

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

LIFECORE FITNESS, INC.,)
d/b/a ASSAULT FITNESS,)
)
Petitioner,)
)
vs.)
)
WOODWAY USA, INC.,)
)
Patent Owner.)
_____)

U.S. Patent No. 11,465,005

IRP2024-00083

CONFERENCE CALL

Tuesday, May 7, 2024

2:02 p.m.

Reported by: Cynthia M. Thomas, RPR, RMR, CRR, CSR-3836

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25 Reported by: Cynthia M. Thomas, RPR, RMR, CRR, CSR-3836

1 APPEARANCES (VIA TELEPHONE):

2
3 Judge Meredith C. Petravick
4 Judge Amee Shah
5 Judge Neil T. Powell
6 Patent Trial and Appeal Board

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1 Tuesday, May 7, 2024

2 2:02 p.m.

3 - - -

4 JUDGE PETRAVICK: Good afternoon. This is
5 Judge Petravick. Can you hear me?

6 MR. TURNER: Yes, I can. Hello, this is
7 Andrew Turner for Petitioner.

8 Can you hear me?

9 JUDGE PETRAVICK: Yes, I can hear you.
10 Is there counsel on the line for Patent
11 Owner?

12 MR. McKENNA: Yes. Richard McKenna for
13 the Patent Owner, and my Backup Counsel Kadie
14 Jelenchick.

15 JUDGE PETRAVICK: Is there anybody else on
16 the line for Petitioner?

17 MR. TURNER: Also for Petitioner I have my
18 colleague here, Reza Esfahani.

19 JUDGE PETRAVICK: So, as I said, I am
20 Judge Meredith Petravick, and with me on the line is
21 Judge Neil Powell and Judge Amee Shah.

22 And this is a conference call for
23 IPR2024-00083.

24 The Board has asked for this conference
25 call so we can get a bit more information on the

1 issue of whether the petition was filed by a person
2 as required by Section 311.

3 But what I'd like to do is, I have a
4 series of questions, and I'd like to hear from both
5 parties on each question.

6 But before I get to this case at hand,
7 I believe you're both counsel for the earlier
8 related cases, the -- what is it? -- the -0836 case,
9 the -0843 case, and the -0849 case.

10 Is that correct?

11 MR. TURNER: This is Andrew Turner for
12 Petitioner.

13 Yes, that is correct.

14 JUDGE PETRAVICK: And for Patent Owner?

15 MS. JELENCHICK: This is Kadie Jelenchick
16 for Patent Owner.

17 That is correct.

18 JUDGE PETRAVICK: All right. So in each
19 of those cases, the last updated mandatory notices
20 from the Petitioner proposed to update the caption
21 in that case to be LifeCORE Fitness, LLC.

22 Does Patent Owner have any opposition to
23 updating the caption in those cases where the
24 conversion happened after the petition was filed?

25 MS. JELENCHICK: This is Kadie Jelenchick

1 on behalf of the Patent Owner.

2 The Patent Owner doesn't object for that
3 exact reason. The petitions were filed in the name
4 of LifeCORE Fitness, Inc., the California
5 corporation, which was in existence at the time of
6 the April 11, 12, 13, 2023 filing of the petitions.

7 JUDGE PETRAVICK: All right. Thank you.

8 So now that we've got those cases squared
9 away, I'd like to talk about this latest filed case
10 again. It's the IPR2024-00083.

11 My first question -- and I'd like
12 Petitioner to answer this question first -- is
13 would the misnaming or, you know, having a misnomer
14 in the name of the Petitioner cause us to lose
15 jurisdiction over the case.

16 Are we dealing with a jurisdictional issue
17 as opposed to a procedural issue?

18 MR. TURNER: Thank you, your Honors. This
19 is Andrew Turner again for Petitioner.

20 And, no, we don't think the PTAB would
21 lose jurisdiction here. We think it's more of a
22 procedural issue. It's more, I guess, form over
23 substance. And this kind of gets into, I guess,
24 some corporation law. I don't know if you want me
25 to delve into that.

1 But, basically, it's our position here
2 that under corporation law, whether this is Delaware
3 law, state law, which was what --

4 JUDGE PETRAVICK: Well, let me stop you
5 right there, because I'll have questions about that
6 later.

7 But right now what I'm asking is if,
8 similar to our RPI case law here at the Board --
9 you know, concentrating on the case law here at the
10 Board -- the Board's jurisprudence and our
11 precedential cases say that even though 312 says
12 that the petition must not be considered unless an
13 RPI is named, under certain circumstances we let
14 RPIs be -- updated for, you know, errors --
15 correcting errors and stuff after the petition is
16 filed as long as there will be no 315, if the party
17 was named, you know, in the petition when it was
18 filed.

19 Our precedent or the way that has evolved
20 since the PTAB was formed is that that question is
21 not jurisdictional. You know, it's more of a
22 procedural question. And that allows us to update
23 the RPIs during trial under certain conditions.

24 And so my question is sort of going on to,
25 like, is 35 U.S.C. 311, the portion that requires

1 the petition to be filed by a person other than the
2 Patent Owner, is that a procedural question or is
3 that a question that, if it's not fulfilled, we
4 don't have jurisdiction?

5 MR. TURNER: It's Petitioner's position
6 that that's a procedural question. And in cases
7 similar to the 312 argument, they held it was a
8 procedural issue as it related to RPIs.

9 JUDGE PETRAVICK: All right. Patent
10 Owner, same question for you.

11 And if you could say your name before you
12 speak.

13 MS. JELENCHICK: Sure, of course. This is
14 Kadie Jelenchick on behalf of Patent Owner.

15 I'm sure the Board is not surprised to
16 learn that we have a different view that
17 35 U.S.C. 311 is a jurisdictional requirement. And
18 there was no person as of the time that the petition
19 was filed because there was no corporate entity
20 under the name LifeCORE Fitness, Inc., in California
21 or --

22 JUDGE PETRAVICK: Yeah, I understand your
23 position as to the facts about the corporation. But
24 could you tell me why you think 35 U.S.C. 311 is
25 jurisdictional. Why would a case that doesn't

1 comply with that rob the Board of jurisdiction?
2 What language in 311 do you think causes that to
3 happen?

4 MS. JELENCHICK: Sure.

5 "... a person who is not the owner
6 of a patent may file with the Office a
7 petition to institute an inter partes
8 review of the patent."

9 JUDGE PETRAVICK: Right.

10 MS. JELENCHICK: Whatever LifeCORE was
11 calling itself at the time, the quote/unquote
12 person, as contemplated by 35 U.S.C. 311, would have
13 been the Delaware LLC. It was not the nonexistent,
14 now defunct, California corporation.

15 We're aware of no legal authority, rule,
16 or case law that stands for the proposition, within
17 Delaware, that an entity that previously existed and
18 no longer exists, whether by conversion or
19 otherwise, has the ability to file a lawsuit or has
20 standing as a quote/unquote person, as that term is
21 understood in a parlance of corporate law, to raise
22 a legal issue.

23 And here the legal issue is whether they
24 have the ability to file a petition to institute an
25 inter partes review.

1 JUDGE PETRAVICK: Yeah, that argument goes
2 to the procedure and whether the -- I believe the
3 procedure and whether the Petitioner has followed
4 the procedure.

5 But my question is more as to
6 jurisdictional issues as opposed to a procedural --
7 to procedural issues at that point. You know,
8 similarly section 312 says the petition
9 will not be considered unless, you know, all RPIs
10 are, you know, named. And yet that's not a
11 jurisdictional issue. That is more of a procedural
12 issue that the Board is allowed to update.

13 MS. JELENCHICK: Understood. However, 311
14 identifies the parameters of who may bring a
15 petition. And unless you satisfy that requirement,
16 there's no jurisdiction to even trigger the Board's
17 jurisdiction.

18 So, you know, I get your point that --

19 JUDGE PETRAVICK: I'm just gonna push you
20 a little bit further.

21 Wouldn't that argument apply to all
22 procedures -- all procedural rules then, you know,
23 under 312? It wouldn't -- we would have no
24 jurisdiction. And we already know from case law
25 that that's not the correct argument. For example,

1 in Wi-Fi One.

2 MS. JELENCHICK: I get your point. There
3 is, of course, a procedural component to what's
4 going on here.

5 And I think -- if we put this in context,
6 I think what's clear is that LifeCORE Fitness messed
7 up, and they should have filed in the name of the
8 Delaware LLC. And now they want to cast it as
9 simply a -- you know, I heard Petitioner counsel
10 refer to it as, you know, "form over substance."

11 That's not the case. You need to be a
12 person to file a petition. There was no person.
13 There was no operative person as of the timing of
14 when the petition was filed, which happened to be
15 the last day of the statutory period.

16 JUDGE PETRAVICK: All right. Thank you.
17 So that kind of leads into my next
18 question.

19 Petitioner, why was the California case --
20 corporation named in the petition instead of the
21 Delaware petition -- instead of the Delaware
22 corporation? Excuse me.

23 MR. TURNER: Thank you, your Honors.
24 Again, this is Andrew Turner for Petitioner.

25 And we listed the California corporation

1 in the petition because we were not aware of the
2 conversion at the time. So we were -- we didn't
3 handle the conversion for LifeCORE, so we
4 actually -- we didn't learn about it until much
5 later. Actually, I didn't see it until the Patent
6 Owner Preliminary Response. But it came out during
7 the litigation a few months ago.

8 So we were not aware of it until --
9 I think the earliest we saw it in the litigation, it
10 came out during a deposition in December of a Roger
11 Bates. So that's when my co-counsels were aware of
12 it from deposition.

13 So we were -- you know, as a team,
14 Petitioner was aware of it, I guess, in late
15 December. Petitioner's counsel, that is.

16 JUDGE PETRAVICK: Uh-huh. So it was an
17 error --

18 MR. TURNER: Yes.

19 JUDGE PETRAVICK: -- in the naming.

20 The entity is the same. The people that
21 hired you to do the IPR are the Delaware -- is the
22 Delaware corporation. You didn't realize the name
23 had changed.

24 MR. TURNER: Correct. We're working with
25 the same -- you know, the same management team at

1 LifeCORE when they changed from being incorporated
2 in California to a Delaware LLC. We're interacting
3 with the same team. And we're also handling -- our
4 firm is handling the litigation for them, also.

5 JUDGE PETRAVICK: Okay. And what happened
6 in the related district court case with the naming
7 of the entity?

8 MR. TURNER: Again, Andrew Turner for
9 Petitioner.

10 The name has not changed in the district
11 court litigation. And we will look into that,
12 whether it needs to change. But based on --
13 basically, based on corporation law, it's our
14 understanding that the ...

15 THE COURT REPORTER: I'm sorry, Counsel,
16 there was interference on the line and I couldn't
17 hear you. The last I heard was:

18 (Record read as follows:

19 "But based on -- basically,
20 based on corporation law, it's our
21 understanding that the ...")

22 MR. TURNER: So based on corporation law,
23 you know, before we talk about conversion, which
24 is -- we cited that in some of our briefing, the
25 Delaware conversion provision, you know, the entity

1 continues to exist after a conversion, and it does
2 not constitute a dissolution.

3 And then, also, there's also provision in
4 the Delaware statute that has to do with a wind-up
5 provision. So, basically, you know, this is a
6 common occurrence where, you know, companies might
7 change their status during litigation. And
8 there's -- in Delaware corporation law, there's a
9 wind-up provision which -- let me see. I can pull
10 it up here.

11 So, you know, as we mentioned in our
12 briefing, it's our position that the conversion does
13 not constitute a dissolution, and it's a
14 continuation of the existence. So, basically,
15 whether there's a conversion, LifeCORE is still the
16 same entity and continues to exist as the LLC.

17 And, also, even if LifeCORE was
18 dissolved -- right? -- even if it was dissolved,
19 there's a wind-up provision in corporation law. And
20 in Delaware, this is Section 278. So this is --
21 even if a company is dissolved, they have a period
22 of three years to continue -- that they can continue
23 to pursue and defend in lawsuits, including civil,
24 criminal, and/or administrative proceedings.

25 So it's our position that LifeCORE still

1 exists. And even if they -- you know, through this
2 conversion, they were dissolved, they would be
3 covered by a wind-up provision and they could still
4 pursue this litigation under the prior name.

5 But this is something we will look at as
6 far as if we need to update the name in the, you
7 know, California litigation. But we have not done
8 so yet.

9 JUDGE PETRAVICK: Thank you.

10 Patent Owner, sort of a similar question.

11 Patent Owner is not confused by what --
12 you know, like if there was an error in the naming
13 of the entity, Patent Owner is not confused or is
14 confused by which entity filed the petition or that
15 the -- you are aware that the California corporation
16 converted into the Delaware corporation; that there
17 is still an entity regardless of what name is on the
18 petition.

19 MS. JELENCHICK: This is Kadie Jelenchick
20 on behalf of the Patent Owner.

21 Yes, today, Patent Owner is well aware
22 that Petitioner would like to be LifeCORE
23 Fitness LLC.

24 At the time that the petition was filed,
25 we had every reason to believe that LifeCORE

1 Fitness Inc. was the Petitioner. That was based on
2 their identification of the real party-in-interest
3 in their October 24th, 2023, petition. That was
4 also based on LifeCORE Fitness Inc.'s responses to
5 Patent Owner's interrogatories in the parallel
6 litigation, where specifically Patent Owner sought
7 the identification of any entity or persons,
8 including but not limited to any holding company,
9 parent, subsidiary, affiliate, shareholder, or third
10 party that had any financial interest, direct or
11 indirect, in the outcome of this litigation.

12 The response to that interrogatory, which
13 was provided in August of 2022, stated that the
14 responding party is a California corporation. It
15 has no parent, subsidiary, or affiliate.

16 That interrogatory was not supplemented
17 until February the 29th, 2024, where there was an
18 identification of this Delaware conversion.

19 There was rumblings of a Delaware
20 conversion during Mr. Bates' December 2023
21 deposition, which was news to Patent Owner. And
22 December of 2023 was well after the one-year bar
23 date for when Petitioner had the ability to file
24 that petition challenging the '005 patent.

25 And I heard from Petitioner's counsel that

1 they just weren't aware of this conversion, but
2 that's just not credible. In response to deposition
3 questioning in the parallel litigation, witnesses
4 refused to answer questions about this conversion on
5 the advice of counsel.

6 Specifically, Ms. Bates, who is the
7 current CEO -- a member, as we understand it, of
8 some portion of the currently existing Delaware
9 LLC -- testified expressly that on the advice of
10 counsel -- why LifeCORE Fitness Inc. ...

11 THE COURT REPORTER: I'm sorry, but I --
12 I didn't -- I'm sorry. I apologize, Ms. Jelenchick.

13 Ms. Jelenchick, I apologize, but there's
14 so much feedback on the line that it's so hard for
15 me to hear. Whoever isn't speaking, could they
16 maybe mute while they're not speaking, because
17 there's so much feedback.

18 Am I the only one hearing it?

19 JUDGE PETRAVICK: I believe you're the
20 only one hearing the feedback. Your connection
21 seems to be a little shaky.

22 THE COURT REPORTER: My phone connection?

23 JUDGE SHAH: This is Judge Shah. I'm
24 hearing the feedback, as well.

25 MR. TURNER: This is Andrew Turner.

1 I hear the feedback, as well.

2 JUDGE PETRAVICK: Oh. Well, then maybe
3 it's me who has the feedback.

4 Is that better?

5 THE COURT REPORTER: It seems to be.

6 JUDGE PETRAVICK: Hello?

7 JUDGE SHAH: Yes.

8 THE COURT REPORTER: Yes.

9 JUDGE PETRAVICK: Okay.

10 THE COURT REPORTER: Yes, that's better.

11 JUDGE PETRAVICK: My apologies.

12 THE COURT REPORTER: Let me just state
13 where I left off.

14 (Record read as follows:

15 "Specifically, Ms. Bates, who
16 is the current CEO -- a member, as
17 we understand it, of some portion
18 of the currently existing Delaware
19 LLC -- testified expressly that on
20 the advice of counsel -- why LifeCORE
21 Fitness Inc. ...")

22 That's where I left off.

23 MS. JELENCHICK: ... why LifeCORE
24 Fitness Inc., a California corporation, incorporated
25 into the Delaware LLC. Ms. Bates would not answer

1 questions about that conversion based on said advice
2 of counsel.

3 And it's just not credible that there was
4 no investigation by Petitioner as to who was the
5 proper quote/unquote person to bring the Petition in
6 the first instance.

7 This is not an instance where we're
8 talking about a couple of days. We're talking about
9 six months elapsed between the time that LifeCORE
10 Fitness Inc. converted into the Delaware LLC, and
11 six months later they filed a petition for IPR
12 challenging the '005 patent on the very last day.

13 As we understand it, there was a
14 transaction afoot. LifeCORE Fitness Inc. was
15 contemplating some type of sale of all or a portion
16 of its assets. And it's our supposition that the
17 conversion into the Delaware LLC was for the
18 purposes of some perceived benefit for that
19 transaction. We've now seen that that transaction
20 has come to fruition in some updated mandatory
21 disclosures that Petitioner filed in this petition.

22 However, it appears that what Petitioner
23 was trying to do is have all of the benefits of a
24 Delaware conversion and none of the limitations that
25 are clear regardless of whether there is the ability

1 within Delaware corporate law to seek relief
2 vis-a-vis any wind-up provisions of the company.

3 LifeCORE Fitness Inc., the California
4 corporation, how it is treated as a legacy
5 organization in the context of the district court
6 litigation has no bearing on whether this particular
7 board has the ability to decide whether they were a
8 proper person for the purposes of filing this
9 petition in the first place.

10 We agree with Petitioner's counsel that
11 liability will pass to the Delaware LLC for the
12 purposes of our infringement allegation, but that
13 says nothing about whether a nonexistent California
14 corporation has the capacity to sue when it is no
15 longer in existence.

16 And I think that the practical
17 implications of what Petitioner is trying to propose
18 here is that at any time, seemingly within a
19 three-year period, LifeCORE Fitness Inc., the
20 California corporation, could file a petition
21 challenging an IPR -- bringing an IPR petition for
22 any patent because it was in existence three years
23 ago. There's no legal authority to that. They
24 haven't cited to any --

25 JUDGE PETRAVICK: We've gotten away from

1 the question a little bit. Don't worry, there will
2 be more questions and more chances to talk. But
3 let's just move on to the next question.

4 So, Patent Owner, what I took from that is
5 that you're not confused that the Delaware
6 corporation was previously the California
7 corporation.

8 MS. JELENCHICK: In this moment, no,
9 there's no confusion.

10 JUDGE PETRAVICK: Yeah, there's no
11 confusion. Okay.

12 My next question is: Patent Owner, if we
13 viewed this as just an error in the naming of the
14 Petitioner, and allowed them to update or correct
15 the naming, what prejudice would you suffer from
16 that other than, of course, that the IPR has a
17 chance to continue or, you know, not be terminated
18 based on this issue?

19 MS. JELENCHICK: Well, I mean, the
20 prejudice is clear insofar as it -- to the extent
21 the Board allowed them to correct the name and
22 require updating of the real parties-in-interest,
23 which, to date, is still incorrect and deficient and
24 fails to -- as it stands, Petitioner has failed to
25 identify all real parties-in-interest.

1 The Patent Owner is left with significant
2 uncertainty as to how the potential estoppel
3 provisions may apply or don't apply.

4 Patent Owner is also prejudiced insofar as
5 the parallel district court proceeding is proceeding
6 as it relates to fact and expert discovery, but
7 summary judgment and trial dates are held in
8 abeyance based on the earlier-filed IPRs.

9 And now the Patent Owner, to the extent
10 there is a correction and the Board decides to
11 institute, will continue to have to delay to seek
12 recourse for its infringement allegation.

13 Petitioner waited until the final day of
14 the statutory period to file an IPR petition on a
15 fourth related patent where the three previous
16 petitions that were filed were eight months earlier
17 and based on the overlapping prior art. And they
18 didn't follow the procedural rules when they did it.

19 So simply failing to comply with the rules
20 and feigning ignorance until Patent Owner points it
21 out in proceedings -- Patent Owner has suffered
22 prejudice not only from the litigation perspective,
23 not only from the integrity of the proceedings, but
24 also the additional legal fees in having to deal
25 with the wrangling and the backfilling of

1 Petitioner's deficiencies in a petition that could
2 have been filed correctly in the first instance had
3 they taken the time and done the necessary due
4 diligence to do so.

5 JUDGE PETRAVICK: Okay. Petitioner, same
6 question. Do you think Patent Owner has suffered
7 any prejudice from, you know, the naming -- the
8 misnaming of the entity in the petition?

9 MR. TURNER: Your Honors, there's no
10 prejudice here. The '005 patent has only been
11 asserted against one entity, and that's Petitioner.

12 So there's no potential unnamed RPIs that
13 would be estopped here. So there's no prejudice
14 with respect to that.

15 And as far as the litigation fees,
16 Petitioner moved to stay the related litigation as
17 soon as the first three IPRs were instituted, but
18 the district court denied that motion.

19 JUDGE PETRAVICK: All right. And I take
20 it that Patent Owner opposed the stay in the
21 district court litigation?

22 MR. TURNER: Yes.

23 MS. JELENCHICK: This is Kadie Jelenchick
24 on behalf of the Patent Owner.

25 That is correct.

1 JUDGE PETRAVICK: Okay. Thank you.

2 From what Patent Owner has said already,
3 I believe Patent Owner believes that Petitioner
4 acted in bad faith and that there was gamesmanship
5 going in by the fact that the entity -- the name of
6 the entity wasn't corrected earlier.

7 Would that be a correct summary of what
8 you argued?

9 MS. JELENCHICK: This is Kadie Jelenchick
10 on behalf of Patent Owner.

11 Yes. I believe, in large part, that's
12 true.

13 JUDGE PETRAVICK: All right. Does
14 Petitioner have any response to that?

15 MR. TURNER: Thank you, your Honors. This
16 is Andrew Turner for Petitioner.

17 As far as the bad faith from the
18 litigation, I think, you know, LifeCORE has used
19 multiple law firms. So they used another firm,
20 which was discussed in some of the same depositions,
21 for some of the agreement work. So he did not
22 handle the conversion, and he was not aware.

23 As far as -- I think there was also
24 some -- Patent Owner argued about the timeliness.
25 And if that was the question here, timeliness --

1 sorry, excuse me.

2 There's nothing to gain for us by, you
3 know, withholding this name change. I mean,
4 Petitioner has filed updated mandatory notices as we
5 were aware of them. And this was just an error.
6 And once we learned about it, we updated our
7 mandatory notice.

8 JUDGE PETRAVICK: Thank you.

9 The last question from me -- my last
10 question is: When I look at the cases that are, you
11 know, cited in the brief and things, I just want to
12 make sure, does either party know of any case where
13 the Petitioner's name has been corrected after the
14 filing of a petition at the PTAB.

15 Petitioner?

16 MR. TURNER: Your Honors, again, Andrew
17 Turner for Petitioner.

18 I'm not aware of a case where the name of
19 the Petitioner was corrected. I mean, we cited --
20 in our briefing, we cited the proponent -- proponent
21 case, which is a designated decision, where the RPI
22 was updated later. But as far as the name of the
23 Petitioner, we didn't find a case on that.

24 JUDGE PETRAVICK: Patent Owner?

25 MS. JELENCHICK: This is Kadie Jelenchick

1 on behalf of the Patent Owner.

2 No, not on facts similar to this where
3 there was a California corporation that converted to
4 a Delaware entity and filed an IPR.

5 JUDGE PETRAVICK: All right. So I'm aware
6 of some cases where a conversion or merger happened
7 after the petition was filed, but not before the
8 petition was filed.

9 So it seems like we might be in some new
10 territory here on this issue, and might be best for
11 a Director Review issue.

12 MS. JELENCHICK: Judge Petravick, this is
13 Kadie Jelenchick on behalf of the Patent Owner.

14 If I can just respond to one thing that
15 Mr. Turner said at the end relating to the fact that
16 they had nothing to gain by the error in the name.

17 JUDGE PETRAVICK: Uh-huh.

18 MS. JELENCHICK: The issue is had they
19 filed their petition for IPR sooner, i.e., not
20 waited until the last day of the statutory period,
21 and otherwise tried to tether that forced filing to
22 have consistent timing with the three previously
23 filed IPRs, this issue likely would have come to
24 light far sooner. But, instead, they waited until
25 the end, obscured the facts, and failed to

1 investigate, notwithstanding signing as an officer
2 of the Patent Office, that it was in compliance with
3 the requirements to bring a petition, that the
4 proper real parties-in-interest were identified.
5 And it was only by happenstance that we learned
6 about it in deposition.

7 Fast-forward five months later, and here
8 we are facing what should have been a trial date in
9 October, which is now on hold pending resolution of
10 the three earlier-filed IPRs and possibly a further
11 extension of that stay and adjournment of summary
12 judgment and a trial date to accommodate the
13 eight-month delay in bringing that fourth IPR
14 petition.

15 And so while I appreciate that Petitioner
16 may feel like they had nothing to gain, but they had
17 every obligation to exercise their appropriate due
18 diligence to file with the proper name in the first
19 place. And it shouldn't be the Patent Owner that
20 suffers the penalty because of their carelessness,
21 lack of diligence or, at worst, gamesmanship.

22 JUDGE PETRAVICK: All right. Thank you.
23 Petitioner, would you like to respond to
24 that?

25 MR. TURNER: Again, Andrew Turner for

1 Petitioner.

2 Regarding timing, the IPR petition here
3 for the '005 patent was filed within the one-year
4 time limit.

5 And one thing, you know, I'd like to
6 mention here is, you know, we tried to optimize our
7 IPR petitions and just file one challenging each
8 patent. And there were a number of claim
9 instruction issues in the related litigation.

10 So that is one thing that -- we did have a
11 Markman hearing in district court. And, you know,
12 some of the delay in filing this fourth IPR petition
13 is waiting for this Markman order which,
14 unfortunately, that -- I don't think that issued
15 until after we ended up filing.

16 But in our petitions, we sometimes had
17 alternate grounds just to address all the different
18 claim construction positions that were being
19 furthered in the litigation. So that's one of the
20 reasons why we delayed filing this fourth IPR
21 petition.

22 JUDGE PETRAVICK: All right. Just to be
23 clear, Petitioner, when your client converted, you
24 had conversations with the client after that fact,
25 did they indicate that there was a conversion?

1 MR. TURNER: No, they did not.

2 JUDGE PETRAVICK: All right. I'm going to
3 take a minute to pause and poll my colleagues as to
4 whether they have any other questions.

5 (Brief interruption in the proceedings.)

6 JUDGE PETRAVICK: All right. They do not.
7 I think that's all the information that we
8 were seeking from you today. Thank you so much for
9 coming and providing us that information.

10 Petitioner, as the statutory deadline for
11 entering a decision is coming up, if possible, could
12 you file this transcript as soon as you can into the
13 case?

14 MR. TURNER: Yes, we will.

15 JUDGE PETRAVICK: That would be great.
16 Are there any other issues the parties
17 wish to deal with today?

18 MR. TURNER: No.

19 MS. JELENCHICK: Nothing from the Patent
20 Owner.

21 JUDGE PETRAVICK: All right. Well, thank
22 you again for joining us. We are adjourned.

23 (Proceeding adjourned at 2:41 p.m.)

24 \

25 \

CERTIFICATE

STATE OF MICHIGAN)
) ss
COUNTY OF OTTAWA)

I, CYNTHIA M. THOMAS, Certified Shorthand
Reporter and Notary Public, do hereby certify that
the foregoing proceeding was taken before me via
telephone.

I FURTHER CERTIFY that the proceeding was
taken in shorthand and thereafter transcribed by means
of computer-aided transcription by me and under my
direction and supervision, and that it is a true and
accurate transcript of my original shorthand notes.

I FURTHER CERTIFY that I am not a relative or
employee or attorney of any of the parties, or
financially interested in this action.

IN WITNESS WHEREOF, I have hereunto set my
hand this 9th day of May, 2024, at Grand Rapids,
Michigan.

Cynthia M. Thomas

CYNTHIA M. THOMAS
Certified Shorthand Reporter No. 3836
Notary Public, Ottawa County, Michigan
My Commission Expires: 11-09-28

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