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SAMSUNG ELECTRONICS, CO., :
LTD.; SAMSUNG ELECTRONICS :
AMERICA, INC.; and SAMSUNG :
TELECOMMUNICATIONS :
AMERICA, LLC, :
PLAINTIFFS, :
vs. :
BLACK HILLS MEDIA, LLC, :
DEFENDANT. :

- - -

HEARING BEFORE THE PATENT TRIAL AND APPEAL BOARD
(via teleconference)
November 20, 2014

Reported by: Jackie Johnson
Court Reporter
Notary Public

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Teleconference before the Patent Trial and Appeal

Board on the 20th day of November, 2014 at 4:00 p.m.,

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before Jackie Johnson, Court Reporter and Notary Public.

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

2 JUDGE McNAMARA: Good afternoon. This is
3 Judge McNamara. I believe on the line there's also
4 Judge Hoff, Judge Ippolito, Judge McKone, and Judge
5 Chen.

6 Is there someone on for the Petitioner, the
7 Samsung entities?

8 MS. REISTER: Yes, Your Honor. This is
9 Andrea Reister, and I'm on with my backup counsel
10 Greg Discher.

11 JUDGE McNAMARA: And for the Patent Owner?
12 I guess that's Black Hills.

13 MR. ENGELLENNER: Yes, Your Honor. Thomas
14 Engellenner here, lead counsel on the 740 and 737
15 cases.

16 With me are my partners Reza Mollaaghababa,
17 lead counsel on the 711 and 733 cases, and Lana
18 Gladstein, lead counsel on the 709 and 723 cases.

19 JUDGE McNAMARA: Alright. So is anybody
20 else going to be joining us or do we have a full
21 complement of participants? I understand we're
22 supposed to have 11 people joining.

23 MR. GRAVOIS: This is Robert Gravois and
24 Kenneth Knox, backup counsel for Patent Owner. I
25 believe Andrew Crain, lead counsel, is calling in

1 right now.

2 JUDGE McNAMARA: Mr. Crain, have you joined
3 yet?

4 MR. CRAIN: Yes, I have.

5 JUDGE McNAMARA: Okay. Great.

6 Mr. Crain, you are on what case?

7 MR. CRAIN: I am on four of the IPRs, the
8 first one being the 717 IPR, the 686 patent, and the
9 second one being the 718 IPR, and also the 721 IPR
10 for the two Goldberg patents, and then the last one
11 is for the 735 IPR, and that's for the 593 patent.

12 JUDGE McNAMARA: Alright. We have a few
13 things to talk about today.

14 This is our initial conference.
15 Ordinarily, we would have issued or we would have
16 entered a Scheduling Order, but we did not do that,
17 because we have, if I'm right, we're talking about
18 nine separate cases today.

19 MS. REISTER: Correct.

20 JUDGE McNAMARA: 709, 11, 17, 18, 21, 23,
21 35, 37 and 40.

22 They're all related in one way or another,
23 and so when we get down to all the hearings, I assume
24 that the parties will want to conduct them over the
25 same couple of days.

1 I'm assuming that everybody is not going to
2 want to be running in here on Monday one week and
3 Wednesday on the following week.

4 I'm assuming that the parties would prefer
5 to do this maybe a couple of them on Monday, a couple
6 of them on Tuesday, and that sort of thing.

7 Clearly, because of the overlap, we are not
8 going to be conducting all of those hearings. We are
9 not going to conduct nine separate hearings.

10 So I also wanted to get some sense from
11 counsel as to which ones they think would be best
12 done together and the timing with respect to that.

13 Just so you know, the timing that would
14 normally -- that we would normally have these
15 hearings on would be -- if it were just one case, it
16 would be somewhere on or about July 30th of 2015.

17 So I'm looking at that week, which I guess
18 it looks like it's the week of July 27th through the
19 31st, and that's the approximate week in which we
20 would be looking to conduct these hearings. So let's
21 talk a little bit about that.

22 Have the parties had a chance to discuss
23 this?

24 MR. CRAIN: Judge, this is Andrew Crain. If
25 I could jump in for a moment.

1 Perhaps, before I got on the call, everyone
2 had introduced themselves, but I wanted to alert the
3 Board and Samsung's counsel that I believe there may
4 be a court reporter on the line.

5 JUDGE McNAMARA: Would you arrange, by the
6 way, to have a transcript filed for this hearing?
7 Thank you.

8 MR. CRAIN: We most certainly will.
9 Thank you. I'll turn it back to you.

10 JUDGE McNAMARA: Alright. Thank you.
11 Speaking of that, I just wanted to clarify.

12 Mr. Engellener, you said you were lead
13 counsel on the 740 and 737?

14 MR. ENGELLENER: Yes, Your Honor.

15 JUDGE McNAMARA: Ms. Gladstein is on the 709
16 and the 723?

17 MR. ENGELLENER: Yes, Your Honor.

18 JUDGE McNAMARA: I'm sorry. Your other
19 counsel was who?

20 MR. ENGELLENER: Reza Mollaaghababa.

21 I misspoke. He is lead counsel on the 711
22 case.

23 So there's five cases that we are handling,
24 and Mr. Crain's firm is handling four cases.

25 JUDGE McNAMARA: Okay. Great. Great.

1 That's good.

2 Anyway, have the parties had a chance to
3 talk about this with respect to how you might want to
4 conduct the hearings and which ones they might like
5 to combine and that sort of thing?

6 MS. REISTER: Your Honor, this is counsel
7 for Samsung. I know, we have not conferred with
8 either of the two law firms on that issue.

9 JUDGE McNAMARA: I see.

10 Well, does anybody have any thoughts?

11 MS. REISTER: Yes, we do.

12 JUDGE McNAMARA: Okay. I'd like to hear
13 them.

14 MS. REISTER: Certainly, Your Honor.

15 I think one thing that I'd like to just
16 point out right from the beginning, in terms of a
17 schedule. You had mentioned the week of July 27th
18 through the 31st, and one of the schedule conflicts
19 that Samsung has is earlier that month, July 2nd to
20 17th.

21 So we have no conflicts with the July 27 to
22 31 week, but certainly do in the 2 to 17 time frame,
23 and we wanted to alert the Board to that today.

24 JUDGE McNAMARA: Okay.

25 MS. REISTER: We have given a lot of

1 thought, and I think the Board is absolutely correct,
2 that in terms of the preference of Petitioners to
3 consolidate workload for all the parties here, in
4 terms of the oral argument.

5 We're mindful of the consolidation that was
6 done in the Yahama proceedings that had an oral
7 argument on October the 21st. I believe in those
8 cases, there were four patents consolidated into a
9 single hearing.

10 JUDGE McNAMARA: Right.

11 MS. REISTER: And those same four patents
12 are at issue in this set of nine. There is also a
13 fifth patent that's related to those four.

14 The 323 patent, which is in the 709
15 proceeding, that is a parent of one of the four that
16 were heard together.

17 So from the Petitioner's perspective, we
18 think it's reasonable to hold a consolidated hearing
19 with five patents, the 952 patent, the 652, the 099,
20 the 873, and the 323. There's a lot of commonality
21 of issues there. Four of those patents were held in
22 a consolidated hearing previously.

23 JUDGE McNAMARA: Could you tell me which
24 IPRs they pertain to?

25 MS. REISTER: Certainly, Your Honor.

1 This would be the 709, the 711, the 723,
2 the 737, and the 740.

3 I believe those five patents are, on the
4 Patent Owner's side, they're all being represented by
5 the Pepper Hamilton firm.

6 So although there may be different lawyers,
7 it's a nice set of the same law firm.

8 JUDGE McNAMARA: How does that work for the
9 Patent Owner?

10 MR. ENGELLENER: Your Honor, Thomas
11 Engellener here for Pepper Hamilton.

12 As you may recall, the October 25th hearing
13 was a bit of a smorgasbord. There were not the same
14 issues in all of these cases. In fact, there were
15 different issues in each one of them.

16 We had suggested earlier on that they be
17 tried by family, and we'd like to suggest that again
18 here. It's not a great deal of division in that
19 there are two cases that are related to each other,
20 the Qureshi patents, and then there are three other
21 cases that are related to the so-called wheel
22 patents.

23 Our preference would be to treat each one
24 of those as a family and to have oral argument on
25 each family separately.

1 JUDGE McNAMARA: Alright. What does the
2 Petitioner think about that?

3 MS. REISTER: We wouldn't have any
4 particular objection to that, Your Honor. I think
5 that there is some overlap of issues among those
6 five.

7 Perhaps we could have those hearings by
8 family, maybe a hearing in the morning and a hearing
9 in the afternoon or something along that line,
10 something close in time, given the overlap of the
11 issues.

12 JUDGE McNAMARA: Yeah. I guess my
13 recollection of the hearing we had in October is we
14 had no trouble following it. There was enough
15 overlap that we really didn't have any problem
16 following it, but we will take that under
17 consideration at this point.

18 Alright. With respect to the other four
19 patents, Mr. Crain -- well, let me ask the
20 Petitioner: Would you consolidate those into a
21 single hearing, as well?

22 MS. REISTER: I think on the other four,
23 Your Honor, what we would suggest, part of which I
24 think is analogous to Patent Owner's family approach,
25 is there are two of those patents, the 689 which is

1 involved in a 718 proceeding, and the 082 patent
2 which is involved in a 721 proceeding. Those are
3 related to each other, and that would make sense to
4 us to do those in one hearing.

5 The remaining two patents, which are the
6 717 and the 735 proceeding, aren't really related to
7 each other, but again I think we could do sort of
8 back-to-back arguments on those patents so that
9 perhaps we could accomplish one hearing in the
10 morning on 689 and 082 patents and one hearing in the
11 afternoon on 686 and 593 or on consecutive days so
12 that we could pair those other two up to each.

13 JUDGE McNAMARA: Assuming we were to do
14 that, let's say -- well, let me ask the Patent Owner:
15 What is your opinion on that kind of a division?

16 MR. CRAIN: Your Honor, this is Andrew Crain
17 speaking on behalf of Patent Owner for that question.

18 I would tend to agree with Petitioner with
19 respect to the 718 IPR on the 082 patent -- I'm sorry
20 -- the 721 IPR on the 082 patent and the 718 on the
21 689. They do share a couple of the same issues
22 there. I think we would be amenable to do those
23 together.

24 I would probably tend to disagree a little
25 bit with the combination of the other two. I do

1 agree with counsel that they are different, and for
2 that reason, I think that they should probably be
3 dealt with individually.

4 Now, we could do these either all in one
5 day or sequential days. We have no objection to that
6 at all.

7 It may be a better approach for the 717 IPR
8 on the 686 patent to be separate from the 735 IPR on
9 the 593, but we have no issue with the combination of
10 the 721 and the 718 IPR if you're with me on all
11 those numbers.

12 JUDGE McNAMARA: I'm trying to follow along,
13 because there's a lot of numbers floating around
14 here.

15 Yes, I think I understand the 718 and 721,
16 both sides -- the 718 IPR and the 712 IPR both sides
17 agree it could be heard in a single hearing.

18 The 713 and the -- I'm sorry -- 717 and the
19 735 IPRs, the question is whether or not we should
20 try and shoehorn that into one hearing or do it as
21 two separate hearings.

22 MS. REISTER: Right.

23 MR. CRAIN: Right.

24 JUDGE McNAMARA: Hang on just a second.

25 Okay. I've had a chance to chat with the

1 judges for a minute. Now, what we will plan to do is
2 to combine the 718 -- to have a consolidated hearing
3 for IPR 2014-00718 and 00721.

4 I guess we can do the other two, the 717
5 and the 735 cases, separately on the same day, and
6 that would work out okay, as well. Alright. So we
7 will plan to do that.

8 Is everybody free that week, that last week
9 of July, July 27th to the 31st?

10 MS. REISTER: This is counsel for
11 Petitioners, Your Honor, and yes, I believe we are.
12 I think we would prefer to do it early in the week,
13 the 27th, 28th, and 29th.

14 JUDGE McNAMARA: Okay. And you have no
15 objection if let's say if we're doing the first
16 group, for example, the five of them, either in one
17 or two hearings, on let's say the 27th, and then we
18 will go right into the next group on the 28th, if
19 that's okay with everybody.

20 Nobody needs a day in between or anything?

21 MR. CRAIN: Judge, this is Andrew Crain
22 speaking for Patent Owner.

23 As I'm looking at my schedule now, it looks
24 like I have a proposed trial date beginning on
25 July 28th. I need to check to make sure that is, in

1 fact, accurate, but I'm looking at my calendar for
2 the first time as we're speaking here, and that has
3 popped up.

4 I certainly can get back to the Court, at
5 the earliest convenience, on that, if that's
6 acceptable.

7 JUDGE McNAMARA: The only option for us is
8 to move it up a week to the 20th, which gives you
9 guys less time.

10 MS. REISTER: Right. Right.

11 JUDGE McNAMARA: And that's right after -- I
12 think Petitioner is not available before the 17th.

13 MS. REISTER: Correct. From the 2nd to the
14 17th, and that's a firm commitment out of the
15 country.

16 JUDGE McNAMARA: Right. So we could do it
17 the week of the 20th or we could do it the week of
18 the 27th; is that okay?

19 MR. CRAIN: Yeah. The week of the 20th, I
20 think, from Patent Owner's perspective, at least from
21 my perspective, for those cases I'm involved in,
22 appears to be open.

23 I'm trying to confirm right now the trial
24 date. We can continue on.

25 JUDGE McNAMARA: Sure.

1 For Petitioners and for Mr. Engellenner at
2 Pepper Hamilton, is that week available for you, as
3 well, the week of the 20th?

4 MR. ENGELLENNER: Yes, sir, Your Honor. It
5 appears to be open.

6 JUDGE McNAMARA: And the week of the 27th?

7 MR. ENGELLENNER: In that case, as well,
8 yes.

9 JUDGE McNAMARA: So we just need to know
10 from Mr. Crain whether it will be the week of the
11 20th or the 27th.

12 If it's the week of the 20th, would you
13 prefer to do it at the beginning of the week or the
14 latter part of the week?

15 MS. REISTER: This is counsel for
16 Petitioners.

17 Obviously, given our scheduling conflict,
18 which we've already confirmed with the Board, we
19 obviously would request that any hearing that would
20 be held the week of the 20th would be at the end of
21 the week.

22 JUDGE McNAMARA: Sure. I thought that might
23 be the case.

24 All of this will depend on what our
25 courtroom availability looks like for that period of

1 time, as well.

2 MS. REISTER: I understand.

3 JUDGE McNAMARA: Right now I think the
4 hearing rooms are still pretty much available,
5 because we don't usually schedule them that far out.
6 That's why I wanted to have this conversation with
7 everybody, to make sure we have rooms available and
8 that sort of thing.

9 MR. ENGELLENER: Your Honor, if I could
10 make one more request.

11 The last hearing that we had on the
12 consolidated cases with Yamaha was in a courtroom
13 that had only an occupancy of 15. Then when you
14 counted the judges and the stenographer, there was
15 very little room for counsel, much less for clients.

16 If there's a possibility, because of the
17 large number of people involved here, whether there
18 would be an opportunity to get one of the larger
19 conference rooms, that would certainly be
20 appreciated.

21 JUDGE McNAMARA: We'll do what we can.

22 I'm just looking right now. It looks like
23 Hearing Room A, which is our largest room -- I don't
24 have control over the booking of the hearing rooms.
25 But right now Hearing Room A looks like it might be

1 available during that week of the 22nd, 23rd, 24th.

2 The Hearing Room A might not be available Wednesday,
3 the 29th.

4 MR. CRAIN: Judge, this is Andrew Crain. If
5 I could interject.

6 I've had an opportunity to reconfirm. It
7 looks like I did pull out a date for a proposed trial
8 date. So I can confirm that the 28th, which you had
9 initially suggested, would be amenable.

10 JUDGE McNAMARA: Alright. So if I were to
11 ask preferences, would you guys prefer to do it on
12 the 23rd and the 24th or the 27th and 28th?

13 MS. REISTER: This is counsel for
14 Petitioners.

15 We strongly prefer the 27th to 28th.

16 JUDGE McNAMARA: Okay.

17 Is that okay with the Patent Owner?

18 MR. CRAIN: No objection here.

19 MR. ENGELLENNER: None here either.

20 JUDGE McNAMARA: So we will schedule these
21 for the 27th and the 28th, which then means that the
22 remaining dates will all fall out before that,
23 obviously, and just to give you an approximate date,
24 you can renegotiate any dates through day five when
25 you get the Scheduling Order.

1 We will send out a formal Scheduling Order
2 so you will know what these dates are exactly, but it
3 will be somewhere around the 4th of February when the
4 Patent Owner response and Motions to Amend are due.

5 The reply, Petitioner's reply, in
6 opposition to any Motions to Amend, will be then due
7 around May 4th. The Patent Owner reply to the
8 opposition to the Motion to Amend will be around June
9 4th. Motions to Exclude at the end of June,
10 June 25th. Oppositions to the Motions to Exclude
11 will be July 9th. Observations on cross would also
12 be due on June 25th, and responses on July 9th, and
13 then reply to the opposition -- any opposition to
14 Motion to Exclude would be due around July 16th.

15 So we will send out a Scheduling Order that
16 goes to that, and in the Scheduling Order, we will
17 also address the question of that first group of
18 cases, whether to do them all at once or to do them
19 in two separate groups. We'll see how that plays
20 out, as well.

21 Alright. Are there any other questions on
22 scheduling, any other thoughts?

23 MS. REISTER: None from Petitioners, Your
24 Honor.

25 MR. CRAIN: None from Patent Owner on the

1 cases I'm involved in.

2 MR. ENGELLENNER: None here either, Your
3 Honor.

4 JUDGE McNAMARA: Alright. Let me see. I
5 guess the next thing I wanted to mention is, with
6 respect to related matters, are any of the patents --
7 the Patent Owner could probably respond to this best.

8 Are any of the patents that are involved
9 here currently the subject of a re-exam proceeding?

10 MR. ENGELLENNER: No, Your Honor.

11 JUDGE McNAMARA: I know there's a bunch of
12 litigation going on.

13 Is any of the litigation stayed or is that
14 also still proceeding?

15 MR. ENGELLENNER: The litigation is
16 currently stayed.

17 MS. REISTER: That's the District Court
18 litigation, correct.

19 JUDGE McNAMARA: So there's no District
20 Court litigation that's actually proceeding. They're
21 all stayed at the moment involving these patents?

22 MR. ENGELLENNER: That's my understanding.
23 I'm not litigation counsel.

24 There is one case that's proceeding against
25 Defendant Sonos, but I do not think it involves any

1 of the patents that are involved here.

2 JUDGE McNAMARA: Okay. Is there an ITC
3 case, as well?

4 MS. REISTER: Yes, there is, Your Honor.
5 The ITC case, I believe, has concluded.

6 JUDGE McNAMARA: Has concluded. Okay.

7 A couple of other things I wanted to talk
8 about. First, the Protective Order. In the event
9 that anyone wants to file a Motion to Seal, we will
10 need to have a Protective Order in place. There is
11 no Protective Order that is entered at this time.

12 I know there's sometimes been a little bit
13 of confusion because of what the -- because of how
14 the Office Patent Trial Practice Guide refers to the
15 default standing Protective Order, but it's not
16 entered unless you actually sign it and ask for it.
17 So just so everyone knows, we don't have a Protective
18 Order in place at this time.

19 If you're going to be filing any Motions to
20 Seal the confidential information or anything like
21 that, you will need to get that Protective Order
22 signed.

23 Then if there's any changes that you want
24 to make to the standing Protective Order, we need a
25 redlined version of our Protective Order so we know

1 what the differences are.

2 Let's see. Oh, the other thing I should
3 remind anybody that if there's any confidential
4 information that's used during the proceeding, if
5 it's in the final decision, it's going to get made
6 public, and that's something you will want to be
7 thinking about, as well. It becomes public 45 days
8 after denial of a petition or sooner, 45 days after
9 the judgment of a trial.

10 You can ask for it to be expunged, but I
11 want to make sure that everybody is aware of that
12 provision in the rules.

13 Okay. Here's the next interesting topic
14 that we will want to talk about, initial disclosures
15 and discovery.

16 I assume the parties haven't agreed to any
17 initial disclosures back and forth; is that right?

18 MS. REISTER: That's correct.

19 MR. CRAIN: Correct.

20 MR. ENGELLENER: Correct.

21 JUDGE McNAMARA: And so just as a general
22 rule, discovery requests and objections don't get
23 filed with the Board without some prior
24 authorization.

25 So if you're unable to resolve a discovery

1 issue, you handle discovery issues just like you
2 would in District Court. Try and work them out.

3 If you can't work them out, then you can
4 come to us, and we will try to work them out for you,
5 and that may involve our authorizing a Motion to
6 Compel.

7 I gather there's a discovery issue pending
8 right now, though, in the 717 and 735, IPR 717 and
9 735 case; is that right?

10 MR. ENGELLENER: That's correct, Your
11 Honor.

12 JUDGE McNAMARA: So let me hear who is
13 seeking -- well, first of all, we had authorized --
14 as I recall, the issue in those cases had to do with
15 the real party in interest, and we had authorized
16 some limited discovery with respect to documents and
17 Answers to Interrogatories.

18 Has that discovery been completed?

19 MR. ENGELLENER: That has occurred.

20 JUDGE McNAMARA: That has occurred.

21 So what's the issue that's pending now?

22 MR. CRAIN: Judge, this is Andrew Crain
23 speaking.

24 The issue that is apparently an issue of
25 the parties pertains to Patent Owner's desire to

1 depose, as part of routine discovery, an individual
2 that submitted a Declaration on behalf of Petitioner
3 in both of the two IPRS at issue, the 717 and the
4 735. We understand that to be a part of routine
5 discovery.

6 Patent Owner would like to take a
7 deposition to cross examine that declarant, and I
8 believe that Petitioner has taken a position that it
9 does not intend to make that individual available.
10 This is relevant to the real party in interest issue.

11 We understand that the rules allow that, as
12 a part of routine discovery, and we'd like to see if
13 we could bring that issue to resolution here. Or if
14 the Board would prefer for that issue to be briefed,
15 we're happy to that, as well.

16 JUDGE McNAMARA: Let me hear from the
17 Petitioner about that.

18 MS. REISTER: Yes, Your Honor.

19 You are correct that this all relates back
20 to the additional discovery that was requested by
21 Patent Owner, and in the two papers ordering the
22 limited additional discovery in the proceedings, the
23 additional discovery was ordered in the form of
24 interrogatories and document requests. That Order
25 did not require the Petitioner to make Mr. Cho, who

1 is a resident in Korea, available for cross
2 examination.

3 The Patent Owner has already come back to
4 the Board on this very issue once before, and in a
5 communication from the Board dated October 24th, the
6 Panel clarified, again, that the discovery that was
7 ordered in the motion was interrogatories and to
8 produce documents, as specified in the Order. The
9 Order does not require that Petitioner make Mr. Cho
10 available for cross examination.

11 As the Patent Owner has confirmed, the
12 discovery that was actually ordered by the Board,
13 Patent Owner complied with it a week earlier than the
14 Patent Owner had requested.

15 In addition, Patent Owner had requested
16 that Petitioner voluntarily provide the same scope of
17 additional discovery in five of the additional
18 proceedings here, and Patent Owner has complied with
19 that, as well -- excuse me -- the Petitioner. My
20 apologies. The Petitioner has provided that
21 additional discovery voluntarily to the Patent Owners
22 in the additional proceeding. The Patent Owner has
23 not raised any objections to the discovery provided.

24 So it's our position that the issue of the
25 cross examination of Mr. Cho was really one of

1 additional discovery, and that issue has been closed
2 twice with the Board's original Order and the
3 confirmation on October 24th that Petitioner is not
4 required to make Mr. Cho available for cross
5 examination.

6 We think that routine discovery doesn't
7 apply, as the very beginning of the Rule of
8 4251(b)(1) says, "Except as the Board may otherwise
9 order."

10 We believe that the Board has otherwise
11 ordered that we are not required to make Mr. Cho
12 available for cross examination.

13 MR. CRAIN: Judge, may I respond?

14 JUDGE McNAMARA: Sure.

15 MR. CRAIN: I would like to clarify.

16 The prior request to the Board, I think
17 there was a little confusion, and perhaps we can
18 clarify that.

19 We never meant to indicate that the Order
20 with respect to additional discovery specifically
21 authorized that discovery, because that was
22 pertaining to additional discovery.

23 We were merely seeking to reference, I
24 believe, on Page 4 of that Order, that the Board had
25 indicated that the Patent Owner was entitled to

1 corroboration of the assertions of the declarant and
2 to cross examine declarant.

3 As we understand the rules, Rule 4251 --
4 I'm sorry -- 4151(b)(1)(2), it would be to cross
5 examine the affidavit testimony that was provided.

6 We believe it's part of routine discovery,
7 and I think the Board now seems to understand that
8 the parties just do it differently.

9 JUDGE McNAMARA: Right. I remember part of
10 the reason that we ran with the discovery, in the
11 first place, was because of the Declaration. We did
12 not know that Mr. Cho would be available for cross
13 examination. So we granted the initial discovery,
14 the limited discovery in terms of the Answers to
15 Interrogatories and the documents.

16 As I understood it, that discovery was
17 specifically tailored to get to the issue of the real
18 party in interest.

19 The Order, itself, and we clarified later,
20 the Order did not order the production of Mr. Cho at
21 the time, and so that's what we were saying when we
22 responded to the inquiry that we got about whether or
23 not the Order authorized the deposition of Mr. Cho.

24 So I sort of see this as sort of a separate
25 request, given that -- a separate discovery request,

1 and I understand that you're making it under routine
2 discovery under the provision that says that you can
3 cross examine someone who's provided affidavit
4 testimony.

5 Let me ask you this: What did the
6 discovery we granted produce?

7 MR. CRAIN: The discovery that was provided
8 by -- that was authorized by the Board did speak to
9 issues with respect to who was involved with the
10 preparation of the petition and whether or not there
11 were payments that were received.

12 I think the parties might disagree on, you
13 know, how narrowly that was construed by Petitioner
14 with respect to how those responses were positive.

15 However, in the Declaration of Mr. Cho, the
16 position that there is not another real party in
17 interest, there were some statements made that, quite
18 frankly, that Patent Owner would like to understand
19 with respect to what type of input may have occurred
20 from the -- there's a statement in some of the
21 paragraphs that at least leaves open the question of
22 what may or may not occur that Patent Owner would
23 like to cross examine to better understand.

24 JUDGE McNAMARA: But do those statements go
25 to control?

1 MR. CRAIN: It would.

2 MS. REISTER: This is the Patent Owner --
3 excuse me -- Petitioner.

4 JUDGE McNAMARA: I know.

5 MS. REISTER: Do you need a response?

6 JUDGE McNAMARA: That's alright. Go ahead.
7 Yes, please.

8 MS. REISTER: I think the question that you
9 asked is what did the discovery show, and I think
10 what the discovery showed is that there isn't any
11 information either.

12 In other words, when you look at the
13 interrogatories that were asked for and the documents
14 that were asked for, essentially, there are no
15 persons or entities that Google Earth counsel
16 directed to provide a copy with one or more drafts.
17 There was no funding. There was no documents,
18 notifications, etcetera.

19 So I think that the real issue here is that
20 all of the discovery is perfectly consistent with
21 Mr. Cho's Declaration that Google did not participate
22 in or control at all these proceedings.

23 I think that Mr. Crain has not been able to
24 produce any specific evidence to justify going
25 through this additional discovery all over again.

1 The Board narrowly tailored the discovery.
2 We have complied with the discovery and it, frankly,
3 does not show that there was any control or direction
4 by Google.

5 JUDGE McNAMARA: Mr. Crain, is there
6 anything that's inconsistent with the discovery you
7 received from Mr. Cho's Declaration?

8 MR. CRAIN: Well, Judge, that actually
9 brings up a great question.

10 You know, in the interest of justice, if
11 the Patent Owners wanted to bring a motion with
12 respect to this real party in interest, we have no
13 way to respond to any statement that Mr. Cho made
14 with any testimony that he might also provide.

15 To answer your question of whether there
16 are inconsistencies, there are statements that are
17 made there that we would like to understand and
18 possibly probe, because there, in fact, may be with
19 respect to statements that Google had no substantive
20 input. Well, it doesn't say that they had zero
21 input, and we'd like to understand exactly what input
22 they had with that. There are also statements with
23 respect to having received no payments from Google.

24 I think it would be perfectly within the
25 bounds of what would be relevant to understand the

1 scope of the determination of that declarant to make
2 those statements and what he may or may not have done
3 to make such claims which, ultimately, does go to
4 whether or not there is direction or control.

5 We have no way to respond to that, and if
6 we were to bring such a motion, it would have a
7 Declaration without, you know, any way of challenging
8 it.

9 So we would submit, respectfully, that in
10 the interest of justice, and as we understand the
11 rules, that they allow for a cross examination in
12 such a situation.

13 JUDGE McNAMARA: Well, I guess what's going
14 through my mind is we certainly gave you the
15 discovery or at least most of the discovery you were
16 asking for.

17 Let me ask Samsung: Are you planning to
18 rely on this Declaration from Mr. Cho for anything
19 else?

20 MS. REISTER: No, Your Honor.

21 JUDGE McNAMARA: No?

22 MS. REISTER: As far as we're concerned, if
23 the Board would agree, we would discard the
24 Declaration.

25 The Board has issued its discovery based

1 upon the motion that was done by Patent Owner, and we
2 have complied with that.

3 Mr. Crain has not identified any
4 inconsistencies, and if it were to resolve the issue,
5 we are willing to go on the Record and say we won't
6 rely on it for any other reason. We'll withdraw it.

7 MR. CRAIN: Judge, if I may respond to that.
8 I mean, that's an attempt to unring the bell.

9 The information has already been provided.
10 We're just simply asking for the opportunity, which
11 is a very common thing, to test and curb those
12 assertions which were asserted in defense of the
13 motion.

14 We do believe that there are at least some
15 questions that could quite likely relate to the very
16 issue for which Patent Owner, if the evidence
17 supports it, ultimately to bring a motion with
18 respect to, you know, Section 312(a).

19 MS. REISTER: I believe, Your Honor, that
20 there's nothing in Mr. Cho's Declaration that's at
21 all inconsistent with the responses in the discovery
22 that has been produced.

23 I think this is, frankly, all based on
24 speculation, and there's nothing that Mr. Crain has
25 identified that he believes that will be counter to

1 what he's already gotten in the production.

2 I think it's a situation where Mr. Crain is
3 just not happy with the evidence that was produced,
4 but that's not a reason to have Mr. Cho, who does
5 reside in Korea, undergo a deposition.

6 MR. CRAIN: With all due respect, Judge,
7 it's not a matter that we're unhappy. It's just that
8 we want to do a complete analysis of the information
9 that has been put into the Record and is being framed
10 by Petitioner as a matter of additional discovery as
11 if we have to have the basis that there is something.

12 We believe that this is a proper analysis
13 under the routine discovery provisions of the Board
14 for which the Declaration has already been made of
15 Record, and we believe it is proper and appropriate
16 to have the opportunity to cross examine this
17 witness.

18 JUDGE McNAMARA: Yeah, I think it was you
19 that suggested that it was, in the interest of
20 justice, which would be the standard for additional
21 discovery, as opposed to routine discovery.

22 But my understanding is that you're taking
23 the position that this is a matter of routine
24 discovery, not additional discovery, right?

25 MR. CRAIN: That's correct.

1 If I misstated that, I apologize.

2 JUDGE McNAMARA: That's alright. I just
3 want to make sure we're all on the same page.

4 MR CRAIN: I think I'm referring -- I'm
5 sorry. I'm referring to just a general rule of
6 fairness.

7 JUDGE McNAMARA: Yeah.

8 MR. CRAIN: If I could add one more thing.

9 With respect to the location of this
10 witness, I think we could certainly work with
11 Petitioner to accommodate that, whether that's done
12 by videoconference or the witness is -- I don't know
13 if the witness routinely travels to the United States
14 or not. We've not had those discussions.

15 Patent Owner is certainly willing to work
16 with Petitioner to coordinate the deposition at a
17 convenient time and manner.

18 JUDGE McNAMARA: Alright. Hang on just a
19 second.

20 Alright. I've had a chance to talk with
21 the other judges, as well. I think what we will do
22 is we will allow the Patent Owner a week -- well,
23 next week is Thanksgiving. So I guess let me look at
24 the calendar again. So it depends on the calendar in
25 this case -- I guess until December 2nd to file a

1 brief Motion to Compel, no more than five pages.

2 You really ought to give us some good
3 reasons. You know, I understand you're taking the
4 position that it's routine discovery, but just the
5 mere presence of a Declaration on which we have
6 already acted and given you some discovery is
7 something that you should be thinking about in
8 addressing your motion.

9 You know, I'm not inclined -- I don't want
10 to say I'm not inclined. I want to say that there
11 would be skepticism if this is primarily a fishing
12 expedition. So you ought to try and get us
13 information that you are specifically trying to get
14 or to substantiate.

15 I understand, for example, you said, "Well,
16 Google had no substantial involvement." Maybe that's
17 what you're looking for. But in any case, we want to
18 know precisely what you're looking for.

19 Keep in mind that if any discovery is
20 granted, it's going to be very limited to just what's
21 in that deposition -- I'm sorry -- just what's in
22 that Declaration. There would be nothing else you
23 would be allowed to ask about, which is another thing
24 I'm concerned about. If we allow that discovery,
25 that deposition, that we're going to be on the phone

1 call all day.

2 So anyway, you can have, I guess, until
3 December 2nd to get us a five page Motion to Compel,
4 and then the Petitioner can have a week to respond to
5 that, five pages.

6 MS. REISTER: December 9th, Your Honor?

7 JUDGE McNAMARA: December 9th. Right.

8 MS. REISTER: Thank you, Judge.

9 MR. CRAIN: Thank you very much, Judge.

10 JUDGE McNAMARA: Alright. Hang on just a
11 second.

12 Okay. With respect to just closing out
13 this conference, just a few other things I want to
14 mention, and that concerns motions.

15 Keep in mind, if it's not already clear,
16 that before anyone can file any kind of a motion,
17 other than the motions that are authorized in the
18 Scheduling Order or motions that are authorized by
19 the rules, you need to -- before you can file any
20 other kind of motion, you need to request a
21 conference and get authorization from the Board.

22 I do want to mention that you don't need
23 authorization to file a Motion to Amend, but we do
24 require a conference before filing a Motion to Amend.

25 We do that because Motions to Amend are

1 tricky things, and we want to make sure everybody is
2 on the same page and understands what's required of a
3 Motion to Amend, and recognizes the difference, for
4 example, between substitute claims and amended claims
5 and that sort of thing.

6 Okay. Is there any chance that there's a
7 settlement in the offing that might affect our
8 scheduling here?

9 MS. REISTER: This is Petitioner. Not to my
10 knowledge.

11 MR. CRAIN: Same here.

12 MS. REISTER: Your Honor, could I just
13 clarify one point on the Motion to Amend?

14 JUDGE McNAMARA: Sure.

15 MS. REISTER: I understand, from the papers
16 that Patent Owner has filed, that they're not
17 currently contemplating a Motion to Amend at this
18 time, but if they do desire to file one, they will
19 need to have this conference with the Board before it
20 actually gets filed, correct?

21 JUDGE McNAMARA: That's correct.

22 Actually, I would recommend that you have
23 that conference two to three weeks before the filing
24 date, before you file.

25 Anything else?

1 MR. ENGELLENER: Yes, Your Honor. Tom
2 Engellenner.

3 Petitioner's counsel alluded to this, but
4 after this issue of discovery arose, we approached
5 Petitioner's counsel, and I didn't want to trouble
6 the Board with another conference call and another
7 request for additional discovery. They voluntarily
8 provided us the same discovery that they did to
9 Mr. Crain in the other four cases.

10 We are not seeking a deposition of Mr. Cho,
11 but we would only ask that if something useful were
12 to come of it, from the results of Mr. Crain's
13 examining of Mr. Cho, that we would be able to admit
14 the same testimony into the other cases.

15 JUDGE McNAMARA: Well, I guess one thing
16 that counsel ought to talk about, and this is all
17 premature, because we haven't authorized the
18 deposition. Okay. But if one took place, you should
19 all talk about whether or not the transcript would be
20 available and that sort of thing.

21 Another whole issue is whether or not
22 there's confidential subject matter and all that
23 stuff.

24 But you're all parties, and so that's
25 something that I think is a bridge that we will cross

1 if and when we come to it.

2 Anything else?

3 MR. ENGELLENER: No, Your Honor.

4 MS. REISTER: None from Petitioner, Your
5 Honor.

6 MR. CRAIN: And none here.

7 JUDGE McNAMARA: Well, thank you very much.
8 Please, if you would file a copy of the
9 transcript.

10 I appreciate the court reporter being
11 onboard today, and we're adjourned.

12 Thank you all very much.

13 MS. REISTER: Thank you.

14 MR. CRAIN: Thank you.

15 MR. ENGELLENER: Thank you.

16 JUDGE McNAMARA: Have a good day.

17 (The hearing was adjourned)

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1 CERTIFICATE OF REPORTER

2

3 STATE OF NORTH CAROLINA)

4

5 COUNTY OF GASTON)

6

7 I, JACKIE JOHNSON, the officer before
8 whom the hearing was held do certify that the
9 proceedings were taken by me to the best of my ability
10 and thereafter reduced to typewriting under my
11 direction; that I am neither counsel for nor employed by
12 any of the parties to the action in which this hearing
13 was held, and further, that I am not a relative or
14 employee of any attorney or counsel employed by the
15 parties thereto, nor financially or otherwise interested
16 in the outcome of the action.

17



18

19 JACKIE MILAM

20 MY COMMISSION EXPIRES: August 30, 2016

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22

23

24

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