SAMSUNG ELECTRONICS, CO., LTD.; SAMSUNG ELECTRONICS AMERICA, INC.; and SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,

PLAINTIFFS,

vs.

BLACK HILLS MEDIA, LLC,

DEFENDANT.

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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., before Jackie Johnson, Court Reporter and Notary Public.

P R O C E E D I N G S

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

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

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

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

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

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

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

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

right now.

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

MR. CRAIN: Yes, I have.

JUDGE McNAMARA: Okay. Great.

Mr. Crain, you are on what case?

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

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

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

MS. REISTER: Correct.

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

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

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

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

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

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

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

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

Have the parties had a chance to discuss this?

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

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

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

MR. CRAIN: We most certainly will.

Thank you. I'll turn it back to you.

JUDGE McNAMARA: Alright. Thank you.

Speaking of that, I just wanted to clarify.

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

MR. ENGELLENER: Yes, Your Honor.

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

MR. ENGELLENER: Yes, Your Honor.

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

MR. ENGELLENNER: Reza Mollaaghababa.

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

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

JUDGE McNAMARA: Okay. Great. Great.

That's good.

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

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

JUDGE McNAMARA: I see.

Well, does anybody have any thoughts?

MS. REISTER: Yes, we do.

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

MS. REISTER: Certainly, Your Honor.

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

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

JUDGE McNAMARA: Okay.

MS. REISTER: We have given a lot of

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

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

JUDGE McNAMARA: Right.

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

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

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

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

MS. REISTER: Certainly, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. REISTER: Right.

MR. CRAIN: Right.

JUDGE McNAMARA: Hang on just a second.

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

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

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

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

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

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

Nobody needs a day in between or anything?

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

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

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

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

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

MS. REISTER: Right. Right.

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

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

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

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

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

JUDGE McNAMARA: Sure.

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

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

JUDGE McNAMARA: And the week of the 27th?

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

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

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

MS. REISTER: This is counsel for Petitioners.

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

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

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

time, as well.

MS. REISTER: I understand.

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

MR. ENGELLENNER: Your Honor, if I could make one more request.

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

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

JUDGE McNAMARA: We'll do what we can.

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

available during that week of the 22nd, 23rd, 24th. The Hearing Room A might not be available Wednesday, the 29th.

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

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

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

MS. REISTER: This is counsel for Petitioners.

We strongly prefer the 27th to 28th.

JUDGE McNAMARA: Okay.

Is that okay with the Patent Owner?

MR. CRAIN: No objection here.

MR. ENGELLENNER: None here either.

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

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

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

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

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

MS. REISTER: None from Petitioners, Your Honor.

MR. CRAIN: None from Patent Owner on the

cases I'm involved in.

MR. ENGELLENNER: None here either, Your Honor.

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

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

MR. ENGELLENNER: No, Your Honor.

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

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

MR. ENGELLENNER: The litigation is currently stayed.

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

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

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

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

of the patents that are involved here.

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

MS. REISTER: Yes, there is, Your Honor.

The ITC case, I believe, has concluded.

JUDGE McNAMARA: Has concluded. Okay.

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

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

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

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

what the differences are.

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

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

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

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

MS. REISTER: That's correct.

MR. CRAIN: Correct.

MR. ENGELLENNER: Correct.

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

So if you're unable to resolve a discovery

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

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

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

MR. ENGELLENNER: That's correct, Your Honor.

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

Has that discovery been completed?

MR. ENGELLENNER: That has occurred.

JUDGE McNAMARA: That has occurred.

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

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

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

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

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

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

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

MS. REISTER: Yes, Your Honor.

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

is a resident in Korea, available for cross examination.

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

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

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

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

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

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

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

MR. CRAIN: Judge, may I respond?

JUDGE McNAMARA: Sure.

MR. CRAIN: I would like to clarify.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDGE McNAMARA: But do those statements go to control?

MR. CRAIN: It would.
MS. REISTER: This is the Patent Owner -- excuse me -- Petitioner.
JUDGE McNAMARA: I know.
MS. REISTER: Do you need a response?
JUDGE McNAMARA: That's alright. Go ahead. Yes, please.
MS. REISTER: I think the question that you asked is what did the discovery show, and I think what the discovery showed is that there isn't any information either.
In other words, when you look at the interrogatories that were asked for and the documents that were asked for, essentially, there are no persons or entities that Google Earth counsel directed to provide a copy with one or more drafts. There was no funding. There was no documents, notifications, etcetera.
So I think that the real issue here is that all of the discovery is perfectly consistent with Mr. Cho's Declaration that Google did not participate in or control at all these proceedings.
I think that Mr. Crain has not been able to produce any specific evidence to justify going through this additional discovery all over again.

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

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

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

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

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

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

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

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

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

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

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

MS. REISTER: No, Your Honor.

JUDGE McNAMARA: No?

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

The Board has issued its discovery based

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

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

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

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

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

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

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

what he's already gotten in the production.

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

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

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

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

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

MR. CRAIN: That's correct.

If I misstated that, I apologize.

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

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

JUDGE McNAMARA: Yeah.

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

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

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

JUDGE McNAMARA: Alright. Hang on just a second.

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

brief Motion to Compel, no more than five pages.

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

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

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

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

call all day.

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

MS. REISTER: December 9th, Your Honor?

JUDGE McNAMARA: December 9th. Right.

MS. REISTER: Thank you, Judge.

MR. CRAIN: Thank you very much, Judge.

JUDGE McNAMARA: Alright. Hang on just a second.

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

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

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

We do that because Motions to Amend are

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

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

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

MR. CRAIN: Same here.

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

JUDGE McNAMARA: Sure.

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

JUDGE McNAMARA: That's correct.

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

Anything else?

MR. ENGELLENNER: Yes, Your Honor. Tom Engellenner.

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

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

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

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

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

if and when we come to it.

Anything else?

MR. ENGELLENNER: No, Your Honor.

MS. REISTER: None from Petitioner, Your Honor.

MR. CRAIN: And none here.

JUDGE McNAMARA: Well, thank you very much.

Please, if you would file a copy of the transcript.

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

Thank you all very much.

MS. REISTER: Thank you.

MR. CRAIN: Thank you.

MR. ENGELLENNER: Thank you.

JUDGE McNAMARA: Have a good day.

(The hearing was adjourned)

CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)

COUNTY OF GASTON)

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

JACKIE MILAM

MY COMMISSION EXPIRES: August 30, 2016

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