're on the line?

3 MR. STEIN: Yes. Thank you, your
4 Honor. And SKK is the same abbreviation
5 that we go with, so that works for us. And
6 you have here today Alex Stein and Chris
7 Betti both of Morgan, Lewis & Bockius on
8 behalf of the patent owner.

9 JUDGE FITZPATRICK: Okay. Thank
10 you. And this was your request. I want to
11 start with the basics. Is the request
12 identical? Is the discovery sought
13 identical for the two cases?

14 MR. STEIN: Yes, it's identical.

15 JUDGE FITZPATRICK: Thank you. And
16 what, you know, if we authorized a motion,
17 I think you styled it as a motion for
18 routine discovery. Can you explain the
19 scope of what you're seeking?

20 MR. STEIN: Yes, your Honor. We're
21 seeking rather narrow sort of motion to
22 compel routine discovery here, and all
23 we're really asking for is for Petitioner
24 to answer the material question as to

1 whether it was behind the European
2 oppositions in which inconsistent positions
3 were taken with respect to a skilled
4 artisan's knowledge and ability to enable
5 and sufficiently describe the Limulus
6 Polyphemus Factor C protein, which is the
7 material issue for both proceedings.

8 So we simply want them to answer yes
9 or no to that question, and then to also
10 provide us with any other information
11 that's inconsistent with the positions that
12 they've offered in these proceedings,
13 because they have not been -- did not come
14 forward with candor to that question. So
15 then that leaves us with the supposition
16 that they might be in possession of other
17 materials that are inconsistent with the
18 positions they've offered here.

19 I'm happy to provide more background
20 as well to the overall question, but I want
21 to make sure to just answer your question
22 as well. That's the limited scope of
23 discovery that we're asking for.

24 JUDGE FITZPATRICK: Okay. And would

1 this be under, you know, our rules
2 51(b)(1)(iii)? I don't know if you have it
3 in front you. But that's the one that
4 says, unless previously served, a party
5 must serve relevant information as
6 inconsistent with the position advanced by
7 the party during the proceeding concurrent
8 with the filing of a document or saying
9 that contains the inconsistency. Does that
10 sound right?

11 MR. STEIN: Yes.

12 JUDGE FITZPATRICK: Is the idea
13 that, okay, if this was -- I'm sorry. In
14 Europe is the unknown party the opposer?

15 MR. STEIN: Yes. The opposer is an
16 anonymously filed opposition where there
17 is -- I mean, there's all sorts of indicia
18 that it was indeed the Petitioner, but
19 they've avoided answering the material
20 questions.

21 JUDGE FITZPATRICK: Understood.
22 We've seen the -- not the header but the
23 footer, excuse me, on the documents. So is
24 the idea that if they're one in the same or

1 essentially one in the same, they have a
2 duty to supply any inconsistent
3 information. You characterized what was
4 filed in Europe as inconsistent. You
5 already have that. So the idea is do they
6 have more? Obviously --

7 MR. STEIN: Right.

8 JUDGE FITZPATRICK: -- if they do
9 have more, that more might be privileged.
10 It might be work product, things like that.
11 So you're trying to find something would
12 not be subject to those privileges but in
13 addition to what was filed in Europe if, in
14 fact, it's the same party; is that correct?

15 MR. STEIN: Yes, that's correct.
16 Yes, that's correct, your Honor. But I'd
17 also add that, I think, it's material for
18 your Honor's determination on institution,
19 which is why it's important that we raised
20 this now. Because, I think, if it's just
21 some anonymous party and we don't actually
22 know which party it was, although, you
23 know, we have every indicia that it was, in
24 fact, the Petitioner. But if it was, in

1 fact, the Petitioner as we're saying it
2 was, a lot of the statements that they made
3 are reflective of the skilled artisans or a
4 person skill in the arts knowledge in the
5 relevant time period and their ability to
6 construct that Limulus Polyphemus Factor C
7 Protein.

8 And if it was their statement and it
9 was their factual submission, then that
10 expert declaration from Professor Frohman,
11 it has a different weight of the evidence
12 than it does if it was an anonymous party.
13 And that's why in our view it's important
14 for them to answer the question now before
15 institution, because it is material to the
16 institution decision. And I'll add one
17 other point on that.

18 If you look back at the two
19 petitions as well, you'll see that in the
20 PGR of course they have been able to raise
21 the 112 argument directly. But in both
22 proceedings, they're relying on the alleged
23 lack of priority to be able to use
24 intervening prior art.

1 So, again, if the evidence is as
2 weighty as we think it is and shows these
3 contradictory positions, it's much more
4 relevant, I guess, for your Honor's
5 determination in making the institution
6 decision than it is if this were truly an
7 anonymous party that has no stake in the
8 outcome here, which of course we do not
9 think is this case.

10 JUDGE FITZPATRICK: Thank you.
11 Mr. McKeown, I'll have some questions for
12 you but I want to follow up here.

13 Mr. Stein, is it your position
14 that -- the surname of this declarant in
15 Europe is Frohman, right?

16 MR. STEIN: Yes.

17 JUDGE FITZPATRICK: Is it your
18 position -- that testimony is helpful to
19 SKK. But the issue is, if it can be
20 attributed to Petitioner, it would, you
21 know, presumed carry more weight. Is
22 that the idea?

23 MR. STEIN: Yes, absolutely. And
24 just to put a little bit of a finer point

1 on that, because Petitioner did make an
2 argument in their opposition brief on
3 discretionary denial, which is Paper 8 in
4 each of these proceedings, but they tried
5 to say that, oh, Professor Frohman was
6 talking about a 2016 date and that's a
7 different, you know, time period than we're
8 dealing with here.

9 That's a mischaracterization.
10 Because if you look back at Exhibit 2004 in
11 both proceedings, which is the Frohman
12 declaration, I heard your Honor to take a
13 look at the positions he was offering
14 because he talks about techniques from
15 1988, sequence information from 1991 or the
16 straightforward protocols from the 1990s.
17 So regardless of the actual priority date
18 at issue there, it's irrelevant to the
19 material submissions he was making, which
20 rely on much older knowledge in the art.
21 So it is a very important point, and why
22 we're looking for candor from Petitioner
23 here. But, yes, you phrased it correctly.

24 JUDGE FITZPATRICK: And I see -- and

1 on paragraph three, though, he does
2 officially say, I'm qualified to arrive at
3 an opinion to what a person artisan skilled
4 in the art would have known and it included
5 dot, dot, dot, I'll skip something, as of
6 October 18th, 2016. That's what he says.
7 But then in, you know, in other paragraphs
8 cited in there, he is referring back to
9 things, for example, that he said back in
10 1991. I'm just taking your word for it
11 right now, but that's your idea.

12 I mean, you can see like he is
13 giving his opinion officially as of what
14 would be the level of skill in 2016, but
15 he's basing that, in some respects, on
16 things that were long known. Is that a
17 good way to --

18 MR. STEIN: Yes. And just to give
19 you the citations, that's in our patent
20 owner preliminary response Paper 7 at page
21 37 in the PGR and Paper 7 at 30 to 31 in
22 the IPR if you want to reference that
23 later.

24 JUDGE FITZPATRICK: Okay. All

1 right. Mr. McKeown, can you, I guess,
2 state your position?

3 MR. MCKEOWN: Sure.

4 JUDGE FITZPATRICK: Thank you.

5 MR. MCKEOWN: Sure. So what the
6 patent owner is asking for is additional
7 discovery. It's not routine discovery.
8 That's first and foremost. Second, to the
9 extent I understand the argument, there is
10 some opposition papers talking about
11 obviousness as of 2016 and patent owner
12 believes that somehow this relates to
13 enablement in 2012. It doesn't.

14 I wouldn't expect that argument to
15 confuse anybody in the patent office. If
16 you're going to enable something in an
17 application in 2012, whether it's obvious
18 or not, you have to describe it and it's
19 not obvious. At least it wasn't obvious
20 from 2012, and that was from the patent
21 owner's own declaration that they filed in
22 the prosecution.

23 So we're talking about enablement
24 and obviousness, and that there's some

1 discussion in the declaration somewhere
2 about some of the considerations of what
3 one skilled in the art or some of the
4 experiences one skilled in the art would
5 have had in the relevant time frame. It's
6 nothing to do with enablement or
7 obviousness, you know, four years apart.
8 So the premise is false to begin with.

9 Second, we've already confirmed in
10 writing that there is no routine discovery.
11 There's nothing inconsistent that we have
12 to serve or to provide the patent owner
13 relative to what we said in our
14 discretionary filing. To be clear, what we
15 said is EPO filings are public and anyone
16 can get these documents and file them.

17 We're not aware of anything that's
18 inconsistent with that, and I don't take
19 too kindly to allegations that I violated
20 my duty of candor. If patent owner
21 believes that, they're free to report me to
22 the office of enrollment and discipline.
23 This is not a discovery issue. This is
24 additional discovery.

1 Aside from this confusion on
2 enablement and obviousness is somehow
3 providing some relevance, I have not heard
4 any explanations as to Garmin factors or
5 what any of this has to do with what the
6 panel had for which is to decide the
7 merits. And, again, I think the patent
8 owner has clued into this. To be crystal
9 clear, I cannot confirm or deny one way or
10 the other my client's EPO patent strategy.
11 So it's not clear to me what's being
12 requested here.

13 The rules made clear that -- the
14 rules themselves don't make anything
15 discoverable that is otherwise protected by
16 legally recognized privileges such as
17 attorney-client or attorney work product.
18 We simply don't have anything to give them.
19 So for those reasons, Petitioner opposes
20 the request as irrelevant, improper under
21 the discovery rules and futile in any
22 event.

23 JUDGE FITZPATRICK: Let me follow up
24 on a few of those things, Mr. Stein. So

1 let's focus on routine discovery, because
2 they're not asking for additional
3 discovery. You can characterize that. I
4 understand that. But why would -- if it's
5 the same party that filed those
6 opposition -- the request for the
7 opposition in Europe and they have
8 additional documents that are not
9 privileged or work product immune, wouldn't
10 that be subject to routine discovery?

11 MR. STEIN: Is that question for
12 patent owner, Your Honor?

13 JUDGE FITZPATRICK: That question is
14 for Petitioner, Mr. McKeown, because he
15 characterized patent owner's request -- the
16 scope of what patent owner is seeking as
17 additional discovery, but patent owner is
18 saying we want it under routine discovery
19 because it's inconsistent. Although Mr. --
20 you know, let me start over. I did screw
21 up. I called you -- I referred to
22 Mr. Stein. I meant to say I would like to
23 hear from Mr. McKeown as to why this
24 wouldn't be routine discovery if, a couple

1 premises, if it's the same party and if
2 there is additional information that is not
3 privileged, you know, or work product
4 immune.

5 MR. MCKEOWN: well, I guess the
6 short answer is there has to be some
7 inconsistency for us to have an obligation
8 to produce anything and --

9 JUDGE FITZPATRICK: Thank you. And
10 that's what I wanted to focus on. So is it
11 your position that the Frohman declaration
12 itself, which has already been served, at
13 least indirectly. It's public. They have
14 it. It's filed in this case. Is it your
15 position that Frohman doesn't make -- say
16 things that are inconsistent with your
17 position?

18 MR. MCKEOWN: Right. So if you look
19 at pages 8 through 12 or 17 through 20 of
20 the opposition brief we filed in the 440
21 proceeding as well as --

22 JUDGE FITZPATRICK: Give me one
23 second. I'm in that docket. Where do you
24 want me to go?

1 MR. MCKEOWN: Sure. It's the
2 opposition brief, the discretionary
3 opposition brief.

4 JUDGE FITZPATRICK: Okay. Yes,
5 Paper 8.

6 MR. MCKEOWN: Pages 8 through 12 and
7 17 through 20 talk about why the discussion
8 and the EPO relative to obviousness is
9 completely different and unrelated to the
10 arguments made in this proceeding even if
11 we can assume one way or the other or why
12 the identity of the person making that
13 argument would even matter. Enablement and
14 obviousness are just two different things.

15 JUDGE FITZPATRICK: No one would
16 dispute that those are two different
17 things. I think the level of skill plays
18 into both, though.

19 MR. MCKEOWN: Sure, yes. I mean,
20 the level of skill of course is going to
21 change in 2012 as compared to 2016.

22 JUDGE FITZPATRICK: Yep. I have a
23 question. I'm going to switch gears a
24 little bit here. This is going to be for

1 both of you, and I looked at the PGR case
2 more densely than I have the IPR
3 personally. I can't speak for the rest of
4 the panel. But in the PGR challenge
5 patent, and let me grab it because there's
6 a lot of numbers here. It's the 109
7 patent, ends in 109. And there's a claim
8 of priority and there's many applications,
9 you know, in there and one of them, you
10 know, goes back to December 10th, 2013.
11 That's the one that Petitioner you focus on
12 in grounds one and two, your enablement and
13 written description challenges, but then
14 there's some intervening ones. Like before
15 you get to, you know, the application that
16 was filed in 2021 that resulted in the 109
17 patent.

18 And then on the ground three, it's
19 an anticipation ground and you rely on -- I
20 forget the name of it right now -- but it's
21 a reference that, I think, is from 20 -- is
22 it 2019? Here's where I'm going.

23 Grounds one and grounds two state
24 that they challenge enablement and written

1 description, but they focus on the level of
2 skill in 2013 whereas, I think, that they
3 should have focused on the level of skill
4 in 2021, because 112 looks at the
5 application itself. If you want to pile on
6 to get 120 priority, then you have to look
7 at prior documents that you want to rely
8 on. But strictly speaking, the 109 patent
9 can comply with the written description and
10 enablement requirements if nearly the
11 instant application was enabling and fully
12 describing of the invention.

13 And so there's a focus on 2013, and
14 I understand because that relates to the
15 anticipation ground. But it seems to me
16 that grounds one and grounds two are going
17 to be deficient in the PGR, because it's
18 the wrong date. It's focusing on the level
19 of skill there.

20 So then I turn to the ground three
21 and we have a reference -- I don't want to
22 misspeak. Let me get the date of that
23 reference. I think you call it the 629
24 publication, and it was published on

1 August 8th, 2019. So then I go back to the
2 109 patent and I look at where are the
3 other applications in here and one of them
4 was filed April 30th, 2019. Basically the
5 parent -- the immediate parent application.

6 So if the level of skill on
7 April 30th of 2019 is sufficient to enable
8 these, you know, the application, the
9 claims that were ultimately, you know,
10 issued in the 109 patent and fulfilled the
11 written description requirement, wouldn't
12 that be good enough for patent owner and
13 where am I going wrong on that? I'm sorry,
14 this is a curve ball, but it's something
15 I've been struggling with as I have been
16 reading the briefs. And since you guys are
17 talking about the dates being so important
18 about the level of skill, I wanted to bring
19 it up because it relates to that.

20 MR. MCKEOWN: Well, the level of
21 skill, I guess -- I mean, I want to be
22 clear here. We're talking about
23 enablement, which is a written description,
24 right. It doesn't impact whether or not

1 description would render something obvious.
2 But I'll ask, my colleague, Ms. Loughran,
3 to address this because she's closer to the
4 technology than I am.

5 MS. LOUGHRAN: Sure. Good morning,
6 your Honor. So the argument in the PGR is
7 broader and in certain ways different than
8 just this argument that has been raised
9 here about the sequence and when the
10 sequence was known and when it would have
11 been -- when it would have been obvious to
12 or separately what it would have been in
13 the possession of the inventors are enabled
14 by the inventors to make the recombinant
15 protein from the sequence. So that is an
16 aspect of our challenge in the PGR, but the
17 PGR challenge itself is broader than that.

18 The claims in the 109 patent are
19 directed to, you know, a multicomponent
20 assay where we have argued that, you know,
21 separate and apart from the issue about
22 sequence to protein, the inventors didn't
23 enable or have possession of creating
24 recombinant versions of each of the various

1 factors in factor B, factor C pro-clotting
2 enzyme in that assay, and that was not true
3 as of the priority date and not true as of
4 the date the patent was filed.

5 So the PGR does -- the 109
6 challenge, you know, goes well beyond just
7 this issue of when was Limulus sequence
8 known and when was the recombinant
9 production of it, you know, obvious and/or
10 described and enabled. Does that answer
11 your Honor's question?

12 JUDGE FITZPATRICK: Well, what is
13 that year? Is the 109 patent would it
14 comply with the written description and
15 enablement requirements right now if filed
16 today? Obviously it wouldn't violate 102
17 and 103. But the document itself, would it
18 be enabling and satisfy the written
19 description because now there's been
20 improvements in the level of --

21 MS. LOUGHRAN: I think, I guess, I
22 we could ask --

23 JUDGE FITZPATRICK: It may be
24 uncomfortable.

1 MS. LOUGHRAN: -- where it is today,
2 right.

3 JUDGE FITZPATRICK: I just wanted to
4 point out that there's a series of
5 potential priority dates that patent owner
6 can have for the 109 patent. The youngest
7 is December 17th, 2021. You look at -- I
8 think you look at each, you know, and the
9 parties focused on 2013 and, you know, and
10 then Frohman comes along and says certain
11 things in 2016, and I'm trying to see how
12 that relates to this since there are other
13 priority dates that the 109 patent could
14 fall back on for the anticipation ground.

15 MS. LOUGHRAN: Correct. And to be
16 clear, all of the disclosures, all of the
17 disclosures are the same. And, yes,
18 there -- like, I don't think that anybody
19 is challenging the idea that at some point,
20 I believe, in 2017 if you go by you own
21 admissions in their later patent filings,
22 they finally did come up with that sequence
23 and were able to make the Limulus
24 recombinant protein. But even then, the

1 specification does not describe or enable
2 how to make factor B in lamella cells, how
3 to make pro-clotting enzymes in lamella
4 cells, how to make factor C, factor B and
5 pro-clotting enzyme in lamella cells across
6 different species and to combine those.

7 That is the argument in the PGR
8 that -- honestly, that makes them describe
9 them and enable them today. I would have
10 go back and check with our expert on what
11 the status of that is. But the Frohman
12 declaration, again, only gets to the
13 obviousness of making this protein as of
14 the, you know, by the time the sequence was
15 known and was public and does not get at
16 this separate question that we raised in
17 this PGR, which is that the claims there go
18 well beyond that and recite an assay with a
19 whole bunch of components that can be
20 combined in any manner and patent owner,
21 the specification there didn't describe or
22 enable a single example of that.

23 JUDGE FITZPATRICK: I brought us
24 into the weeds. I'm going to stop there.

1 MS. LOUGHRAN: Apologies.

2 JUDGE FITZPATRICK: No. Thank you
3 for answering, unless, Mr. Stein, you want
4 to respond. You don't need to, but we'll
5 get back to the main issue here. Go ahead.

6 MR. STEIN: I'll try to zero us back
7 as well, but I want to make sure I've had a
8 chance to speak for a moment. So on the
9 point of the relevant date for purposes of
10 the 112 issues, I wanted to clarify as well
11 that of course we're saying we are entitled
12 to our earliest date and that's why we're
13 sort of pointing to things in 2013 to
14 support our argument, and I wanted to sort
15 of divert things back to our brief for a
16 minute.

17 So if you go to Paper 7 in the PGR
18 for now at page 36, I wanted to clarify --
19 I know they're trying to draw this
20 distinction of, and of course nobody is
21 going to argue that there are different
22 doctrines around obviousness or invented
23 steps and then enablement. But the
24 relevant point we're making is that there

1 were material admission in fact about what
2 a skilled artisan would know well before
3 2016, well before 2013 and going all the
4 way back to the '90s and the '80s, and
5 that's what's spelled out in our brief at
6 pages 36 to 39.

7 And the one other point I wanted to
8 make as well is when you get to page 39 in
9 Paper 7 from the PGR, you'll see it's not
10 just the Frohman declaration, which we've
11 been focusing on. It's also the argument
12 the opponents themselves make when
13 characterizing one of our publications, and
14 they're taking directly contradictory
15 positions if you look at the arguments in
16 our briefs continuing from page 39.

17 I wanted to sort of steer things
18 back around and to kind of what our
19 position is, and why these statements are
20 contradictory. Again, this all goes back
21 to sort of the pressing question of the
22 day, which is, does this answer need to
23 come as routine discovery? And our
24 position it absolutely does.

1 And, your Honor, I think kind of the
2 fact that we're even going through this is
3 a little surprising, because Petitioner
4 kind of has all the cards here. If they
5 weren't behind the opposition, why don't
6 they just say, no, it wasn't done? And
7 then this issue -- now we're still talking
8 about what would be the relevance of that
9 evidence from the opposition. It would
10 still have some relevance. But why won't
11 they just answer the question? That would
12 resolve everything we're talking about.

13 JUDGE FITZPATRICK: I think there
14 was -- I'm going to let Judge Yang chime in
15 here, because she has a question.

16 JUDGE YANG: This is Judge Yang. I
17 did actually wanted to ask Petitioner
18 whether it's your position that you are not
19 able to say whether Petitioner is the party
20 who filed the opposition; and if so, if
21 that's the position that you cannot say,
22 what is the basis for that, that inability?

23 MR. MCKEOWN: Sure, your Honor. So
24 this is Scott McKeown again. So the simple

1 answer is we can't say that it's not us.
2 We can't say that it is us, because that's
3 our EPO patent strategy and it's privileged
4 information.

5 JUDGE YANG: Okay. So the argument
6 is that it is privileged whether or not,
7 and you're admitting either way because
8 that will be under your understanding that
9 is privileged information. We have to
10 resolve that before we resolve this issue.
11 So what is the privilege? What is the
12 basis for the privilege? Is it work
13 product? Is it attorney-client? What is
14 the basis for that privilege argument?

15 MR. MCKEOWN: It's attorney-client
16 privilege, your Honor, and work product I
17 would imagine.

18 JUDGE FITZPATRICK: The identity of
19 the requester in Europe? That would be a
20 factual thing. So how could that be
21 attorney-client privilege?

22 MR. MCKEOWN: Information on my
23 client's activities in another form are
24 privileged whether we're confirming,

1 denying or otherwise. It's jut not
2 relevant to this proceeding. I understand
3 the patent owner's theories, but we said
4 nothing inconsistent that would qualify as
5 routine discovery. As I said, it would be
6 privileged anyway.

7 JUDGE YANG: Right. I think we're
8 trying to separate out sort of the
9 privilege versus whether it's routine or
10 not. So it sounds like you're making both
11 arguments. You're saying it is privileged
12 even though, I think, Judge Fitzpatrick
13 said it's a fact. But you also -- separate
14 from that, you're also saying it's not
15 routine discovery because there's nothing
16 consistent, but you're making both
17 arguments. I think that's what we're
18 trying to clarify.

19 MR. MCKEOWN: well, yes, I guess I'm
20 making three arguments. I don't believe
21 it's relevant first and foremost; number
22 two, we haven't said anything inconsistent.
23 We have no information that we can provide
24 as to filing the EPO not being public. And

1 to the extent the board were to allow some
2 additional discovery, routine discovery,
3 however you want to identify it, we can't
4 say one way or the other. So it's
5 privileged.

6 JUDGE YANG: Let me just follow up
7 with the patent owner. I want to give you
8 a chance to respond to this argument about
9 privilege. So what would your response to
10 that be?

11 MR. STEIN: I'm trying to check.
12 It's not something that's been raised
13 before, which is a little surprising
14 because we have had some correspondence
15 with Petitioner, and they've never raised
16 their apparent position today that this is
17 privilege. So we need a little bit of time
18 to chew on that. So, I guess, that's the
19 best I can offer right now. I agree with
20 Judge Fitzpatrick on that. I'm not really
21 seeing the underpinnings there, but I
22 haven't had a whole lot of time to think
23 about it.

24 JUDGE YANG: Okay. I do want to ask

1 Petitioner one more question, which is I
2 don't think you had a chance to respond to
3 whether you think this issue should be
4 resolved before institution decision. So I
5 just wanted to give you a chance to respond
6 to that.

7 MR. MCKEOWN: Sure. Thank you, your
8 Honor. And to be clear, we've already
9 confirmed in writing that there is no
10 discovery to be had. And if patent owner
11 had interest in exploring it any further,
12 they could have. Well, my take is whether
13 or not someone, whether it's Petitioner or
14 someone else, made a statement someplace
15 else in Europe that could be argued as
16 inconsistent with the statements in the
17 petition, all that evidence is in the
18 record. I don't know that it really
19 matters who made it.

20 We don't believe it to be
21 inconsistent in the first instance but, I
22 think, the petition is pretty clear as to
23 why there's a lack of enablement and the
24 fact that there may be some other

1 statements somewhere else is not going to
2 change that outcome one way or the other.
3 So, you know, as to whether or not this
4 discovery is appropriate now or later, I
5 just don't think that it matters one way or
6 the other, because the board needs to
7 decide the record as it is, and it's
8 perfectly capable of laying the evidence
9 that's there.

10 JUDGE YANG: Okay. That's all the
11 questions I have for now. So I'll turn it
12 back to Judge Fitzpatrick.

13 JUDGE FITZPATRICK: Thank you.
14 We're going to authorize briefing. And
15 with that said, I want to ask patent owner
16 what they're thinking in terms of pages and
17 timing.

18 MR. STEIN: I think seven pages
19 should be sufficient, and I can't remember
20 exactly when the institution decision would
21 be due. But as long as there's still room
22 --

23 JUDGE FITZPATRICK: Let me check
24 here for you.

1 JUDGE YANG: It's September 11th.

2 MR. STEIN: If we could do maybe two
3 weeks, I think that would be reasonable,
4 seven pages due in two weeks.

5 JUDGE FITZPATRICK: That takes us to
6 August 15th. And then, Mr. McKeown, how
7 much -- you know, you probably don't know
8 until you see it but we have to give you
9 two weeks then to be fair.

10 MR. MCKEOWN: Yeah.

11 JUDGE FITZPATRICK: That gets us to
12 August 29th. And I don't know that we have
13 that kind of time. I just don't see us --
14 we're going to be scrambling at that point.
15 I don't know how much -- let's say we
16 institute anyway, and then might still be
17 relevant and it still would be helpful in
18 that sense. But, I think, we need to move
19 this faster, Mr. Stein.

20 MR. STEIN: I think we can do --
21 yes. Given the schedule, I think a week
22 make sense, your Honor.

23 JUDGE FITZPATRICK: Let's do one
24 week each and no reply brief. That should

1 give us enough time. Does anyone have any
2 questions?

3 MR. MCKEOWN: None from Petitioner,
4 your Honor.

5 JUDGE FITZPATRICK: A couple of
6 things actually. Can you drop like a
7 footnote starting with the patent owner's
8 brief, you know, please, like, drop a
9 footnote saying this is self-significantly
10 identical or identical to what I'm filing
11 in the other case or not in that same
12 footnote flag what is different, some sort
13 of characterization of how they are
14 different, okay. So we'll have duplicative
15 papers. Just so that the record is
16 straight, they need to be filed in both
17 cases but I don't want to read identical
18 papers without knowing that ahead of time
19 and then --

20 MR. STEIN: Can we do that on the
21 case caption page? Are you okay with that
22 just to keep it right up front?

23 JUDGE FITZPATRICK: Actually, that
24 would be perfect in this case. We're going

1 to authorize that, because that makes
2 sense. Just make sure you're careful with
3 what you're referring to. If things are
4 exemplary, you can say, hey, I'm citing to
5 the patent owner response in the PGR at
6 page 12, for example. Say that's exemplary
7 because there's something else, you know.
8 Just make sure it doesn't generate
9 confusion, okay?

10 MR. STEIN: Yes, understood.

11 JUDGE FITZPATRICK: And then this
12 one is for Mr. McKeown. Did you have a
13 court reporter?

14 MR. MCKEOWN: I believe so.

15 JUDGE FITZPATRICK: If you do, can
16 you have the court reporter file the
17 transcript as an exhibit in both cases? If
18 not, can you send an e-mail copy, you know,
19 opposing counsel, just send an e-mail to
20 the board saying, FYI, we did not have a
21 court reporter, okay?

22 MR. MCKEOWN: Yes. Can the court
23 reporter identify themselves if they're on
24 the line?

1 JUDGE FITZPATRICK: Absolutely.
2 Please speak up if you are.

3 THE COURT REPORTER: Yes. This is
4 Kristen Edwards, the court reporter.

5 MR. MCKEOWN: Okay. Great. We'll
6 file on both records when it becomes
7 available as usually is the case.

8 JUDGE FITZPATRICK: Excellent. So
9 the motion is going to be limited -- I
10 don't want to go into additional discovery.
11 I want it to focus on what the
12 characterization of it as routine
13 discovery. The rule is -- I just shut this
14 out.

15 MR. STEIN: 42.51(b)(1)(iii).

16 JUDGE FITZPATRICK: Yes, little
17 Roman three. Thank you.

18 MR. STEIN: We're only asking for --
19 yeah.

20 JUDGE YANG: And I do want to make
21 sure since we're not having a reply brief
22 that, I think, patent owner you will want
23 to address the privilege issue, because I
24 would like to get sort of a sense on that

1 if you have any response to that since
2 there's not going to be a reply.

3 MR. STEIN: Understood. We'll do
4 our best to address that given the sort of
5 the limited representations we have on the
6 call today but, yes, we'll address it.

7 JUDGE FITZPATRICK: Excellent.
8 Thank you, everybody. Any final questions?

9 MR. MCKEOWN: None from Petitioner,
10 your Honor.

11 MR. STEIN: Nothing else from patent
12 owner. Thank you, your Honor, for your
13 time and attention to this. We appreciate
14 it.

15 JUDGE FITZPATRICK: Certainly. The
16 call is adjourned and have a good day.

17
18 (Telephonic conference call
19 concluded at 12:02 p.m.)
20
21
22
23
24

COMMONWEALTH OF MASSACHUSETTS

I, KRISTEN M. EDWARDS, COURT REPORTER,
do hereby certify that the foregoing is a true and
accurate transcription of my stenographic notes,
to the best of my knowledge and ability.

WITNESS MY HAND, this 4th day of
August, 2025.

Kristen M. Edwards

Kristen M. Edwards

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