

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

B/E AEROSPACE, INC.
Petitioner

v.

MAG AEROSPACE INDUSTRIES, LLC
Patent Owner

CASE IPR2014-01511
Patent No. 6,536,054

TRANSCRIPT OF OCTOBER 2, 2015 TELEPHONIC HEARING

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Dated: October 7, 2015

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned certifies that on
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In The Matter Of:

B/E AEROSPACE, INC.

v.

MAG AEROSPACE INDUSTRIES, INC.

TRANSCRIPT OF TELEPHONIC HEARING

October 2, 2015



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

B/E AEROSPACE, INC.,	)	CASE NOS.
	)	IPR2014-01510
Petitioner,	)	(Patent 6,353,942 B1)
	)	IPR2014-01511
VS.	)	(Patent 6,536,054 B2)
	)	IPR2014-01513
MAG AEROSPACE INDUSTRIES,	)	(Patent 6,536,055 B2)
INC.,	)	
	)	
Patent Owner.	)	
_____	)	

TRANSCRIPT OF TELEPHONIC HEARING

TAKEN ON

FRIDAY, OCTOBER 2, 2015

Reported by: DENISE A. ROSS

CSR No. 10687

TRANSCRIPT OF TELEPHONIC HEARING - 10/2/2015

Page 2	Page 4
1 TRANSCRIPT OF TELEPHONIC HEARING, taken 2 FRIDAY, OCTOBER 2, 2015, at 10:01 a.m., before 3 DENISE A. ROSS, CSR No. 10687. 4 5 APPEARANCES (ALL TELEPHONIC): 6 7 ADMINISTRATIVE PATENT JUDGE: 8 JUDGE PHILLIP J. KAUFFMAN 9 10 FOR THE PETITIONER B/E AEROSPACE, INC.: 11 IRELL & MANELLA LLP 12 BY: BENJAMIN HABER, ESQ. 13 ELLISEN TURNER, ESQ. 14 1800 Avenue of the Stars 15 Suite 900 16 Los Angeles, California 90067-4267 17 (310) 277-1010 18 19 FOR PATENT OWNER MAG AEROSPACE INDUSTRIES, INC.: 20 21 KILPATRICK TOWNSEND & STOCKTON LLP 22 BY: JOHN C. ALEMANNI, ESQ. 23 1001 West Fourth Street 24 Winston-Salem, North Carolina 27101-2400 25 (336) 607-7311	1 MR. HABER: John? 2 MR. ALEMANNI: Yes. 3 MR. HABER: I think, your Honor, Mr. Alemanni 4 for MAG has joined the call. 5 JUDGE KAUFFMAN: Thank you. 6 This is Judge Kauffman. 7 Mr. Alemanni, before you joined the call, we 8 discovered that Ms. Ross is a court reporter for 9 Petitioner. 10 I haven't asked yet, but I'd like Petitioner 11 to assure me that a copy of the transcript will be 12 filed. 13 MR. HABER: Yes, your Honor. 14 JUDGE KAUFFMAN: Mr. Haber and Mr. Turner are 15 on for Petitioner. 16 And, Mr. Alemanni, is it just you for 17 Patent Owner? 18 MR. ALEMANNI: Yes, it will be, your Honor. 19 I apologize. The e-mail only came to me, and it was 20 somehow stuck in my spam folder. So I did not see it. 21 So I apologize for joining late. 22 JUDGE KAUFFMAN: That's okay. Thank you. 23 Ms. Ross, are there any spellings you need or 24 anything else you need before we proceed? 25 THE REPORTER: No, thank you, your Honor.
Page 3	Page 5
1 FRIDAY, OCTOBER 2, 2015 2 10:01 a.m. 3 4 JUDGE KAUFFMAN: This is a conference call in 5 IPR2014-01510 also in -01511 and -01513. 6 Mr. Haber, I heard you earlier. 7 You're here today for Petitioner. 8 And who else is with you? 9 MR. HABER: Yes. With me is Ellisen Turner. 10 JUDGE KAUFFMAN: And, Patent Owner, are you 11 with us? 12 Well, if Petitioner could try to get 13 Patent Owner on the line, that would be great. 14 I'm going to go back on mute until we have 15 both parties. 16 MR. HABER: All right. Thank you. 17 (Recess taken.) 18 MR. HABER: Your Honor, this is Ben Haber. 19 We have called multiple of MAG's counsel and e-mailed 20 counsel of record to join the call. I've not been able 21 to get in touch with any of them, but hopefully they'll 22 join shortly. 23 JUDGE KAUFFMAN: This is Judge Kauffman. 24 Thank you for the update. 25 MR. ALEMANNI: Hello, this is John Alemanni.	1 JUDGE KAUFFMAN: Petitioner, you asked for 2 the call. So I'd like for you to please tell me what 3 it is you'd like for us to do. 4 MR. HABER: Yes, your Honor. 5 So MAG filed its Patent Owner response and 6 for the first time raised some issues related to 7 secondary considerations, commercial success of its 8 products and new claim construction arguments. 9 B/E is aware of material that is inconsistent 10 with positions that MAG has taken in its response. 11 This material was produced to B/E in connection with a 12 separate litigation, which is ongoing between B/E and 13 MAG, under a litigation protective order. 14 So we have in our possession certain 15 documents that we know reflect inconsistent 16 information. 17 The protective order that's in place 18 specifically allows for MAG to consent to use of its 19 material in the IPR. There is also a provision in the 20 protective order that allows the Board -- an 21 administrative agency to order its production in the 22 IPR. 23 JUDGE KAUFFMAN: I'm sorry. Mr. Haber, could 24 you repeat that last part, please. 25 MR. HABER: There is a provision in the

2 (Pages 2 to 5)

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Page 6 1 litigation protective order, specifically Section 13, 2 which allows an administrative agency to order the 3 production of material produced under the protective 4 order. 5 And so what we would like to do is ask the 6 Board to order us to produce this information that we 7 know is inconsistent with positions that MAG has taken. 8 Specifically, we identified to MAG about 9 20 documents and 8 deposition transcripts that we would 10 like to use in the IPR. We asked for MAG to consent 11 for us to use these documents. MAG has refused to 12 provide consent. 13 Additionally, in June, we also had a similar 14 issue come up related to litigation material in the 15 IPR. And B/E and MAG actually agreed amongst 16 themselves to a procedure for using litigation material 17 in the IPR. 18 We exchanged some litigation material, and 19 MAG actually used some of its own and B/E's material in 20 the IPR in connection with its opposition. 21 So in the alternative to consenting under the 22 protective order, we asked MAG to simply agree to the 23 prior procedure that we used with regard to litigation 24 material in the IPR. MAG has refused to agree to that 25 as well.	Page 8 1 JUDGE KAUFFMAN: Mr. Haber, if I could just 2 ask if you've already had a chance to -- and I know 3 we're only talking about the depositions and not the 4 other documents yet. 5 But if you've already had a chance to 6 cross-examine the witness about the matter, why do you 7 also need the underlying document to be submitted in 8 the record? 9 MR. HABER: There's a few things. 10 One is that some of the inconsistent 11 statements are the prior deposition testimony itself. 12 So to the extent that the witness testified as to 13 the -- for example, the meaning of "line replaceable 14 unit" in his deposition now, he testified contradictory 15 in the litigation. And we need to be able to use both 16 of that testimony to highlight the inconsistency. 17 And, also, to the extent that there is 18 testimony about underlying documents, contracts, things 19 like that, that reflect various reasons for commercial 20 success, we need to be able to present that underlying 21 evidence. Otherwise the testimony doesn't really have 22 any context. 23 And when we asked for using this material, 24 MAG did not identify any prejudice with regard to our 25 use of this material. In fact, there couldn't be any.
Page 7 1 So we are kind of stuck in a position now 2 where we know of information which is inconsistent with 3 positions MAG has taken. We may have an obligation to 4 produce that information under our duty of candor to 5 the Board. And we can't do that without MAG's consent 6 or a Board order. 7 The material is inconsistent in a number of 8 ways. The depositions are in some cases depositions of 9 MAG declarants who have provided testimony in the IPR. 10 They've provided conflicting testimony in litigation, 11 specifically with regard to the meaning of the term 12 "LRU," with regard to how the MAG embodiments fared in 13 the marketplace. 14 Some of this material was already actually 15 used in connection with deposing these witnesses. For 16 example, Mr. Jones, Mr. Morris, Mr. Conrad were deposed 17 in the IPR. Their prior litigation testimony was 18 presented to them. They were given opportunities to 19 address it. 20 Mr. Jones, in fact, testified that he relied 21 on his prior litigation testimony in preparing his 22 declaration for use in the IPR. 23 The material is really already part of the 24 record. It's just that MAG will not allow us to file 25 it.	Page 9 1 We have the documents. They know exactly what we want 2 to use. They don't need to search for anything. We 3 actually have the documents in our possession. All we 4 need to do is file them. 5 On the other hand, the prejudice to B/E would 6 be severe if we are not able to respond to 7 contradictory testimony and contradictory evidence with 8 evidence that we know exists. 9 And it would also be prejudicial to the 10 Board, because the Board would be making its decision 11 based on an incomplete record when there is evidence 12 out there that -- that directly contradicts with MAG's 13 positions. 14 JUDGE KAUFFMAN: Okay. I think I understand 15 your position, Mr. Haber. 16 And the ultimate solution you want from us is 17 for the panel to order Petitioner to produce those 18 20 documents and 8 different depositions? 19 MR. HABER: I think that would be the easiest 20 way. 21 JUDGE KAUFFMAN: I'll come back to you. 22 But I'd like to hear Patent Owner's position. 23 And, in particular, I'd like to understand what 24 prejudice there would be to you for those documents to 25 be entered in the record.

3 (Pages 6 to 9)

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Page 10 1 MR. ALEMANNI: Your Honor, thank you. 2 This is John Alemanni for the Patent Owner, 3 MAG. 4 I think this is clearly litigation by ambush. 5 These documents are documents that B/E has had in its 6 possession for 18 months in litigation. 7 They waited until all the depositions were 8 done with our declarants, and they waited until after 9 they requested from us and received permission to file 10 a stipulation extending the deadlines. 11 And then once they had agreement from us to 12 extend the deadlines and all the depositions were done, 13 then they requested these additional documents. 14 And I'll address the documents in turn. 15 But I think they're attempting -- B/E is 16 attempting to characterize this as routine discovery. 17 It's not. It's clear from the timing -- our response 18 is filed in July; so they've had our response for 19 2 1/2 months. 20 It's clear from the timing and from the type 21 and contents of documents that this isn't routine 22 discovery. 23 So B/E would be required to show that the 24 interests of justice are served in ordering us to 25 produce these documents at the 11th hour of this	Page 12 1 was denied, B/E said that submitting the information at 2 that early stage would be consistent with the Board's 3 ability to timely complete the IPR. 4 They said further that our response due date 5 is nearly six weeks out, and MAG has long been aware of 6 this material from the underlying information. 7 I'm quoting from Proceeding 1510, Paper 35. 8 This request is just the opposite. It's at 9 the very last hour. We can do absolutely nothing to 10 respond to most of what they're requesting to have 11 produced. I think this request should be denied on 12 that basis. 13 Further, this is a routine discovery. Their 14 e-mail to us on September 25th stated that the 15 opposition papers -- our opposition raises several 16 issues that require a response using material that was 17 previously produced. 18 Again, they've known about that response 19 since July 16th. If it were true that they needed this 20 material in response to that, they could have begun 21 this discussion months ago. They chose to wait until 22 all the additional discovery was not -- you know, was 23 completed. 24 I think the materials themselves are not 25 materials that fall under routine discovery. There's
Page 11 1 proceeding. 2 And so, I mean, taking these in turn, they've 3 had the documents for 18 months. They knew they 4 required separate production under the district court 5 protective order. 6 In fact, as Mr. Haber mentions, five months 7 ago, they asked for a different set of documents. We 8 went through a negotiation process and determined which 9 documents we'd produce. And then they tried to submit 10 them as supplemental information. The Board held that 11 they were not relevant to the proceeding. 12 They've had our response for almost 13 2 1/2 months. It was filed July 16th. And they never 14 before requested this information. They waited until, 15 as I said, the depositions were completed. And we 16 requested the -- the extension that they requested, we 17 agreed to. 18 I think it's clear this is not something 19 that's allowable by the Board. I think the Board 20 stated in the very first IPR that a party may not 21 attempt to alter the Board's trial proceedings under 22 the pretext of discovery. 23 B/E also recognized that the timing of when 24 these requests were made is important. In its motion 25 to submit supplemental information in May, the one that	Page 13 1 two types of documents and the deposition transcripts. 2 I think the documents themselves don't contain 3 information contrary to the positions we've taken. 4 They're internal documents. They're marked highly 5 confidential. 6 The depositions themselves, Mr. Haber noted 7 that they introduced those depositions that were marked 8 AEO at the depositions of our declarants. And he said 9 that they asked questions about them. 10 They could have explored those deposition 11 transcripts. To the extent that they contain 12 inconsistent statements, they could have asked our 13 deponents to clarify those statements. 14 What they're doing instead is they want to 15 introduce their transcripts after the fact, after the 16 point of which the defendants could explain their 17 answers or could address any inconsistent statements 18 and then take those statements out of context, put them 19 together and argue that they're inconsistent 20 statements. 21 I think those depositions, if they had wanted 22 them, as they said they introduced them as depositions, 23 they could have explored those deposition transcripts 24 from the prior litigation during the deposition -- 25 during the cross-examination of those deponents.

4 (Pages 10 to 13)

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Page 14 1 The remainder of the transcripts are, for 2 example, inventor deposition transcripts. It's not 3 clear at all why those are relevant. 4 And so these are not the sorts of materials 5 that are subject to routine discovery. And obtaining 6 additional discovery requires that B/E shows it's 7 necessary in the interest of justice, under 35 U.S.C. 8 316(a)5. 9 And, again, the Board addressed this in the 10 Garmin Cuozzo case, 2012-00001. And I'm referring to 11 Paper 26. 12 So two of the factors are, Factor 2, which 13 litigation positions and underlying basis -- asking for 14 the other party's litigation positions and the 15 underlying basis for those positions is not necessary 16 in the interest of justice. I'm quoting from that 17 case. 18 So, again, this is just an attempt to alter 19 the trial procedures, bring this evidence in at the 20 very last minute under the pretext of routine 21 discovery. 22 Another factor, Factor 3, is the ability to 23 generate equivalent information by other means. We've 24 already touched on the fact that they could have taken 25 the deposition transcripts, attempted to use them to	Page 16 1 protective order. 2 We had that discussion five months ago. I 3 think Mr. Haber alluded to that when he said he wanted 4 the Board to order the production of these, that they 5 can't simply use the documents from the district court 6 litigation in this proceeding. 7 JUDGE KAUFFMAN: Okay. Thank you, 8 Mr. Alemanni. I'll come back to you. 9 Mr. Haber. 10 MR. HABER: Yes. 11 JUDGE KAUFFMAN: Are these documents -- the 12 20 documents and 8 depositions -- are these the same 13 things that were the subject of the motion for 14 supplemental information that we denied in Paper 37 in 15 the 1510 proceedings? 16 MR. HABER: No, your Honor. These are 17 different documents. Those actually -- going back to 18 those documents -- 19 JUDGE KAUFFMAN: Just a second, Mr. Haber. 20 There's no overlap at all; none of these 21 documents were part of that? 22 MR. HABER: No, none of them were. 23 Those documents were actually already 24 produced to B/E under agreement from MAG; so they are 25 already available for use in the IPR.
Page 15 1 impeach the witnesses. They didn't do so. They've 2 given up that opportunity. 3 In relation to the other documents, they 4 introduced publicly available documents at the -- at 5 the depositions. For example, they used MAG 0003486, 6 which is a publicly available document. It's a 7 Monogram ad regarding an Orbital toilet. They used 8 that in Mr. Conrad's deposition. 9 So this information is also available -- at 10 least some of it is available publicly. 11 JUDGE KAUFFMAN: Mr. Alemanni, I think I 12 understand your position. We're especially going to 13 come back to the timing issue with Petitioner, but I 14 have a couple questions for you. 15 MR. ALEMANNI: Okay. 16 JUDGE KAUFFMAN: First of all, do you dispute 17 that there are inconsistent statements in the material? 18 MR. ALEMANNI: I do. 19 JUDGE KAUFFMAN: Okay. Second of all, why 20 are you convinced that this is a discovery issue when 21 Petitioner already has the documents? 22 MR. ALEMANNI: Because the documents -- the 23 documents haven't been produced in this proceeding. 24 And it's clear that they have to be produced separately 25 in this proceeding under the district court's	Page 17 1 These are separate documents, specifically 2 responding only to issues raised in MAG's opposition. 3 JUDGE KAUFFMAN: Okay. And talk to me about 4 timing. 5 Because I'm trying to understand, if you had 6 this document when you were able to cross-examine the 7 witness, why you then also need to put in the document. 8 I don't understand why it isn't enough that, 9 in that testimony you presented him with the prior 10 testimony and he got to address that. 11 Why isn't that the best evidence that I can 12 look at? 13 MR. HABER: Certainly, your Honor. 14 With regard to the deposition testimony, the 15 depositions were presented to the witness. The witness 16 in several cases testified that he reviewed his 17 deposition transcript. We asked the witness 18 specifically, "Is there anything about your prior 19 testimony that you would like to change, that you would 20 like to correct, that you would like to alter in any 21 way?" 22 We offered the witness the opportunity to 23 testify about the deposition transcript. And that 24 opportunity was presented to him. 25 Now, every single point in the prior

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Page 18 1 deposition, we obviously couldn't ask about. We 2 couldn't re-ask the same question over and over again. 3 And so the witness, having an opportunity to 4 respond and basically adopting his prior testimony, we 5 would like to show that to the Board. 6 And the -- the issue is that not only is the 7 testimony not internally inconsistent -- not internally 8 consistent with the witness, but the testimony is 9 inconsistent with statements that MAG makes in its 10 opposition. 11 So any particular witness would only be able 12 to respond to his own testimony. They wouldn't be able 13 to respond to MAG's arguments. 14 So we have done what we could do to elicit 15 all of the testimony that the Board should consider in 16 evaluating MAG's arguments. 17 Now, with regard to Mr. Alemanni's discussion 18 of timing, one thing I'll just note, he didn't, I don't 19 think, squarely address any prejudice that MAG would 20 suffer. B/E already has these documents. It won't 21 hurt MAG in any way. They don't have to look for them. 22 We have them. 23 And with regard to the depositions, after MAG 24 filed its Patent Owner opposition, we immediately asked 25 for depositions to occur in August. MAG delayed	Page 20 1 Mr. Jones testifies that the plain meaning to 2 a line mechanic is that a line replaceable unit is 3 something that is replaced on the line while the 4 aircraft is in the field and still in revenue-making 5 status. 6 So that's his current testimony. 7 JUDGE KAUFFMAN: Meaning the testimony in 8 this proceeding? 9 MR. HABER: Yes. In this proceeding, in his 10 declaration and his deposition. 11 In the prior litigation, he was asked 12 squarely: 13 "For a component or module to 14 qualify as a line replaceable 15 unit, does that component or 16 module have to be removed during 17 the operational or revenue 18 status of the airplane?" 19 And he testified: 20 "It does not have to be." 21 So he's taking a contrary position. Now he 22 says an LRU has to be serviced during revenue-making 23 status. In his prior testimony, he said that it does 24 not have to be. 25 So that's just one example.
Page 19 1 depositions until September. So there was a one-month 2 delay there. 3 We asked MAG -- after we compiled all of the 4 documents that we wanted and we deposed the witnesses 5 and we knew which documents we were going to use, we 6 asked MAG for these specific documents just days after 7 the last deposition concluded so that we could know 8 exactly what we were going to ask for. We didn't have 9 to have serial requests. 10 And as Mr. Alemanni explained, we previously 11 had an agreed-upon procedure whereby we would exchange 12 this information internally. And we had no reason to 13 expect that this would be at all controversial since we 14 agreed previously to the use of material that the 15 parties have in their possession. 16 JUDGE KAUFFMAN: Mr. Haber, could you -- is 17 it possible for you to give me an example of one of -- 18 some information in a deposition that's inconsistent 19 with what a witness said to you in their testimony. 20 MR. HABER: Sure. I can give you an example 21 from the Jones deposition. 22 Mr. Jones is a declarant that MAG has put 23 forward that offers testimony on line maintenance, 24 specifically on the meaning of the term "line 25 replaceable units."	Page 21 1 JUDGE KAUFFMAN: Mr. Haber, isn't there a 2 difference between "revenue-making status" and "in the 3 field"? 4 MR. HABER: So both of these statements 5 relate to revenue status. His current testimony -- 6 There is a difference between "in the field" 7 and "revenue status." 8 His current testimony says that an LRU has to 9 be changed while the plane is in his revenue status. 10 That is in his declaration. 11 And the question he was asked was about 12 whether or not a component has to be changed while a 13 toilet is in revenue status. And he said it doesn't 14 have to be. 15 JUDGE KAUFFMAN: And is "revenue status" a 16 term of art? 17 MR. HABER: Yes. 18 JUDGE KAUFFMAN: And it means? 19 MR. HABER: It means while the plane is 20 essentially flying with passengers, according to MAG; 21 and they've offered testimony on that as well. 22 JUDGE KAUFFMAN: Okay. And I'd like for you 23 to hold there. I will come back to you. 24 So, Mr. Alemanni, why is that not 25 contradictory?

6 (Pages 18 to 21)

1 MR. ALEMANNI: So I think that's a fair
2 question, your Honor.

3 What B/E asked Mr. Jones at the beginning of
4 his -- they introduced his testimony and said, "Okay.
5 When you were previously under oath, did you testify
6 accurately? Is there anything you want to change?"

7 Mr. Jones, you know, didn't go through his
8 whole deposition and try to pull out every sentence and
9 every term. And so he said, "Yeah, I testified
10 accurately. I mean, it was in a different proceeding.
11 It was under different standards. But I testified
12 accurately and truthfully."

13 And so the question that B/E presents here,
14 that his testimony was perhaps inconsistent or they
15 contend that it was inconsistent, that's a question
16 that fairly could be posed to Mr. Jones. Show him his
17 prior deposition testimony where B/E claims there's an
18 inconsistency and to have Mr. Jones testify to that
19 inconsistency.

20 What B/E proposed to do instead is ask
21 Mr. Jones a bunch of questions; and then when Mr. Jones
22 has no opportunity to address any inconsistencies,
23 assail him for these alleged inconsistencies.

24 And, again, it's two different proceedings,
25 two different standards.

1 It's a fair question to ask him. He
2 certainly can be impeached on prior testimony if it is
3 inconsistent, but he should be afforded the
4 opportunity.

5 And B/E had every opportunity to ask him the
6 question. He should be afforded the opportunity to
7 explain that. I think that's what's helpful to the
8 panel.

9 Merely taking statements from a different
10 proceeding, different standard out of context and then
11 using attorney argument or expert testimony to try
12 to --

13 JUDGE KAUFFMAN: Mr. Alemanni, are you saying
14 that it's required that any time there's an
15 inconsistent statement, it has to be brought in through
16 testimony, that it can't be brought in through a
17 document, because I don't know that rule?

18 MR. ALEMANNI: No, your Honor, I'm not saying
19 that.

20 I'm saying that that would provide more
21 useful testimony, particularly -- that would provide
22 more useful evidence in this case as opposed to pulling
23 these statements out of context.

24 JUDGE KAUFFMAN: But useful is not the same
25 as admissible.

1 You know, I would agree with you that the
2 most useful information to us generally is when someone
3 has been asked a question and then had the opportunity
4 to clear it up so we can get as close to the truth as
5 possible.

6 But I think that very often, inconsistent
7 prior statements in documents can be admissible.

8 Why would this -- what looks like an
9 inconsistency on its face -- why would that be
10 inadmissible?

11 MR. ALEMANNI: I don't know that it is
12 inadmissible. And I don't disagree that it's
13 potentially useful to the panel. I just disagree -- I
14 don't think it's useful enough to show that in the
15 interest of justice, we should be ordered to produce it
16 at the 11th hour in this proceeding.

17 As Mr. Haber explained, they put these
18 documents together before they did the deposition.
19 They compiled all the documents they wanted, and then
20 they waited. And they waited until the depositions
21 were over. They waited until they asked us for an
22 extension of time.

23 We negotiated over the course of several
24 days. We agreed to the extension of time. As soon as
25 we had agreed to the extension of time, then they said,

1 "Okay. We're going to spring this document request on
2 you; and if you don't agree, we're going to the Board
3 to get it produced."

4 So I just think the overall circumstances of
5 this do not meet the interest of justice standard that
6 the Board has articulated and that should be followed
7 in this case.

8 MR. HABER: Your Honor, if I may respond real
9 quickly.

10 JUDGE KAUFFMAN: This is Mr. Haber for the
11 court reporter.

12 Go ahead.

13 MR. HABER: Yes.

14 So I just wanted to address a couple points.

15 One is that MAG prepared this -- this
16 declaration with these inconsistencies. We have tried
17 to highlight them to the best of our ability.

18 It's really MAG's obligation to not prepare
19 inconsistent testimony, and they have an obligation to
20 produce inconsistent information that they didn't.

21 And we took time to discover it and gave
22 witnesses the opportunity to address it. Mr. Jones, in
23 particular, testified that he reviewed his transcript.
24 I mean, there's nothing that was sprung on anyone. And
25 we took his testimony.

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1 And then, the information was not compiled
2 before the depositions. The discovery is the process
3 of compiling that information. And after the
4 depositions were concluded, we had a complete list of
5 what we felt were inconsistent statements that the
6 Board should consider.

7 And that is where we are right now. There's
8 really no surprise.

9 MAG perhaps thought they had the last word on
10 this. But the reality is we should respond, and the
11 Board should have a complete record before it.

12 JUDGE KAUFFMAN: And, Mr. Haber, for each of
13 the eight deposition transcripts that you're
14 discussing, you say that there is some inconsistency
15 you can point to in prior testimony?

16 MR. HABER: Yes. Yes. It's either
17 inconsistent with prior testimony or directly
18 inconsistent with attorney argument, essentially, that
19 MAG has made in its opposition paper.

20 JUDGE KAUFFMAN: And, Mr. Alemanni, why
21 wouldn't I see this as routine discovery that's an
22 inconsistent statement under 4251(b)(1) triple I?

23 How come you think it's not routine
24 discovery?

25 MR. ALEMANNI: I don't know specifically what

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1 understand our duty to produce documents that present
2 an inconsistent statement. We don't believe they do.

3 JUDGE KAUFFMAN: Mr. Alemanni -- Haber --
4 MR. HABER: Yes.

5 JUDGE KAUFFMAN: -- why do you need the
6 entire deposition?

7 Why can't you identify the parts that are
8 inconsistent and show those to the Patent Owner?

9 MR. HABER: We could certainly do that. We
10 would have no problem with that. We expected MAG to
11 agree previously. They told us right when we asked
12 that they would not agree. They didn't engage in any
13 sort of meet and confer. But now we're kind of nearing
14 the end of where we need to file our papers.

15 So to the extent that there's negotiation
16 that has to happen, we're certainly willing to do that.

17 JUDGE KAUFFMAN: I feel like when the Board
18 gives a solution, it's sort of a hammer, when sometimes
19 something more delicate or more precise would be
20 better.

21 For example, you know, if we did a motion for
22 this as discovery and we say that the whole deposition
23 can't come in because really only one paragraph of it
24 was -- shows an inconsistency, then we just say "no" to
25 the whole thing.

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1 B/E is going to refer to in this particular document.
2 There's a little bit of inconsistency with what
3 Mr. Haber said. He said they compiled the documents
4 before the depositions and then came up with the final
5 list.

6 But as I look at these documents, these are
7 internal documents that before the --

8 Mr. Haber's communication to us suggested
9 that all these documents have to do with secondary
10 considerations. But they are raised in response to
11 our -- to what we said in our Patent Owner response.

12 And so I look at these documents. Many of
13 these -- in fact, I think all of these documents were
14 created prior to the sale of the toilets that are at
15 issue and refer to, you know, design, concepts, things
16 like that.

17 So I have no indication of what they're
18 referring to in each of these particular documents as
19 inconsistent statements. We don't see them as
20 inconsistent with any of the arguments we made.

21 So I can't address specifically what he's
22 saying, because they haven't identified to us what it
23 is they think is inconsistent about it.

24 But, in general, as I look at the documents,
25 I don't think they're inconsistent at all. We

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1 But maybe you can work with Patent Owner and
2 show them, these are the six paragraphs we would have
3 put in from here; and these are the pages we need from
4 here. And maybe the two of you can come to an
5 agreement that's a better solution than you can get
6 from the Board.

7 And I also understand sometimes it's
8 difficult to come to a compromise between the parties.
9 It is an adversarial proceeding.

10 So is it realistic to think that the two of
11 you could try that, because I feel like Patent Owner
12 hasn't had a chance to look at specifics of what you're
13 saying is inconsistent, and try to come to an agreement
14 that way?

15 MR. HABER: So the issue is really one of
16 timing. We have basically a short amount of time to do
17 this. And to the extent that we go through all of this
18 and MAG still refuses, then we'll really be out of
19 time.

20 One thing that we could do is that we
21 could -- rather than filing the whole transcripts, we
22 could just file the portions that are inconsistent.
23 And then there are also the additional documents
24 themselves -- apart from the depositions, the documents
25 themselves, which are inconsistent and in some cases

8 (Pages 26 to 29)

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1 varied portions of the document, subsections relating 2 to sales and things. 3 One of -- one of the classes of documents 4 that are -- is not consistent is that MAG identifies 5 six contracts for sale of its toilets, and they've only 6 produced three of them. There are three other 7 contracts regarding the sale of its toilets that were 8 not produced to MAG that we have in our possession. 9 And they are -- they highlight -- they make 10 clear that, you know, the sale of their toilets were 11 not related to patented features. 12 And it's really the contracts themselves in 13 their entirety that should be presented to the Board. 14 MAG shouldn't be able to cherry pick the three 15 contracts that they want to submit and not submit other 16 ones. 17 So we're certainly willing to work with MAG, 18 but we are concerned that we will run out of time. And 19 we're especially concerned, since we basically had an 20 agreement in June that MAG is now unwilling to abide 21 by. 22 JUDGE KAUFFMAN: I understand that. 23 And I'll give you a say in just a minute, 24 Mr. Alemanni. 25 Would each side agree that if the two of you	1 And I just did want to mention one thing. 2 Again, under the protective order, the Board 3 could simply order us to produce the documents; and 4 then we would just produce them. 5 JUDGE KAUFFMAN: I understand your position 6 on that. And I think I understand Mr. Alemanni's 7 position on that as well. 8 MR. HABER: Thank you, your Honor. 9 JUDGE KAUFFMAN: Thank you. 10 (Recess taken.) 11 JUDGE KAUFFMAN: This is Judge Kauffman. The 12 panel members are back with me on the line. 13 Do I still have Mr. Haber on the line? 14 MR. HABER: Yes, your Honor. 15 JUDGE KAUFFMAN: Ms. Ross? 16 THE REPORTER: Yes, your Honor. 17 JUDGE KAUFFMAN: And Mr. Alemanni? 18 MR. ALEMANNI: Yes, your Honor. 19 JUDGE KAUFFMAN: First of all, I'd like to 20 say that it sounds to me like -- that the example that 21 Petitioner has given us is it is not required, and it 22 is required. That seems like a pretty black-and-white 23 inconsistency, which then makes it the Patent Owner's 24 obligation to submit it as routine discovery. 25 And if you don't, then the solution for that
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1 agree these documents can be submitted, or does your 2 order with the district court require something more 3 than that? 4 Petitioner? 5 MR. HABER: Yes. 6 So our position is that we can simply agree, 7 and we expected MAG to just agree. The order allows 8 them to provide written consent. We identified the 9 documents that we wanted to file. And there's really 10 nothing else that's required, other than to just have 11 MAG send us an e-mail that says it's okay. 12 JUDGE KAUFFMAN: And, Mr. Alemanni, do you 13 agree that this can be done by consent; or is something 14 more required? 15 MR. ALEMANNI: No, your Honor, I agree that 16 this can be done by consent. 17 And to the extent there's a time pressure, 18 that's caused by B/E's waiting to the very last moment 19 to request these documents. 20 JUDGE KAUFFMAN: I need a minute to have a 21 side call with the panel. And I'm going to ask 22 everyone to hold, please. I'm sorry to ask you to do 23 that, but I need to talk to them. And then I'll be 24 back with you as soon as I can. 25 MR. HABER: All right, your Honor.	1 can be that the statement that you initially relied on 2 could be expunged or not used in your favor; so there 3 is a significant consequence to that. 4 Regarding the timing of this, you know, what 5 the Petitioner can put in at this point in the 6 proceeding is what's within the scope of the 7 Patent Owner's response. 8 And so -- and they don't know what that is. 9 So we can't really look at the whole period of time and 10 think that Petitioner has been sitting on it for that 11 period of time. It's really been since the 12 Patent Owner's response, because then they know these 13 are the things that we can still fairly comment on and 14 submit evidence about. 15 What I propose is this: That the parties 16 take one week; and during that week, I would like a 17 good-faith effort by Petitioner to show the 18 Patent Owner, these are the parts. We're not expecting 19 that the whole of these documents or the whole of these 20 depositions is coming in, but just that the 21 inconsistent parts and then what it's inconsistent with 22 are identified so that the Patent Owner can make a 23 meaningful decision about that. 24 And then the two of you come to agreement, 25 and then it can just be submitted with the Petitioner's

Page 34 1 reply. 2 I'll remind you that it does need to be 3 within the scope of the Patent Owner's response, it 4 needs to be inconsistent and it needs to be relevant to 5 these proceedings. 6 For example, that question was about in 7 revenue status. And that, to my knowledge, is not a 8 term in the spec. It's not a claim term. It's a term 9 of art that relates to that information. 10 But you can see, my point is that there's got 11 to be a way that it relates to an issue that's before 12 the Board. 13 Petitioner, what do you think about that 14 proposal? 15 And if in a week you cannot come to an 16 agreement, we'll have another call; and we'll go from 17 there. 18 MR. HABER: Yes, your Honor. 19 Assuming that we can negotiate in good faith, 20 the only problem I can see with that is if ultimately 21 we reach our filing deadline and MAG tells us, "Oh, by 22 the way, we don't agree that any of these are 23 inconsistent and you can't file them," we'll be in the 24 same position that we are now. 25 And I worry that this information will not be	Page 36 1 Mr. Alemanni? 2 MR. ALEMANNI: Yes, your Honor. 3 I think Patent Owner is fine with the process 4 you laid out, and we're absolutely okay with 5 negotiating in good faith. 6 I do have one question. 7 That is, prior to the call, I presume the 8 Board is going to want some sort of list of disputes as 9 opposed to just having a call like this where it's sort 10 of in the abstract. 11 Do you have any particular preference for 12 what we present if there are any disagreements 13 remaining at that time? 14 JUDGE KAUFFMAN: Give me just a minute. I'm 15 waiting to hear from my panel members. 16 MR. ALEMANNI: Okay. 17 MR. HABER: And, your Honor, I just want to 18 make one point, which is that a week from today is the 19 9th; and that is the day that our reply and our filing 20 is actually due. 21 JUDGE KAUFFMAN: I didn't realize we were 22 that close in time. 23 And, Patent Owner, would you object to a week 24 of extension to try to work this out? 25 MR. ALEMANNI: No, your Honor.
Page 35 1 able to be in front of the Board. 2 JUDGE KAUFFMAN: I understand your concern. 3 But I don't think that can happen, because one week 4 from today, if you -- if the parties haven't resolved 5 this, we're going to have another call. And then the 6 Board is going to have to look into what's inconsistent 7 and what's not. And we're going to have to make an 8 order at that time. 9 MR. HABER: Okay. One -- I think that's 10 fair. 11 One thing that we were also thinking of on 12 our end is that MAG ultimately will not be without any 13 sort of remedy. If we put these documents in and MAG 14 still objects to them saying that they're not 15 inconsistent, they can file objections. They can move 16 to exclude them. And, essentially, the documents will 17 be in front of the Board; and MAG can make whatever 18 arguments it wants to make in its motions to exclude. 19 And to the extent that there is no 20 inconsistency, then the Board could exclude those 21 documents. 22 That way, at least the documents will be in 23 front of the Board; and MAG will still have an 24 opportunity to comment on inconsistencies. 25 JUDGE KAUFFMAN: Okay. Thank you, Mr. Haber.	Page 37 1 We've already agreed to a week extension to 2 the deadline; so we would be open to another extension. 3 We'll just have to work out the remaining schedules. 4 The oral hearing, I believe, is mid November; 5 so we're getting somewhat close to when the panel will 6 have to consider all of this. 7 So to the extent it doesn't cause you a 8 problem, then, yes, Patent Owner would certainly be 9 amenable to a reasonable extension. 10 MR. HABER: And we would agree to extending 11 the deadline to the 16th. 12 JUDGE KAUFFMAN: Hold on just a second, 13 please. I need to send a message to the panel. 14 So just to be clear, on the 9th, you will 15 have worked this out; or we will have another call. 16 The deadline for the Petitioner's reply is now the 16th 17 of October. 18 I would like an agreement from the parties on 19 that to be submitted for the record, please. 20 If we are to have a call and it's not 21 resolved between you, then I would like for each side 22 to have a list of the items that are sought to be 23 entered. And then we need to talk about how they're 24 inconsistent, how they're within the scope and how 25 they're relevant.

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1 Any questions, Mr. Haber?
2 MR. HABER: No, your Honor. I think that
3 is -- I think we understand.
4 JUDGE KAUFFMAN: Mr. Alemanni, what do you
5 think?
6 MR. ALEMANNI: No, your Honor. That sounds
7 reasonable.
8 JUDGE KAUFFMAN: Okay. Ms. Ross, do you have
9 any questions for me?
10 THE REPORTER: No, thank you, your Honor.
11 JUDGE KAUFFMAN: Okay. Well, thank you both
12 for trying to work this out. I hope that you're able
13 to do that. And if not, we'll go from there.
14 Let me just check with the panel.
15 Okay. Thank you very much. That concludes
16 our call for today.
17 MR. ALEMANNI: Thank you, your Honor.
18 MR. HABER: Thank you.
19 (Whereupon, the hearing concluded
20 at 10:53 a.m.)
21 -o0o-

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1 I, DENISE A. ROSS, a Certified Shorthand
2 Reporter for the State of California, do hereby
3 certify:
4 That said proceedings were taken before me at
5 the time and place therein set forth and were taken
6 down by me in shorthand and thereafter reduced to
7 typewriting via computer-aided transcription under my
8 direction;
9 I further certify that I am neither counsel
10 for, nor related to, any party to said action, nor in
11 anywise interested in the outcome thereof.
12 IN WITNESS WHEREOF, I have hereunto
13 subscribed my name this _____ day of _____
14 2015.
15
16
17
18 _____
19 Denise A. Ross
20 CSR No. 10687
21
22
23
24
25

11 (Pages 38 to 39)

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