

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE PATENT TRIAL AND APPEAL BOARD

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EAGLE VIEW TECHNOLOGIES, et al.,

Petitioner,

-vs

XACTWARE SOLUTIONS, INC., et al.,

Patent Owners.  
-----

Civil Action No. 1:15-cv-07025-RBK-JS

IPR2016-582, 586, 587, 589, 589, 590,

591, 592, 593 and 594  
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TELEPHONE HEARING BEFORE

JUDGE BRYAN MOORE

JUDGE STACEY WHITE

JUDGE HOWARD B. BLANKENSHIP

June 27, 2016

2:00 p.m.

Reported by: Cassandra E. Ellis, RPR, CLR, CSR

JOB NO. 16640

1                   TELEPHONE HEARING BEFORE JUDGE BRYAN MOORE,  
2   JUDGE HOWARD B. BLANKENSHIP, AND JUDGE STACEY WHITE,  
3   on JUNE 27, 2016, before Cassandra E. Ellis,  
4   Registered Professional Reporter, Certified Court  
5   Reporter, Certified Livenote Reporter, Realtime  
6   Systems Administrator, and Notary Public within and  
7   for the State of Maryland.

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EXHIBITS MARKED

(None)

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

2 JUDGE MOORE: Hello, this is  
3 Judge Moore. Before we get going  
4 can either party tell me if  
5 there's a reporter on the call?

6 MR. CUTRI: Good afternoon,  
7 Judge Moore, this is Gianni Cutri,  
8 for the patent owners, and we  
9 arranged to have a court reporter  
10 on the call.

11 JUDGE MOORE: Okay. And is  
12 the court reporter present?

13 THE REPORTER: Yes, I am.

14 JUDGE MOORE: A few things,  
15 then, before we get started, as is  
16 always the case with the reporter  
17 on the call, you want to identify  
18 yourself so it makes it easier for  
19 the reporter to know who's  
20 speaking. So identify yourself  
21 before you speak.

22 And also, if the party that

1 requested the reporter could  
2 obtain a transcript and file it in  
3 the case, we would request that  
4 you do that.

5 MR. CUTRI: We will do that,  
6 Your Honor.

7 JUDGE MOORE: Okay. All  
8 right.

9 This is the conference call  
10 for a number of cases, all  
11 IPR2016, and they list as 582,  
12 586, 587, 589, and I guess they  
13 are consecutive from that point  
14 on, 589 through 594, so it appears  
15 to be eight or nine cases, I can't  
16 make my count, here.

17 This conference was  
18 requested by petitioner. And the  
19 petitioner's requesting to file  
20 replies to the patent owner  
21 preliminary responses in each of those  
22 cases.

1                   And petitioner, before we  
2 get started -- actually, no, I'll let  
3 you go ahead.

4                   So since you requested the  
5 call -- oh, the roll call, since I  
6 heard the names, let's do the roll  
7 call of who's on the call, first for  
8 petitioner.

9                   MR. NIKOLSKY: Sure. Good  
10                  afternoon, Judge Moore. My name  
11                  is Mark Nikolsky, N-i-k-o-l-s-k-y.  
12                  I'm lead counselor for petitioner  
13                  Xactware Solutions, and on the  
14                  call with me are my backup counsel  
15                  Amit Parikh, A-m-i-t, P-a-r-i-k-h,  
16                  and Tim Homlish, H-o-m-l-i-s-h.

17                  JUDGE MOORE: Okay. And for  
18 the patent owner?

19                  MR. CUTRI: Good afternoon,  
20                  Judge Moore, this is Gianni Cutri,  
21                  C-u-t-r-i, for the patent owners,  
22                  Eagle View and Pictometry, and on

1 the phone with me is my partner,  
2 Jared Barcenas, B-a-r-c-e-n-a-s.

3 JUDGE MOORE: Okay. And  
4 just for me, is everyone who's on  
5 the call signed onto the case, in  
6 other words, are there any  
7 in-house or other people here on  
8 the call?

9 MR. NIKOLSKY: Not for  
10 petitioner, Your Honor.

11 MR. CUTRI: And not for  
12 patent owner.

13 JUDGE MOORE: Okay. So  
14 then, starting, as I said, with  
15 petitioner, if you could explain  
16 to us your position?

17 MR. NIKOLSKY: Sure. Thank  
18 you, Your Honor.

19 Your Honor, the reason why  
20 we had requested this call is that  
21 the petitioners, as you mentioned  
22 earlier, seek leave to file



1       replies to the patent owner's  
2       preliminary responses that were  
3       filed in each of these  
4       proceedings.

5               We believe that there is  
6       regulatory authority, under  
7       amended 37 CFR 42.23, which  
8       effected May 1st, provides that  
9       arguments raised -- that a  
10      response can be filed to arguments  
11      raised in corresponding opposition  
12      patent owner preliminary responses  
13      or patent owner responses.

14             And by virtue of that  
15      addition of the patent owner  
16      preliminary response as being  
17      evasive, we believe that it's  
18      permissible for us to issue this  
19      request.

20             We also are aware of 37 CFR  
21      42.108C, which provides that a  
22      petitioner may seek leave to file

1 a reply to a patent owner  
2 preliminary response only upon  
3 showing of good cause.

4 We believe that there is  
5 good cause that supports this  
6 application. And just by way of  
7 background, Your Honors, we  
8 initially sent an e-mail to the  
9 Board requesting that we have  
10 leave to go ahead and file the  
11 replies to the patent owner  
12 preliminary responses.

13 We were admonished for  
14 sending that e-mail by  
15 Mr. Kellogg. We thought that that  
16 was the appropriate mechanism for  
17 doing so, largely because 42.108C  
18 provides that a showing of good  
19 cause must be made.

20 So we certainly apologize if  
21 that was a misstep on our part.  
22 And we thank you for permitting us

1 to have this call.

2 As was requested --

3 JUDGE MOORE: Excuse me,  
4 yeah, let me just jump in here.

5 First of all, for the  
6 record, I don't believe I've  
7 mentioned, but Judge Blankenship  
8 and Judge White are also on the  
9 call.

10 MR. NIKOLSKY: Okay.

11 JUDGE MOORE: And to your  
12 earlier point, since you raised  
13 the point, from your comments I  
14 just want to make it clear that  
15 the point was that when requesting  
16 -- it's certainly fine for parties  
17 to request anything that they have  
18 a right to request, it's just the  
19 e-mail that goes to the staff  
20 should contain a short description  
21 of that request, especially in the  
22 case where you're asking to file a

1 substantive paper, including a  
2 great amount of assumptions that  
3 would be in the paper in some ways  
4 defeats the purpose of having the  
5 call. So that was the purpose,  
6 there.

7 And certainly we always  
8 remind the parties to confer  
9 before making any request or  
10 request for phone calls conferring  
11 on the dates that you're  
12 available, and also to confer as  
13 to the substance, even if you're  
14 pretty sure that the other side  
15 won't agree, it's important that  
16 you talk before we get on the  
17 phone.

18 So that's all that -- that  
19 we're -- the point that we were  
20 trying to make there.

21 MR. NIKOLSKY: Okay.  
22 Understood. And thank you, Your

1 Honor.

2 So in that -- in light of  
3 that, and as we were instructed by  
4 Mr. Kellogg, we went ahead and had  
5 a meet and confer phone call with  
6 opposing counsel wherein we  
7 discussed what the purpose of this  
8 phone call would be, and now we  
9 are applying to the Court for  
10 leave to seek replies -- to file  
11 replies to each of the patent  
12 owner preliminary responses.

13 Your Honors, we think that  
14 there are seven categories of  
15 issues that pervade all of the  
16 patent owner preliminary responses  
17 that fall into seven issues. And  
18 we believe that each of those  
19 issues provides adequate good  
20 cause, under 42.108C, to permit  
21 the petitioner to go ahead and  
22 file these replies.

1 I would like to just  
2 summarize for Your Honors, very  
3 quickly, what those issues are, I  
4 can also provide an example to  
5 Your Honors of each of these if  
6 Your Honors would like.

7 JUDGE MOORE: Yeah, that's  
8 fine. We'll take it as it goes,  
9 but certainly, you know, we don't  
10 want chapter and verse. But if a  
11 particular example would be  
12 helpful for the call, then we'll  
13 take it as it goes.

14 MR. NIKOLSKY: Sure, sounds  
15 good.

16 So beginning with the first  
17 issues, Your Honors, we think that  
18 the first reason that supported  
19 the cause would be inaccurate  
20 statements that were made by the  
21 patent owner regarding public  
22 accessibility of the Hsieh

1 reference, including -- and that's  
2 already on record regarding  
3 indexing of that reference and  
4 other indicia of public  
5 accessibility.

6 We believe that that arises  
7 in IPRs 582, 586, 587, 589, 590,  
8 591, 592, and 594.

9 And just by way of a quick  
10 example, Your Honors, in  
11 connection with the 586 IPR, the  
12 patent owner preliminary response  
13 on page 22 that, quote, There is  
14 no evidence that Hsieh was indexed  
15 or otherwise made accessible to  
16 the public, as required, end  
17 quote.

18 However, Your Honors, there  
19 is an index label that appears on  
20 the bottom side of the cover page  
21 of that Hsieh reference, in  
22 particular, its exact words, at

1       1004 in that same proceeding, on  
2       page 0001 of 0083, so we believe  
3       that that is an inaccurate  
4       statement that should be pointed  
5       out.

6               Additionally, there is other  
7       evidence regarding barcoding at a  
8       barcode label generated by the  
9       Carnegie-Mellon University  
10      library, and that barcode appears  
11      on page 0082 of 0083.

12             So we believe that that  
13      issue provides good cause for us  
14      to at least file a reply pointing  
15      out what the petitioner believes  
16      is evidence already of record for  
17      public accessibility of this  
18      reference. That's the first  
19      issue, Your Honor.

20             The second issue is what we  
21      believe is patent owner's  
22      misinterpretation of the internet



1 archives affidavit that was  
2 submitted in these proceedings in  
3 support of public accessibility of  
4 the AppliCad reference, and in  
5 addition we believe that there is  
6 citation of non-analogous case law  
7 regarding public accessibility of  
8 the AppliCad reference.

9 We believe that this appears  
10 in IPRs 582, 586, 587, 589, 590,  
11 591, and 592.

12 Just by way of one quick  
13 example, Your Honors, so for  
14 example, in the 589 IPR, in the  
15 patent owner preliminary response  
16 on page 14, the patent owner  
17 states that, quote, the  
18 petitioner's affidavit merely  
19 identifies the URL for the  
20 AppliCad reference.

21 Nowhere does the affidavit  
22 address whether the URL was made

1       available to interested persons  
2       with ordinary skill in the art,  
3       end quote.

4               We believe that that is an  
5       inaccurate statement because the  
6       affidavit that we did supply, from  
7       the way back machine, specifically  
8       states, and I'm quoting, that the  
9       archive data was made available  
10      and browseable by the way back  
11      machine, it compiles a software  
12      program named Crawlers, which  
13      services the web, and  
14      automatically stored copies of the  
15      web files, preserving these files  
16      if they existed from the point in  
17      time of capture.

18             So we believe that there is  
19      already clearly evidence of  
20      records that supports public  
21      accessibility evidence rule.

22             In addition, Your Honors, we

1 think that the case law that  
2 opposing counsels have cited on  
3 this issue -- we studied the SIR  
4 cases and the Calypso case, we  
5 believe that they're  
6 distinguishable.

7 They're completely,  
8 differently fact patterns. They  
9 do not in any way, shape, or form  
10 involve a way back declaration  
11 that was submitted by petitioner.

12 In accordance to that issue  
13 there is good cause for us to go  
14 ahead and file a reply to that  
15 issue.

16 The third issue, Your  
17 Honors, is with respect to prior  
18 Board decisions, which we believe  
19 support the public accessibility  
20 of the Pictometry in the R2D prior  
21 art references that were cited,  
22 and in particular this appears in

1 IPRs 590, 593, and 594, we believe  
2 that there is one case in  
3 particular that we would like to  
4 bring to the Court's attention,  
5 which supports public  
6 accessibility, and that is the  
7 international business machines  
8 which is incremental to the  
9 Ventures Two case decision from  
10 IPR2014-00681. And we think that  
11 that is very factually similar to  
12 what we have at issue with respect  
13 to these two user manuals, i.e.,  
14 the Pictometry user manual and the  
15 R2D user manual. And -- excuse  
16 me -- we believe that that is also  
17 a good cause to submit replies.

18 There is three -- I'm sorry,  
19 four other issues, which I will  
20 try to get through quickly.

21 The fourth issue, Your  
22 Honors, is what we believe is a

1 false statement by the patent  
2 owner that the petitioner concedes  
3 that the preambles of certain  
4 claims were limiting, that appears  
5 in IPRs 586, 589, 591, 592.

6 Just a very quick example,  
7 in 586 IPR, at page 51, the patent  
8 owner stated, quote, Petitioner  
9 concedes that the preambles in  
10 claims 1, 10, and 16 are limiting,  
11 and identified the aft record  
12 Hsieh, reportedly meaning the  
13 generating root estimate report  
14 access thereof.

15 And make a similar statement  
16 on 589 IPR, page 39, where they go  
17 so far to say that the petitioner  
18 asserts that the preamble in claim  
19 26 is limited.

20 We have made no such  
21 concessions or any statements  
22 regarding whether the preamble in

1 any of these claims are limiting.

2 So we believe that that is a false  
3 statement that should be brought  
4 to the Board's attention by way of  
5 reply.

6 Three more to go and I'm  
7 done. And again, I thank you for  
8 indulging me.

9 JUDGE MOORE: Okay. And now  
10 that we've gone through -- give me  
11 an amoeba of an idea, for  
12 instance, as you say, there are  
13 examples, I think, for the  
14 inaccurate statements or your  
15 alleged inaccurate statements  
16 about the Hsieh, that's the issue.

17 The issue that you have  
18 cited is the issue. There may be  
19 more arguments to make, but there  
20 is no other inaccurate statement  
21 about Hsieh except regarding  
22 public accessibility, correct?

1           MR. NIKOLSKY: Well, Your  
2 Honor, we think that there are  
3 other inaccurate statements, as  
4 well. And that was our sixth  
5 point on here. And we think that  
6 they are technically incorrect  
7 statements as to what this  
8 reference actually teaches.

9           And we would like the  
10 opportunity, in a reply brief, to  
11 brief on it, but just here's a  
12 very quick example, in -- on pages  
13 24 through 25 of the patent owner  
14 preliminary response, in 589 IPR,  
15 the patent owner states, quote,  
16 that Hsieh explicitly instructs  
17 those of skill in the art not to  
18 use that, and by "that" they meant  
19 the multi-image roof matching  
20 method or any other method other  
21 than single image building  
22 detection because the other

1 methods are more complex due to  
2 the combinatorics involved, end  
3 quote. That's the quote.

4 But Your Honor, Hsieh never  
5 instructs users to not use MIRM,  
6 it gives examples of MIRM and also  
7 SIDD, which is another mode of  
8 operation, which is single image.  
9 And it's more than single image,  
10 which I'll explain in one second.  
11 And that's clearly an inaccurate  
12 statement.

13 And Hsieh never says --  
14 never instructs the person to not  
15 use that mode of operation.

16 Just one other thing --

17 JUDGE MOORE: Okay. And  
18 sorry.

19 MR. NIKOLSKY: Go ahead.

20 JUDGE MOORE: I didn't get  
21 where I wanted to go because I  
22 used a bad example.



1 MR. NIKOLSKY: Okay.

2 JUDGE MOORE: But what I'm  
3 saying is as you list these seven  
4 examples, seven examples, I'm  
5 trying to get a sense of what  
6 more, besides what you're telling  
7 me now, I would expect to see in a  
8 brief.

9 MR. NIKOLSKY: Oh, sure,  
10 Your Honor.

11 JUDGE MOORE: Exactly. So I  
12 can understand, you know. A  
13 patent owner will have a chance to  
14 respond, here.

15 MR. NIKOLSKY: Yes.

16 JUDGE MOORE: But I just  
17 want to get a sense of the scope  
18 of what we're talking about in  
19 terms of what your paper would  
20 include.

21 MR. NIKOLSKY: Understood.

22 JUDGE MOORE: So talk about,

1       number one, my point is that in  
2       number one defines the issue, in  
3       other words, it's not a general  
4       statement. And then there are  
5       other public accessibility issues.  
6       Number one, it's complete as to  
7       what the issue is.

8               Do you get what I'm saying  
9       now?

10              MR. NIKOLSKY: I understand.  
11       I understand, Your Honor, yes.  
12       Number one is complete as to that  
13       issue.

14              JUDGE MOORE: Right. And so  
15       forth, through the ones that we've  
16       discussed --

17              MR. NIKOLSKY: Yes.

18              JUDGE MOORE: -- so far?

19              MR. NIKOLSKY: That's  
20       correct, Your Honor.

21              And, in fact, what we had  
22       done, at the request of opposing

1       counsel, prior to our meet and  
2       confer call, is opposing counsel  
3       had requested that we identify in  
4       every one of the PLPRs every  
5       example that we believe supports  
6       these categories.

7               We're not saying it goes  
8       beyond the category, we're just  
9       saying the actual category,  
10      itself. We went and did that, and  
11      we sent over to opposing counsel  
12      the complete list, by e-mail.

13             Our account was about 25 to  
14      26 pages worth of citations that  
15      we could provide in support of  
16      each of these issues.

17             Obviously, if we're  
18      permitted to brief the issue, we  
19      will try to state this as  
20      concisely as possible for the  
21      Board's benefit, but in terms of  
22      the number of examples there

1           rather than limit us.

2                   But to Your Honor's question  
3           of, you know, is the issue capped  
4           here, precisely, in what I've  
5           identified, yes, it is, as to each  
6           of these issues.

7                   JUDGE MOORE:   Okay.   All  
8           right.   And then go ahead and  
9           continue.

10                  MR. NIKOLSKY:   Okay.   So we  
11           had finished -- we had just  
12           touched on our six with respect to  
13           -- and we've done, already, issues  
14           one through four.   And we jumped  
15           right now, by the seque that I  
16           made, to our issue six, which is  
17           an inaccurate statement about the  
18           teachings of the Hsieh reference.

19                  I gave the one example of  
20           their quote that it explicitly  
21           instruct the person with skill in  
22           the art not to use the MIRM

1 method, which we think is a  
2 factually false statement and not  
3 consistent with what Hsieh  
4 actually teaches.

5 There's another example that  
6 we think should be pointed out.

7 The patent owner states that the  
8 Hsieh -- that the SIDD process is  
9 only limited to a single image.

10 But, in fact, the technical  
11 teaching of the Hsieh reference  
12 states that the SIDD process,  
13 itself, utilizes multiple images  
14 and it's not constrained to a  
15 single image as improperly argued  
16 by the patent owner.

17 So if we can provide a  
18 quote, which directly supports  
19 that, very quickly, the reference  
20 says, on page 19, once the  
21 building object is measured in all  
22 of the images, the 3D position of

1 the object is reframed and  
2 geometric constraints of the  
3 building model are applied, that's  
4 described in the SIDD technique,  
5 which is entirely inconsistent  
6 with the characterization of the  
7 SSID processes only involving one  
8 image.

9 So that's an issue that we  
10 would like the opportunity, and we  
11 figure there's good cause, to  
12 brief.

13 The last two that I have,  
14 Your Honors, and again, I thank  
15 you for indulging us with this  
16 request, the -- our fifth issue  
17 and our seventh issue are the two  
18 that are left.

19 The fifth issue is what we  
20 believe are false  
21 characterizations of claim  
22 language, in IPRs 582, 586, 587,

1        590, 591, 592, and 594, Your  
2        Honors, we think that this issue  
3        is present. One example I will  
4        give you is that in the 586 IPR,  
5        in patent owner preliminary  
6        response on page 46, and also on  
7        the 587 IPR, at page 44, the  
8        patent owner states, quote, unlike  
9        the two-dimensional aerial images  
10       required by the claims, the  
11       disclosure of LIDAR uses  
12       three-dimensional LIDAR point  
13       clouds, that is a false  
14       characterization of claim  
15       languages. The claim language in  
16       the patent that's at issue in  
17       those two IPRs does not recite  
18       two-dimensional aerial images.

19                And additionally the patent  
20       owner does not -- and the patent  
21       owner, in preliminary response,  
22       does not couch this as a claim

1 construction issue, but just  
2 boldly states that the claim  
3 supply us these limitations when,  
4 in fact, it does not use the words  
5 two dimensional, at all, in the  
6 claims.

7 The last issue that we have,  
8 Your Honors, and we think that  
9 it's a catchall, but it applies to  
10 every IPR at issue in this -- in  
11 these proceedings, all nine IPRs,  
12 so I won't go through and  
13 enumerate them, but we think that  
14 the patent owner has  
15 misinterpreted and misapplied the  
16 law regarding obviousness.

17 A very quick example is the  
18 patent owner takes the position  
19 that the Hsieh and the Apple CAD  
20 references are technically not  
21 combinable or there's no teaching  
22 of combining with each other in



1 support of their position.

2 And we simply think that  
3 that's the wrong standard for  
4 obviousness, in fact, you know, as  
5 MPEP 2145 makes clear, Your  
6 Honors, the perfect standards is  
7 what the combined teachings of the  
8 references would have taught to a  
9 person of ordinary skill in the  
10 art, not whether there's technical  
11 combinability between references.  
12 So as to that --

13 JUDGE MOORE: Certainly as  
14 to that issue we, you know, are  
15 well aware of the law and the  
16 standards for obviousness. So,  
17 you know, I'm not making any --  
18 any ruling, here. I'm just -- I  
19 would say that that particular  
20 issue of all the issues that you  
21 brought today I'm less -- less  
22 inclined to think that we would

1           need any further briefing on.

2                   MR. NIKOLSKY:   Okay,  
3           understood, understood, Your  
4           Honor.   And that's -- that's  
5           essentially it, so we've got our  
6           summary of those seven issues.   We  
7           respectfully request that there is  
8           good cause, under 42.108C, for the  
9           petitioner to file replies to each  
10          of the patent owner preliminary  
11          responses.   And we thank you for  
12          hearing our application.

13                   JUDGE MOORE:   All right.  
14          Thank you.

15                   Patent owner?

16                   MR. CUTRI:   Thank you.

17                   JUDGE MOORE:   If you would  
18          like to respond?

19                   MR. CUTRI:   Sure.   Thank  
20          you, Your Honor.

21                   So I guess I should add a  
22          couple of things.   First of all, I

1 think that your question about what  
2 the scope of the replies -- those  
3 replies would be, just so you're  
4 clear, we asked that exact question  
5 because the petitioner has said these  
6 were examples of things that we want  
7 to raise, when they came back to us  
8 with their proposed --

9 THE REPORTER: Somebody is  
10 typing and it is cutting out the  
11 voice. I am getting bits and  
12 spurts.

13 JUDGE MOORE: Maybe folks  
14 can just go on mute.

15 MR. CUTRI: I think that's  
16 better.

17 When we got their listing we  
18 counted 105 separate arguments  
19 that they proposed to raise in  
20 these replies.

21 And from our reading what --  
22 what it appears petitioner is

1 saying is they have encapsulated  
2 the issue, that they have many  
3 different expressions of those  
4 issues, and different expressions  
5 of how they would propose to write  
6 them up.

7 And I think -- I think it's  
8 fair to say that petitioners  
9 believe that as long as you give  
10 them a reply in their mind,  
11 they've sort of accurately  
12 described an issue, it gives them  
13 free rein to redo the petition.

14 Let me -- and let me tell  
15 you what I mean by that, do you  
16 have in front of you -- can you --  
17 are you possibly able to go to the  
18 proceeding, the 591 proceeding,  
19 the 2016-591 proceeding?

20 JUDGE MOORE: Yes. We have  
21 that, we have the case, we can  
22 pull it up.

1           MR. CUTRI: Yeah, because  
2           that actually would help us kind  
3           of explain our position. It's  
4           paper nine in 2016-591.

5           JUDGE MOORE: Okay. You  
6           know, give a little pause, here --

7           MR. CUTRI: Yes.

8           JUDGE MOORE: -- so I can  
9           make sure, and -- and can you  
10          repeat what was the paper number  
11          and the case number again?

12          MR. CUTRI: Sure. It's  
13          2016-00591, and that should be  
14          paper nine, which is the second --  
15          it should be the second petition.

16          JUDGE MOORE: Okay. I'm  
17          going to need just a minute more  
18          to make sure the -- all the judges  
19          have a chance to get this up.

20          MR. CUTRI: No problem.

21          JUDGE MOORE: Okay. Go  
22          ahead.

1           MR. CUTRI: So we're looking  
2       at the second corrected petition  
3       for intra partes review. And the  
4       reason it's the second corrected  
5       petition is there was a filing of  
6       this petition and then the --  
7       we'll point it out that it  
8       contains claim charts that had  
9       improper arguments.

10           And you may recall that we  
11       actually got on the phone with the  
12       Board, even after it was  
13       corrected, and the Board ordered  
14       the petitioners to correct it, yet  
15       again, to remove improper  
16       arguments in the petition.

17           And by way of background,  
18       the petitioners here are  
19       challenging 153 claims in nine  
20       petitions. And what flows from  
21       that is they basically failed to  
22       make the required showing in these

1 petitions and they're looking for  
2 a redo by way of a reply.

3 Let me show you some  
4 examples. If you look at page  
5 Romanette two you'll see that  
6 there are some -- in Roman numeral  
7 seven there are actually eight  
8 tables that are referenced there.  
9 Do you see that, it's table one,  
10 table two through eight?

11 JUDGE MOORE: Yeah.

12 MR. CUTRI: Those are the  
13 eight grounds that they're  
14 asserting. And if you scroll  
15 down, continue to Romanette five,  
16 there's a listing of the exhibits.  
17 And then if you scroll down to the  
18 actual listing of the grounds, it  
19 begins on printed page four, and  
20 use of the bullet points listed  
21 there are either 102B reference or  
22 103 references, and they're all

1 listed under various combinations,  
2 Hsieh plus Perlant, Hsieh plus  
3 AppliCad, Hsieh plus Aerowest, and  
4 Avrahami plus Perlant, and  
5 multiple variations, and at the  
6 bottom of page four, the earliest  
7 priority date for the '152 patents  
8 provisional application, number  
9 61/197 904, filed on October 31st,  
10 2008, and then it says, in the  
11 foregoing references relied upon  
12 for the grounds of rejections,  
13 published or otherwise publicly  
14 available more than one year  
15 before the earliest claimed  
16 priority date.

17 And there's no citation,  
18 there's no analysis, there's no  
19 pointing to any evidence supporting  
20 that statement.

21 What the patent owner did,  
22 in our response or preliminary



1 response, is we pointed out, as many  
2 cases have, including at the federal  
3 circuit, we pointed out that that was  
4 a failing in the petition. And we  
5 explained, with citation to what was  
6 already in the record, why that was a  
7 failing, and we've cited to the  
8 appropriate cases.

9 Similarly, if you will  
10 scroll down to page 52, printed page  
11 52, it should say, at the top of that  
12 page, it says table six.

13 JUDGE MOORE: All right.

14 MR. CUTRI: Now, patent --  
15 petitioner is trying to make the  
16 claim for the rationale for  
17 combining Avrahami in view of  
18 Perlant, and it says, person of  
19 ordinary skill in the art would  
20 have combined the registration  
21 process in Perlant with the  
22 three-dimensional roof generation

1 of Avrahami.

2 One of ordinary skill in the  
3 art would combine Perlant with  
4 Avrahami for the same reasons as  
5 one would combine Hsieh with  
6 Perlant as discussed in Section  
7 7BE above.

8 E.g., Avrahami is the base  
9 device. Perlant improves the base  
10 device, functionality, and the result  
11 would be -- and so in other words, in  
12 this ground, the only rationale for  
13 combining these two references  
14 Avrahami and Perlant, will say, look  
15 at Hsieh plus Perlant. So in other  
16 words they're saying A would be  
17 combined with C because A would be  
18 combined with B.

19 And we pointed out in our  
20 preliminary response that that was a  
21 total failure of the required showing  
22 for obviousness. And we pointed to

1 features of each of the references  
2 that made it clear that this was not  
3 correct.

4 We went -- we didn't just  
5 say it was a failure. We said it was  
6 --

7 THE REPORTER: I'm sorry, I  
8 missed that, you said, "We said it  
9 was," and then you blanked out  
10 again.

11 MR. CUTRI: I can't recall,  
12 but I probably said we said, you  
13 know, we said that that was  
14 insufficient.

15 And the Board, I believe, is  
16 familiar with the Intelligent  
17 Biosystems case at the federal  
18 circuit. And what the federal circuit  
19 explained in that case was under USC  
20 35 USC B12(a)(3), it's of the utmost  
21 importance that petitioners in the IPR  
22 proceeding adhere to the requirements

1     that the initial petition identify  
2     with particularity the evidence that  
3     supports the grounds for the challenge  
4     to each claim, and that's quoting 312,  
5     Avrahami.

6             And then the federal circuit  
7     explained that in that case IBS, which  
8     the petitioner chose which grounds of  
9     invalidity to assert in its petition,  
10    and it chose not to assert this new  
11    one.

12            Unlike district court  
13    litigation, where parties have greater  
14    time to revise and develop their  
15    arguments over time in response to the  
16    material, the expedited natures of  
17    IPRs bring with it an obligation for  
18    petitioners to make their case in  
19    their petition to institute.

20            While the Board's  
21    requirements are strict ones they are  
22    requirements of which petitioners are

1     aware when they seek to institute an  
2     IPR.

3                 So what we have here is a  
4     failure by the petitioners to  
5     substantiate the public availability  
6     of their references. A failure, in  
7     many instances, to make an adequate  
8     showing under section 103.

9                 And I'll represent to the  
10    Board that with respect to public  
11    availability, that one sentence, that  
12    is how all of the petition -- there is  
13    just one sentence that says, this was  
14    publically available. There's no  
15    analysis.

16                And so what we have here,  
17    really, is a request for a redo. The  
18    federal circuit made it crystal clear  
19    that that's not appropriate.

20                So the only consideration  
21    left is whether there's good cause.  
22    And I'm sure for good cause for

1 re-file -- I know the Board is very  
2 familiar with the many cases for the  
3 amendment to 108C that establish that,  
4 you know, just wanting to add new  
5 arguments that could have been raised  
6 previously is not allowed.

7 But we do have a  
8 post-amendment case that I wanted to  
9 bring to the Board's attention, in  
10 2016-280, the 2016-280 proceeding, and  
11 it's paper 21 in that proceeding, and  
12 it's the Teva versus Indivior case,  
13 and it's Judge Bonilla writing for the  
14 panel.

15 And I'll give you a  
16 background, and I'm sure the Board can  
17 go and take a look, but in sum, the  
18 issue in that case was the following:  
19 The petitioner had set forth two  
20 pieces of prior art in their petition,  
21 and they had, very similar to what we  
22 have here, that did not actually make

1 a showing that they were publicly  
2 available.

3           Instead, the petitioner  
4 said, well, the patent owner in a  
5 different proceeding has stipulated  
6 that these are printed publications  
7 and are prior art. And then they  
8 cited to a documentary.

9           The patent owner, in their  
10 response, said, that is an -- that is  
11 insufficient to make the showing that  
12 this is publicly available. Yes, we  
13 stipulated to it, but that was for  
14 litigation reasons and that's --  
15 that's not a substitute for making  
16 your showing in the petition.

17           And the patent owner argued  
18 that a reply should not be allowed  
19 under the good cause standard, which  
20 as Bonita said in paper 21 is, upon  
21 considering both parties' positions,  
22 the petitioner does not persuade us

1     that sufficient good cause exists,  
2     less the final reply in response, the  
3     Board to file new evidence regarding  
4     the public accessibility of the prior  
5     art.

6             First, as patent owner  
7     notes, in relation to the pre-trial  
8     stipulation -- stipulation, petitioner  
9     could have, but did not, file that  
10    document when it filed its petition.  
11    Petitioner had not established good  
12    cause as to why we should allow  
13    petitioner to file that document now.

14            And then it says: Although  
15    it may be that good cause could exist  
16    in certain situations where new  
17    evidence comes to light, after the  
18    filing of the petition, we are not  
19    persuaded that sufficient cause exists  
20    in this case.

21            Here, petitioner essentially  
22    asks to significantly bolster its



1 petition with new substantive argument  
2 regarding evidence.

3 Well, after a statutory bar  
4 date in relation to an issue where it  
5 has the burden to make a threshold  
6 showing, and Judge Bonilla continued  
7 and said, we are not persuaded to  
8 allow petitioner to fix its petition  
9 in this fashion.

10 We submit that that is  
11 exactly the scenario we find ourselves  
12 in here. You've seen the petition,  
13 you've seen that there's been a  
14 failure -- failure to establish public  
15 availability, a failure that these  
16 instances and others to establish the  
17 103 combinations. What petitioner is  
18 hoping you'll do is give them a chance  
19 to redo the petition. The federal  
20 circuit has made it clear that that's  
21 not appropriate.

22 The petitioners knew what

1 the proceedings were, they have now  
2 had three chances, initial petition,  
3 corrected petition, and the second  
4 corrected petition you ordered to fix  
5 their paper.

6 We don't think it's  
7 appropriate that they have yet another  
8 chance. Certainly they haven't  
9 established good cause. I think the  
10 cases, even the amendments, talk  
11 mainly about new evidence that the  
12 petitioner couldn't have responded to,  
13 and everything that you heard today is  
14 essentially the petitioner saying,  
15 well, we take a different view. And,  
16 well, it -- we want to make this  
17 argument, now, in light of what we see  
18 the patent owner saying.

19 And, in particular, they  
20 want to make these arguments now  
21 because we believe we've made a  
22 substantial showing about their

1 failure to meet their burden in the  
2 opening petition.

3           So I'll make two final  
4 points, here, one is that for reply,  
5 the Board is inclined to provide a  
6 reply, we would ask for a sur reply.  
7 But to be clear, we don't think the  
8 petitioner has made the showing that a  
9 threshold showing is appropriate.

10 And, in fact, what we see in the case,  
11 and what we think is appropriate here  
12 is that if the petitioner -- what the  
13 petitioner seems to be saying is they  
14 don't trust the Board to understand  
15 and interpret the evidence that has  
16 already been put forth.

17           We think the Board is more  
18 than capable of doing that, if it  
19 turns out that suddenly that we  
20 somehow made some false statement,  
21 that they absolutely dispute we will  
22 -- the Board will figure that out.

1           But additionally, if that  
2   situation does come to pass, you know,  
3   the petitioner can file a motion to  
4   adhere. And that is the appropriate  
5   remedy on the problem.

6           Now I will say that we have  
7   substantive responses. I have  
8   substantive responses to everything  
9   petitioner has raised here.

10           But in keeping with the  
11   Board's admonition that, you know, you  
12   not make a substantive presentation,  
13   when all you're asking for is the  
14   issue of whether -- whether replies  
15   are appropriate, I'm not -- I'm not  
16   providing those here.

17           We think that the  
18   appropriate outcome, here, is that a  
19   reply should be denied and the Board  
20   should consider the petition as filed,  
21   that's been corrected a number of  
22   times, and patent owner's preliminary

1 response and -- and make the  
2 appropriate ruling with respect to the  
3 petition based on what's already in  
4 evidence.

5 JUDGE MOORE: All right.

6 Thank you.

7 Petitioner, could you  
8 respond, but limit your response  
9 to that specific issue of what is  
10 the good cause and what, in your  
11 estimation, makes this different  
12 than -- than any other petition  
13 that we see where petitioner gets  
14 one shot and patent owner gets to  
15 basically poke holes in what  
16 petitioner has done, and -- and  
17 petitioner has the burden, and  
18 this is the process that we have,  
19 that Congress put before us.

20 So I'd like you to respond  
21 but, you know, specifically to the  
22 good cause, not to the merits of

1 each one of these or any  
2 particular one of these.

3 MR. NIKOLSKY: Sure, Your  
4 Honor.

5 And I would just like to  
6 start by saying that we disagree  
7 with patent owner's  
8 characterization of this as a  
9 redo. We are not in any way,  
10 shape, or form trying to redo our  
11 petition.

12 We believe our petition sets  
13 forth adequate bases for this  
14 Board to institute, and  
15 particularly with respect to  
16 public accessibility of these  
17 references, et cetera. We're not  
18 looking to change anything.

19 We think that the some of  
20 the misstatements and inaccurate  
21 statements that are made by  
22 opposing counsel are -- are so

1       incorrect, and so egregious, that  
2       we should have the opportunity to  
3       utilize this mechanism to point  
4       them out.

5               When the patent owner says  
6       that there's no evidence of public  
7       accessibility, when, in fact,  
8       plainly indicates that this  
9       reference is indexed, that's an  
10      inaccurate statement.

11             Secondarily, when the patent  
12      owner states that the petitioner  
13      conceded certain things or  
14      conceded that the preamble of  
15      claims states certain things when,  
16      in fact, petitioner made no such  
17      statement, that rises to the level  
18      of allowing the petitioner to at  
19      least point out those incorrect  
20      statements to the Board.

21             So Your Honors, we think  
22      that all of these things that we've

1 raised are very tailored in nature,  
2 they're very specific in nature,  
3 they're targeted solely to issues that  
4 are raised by virtue of the patent  
5 owner's preliminary response.

6 We're not seeking to  
7 introduce new evidence at this stage.  
8 We're not seeking to supplement the  
9 records with evidentiary information.  
10 We're merely trying to point out that  
11 there are inaccurate and grossly  
12 inaccurate statements that warrant  
13 raising these issues in reply, and  
14 those, because of the egregious nature  
15 of those statements, that is a  
16 petition of good cause.

17 MR. CUTRI: Your Honor,  
18 might I respond?

19 JUDGE MOORE: Okay. Sorry,  
20 were you -- were you finished?

21 MR. NIKOLSKY: I'm finished,  
22 sir.



1 JUDGE MOORE: Okay, thank  
2 you. Sir?

3 MR. CUTRI: Your Honor,  
4 yeah, all I'll say is this: If  
5 all good cause required was for  
6 the petitioner to say, I disagree  
7 and I think that's a gross  
8 mischaracterization, there would  
9 be a reply in every instance. And  
10 that's not the standard because  
11 then I could come back in their  
12 reply and say -- and ask for a sur  
13 reply and say, well, I think they  
14 grossly misstated. And they could  
15 come back and say, again, well,  
16 your sur reply has a gross  
17 mistake. And it could go on and  
18 on and on forever.

19 We think the law is clear,  
20 this is not a good cause  
21 situation. This is a situation  
22 where they are seeking to add

1       substantial new argument to their  
2       positions, and we think the Board  
3       should deny it, and if there is  
4       such an issue later the  
5       appropriate action here is a  
6       motion for redo.

7               JUDGE MOORE: All right.  
8       What we are going to do is I'm  
9       going to caucus for a moment with  
10      my fellow panel members. And we  
11      will come back on the call in a  
12      few minutes.

13             We may have more questions  
14      and/or we may just wrap up the  
15      call. But we'll be a few minutes.

16             MR. NIKOLSKY: Thank you,  
17      Your Honors.

18             (Recess.)

19             JUDGE MOORE: Okay, this is  
20      Judge Moore, back on the call.  
21      We've discussed and we've heard  
22      the arguments that you've made

1           here.

2                   We are going to take those  
3           arguments under consideration and  
4           an order will be forthcoming in  
5           the next day or so.

6                   Is there anything further  
7           from petitioner?

8                   MR. NIKOLSKY:   Nothing  
9           further, Your Honor.   Thank you.

10                  JUDGE MOORE:   Anything  
11           further from patent owner?

12                  MR. CUTRI:    No, Your Honor.  
13           Thank you very much.

14                  JUDGE MOORE:   All right.  
15           With that, this call is adjourned.

16                  MR. NIKOLSKY:   Thank you,  
17           Your Honor.

18                   (Whereupon, the hearing was  
19           adjourned at 2:54 p.m.)

20

21

22

## 1 CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

2 I, Cassandra E. Ellis, Registered Professional  
3 Reporter, the officer before whom the foregoing  
4 proceedings were taken, do hereby certify that the  
5 foregoing transcript is a true and correct record of  
6 the proceedings; that said proceedings were taken by  
7 me stenographically and thereafter reduced to  
8 typewriting under my supervision; and that I am  
9 neither counsel for, related to, nor employed by any  
10 of the parties to this case and have no interest,  
11 financial or otherwise, in its outcome.

12 IN WITNESS WHEREOF, I have hereunto set my hand  
13 and affixed my notarial seal this 28th day of June  
14 2016.

15 My commission expires:

16 March 30, 2019

17  
18 \_\_\_\_\_  
19 CASSANDRA E. ELLIS

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21 THE STATE OF MARYLAND

22 REALTIME SYSTEMS ADMINISTRATOR

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