



## Transcript of **TELEPHONIC JUDGE'S CONFERENCE**

**Date:** May 20, 2014

**Case:** MICROSOFT CORPORATION v. SURFCAST, INC.

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## 1 UNITED STATES PATENT AND TRADEMARK OFFICE

## 2 BEFORE THE PATENT TRIAL AND APPEAL BOARD

3 -----x

4 MICROSOFT CORPORATION, : Inter Partes

5 Petitioner, : Review No.:

6 v. : IPR2014-00271

7 SURFCAST, INC., : IPR2013-00292

8 Patent Owner. :

9 Patent No. 6,724,403 :

10 Issued: April 20, 2004 :

11 Filed: October 30, 2000 :

12 Inventors: Ovid Santoro, et al. :

13 Title: System and Method for :

14 Simultaneous Display of :

15 Information Sources :

16 -----x

17 Telephonic Judge's Conference Before

18 The Honorable Michael Tierney and Matthew R. Clements

19 Sacramento, California

20 Tuesday, May 20, 2014, 2:00 p.m.

21 Job No.: 59133

Pages: 1 - 59

22 Reported by: Denice Lombard, CSR

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1           Telephonic Judge's Conference with the Patent  
2           Trial and Appeal Board:

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Phone: 866-702-0697

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14           Pursuant to Agreement, before DENICE LOMBARD,  
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A P P E A R A N C E S

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1           A P P E A R A N C E S   C O N T I N U E D  
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P R O C E E D I N G S

JUDGE TIERNEY: We're starting the call. This is Judge Tierney joining with Judge Clements, and we're going to have identification of counsel for the parties. I'm going to begin with Patent Owner. If you could please identify who is on the line for you today.

MR. BONE: Yes, this is Richard Bone, lead counsel for Patent Owner SurfCast.

JUDGE TIERNEY: Thank you. Anyone else with you today?

MR. HEINTZ: Your Honor, this is James Heintz, also for Patent Owner.

JUDGE TIERNEY: And just out of curiosity, who requested the court reporter today?

MR. BONE: Patent Owner.

JUDGE TIERNEY: Okay. You will be responsible for submitting a copy of the transcript as an exhibit? Is there any question about that?

MR. BONE: No question, no.

JUDGE TIERNEY: Thank you. Anyone else for Patent Owner today before I move on?

MR. BONE: No.

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1 JUDGE TIERNEY: Moving over to Petitioner, do  
2 I have representative of Petitioner on the line?

3 MR. KUSHAN: Yes, Your Honor. This is Jeff  
4 Kushan, and with me is Joe Micallef.

5 JUDGE TIERNEY: Anyone else for the  
6 Petitioner?

7 MR. KUSHAN: No.

8 JUDGE TIERNEY: My understanding is the Patent  
9 Owner requested the call today. Is that correct,  
10 Patent Owner?

11 MR. BONE: That's correct.

12 JUDGE TIERNEY: Okay. So I'd like to begin  
13 today's call then for Patent Owner to take a couple  
14 minutes and just give us an overview of the relief  
15 you're seeking today, after which we'll go ahead and  
16 we'll hear from Petitioner on the points you raise. So  
17 you have the floor, Patent Owner.

18 MR. BONE: Thank you, Your Honor. I've noted  
19 in the e-mail requesting the call, we'd requested  
20 relief on two -- sorry, there was disturbance on the  
21 line there.

22 MS. MARTIN: Counsel, hello?

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1 JUDGE TIERNEY: Yes?

2 MS. MARTIN: Hi. My name is Tasha Martin.

3 I'm the court reporter. I just joined the conference.

4 JUDGE TIERNEY: Okay. You're a court reporter  
5 for whom? The Patent Owner or Petitioner?

6 MS. MARTIN: For Mr. Bone.

7 JUDGE TIERNEY: Mr. Bone, do you have one or  
8 two court reporters on the line today?

9 MR. BONE: I only requested one.

10 MR. KUSHAN: So we had -- Your Honor, we had  
11 requested a court reporter, but I had not appreciated  
12 there was a second court reporter. So why don't we  
13 have Mr. Bone's court reporter drop off and we'll just  
14 proceed with the one we've already suffered through to  
15 get to this point of comprehension if that's okay.

16 MS. MARTIN: That is fine, Counsel. I  
17 understand. I'm signing off.

18 MR. KUSHAN: Thank you.

19 MR. BONE: Thank you.

20 JUDGE TIERNEY: My understanding is Petitioner  
21 has a court reporter on the line, not Patent Owner, and  
22 Petitioner, you're responsible for submitting a copy of

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1 the transcript as an exhibit in the file.

2 MR. KUSHAN: Yes, Your Honor. We will take  
3 care of that.

4 JUDGE TIERNEY: Thank you. Now we'll go back  
5 to where we were. And Patent Owner, if you could  
6 please go ahead and give us an overview today.

7 MR. BONE: That's correct. So as noted in my  
8 e-mail requesting this call, we had wanted to seek  
9 relief on two issues, and they are somewhat related. I  
10 would just state the two issues for the record, and  
11 then I'll begin by talking a little bit about the  
12 first.

13 The first issue is we had wanted to request  
14 relief for an additional motion to amend. And the  
15 second issue is that we had also wanted to request  
16 briefing on the claim-construction standard for this  
17 proceeding.

18 Now, in the context of the first issue, which  
19 was our wish to bring an additional motion to amend,  
20 you may know from the record, Your Honor, that there  
21 was a conference call with the Board and the parties on  
22 April 16 in which Patent Owner first raised this issue.



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1 And after that -- as a result of that call, the parties  
2 were instructed to meet and confer.

3 Now, Patent Owner provided Petitioner's  
4 counsel with two proposed adjustments to the language  
5 of the substitute claim. But what ultimately happened  
6 is that Petitioner's counsel wanted to receive from us  
7 essentially a written briefing on the merits of these  
8 changes, which would have been quite voluminous, and we  
9 frankly saw as an attempt to frustrate or delay  
10 consideration of the issue, frankly something we found  
11 a little bit ironic given that there is a parallel  
12 District Court proceeding in which the Petitioner had  
13 opposed a motion to stay.

14 So we have a kind of situation where the  
15 Petitioner wanted to keep a District Court case going  
16 at full speed but then doesn't seem to want us to be  
17 able to bring issues to the table timely in this  
18 proceeding.

19 JUDGE TIERNEY: Okay. At this point I want to  
20 note the 35 USC 316 does allow for additional motions  
21 to amend. However, it is a limited right or ability, I  
22 should say ability. It's 316 D 2:

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1 "Additional motions to amend may be permitted  
2 upon joint request of Petitioner and Patent  
3 Owner to materially advance settlement."

4 The Patent Owner is not seeking to materially  
5 advance settlement at this time, correct?

6 MR. BONE: Well, I would say with some irony,  
7 Your Honor, that I think that you may intuit that  
8 settlement of this case is perhaps a distant prospect  
9 at this stage.

10 JUDGE TIERNEY: This is a simple -- I'm asking  
11 hopefully and easy question. You're not seeking to  
12 file an additional motion under the first prong of  
13 316 D 2.

14 MR. BONE: That's correct.

15 JUDGE TIERNEY: It's under the second prong as  
16 permitted by regulation, regulation prescribed by  
17 director which would be good cause, correct?

18 MR. BONE: That's correct.

19 JUDGE TIERNEY: So what I'd like to hear then  
20 is the good cause for the second motion to amend.

21 MR. BONE: Yes, Your Honor. So there's  
22 two-fold reason for this. Firstly, just a general --

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1 it's the general disposition of amendments as we've  
2 seen empirically in watching inter partes review  
3 evolve, amendments appear to be actually quite rarely  
4 granted. In fact, we're not aware of any that have  
5 been granted. We understand --

6 JUDGE TIERNEY: I'll point out there was one  
7 granted. It should have just went out within the last  
8 hour, so . . .

9 MR. BONE: Welcome news I think for patent  
10 holders.

11 But the general principle I was trying to get  
12 at is we understand that the disposition of these  
13 proceedings is that motions to amend are firstly only  
14 considered if its main claim, the unamended claims, are  
15 considered untenable.

16 And then therefore, if we were in that unhappy  
17 situation, the amended claims would be our last  
18 backstop. And therefore we would want to be able to  
19 make sure that those claims are not susceptible to, how  
20 shall I say, minor issues that could sink them.

21 And in considering the Petitioner's opposition  
22 to our motion to amend, some we think relatively minor



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1 issues were raised that we felt could be actually quite  
2 simply addressed with some adjustments to the  
3 substitute claim language. And essentially that would  
4 be our basis for good cause.

5 JUDGE TIERNEY: So let me make sure I  
6 understand it correctly. You would actually be  
7 modifying the proposed claims and not just modifying  
8 the briefing that goes in explaining the basis for the  
9 claims.

10 MR. BONE: Well, I think -- the motion for  
11 additional amendment would obviously be supported by a  
12 limited amount of briefing, but it would not be  
13 briefing that would disturb the positions we have  
14 already made in our prior briefing.

15 JUDGE TIERNEY: So basically the claims that  
16 are provided in your motion for the remaining claims,  
17 you'll be proposing a second set of proposed substitute  
18 claims.

19 MR. BONE: Well, that's correct. The language  
20 change would be quite minor though.

21 JUDGE TIERNEY: And could you walk me  
22 through -- let pull it up on my screen, and then give

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1 me just one moment for that. I'm pulling up your  
2 motion to amend.

3 And can you walk me through what you say the  
4 minor changes to the claim language would be. I'm  
5 looking at "Our Proposed Substitute Claim 56." It's a  
6 substitute for Claim 46.

7 MR. BONE: Claim 53 I believe.

8 JUDGE TIERNEY: Oh, apologies. It's Claim 53,  
9 substitute for Claim 46.

10 MR. BONE: So if you look at page 2 of our  
11 motion to amend, there is underlying language eight  
12 lines down. And where you would see after a comma  
13 "said grid of tiles," that would become "said tiles."  
14 That's the first adjustment.

15 JUDGE TIERNEY: And the need for that  
16 adjustment is --

17 MR. BONE: We believe that's simply a clarity  
18 issue. In the opposition to amend Petitioner had  
19 raised an objection to the way that phrase was written  
20 and made an argument that it contained an internal  
21 inconsistency, which we don't happen to think that  
22 argument is compelling, but we want to make sure that

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1 any possible ambiguity there is resolved.

2 JUDGE TIERNEY: Okay. Please continue.

3 MR. BONE: The second request is, if you go to  
4 the bottom of page 2, three lines up from the bottom,  
5 we would propose to add "by a user" after "wherein the  
6 tiles are selectable."

7 JUDGE TIERNEY: At this moment I'm writing  
8 this down. And you said added language would be "by a  
9 user"?

10 MR. BONE: Yes.

11 JUDGE TIERNEY: And the need for that language  
12 is --

13 MR. BONE: This arises because of a reference  
14 that Petitioner relied on in their opposition to our  
15 motion to amend. And it's not a reference over which  
16 trial has been instituted. And we had deposed  
17 Petitioner's expert on some aspects of that reference,  
18 and through that discovery concluded that there was a  
19 potential interpretation of that reference -- which,  
20 again, we don't necessarily agree with -- but could  
21 raise a potential issue for this claim language.

22 And we think that adding the "by a user,"

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1 which is fully supported by our specification, would  
2 clarify that particular issue.

3 JUDGE TIERNEY: Let me just ask a question to  
4 clarify. I have not gone through in great detail on  
5 this, so if my questions are overly simplistic, so be  
6 it.

7 If it's unselectable by a user, who is it  
8 selectable by?

9 MR. BONE: There was a question that came up  
10 in the context of this reference -- the reference is  
11 Kostos, K-o-s-t-e-s -- as to whether somehow the  
12 operating system of the computer was able to perform a  
13 selection operation.

14 JUDGE TIERNEY: But in terms of at least  
15 obviousness, and, I mean, when you say tiles are  
16 selectable, isn't it obvious for one of ordinary skill  
17 in the art to have a person actually select? And  
18 certainly when you read the specification for saying  
19 selectable, isn't it the normal reading it's selectable  
20 by a user?

21 MR. BONE: Well, sir, when you say isn't it  
22 obvious, did you actually mean obvious as being

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1 unpatentable?

2 JUDGE TIERNEY: Two things, two different  
3 questions. One is on patentability. I'm not sure why  
4 we need to go, and how it's going to -- "by a user"  
5 would overcome a reference necessarily, so I'm not sure  
6 that's necessary there.

7 Too on a claim-construction note, "are  
8 selectable," wouldn't you say the normal reading would  
9 be selectable by a user in light of your specification?

10 MR. BONE: I believe that is, but, I mean, as  
11 you are fully aware, the Board's reasonable  
12 construction mandate could be stretched to accommodate  
13 selection operations.

14 JUDGE TIERNEY: Okay. I see where you're  
15 going. I'm just trying to make sure that I'm not  
16 misunderstanding the position you're taking.

17 MR. BONE: I think we actually fully  
18 understand each other here.

19 JUDGE TIERNEY: Okay. Are there any other  
20 changes that you're seeking to be made?

21 MR. BONE: That was all.

22 JUDGE TIERNEY: Thank you. And at this point,



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1 if I may, is there anything else before I turn to  
2 Petitioner?

3 MR. BONE: No, Your Honor.

4 JUDGE TIERNEY: Okay. Let's go to Petitioner.  
5 On the issue of this second motion to amend where it's  
6 taking out the word "of" on page 2, line 8, and on  
7 page 2 third line from the bottom they add "by a user,"  
8 could you please explain any objection you have to  
9 having them put in a claim of that nature.

10 MR. KUSHAN: So let me first clarify that I  
11 believe their first amendment is to change the phrase  
12 "grid of tiles" to "tile."

13 MR. BONE: To "tiles" plural.

14 MR. KUSHAN: Yeah, grid of tiles" to "tiles"  
15 plural, and is not simply to remove the word "of," but  
16 it's changing kind of the concept from going a "grid of  
17 tiles" to "tiles" as they've cast it.

18 And the second amendment you have stated  
19 correctly.

20 So our position, we have been trying to  
21 understand how the changes they have proposed would  
22 resolve any of the patentability issues that we had

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1 previously identified, first in our petition, and then  
2 in our opposition to the motion to amend.

3 And we have not been given information from  
4 Patent Owner that helps us resolve that question. We  
5 don't see how any of the amendments they're proposing  
6 would in fact alter the rejection or alter the  
7 trans-patentability that has been stated and found the  
8 way we see the prior art relating to the claim  
9 language.

10 And so when we were trying to engage the  
11 Patent Owner in discussion about how these amendments  
12 would address things we had previously identified,  
13 unfortunately we didn't get the response to the  
14 substance of our questions.

15 And so we sit today unable to give you an  
16 answer how this would actually materially advance the  
17 proceedings, because they're not resolving any of the  
18 issues that we identified, both in the petition and in  
19 our opposition to the motion.

20 JUDGE TIERNEY: Well, Petitioner, what if we  
21 were to go ahead and authorize a corrected amendment  
22 where instead of -- it would be essentially a second

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1 amendment to a second motion to amend, but we would  
2 just have it replace the first motion to amend, no new  
3 briefing. They would not need to brief anything  
4 further. All they're doing is putting cut and paste  
5 almost on that Claim 53 with that language they just  
6 proposed, and the briefing stands as it's already been  
7 filed. Would you have any objection at that point?

8 MR. KUSHAN: Well, we certainly would object,  
9 and let me just give you an explanation. The change  
10 that they have identified, the "grid of tiles" to  
11 "tiles," I believe has come from our opposition where  
12 we had pointed out a lack of support for modifying -- a  
13 fair amount of confusion actually in their patent about  
14 the attributes of tiles versus the attributes that  
15 would be sort of the grid of tiles.

16 And so moving from "grid of tiles" to "tiles"  
17 actually we think has a fairly substantive question  
18 that's engaged, and that issue has not been briefed as  
19 framed.

20 JUDGE TIERNEY: Well, wouldn't that actually  
21 put their claim in better condition for -- in terms of  
22 like the next prosecution where we say it's a better



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1 position for allowance?

2 MR. KUSHAN: I don't believe so, Your Honor.  
3 We had presented a prior art that addressed the concept  
4 of using tiles or forms of windows that -- you know,  
5 that I don't think the issues relative to the prior art  
6 are resolved by the changes they're proposing.

7 JUDGE TIERNEY: I understand. Let's focus  
8 though on the -- I was hearing a slate and puts it  
9 indefiniteness that it was hard to understand the  
10 meaning of the claim in light of the specification when  
11 you say "grid of tiles." Wouldn't it at least add some  
12 clarity to the claim language if this went to the  
13 "tiles" language.

14 MR. KUSHAN: Well, no, see they're still  
15 having difficulty -- I think there's still a  
16 significant issue of whether that new claim would be  
17 supported under 112.

18 JUDGE TIERNEY: With this minor change does  
19 that add to the problem or actually at least alleviate  
20 it in terms of construction of the claim?

21 MR. KUSHAN: I don't think it alleviates it.  
22 I think it's keeping it in same the same posture that

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1 it is now, which that it's not supported as it's  
2 presented.

3 JUDGE TIERNEY: Well, then let's back. So  
4 you're saying that it makes no substantive difference  
5 either way.

6 MR. KUSHAN: Well, we would like -- obviously  
7 we briefed and responded to their presentation in the  
8 claim amendment based on looking at their specification  
9 and addressing what we thought was the new claim  
10 language.

11 But this amendment would disrupt the briefing  
12 that has been presented as to the claim term "grid of  
13 tiles" which we've had analyzed against the written  
14 description.

15 So the issue that we're having concern with by  
16 the amendment is that we would have to rely on our  
17 briefing relating to the "grid of tiles" concept and  
18 written description, and hope that that is sufficient  
19 to guide you as to the support for "tiles" which is a  
20 different phrase.

21 And that's a substantive concern which we  
22 don't think has been fully briefed in the record.

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1 MR. MICALLEF: Your Honor, let me also try to  
2 answer your question.

3 JUDGE TIERNEY: Yes, please.

4 MR. MICALLEF: One of the concerns -- I don't  
5 think the change to the written description is an  
6 issue. But one of the concerns that I have is I don't  
7 really see why they think this may have an effect on  
8 the patentability issues as to Kostas.

9 And so -- and we asked questions of them to  
10 that and never got a substantive answer. So it would  
11 seem to me, if they are correct that it may have an  
12 effect on the patentability issues as to Kostas, then  
13 simply letting them put it in there without giving us a  
14 chance to address it, and also without their showing  
15 any good cause for a second amendment, seems like  
16 that's not the right thing to do under the regulations.

17 JUDGE TIERNEY: I'm aware of the regulations.  
18 What I'm trying to find out though is, is Patent  
19 Owner -- basically the Patent Owner comes in and says,  
20 'I need minor corrections to my claim so I'm not having  
21 form over substance here. I want to make sure that my  
22 claims are basically found to be patentable by the

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1 Board and upheld. And I don't want to have these  
2 procedural hurdles or nit picks" basically is what I'm  
3 kind of getting the gist.

4 So if there's a minor edit they can do please,  
5 let it in. That's what I'm hearing from that side.

6 I understand from your side you're saying  
7 there may be -- it's not necessarily more patentable  
8 with the amended language, but you're saying their  
9 briefing is not as precise because the language  
10 changed.

11 MR. KUSHAN: And we do feel that the term  
12 "grid of tiles" and "tiles" as used as a definitional  
13 element of the claim, they're different. And the  
14 necessary analysis here to go through for 112 support  
15 is going to be different. It's a fact-dependent  
16 analysis to see whether the support is there in either  
17 term.

18 JUDGE TIERNEY: So what I'm trying to find  
19 though is at lease see if there's any way on this phone  
20 call -- and maybe that I'll have to take it under  
21 advisement with my panel members -- to see if there's  
22 some way to balance out -- we do not want to prejudice



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1 the Patent Owner where they feel like they're going to  
2 have a procedural or minor hurdle here that's going to  
3 prevent them from getting a motion to amend granted.

4 At the same time we want to obviously allow  
5 Petitioner full opportunity to respond to any  
6 substantive changes that are made.

7 And so is there a way that we can find a path  
8 through this so that both sides are able to have a  
9 proper way of going forward?

10 Can you give me any proposed solutions to this  
11 question that's been posed?

12 MR. KUSHAN: Well, your Honor, I guess we're  
13 kind of at a challenge here to answer your question.  
14 One of the issues that we believe would have to be  
15 engaged first is whether the amendment that's being  
16 proposed would in some way advance the proceeding.

17 We appreciate the guidance you're giving us,  
18 which is is this going to be a minor issue that they  
19 believe is appropriate to fix. And our view is that  
20 it's not a minor issue, it does require and raise new  
21 issues relative to the briefing that's been completed  
22 on the claim amendment.

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1 JUDGE TIERNEY: How much additional briefing  
2 would be required by this? How many pages are needed  
3 to address the -- again, I'll tell you what I'm hearing  
4 here is they're minor issues, what Patent Owner is  
5 saying. I'm looking at the changes. They do not  
6 appear on their face to be major changes. So I am  
7 sensitive to the face that you have not been able to  
8 brief if they are major or minor or changes.

9 How much briefing would be entailed if we did  
10 allow these changes to be in, no further briefing by  
11 the Patent Owner?

12 MR. MICALLEF: Your Honor, I would say I can't  
13 imagine it would be much, but I also -- because I  
14 haven't been given any information about this on the  
15 patentability front before this phone call, I'm not so  
16 sure I can answer. But it would certainly be minuscule  
17 and maybe nothing.

18 MR. KUSHAN: So what I understand is you're  
19 proposing to allow us to file a supplemental brief  
20 relative to their amendment so they aren't going to be  
21 putting additional amendments in.

22 JUDGE TIERNEY: If the panel were to go ahead

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1 and authorize the Patent Owner to go ahead and file  
2 their motion to amend as a corrected motion to amend,  
3 in a sense second motion to amend, it would be a  
4 replacement; and the sole replacement would be changes  
5 they've identified on the phone in that claim language,  
6 Claim 53; we would then allow the Petitioner an  
7 opportunity to go ahead and put in some we'll call it  
8 supplemental briefing, or however you want to term it,  
9 of a limited nature. That's one suggestion.

10 And I would want to confer with the panel  
11 before we went with it. I'm trying to find out on the  
12 phone if there's some balance we can give here so that  
13 both sides feel they've had an opportunity to present  
14 their case in the best light.

15 MR. BONE: Your Honor, this is counsel for  
16 Patent Owner. Maybe I can just ask a quick  
17 clarification.

18 JUDGE TIERNEY: Yes.

19 MR. BONE: I mean, I assume that if you were  
20 to proceed this way you would actually also ask us to  
21 provide our own 112 support for the correcteded  
22 amendments?

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1 JUDGE TIERNEY: How much 112 support is  
2 needed? Is it just going to be anything more than just  
3 identifying where in the specification -- I mean, are  
4 we talking column/line? Or are you actually trying to  
5 find a briefing on it? Understanding you're saying  
6 they're very minor.

7 MR. BONE: Well, I believe we can do it by  
8 column and line, simple as that.

9 JUDGE TIERNEY: So they are of a minor nature,  
10 and since they are of a minor nature, I'm -- at least  
11 myself -- willing to entertain the fact that you'll go  
12 ahead and have this replacement.

13 And so I'm turning to the Petitioner and  
14 seeing if there's some way I can propose to the panel  
15 when we take it under advisement, is there some way of  
16 alleviating any problems that you're saying may arise  
17 due to patentability issues that we are not seeing on  
18 the phone necessarily?

19 MR. KUSHAN: So if you're asking us how many  
20 pages we need to address the 112 or other issues we can  
21 see in the claims, we could do that with a small  
22 briefing, five pages max, because I don't know -- I



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1 think what we would want to have is the right to go  
2 back and assess the 112 questions and the prior art  
3 issues that we identified before and address any issues  
4 as they are presented by the amended claim.

5 But we would limit ourselves to five pages to  
6 do that, because we would assume it would be primarily  
7 a technical focus of our conference. That would be one  
8 approach we could take where we respond to their  
9 amendment.

10 Again, we'd have -- I'm setting aside our  
11 concerns about good cause and the timing and sequencing  
12 of all this, because you've asked us to focus on just  
13 the scenario of an additional briefing.

14 JUDGE TIERNEY: Again, I understand you're  
15 saying that the good cause is not presented here.  
16 However, I am hearing from the Patent Owner that  
17 they're saying good cause is just such a minor nature.

18 And that is something that we're unable to  
19 decide on the phone today, whether it is a minor or  
20 major nature. And it may need briefing.

21 But if we're going to have briefing on that  
22 issue, then it would be -- it seems to be like why not

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1 allow them the opportunity to put in their corrected  
2 claim, identify the column/line and allow you up to  
3 five pages of briefing.

4 I mean, again, I'm just looking for possible  
5 solutions to the problem that's been identified.

6 MR. KUSHAN: If you proceed in that manner we  
7 can live with that. We would certainly want to make  
8 sure we don't have any delays in the schedule that's  
9 been set in the case. And I assume that part of your  
10 calculus is to avoid any of those delays.

11 JUDGE TIERNEY: We are attempting to keep this  
12 case on schedule.

13 So now I have proposed at least a solution  
14 that the Petitioner can live with.

15 Patent Owner, I'm going back to you now. The  
16 proposed solution you've been listening to, the  
17 proposed solution would allow you to file a corrected  
18 motion to amend. Your correction could be on Claim 53.  
19 You would put in the edits you've identified, and you  
20 would also add in a very brief identification  
21 column/line citation for the two edits you're  
22 proposing.

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1           The petition then would be given up to five  
2       pages to go ahead and provide some briefing on solely  
3       briefing the patentability issues raised by the, shall  
4       we say, minor corrections that were done to Claim 53.

5           Patent Owner, do you have any objection to  
6       such a proposal? And if so --

7           MR. BONE: I think that's a good proposal. I  
8       mean, there's two comments. One is technical, and that  
9       is are you expecting therefore that we effectively  
10      incorporate by reference the argument portion of the  
11      prior motion to amend?

12          JUDGE TIERNEY: What I would suggest doing,  
13      just for simplicity -- and this is open -- different  
14      ways of handling -- you could just basically take what  
15      you filed before, make the minor edits in there, add  
16      the cite to column/line and just file it.

17          So those are the only changes you'd be making.  
18      And then it would be all in one document. So you'd  
19      have your briefing, your claim, et cetera.

20          Alternatively you could do as you suggest and  
21      have a separate document where you just have Claim 53  
22      and a column/line. Which do you prefer?

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1 MR. BONE: I think probably the first, but  
2 actually I wanted to possibly sort of defer an answer  
3 to that until we discuss the second issue that we have  
4 for this call.

5 And then the other comment I was going to say,  
6 just to be a little more argumentative, is it seems to  
7 us that five pages may be rather excessive for  
8 Petitioner's reply brief. But it may be that the rules  
9 don't permit you anything less than five pages.

10 JUDGE TIERNEY: The rules actually in this  
11 instance, since it is not specified by rule, it is up  
12 to the panel. And here, since we are taking the  
13 unusual step of allowing these lawyers in effect a  
14 second motion to amend, I don't necessarily -- let's  
15 put it this way. I'm not entirely convinced that five  
16 pages are necessary. But I'm trying to alleviate  
17 prejudice to all around.

18 So I'm allowing Patent Owner to try and bring  
19 in a claim that they may not have been entitled to  
20 necessarily, but I'm also trying to eliminate prejudice  
21 to the Petitioner by giving them some flexibility. And  
22 if they're saying they need up to five, I would grant



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1       them the up to five with the understanding that they're  
2       not to use them unless the need to.

3               In other words, don't just add in argument for  
4       argument sake.

5               MR. BONE:   Okay, I understood, Your Honor.

6               JUDGE TIERNEY:   And then as to how you wish to  
7       file the corrected motion to amend, I'm assuming I will  
8       contact -- I'll ask Judge Clements if he has any  
9       objection to the proposed solution at this time.   We  
10      can hear from Judge Clements.   He's on the line.

11              JUDGE CLEMENTS:   No objection from me.

12              JUDGE TIERNEY:   And Judge Clements, could you  
13      identify a best way for them to file such a proposed  
14      corrected amendment or second motion to amend, however  
15      you'd like to style?

16              JUDGE CLEMENTS:   I think if the corrected  
17      motion to amend were one document, that would probably  
18      be the most helpful.   And I guess if it is one document  
19      that's replacing the prior motion to amend, if Patent  
20      Owner can file maybe a redline against the previous  
21      motion to amend just to make it easier to identify the  
22      changes, that would be helpful.

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1 JUDGE TIERNEY: Patent Owner, do you have any  
2 questions regarding that?

3 MR. BONE: No, I think that would be fine.  
4 But as I said, I think we also need to address the  
5 second issue we wanted to raise. And also there is a  
6 time consideration of -- you know, the proposal does  
7 leave it up to -- I mean sort of -- it is basically a  
8 good-faith measure that Petitioner won't introduce new  
9 material into their reply.

10 JUDGE TIERNEY: I'm confident that if they  
11 introduce new material you will identify it. I would  
12 caution you however, we do allow some leeway if their  
13 commentary is directed to the new language, it will be  
14 taken in the scope of what's been authorized.

15 If they take it upon themselves to go outside  
16 that scope, they do risk the entire briefing to be  
17 stricken from the record. And I would not hesitate to  
18 strike it should I believe they have exceeded their  
19 authority, the authorization given.

20 MR. BONE: Fair enough, Your Honor.

21 MR. HEINTZ: Your Honor, if I may, I just want  
22 to understand, when we file the corrected amendment or

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1 corrected motion, are we saying just file a single  
2 document with redlines, or do we want a clean copy and  
3 like an attachment showing the redlines?

4 JUDGE TIERNEY: I would prefer it be a clean  
5 copy, and you can submit it in exhibit a redline. If  
6 you'd rather have it as an appendix, I'll leave it to  
7 you and your discretion. You may file it either as an  
8 exhibit or an appendix, whatever suits you.

9 MR. HEINTZ: Thank you, Your Honor.

10 JUDGE TIERNEY: Okay. Any further questions  
11 regarding the format?

12 MR. BONE: No, Your Honor.

13 JUDGE TIERNEY: Okay. We'll turn to the  
14 District Court claim construction. However, I do want  
15 to make sure before I forget, we will need a timing for  
16 the filing of these papers and leave that issue -- make  
17 sure we don't forget to address before we adjourn  
18 today.

19 So going to the second issue, Patent Owner,  
20 you identified an issue regarding how we should  
21 construe claims. If you'd like to give us a little bit  
22 of background on that issue now.

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1 MR. BONE: Yes, thank you, Your Honor.

2 So as I alluded to earlier -- and you've  
3 actually corrected me -- I would have said two hours  
4 ago that to date no Patent Owner motion has been  
5 granted. However, you're telling me that in fact one  
6 has now. But still the statics are one out of more  
7 than 20 I believe.

8 And there has also been the recent PTAB road  
9 shows that went across the country in which some slides  
10 were presented by the PTAB panels which offered, in our  
11 view, new guidance to patent owners to how to make --  
12 the PTAB standards for supporting an amendment.

13 The point is, that at the time that we made  
14 our original motion to amend, which is in January of  
15 this year, we did not have the benefit of that  
16 guidance, nor did we have the benefit of the statistics  
17 which show that granted motions to amend are extremely  
18 rare.

19 And we've read, given one of the guiding  
20 opinions in this area, which I believe was written by  
21 yourself, Your Honor, in CBM 2012-00001, which says  
22 that the BRI standard in inter partes review is



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1 justified in large part because the Patent Owner has  
2 the ability to amend the claims.

3 And that's commensurate with the rest of the  
4 way the office behaves, which is that if the Board  
5 claim construction standard, the fact that a Patent  
6 Owner can amend allows them to essentially cope with  
7 issues that raises.

8 So we're here in the situation of our motions  
9 to amend having been filed and briefed, and Petitioner  
10 having had a chance to reply.

11 And we think that, you know, given the history  
12 of this and the evolving standard of the way that  
13 amendments are justified, it seems that in fact what  
14 would be proper in our instance is to have the Phillips  
15 standard of claims construction applied when the Board  
16 ultimately rules on this case rather than the BRI  
17 standard.

18 And mindful of the scheduling in this case, we  
19 were hoping to be able to have the parties submit a  
20 brief on this issue. We believe that could be done  
21 before the currently scheduled oral hearing, but  
22 basically we would like to have that issue briefed.

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1 JUDGE TIERNEY: I'm not entirely clear on why  
2 we would use the District Court standard in place of  
3 BRI at this point. Can you please focus in on that  
4 issue for me and why we would want to use the District  
5 Court standard. I understand you say you weren't  
6 aware, so you didn't necessarily brief it. But why is  
7 this case needing a District Court standard?

8 MR. BONE: Well, the reason is, Your Honor, is  
9 that at point at which we had justified our motion to  
10 amend, we were not aware that in fact the standard for  
11 that is very high. And we think that empirically the  
12 standard that had in fact been articulated by the Board  
13 is actually -- I mean, dare I say inconsistent with the  
14 overall principle of BRI. It actually makes it too  
15 hard for a Patent Owner.

16 And therefore it would be more -- given the  
17 high likelihood that a motion to amend ultimately is  
18 unsuccessful, it would seem more appropriate to have  
19 the Phillips standard apply.

20 JUDGE TIERNEY: The alternative, you're saying  
21 you're filing a motion to amend, and we've just spent  
22 all this time talking about the need for a motion to

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1 amend, and I relieved some of the burdens for you.

2 But at the same time we're also going to apply  
3 a District Court standard which contemplates no  
4 amendments being entered.

5 MR. BONE: So I think if you appreciate the  
6 way it works is that a claim construction is applied  
7 under some standards to the claims of the patent in  
8 unamended form. And it's only if the claims there are  
9 found unpatentable that you get to consider the need  
10 for a motion to amend.

11 The point is, I guess, that if a motion to  
12 amend can almost never be successful, that would seem  
13 to vitiate the idea of applying BRI to the unamended  
14 claim.

15 JUDGE TIERNEY: So you're saying we should  
16 find first if your motion to amend is -- well, I'm  
17 still trying to figure out why you're filing a motion  
18 to amend if you're saying it's going to be  
19 unsuccessful.

20 MR. BONE: Well, at the time we filed it we  
21 were not aware that it would be unsuccessful.

22 So let me just restate it one more time. Our

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1 understanding is that the Board only ever rules on a  
2 motion to amend in any situation if the underlying  
3 claims are found unpatentable, that is the unamended  
4 claims. And of course we would ultimately hope that  
5 our unamended claims survive this defeat is obviously  
6 our goal.

7 One puts in a motion to amend as something of  
8 a backstop; in other words, a fallback position. The  
9 point being that you would get to that on a motion to  
10 amend would be considered, and it's consistent with the  
11 BRI construction being applied to the unamended claim.

12 Now, if ultimately you apply the BRI standards  
13 to those claims but still a motion to amend is almost  
14 impossible to grant, that seems to me to be  
15 inconsistent with the overall application of the BRI  
16 standard.

17 JUDGE TIERNEY: I beg to differ on the  
18 impossible to grant language. I think that's not an  
19 entirely correct proposition at this point.

20 MR. BONE: Well, we're still looking at one  
21 out of 25 or so, which admittedly is not impossible. I  
22 concede that.



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1 JUDGE TIERNEY: I just want to point out,  
2 these are the early cases. We have not hit a steady  
3 state yet for our process. And that's actually -- I  
4 understand there are some difficulties, and you're  
5 saying there was difficulty understanding how the  
6 motion to amend would progress.

7 In a sense, I think you can tell today, I've  
8 been somewhat inclined to allow you an opportunity to  
9 try and make some changes to your motion to amend to  
10 try and alleviate some of the burdens here.

11 MR. BONE: Yes, I appreciate that.

12 JUDGE TIERNEY: So that's why I'm not entirely  
13 convinced today that we're using an impossible  
14 standard. It may be -- I agree it may not be as easy  
15 as it would be in an ex parte prosecution. But I'm not  
16 sure that wouldn't necessarily vitiate the brief  
17 standard.

18 However, I'll allow Judge Clements to chime in  
19 if he sees something differently or hears something  
20 differently.

21 JUDGE CLEMENTS: No, my views are consistent  
22 with Judge Tierney.

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1 MR. HEINTZ: Your Honor, may I make one  
2 additional brief point on this topic?

3 JUDGE TIERNEY: Of course. Let's hear it.

4 MR. HEINTZ: Sure. As you know, we only  
5 amended Independent Claim 46 and its dependents. We  
6 did not attempt to amend Claim 1 or the other  
7 independent claim, Claim 22.

8 And the reason for that, a large part of the  
9 reason for that, had to do with the restrictions on the  
10 page limits for these motions.

11 As I think I've expressed before, we were  
12 under tremendous pressure to get everything into the  
13 15 pages. And as a result of that page limit, we  
14 didn't try to amend the other claims, and we didn't  
15 present the possibly different claim amendments that we  
16 might have tried in a ex parte process.

17 And even despite how much we tried to do in  
18 our conditional motion for amendment, we also, as you  
19 know, addressed the prior art that was perceived to be  
20 the most relevant. Even there, Microsoft identified  
21 this Myers reference as something that we should have  
22 done and has taken the position, which has not yet been



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1 ruled on, that the failure to address this one  
2 reference means or motion must fail for that reason  
3 alone.

4 And so the point is that it is very -- your  
5 ability to amend the claim as a Patent Owner in these  
6 proceedings is very much curtailed. And when the  
7 application of the BRI rests on the ability to amend  
8 the claims, we believe that given these very  
9 significant -- not impossible, but very significant  
10 restrictions that have been placed on it as a result of  
11 the rules, and more particularly the evolving case law  
12 that's happened, that under these conditions when you  
13 weigh those two factors, the application of the BRI is  
14 not justified.

15 And we mean no disrespect for that. We  
16 understand the Board's position and your well-reasoned  
17 opinion, but just under the circumstances we think it's  
18 a very significant restriction on the ability to amend  
19 such that the BRI should not really be applied.

20 JUDGE TIERNEY: I would just like to say I  
21 understand you're saying that there are certain hurdles  
22 that are being imposed, and I'm trying to find out if

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1       there's a way in this case to try and lessen those  
2       hurdles or remove some of the hurdles.

3               For example, in the second motion to amend we  
4       are authorizing it here. Is there another hurdle that  
5       you feel in particular was overly hampering your  
6       ability to respond that we need to consider at this  
7       point?

8               MR. HEINTZ: Well, I would say if we had more  
9       pages to write the motion to amend we could have  
10      amended the other claims.

11              JUDGE TIERNEY: And refresh my recollection.  
12      Apologies. I have a few cases on my docket. I don't  
13      remember on this particular one. Did we have a request  
14      for an additional amount of pages that we denied?

15              MR. HEINTZ: You did not have a request, but  
16      we discussed at length this issue with yourself and  
17      Judge Chang in particular. I remember her talking  
18      about it. And the overwhelming impression we got was  
19      that we needed to do this in 15 pages.

20              You may remember one of the questions we  
21      raised was, we had an independent claim and 20 claims  
22      that depended from it. And so if we tried to amend the

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1 independent claim, that would mean we'd asked if we  
2 could use an appendix, to put the claim amendments into  
3 an appendix rather than have it could against 15 pages.  
4 And we were told no, you were not allowed to do that.

5 And so I will tell the Court that we did not  
6 specifically request, after being told that we couldn't  
7 put it in an appendix, request additional pages. But  
8 it was my impression, and I spoke to Dr. Bone after the  
9 call, it was our impression that we were being told you  
10 had to get it done in 15 pages.

11 JUDGE TIERNEY: I appreciate that. I thank  
12 you for the answer. Is there something at this point  
13 though that you feel is a procedural hurdle which is  
14 prejudicing you unnecessarily, if we were to go forward  
15 with the broadest reasonable, that you wish the Board  
16 to consider and in any way modify or reduce the  
17 procedural hurdle? Is there something we can talk  
18 about today or --

19 MR. HEINTZ: Well, beyond allowing us to  
20 submit an amendment for the other independent claims as  
21 we were not able to address in our previous  
22 amendment -- sorry, motion to amend, no.

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1 MR. BONE: I will just add this, Your Honor.  
2 We don't see it as much as a procedural hurdle as  
3 actually something that could still be accommodated in  
4 this proceeding given that we would expect to brief the  
5 claim-construction standard and show that it would  
6 still -- even changing the standard would still support  
7 the patentability of our main claims under the  
8 constructions we put on.

9 JUDGE TIERNEY: Is that something you can  
10 raise at hearing though? Because at this point we are  
11 pretty much near the end of the briefing schedule, and  
12 I would not want you to bring in additional issues that  
13 would require additional briefing and could obviously  
14 impact the schedule.

15 But if it's something that you feel necessary,  
16 is there a reason why you would not be able to bring it  
17 up at hearing if we authorize some discussion at this  
18 point?

19 MR. BONE: I believe that we could do that  
20 with appropriate authorization.

21 JUDGE TIERNEY: And now we've had a long  
22 discussion with the Patent Owner. I would like to hear



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1 Petitioner's points of view on this issue.

2 MR. KUSHAN: Thank you. Hearing the  
3 discussion raises a number of concerns. First of all,  
4 it's not simply your discretion to shift gears on the  
5 claims construction. There's a rule that was  
6 promulgated after a notice of common rule making that  
7 says you're to stop and follow and use the broadest  
8 reasonable construction.

9 JUDGE TIERNEY: And let's stay away from --  
10 what I'd like to hear more from on the Petitioner, I  
11 understand substantively that there's a disagreement.  
12 I understand what the Board's rule is. And I've  
13 written a case I think was referred to on this, and to  
14 use the broadest interpretation.

15 Procedurally, though, what I'd like to know  
16 is, at this stage of the proceeding if the Patent Owner  
17 were to bring up the issue saying at the oral hearing  
18 that they would like us to apply the District Court  
19 claim construction and get some discussion of that, is  
20 there any procedural issue that you wish to raise  
21 regarding that, or do you believe it's going to  
22 improperly prejudicing the Petitioner's case should we



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1 authorize them to bring it up at the hearing?

2 MR. KUSHAN: I'm coming up with an answer to  
3 that question. And there it may be yes to both.

4 So I think we will accommodate whatever the  
5 Board tells us to accommodate in terms of briefing. I  
6 think one of the challenges we've had in briefing to  
7 date is that the pleadings you've seen from the Patent  
8 Owner has presented a number of different proposed  
9 readings and interpretations of their claims. And  
10 that's somewhat confusing to have to deal with.

11 JUDGE TIERNEY: Let's back up. We do have --  
12 the rule is BRI applies. The default there is BRI will  
13 apply. At hearing, the Patent Owner wishes to raise  
14 the issue that it may be best to, for this particular  
15 case, raise the District Court claim construction and  
16 would give us an explanation of it.

17 MR. MICALLEF: Let me object. I am also  
18 actually counsel in the parallel litigation, so I know  
19 something about the claim interpretations that Patent  
20 Owner has been asserting there.

21 And I would like to point out that they have  
22 asserted those claim interpretations in the Patent

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1 Owner's response, including one interpretation that is  
2 much broader than the Petitioner adopted in the  
3 institution decision, and they haven't even asserted  
4 any patentability argument.

5 So listen. If Your Honor wants to hear  
6 argument on which standard should apply as opposed to  
7 which claim interpretation, we will do it.

8 JUDGE TIERNEY: And all I'm saying is, it's  
9 not what I wish to hear, it's that I want to provide  
10 the parties an opportunity to present their case in the  
11 best light that they believe would be appropriate.

12 And here I'm hearing the Patent Owner saying  
13 they believe appropriate to use some of their time --  
14 or briefing, as what they proposed -- but I'd rather  
15 have it at the hearing if they wish to bring it up and  
16 save some of the time and argue why a District Court  
17 claim construction would be appropriate.

18 If they wish to do so, I want to know how much  
19 procedural or prejudicial aspect there is to the  
20 Petitioner to have them do so.

21 MR. KUSHAN: Well, Your Honor, if you're going  
22 to confine them to the same amount of time that you've

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1 already scheduled or anticipated providing, and that's  
2 how they choose to argue their case, that helps address  
3 some of our concern.

4 One of the issues, obviously, is that once the  
5 arguments have proceeded, we assume that we'll be able  
6 to rebut or address in response whichever issues we  
7 think merit a response at the oral hearing.

8 If in fact there is some inclination of the  
9 Panel to take up and employ -- use some of these  
10 alternative constructions, then I would hope there  
11 would be an opportunity to respond to that. But I  
12 understand we don't really want to disrupt the  
13 schedule.

14 My feeling is at this point, as long as you're  
15 keeping the parameters locked down as to the amount of  
16 time, then we'll work within that structure, and we'll  
17 address whatever issues come up during the hearing.

18 So I don't think we wish to have any  
19 additional overlay of briefing on the issue at this  
20 point in the proceeding, and we just want to get to the  
21 oral hearing and get to the motion proceedings.

22 JUDGE TIERNEY: Judge Clements, would you find

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1 it acceptable to just allow the Patent Owner to raise  
2 it as briefing -- sorry, raise it at the hearing even  
3 though there's no technical briefing on that particular  
4 point?

5 JUDGE CLEMENTS: Yes, I would be fine with  
6 that.

7 JUDGE TIERNEY: So I think this is a way of  
8 ensuring that the schedule goes forward without  
9 disruption is to authorize the Patent Owner to bring it  
10 up to the extent they believe it's in their best  
11 interest.

12 So hearing from my copanelist, the Patent  
13 Owner is authorized to go ahead and raise the issue of  
14 whether or not BRI or District Court claim construction  
15 should apply at the oral hearing.

16 And of course should the Petitioner believe a  
17 rebuttal is necessary, they would be able to create  
18 their rebuttal at that time. No additional briefing,  
19 though, is authorized at this time on that particular  
20 issue.

21 Any demonstratives to be provided on District  
22 Court claim constructions should be limited to whether



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1 or not we should use District Court construction over  
2 BRI and not just try and merely reargue the case. So  
3 we will limit, then, the demonstratives to only this  
4 specific issue, BRI or not to BRI.

5 Any questions by Patent Owner?

6 MR. BONE: No questions, Your Honor.

7 JUDGE TIERNEY: Okay. Anything from the  
8 Petitioner on this point?

9 MR. KUSHAN: No, Your Honor.

10 JUDGE TIERNEY: Okay. Now, before I said we  
11 would go back to the issue of filing the corrected  
12 amendment and some briefing on that, we had to set  
13 dates. Could the parties please provide us with what  
14 dates they think best.

15 Let's start with the Patent Owner. When would  
16 you like to submit your corrected amendment? Or shall  
17 we term it a second motion to amend? What would you  
18 like to do in this case?

19 MR. BONE: Given the way that you  
20 characterized it on this call, I think it's probably  
21 proper to call it a corrected motion.

22 JUDGE TIERNEY: Okay.



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1 MR. BONE: I think May 30th would be the  
2 latest.

3 JUDGE TIERNEY: And then Petitioner, do you  
4 have any objections to May 30th?

5 MR. KUSHAN: No.

6 JUDGE TIERNEY: And then about what time would  
7 you be able to provide your up to five pages of  
8 briefing?

9 MR. MICALLEF: Your Honor, I'm kind of  
10 scratching my head about why Patent Owner said  
11 May 30th. It's a redline that they already have. They  
12 could file it tomorrow.

13 I mean, that's fine. The reason I'm  
14 scratching my head also is because there's an awful lot  
15 to do both in these proceedings and in the related  
16 parallel litigation, which is in the middle of expert  
17 discovery.

18 JUDGE TIERNEY: And I'll just make it easy.  
19 Petitioner, if you need to -- they're asking for  
20 10 days to submit what is, as you said, a very simple  
21 thing. Do you wish to have two weeks to then respond?

22 MR. KUSHAN: That would be fine, Your Honor.

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1 JUDGE TIERNEY: Okay. So pick me a date,  
2 throw me a date that we can go with.

3 MR. KUSHAN: So we're just going into our  
4 calendar. So that would be the 13th -- June 13th, Your  
5 Honor.

6 JUDGE TIERNEY: I find that acceptable.

7 Any objection by Patent Owner?

8 MR. BONE: No objection, Your Honor.

9 JUDGE TIERNEY: Okay. So both sides are  
10 having what I believe to be ample time to do this. If  
11 there's an objection, let me know now. Either side  
12 have any objection to these dates? Hearing none, the  
13 Panel adopts -- Judge Clements that includes you. Do  
14 you have any objection to May 30 and June 13th?

15 JUDGE CLEMENTS: No objection from me.

16 JUDGE TIERNEY: Hearing from the Panel member,  
17 the Panel concurs. We look forward to seeing the  
18 corrected motion to amend May 30, and we will receive  
19 some -- I don't know how we want to term it --  
20 additional briefing due June 13th from the Petitioner.

21 Going back to Patent Owner, you had two issues  
22 you wished to discuss today. Are there any additional

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1 issues that have arisen today that you need to address?

2 MR. BONE: There's just one very kind of  
3 clerical issue which I had not put in the original  
4 e-mail to the Court, but I don't think it's  
5 particularly controversial. It just concerns some  
6 exhibits.

7 So we had previously filed a motion to seal  
8 two depositions transcripts for the inventor and also a  
9 company officer on our side. And that motion to seal  
10 was granted.

11 Now, the way the PRPS record is, is that in  
12 fact both parties have put in transcripts of those  
13 depositions. The ones that we put in are now I believe  
14 properly sealed. The ones that Petitioner put in are  
15 currently designated "parties and Board's eyes only,"  
16 and therefore we would want to just file an additional  
17 motion to seal to make sure those versions are  
18 maintained under seal. That's the first issue.

19 And the second --

20 JUDGE TIERNEY: Before we go to the second,  
21 let me just turn to Mr. Clements and hear his thoughts  
22 on how he would like to present it.

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1 JUDGE CLEMENTS: Yeah, I guess I'm not opposed  
2 to a second motion to seal identifying those two  
3 exhibits. I don't remember them being identified in  
4 the previous motion to seal. I hope we didn't overlook  
5 those in the original motion to seal.

6 MR. BONE: No, we had only identified at that  
7 point the versions that we had submitted.

8 JUDGE TIERNEY: Another motion to seal is  
9 authorized.

10 And next question?

11 MR. BONE: It's a similar topic. We had, in  
12 our reply to Petitioner's opposition to amend,  
13 submitted a copy of a deposition transcript of  
14 Petitioner's expert in the District Court case.

15 Now, we understand that Petitioner may well  
16 object to that exhibit or portions of it. We submitted  
17 it, again, "parties and Board's eyes only" pending  
18 resolution of any objections.

19 It's our understanding that Petitioners  
20 indicated that they would object to it as an exhibit,  
21 but they do not need it to be maintained as a  
22 confidential document. Therefore, we would simply just

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1 want to authorize the Board to making that document  
2 publicly, accessible whereas it's currently "parties'  
3 and Board's eyes only."

4 JUDGE TIERNEY: I have no objection to just  
5 identifying it in your motion to seal that you're going  
6 to file on the other papers. Just go ahead and point  
7 out that you wish PRPS flag to be reset as public.

8 MR. BONE: Okay.

9 MR. MICALLEF: Your Honor --

10 JUDGE TIERNEY: Yes.

11 MR. MICALLEF: I'm a little confused. There  
12 have been, as Mr. Bone just mentioned, that this was a  
13 deposition of an expert in the pending litigation.  
14 There have been no depositions of experts in the  
15 pending litigation as of yet.

16 MR. BONE: Okay. I'm sorry, Mr. Micallef, my  
17 mistake. It's -- the person in question is  
18 Mr. Belfiore. I possibly misstated him. He's not an  
19 expert.

20 MR. MICALLEF: Okay, I see. And I believe  
21 it's a little bit more complicated than that.

22 JUDGE TIERNEY: Should we remain "parties and



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1 Board eyes only" out of an abundance of caution?

2 MR. MICALLEF: Some of it's public and some of  
3 it I think is still confidential. But I have to go  
4 back and confirm. I mean, I have no problem with the  
5 public stuff being on the public record.

6 JUDGE TIERNEY: Why don't we go ahead and just  
7 leave that as "parties and Board only" at this point  
8 until we get further clarification and not worry about  
9 it. I mean, unless there's some objection, it's safer  
10 to err on the side of caution here than releasing  
11 something to the public that should not be released.

12 MR. MICALLEF: Thank you, Your Honor.

13 MR. BONE: That's fair enough.

14 JUDGE TIERNEY: Okay. Anything else Patent  
15 Owner?

16 MR. BONE: Nothing else. Again, I would just  
17 let backup counsel, Mr. Heintz, chime in if he has  
18 anything further to say.

19 MR. HEINTZ: Nothing here, thank you.

20 JUDGE TIERNEY: Petitioner, do you have  
21 anything to add today that we need to discuss or are we  
22 adjourned essentially?

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1 MR. KUSHAN: We have nothing further to add,  
2 Your Honor.

3 JUDGE TIERNEY: Well, this has been a little  
4 longer call than I anticipated, but thank you everyone  
5 for your patience today. I believe we covered a lot of  
6 ground.

7 Hearing no further issues, we're adjourned.  
8 We look forward to the papers being filed by the  
9 parties. Until then, we're adjourned. Thank you.

10 (Proceedings adjourned at 2:00 p.m.)  
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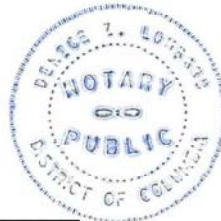
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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 22nd day of May 2014.

My commission expires June 14, 2018.



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