

**In the Matter of:**

*Arkema France*

*vs.*

*Honeywell International*

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*Telephonic Record of Proceedings*

*February 24, 2016*

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ARKEMA FRANCE,

Petitioner

v.

HONEYWELL INTERNATIONAL, INC.,

Patent Owner

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Case IPR2015-00915

Case IPR2015-00916

Case IPR2015-00917

Telephonic record of proceedings taken before NANCY EATINGER, C.S.R., and Notary Public, pursuant to the Rules of the United States Patent and Trademark Office, before the Honorable JO-ANNE M. KOKOSKI, Honorable JON B. TORNQUIST, and the Honorable ROBERT A. POLLACK, commencing at 2:30 o'clock p.m., taken on February 24, 2016 upon the trial of the above entitled case.

1 PRESENT:

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appeared on behalf of Petitioner;

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appeared on behalf of the Patent Owner.

1 THE HONORABLE KOKOSKI: This call concerns  
2 IPR2015-001915, 00916 and 00917.

3 Who do I have for the petitioner?

4 MR. BEAUPRÉ: Jon Beaupré for Arkema France and  
5 also Allen Baum and Rickard DeMille, your Honor.

6 THE HONORABLE KOKOSKI: Thank you.

7 Who do I have for the patent owner?

8 MR. ROSE: Good afternoon. This is Bruce Rose,  
9 and with me are Christopher Douglas and Miranda  
10 Sooter.

11 THE HONORABLE KOKOSKI: Thank you.

12 Is there a court reporter on the line today?

13 THE COURT REPORTER: There is. I'm Nancy.

14 THE HONORABLE KOKOSKI: All right, thank you.

15 Who arranged to have the court reporter on  
16 the line?

17 MR. BEAUPRÉ: Your Honor, this is Jon Beaupré.  
18 Arkema France requested the court reporter, and we're  
19 happy to circulate contact information. I believe we  
20 already did to the patent owner.

21 THE HONORABLE KOKOSKI: Okay. Once the  
22 transcript of this call is ready, will you please  
23 file it as an exhibit into purpose?

24 MR. BEAUPRÉ: Absolutely. Thank you, your Honor.

1 THE HONORABLE KOKOSKI: All right. Thank you.

2 I understand that petitioner requested this  
3 call to seek authorization to file a motion for  
4 additional discovery as well as a motion to compel  
5 patent owner to produce unredacted copies of two  
6 exhibits that patent owner filed in connection with  
7 the patent owner response.

8 We'll address petitioner's motion for  
9 additional discovery first. The Board did receive a  
10 copy of the requests that petitioner provided to the  
11 patent owner, and we thank you for forwarding that to  
12 us. It should make this a little easier for us to  
13 follow.

14 Before we get started, I would like to  
15 remind you that when you're requesting authorization  
16 to file a motion for additional discovery, the party  
17 seeking such discovery should be able to articulate a  
18 clear reason as to the relevancy of the discovery  
19 sought.

20 Petitioner, would you like to begin?

21 MR. BEAUPRÉ: Yes, thank you, very much, your  
22 Honor.

23 I'm happy to go in the order of the February  
24 15th letter if that's preferable, and so the letter

1 is set forth in two different -- or set up in two  
2 different sections.

3 The first section requests depositions of  
4 non-declarants, and we really only need to talk about  
5 the first two, Selma and Haluk. Those are named  
6 inventors that did not provide declarations, and for  
7 both Selma and Haluk, but particularly Selma, many of  
8 the documents, in fact, the vast majority of the  
9 documents that Honeywell relies on for its antedating  
10 argument were authored by Selma.

11 She's the first named investor, so the lead  
12 inventor. She's also listed in the documents as  
13 having, quote, "project responsibility" and the  
14 individual who -- the only person who is listed on  
15 the invention disclosure where it asks for who  
16 reduced this invention to practice. Those are  
17 Honeywell's documents that name her as that. And so  
18 it's our position that Selma is going to be relevant  
19 for deposition for many different reasons.

20 One is the vast number of documents that she  
21 authored. I'm happy to walk through those. It's in  
22 the -- it's 15 or 20 documents, and each one of them  
23 is relied on by Honeywell for its antedating  
24 argument, and to give you just an overview of the

1 types of documents, the project permit change  
2 document, that's the one that -- one of the first  
3 documents, and it lists Selma as having project  
4 responsibility.

5 There's also the monthly technology reports  
6 where she provides information on what's going on  
7 with the invention or the alleged invention over time  
8 that relates to diligence and reduction of practice.

9 She also wrote the instructions for  
10 experiments. A couple of those documents are relied  
11 on by Honeywell to show its reduction of practice, so  
12 whether or not there was a working model at that  
13 point in time, it is certainly affected by what the  
14 parameters were for the experiment, and Selma wrote  
15 them.

16 For example, the starting percentage of KOH,  
17 the temperature and time of the reactor, flow rate,  
18 things like that, and so these documents -- the  
19 instructions for experiments are just before and then  
20 during and then just after the alleged reduction of  
21 practice by Honeywell, so they show whether or not  
22 Honeywell had a working model of the alleged  
23 invention.

24 As I noted earlier, the invention disclosure



1 and then the detailed disclosure, those are documents  
2 that were sent to outside counsel in order to assist  
3 with preparation of the application, and again, they  
4 were authored by Selma, and then she's listed as  
5 being the person who reduced it to practice.

6 And I'd be happy to provide exhibit numbers  
7 for these as I go through them. I just don't want  
8 to, I don't want to delve too deeply or more deeply  
9 than your Honors would prefer.

10 THE HONORABLE KOKOSKI: I think we can keep it at  
11 the general level for now.

12 MR. BEAUPRÉ: Okay, thank you.

13 And then there's also a series of documents  
14 that are correspondence with outside counsel. In  
15 there Selma is identified as a tech lead who can be  
16 contacted with respect to preparing a more detailed  
17 description, and then it says, please contact Selma  
18 directly, and then Selma is the one who gives the  
19 outside counsel the authorization to file the  
20 application, quote, "as is".

21 And then finally, what Honeywell called  
22 laboratory notebook pages, those -- even though they  
23 were authored about a year after the experiments were  
24 done, we don't necessarily -- we don't agree that

1 they are lab notebook pages, but that aside, those  
2 were, again, authored by Selma.

3 So when you look at these documents, they  
4 are really the key documents for conception,  
5 reduction of practice and diligence.

6 Honeywell provides the declaration for Tung,  
7 who is one of the other inventors, he's the second  
8 named inventor, but not for Selma, and it certainly  
9 seems like Honeywell is just trying to present a few  
10 snippets of evidence but without the full picture,  
11 and without the full picture, by speaking with Selma  
12 or deposing Selma, the author of these documents, we  
13 can't fully understand what they mean, what they're  
14 saying, what she understood them to mean, which is  
15 all relevant.

16 Walking through the rest of the Garmin  
17 factors, it's easy for them to produce her. She's  
18 still with Honeywell we understand, and it's in the  
19 interests of justice for us to be able to speak with  
20 the primary author, the only author for these  
21 documents that Honeywell relies on.

22 Furthermore, our request is straightforward.  
23 We're not looking for litigation strategy.

24 And then finally, it wouldn't be unduly

1 burdensome.

2 Another point that -- in our meet and confer  
3 when we spoke with Honeywell, Mr. Rose suggested that  
4 we first should depose Tung and learn whether or not  
5 he can't answer any questions and then we could ask  
6 Selma about them or renew our request for a  
7 deposition of Selma.

8 We have a problem with that type of setup  
9 for several reasons. First of all, just because Tung  
10 is able to answer a document doesn't -- or a question  
11 about a document that he authored doesn't mean that  
12 that's necessarily the same answer that Selma would  
13 give, so I think that we could get through the entire  
14 Tung deposition and at the end have him answer all of  
15 our questions, but those answers aren't necessarily  
16 going to be consistent with or accurate in view of  
17 the fact that Selma was the one who authored these  
18 key documents.

19 Also, we think that it's very likely that  
20 there will -- or almost certain that Tung will not be  
21 able to answer certain questions. For example, why  
22 did you write this, what did you mean by this? Well,  
23 he didn't author these documents, so he's not going  
24 to be able to answer those questions.

So to force us to do this in two steps when we really have a compressed time period, it's inefficient and unworkable.

And then finally, it would basically give a roadmap of our questions and give Selma a chance to look at the transcript ahead of time and basically just compare Tung's answers without giving her original testimony, so to speak, or unaffected testimony.

And then with respect to Haluk, he's the third named inventor. He doesn't have as many documents as Selma, but he did write the document that Honeywell is relying on for conception. That was the first document, their substantive exhibit submitted. It's 2007 from March of 2008. That's notes from this brainstorming session where the alleged conception occurred.

And so again, we don't think Tung can answer those questions about that brainstorming session and that document because there's nothing indicating he was there, and he didn't author the document, all he did was authenticate it.

So that's everything regarding the additional deponents that we're requesting. If your

1 Honors would like to hear more about the written  
2 requests, I'm happy to talk about those or perhaps it  
3 makes sense to complete our discussion on the  
4 deponents first.

5 THE HONORABLE KOKOSKI: I do think it does make  
6 sense to continue talking about the deponents all at  
7 once.

8 Patent owner, why don't you go ahead.

9 MR. ROSE: Yes, this is Bruce Rose. In listening  
10 to what counsel describes, it really does appear to  
11 us that this is purely a fishing expedition.

12 You know, we invited petitioner to let us  
13 know in advance of our meet and confer what the  
14 reasons were that they need this discovery, and the  
15 response was, well, it relates to the issues of  
16 conception, reduction of practice and diligence, and  
17 I don't think that's enough of a description of what  
18 exactly the discovery is expected to show.

19 If nothing else, I think it falls into the  
20 category of being the mere possibility of finding  
21 something useful and really amounts to a fishing  
22 expedition.

23 The interesting thing at this point is that  
24 not one of the declarants that we put in declarations

1 for has been deposed yet, nor has petitioner even  
2 sought dates for depositions for any of the  
3 declarants, and so to say before you have even taken  
4 deposition number one that we need these additional  
5 depositions because we're not going to be able to get  
6 the information we want out of the declarants that  
7 will be made available, that is not -- there's  
8 nothing other than speculation there on the  
9 petitioner's part to that effect.

10 So at the very least we think that a  
11 deposition should go forward including the  
12 depositions of Harry Tung, who is an inventor, and by  
13 the way, who is Selma Bektesevic's boss, so she was  
14 preparing these reports, and they were being prepared  
15 for Harry Tung. So Harry has as much information as  
16 Selma would on those, and at the end, we think the  
17 exhibits stand on their own. The exhibits are what  
18 they are, and they're being used to prove this work  
19 was being done and this work was prepared.

20 So they have been authenticated. They show  
21 that these experiments were done. Harry will be able  
22 to testify that the experiments were done, and  
23 between the documents and the testimony and the  
24 declaration, there's nothing more to be gained other

1 than perhaps thinking, well, we might get something  
2 different from Selma. That to me is classic fishing.

3 THE HONORABLE KOKOSKI: Okay, thank you.

4 Petitioner, do you have a brief response?

5 MR. BEAUPRÉ: Yes.

6 Regarding the fact that we haven't deposed  
7 declarants yet, yes, we haven't obviously. We don't  
8 disagree with that, but the reason that we haven't --  
9 and first of all, we're going to make those requests  
10 shortly, but we'd like to, we'd like to depose these  
11 additional inventors at the time that we depose Tung  
12 for efficiency and especially due to the compressed  
13 schedule. While we are out there deposing Tung, we  
14 can depose Selma and Haluk as well.

15 And also regarding a fishing expedition,  
16 these -- we're not asking for obscure witnesses,  
17 we're not asking for people who don't have  
18 involvement in the case. These are the primary --  
19 these are the authors of the primary and key  
20 documents.

21 The only reason that we even need to request  
22 them as additional discovery is because Honeywell  
23 took what I would think is an unusual approach of not  
24 using the authors of the documents to authenticate

1 the documents themselves. It really looks like  
2 something is going on there where the primary author,  
3 the only author is not the one who's offering an  
4 affidavit or a declaration, and the only reason I can  
5 think of is to limit the number of depositions that  
6 we are allowed to take, and I think it feels like  
7 gamesmanship with the way that IPRs are set up how  
8 you only automatically get the right to depose  
9 declarants, so they're minimizing the number of  
10 declarants and not having the true authors.

11 THE HONORABLE KOKOSKI: Okay, thank you.

12 MR. ROSE: If I may respond briefly?

13 THE HONORABLE KOKOSKI: Briefly, yes, go ahead.

14 MR. ROSE: Again, you know, first of all, there  
15 is nothing unusual in an IPR of submitting a  
16 declaration by one of several inventors and not  
17 submitting declarations from all the inventors, and  
18 so there is no, quote, unquote, "gamesmanship" as  
19 counsel has indicated, and indeed, I am not aware of  
20 any supporting authority that says if one inventor  
21 submits a declaration, then all inventors should  
22 submit a declaration.

23 And frankly, I think counsel has just  
24 acknowledged that this is a fishing expedition when



1 he says it seems that, quote, unquote, "something is  
2 going on there". I mean, so he wants to take a  
3 deposition to find the "something" that's going on  
4 there. That's fishing.

5 THE HONORABLE KOKOSKI: Okay, thank you.

6 Could you please hold the line for a moment  
7 while I have a discussion with the Panel?

8 MR. ROSE: Certainly.

9 MR. BEAUPRÉ: Thank you, your Honor.

10 (Brief recess taken.)

11 THE HONORABLE KOKOSKI: Thank you for holding.

12 Let's move to the petitioner's document  
13 request. Petitioner, why don't you go ahead with  
14 those.

15 MR. BEAUPRÉ: Thank you, your Honor. So these  
16 can be grouped in several different sections, and  
17 I'll try to consolidate and identify in advance when  
18 I'm doing so.

19 The first two bullet points that both start  
20 with the words "lab notebooks", basically what we're  
21 requesting there -- what we've received so far is

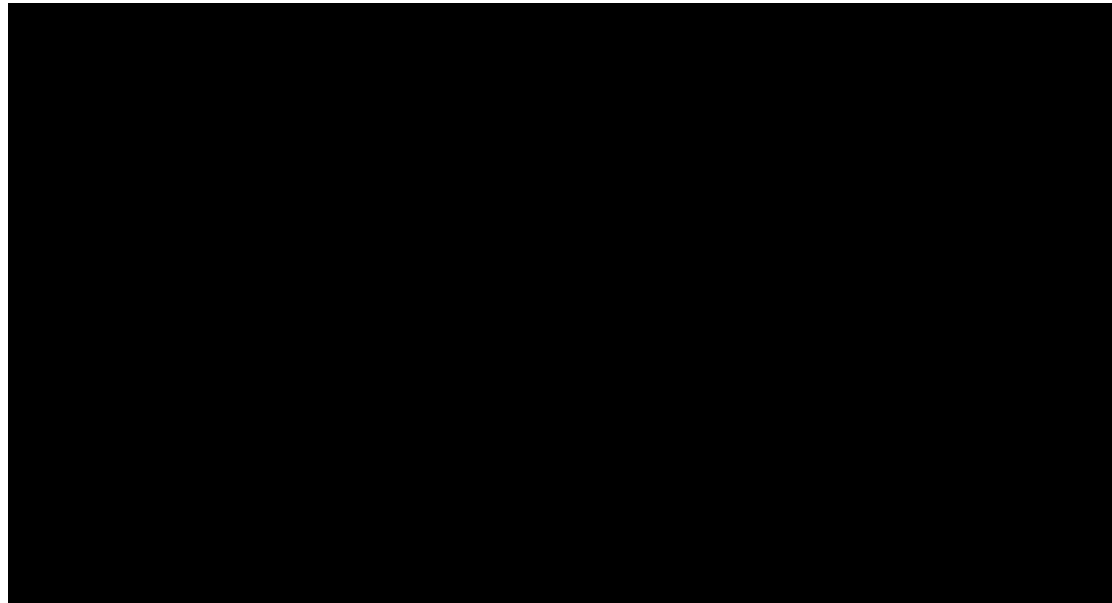
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And then there's also Exhibits 2011, 2012 and 2015. Those are more contemporaneous documents that were created just before the experiments. Those are instructions that tell the technicians what to do, but we don't have lab notebooks that were created during the time of the experiment or the various experiments, plural, and just after those.

So, for example, it's standard practice with experiments to create a lab notebook that takes notes on the experiments that were run, the parameters, the results thereof, and then the technician or the inventor's thoughts on the results of the experiment, and so we're requesting those.



This would be relevant and useful to Arkema's case to show whether Honeywell had possession of the invention at the time of the alleged conception and reduction of practice.

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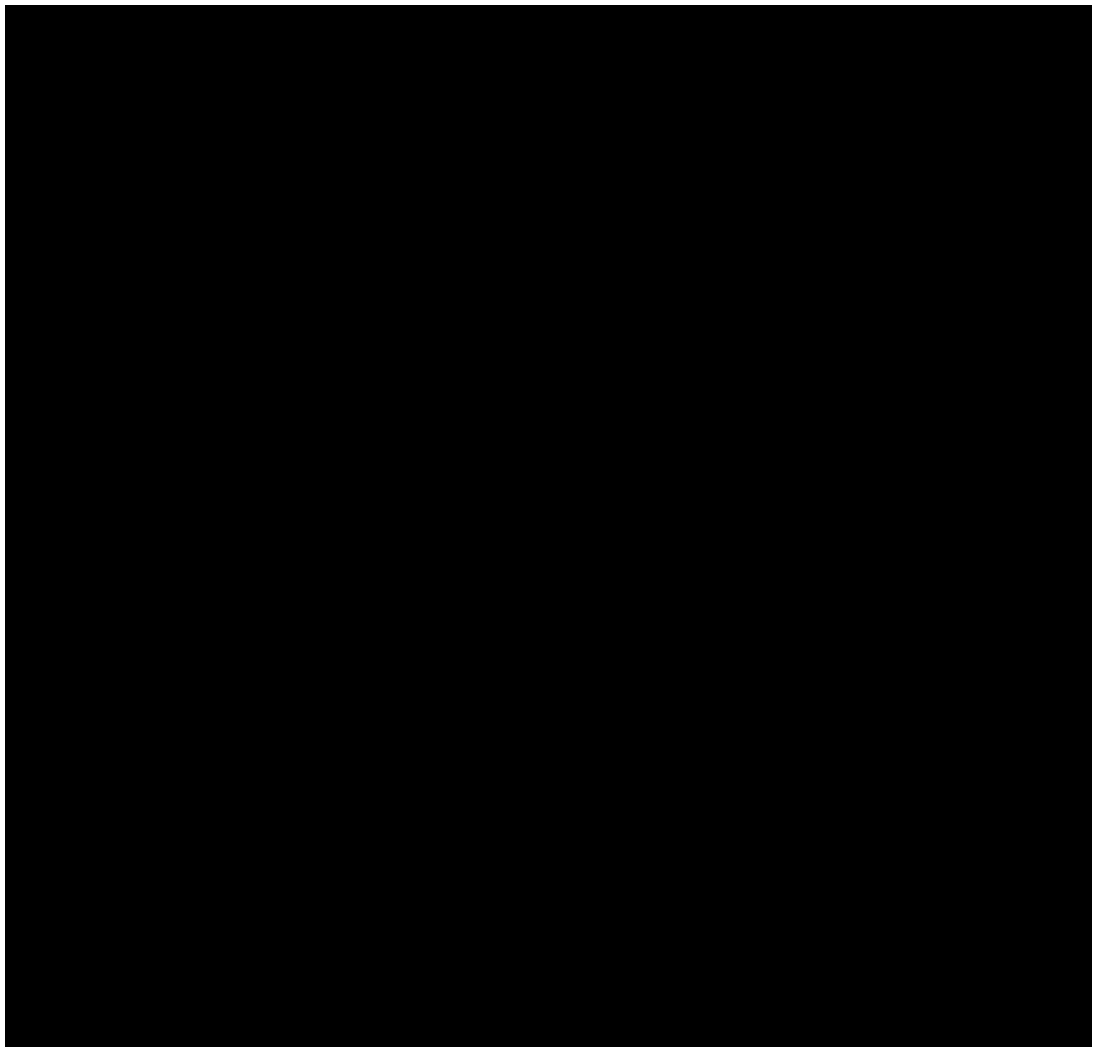
I guess I already went through why we think it's more than a possibility or allegation why they exist and why they would be useful.

And finally, they wouldn't be burdensome to produce. They're presumably stored in the same spot where the other related documents were stored. So that's the two bullet points related to the lab notebooks.

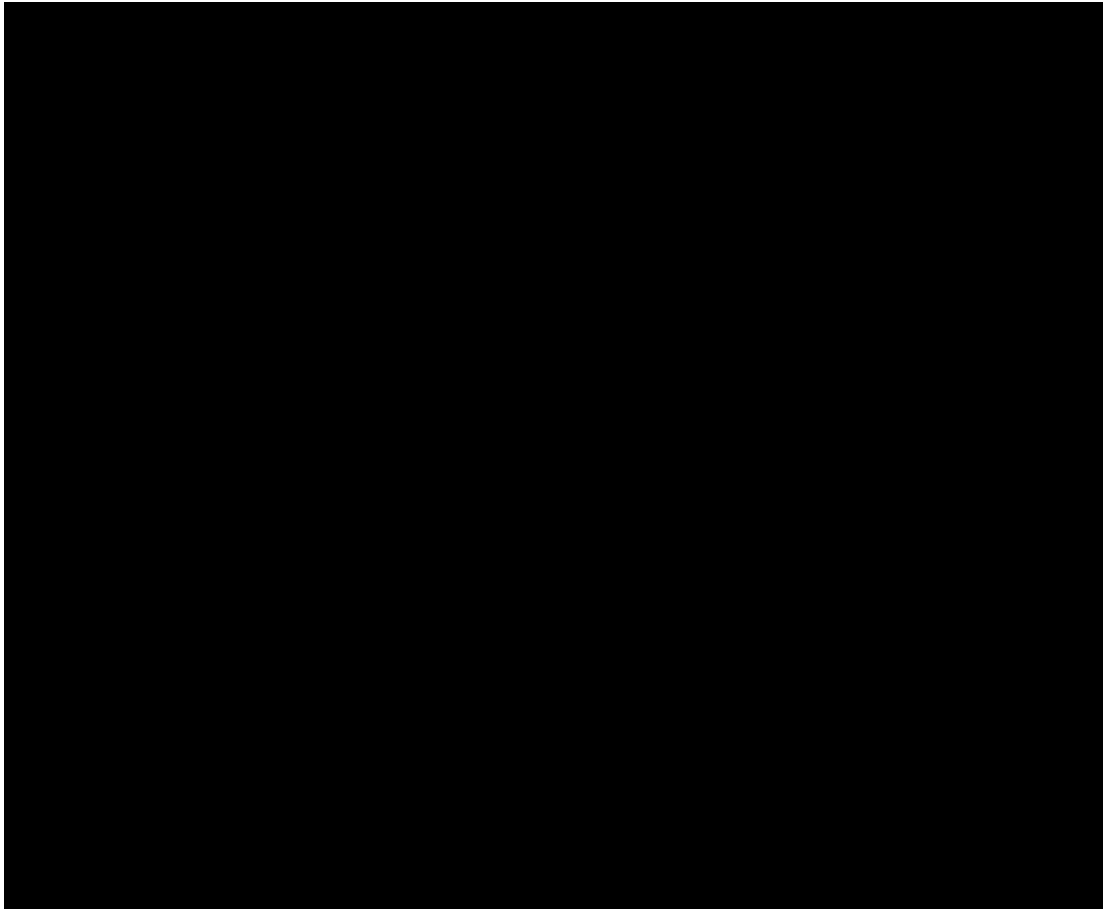
The next two bullet points, those two go together as well. Those are portions of contemporaneously created minutes or notes and then formal minutes from the patent committee meetings.

Taking that into two sections, the contemporaneous notes from the patent committee meetings, counsel for Honeywell has indicated that no

1 such notes exist, and so if they can -- at least  
2 during our meet and confer that was our understanding  
3 of the situation, so as long as there were no notes,  
4 as long as counsel for Honeywell can confirm that no  
5 contemporaneous notes exist that were taken during  
6 these patent committee meetings, that part of the  
7 request we can set aside and then really focus on the  
8 formal minutes.



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And so what we're looking for is the documents that correspond to Exhibit 2042. That's the July, 2010 meeting. We're looking for the similar documents from the other patent committee meetings between the time of conception and the time of filing.

And so it's not a lot of meetings, there's a handful of meetings, they met every three to four months, and we're fine having redactions similar to what Honeywell did with 2042 where all we're looking

1 at is this one purported invention that became the  
2 282 Patent and what was its status, what was the  
3 decision on that document or on that invention  
4 whether to file or not or abandon or hold or  
5 authorize to send it to outside counsel.

6 And then the next bullet point is in our  
7 document request. Documents sufficient to show the  
8 date when Honeywell first became aware of Sadat in  
9 our prior art because, as your Honors likely know,  
10 one of our prior art references is a patent  
11 application that was filed by Arkema, and it was  
12 filed well before the Honeywell application.

13 The timing of it is such that the Arkema  
14 Sadat publication became public right around the time  
15 of this patent committee meeting and just before  
16 Honeywell sent an e-mail to outside counsel asking  
17 them to prepare a patent application, and so we think  
18 that that -- Honeywell's awareness, the date at which  
19 they were first aware of Arkema's publication is  
20 relevant to the issue of diligence, particularly  
21 towards diligence in constructive reduction of  
22 practice and whether or not Honeywell was spurred by  
23 Arkema's publication to file its own application. So  
24 that's why we think it would be relevant and useful.

1           And then when we had the meet and confer  
2     with Honeywell, I understand that one of their  
3     objections to this is that it would be  
4     attorney-client privilege. We're not looking to get  
5     any attorney-client privileged information. In fact,  
6     I think we could handle this in a way similar to a  
7     privilege log where if Honeywell just produces a  
8     privilege log for that one or two, however many, it  
9     shouldn't be many documents, it should be one or two  
10    or a small number, because we're just looking for the  
11    date that they became aware of that application, and  
12    the privilege log could say something along the lines  
13    of, you know, day two, a "to" field, a "from" field,  
14    and then generally describe the type of privilege  
15    that's being asserted and the type of communication  
16    that it is, and that would be enough for us to just  
17    know, okay, this is when Honeywell knew about the  
18    Arkema application.

19           And then next we have on here, this is the  
20    second to last bullet point on page two of our  
21    letter, the Draft Patent Application that was sent to  
22    Selma Bektesevic. She's the lead inventor we talked  
23    about earlier. So what that is, the first draft of  
24    the provisional application, Honeywell produced the

1 cover e-mail that was sending it to Selma, but it  
2 didn't produce the Draft Patent Application itself.

3 First, talking about the relevance and  
4 usefulness, it relates to diligence and reduction of  
5 practice for a couple reasons.

6 One is that when you look at the time from  
7 the date that Honeywell requested that outside  
8 counsel start drafting the patent application to the  
9 date of that e-mail where outside counsel sent the  
10 first draft, it was 41 days. So in other words, it  
11 took 41 days for the patent attorney to prepare that  
12 application, and we want to -- we think it's relevant  
13 and useful to see what that application looks like  
14 because one of the factors in determining whether or  
15 not the patent attorney was diligent or reasonably  
16 diligent is to look at how much work that patent  
17 attorney had to do.

18 And in this particular case, this  
19 application wasn't -- it wasn't written from scratch.  
20 There was a detailed, a long detailed description  
21 that Selma wrote for the inventor that accompanied  
22 the Invention Disclosure Agreement or disclosure  
23 paper.

24 And then there was -- so that was a big



1 section of the provisional where it was cut and  
2 pasted. You can see when you compare that detailed  
3 description sent by Selma, when you compare it to the  
4 Final Provisional Application as it was filed.

5 And then you can also see that there was  
6 also a lot of information that was copied and pasted  
7 from one of Honeywell's earlier applications, one of  
8 the applications that's in the priority serial chain.

9 And so once we see that provisional, that  
10 Draft Provisional Application, we can see whether  
11 there was any additional work that was done by the  
12 patent attorney that would explain why it took 41  
13 days to cut and paste from a couple documents, add a  
14 little bit of extra content and then send it to the  
15 inventors.

16 And then I understand Honeywell is asserting  
17 privilege for this document as well. First of all,  
18 they already submitted the cover e-mail that is  
19 sending the Draft Patent Application, so we think  
20 they waived attorney-client privilege by doing that.

21 And then secondly, we're not looking for any  
22 attorney-client communications. For example, if  
23 there were embedded questions or notes that were  
24 directed to the inventors, we think that at least for

1 the time being or until an in camera inspection is  
2 appropriate that Honeywell can have the right to  
3 redact that information out.

4 Really what we want to see is what was the  
5 status of that patent application, and where did it  
6 stand after 41 days because that's relevant to  
7 diligence.

8 Then the next two bullet points, which are  
9 April, 2009, Forward Engineering Request Form and  
10 then a September, 2009 White Paper to brief Honeywell  
11 top executives, those can be grouped together.

12 These are documents that Honeywell is using  
13 to allege diligence, but we don't have the documents.  
14 Honeywell just pointed to them and said, okay, these  
15 documents show that we were diligently working on  
16 these things, but without seeing the documents  
17 themselves, we don't know whether those documents  
18 relate to the alleged invention that became the 282  
19 Patent or what steps those papers actually show or if  
20 they're even from different technology that's not  
21 related to the 282 Patent.

22 And then finally, the second to last bullet  
23 point is Bruce Bradford time records. We understand  
24 from Honeywell that -- from our meet and confer that

1 these do not exist, so assuming that Honeywell's  
2 counsel can confirm as much today, we can drop that.

3 And that last request, the Eric Sumner time  
4 records, we're not seeking those anymore. We removed  
5 those after our meet and confer.

6 THE HONORABLE KOKOSKI: Okay, thank you.

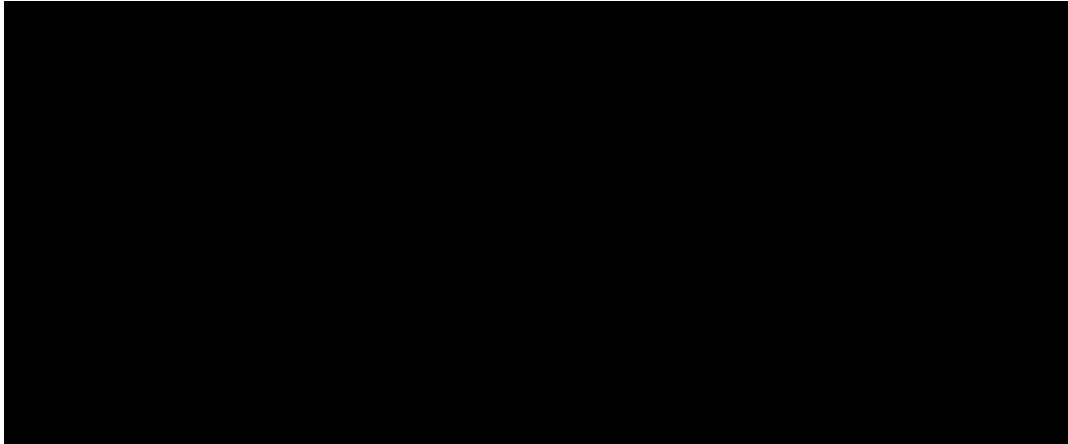
7 Patent owner, your response?

8 MR. ROSE: Okay. I'll try to break it down along  
9 similar lines as petitioner did into the various  
10 bullet points, and so to start with the lab  
11 notebooks, again, we think that there's nothing to be  
12 gained there that's relevant to this case, and the  
13 reason being -- and counsel had mentioned the  
14 experiments and the results of the experiments should  
15 be in those notebooks, but the results of the  
16 experiments are in the documents that were produced.

17 The various reports, the monthly technology  
18 reports, et cetera, that were submitted to Harry Tung  
19 and were included with his declaration have  
20 appendices, and in the appendices you have all the  
21 results of those experiments.

22 And so when they depose Harry, if they so  
23 choose to depose him, he'll be able to confirm what  
24 was in those notebooks is the data -- and the results

1 of the experiment is the data that is in the  
2 appendices and which was produced and submitted.



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10 patent owner to be able to stand on what was  
11 submitted and let the declarant be deposed. If  
12 counsel thinks that there is some hole in that  
13 evidence, they can try to explore that in the  
14 deposition.

15 As for the formal minutes, again, as we said  
16 on the meet and confer, no contemporaneously created  
17 minutes or notes exist, so there's nothing to be  
18 obtained there.

19 As for the formal minutes, we did produce  
20 the July, 2010, and again, that goes along with  
21 our -- you know, what we're making in our case in  
22 chief on antedating these references.

23 If counsel feels that they're -- you know,  
24 that that's not enough, then counsel can make that

1 argument, but the documents we've submitted we  
2 believe satisfy it, and what happened before the July  
3 12th -- I'm sorry, the July, 2010 minutes is not  
4 pertinent to the issues raised here and identified in  
5 the Bradford declaration.

6           Moreover, again, they have not sought to  
7 take the deposition of Bruce Bradford, who is the one  
8 that authored those notes and submitted them with his  
9 declaration, so if they want to ask what was taking  
10 place before the July, 2010 notes, then -- or formal  
11 minutes, then they can certainly ask him that and go  
12 with what he responds.

13           So again, I think demanding the documents  
14 and not having any basis to think there's anything,  
15 you know, useful in them amounts to mere fishing or,  
16 again, failing on the first of the Garmin factors  
17 that they're identifying just a mere possibility of  
18 finding something useful and a mere allegation that  
19 something useful will be found. So I don't think  
20 they've made it over the first of the Garmin factors  
21 and a third of the Garmin factors, the ability to get  
22 the information somewhere else, which is to take the  
23 depositions of these declarants.

24           The next category, is the document

1 sufficient to show when Honeywell first became aware  
2 of the applications, and again, I think they fail  
3 terribly on the first of the Garmin factors because  
4 they want to show by one of those that somehow  
5 Honeywell was spurred on by the publication of the  
6 Arkema application.

7 That is pure speculation that that happened,  
8 and so, you know, if they want to ask that question  
9 of Bruce Bradford, they can certainly do that, but  
10 saying that if we find out the date that Honeywell  
11 first learned of this, then we're going to make the  
12 argument that they were spurred on.

13 A day does not amount to spurring of  
14 anything, and so that would be pure conjecture by  
15 counsel unless they have something in a deposition  
16 that they haven't taken yet that would cause such  
17 relevance -- or such an argument to even be made. So  
18 again, I think this is further fishing. It fails  
19 under the first and the third of the Garmin factors.

20 The next category, the Forward Engineering  
21 Request Form and the White Paper, the next two bullet  
22 points, again, those were identified by Mr. Morris in  
23 his declaration, and again, simply to show that  
24 activity was taking place at those times.

He doesn't cite to the substance of those documents and anything in them to support the argument that activity was taking place. He just says activity was taking place, and I know this because I was aware of this document, and I was aware of that document. And if they want to challenge those statements by Mr. Morris, certainly he'll be made available for a deposition, but they haven't requested that yet.

There's nothing in those documents that we're relying on. We're relying on the mere existence of activity at the time, and if Arkema believes that's not sufficient evidence, well, they can make that argument, but they don't need the additional information that's within those documents to say that what we've set forth is insufficient.

And then finally, the time records of Bruce Bradford, as indicated on the meet and confer, no such records exist.

I'm sorry, I am just told by my colleagues that I skipped the Draft Patent Application. Yes, as indicated with the other ones, that was, again, -- the e-mail was simply submitted to show that activity was taking place at the time, not that -- not the

1 substance of what's in the Draft Patent Application.

2 We're walking through the steps of what  
3 these people were doing during this diligent period,  
4 and the indication is that a Draft Patent Application  
5 was submitted, and that's what the e-mails show, and  
6 we don't believe counsel needs to see the application  
7 to know that it was an application.

8 And again, Harry Tung was copied on that  
9 transmission, and they can ask him questions about  
10 that Draft Patent Application if and when they decide  
11 to take his deposition.

12 And also, as discussed, that application is,  
13 in fact, peppered with attorney comments, and  
14 therefore, attorney-client privilege material.

15 THE HONORABLE KOKOSKI: Thank you.

16 Petitioner, you were pretty thorough your  
17 first time through. Is there anything you would like  
18 to respond to specifically and briefly?

19 MR. BEAUPRÉ: Yes. I'll be very brief. Jumping  
20 down towards the middle of -- towards the bottom of  
21 the first page talking about the spurring issue when  
22 Honeywell first became aware, the timeline here  
23 provides more than mere speculation.

24 The invention was allegedly reduced to



1 practice in September of 2009. Then a year and --  
2 yes, that's right -- no, I'm sorry, September of  
3 2008. I knew there was something wrong about that.  
4 And then a year and a half later.

5 So just a couple of years after Arkema's  
6 publication became public, which is a year and a half  
7 after the alleged reduction to practice, that's when  
8 Honeywell suddenly decided, oh, now we want to hurry  
9 up and file within a couple weeks or six weeks when  
10 they requested -- when they sent it to the outside  
11 counsel.

12 So that to me is definitely more than mere  
13 speculation on spurring, and really, any other  
14 evidence that would show and support spurring, we  
15 don't have access to that information now because  
16 Honeywell didn't submit it.

17 And then finally, with respect to the  
18 forward engineering, forward thinking and White  
19 Paper, yes, we understand that Honeywell is pointing  
20 to those just to say activity was taking place, but  
21 that's not our point. Our point is that activity  
22 that you're alleging might be completely irrelevant  
23 to the invention or the alleged invention.

24 And for all of these points, for us to take

1 a deposition without documents and then -- key  
2 documents and then later have to go back and either  
3 take more depositions or just be stuck with that  
4 original deposition that was insufficient because we  
5 didn't have the documents in front of us to be able  
6 to refresh the witness or fully question the witness,  
7 we're not going to be able to get into the details of  
8 any of these matters without the documents because  
9 without putting them in front of a witness, the  
10 witness isn't going to be able to remember enough to  
11 answer our questions, and we're not going to be able  
12 to ask specific enough questions to be able to test  
13 the various things that we're talking about here,  
14 such as, you know, what did the original lab notebook  
15 say? Well, the witness isn't going to remember what  
16 they said. And what activity was taking place?  
17 Well, Morris isn't going to know all of the details  
18 of what was taking place. He might remember broad  
19 strokes, but that doesn't mean that he's going to  
20 remember enough or that he's likely to remember  
21 enough to be able to tell us whether or not those  
22 activities were relevant.

23 And so that point applies across the board,  
24 that we really need the documents before we take

1 these depositions. It will make the depositions much  
2 more efficient and effective.

3 MR. ROSE: If I may briefly respond, your Honors.

4 THE HONORABLE KOKOSKI: Go ahead.

5 MR. ROSE: Yeah, and again, I think that what  
6 counsel is saying, you know, has these falling  
7 squarely into failing under the first of the Garmin  
8 factors because what counsel is saying is, well, we  
9 would look for that paper or look at those lab  
10 notebooks, and it might show that there was activity  
11 going on that was not related to this.

12 Well, that is stating the mere possibility  
13 of finding something useful and a mere allegation  
14 that something useful will be found. That fails  
15 under Garmin.

16 So we don't think they've met the burden of  
17 getting to these documents certainly without taking  
18 the depositions, but right now, again, it's pure  
19 speculation that they're going to find something.

20 And similarly with the spurring, that is  
21 purely counsel's conjecture that the application was  
22 published, and then this, you know, activity took  
23 place by Honeywell, they must have been spurred.

24 There's nothing more there other than

1 speculation, so again, I believe that fails under the  
2 first of the Garmin factors, and specifically without  
3 taking the depositions, it fails under the third.

4 THE HONORABLE KOKOSKI: Okay. Thank you, very  
5 much. I'm going to go ahead and put you on hold  
6 while the panel confers.

7 (Brief recess taken.)

8 THE HONORABLE KOKOSKI: Thank you for holding.  
9 Do I still have everybody on the line?

10 MR. ROSE: Patent owner is here, your Honor.

11 MR. BEAUPRÉ: And so is petitioner. Thank you,  
12 your Honor.

13 THE HONORABLE KOKOSKI: Thank you. At this time  
14 after conferring, the Panel has decided that we're  
15 going to authorize petitioner to file their requested  
16 motion for additional discovery.

17 We would like to emphasize that you need to  
18 as you have already done go through the Garmin  
19 factors and establish why this discovery is within  
20 the interests of justice.

21 When do you think you can get that motion  
22 filed?

23 MR. BEAUPRÉ: By early next week, your Honor.

24 THE HONORABLE KOKOSKI: Okay. So that works for

1 us. What we are going to order is then that you get  
2 that motion on file within a week of today or  
3 tomorrow I guess because the order for this  
4 conference call won't go out until tomorrow, and then  
5 that will be 15 pages. I don't know if I said that  
6 already.

7 And then patent owner, you'll have a week  
8 from when you get that motion to file your  
9 opposition, and we are not going to authorize any  
10 reply at this time.

11 MR. BEAUPRÉ: Thank you, your Honors.

12 MR. ROSE: Thank you.

13 THE HONORABLE KOKOSKI: Any questions?

14 MR. BEAUPRÉ: I don't have any questions on the  
15 first issue.

16 THE HONORABLE KOKOSKI: Okay. Patent owner?

17 MR. ROSE: Yeah, we just wanted to confirm that  
18 we would have a 15-page limit, is that correct?

19 THE HONORABLE KOKOSKI: Oh, yes, you will have 15  
20 pages as well.

21 Okay. So I think that wraps up the first  
22 issue. Let's turn now to petitioner's request for  
23 authorization to file a motion to compel.

24 Petitioner, why don't you go ahead.

1 MR. BEAUPRÉ: Thank you, your Honor. This will  
2 be brief, much, much briefer than the last one, so  
3 thank you for listening through the first one.

4 Your Honors likely recall there were several  
5 exhibits that were redacted, and we had -- we  
6 narrowed down the universe to two documents that both  
7 have the same redaction, so it's really just one  
8 issue that we're looking at, and the parties before  
9 this call agreed -- we agreed that we would -- that  
10 neither party would read into the record while the  
11 court reporter is on the line the redacted portion of  
12 the document.

13 Petitioner knows generally what that line is  
14 because we inspected the document, but if we could go  
15 off record for a moment, then patent owner could read  
16 the actual sentence into the -- not into the record,  
17 but just so your Honors can hear it, and then we  
18 could go back on record, and I will refrain from  
19 saying that redacted sentence, I will just talk about  
20 it generally if that's okay?

21 THE HONORABLE KOKOSKI: Patent owner, that is  
22 okay with you?

23 MR. ROSE: Yes, that's fine, your Honor.

24 THE HONORABLE KOKOSKI: Okay. That seems an

1 expeditious way to get through this. Let's go off  
2 the record.

3 (Discussion had off of the record.)

4 THE HONORABLE KOKOSKI: Back on the record.

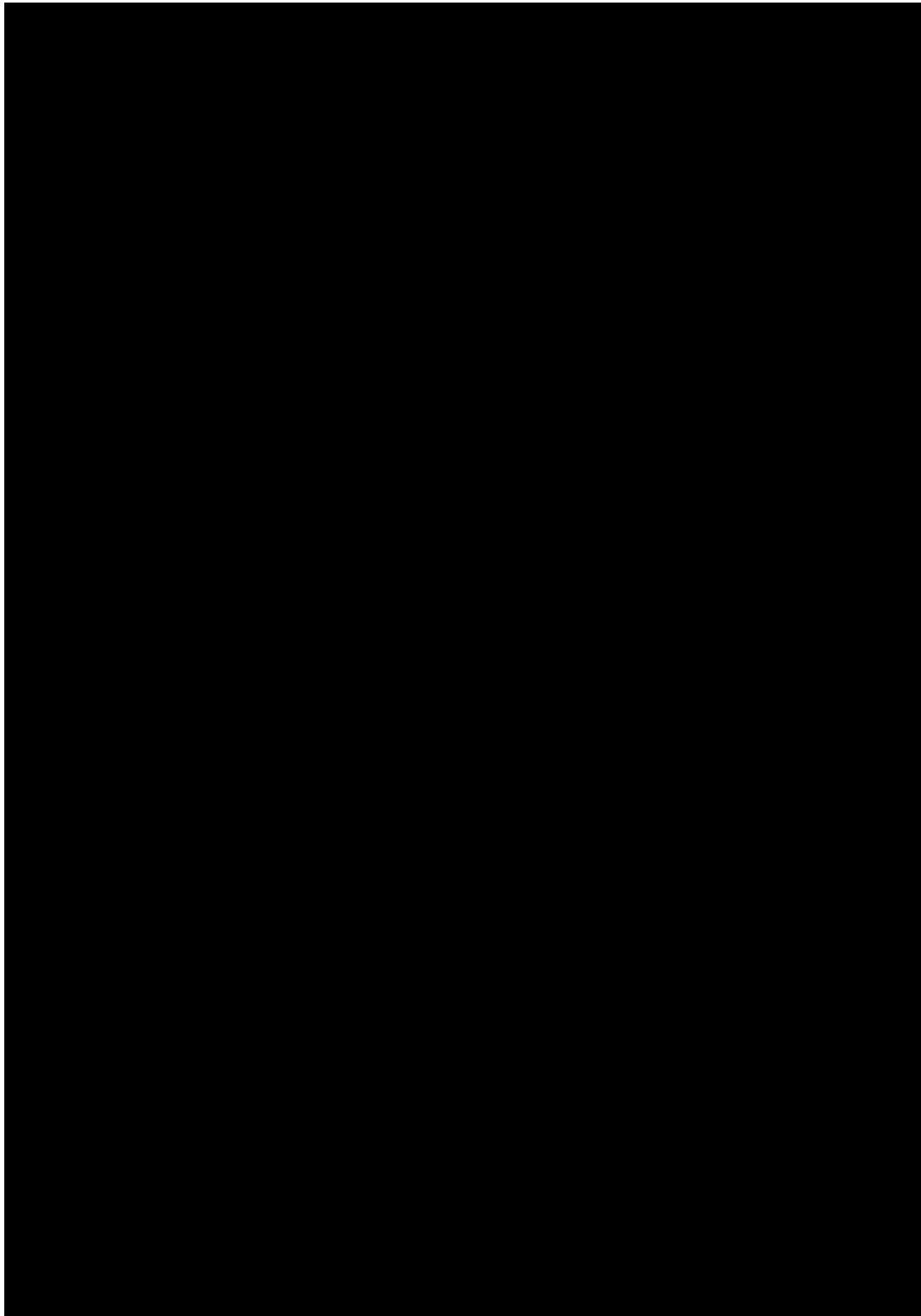
5 Petitioner, why don't you resume.

6 MR. BEAUPRÉ: Thank you, your Honor. So the  
7 redacted portion of Exhibits 2032 and 2033, because  
8 Honeywell submitted that e-mail as a whole and only  
9 redacted out a portion of it, submitting the e-mail  
10 as a whole is enough to have waived any  
11 attorney-client privilege.

12 During our last call on this issue we cited  
13 to a case that touches on this point, Garmin B.  
14 Cuozzo, IPR2012-1, Paper 36, and I won't read the  
15 long quote that I read last time, but the short of it  
16 is where the Court said that normally there's  
17 attorney-client privilege, but because they were  
18 submitted on Cuozzo's own initiative, attorney-client  
19 privilege has been waived.

20 And so these -- after attorney-client  
21 privilege has been waived, because this is routine  
22 discovery, we don't even need to look at the Garmin  
23 factors, so really that's just the end of the  
24 analysis in our opinion.

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5 THE HONORABLE KOKOSKI: Okay. Thank you.

6 Petitioner, do you have anything to add?

7 MR. BEAUPRÉ: Just that when the document is  
8 submitted as a whole, there's -- I haven't seen any  
9 case law and Honeywell hasn't been provided any  
10 support for the proposition that you can pick and  
11 choose and say, well, the communication as a whole  
12 wasn't advice, but this one particular sentence was  
13 advice. That's not how a waiver works.

14 MR. ROSE: For patent owner, I completely  
15 disagree that that is the case all the time, that a  
16 portion of the document may be privileged and another  
17 portion of the document may not be privileged.  
18 There's absolutely nothing unusual about that. In  
19 fact, I would submit that that's more common than  
20 not.

21 THE HONORABLE KOKOSKI: Okay. Was there anything  
22 else that either of you wanted to add at this point?  
23 Petitioner?

24 MR. BEAUPRÉ: None from petitioner. Thank you,

1 your Honors.

2 THE HONORABLE KOKOSKI: Patent owner?

3 MR. ROSE: Nothing from the patent owner. Thank  
4 you, your Honors.

5 (Brief recess taken.)

6 THE HONORABLE KOKOSKI: Thank you for holding.

7 Petitioner, we do have one follow-up  
8 question. You had cited a Garmin case with respect  
9 to your attorney-client privilege waiver argument.  
10 Could you just clarify what paper number you were  
11 citing from in that case?

12 MR. BEAUPRÉ: Yes, your Honor. Paper 36.

13 THE HONORABLE KOKOSKI: Paper 36?

14 MR. BEAUPRÉ: Yes.

15 THE HONORABLE KOKOSKI: Okay, thank you.

16 What we're going to do with regards to the  
17 authorization for the motion to compel is take it  
18 under advisement, and we will issue an order with our  
19 decision on that shortly, and when I say shortly,  
20 within a day I will say because I know that you're  
21 under time pressures with respect to the schedule.

22 Petitioner, do you have any further issues  
23 today?

24 MR. BEAUPRÉ: No, no. Thank you, very much, your

1 Honor.

2 I would note it's Paper 36, page numbers 9  
3 and 10 if that helps you.

4 THE HONORABLE KOKOSKI: Thank you.

5 MR. BEAUPRÉ: And thank you, very much, for the  
6 call and for your consideration.

7 THE HONORABLE KOKOSKI: You're welcome.

8 Patent owner, do you have any further issues  
9 today?

10 MR. ROSE: Nothing further here, your Honors.  
11 Thank you.

12 THE HONORABLE KOKOSKI: Thank you all for being  
13 here today, and I would just like to say briefly  
14 before we adjourn that we do appreciate that the  
15 parties were able to work out a lot of those issues  
16 from the last call with regard to the redactions and  
17 that you were able to whittle it down to just two  
18 documents, so we appreciate that you took that time  
19 and effort and got that done and hope that in the  
20 future if other arguments come up that you can also  
21 resolve them similarly.

22 So with that being said, thank you, and this  
23 call is adjourned.

24 MR. BEAUPRÉ: Thank you, your Honor.

1 MR. ROSE: Thank you, your Honor.

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1 STATE OF ILLINOIS )  
 ) ss:  
2 COUNTY OF COOK )

3 NANCY EATINGER, being first duly sworn,  
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7 That she reported in shorthand and  
8 thereafter transcribed the foregoing proceedings;

9 That the within and foregoing transcript  
10 is true, accurate and complete and contains all the  
11 evidence which was received in the proceedings had  
12 upon the above-entitled cause.

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<b>A</b>			
<b>abandon</b>	42:14	<b>Ann</b>	42:20
21:4	<b>adjourned</b>	3:4	<b>Arkema</b>
<b>abaum@brinksgils...</b>	42:23	<b>answer</b>	1:7 4:4,18 21:11,13
3:15	<b>advance</b>	10:5,10,12,14,21,24	22:18 29:6 30:12
<b>ability</b>	12:13 16:17	11:18 33:11	<b>Arkema's</b>
28:21	<b>advice</b>	<b>answers</b>	18:2 21:19,23 32:5
<b>able</b>	39:22 40:12,13	10:15 11:7	<b>arranged</b>
5:17 9:19 10:10,21,24	<b>advisement</b>	<b>antedating</b>	4:15
13:5,21 17:17 26:23	41:18	6:9,23 27:22	<b>art</b>
27:10 33:5,7,10,11	<b>affidavit</b>	<b>anymore</b>	21:9,10
33:12,21 42:15,17	15:4	26:4	<b>articulate</b>
<b>above-entitled</b>	<b>afternoon</b>	<b>APPEAL</b>	5:17
44:12	4:8	1:4	<b>aside</b>
<b>absolutely</b>	<b>agree</b>	<b>appear</b>	9:1 19:7
4:24 40:18	8:24	12:10	<b>asking</b>
<b>access</b>	<b>agreed</b>	<b>appeared</b>	14:16,17 21:16
32:15	37:9,9	3:16,22	<b>asks</b>
<b>accompanied</b>	<b>Agreement</b>	<b>appendices</b>	6:15
23:21	23:22	26:20,20 27:2,8	<b>asserted</b>
<b>accurate</b>	<b>ahead</b>	<b>application</b>	22:15
10:16 44:10	11:6 12:8 15:13 16:13	8:3,20 19:20 21:11,12	<b>asserting</b>
<b>acknowledged</b>	34:4 35:5 36:24	21:17,23 22:11,18,21	24:16
15:24	<b>allegation</b>	22:24 23:2,8,12,13	<b>assist</b>
<b>acting</b>	18:11 28:18 34:13	23:19 24:4,10,19	8:2
20:12	<b>allege</b>	25:5 29:6 30:21 31:1	<b>assume</b>
<b>activities</b>	25:13	31:4,6,7,10,12 34:21	20:4
33:22	<b>alleged</b>	39:9	<b>assuming</b>
<b>activity</b>	7:7,20,22 11:17 18:4,6	<b>applications</b>	26:1
29:24 30:3,4,12,23	25:18 32:7,23	24:7,8 29:2 39:5	<b>attend</b>
32:20,21 33:16 34:10	<b>allegedly</b>	<b>applies</b>	19:19
34:22 39:18	31:24	33:23	<b>attorney</b>
<b>actual</b>	<b>alleging</b>	<b>appreciate</b>	23:11,15,17 24:12
18:6 37:16	32:22	42:14,18	31:13 39:9,10
<b>add</b>	<b>Allen</b>	<b>approach</b>	<b>attorney-client</b>
24:13 40:6,22	3:12 4:5	14:23	22:4,5 24:20,22 31:14
<b>added</b>	<b>allowed</b>	<b>appropriate</b>	38:11,17,18,20 41:9
27:8	15:6	25:2	<b>August</b>
<b>additional</b>	<b>ALSTON</b>	<b>April</b>	16:24
5:4,9,16 11:24 13:4	3:17	25:9	<b>authenticate</b>
14:11,22 24:11 30:15	<b>amount</b>	<b>Arbor</b>	11:22 14:24
35:16	29:13	3:4	<b>authenticated</b>
<b>address</b>	<b>amounts</b>	<b>argument</b>	13:20
5:8	12:21 28:15	6:10,24 28:1 29:12,17	<b>author</b>
<b>adjourn</b>	<b>analysis</b>	30:3,14 41:9	9:12,20,20 10:23
	38:24	<b>arguments</b>	11:21 15:2,3

<b>authored</b> 6:10,21 8:4,23 9:2 10:11,17 28:8	3:16,22 <b>Bektesevic</b> 22:22	28:7 29:9 30:17 <b>bruce.rose@alston....</b> 3:20	24:8 <b>challenge</b> 30:6
<b>authority</b> 15:20	<b>Bektesevic's</b> 13:13	<b>bullet</b> 16:19 18:16,18 21:6 22:20 25:8,22 26:10 29:21	<b>chance</b> 11:5
<b>authorization</b> 5:3,15 8:19 36:23 41:17	<b>believe</b> 4:19 28:2 31:6 35:1 39:23	<b>burden</b> 34:16	<b>change</b> 7:1
<b>authorize</b> 21:5 35:15 36:9	<b>believes</b> 30:13	<b>burdensome</b> 10:1 18:8,13	<b>Charlotte</b> 3:19
<b>authorized</b> 20:2	<b>big</b> 23:24	<b>button</b> 39:1	<b>Chicago</b> 3:9 44:18
<b>authors</b> 14:19,24 15:10	<b>BIRD</b> 3:17		<b>chief</b> 27:22
<b>automatically</b> 15:8	<b>bit</b> 24:14	<hr/> <b>C</b> <hr/>	<b>choose</b> 26:23 40:11
<b>available</b> 13:7 30:8	<b>board</b> 1:4 5:9 33:23	<b>call</b> 4:1,22 5:3 36:4 37:9 38:12 42:6,16,23	<b>Christopher</b> 3:17 4:9
<b>aware</b> 15:19 21:8,19 22:11 29:1 30:5,5 31:22	<b>boss</b> 13:13	<b>called</b> 8:21 16:22 19:16,16	<b>christopher.douglas...</b> 3:21
<b>awareness</b> 21:18	<b>bottom</b> 31:20	<b>camera</b> 25:1	<b>circulate</b> 4:19
	<b>Boulevard</b> 3:13	<b>Carolina</b> 3:14,19	<b>cite</b> 30:1
<hr/> <b>B</b> <hr/>	<b>Bradford</b> 25:23 28:5,7 29:9 30:18	<b>case</b> 1:14,15,15 2:10 14:18 18:2 19:12 23:18 26:12 27:21 38:13 40:9,15 41:8,11	<b>cited</b> 38:12 41:8
<b>B</b> 2:7 38:13	<b>brainstorming</b> 11:16,19	<b>category</b> 12:20 19:14,15 20:5,6 20:8 28:24 29:20	<b>citing</b> 41:11
<b>back</b> 33:2 37:18 38:4	<b>break</b> 26:8	<b>cause</b> 29:16 44:12	<b>Cityfront</b> 3:8
<b>basically</b> 11:4,6 16:20	<b>brief</b> 14:4 16:10 25:10 31:19 35:7 37:2 41:5	<b>certain</b> 10:20,21	<b>claim</b> 39:6
<b>basis</b> 28:14	<b>briefly</b> 15:12,13 31:18 34:3 42:13	<b>certainly</b> 7:13 9:8 16:8 18:8 28:11 29:9 30:7 34:17	<b>claims</b> 39:5
<b>Baum</b> 3:12 4:5	<b>BRINKS</b> 3:2,7,12	<b>Certified</b> 44:4	<b>clarify</b> 41:10
<b>Beaupré</b> 4:4,17	<b>broad</b> 33:18	<b>cetera</b> 26:18	<b>classic</b> 14:2
<b>BEAUPRÉ</b> 3:2 4:4,17,24 5:21 8:12 14:5 16:9,15 31:19 35:11,23 36:11 36:14 37:1 38:6 40:7 40:24 41:12,14,24 42:5,24	<b>Bruce</b> 3:17 4:8 12:9 25:23	<b>chain</b>	<b>clear</b> 5:18
<b>behalf</b>			<b>colleagues</b> 30:20
			<b>column</b> 19:21,23
			<b>come</b> 17:23 42:20

<b>commencing</b> 2:8	29:14 34:21	26:13 27:12,23,24	31:10
<b>comments</b> 31:13	<b>connection</b> 5:6	29:15 31:6 32:11	<b>decided</b> 32:8 35:14
<b>committee</b> 18:21,23 19:6,13,17 20:18 21:15	<b>consideration</b> 42:6	34:6,8	<b>decision</b> 19:16,21,23 20:2 21:3 41:19
<b>common</b> 40:19	<b>consistent</b> 10:16	<b>counsel's</b> 34:21	<b>declarant</b> 27:11
<b>communication</b> 22:15 40:11	<b>consolidate</b> 16:17	<b>County</b> 44:2,5,6	<b>declarants</b> 12:24 13:3,6 14:7 15:9 15:10 28:23
<b>communications</b> 24:22	<b>construction</b> 39:6	<b>couple</b> 7:10 23:5 24:13 32:5,9	<b>declaration</b> 9:6 13:24 15:4,16,21 15:22 26:19 28:5,9 29:23
<b>compare</b> 11:7 24:2,3	<b>constructive</b> 21:21	<b>court</b> 4:12,13,15,18 37:11 38:16	<b>declarations</b> 6:6 12:24 15:17
<b>compel</b> 5:4 36:23 41:17	<b>contact</b> 4:19 8:17	<b>Courts</b> 44:6	<b>deeply</b> 8:8,8
<b>complete</b> 12:3 44:10	<b>contacted</b> 8:16	<b>cover</b> 23:1 24:18	<b>definitely</b> 32:12
<b>completely</b> 32:22 40:14	<b>contains</b> 44:10	<b>create</b> 17:11	<b>delve</b> 8:8
<b>compressed</b> 11:2 14:12	<b>contemporaneous</b> 17:4 18:23 19:5	<b>created</b> 17:5,7,21,24 18:20 27:16	<b>demanding</b> 28:13
<b>conception</b> 9:4 11:13,17 12:16 18:4 20:19	<b>contemporaneously</b> 17:24 18:20 27:16	<b>Cuozzo</b> 38:14	<b>DeMille</b> 3:7 4:5
<b>concerns</b> 4:1	<b>content</b> 24:14	<b>Cuozzo's</b> 38:18	<b>deponents</b> 11:24 12:4,6
<b>conducting</b> 27:7	<b>continue</b> 12:6	<b>cut</b> 24:1,13	<b>depose</b> 10:4 14:10,11,14 15:8 26:22,23
<b>confer</b> 10:2 12:13 19:2 22:1 25:24 26:5 27:16 30:18	<b>Cook</b> 44:2,5	<b>C.S.R</b> 2:4 44:15	<b>deposed</b> 13:1 14:6 27:11
<b>conference</b> 36:4	<b>copied</b> 24:6 31:8	<b>D</b>	<b>deposes</b> 44:4
<b>conferring</b> 35:14	<b>copies</b> 5:5	<b>data</b> 26:24 27:1,8 39:11	<b>deposing</b> 9:12 14:13
<b>confers</b> 35:6	<b>copy</b> 5:10	<b>date</b> 21:8,18 22:11 23:7,9 29:10 40:3	<b>deposition</b> 6:19 10:7,14 13:4,11 16:3 27:14 28:7 29:15 30:8 31:11 33:1,4
<b>confirm</b> 19:4 26:2,23 36:17	<b>correct</b> 36:18	<b>dated</b> 16:23,24	<b>depositions</b> 6:3 13:2,5,12 15:5
<b>confirmation</b> 17:18	<b>correspond</b> 20:16	<b>dates</b> 13:2 39:18	
<b>conjecture</b>	<b>correspondence</b> 8:14 40:3	<b>day</b> 22:13 29:13 41:20	
	<b>counsel</b> 8:2,14,19 12:10 15:19 15:23 18:24 19:4,18 21:5,16 23:8,9 26:2	<b>days</b> 23:10,11 24:13 25:6	
		<b>decide</b>	



28:23 33:3 34:1,1,18 35:3 <b>describe</b> 22:14 <b>describes</b> 12:10 16:24 <b>description</b> 8:17 12:17 23:20 24:3 <b>detailed</b> 8:1,16 23:20,20 24:2 <b>details</b> 17:22,22 33:7,17 <b>determining</b> 23:14 <b>different</b> 6:1,2,19 14:2 16:16 20:1 25:20 <b>diligence</b> 7:8 9:5 12:16 20:14 21:20,21 23:4 25:7 25:13 39:7,11 <b>diligent</b> 23:15,16 31:3 <b>diligently</b> 20:12 25:15 <b>directed</b> 24:24 <b>directly</b> 8:18 <b>disagree</b> 14:8 40:15 <b>disclosure</b> 6:15 7:24 8:1 23:22,22 <b>discovery</b> 5:4,9,16,17,18 12:14 12:18 14:22 35:16,19 38:22 <b>discussed</b> 31:12 <b>discussion</b> 12:3 16:7 38:3 39:22 <b>document</b> 7:2 10:10,11 11:12,14 11:20,21 16:12 17:20 19:13 20:1 21:3,7	24:17 28:24 30:5,6 37:12,14 39:15,23 40:7,16,17 <b>documents</b> 6:8,9,12,17,20,22 7:1 7:3,10,18 8:1,13 9:3 9:4,12,21 10:18,23 11:12 13:23 14:20,24 15:1 17:4,16 18:15 20:16,18 21:7 22:9 24:13 25:12,13,15,16 25:17 26:16 28:1,13 30:2,10,15 33:1,2,5,8 33:24 34:17 37:6 42:18 <b>doing</b> 16:18 24:20 31:3 <b>Douglas</b> 3:17 4:9 <b>draft</b> 22:21,23 23:2,10 24:10,19 30:21 31:1 31:4,10 39:21 <b>drafting</b> 23:8 39:9 <b>Drive</b> 3:8 44:17 <b>drop</b> 20:6,9 26:2 <b>due</b> 14:12 <b>duly</b> 44:3 <b>Durham</b> 3:14 <hr/> <b>E</b> <hr/> <b>earlier</b> 7:24 22:23 24:7 39:5,7 <b>early</b> 35:23 <b>easier</b> 5:12 <b>easy</b> 9:17	<b>EATINGER</b> 2:4 44:3,15 <b>effect</b> 13:9 <b>effective</b> 34:2 <b>efficiency</b> 14:12 <b>efficient</b> 34:2 <b>effort</b> 42:19 <b>either</b> 33:2 40:22 <b>embedded</b> 24:23 <b>Emperor</b> 3:13 <b>emphasize</b> 35:17 <b>engineering</b> 25:9 29:20 32:18 <b>entire</b> 10:13 <b>entitled</b> 2:10 <b>Eric</b> 26:3 <b>especially</b> 14:12 17:20 <b>establish</b> 35:19 <b>et</b> 26:18 <b>everybody</b> 35:9 <b>evidence</b> 9:10 27:13 30:13 32:14 44:11 <b>exactly</b> 12:18 <b>example</b> 7:16 10:21 17:10 19:11 24:22 <b>exchanged</b>	40:4 <b>executives</b> 25:11 <b>exhibit</b> 4:23 8:6 11:14 16:22 17:21 20:16 <b>exhibits</b> 5:6 13:17,17 17:3 37:5 38:7 <b>exist</b> 17:17,19 18:12 19:1,5 26:1 27:17 30:19 <b>existence</b> 30:12 <b>expected</b> 12:18 <b>expedition</b> 12:11,22 14:15 15:24 <b>expeditious</b> 38:1 <b>experiment</b> 7:14 17:8,14 27:1 <b>experiments</b> 7:10,19 8:23 13:21,22 16:23 17:5,9,11,12 18:5 26:14,14,16,21 <b>explain</b> 24:12 <b>explore</b> 27:13 <b>extent</b> 17:16 39:3,10 <b>extra</b> 24:14 <b>e-mail</b> 21:16 23:1,9 24:18 30:23 38:8,9 <b>e-mails</b> 31:5 <hr/> <b>F</b> <hr/> <b>fact</b> 6:8 10:17 14:6 22:5 31:13 40:19 <b>factors</b>
--	---	--	---

9:17 23:14 28:16,20 28:21 29:3,19 34:8 35:2,19 38:23 <b>fail</b> 29:2 <b>failing</b> 28:16 34:7 <b>fails</b> 29:18 34:14 35:1,3 <b>fair</b> 27:9 <b>fall</b> 39:24 <b>falling</b> 34:6 <b>falls</b> 12:19 <b>far</b> 16:21 <b>February</b> 2:9 5:23 <b>feels</b> 15:6 27:23 <b>field</b> 22:13,13 <b>file</b> 4:23 5:3,16 8:19 19:20 20:9 21:4,23 32:9 35:15 36:2,8,23 <b>filed</b> 5:6 20:3 21:11,12 24:4 35:22 <b>filing</b> 20:20 <b>Final</b> 24:4 <b>finally</b> 8:21 9:24 11:4 18:13 25:22 30:17 32:17 <b>find</b> 16:3 29:10 34:19 <b>finding</b> 12:20 28:18 34:13 <b>fine</b> 20:23 37:23	<b>first</b> 5:9 6:3,5,11 7:2 10:4,9 11:14 12:4 14:9 15:14 16:19 21:8,19 22:23 23:3,10 24:17 28:16,20 29:1,3,11 29:19 31:17,21,22 34:7 35:2 36:15,21 37:3 39:19 44:3 <b>fishing</b> 12:11,21 14:2,15 15:24 16:4 27:4 28:15 29:18 <b>Flash</b> 20:6 <b>flow</b> 7:17 <b>focus</b> 19:7 <b>follow</b> 5:13 <b>follow-up</b> 41:7 <b>force</b> 11:1 <b>foregoing</b> 44:8,9 <b>Form</b> 25:9 29:21 <b>formal</b> 18:21 19:8,9,13 27:15 27:19 28:10 <b>forth</b> 6:1 30:16 <b>forward</b> 13:11 25:9 29:20 32:18,18 <b>forwarding</b> 5:11 <b>found</b> 28:19 34:14 <b>four</b> 20:22 <b>France</b> 1:7 4:4,18	<b>frankly</b> 15:23 <b>front</b> 33:5,9 <b>full</b> 9:10,11 <b>fully</b> 9:13 33:6 <b>further</b> 29:18 41:22 42:8,10 <b>Furthermore</b> 9:22 <b>future</b> 42:20 <hr/> <b>G</b> <hr/> <b>gained</b> 13:24 26:12 27:3 <b>gamesmanship</b> 15:7,18 <b>Garmin</b> 9:16 28:16,20,21 29:3 29:19 34:7,15 35:2 35:18 38:13,22 41:8 <b>general</b> 8:11 <b>generally</b> 22:14 37:13,20 <b>getting</b> 34:17 <b>GILSON</b> 3:2,7,12 <b>give</b> 6:24 10:13 11:4,5 <b>gives</b> 8:18 <b>giving</b> 11:7 <b>go</b> 5:23 8:7 12:8 13:11 15:13 16:13 18:18 28:11 33:2 34:4 35:5 35:18 36:4,24 37:14 37:18 38:1 <b>goes</b>	27:20 39:2,6 <b>going</b> 6:18 7:6 10:16,23 13:5 14:9 15:2 16:2,3 29:11 33:7,10,11,15 33:17,19 34:11,19 35:5,15 36:1,9 41:16 <b>Good</b> 4:8 <b>grouped</b> 16:16 25:11 <b>guess</b> 18:10 36:3 <hr/> <b>H</b> <hr/> <b>half</b> 32:4,6 <b>Haluk</b> 6:5,7 11:10 14:14 27:6 <b>handful</b> 20:22 <b>handle</b> 22:6 <b>happened</b> 28:2 29:7 <b>happy</b> 4:19 5:23 6:21 8:6 12:2 <b>Harry</b> 13:12,15,15,21 26:18 26:22 27:6 31:8 <b>hear</b> 12:1 37:17 <b>helps</b> 42:3 <b>he'll</b> 26:23 30:7 <b>hold</b> 16:6 19:24 20:5,8,11 21:4 35:5 <b>holding</b> 16:11 35:8 41:6 <b>hole</b> 27:12 <b>Honeywell</b>
--	--	--	--

1:11 6:9,23 7:11,21 7:22 8:21 9:6,9,18,21 10:3 11:13 14:22 17:18 18:2,6,24 19:4 19:15 20:12,24 21:8 21:12,16,22 22:2,7 22:17,24 23:7 24:16 25:2,10,12,14,24 29:1,5,10 31:22 32:8 32:16,19 34:23 38:8 40:9 <b>Honeywell's</b> 6:17 21:18 24:7 26:1 <b>Honor</b> 4:5,17,24 5:22 16:9,15 35:10,12,23 37:1,23 38:6 39:14 41:12 42:1,24 43:1 <b>Honorable</b> 2:6,7,8 4:1,6,11,14,21 5:1 8:10 12:5 14:3 15:11,13 16:5,11 26:6 31:15 34:4 35:4 35:8,13,24 36:13,16 36:19 37:21,24 38:4 39:12 40:5,21 41:2,6 41:13,15 42:4,7,12 <b>Honors</b> 8:9 12:1 21:9 34:3 36:11 37:4,17 41:1,4 42:10 <b>hope</b> 42:19 <b>hurry</b> 32:8	<b>included</b> 26:19 <b>including</b> 13:11 <b>indicated</b> 15:19 18:24 30:18,22 <b>indicating</b> 11:20 <b>indication</b> 31:4 <b>individual</b> 6:14 <b>inefficient</b> 11:3 <b>information</b> 4:19 7:6 13:6,15 22:5 24:6 25:3 28:22 30:15 32:15 <b>initial</b> 39:21 <b>initiative</b> 38:18 <b>inspected</b> 37:14 <b>inspection</b> 25:1 <b>instructions</b> 7:9,19 17:6 <b>insufficient</b> 30:16 33:4 <b>interesting</b> 12:23 <b>interests</b> 9:19 19:22 35:20 <b>INTERNATIONAL</b> 1:11 <b>invention</b> 6:15,16 7:7,7,23,24 18:3 19:22 20:10,13 21:1,3 23:22 25:18 31:24 32:23,23 <b>inventions</b> 19:14 <b>inventor</b> 6:12 9:8 11:11 13:12	15:20 22:22 23:21 <b>inventors</b> 6:6 9:7 14:11 15:16,17 15:21 19:19 24:15,24 <b>inventor's</b> 17:14 <b>investor</b> 6:11 <b>invited</b> 12:12 <b>involvement</b> 14:18 <b>in-house</b> 19:18 <b>IPR</b> 15:15 <b>IPRs</b> 15:7 <b>IPR2012-1</b> 38:14 <b>IPR2015-001915</b> 4:2 <b>IPR2015-00915</b> 1:14 <b>IPR2015-00916</b> 1:15 <b>IPR2015-00917</b> 1:15 <b>irrelevant</b> 32:22 <b>issue</b> 21:20 31:21 36:15,22 37:8 38:12 39:7 41:18 <b>issues</b> 12:15 28:4 41:22 42:8 42:15	<b>JO-ANNE</b> 2:6 <b>July</b> 17:1 18:7 19:10,12 20:17 27:20 28:2,3 28:10 <b>Jumping</b> 31:19 <b>justice</b> 9:19 35:20
<hr/>			
<b>K</b>			
<hr/>			
<b>K</b>			
3:7			
<b>keep</b>			
8:10			
<b>key</b>			
9:4 10:18 14:19 19:24			
19:24 33:1			
<b>knew</b>			
22:17 32:3			
<b>know</b>			
12:12,13 15:14 21:9			
22:13,17 25:17 27:21			
27:23 28:15 29:8			
30:4 31:7 33:14,17			
34:6,22 36:5 39:20			
41:20			
<b>knows</b>			
37:13			
<b>KOH</b>			
7:16			
<b>KOKOSKI</b>			
2:7 4:1,6,11,14,21 5:1			
8:10 12:5 14:3 15:11			
15:13 16:5,11 26:6			
31:15 34:4 35:4,8,13			
35:24 36:13,16,19			
37:21,24 38:4 39:12			
40:5,21 41:2,6,13,15			
42:4,7,12			
<hr/>			
<b>L</b>			
<hr/>			
<b>lab</b>			
9:1 16:20,22 17:7,11			

17:19,24 18:16 26:10 27:4,7 33:14 34:9 <b>laboratory</b> 8:22 <b>law</b> 40:9 <b>lead</b> 6:11 8:15 22:22 <b>learn</b> 10:4 <b>learned</b> 29:11 <b>left</b> 39:15 <b>letter</b> 5:24,24 22:21 <b>Let's</b> 16:12 36:22 38:1 <b>level</b> 8:11 <b>License</b> 44:16 <b>limit</b> 15:5 36:18 <b>line</b> 4:12,16 16:6 35:9 37:11,13 <b>lines</b> 22:12 26:9 <b>LIONE</b> 3:2,7,12 <b>listed</b> 6:12,14 8:4 <b>listening</b> 12:9 37:3 <b>lists</b> 7:3 <b>litigation</b> 9:23 <b>little</b> 5:12 17:1 24:14 <b>LLP</b> 3:17 <b>log</b> 22:7,8,12	<b>long</b> 19:3,4 23:20 38:15 <b>look</b> 9:3 11:6 23:6,16 27:4 34:9,9 38:22 <b>looking</b> 9:23 20:15,17,24 22:4 22:10 24:21 37:8 <b>looks</b> 15:1 23:13 <b>lot</b> 20:21 24:6 42:15 <hr/> <b>M</b> <hr/> <b>M</b> 2:6 3:18 <b>Main</b> 3:3 <b>majority</b> 6:8 <b>making</b> 27:21 <b>March</b> 11:15 <b>material</b> 31:14 39:10 <b>matters</b> 33:8 <b>mean</b> 9:13,14 10:11,22 16:2 33:19 <b>means</b> 20:3,8 <b>meet</b> 10:2 12:13 19:2 22:1 25:24 26:5 27:16 30:18 <b>meeting</b> 19:13,18 20:17 21:15 <b>meetings</b> 18:21,24 19:6 20:19 20:21,22 <b>mentioned</b> 26:13 <b>mere</b>	12:20 28:15,17,18 30:11 31:23 32:12 34:12,13 <b>merely</b> 39:17 <b>met</b> 20:22 34:16 <b>Michigan</b> 3:4 <b>middle</b> 20:8 31:20 <b>minimizing</b> 15:9 <b>minutes</b> 18:20,21 19:8,10 27:15,17,19 28:3,11 <b>Miranda</b> 3:18 4:9 <b>miranda.sooter@al...</b> 3:21 <b>model</b> 7:12,22 <b>moment</b> 16:6 37:15 <b>month</b> 17:21 <b>monthly</b> 7:5 26:17 <b>months</b> 20:3,4,9,23 <b>Morris</b> 29:22 30:7 33:17 <b>motion</b> 5:3,4,8,16 35:16,21 36:2,8,23 41:17 <b>move</b> 16:12 <hr/> <b>N</b> <hr/> <b>name</b> 6:17 <b>named</b> 6:5,11 9:8 11:11 <b>Nancy</b> 2:4 4:13 44:3,15	<b>narrowed</b> 37:6 <b>necessarily</b> 8:24 10:12,15 <b>need</b> 6:4 12:14 13:4 14:21 30:14 33:24 35:17 38:22 <b>needs</b> 31:6 <b>neither</b> 37:10 <b>non-declarants</b> 6:4 <b>normally</b> 38:16 <b>North</b> 3:8,14,19 <b>Notary</b> 2:4 44:16 <b>note</b> 42:2 <b>notebook</b> 8:22 9:1 16:22 17:11 17:24 33:14 <b>notebooks</b> 16:20 17:7,19 18:17 26:11,15,24 27:5 34:10 <b>noted</b> 7:24 <b>notes</b> 11:16 17:11 18:20,23 19:1,3,5,13 24:23 27:17 28:8,10 <b>number</b> 6:20 13:4 15:5,9 22:10 41:10 <b>numbers</b> 8:6 42:2 <hr/> <b>O</b> <hr/> <b>objections</b> 22:3 <b>obscure</b>
--	---	---	--

14:16 <b>obtained</b> 27:18 <b>obviously</b> 14:7 17:16 <b>occurred</b> 11:17 <b>offering</b> 15:3 <b>Office</b> 1:1 2:6 <b>oh</b> 32:8 36:19 <b>okay</b> 4:21 8:12 14:3 15:11 16:5 22:17 25:14 26:6,8 35:4,24 36:16 36:21 37:20,22,24 39:12 40:5,21 41:15 <b>once</b> 4:21 12:7 24:9 <b>ones</b> 27:7 30:22 <b>opinion</b> 38:24 <b>opposition</b> 36:9 <b>order</b> 5:23 8:2 36:1,3 41:18 <b>original</b> 11:8 33:4,14 <b>outside</b> 8:2,14,19 21:5,16 23:7 23:9 32:10 39:9 <b>overview</b> 6:24 <b>owner</b> 1:12 3:22 4:7,20 5:5,6 5:7,11 12:8 26:7 27:10 35:10 36:7,16 37:15,21 39:13 40:14 41:2,3 42:8 <b>o'clock</b> 2:9	<b>P</b> <b>page</b> 22:20 31:21 42:2 <b>pages</b> 8:22 9:1 36:5,20 <b>panel</b> 16:7 35:6,14 <b>paper</b> 23:23 25:10 29:21 32:19 34:9 38:14 41:10,12,13 42:2 <b>papers</b> 25:19 <b>parameters</b> 7:14 17:12 <b>Park</b> 3:13 <b>part</b> 13:9 19:6 <b>particular</b> 23:18 40:12 <b>particularly</b> 6:7 21:20 <b>parties</b> 37:8 42:15 <b>party</b> 5:16 37:10 <b>paste</b> 24:13 <b>pasted</b> 24:2,6 <b>patent</b> 1:1,4,12 2:5 3:22 4:7 4:20 5:5,6,7,11 12:8 18:21,23 19:6,12,17 19:20,23 20:18 21:2 21:10,15,17 22:21 23:2,8,11,15,16 24:12,19 25:5,19,21 26:7 27:10 30:21 31:1,4,10 35:10 36:7 36:16 37:15,21 39:9 39:13 40:14 41:2,3 42:8 <b>people</b>	14:17 31:3 <b>peppered</b> 31:13 <b>percentage</b> 7:16 <b>period</b> 11:2 31:3 39:8 <b>permit</b> 7:1 <b>person</b> 6:14 8:5 <b>pertinent</b> 28:4 <b>petitioner</b> 1:8 3:16 4:3 5:2,10,20 12:12 13:1 14:4 16:13 26:9 31:16 35:11,15 36:24 37:13 38:5 40:6,23,24 41:7 41:22 <b>petitioner's</b> 5:8 13:9 16:12 36:22 <b>Phone</b> 44:18 <b>pick</b> 40:10 <b>picking</b> 39:14 <b>picture</b> 9:10,11 <b>place</b> 28:10 29:24 30:3,4,24 32:20 33:16,18 34:23 39:19 <b>Plaza</b> 3:8 <b>please</b> 4:22 8:17 16:6 <b>pleased</b> 39:21 <b>plural</b> 17:9 <b>point</b> 7:13 10:2 12:23 21:6 22:20 25:23 32:21,21	33:23 38:13 39:11 40:22 <b>pointed</b> 25:14 <b>pointing</b> 32:19 <b>points</b> 16:19 18:16,18 25:8 26:10 29:22 32:24 <b>POLLACK</b> 2:8 <b>portion</b> 37:11 38:7,9 40:16,17 <b>portions</b> 18:19 <b>position</b> 6:18 <b>possession</b> 18:3 <b>possibility</b> 12:20 18:11 28:17 34:12 <b>practice</b> 6:16 7:8,11,21 8:5 9:5 12:16 17:10 18:4,7 20:14 21:22 23:5 32:1,7 <b>prefer</b> 8:9 <b>preferable</b> 5:24 <b>preparation</b> 8:3 <b>prepare</b> 21:17 23:11 <b>prepared</b> 13:14,19 27:5,6 39:17 39:23 40:2 <b>preparing</b> 8:16 13:14 <b>present</b> 3:1 9:9 <b>pressures</b> 41:21 <b>presumably</b>
---	---	--	---

18:14 <b>pretty</b> 31:16 <b>primary</b> 9:20 14:18,19 15:2 <b>prior</b> 21:9,10 <b>priority</b> 24:8 <b>privilege</b> 22:4,7,8,12,14 24:17 24:20 31:14 38:11,17 38:19,21 39:20,24 41:9 <b>privileged</b> 22:5 40:16,17 <b>problem</b> 10:8 <b>proceedings</b> 2:3 44:6,8,11 <b>produce</b> 5:5 9:17 18:9,14 23:2 27:19 <b>produced</b> 19:10 22:24 26:16 27:2 <b>produces</b> 22:7 <b>project</b> 6:13 7:1,3 <b>proposition</b> 40:10 <b>protect</b> 20:10 <b>prove</b> 13:18 <b>provide</b> 6:6 8:6 39:21 <b>provided</b> 5:10 40:9 <b>provides</b> 7:6 9:6 31:23 <b>providing</b> 39:22 <b>provisional</b>	22:24 24:1,4,9,10 39:4 <b>public</b> 2:4 21:14 32:6 44:16 <b>publication</b> 21:14,19,23 29:5 32:6 <b>published</b> 34:22 <b>pure</b> 29:7,14 34:18 <b>purely</b> 12:11 34:21 <b>purported</b> 19:22 21:1 <b>purpose</b> 4:23 <b>pursuant</b> 2:4 <b>pursuing</b> 20:13 <b>put</b> 12:24 35:5 <b>putting</b> 33:9 <b>p.m</b> 2:9 <hr/> <b>Q</b> <hr/> <b>question</b> 10:10 29:8 33:6 41:8 <b>questions</b> 10:5,15,21,24 11:5,19 24:23 31:9 33:11,12 36:13,14 <b>quote</b> 6:13 8:20 15:18 16:1 38:15 <hr/> <b>R</b> <hr/> <b>R</b> 3:12 <b>raised</b> 28:4 <b>rate</b> 7:17 <b>rdemille@brinksgil...</b>	3:10 <b>reactor</b> 7:17 <b>read</b> 37:10,15 38:14,15 <b>ready</b> 4:22 <b>really</b> 6:4 9:4 11:2 12:10,21 15:1 19:7 25:4 32:13 33:24 37:7 38:23 <b>reason</b> 5:18 14:8,21 15:4 26:13 <b>reasonably</b> 23:15 <b>reasons</b> 6:19 10:9 12:14 23:5 <b>recall</b> 37:4 <b>receive</b> 5:9 17:18 <b>received</b> 16:21 44:11 <b>recess</b> 16:10 35:7 41:5 <b>record</b> 2:3 37:10,15,16,18 38:2,3,4 <b>records</b> 25:23 26:4 30:17,19 <b>redact</b> 25:3 <b>redacted</b> 37:5,11,19 38:7,9 39:24 <b>redaction</b> 37:7 <b>redactions</b> 20:23 42:16 <b>reduced</b> 6:16 8:5 20:14 31:24 <b>reduction</b> 7:8,11,20 9:5 12:16 18:4,7 21:21 23:4	32:7 <b>references</b> 21:10 27:22 <b>refrain</b> 37:18 <b>refresh</b> 33:6 <b>regard</b> 42:16 <b>regarding</b> 11:23 14:6,15 <b>regards</b> 41:16 <b>relate</b> 25:18 <b>related</b> 18:15,16 25:21 34:11 <b>relates</b> 7:8 12:15 23:4 <b>relationship</b> 39:4 <b>relevance</b> 23:3 29:17 40:2,2 <b>relevancy</b> 5:18 <b>relevant</b> 6:18 9:15 18:1,8 19:11 20:11 21:20,24 23:12 25:6 26:12 33:22 39:2,5,11 <b>relied</b> 6:23 7:10 <b>relies</b> 6:9 9:21 <b>relying</b> 11:13 18:6 30:11,11 <b>remember</b> 19:17 33:10,15,18,20 33:20 <b>remind</b> 5:15 <b>removed</b> 26:4 <b>renew</b> 10:6
---	--	---	--

<b>reply</b> 36:10	38:5	<b>secrets</b> 20:10	<b>sets</b> 19:9
<b>reported</b> 44:7	<b>Rickard</b> 3:7 4:5	<b>section</b> 6:3 24:1	<b>setup</b> 10:8
<b>reporter</b> 4:12,13,15,18 37:11 44:5	<b>right</b> 4:14 5:1 15:8 21:14 25:2 32:2 34:18	<b>sections</b> 6:2 16:16 18:22	<b>short</b> 20:4 38:15
<b>reporting</b> 44:5	<b>roadmap</b> 11:5	<b>see</b> 23:13 24:2,5,9,10 25:4 31:6	<b>shorthand</b> 44:4,7
<b>reports</b> 7:5 13:14 26:17,18	<b>ROBERT</b> 2:8	<b>seeing</b> 25:16	<b>shortly</b> 14:10 41:19,19
<b>request</b> 9:22 10:6 14:21 16:13 19:7 21:7 25:9 26:3 29:21 36:22	<b>Rose</b> 3:17 4:8,8 10:3 12:9,9 15:12,14 16:8 26:8 34:3,5 35:10 36:12 36:17 37:23 39:14 40:14 41:3 42:10 43:1	<b>seek</b> 5:3	<b>show</b> 7:11,21 12:18 13:20 18:2 21:7 25:15,19 29:1,4,23 30:23 31:5 32:14 34:10 39:16,18 40:3
<b>requested</b> 4:18 5:2 23:7 30:9 32:10 35:15	<b>routine</b> 38:21	<b>seen</b> 40:8	<b>similar</b> 20:18,23 22:6 26:9
<b>requesting</b> 5:15 11:24 16:21 17:15	<b>Rules</b> 2:5	<b>Selma</b> 6:5,7,7,10,18 7:3,14 8:4,15,17,18 9:2,8,11 9:12 10:6,7,12,17 11:5,12 13:13,16 14:2,14 22:22 23:1 23:21 24:3 27:6	<b>similarly</b> 34:20 42:21
<b>requests</b> 5:10 6:3 12:2 14:9	<b>run</b> 17:12		<b>simply</b> 29:23 30:23
<b>Research</b> 3:13	<hr/> <b>S</b> <hr/>	<b>send</b> 21:5 24:14	<b>situation</b> 19:3
<b>resolve</b> 42:21	<b>Sadat</b> 21:8,14	<b>sending</b> 23:1 24:19	<b>six</b> 32:9
<b>respect</b> 8:16 11:10 32:17 41:8 41:21	<b>satisfy</b> 28:2	<b>sense</b> 12:3,6	<b>skipped</b> 30:21
<b>respond</b> 15:12 31:18 34:3	<b>saying</b> 9:14 29:10 34:6,8 37:19	<b>sent</b> 8:2 21:16 22:21 23:9 24:3 32:10	<b>small</b> 22:10
<b>responds</b> 28:12	<b>says</b> 8:17 15:20 16:1 19:24 20:1,3 30:4 44:4	<b>sentence</b> 37:16,19 39:1 40:12	<b>snippets</b> 9:10
<b>response</b> 5:7 12:15 14:4 26:7 39:13	<b>schedule</b> 14:13 41:21	<b>September</b> 25:10 32:1,2	<b>Sooter</b> 3:18 4:10
<b>responsibility</b> 6:13 7:4	<b>scratch</b> 23:19	<b>serial</b> 24:8	<b>sorry</b> 28:3 30:20 32:2
<b>rest</b> 9:16	<b>second</b> 9:7 20:5 22:20 25:22	<b>series</b> 8:13	<b>sought</b> 5:19 13:2 28:6
<b>results</b> 17:13,14 26:14,15,21 26:24	<b>secondly</b> 24:21	<b>session</b> 11:16,19	<b>South</b> 3:3,18 44:17
<b>resume</b>	<b>Secret</b> 20:7	<b>set</b> 6:1,1 15:7 19:7 30:16	<b>speak</b> 9:19 11:8
			<b>speaking</b> 9:11
			<b>specific</b>

33:12 <b>specifically</b> 31:18 35:2 <b>speculation</b> 13:8 29:7 31:23 32:13 34:19 35:1 <b>spoke</b> 10:3 <b>spot</b> 18:14 <b>spurred</b> 21:22 29:5,12 34:23 <b>spurring</b> 29:13 31:21 32:13,14 34:20 <b>squarely</b> 34:7 <b>ss</b> 44:1 <b>stand</b> 13:17 25:6 27:10 <b>standard</b> 17:10,19 <b>start</b> 16:19 23:8 26:10 <b>started</b> 5:14 <b>starting</b> 7:16 <b>STATE</b> 44:1 <b>statements</b> 30:7 <b>States</b> 1:1 2:5 <b>stating</b> 34:12 <b>status</b> 21:2 25:5 <b>steps</b> 11:1 25:19 31:2 <b>stored</b> 18:14,15 <b>straightforward</b> 9:22	<b>strategy</b> 9:23 <b>Street</b> 3:3,18 <b>strokes</b> 33:19 <b>stuck</b> 33:3 <b>submit</b> 15:22 32:16 40:19 <b>submits</b> 15:21 <b>submitted</b> 11:15 24:18 26:18 27:2,9,11 28:1,8 30:23 31:5 38:8,18 40:8 <b>submitting</b> 15:15,17 38:9 <b>substance</b> 30:1 31:1 39:16 <b>substantive</b> 11:14 <b>suddenly</b> 32:8 <b>sufficient</b> 21:7 29:1 30:13 <b>suggested</b> 10:3 <b>Suite</b> 3:3,8,19 44:17 <b>Sumner</b> 26:3 <b>support</b> 30:2 32:14 40:10 <b>supporting</b> 15:20 <b>sworn</b> 44:3 <hr/> <b>T</b> <hr/> <b>table</b> 19:24 <b>take</b> 15:6 16:2 28:7,22	31:11 32:24 33:3,24 41:17 <b>taken</b> 2:3,9 13:3 16:10 19:5 29:16 35:7 41:5 <b>takes</b> 17:11 <b>talk</b> 6:4 12:2 19:19 37:19 <b>talked</b> 22:22 39:7 <b>talking</b> 12:6 23:3 31:21 33:13 <b>talks</b> 39:2 <b>tech</b> 8:15 <b>technician</b> 17:13 <b>technicians</b> 17:6 27:4 <b>technology</b> 7:5 25:20 26:17 <b>techs</b> 27:7 <b>Telephonic</b> 2:3 <b>tell</b> 17:6 33:21 <b>temperature</b> 7:17 <b>terribly</b> 29:3 <b>test</b> 33:12 <b>testify</b> 13:22 <b>testimony</b> 11:8,9 13:23 <b>thank</b> 4:6,11,14,24 5:1,11,21 8:12 14:3 15:11 16:5 16:9,11,15 26:6 31:15 35:4,8,11,13 36:11,12 37:1,3 38:6	39:12 40:5,24 41:3,6 41:15,24 42:4,5,11 42:12,22,24 43:1 <b>thereof</b> 17:13 <b>thing</b> 12:23 18:5 <b>things</b> 7:18 20:2 25:16 33:13 39:3 <b>think</b> 8:10 10:13,19 11:18 12:5,17,19 13:10,16 14:23 15:5,6,23 17:23 18:10 21:17,24 22:6 23:12 24:19,24 26:11 27:9 28:13,14 28:19 29:2,18 34:5 34:16 35:21 36:21 39:19 40:1 <b>thinking</b> 14:1 32:18 <b>thinks</b> 27:12 <b>third</b> 11:11 20:6 28:21 29:19 35:3 <b>thorough</b> 31:16 <b>thoughts</b> 17:14 <b>three</b> 20:1,3,4,9,22 <b>time</b> 7:7,13,17 11:2,6 14:11 17:8 18:3 20:19,19 21:14 23:6 25:1,23 26:3 30:12,17,24 31:17 35:13 36:10 38:15 40:15 41:21 42:18 <b>timeline</b> 31:22 <b>times</b> 29:24
--	---	--	--



<b>timing</b> 21:13	<b>Tung's</b> 11:7	<b>usefulness</b> 23:4	5:8
<b>today</b> 4:12 26:2 36:2 41:23 42:9,13	<b>turn</b> 36:22	<hr/> <b>V</b> <hr/>	<b>we're</b> 4:18 9:23 11:24 13:5 14:9,16,17 16:20 17:15 20:15,17,23,24 22:4,10 24:21 26:4 27:21 29:11 30:11,11 31:2 33:7,11,13 35:14 37:8 41:16
<b>told</b> 30:20	<b>two</b> 5:5 6:1,1,5 11:1 16:19 18:16,18,18,22 22:8 22:9,13,20 25:8 29:21 37:6 42:17	<b>v</b> 1:9	<b>we've</b> 16:21 17:1 28:1 30:16
<b>tomorrow</b> 36:3,4	<b>type</b> 10:8 22:14,15	<b>various</b> 17:8 26:9,17 33:13	<b>White</b> 25:10 29:21 32:18
<b>top</b> 25:11	<b>types</b> 7:1	<b>vast</b> 6:8,20	<b>whittle</b> 42:17
<b>TORNQUIST</b> 2:7	<hr/> <b>U</b> <hr/>	<b>view</b> 10:16	<b>witness</b> 33:6,6,9,10,15
<b>touched</b> 39:8	<b>unaffected</b> 11:8	<hr/> <b>W</b> <hr/>	<b>witnesses</b> 14:16
<b>touches</b> 38:13	<b>understand</b> 5:2 9:13,18 22:2 24:16 25:23 32:19	<b>Wacker</b> 44:17	<b>words</b> 16:20 23:10
<b>trade</b> 20:6,10	<b>understanding</b> 19:2	<b>waived</b> 24:20 38:10,19,21	<b>work</b> 13:18,19 16:24 23:16 24:11 42:15
<b>Trademark</b> 1:1 2:6	<b>understood</b> 9:14	<b>waiver</b> 39:20 40:13 41:9	<b>working</b> 7:12,22 19:15 25:15
<b>transcribed</b> 44:8	<b>unduly</b> 9:24	<b>walk</b> 6:21	<b>works</b> 35:24 40:13
<b>transcript</b> 4:22 11:6 44:9	<b>United</b> 1:1 2:5	<b>walking</b> 9:16 31:2	<b>wouldn't</b> 9:24 18:13
<b>transmission</b> 31:9	<b>universe</b> 37:6	<b>want</b> 8:7,8 13:6 23:12 25:4 28:9 29:4,8 30:6 32:8	<b>wraps</b> 36:21
<b>transmitted</b> 39:17	<b>unquote</b> 15:18 16:1	<b>wanted</b> 36:17 40:22	<b>write</b> 10:22 11:12
<b>trial</b> 1:4 2:10	<b>unredacted</b> 5:5	<b>wants</b> 16:2	<b>written</b> 12:1 23:19
<b>Triangle</b> 3:13	<b>unusual</b> 14:23 15:15 17:20 40:18	<b>wasn't</b> 23:19,19 40:12	<b>wrong</b> 32:3
<b>true</b> 15:10 44:10	<b>unworkable</b> 11:3	<b>way</b> 13:13 15:7 22:6 38:1	<b>wrote</b> 7:9,14 23:21
<b>try</b> 16:17 26:8 27:13	<b>use</b> 39:10	<b>week</b> 35:23 36:2,7	<hr/> <b>Y</b> <hr/>
<b>trying</b> 9:9	<b>useful</b> 12:21 18:1,12 19:12 21:24 23:13 28:15,18 28:19 34:13,14	<b>weeks</b> 32:9,9	<b>Yeah</b> 34:5 36:17
<b>Tryon</b> 3:18		<b>welcome</b> 42:7	<b>year</b>
<b>Tung</b> 9:6 10:4,9,14,20 11:18 13:12,15 14:11,13 26:18 31:8		<b>went</b> 18:10	
		<b>We'll</b>	

8:23 16:23 17:2,21 32:1,4,6 <b>years</b> 32:5	<b>2012</b> 17:3 <b>2015</b> 17:4 <b>2016</b> 2:9 <b>2029</b> 16:22 17:21 <b>2032</b> 38:7 <b>2033</b> 38:7 <b>2042</b> 20:16,24 <b>24</b> 2:9 <b>27703</b> 3:14 <b>282</b> 19:23 21:2 25:18,21 39:4 <b>28280</b> 3:19	<b>41</b> 23:10,11 24:12 25:6 <b>41-day</b> 39:8 <b>444-1000</b> 3:20 <b>455</b> 3:8 <b>4721</b> 3:13 <b>48104</b> 3:4	
<hr/> <b>0</b> <hr/>			
<b>00916</b> 4:2 <b>00917</b> 4:2 <b>084-003451</b> 44:16			
<hr/> <b>1</b> <hr/>			
<b>10</b> 42:3 <b>101</b> 3:18 <b>12th</b> 28:3 <b>15</b> 6:22 36:5,19 <b>15th</b> 5:24 <b>15-page</b> 36:18			
<hr/> <b>2</b> <hr/>	<hr/> <b>3</b> <hr/>	<hr/> <b>5</b> <hr/>	
<b>2:30</b> 2:8 <b>20</b> 6:22 <b>200</b> 3:3 <b>2007</b> 11:15 <b>2008</b> 11:15 17:1 18:7 32:3 <b>2009</b> 16:24 25:9,10 32:1 <b>2010</b> 19:10,12 20:17 27:20 28:3,10 <b>2011</b> 17:3	<b>300</b> 44:17 <b>302-6000</b> 3:4 <b>311</b> 44:17 <b>312</b> 3:9 44:18 <b>321-4200</b> 3:9 <b>36</b> 38:14 41:12,13 42:2 <b>3600</b> 3:8 <b>386-2000</b> 44:18	<b>524</b> 3:3 <hr/> <b>6</b> <hr/> <b>60606</b> 44:18 <b>60611</b> 3:9 <hr/> <b>7</b> <hr/> <b>704</b> 3:20 <b>734</b> 3:4 <hr/> <b>9</b> <hr/> <b>9</b> 42:2 <b>919</b> 3:14 <b>998-5700</b> 3:14	
	<hr/> <b>4</b> <hr/>		
	<b>4000</b> 3:19		