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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE: CHROMACODE LITIGATION) C-23-04823 EKL
)
) SAN JOSE, CALIFORNIA
)
) JUNE 18, 2025
)
) PAGES 1-44

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE EUMI K. LEE
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: SHEPPARD, MULLIN, RICHTER & HAMPTON
BY: JESSE A. SALEN
12275 EL CAMINO REAL, SUITE 100
SAN DIEGO, CALIFORNIA 92130

BY: BRADLEY C. GRAVELINE
321 NORTH CLARK STREET, 32ND FLOOR
CHICAGO, ILLINOIS 60654

FOR THE DEFENDANT: JONES DAY
BY: EDWARD R. REINES
DEREK C. WALTER
1755 EMBARCADERO ROAD
PALO ALTO, CALIFORNIA 94303

ALSO PRESENT: CHIEMI SUZUKI
FERNANDO MEZA GUTIERREZ
JOHN CASSINGHAM

REMOTE REPORTED BY: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

1 SAN JOSE, CALIFORNIA

JUNE 18, 2025

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

3 (COURT CONVENED AT 10:07 A.M.)

4 THE COURT: GOOD MORNING, EVERYBODY. PLEASE BE
5 SEATED.

6 THE CLERK: WE'RE CALLING CASE NUMBER 5-23-CV-4823
7 EKL, IN RE: CHROMACODE LITIGATION FOR A MOTION HEARING.

8 COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES ON
9 THE RECORD, STARTING WITH COUNSEL FOR THE PLAINTIFF.

10 MR. SALEN: GOOD MORNING, YOUR HONOR.

11 JESSE SALEN FROM SHEPPARD MULLIN APPEARING ON BEHALF OF
12 PLAINTIFFS CALTECH AND CHROMACODE.

13 AND WITH ME IS BRAD GRAVELINE.

14 THE COURT: GOOD MORNING TO YOU BOTH.

15 MR. WALTER: GOOD MORNING, YOUR HONOR.

16 DEREK WALTER FROM JONES DAY, AND I'M JOINED BY ED REINES.
17 FROM BIO-RAD, FERNANDO MEZA GUTIERREZ AND JOHN CASSINGHAM.

18 THE COURT: GOOD MORNING, EVERYBODY.

19 MR. SALEN: SORRY, YOUR HONOR.

20 JUST FOR THE RECORD, WITH ME ALSO IS CHIEMI SUZUKI FROM
21 CALTECH.

22 THE COURT: GOOD MORNING.

23 ALL RIGHT, COUNSEL. SO WE'RE HERE TODAY WITH A SERIES OF
24 MOTIONS. THE COURT ENTERED THE ADMINISTRATIVE MOTION. THE
25 MAJOR FOCUS TODAY IS THE MOTION TO CONSOLIDATE, WHICH THEN WILL

1 AFFECT ANY -- WILL AFFECT THE ICMC POSSIBLY IN THE OTHER
2 MATTER.

3 I HAVE MY TENTATIVE AND MY INCLINATIONS, SO I WANT TO
4 SHARE THOSE TO BEGIN WITH, BUT THEN AFTER THAT, MOVE INTO A
5 LITTLE BIT OF LARGER CASE THINKING AS WELL.

6 SO JUST BEGINNING WITH THE MOTION TO CONSOLIDATE, THE
7 COURT IS INCLINED TO GRANT THE MOTION. IN WEIGHING THE VARIOUS
8 FACTORS, AND IN TERMS OF THE DISCRETION THAT THE COURT MUST
9 EXERCISE, I DO THINK IT WILL -- THE OVERLAP IN TERMS OF
10 INVENTORS, EACH OF THE PATENT CLAIMS WHICH WILL BE ALLEGING
11 PRIORITY AS TO THE SAME APPLICATION, THE SAME SPECIFICATIONS,
12 THE SAME ASSIGNEES, LIKELY A LIKELIHOOD OF RELIANCE ON SIMILAR
13 PRIOR ART, AS WELL AS I WOULD GUESS INVALIDITY CONTENTIONS, ALL
14 MAKE ME THINK THAT -- THEY'RE WHAT ARE PUSHING MY INCLINATION
15 THAT WAY.

16 ON A LARGER CASE MANAGEMENT -- AND I'M LOOKING FORWARD TO
17 HEARING FROM THE PARTIES ON THAT.

18 ON A LARGER CASE MANAGEMENT LEVEL, LIKE TAKING A BIGGER
19 LOOK AT THIS ALL, I MEAN, THE QUESTION WHICH KEPT POPPING UP IN
20 MY MIND WAS, OKAY, BUT SHOULDN'T, IN REALITY, WHAT -- AND THIS
21 HAPPENED BEFORE I WAS ON THE CASE -- SHOULDN'T THE BIO-RAD
22 PATENTS BE SEPARATE FROM THE CALTECH, FROM THE CAL -- LIKE,
23 THAT SEPARATION TO ME SEEMS TO MAKE MORE SENSE DOWN THE ROAD AS
24 WE LOOK AT CASE MANAGEMENT, AS WE LOOK TOWARDS TRIAL, AS WE
25 LOOK POST-INSTRUCTION.

1 BUT THAT QUESTION WILL BE SAVED FOR ANOTHER DAY LIKELY,
2 LIKELY AFTER THE MARKMAN ORDER GETS ISSUED, I EXPECT BY EARLY
3 JULY, AT THE LATEST MID-JULY, SOMEWHERE IN THE JULY RANGE.

4 SO AFTER THE MARKMAN, I'M GOING TO BE ASKING PARTIES TO
5 CONSIDER GOING TO -- BACK TO MEDIATION, GOING BACK TO SOME ADR
6 EFFORTS, AS WELL AS REALLY THINKING THROUGH WHAT IT MEANS.

7 SO THAT'S BIG PICTURE. SO I'VE BEEN THINKING ABOUT YOU
8 ALL FOR THE PAST WEEK QUITE A BIT, AND IT'S THE REASON WHICH I
9 KEPT THIS MOTION ON CALENDAR DESPITE HAVING CERTAIN
10 INCLINATIONS.

11 SO WITH THAT IN MIND, LET'S BEGIN WITH THE MOTION TO
12 CONSOLIDATE. I'LL BEGIN WITH THE MOVING PARTY, UNLESS YOU JUST
13 WANT TO RESERVE AND HAVE ME BEGIN WITH CALTECH.

14 MR. WALTER: I HAVE JUST A FEW SHORT THINGS I'D LIKE
15 TO SAY, AND THEN I'LL RESPOND TO WHATEVER THEY PROVIDE.

16 WE THINK YOUR TENTATIVE IS GOING IN THE RIGHT DIRECTION.

17 AND THE IMPORTANT POINT, WHICH IS ONE I THINK YOU'VE
18 RECOGNIZED, IS THAT WE ARE ADDING TO THE CASE IS ONE PATENT,
19 IT'S IN THE SAME FAMILY AS THE OTHER PATENTS.

20 AND, YOU KNOW, JUST TO MAKE CLEAR WHAT THAT MEANS, YOU
21 KNOW, THESE ARE PATENTS -- THIS IS A NEW PATENT WE'RE ADDING
22 WITH THE EXACT SAME SPECIFICATION, IT'S GOT THE SAME INVENTORS,
23 IT STEMMED FROM THE SAME WORK, IT CAME OUT OF THE SAME PEOPLE
24 AT CALTECH.

25 YOU KNOW, AND TO DRIVE THE POINT HOME A LITTLE BIT, ALL OF

1 THESE PATENTS THAT ARE IN THIS FAMILY, THEY ARE SUBJECT TO
2 WHAT'S CALLED A TERMINAL DISCLAIMER, AND A TERMINAL DISCLAIMER
3 IS WHAT HAPPENS WHEN AN INVENTOR FILES A FIRST PATENT AND THEN
4 THEY FILE ANOTHER PATENT, THEY FILE A CONTINUATION.

5 YOUR HONOR IS PROBABLY AWARE OF A CONTINUATION. A
6 CONTINUATION, IT'S A PATENT THAT'S GOT THE SAME SPECIFICATION,
7 BUT THEN THEY TRY TO GET NEW CLAIMS. OFTENTIMES WHAT THE
8 EXAMINER WILL SAY IS, "IT LOOKS LIKE YOU'RE REALLY TRYING TO
9 PATENT THE SAME THING, YOU'RE TRYING TO PATENT JUST AN OBVIOUS
10 VARIATION OF IT. SO I'LL LET YOU HAVE YOUR NEW PATENT, BUT I'M
11 NOT GOING TO LET IT HAVE A LONGER LIFE THAN THE ORIGINAL
12 PATENT. YOU'RE GOING TO HAVE TO DISCLAIM ANY LIFE THAT YOUR
13 SECOND PATENT MIGHT HAVE HAD OVER YOUR FIRST PATENT BECAUSE
14 IT'S JUST AN OBVIOUS VARIATION OF IT."

15 AND ALL OF THE PATENTS IN THIS CASE, EVEN THE NEW ONE
16 THEY'RE ADDING, THEY'RE ALL SUBJECT TO THIS OBVIOUSNESS TYPE
17 DOUBLE PATENTING OBJECTION TERMINAL DISCLAIMERS.

18 SO THEY'RE ALL TOGETHER, THERE'S KIND OF THIS
19 ACKNOWLEDGMENT FROM EVERYBODY, THE PATENT OFFICE INCLUDED.
20 THESE ARE ALL WORK THAT -- IT'S REALLY THE SAME STUFF.

21 AND SO IF YOU'RE LOOKING AT A HIGH LEVEL, DOES IT MAKE
22 SENSE TO PUT ALL OF THESE PATENTS IN THE SAME BUCKET? YES, IT
23 DOES.

24 AND I THINK YOUR HONOR BASICALLY HAS ARRIVED AT THAT SAME
25 CONCLUSION. SO I WANT TO ADD THAT POINT.

1 AND I THINK THERE'S TWO PIECES OF NEW INFORMATION THAT I
2 WANT TO PROVIDE THAT -- THIS WAS NOT IN THE BRIEFING. IT'S
3 ONLY COME TO LIGHT IN THE LAST FEW DAYS.

4 THE FIRST PIECE OF INFORMATION RELATES TO THE OVERALL
5 STAGE OF THE CASE. I THINK THAT BEARS ON WHETHER IT MAKES
6 SENSE TO CONSOLIDATE THINGS NOW OR HAVE TWO SEPARATE CASES.

7 AND THERE'S SOME QUESTION THAT CAME UP IN THE BRIEFING
8 ABOUT THE STAGE OF DOCUMENT PRODUCTION.

9 NOW, LAST FRIDAY, JUST A FEW DAYS AGO, A FEW BUSINESS DAYS
10 AGO, WE GOT A VERY BIG PRODUCTION FROM CALTECH. IT'S ABOUT
11 400,000 PAGES. WE MENTIONED THIS IN THE BRIEFING, THAT THEY
12 WERE JUST LEARNING THAT THERE'S INVENTOR DOCUMENTS.

13 WE'RE JUST SEEING THOSE. WE JUST GOT THOSE DOCUMENTS.
14 LIKE I SAID, IT'S ABOUT 400,000 PAGES WE GOT ON FRIDAY. WE
15 HAVEN'T EVEN BEEN ABLE TO LOOK AT THEM. WE'VE BARELY BEEN ABLE
16 TO GET IT LOADED INTO OUR SYSTEM. THIS, WE UNDERSTAND, ARE THE
17 INVENTOR DOCUMENTS.

18 SO IF THE QUESTION IS, IS THIS CASE AT A STAGE WHERE WE
19 SHOULD BE RUSHING AHEAD, OR SHOULD WE BE SLOWING IT DOWN AND
20 GETTING EVERYBODY ON THE SAME PAGE? IT'S THE LATTER.

21 YOU KNOW, THERE'S SIGNIFICANT ISSUES AROUND THAT BECAUSE,
22 AS YOU MIGHT BE AWARE, IN THE PATENT LOCAL RULES, ONE OF THE
23 FIRST THINGS YOU HAVE TO DO, IF YOU'RE THE PATENT OWNER, IS YOU
24 HAVE TO PRODUCE YOUR CONCEPTION AND REDUCTION TO PRACTICE
25 DOCUMENTS.

1 AND WE THINK THAT'S WHAT WE'RE GETTING FOR THE FIRST TIME
2 ON FRIDAY. OKAY?

3 AND SO IF WE'RE TALKING ABOUT THE TIMING, YOU KNOW, DOES
4 IT MAKE SENSE TO CONSOLIDATE WITH A NEW CASE? IT PROBABLY DOES
5 BECAUSE THESE ARE THE DOCUMENTS THAT WE'RE SUPPOSED TO BE
6 GETTING FOR THE NEW CASE PRETTY SOON WITH THEIR INFRINGEMENT
7 CONTENTIONS.

8 THE OTHER THING IS WITH REGARD TO THE OLD PATENTS, THE
9 PATENTS THAT THEY'VE ASSERTED AGAINST US THAT WE THINK SHOULD
10 BE CONSOLIDATED WITH THE NEW PATENTES, THEY'VE TOLD US IN THE
11 LAST TWO WEEKS THAT THEY WANT TO AMEND THEIR INFRINGEMENT
12 CONTENTIONS, OKAY? SO THERE'S GOING TO BE MOTION PRACTICE
13 ON -- ALMOST CERTAINLY THERE'S GOING TO BE MOTION PRACTICE, I
14 MEAN, IT'S NOT GUARANTEED, MAYBE WE'LL BE ABLE TO RESOLVE IT.
15 I'M NOT REAL OPTIMISTIC OF THAT. BUT THERE'S GOING TO BE A
16 DISPUTE ABOUT NEW INFRINGEMENT CONTENTIONS FOR THE OLD PATENT.

17 SO, AGAIN, IF YOU'RE ASKING THE QUESTION, DOES IT MAKE
18 SENSE TO RUSH AHEAD WITH THIS CASE OR JOIN IT UP WITH THE NEW
19 PATENT, THAT'S ANOTHER FACTOR THAT I THINK WEIGHS IN FAVOR OF
20 THE CONSOLIDATION, WHICH IS WHERE I THINK YOUR HONOR IS AT
21 RIGHT NOW.

22 SO THOSE ARE THE NEW PIECES OF INFORMATION THAT I WANTED
23 TO ADD. IF THERE'S ANY QUESTIONS, I'LL ANSWER THOSE.

24 OTHERWISE I'LL SIT DOWN AND I CAN RESPOND TO ANYTHING THAT
25 THEY ADD.

1 THE COURT: I HAD A SERIES OF QUESTIONS. LET ME SEE
2 IF ANY OF THEM ARE APPLICABLE TO --

3 MR. WALTER: AND I CAN ANSWER THE QUESTION ABOUT
4 BIGGER PICTURE CASE MANAGEMENT ISSUES WITH REGARD TO OUR
5 PATENTS AS WELL IF YOU'D LIKE ME TO TALK ABOUT THAT.

6 THE COURT: LET ME MAKE SURE THAT WE TALK ABOUT -- I
7 WANT TO HEAR THAT BEFORE WE END TODAY, BUT LET'S DO THAT MORE
8 TOWARDS THE CASE MANAGEMENT PART.

9 MR. WALTER: OKAY.

10 THE COURT: SO IF I DON'T ASK YOU ABOUT IT, PLEASE
11 RAISE IT WITH ME BECAUSE I REALLY WANT TO HEAR BIO-RAD'S
12 POSITION ON THAT ISSUE.

13 MR. WALTER: OKAY.

14 THE COURT: GIVE ME ONE MOMENT, BECAUSE I HAD A
15 SERIES OF QUESTIONS. I WANT TO MAKE SURE THAT I ASK THE ONES I
16 HAD OF YOU.

17 (PAUSE IN PROCEEDINGS.)

18 THE COURT: I THINK I'M GOOD FOR NOW. THANK YOU.

19 ALL RIGHT. MR. SALEN.

20 MR. SALEN: THANK YOU, YOUR HONOR.

21 SO WE APPRECIATE THE COURT'S TENTATIVE. THANK YOU FOR
22 LETTING US KNOW THE POSITION, YOUR POSITION.

23 WE UNDERSTAND THAT THE CONSOLIDATION MOTION IS UNDER THE
24 COURT'S DISCRETION.

25 THERE ARE A FEW POINTS THAT I THINK ARE IMPORTANT TO

1 CONSIDER, THOUGH, AND WHY CONSOLIDATION, IN OUR VIEW, IS NOT
2 THE BEST COURSE FOR THE CASE RIGHT NOW.

3 FIRST OF ALL, I'D LIKE TO RESPOND TO THE TWO POINTS, OR
4 NEW PIECES OF INFORMATION, JUST WHILE IT'S FRESH, THAT MY
5 COLLEAGUE MADE.

6 SO WITH RESPECT TO THE LARGE DOCUMENT PRODUCTION, THOSE
7 DOCUMENTS ARE NOT THE REDUCTION TO PRACTICE OR CONCEPTION
8 DOCUMENTS. THOSE WERE PRODUCED EARLY ON IN THE CASE WHEN THEY
9 WERE SUPPOSED TO HAVE BEEN PRODUCED. BIO-RAD HAS HAD THOSE
10 FOR, FOR OVER HALF A YEAR NOW.

11 THE PRODUCTION WAS AN ESI PRODUCTION, AND THE PARTIES
12 ENDED UP IN A DISPUTE OVER SEARCH TERMS FOR ESI, ESI
13 SPECIFICALLY FOR TWO PARTIES AT CALTECH THAT WE DISCOVERED
14 AFTER A FIRST ESI PRODUCTION WAS MADE BY CALTECH THAT THOSE,
15 THOSE PARTIES, THOSE INDIVIDUALS, ONE OF THEM -- OR TWO OF THEM
16 BEING INVENTORS, AND THERE'S ACTUALLY A THIRD INDIVIDUAL WHO'S
17 NOT AN INVENTOR.

18 WE HAD ESI FROM THOSE INDIVIDUALS THAT WE WEREN'T AWARE OF
19 BECAUSE IT'S OLDER, AND THAT PRODUCTION WAS MADE AFTER WE
20 AGREED TO ESI SEARCH TERMS.

21 THERE WASN'T -- THERE WAS NO MOTION TO COMPEL OR ANYTHING.
22 THE PARTIES WERE WORKING IN GOOD FAITH WITH EACH OTHER TO
23 NEGOTIATE ESI SEARCH TERMS.

24 BIO-RAD ALSO HASN'T PRODUCED A LARGE PORTION OF ITS ESI
25 THAT WE'RE EXPECTING. I THINK THEY MADE A SMALL PRODUCTION TWO

1 WEEKS AGO.

2 BUT IN ANY CASE, THE POINT IS DOCUMENTS ARE ALMOST ALL
3 PRODUCED IN THE CASE.

4 WRITTEN DISCOVERY, FOR THE MOST PART, HAS BEEN TAKEN.
5 THERE MAY BE SOME ADDITIONAL WRITTEN DISCOVERY, BUT FOR THE
6 MOST PART, IT'S BEEN TAKEN.

7 AND THIRD PARTY DISCOVERY IS UNDERWAY. DEPOSITIONS --

8 THE COURT: JUST -- YOU READ MY MIND.

9 MR. SALEN: YEAH, DEPOSITIONS HAVE BEEN NOTICED. THE
10 FIRST DEPOSITION IN THE CASE WAS TAKEN EARLIER THIS WEEK, AND
11 ANOTHER DEPOSITION IS SCHEDULED FOR -- IT'S A THIRD PARTY
12 DEPOSITION.

13 ANOTHER THIRD PARTY DEPOSITION IS SCHEDULED FOR JULY 1.
14 IT'S ON CALENDAR AND WILL MOVE FORWARD FOR THE INVENTOR OF THE
15 BIO-RAD PATENTS IN THIS CASE. THAT INVENTOR DEPOSITION WILL BE
16 HAPPENING ON JULY 1ST.

17 AND 30(B) (6) DEPOSITION NOTICES HAVE BEEN EXCHANGED BY THE
18 PARTIES. NO DATES -- ACTUALLY, THERE IS A DATE ON CALENDAR FOR
19 THE BIO-RAD DEPOSITION. I CAN'T IMAGINE IT WOULD GO FORWARD.
20 IT'S ON JULY 2ND, AND WE STILL DON'T HAVE BIO-RAD'S ESI, SO
21 THAT MAY MOVE.

22 BUT WE UNDERSTAND NOW THAT THERE IS A CLOSE OF FACT
23 DISCOVERY DATE THAT IS SUBJECT TO OTHER MOVEMENT AFTER THE
24 CLAIM CONSTRUCTION ORDER, BUT THAT'S SET FOR JULY 31ST.

25 AND CALTECH WILL DO EVERYTHING IT CAN TO MAKE SURE WE MEET

1 THAT DATE, AND IF WE NEED TO BE REASONABLE AND MOVE IT, WE, OF
2 COURSE, WILL DO THAT.

3 BUT I THINK WITH RESPECT TO DATES, THOUGH, AND THE STAGE
4 OF FACT DISCOVERY, IF YOU LOOK AT THE OTHER CASE, FROM WHAT I
5 UNDERSTAND -- AND WE TALKED ABOUT THIS ISSUE WITH BIO-RAD --
6 CLAIM CONSTRUCTION, IN BIO-RAD'S VIEW, IS NECESSARY IN THAT
7 CASE, MEANING THAT WE WILL HAVE A CLAIM CONSTRUCTION HEARING IN
8 THAT CASE THAT PROBABLY CAN'T -- I KNOW THE CASE MANAGEMENT
9 PART OF IT, THE HEARING TODAY WILL HAPPEN LATER, BUT --

10 THE COURT: AREN'T THERE SOME TERMS THAT MIGHT BE
11 OVERLAPPING FROM WHAT THE CLAIM CONSTRUCTION HAD OCCURRED? I
12 MEAN, I BEGAN TO DO A WORD SEARCH IN TERMS OF COMPARISON
13 THROUGH THE CLAIMS THEMSELVES.

14 ANYWAYS, WELL, WHAT IS YOUR OPINION ABOUT THAT?

15 MR. SALEN: SO IF WE DID HAVE TO MOVE -- THE
16 PLAINTIFFS HAVEN'T IDENTIFIED ANY TERMS THAT WE THINK REQUIRE
17 CONSTRUCTION.

18 AND WE WOULD CERTAINLY BE MUCH MORE AMENABLE TO THE
19 CONSOLIDATION IF WE CAN SHORTEN THE SCHEDULE AND -- IF WE CAN
20 FORGO A CLAIM CONSTRUCTION AND SHORTEN THE SCHEDULE IN THE
21 OTHER CASE.

22 BUT I UNDERSTAND THAT'S NOT --

23 THE COURT: I'M GOING TO URGE THAT PARTIES SHORTEN
24 THE SCHEDULE JUST BETWEEN THE NOTION THAT, OKAY, THERE'S GOING
25 TO BE INFRINGEMENT CONTENTIONS AND SUCH WHICH OVERLAP.

1 IT SEEMS TO ME THAT WE SHOULD BE ABLE TO DO A MORE
2 RIGOROUS -- THAT WE SHOULD BE ABLE TO DO A TIGHTER SCHEDULE
3 THAN WHAT'S IN THE PATENT LOCAL RULES. THAT'S WHAT I WAS GOING
4 TO PROPOSE.

5 MR. SALEN: AND WE WOULD CERTAINLY BE AMENABLE TO
6 DOING THAT.

7 THAT SAID, THERE ARE A FEW, I THINK THREE, AT LEAST VERY
8 IMPORTANT DIFFERENCES BETWEEN THE CASES.

9 THE COURT: OKAY.

10 MR. SALEN: AND I THINK IT'S IMPORTANT JUST TO MAKE
11 SURE WE UNDERSTAND THEM AND HAVE TALKED ABOUT THEM.

12 THE COURT: THEN I ALSO HAVE SOME FACTUAL -- MORE OF
13 MY FACTUAL QUESTIONS ARE BASED ON -- ARE FOR CALTECH THAN
14 CHROMACODE, SO --

15 MR. SALEN: YOUR HONOR, I'M HAPPY TO ADDRESS THOSE,
16 OF COURSE.

17 THE COURT: OKAY.

18 MR. SALEN: THE CASES INVOLVE DIFFERENT PARTIES, AND
19 I UNDERSTAND YOUR HONOR RECOGNIZES THAT AND TALKED ABOUT THE
20 FACT THAT THE BIO-RAD PATENT ASSERTION IN THE CASE AGAINST --
21 STARTED AS A DECLARATORY JUDGMENT ACTION THAT CHROMACODE HAD
22 FILED.

23 THAT INVOLVES ONLY CHROMACODE AND BIO-RAD AND IS ON
24 COMPLETELY DIFFERENT PATENTS. IT'S ON TWO PATENTS FROM BIO-RAD
25 THAT DO NOT HAVE OVERLAPPING SPECIFICATIONS. THEY'RE NOT THE

1 SAME PATENTS BY ANY MEANS AS THE PATENTS IN THE -- THAT CALTECH
2 HAS ASSERTED.

3 THAT CASE INVOLVES DIFFERENT WITNESSES. CHROMACODE IS A
4 PARTY TO THAT CASE. CERTAINLY CHROMACODE -- CHROMACODE IS NOT
5 A PARTY TO THE NEW CASE.

6 THE COURT: LET'S BACK UP FOR A MOMENT. ARE YOU
7 DISCUSSING THE CASES INVOLVING THE BIO-RAD PATENTS?

8 MR. SALEN: YES.

9 THE COURT: CORRECT.

10 MR. SALEN: AND I UNDERSTAND YOUR HONOR SUGGESTED --

11 THE COURT: AND MY POINT IS MAYBE THAT CASE SHOULD
12 NOT BE WITH THIS CASE.

13 MR. SALEN: AND I DON'T THINK WE EVER AGREED THAT
14 THEY SHOULD BE TOGETHER, BUT THAT -- I DON'T THINK ANYONE IN
15 THIS ROOM WAS IN -- HAD ASKED FOR THAT, AND SO -- BUT THAT'S
16 WHAT HAPPENED.

17 SO -- BUT EVEN WITH THE PATENTS, EVEN WITH THE CALTECH
18 PATENTS THAT ARE ASSERTED IN THE IN RE: CHROMACODE CASE -- AND
19 I'LL CALL IN RE: CHROMACODE CASE THE CASE INVOLVING THE CURRENT
20 CALTECH ASSERTION AND THE OLDER CASE, AND I THINK CALTECH II IS
21 HOW THE PARTIES HAVE REFERRED TO THE NEW FILED CASE ON THE '797
22 PATENT.

23 THE COURT: RIGHT. THAT'S FOLLOWING ALONG WITH MY
24 CHART, BUT YES.

25 MR. SALEN: OKAY. AND WITH RESPECT TO THE PATENTS

1 ASSERTED IN THE IN RE: CHROMACODE CASE, THOSE PATENTS HAVE --
2 THEY'RE NOT -- EVEN THOUGH THEY SHARE THE SAME SPECIFICATION --
3 AND WE DON'T DISPUTE THE TERMINAL DISCLAIMER ISSUES THAT
4 BIO-RAD'S COUNSEL BROUGHT UP, THOSE ARE ALL FACTS, THAT'S TRUE.

5 BUT THEY DO -- THE CLAIMS IN THOSE PATENTS ARE VERY
6 DIFFERENT FOR AN IMPORTANT REASON. THEY INVOLVE METHODS OF
7 PERFORMING -- OF PERFORMING A PCR TEST, OR A TEST, AS OPPOSED
8 TO THE SYSTEM ITSELF.

9 AND THE REASON THAT'S IMPORTANT IS BECAUSE IT AFFECTS THE
10 DAMAGES THEORY IN THE CASE, WHICH -- AND THE ACTUAL TYPE OF
11 INFRINGEMENT THAT OCCURS IN THE CASE.

12 SO THERE'S -- AS -- IF YOUR HONOR IS AWARE, THERE'S TWO
13 DIFFERENT TYPES OF INFRINGEMENT THAT YOU CAN ASSERT IN A PATENT
14 CASE. ONE IS INDIRECT AND ONE IS DIRECT.

15 THE COURT: UM-HUM.

16 MR. SALEN: INDIRECT INFRINGEMENT INVOLVES METHOD
17 PATENTS.

18 THE COURT: UM-HUM.

19 MR. SALEN: WE'RE NOT ACCUSING BIO-RAD ITSELF OF
20 PERFORMING THE METHODS IN THOSE CLAIMS, BUT INSTEAD THIRD
21 PARTIES THAT BIO-RAD SELLS TO ESSENTIALLY.

22 THE COURT: RIGHT.

23 MR. SALEN: SO THERE ARE SEVERAL THIRD PARTIES
24 THAT -- THERE'S AN EXTENSIVE AMOUNT OF THIRD PARTY DISCOVERY IN
25 THE IN RE: CHROMACODE CASE THAT WILL NOT TAKE PLACE IN THE, IN

1 THE CALTECH II CASE.

2 AND THOSE THIRD PARTIES ARE ALREADY PRODUCING DOCUMENTS
3 AND HAVE BEEN DEPOSED, OR AT LEAST ONE OF THEM HAS, AND THERE'S
4 OTHERS THAT ARE SCHEDULED TO BE DEPOSED HOPEFULLY IN THE NEXT,
5 YOU KNOW, SEVERAL WEEKS.

6 AND THE TESTIMONY OF THOSE THIRD PARTIES WILL BE IMPORTANT
7 TO THAT CASE, AND THE DAMAGES THEORY IN THAT CASE WILL DEPEND
8 VERY HEAVILY ON THOSE THIRD PARTIES.

9 THAT'S DIFFERENT THAN WHAT HAPPENED -- THAT TYPE OF
10 DISCOVERY AND TYPE OF EXPERT ANALYSIS AND TYPE OF -- THAT IS
11 ALL DIFFERENT THAN WHAT HAS TO HAPPEN IN THE SYSTEM CLAIM CASE,
12 IN THE CALTECH II CASE, WHICH INVOLVES A DIRECT ACCUSATION THAT
13 BIO-RAD SELLS A DEVICE THAT INFRINGES THE PATENTS.

14 THE COURT: AREN'T THERE GOING TO BE -- I MEAN, A
15 COUPLE OF DIFFERENT THOUGHTS.

16 ONE, THAT ISN'T IT GOOD THAT THE IN RE: CHROMACODE CASE IS
17 HAPPENING ALREADY, THAT DISCOVERY IS HAPPENING, AND THAT THAT
18 THIRD PARTY DISCOVERY IS WELL UNDERWAY FOR THE INDIRECT
19 INFRINGEMENT?

20 BECAUSE I'M NOT HEARING -- IF IT WAS REVERSED, I COULD SEE
21 SAYING, "OH, THIS IS GOING TO CAUSE A LOT OF DELAY IN TERMS OF
22 CALTECH II" IF CALTECH II WAS THE INDIRECT INFRINGEMENT CASE,
23 BECAUSE THEN THE THIRD PARTY DISCOVERY WOULD DRAG IT.

24 OR IT SEEMS LIKE, IF ANYTHING, THE ORDER AND SEQUENCE THIS
25 IS IN SPEAKS TOWARD THE -- THAT THAT'S LESS OF A CONCERN IN

1 TERMS OF THAT THIRD PARTY DISCOVERY.

2 MR. SALEN: IT -- I THINK THAT'S TRUE UNLESS THE CASE
3 GETS DELAYED MORE THAN A YEAR, WHICH -- IF WE CAN'T FIND A WAY
4 TO SHORTEN THE CALTECH II CASE AND AGREE TO A SHORTENED
5 SCHEDULE FOR THAT, THEN I THINK THERE'S AN ISSUE WHERE YOU HAVE
6 FACT DISCOVERY, YOU KNOW, TESTIMONY OF THIRD PARTIES THAT MAY
7 BECOME STALE AND MAY -- THIRD PARTIES MAY -- THE LONGER WE WAIT
8 TO GET TO TRIAL IN THAT CASE, THE MORE PREJUDICE COULD HAPPEN
9 IN THE ABILITY TO PROVE UP OUR THEORY, RIGHT?

10 THE COURT: AND THEN YOU RAISED A POINT, WHICH I WAS
11 WONDERING ABOUT, WHICH WAS ONE OF MY CONCERNS THAT I DIDN'T
12 EXPLICATE, WHICH WAS, ISN'T THERE ALSO A CONCERN NOT HAVING
13 THEM TOGETHER IN TERMS OF DAMAGES APPORTIONMENT TO SOME DEGREE?

14 I MEAN, IT SEEMS TO ME, EVEN IF IT'S INDIRECT AND A DIRECT
15 THEORY OF INFRINGEMENT, THAT THERE'S GOING TO BE SOME BASE
16 WHICH OVERLAPS IN TERMS OF PRODUCT -- I DON'T KNOW ALL THE
17 WORDS THAT YOU ALL DO IN TERMS OF PATENT CASES, BUT I THINK YOU
18 GET WHAT I'M SAYING. ISN'T THERE GOING TO BE A CONCERN IN
19 TERMS OF THE DAMAGES ANALYSIS AND POSSIBLE APPORTIONMENT?

20 MR. SALEN: I THINK THERE IS A CONCERN, BUT I THINK
21 IT WEIGHS IN FAVOR OF KEEPING THE CASES SEPARATE, WITH
22 SEPARATE -- IN THIS CASE WITH SEPARATE JURIES HEARING
23 TESTIMONY, BECAUSE THE APPORTIONMENT THEORIES AREN'T GOING TO
24 BE THE SAME. THEY'RE DIFFERENT CLAIMS.

25 THERE'S -- AND TO THE EXTENT WE'RE ARGUING THAT CALTECH

1 AND CHROMACODE WOULD ARGUE THAT, WHAT'S CALLED THE ENTIRE
2 MARKET VALUE RULES, WHICH BASICALLY MEANS THERE'S AN IMPORTANCE
3 TO THE INVENTION THAT DRIVES DEMAND FOR THE PRODUCT, THAT'S A
4 DAMAGES THEORY THAT WILL -- MEANING THAT APPORTIONMENT IS NOT
5 NECESSARILY APPROPRIATE IN THE CASE.

6 THAT THEORY IS DIFFERENT BASED ON THE METHOD OF USING THE
7 DEVICE VERSUS WHAT THE DEVICE IS ITSELF, AND THOSE -- THOSE TWO
8 TYPES OF INQUIRIES WILL REQUIRE EXPERT ANALYSIS AND REQUIRE
9 OPINIONS, AND LIKELY DIFFERENT OPINIONS POTENTIALLY, THAT COULD
10 CONFUSE A JUROR AS TO WHICH ONE WE'RE TALKING ABOUT, AND IT
11 SEEMS TO US THAT HAVING THE CASES HEARD SEPARATELY MAKES -- IT
12 MAKES THINGS A LOT EASIER FOR A JURY TO PARSE OUT.

13 THE COURT: ISN'T THERE A POSSIBILITY OF HAVING
14 DIFFERENT OUTCOMES IN TERMS OF THE ACTUAL INFRINGEMENT ITSELF
15 AND FINDINGS AND CERTAIN -- LIKE, BY HAVING TWO SEPARATE JURIES
16 RULE ON THIS?

17 MR. SALEN: YES, YOUR HONOR. AND I DON'T KNOW IF
18 THAT'S A RISK. THAT'S JUST A FACT. THEY'RE DIFFERENT CLAIMS.

19 SO TO PROVE INFRINGEMENT ON THE SYSTEM CLAIMS FOR THE
20 CALTECH II CASE, THAT IS GOING TO BE A DIFFERENT ANALYSIS
21 NECESSARILY THAN PROVING INFRINGEMENT OF THE, OF THE
22 IN RE: CHROMACODE CALTECH PATENT CLAIMS, AND CERTAINLY A MUCH
23 DIFFERENT ANALYSIS THAN PROVING INFRINGEMENT OF THE BIO-RAD
24 PATENTS THAT ARE ASSERTED AGAINST CHROMACODE.

25 THE COURT: WE'RE ALL ON THE SAME PAGE, IT SEEMS LIKE

1 MAYBE.

2 LET ME ASK YOU A COUPLE OTHER QUESTIONS WHICH I HAD. WHAT
3 IS THE STATUS -- ARE THERE ANY OTHER PENDING PATENT
4 APPLICATIONS WHICH CALTECH HAS WITHIN THIS FAMILY? LIKE, I'M
5 WORRIED A LITTLE BIT -- FRANKLY SPEAKING, I'M -- WHAT PUT ME
6 MORE A LITTLE BIT ON MY HEELS WAS THE "AND THEN, AND THEN, AND
7 THEN" POSSIBILITY OF WHAT COULD HAPPEN HERE.

8 SO WHAT IS PENDING?

9 MR. SALEN: THERE ARE -- THE FAMILY -- THAT PATENT
10 FAMILY STILL HAS APPLICATIONS THAT ARE PENDING. I WOULD
11 EXPECT, AND I THINK THERE'S A GOOD CHANCE -- AND YOUR HONOR
12 BROUGHT UP THAT YOU WANT TO PUSH THE PARTIES TO SOME SORT OF
13 ADR MEDIATION.

14 THERE ARE DIFFERENT POINTS IN THE PROCESS WHERE IT MAKES
15 SENSE TO DO THAT, AND CERTAINLY AFTER -- HOPEFULLY BEFORE
16 TRIAL, HOPEFULLY BEFORE THE PARTIES SPEND MONEY GETTING A TRIAL
17 IN EITHER CASE, WE FIND A WAY TO RESOLVE THINGS SO THAT WE
18 AMICABLY, OR AT LEAST IN A SETTLEMENT DISCUSSION.

19 BUT CERTAINLY AFTER A FIRST TRIAL, THAT SEEMS LIKE A GREAT
20 OPPORTUNITY TO TRY TO RESOLVE THE CASE.

21 I CAN'T TELL YOU FOR SURE WHAT WILL HAPPEN IN THE FUTURE
22 AS FAR AS OTHER ASSERTED -- OTHER PATENTS THAT ISSUE. THERE
23 WILL BE OTHER PATENTS THAT ISSUE.

24 WE JUST -- THAT'S NOT SOMETHING THAT WE'VE THOUGHT ABOUT
25 ASSERTING OR THOUGHT ABOUT RIGHT --

1 THE COURT: HOW MANY OTHER PATENTS?

2 MR. SALEN: I -- OFF THE TOP -- I'M SORRY, YOUR
3 HONOR, OFF THE TOP OF MY HEAD, I DO NOT REMEMBER HOW MANY ARE
4 PENDING. I THINK THERE'S AT LEAST ONE PATENT APPLICATION
5 THAT'S PENDING.

6 THE COURT: OKAY.

7 MR. SALEN: THERE MAY BE MORE. BUT EVEN -- WHAT
8 HAPPENS WITH PATENTS IS AFTER A PATENT ISSUES, OR BEFORE YOU
9 ACTUALLY HAVE IT ISSUE AS A PATENT, YOU HAVE THE OPPORTUNITY TO
10 FILE A NEW APPLICATION, A CONTINUATION. SO THERE COULD BE
11 UNFILED APPLICATIONS.

12 AND THEN -- AND THAT'S JUST PATENT PROSECUTION. I'M NOT
13 TELLING YOU THAT'S CALTECH'S PLAN OR THIS IS --

14 THE COURT: UM-HUM.

15 MR. SALEN: OBVIOUSLY I THINK FOR BOTH PARTIES' SAKE,
16 THE PARTIES WOULD LIKE TO, I'M HOPING, EVENTUALLY LIKE TO
17 RESOLVE THIS SO WE'RE NOT DOING THIS AGAIN SIX YEARS FROM NOW.

18 THE COURT: I'LL BE HERE, SO --

19 (LAUGHTER.)

20 MR. SALEN: I'M SURE THAT THE PARTIES WOULD BE
21 HAPPIER WITH A RESOLUTION.

22 BUT THAT SAID, AS OF TODAY, AS OF THE FACTS THAT ARE IN
23 FRONT OF US TODAY, I THINK IT'S JUST THE '797 PATENT AND
24 CALTECH II, AND THE OTHER THREE PATENTS THAT ARE IN THE
25 IN RE: CHROMACODE CASE FROM CALTECH, AND THE TWO PATENTS FROM

1 BIO-RAD, THOSE TWO CASES, AND BASED ON THE FACTS, WE JUST THINK
2 THAT THOSE CASES HAVE DIFFERENT THEORIES, DIFFERENT PARTIES,
3 AND DIFFERENT -- AND ALSO, YOUR HONOR, I THINK ONE REALLY
4 IMPORTANT FACT THAT SEEMS TO GET OVERLOOKED -- AND I UNDERSTAND
5 THE INCLINATION TO MAYBE SEPARATE OUT THE BIO-RAD PATENTS, AND
6 YOU SAID YOU WANT TO TALK ABOUT THAT AND I APPRECIATE THAT.

7 BUT I THINK -- IT HASN'T BEEN DONE YET. IT'S -- AND WE
8 DON'T KNOW WHEN IT'S GOING TO BE DONE, OR IF IT WILL BE DONE,
9 WOULD THAT CASE BECOME SEPARATE?

10 AND IN THE MEANTIME, CHROMACODE IS A PARTY TO THAT CASE
11 AND IF WE EXTEND UNNECESSARY CALTECH II OR CONSOLIDATE THE
12 IN RE: CHROMACODE WITH CALTECH II SO THAT CHROMACODE THEN
13 BECOMES A PARTY TO CALTECH II BECAUSE IT'S A CONSOLIDATED CASE
14 AND THAT SCHEDULE GETS DELAYED, CHROMACODE WILL HAVE TO SIT IN
15 LIMBO FOR A MUCH LONGER PERIOD OF TIME WITH THESE PATENTS
16 ASSERTED AGAINST IT.

17 THE COURT: WELL, THIS FEELS LIKE SOMETHING WE CAN
18 DEAL WITH FROM A CASE MANAGEMENT PERSPECTIVE. THIS SEEMS LIKE
19 SOMETHING -- WE COULD SEPARATE OUT BIO-RAD FROM THAT ORIGINAL
20 CASE IF YOU'RE CONCERNED ABOUT THAT AND CONCERNED ABOUT
21 CHROMACODE, WHICH I THINK, YOU KNOW -- WHICH I WANT TO TALK TO
22 YOU ABOUT THE STATUS OF CHROMACODE.

23 SO SUCH THAT THAT -- THAT ACTION COULD PROCEED EVEN THOUGH
24 THEY STAY RELATED, EVEN THOUGH WE DUAL TRACK SOME OF THE
25 DISCOVERY AND SUCH, BUT THAT WE KNOW THAT THAT COULD GO TO

1 TRIAL EARLIER IF NECESSARY.

2 MR. SALEN: WE WOULD BE AMENABLE, YOUR HONOR, TO --
3 BECAUSE YOU BROUGHT IT UP.

4 WITH RESPECT TO DISCOVERY, AND JUST TO MAKE SURE WE LESSEN
5 THE BURDEN OF HAVING TWO CASES, WE'VE OFFERED AND WOULD BE
6 WILLING TO CERTAINLY HAVE A PROCESS AGREEMENT EVEN IF THE CASES
7 AREN'T CONSOLIDATED WHERE DISCOVERY CAN BE USED AND WE CAN
8 AVOID UNNECESSARY DOCUMENT PRODUCTION AND WRITTEN DISCOVERY AND
9 IN DEPOSITIONS IN THE CALTECH II CASE, TO THE EXTENT THEY'RE
10 NOT NECESSARY, TO MINIMIZE IMPACT OF THAT CASE.

11 THE COURT: SO LET'S TALK ABOUT STATUS OF CHROMACODE,
12 BECAUSE CHROMACODE WAS BROUGHT UP IN TERMS OF THE PAPERS AND
13 THE CONCERN OF PREJUDICE TO THE PARTIES.

14 THE PARTY BIO-RAD BROUGHT IT UP AS SORT OF LIKE THIS
15 FALSE, YOU KNOW, SORT OF A RED HERRING OR FOR, LIKE, THERE'S NO
16 ONE BEHIND THE CURTAIN SORT OF THING.

17 SO WHAT IS THE STATUS?

18 MR. SALEN: THEY'VE -- SO CHROMACODE STILL EXISTS AS
19 A COMPANY TODAY. BUT THEY -- THEY'VE BEEN, I THINK, SEVERELY
20 FINANCIALLY IMPACTED BY THE CASE. THEY'VE BEEN UNABLE TO GIVE
21 ADDITIONAL INVESTMENT AND HAVE CUT THEIR WORK FORCE DOWN FROM
22 WHAT USED TO BE, I BELIEVE, SOMEWHERE NORTH OF -- OR SOMEWHERE
23 CLOSE TO 100 EMPLOYEES DOWN TO 8 EMPLOYEES. THEY DON'T HAVE A
24 COMMERCIAL PRODUCT.

25 THEIR BUSINESS IS -- CONTINUES TO BE IMPACTED BY THE RISK

1 OF AN INFRINGEMENT CLAIM AGAINST THEM, OR INFRINGEMENT FINDING
2 AGAINST THEM.

3 SO WITH THE LAWSUIT HANGING OVER CHROMACODE, THEY'VE JUST
4 BEEN EXTREMELY IMPAIRED WITH RESPECT TO THEIR ABILITY TO
5 OPERATE.

6 THEY STILL ARE A COMPANY. I DON'T KNOW HOW MUCH LONGER
7 THAT STAYS THE CASE. BUT THE LONGER THIS CASE GOES ON, THE
8 LESS LIKELY IT IS THAT THEY CAN SURVIVE.

9 THE COURT: SO IF ANYTHING, IT WOULD ALMOST SEEM THAT
10 MY POSSIBLE SUGGESTION WOULD BE BETTER ABOUT SEPARATING.

11 MR. SALEN: SO I THINK -- I -- AND WE AGREE WITH THAT
12 PIECE.

13 I WOULD STILL WANT -- AND I THINK THIS IS THE OTHER THING
14 THAT MAYBE -- BEFORE THESE MOTIONS WERE BROUGHT, THE PARTIES
15 DID TRY TO WORK ON A SCHEDULE IN THE IN RE: CHROMACODE CASE AND
16 DISCUSSED WHAT WOULD HAPPEN IF THE CASES WERE CONSOLIDATED.

17 AND WE WERE OPEN TO THAT POSSIBILITY, BUT, AGAIN, WITH THE
18 FACT -- WITH THE CONSIDERATION THAT THE CASE SCHEDULE SHOULD
19 OPERATE QUICKLY, MORE ADVANCED.

20 SO IF WE'RE ABLE TO FIND -- AND WE ASKED FOR AN OFFER OF
21 WHAT WOULD A CONSOLIDATED CASE SCHEDULE LOOK LIKE FROM BIO-RAD.
22 WE NEVER RECEIVED THAT. INSTEAD, WE ENDED UP IN THIS -- YOU
23 KNOW, WITH THE MOTION TO CONSOLIDATE PENDING.

24 IF WE SAW A SCHEDULE OR, YOU KNOW, IF THERE WAS A SCHEDULE
25 THAT WORKED -- AND MAYBE THIS IS SOMETHING WE CAN TALK ABOUT IN

1 THE CASE MANAGEMENT CONFERENCE PORTION, MAYBE THE CONSOLIDATION
2 ISN'T AS IMPACTFUL.

3 BUT WHAT WE'RE VERY CONCERNED ABOUT IS IN ADDITION TO THE
4 ISSUES WITH, YOU KNOW, JUROR CONFUSION OVER THESE DIFFERENT
5 TYPES OF CLAIMS AND THE DIFFERENT THEORIES THAT EXIST BECAUSE
6 OF THE DIFFERENT PATENTS, I THINK THE ISSUE OF HAVING THIRD
7 PARTY DISCOVERY DONE NOW IN THE CASE, YOU KNOW, AND WE'RE
8 ALREADY PRETTY CLOSE TO THE END OF THIRD PARTY DISCOVERY, AND
9 THEN HAVING TO LET THAT SIT ON ICE FOR ANOTHER YEAR, YEAR AND A
10 HALF BEFORE THAT EVIDENCE EVER COMES TO LIGHT, WITNESSES MOVE
11 ON FROM THOSE THIRD PARTIES, AND BECAUSE THEY'RE THIRD PARTIES,
12 WE'RE UNABLE TO POTENTIALLY COMPEL THEIR APPEARANCE IN COURT
13 FOR TRIAL, WE HAVE TO -- AND THEY MAY NOT BE WILLING TO APPEAR
14 FOR DEPOSITIONS, AND WE'RE WORRIED ABOUT THE EVIDENCE GOING
15 STALE OVER THAT PERIOD OF TIME AND THE PREJUDICE THAT THAT
16 WOULD CAUSE US.

17 THE COURT: THANK YOU.

18 MR. SALEN: THANK YOU, YOUR HONOR.

19 THE COURT: OKAY. MR. WALTER, A COUPLE DIFFERENT
20 POINTS RAISED WHICH I'D LIKE TO HEAR FROM BIO-RAD ON.

21 MR. WALTER: SURE. THERE'S A FAIR BIT TO RESPOND TO.

22 BUT LET ME FIRST ADDRESS WHAT WAS KIND OF THE MEAT OF
23 CALTECH'S ARGUMENT, KIND OF THE CENTRAL PORTION OF WHAT WE JUST
24 HEARD.

25 THEY SET UP THIS DISTINCTION BETWEEN THE TWO CASES AS THE

1 FIRST CASE BEING ONE THAT INVOLVES METHOD CLAIMS AND THIRD
2 PARTY INFRINGERS; AND THEN THE SECOND CASE BEING ONE THAT
3 INVOLVES SYSTEM CLAIMS, OKAY?

4 THAT WHOLE DISTINCTION JUST ISN'T TRUE BECAUSE THE FIRST
5 CASE, THAT INVOLVES PRODUCT CLAIMS, TOO. IT'S NOT JUST A
6 METHOD PATENT CASE. IT'S A PRODUCT CASE CLAIMING -- IT'S A
7 PRODUCT CASE, TOO.

8 YOU KNOW, SO THIS WHOLE IDEA THAT ONE CASE IS METHOD
9 CLAIMS, ONE CASE IS SYSTEM CLAIMS, WE NEED TO HAVE THEM IN
10 SEPARATE THINGS, THAT'S JUST WRONG.

11 YOUR HONOR RAISED A LOT OF GOOD POINTS. ONE OF THEM WAS
12 THE RISK OF INCONSISTENT RESULTS, OKAY? AND YOUR HONOR RAISED
13 ALSO THE QUESTION OF APPORTIONMENT.

14 THOSE TWO THINGS ARE RELATED, AND THOSE ARE SERIOUS
15 CONCERNS IF WE SEPARATE THESE THINGS.

16 THE MOST EXTREME FORM OF INCONSISTENT RESULT WE CAN SEE IF
17 WE HAVE TWO SEPARATE CASES IS DOUBLE DIPPING ON DAMAGES BECAUSE
18 THEY GET DAMAGES TWICE. THEY GET AN INFLATED FORM OF DAMAGES
19 BECAUSE THEY'RE GETTING TWO TRIALS WITH A JURY. OKAY?

20 THAT WOULD BE AN ENTIRELY IMPROPER THING TO DO. I KNOW
21 THAT'S WHAT THEY WOULD LIKE TO DO. THEY WOULD LIKE TO BE ABLE
22 TO THREATEN US WITH THAT. BUT THAT WOULD BE AN ENTIRELY
23 IMPROPER THING TO DO FROM AN APPORTIONMENT AND CONSISTENCY IN
24 RESULTS STANDPOINT.

25 BEYOND THAT, YOU KNOW, JUST THE SUBSTANTIVE RESULTS, YOU

1 KNOW, THE ROYALTY RATES THAT TWO JURIES MIGHT AWARD, TWO
2 COMPLETELY DIFFERENT JURIES MIGHT AWARD, MIGHT BE COMPLETELY
3 OUT OF WHACK RELATIVE TO ONE ANOTHER. THE WRITTEN DESCRIPTION
4 AND ENABLEMENT VERDICTS MIGHT BE OUT OF WHACK RELATIVE TO ONE
5 ANOTHER. THE INFRINGEMENT VERDICTS MIGHT BE OUT OF WHACK
6 RELATIVE TO ONE ANOTHER.

7 AND THAT'S GOING TO COME FROM TWO DIFFERENT JURIES, TWO
8 DIFFERENT JURIES, AND THAT'S GOING TO BE A VERY DIFFICULT THING
9 FOR THE COURT TO RECONCILE WHEN IT COMES TO POST-TRIAL BRIEFING
10 AND THEN ON APPEAL.

11 NOW, WITH REGARD TO THE THIRD PARTY DISCOVERY, THEY RAISE
12 THIRD PARTY DISCOVERY AND HOW IMPORTANT THIRD PARTY DISCOVERY
13 WAS, AND I HEARD DIFFERENT THINGS. THEY SAID WE'RE CLOSE TO
14 THE END OF THIRD PARTY DISCOVERY, AND THEY ALSO SAID THERE'S
15 EXTENSIVE THIRD PARTY DISCOVERY, THERE'S GOING TO BE LOTS OF
16 THIRD PARTY DISCOVERY.

17 WHAT IS TRUE IS THAT THERE'S ONLY BEEN ONE DEPOSITION OF
18 THESE THIRD PARTY WITNESSES. THEY'RE STILL SUBPOENAING PEOPLE.
19 THEY SUBPOENAED EMORY UNIVERSITY JUST I THINK A FEW WEEKS AGO.
20 SO IT'S NOT LIKE THIS HAS BEEN OUTSTANDING FOR A LONG TIME.
21 THEY'RE STILL CRANKING AWAY AT IT.

22 THE ONE DEPOSITION WE'VE HAD WAS COLORADO DEPARTMENT OF
23 PUBLIC HEALTH, AND THAT -- AND I WANT TO GIVE YOU -- THEY PLACE
24 A LOT OF EMPHASIS ON HOW IMPORTANT THIS DISCOVERY IS, OKAY?

25 LET ME GIVE YOU A LITTLE HISTORY ON THE COLORADO

1 DEPARTMENT OF PUBLIC HEALTH. THAT'S OUR FIRST THIRD PARTY.
2 THEY DRAGGED TWO WITNESSES IN FOR DEPOSITION, OKAY?

3 IT TURNS OUT THERE'S ONE PATENT THAT THEIR WORK MIGHT BE
4 RELEVANT TO THAT THEY CONTENDED WAS, WAS ONE OF THESE THIRD
5 PARTY INFRINGERS WHO'S USING THE METHOD PATENTS.

6 AND IT TURNS OUT THE COLORADO DEPARTMENT OF PUBLIC HEALTH,
7 THEY USED BIO-RAD PRODUCTS FOR A TIME, UP UNTIL JULY OF 2023,
8 AND THEN STOPPED USING THEM, AND THEN THEY MOTHBALLED THE
9 INSTRUMENTS AND STOPPED USING THEM.

10 AND THE REASON THAT'S INTERESTING IS BECAUSE THE PATENT
11 THAT THEY CONTENDED WAS RELEVANT TO COLORADO DEPARTMENT OF
12 PUBLIC HEALTH DIDN'T ACTUALLY ISSUE UNTIL NOVEMBER OF 2023. SO
13 ALL OF THE WORK THAT THE COLORADO DEPARTMENT OF PUBLIC HEALTH
14 HAD DONE WAS COMPLETED BEFORE THE SOLE PATENT THAT WAS RELEVANT
15 TO THEM EVEN ISSUED.

16 SO, YOU KNOW, WE'RE TALKING ABOUT THESE AMENDED
17 INFRINGEMENT CONTENTIONS. A FEW WEEKS AGO I GOT A DRAFT SET OF
18 CONTENTIONS THAT IDENTIFIED ALL THESE THINGS FROM THE COLORADO
19 DEPARTMENT OF PUBLIC HEALTH, WE DO THE DEPOSITION ON MONDAY, WE
20 GET A NEW DRAFT LAST NIGHT, AND COLORADO DEPARTMENT OF PUBLIC
21 HEALTH IS GONE BECAUSE THEY DIDN'T DO ANY WORK WHILE THE PATENT
22 WAS EVEN IN EXISTENCE.

23 SO, YOU KNOW, IT'S A LITTLE SURPRISING TO HEAR, HEY,
24 WHAT'S WAGGING -- WHAT'S DRIVING THE CASE HERE IS THIRD PARTY
25 DISCOVERY AFTER WE JUST WENT THROUGH OUR FIRST THIRD PARTY

1 DISCOVERY SCENARIO.

2 AND YOU KNOW, I'LL SAY THIS, TOO. IF IT REALLY IS THE
3 CASE THAT THERE'S A LOT OF THIRD PARTY DISCOVERY WE NEED TO DO,
4 A LOT OF PARTIES NEED TO BE SUBPOENAED, IT DOESN'T MAKE SENSE
5 TO RUSH AHEAD WITH THIS CASE. WE'VE ACTUALLY GOT A LOT OF THAT
6 AHEAD OF US.

7 WHAT IT ACTUALLY MAKES SENSE TO DO IS CONSOLIDATE WITH THE
8 OTHER CASE AND DO IT IN A METHODOICAL FASHION. MAYBE WE CAN DO
9 IT MORE METHODOICALLY SO WE DON'T HAVE PARTIES LIKE THE COLORADO
10 DEPARTMENT OF PUBLIC HEALTH COME AND SIT FOR DEPOSITION ON WORK
11 THAT'S ACTUALLY COMPLETELY AND TOTALLY IRRELEVANT.

12 AND THEN FINALLY, I'LL -- NOT FINALLY, I'VE GOT TWO MORE
13 POINTS ACTUALLY.

14 THERE'S THE -- YOU KNOW, THE 400,000 PAGES OF DOCUMENTS
15 THAT WE RECEIVED LAST WEEK, YOU KNOW, MR. SALEN ACKNOWLEDGED
16 THOSE ARE INVENTOR DOCUMENTS. OKAY?

17 IT'S A LITTLE HARD TO UNDERSTAND HOW THOSE ARE NOT
18 CONCEPTION DOCUMENTS IF THEY'RE INVENTOR DOCUMENTS. I DON'T
19 KNOW WHAT THEY WOULD BE. CERTAINLY IT'S GOT TO BE SOMETHING
20 RELATED TO CONCEPTION.

21 HE SAYS WE ALREADY HAVE THE CONCEPTION AND REDUCTION TO
22 PRACTICE DOCUMENTS. WE'VE ONLY GOT A FEW PAGES OF WHAT THEY
23 PUT IN THEIR CONTENTIONS AS CONCEPTION AND REDUCTION TO
24 PRACTICE DOCUMENTS. IT'S REALLY THIN. IT'S VERY HARD TO
25 BELIEVE THAT THERE'S NOT MATERIAL RELATED TO CONCEPTION AND

1 REDUCTION TO PRACTICE IN 400,000 PAGES.

2 AND IF THERE TRULY IS NOTHING RELATED TO CONCEPTION AND
3 REDUCTION TO PRACTICE IN THE 400,000 PAGES WE RECEIVED LAST
4 WEEK, THEN WE JUST HAVE A BIGGER PROBLEM THAT WEIGHS AGAINST
5 RUSHING QUICKLY LIKE THEY'D LIKE TO DO.

6 NOW, AND THIS IS THE FINAL POINT, THIS GETS INTO THE ISSUE
7 OF CHROMACODE AND WHAT TO DO WITH CHROMACODE.

8 WHAT I HEARD FROM MR. SALEN IS THAT, YOU KNOW, CHROMACODE
9 IS NOW DOWN TO EIGHT EMPLOYEES AND THEY'RE HAVING A VERY HARD
10 TIME PROCEEDING AS A COMPANY BECAUSE, YOU KNOW, THE LAWSUIT HAS
11 JUST MADE IT REALLY, REALLY HARD FOR THEM.

12 OKAY. THIS HAPPENED BEFORE YOU CAME ON THE CASE. YOU
13 MIGHT NOT BE AWARE OF THIS. THE HISTORY OF THE CASE IS AS
14 FOLLOWS: YOU KNOW, BIO-RAD HAD SENT SOME LETTERS TO CHROMACODE
15 IDENTIFYING POSSIBLE INFRINGEMENT, AND THERE WAS VERY LITTLE
16 DISCUSSION AMONG THE PARTIES AFTER THOSE LETTERS.

17 AND THEN WHAT ACTUALLY HAPPENED WAS IT WAS CHROMACODE THAT
18 STARTED THE LITIGATION. CHROMACODE FILED A DECLARATORY
19 JUDGMENT ACTION AND STARTED THE LITIGATION. OKAY?

20 SO I JUST NEED TO CORRECT THAT PICTURE. HE'S KIND OF
21 PAINTED THIS PICTURE AS BIO-RAD FILED THIS LAWSUIT AND TRIED TO
22 SUE THEM OUT OF EXISTENCE.

23 YOU KNOW, WHAT ACTUALLY STARTED HERE WAS CHROMACODE KICKED
24 OFF THE LITIGATION. THEY FILED A DECLARATORY JUDGMENT
25 ACTION --

1 THE COURT: I SAW THAT.

2 MR. WALTER: -- IN N.D. CAL.

3 THE COURT: I DOUBLE-CHECKED IT.

4 MR. WALTER: AND THEN THEY SUED US IN CALIFORNIA.

5 SO THE IDEA THAT -- I DON'T WANT TO HAVE THE FALSE
6 IMPRESSION THAT BIO-RAD IS COMING ALONG TRYING TO SQUASH
7 CHROMACODE, AND THAT'S, YOU KNOW, AND -- AND WE SHOULD, YOU
8 KNOW, TAKE INTO ACCOUNT BIO-RAD'S NEFARIOUS INTENTIONS IN
9 TRYING TO SQUASH CHROMACODE IN CASE MANAGEMENT CONSIDERATIONS,
10 IN CASE MANAGEMENT DECISIONS, BECAUSE WHAT ACTUALLY HAPPENED
11 HERE WAS CHROMACODE KICKED THIS OFF. CHROMACODE KICKED OFF THE
12 LITIGATION.

13 SO THOSE ARE THE MAIN POINTS I WANTED TO MAKE.

14 YOU HAD A FEW QUESTIONS FOR MR. SALEN. ARE THERE ANY
15 QUESTIONS FOR ME?

16 THE COURT: I'M ABOUT TO PIVOT INTO CASE MANAGEMENT,
17 WHICH I DO THINK HITS --

18 AND YOU'RE WELCOME TO COME UP, MR. SALEN.

19 LET ME ASK SEVERAL QUESTIONS BECAUSE THIS IS THE OVERLAP
20 BETWEEN THE TWO. SO ONE OF THE THINGS WHICH WAS JUST ARGUED
21 WAS, HEY, WE'RE COMPLETELY FINE AS LONG AS THIS MOVES FORWARD
22 EXPEDITIOUSLY BECAUSE WE'RE WORRIED ABOUT CHROMACODE BEING
23 SQUASHED AND SO FORTH.

24 BUT LET'S TALK ABOUT THE MOVING EXPEDITIOUSLY PART.

25 SO THE FIRST ISSUE WHAT WAS RAISED CASE MANAGEMENT-WISE,

1 WHICH I WAS WONDERING, WAS DO WE NEED FURTHER CONSTRUCTION? IF
2 I WERE TO DO THIS, IS THERE A NEED FOR FURTHER CONSTRUCTION,
3 CLAIM CONSTRUCTION?

4 MR. WALTER: THERE IS GOING TO BE A NEED FOR FURTHER
5 CLAIM CONSTRUCTION IN THIS CASE. THERE IS GOING TO BE THAT
6 NEED.

7 YOU KNOW --

8 THE COURT: LIMITED FURTHER CLAIM CONSTRUCTION?

9 MR. WALTER: I THINK WE'RE PROBABLY LOOKING AT ON THE
10 ORDER -- IT'S NOT GOING TO BE LIKE WHAT YOU SAW LAST TIME. I
11 THINK WE'RE PROBABLY LOOKING AT ON THE ORDER OF --

12 THE COURT: TWO?

13 MR. WALTER: I WAS GOING TO SAY THREE TO FIVE.

14 THE COURT: TWO TO THREE?

15 MR. WALTER: IT'S A LITTLE -- I DON'T EVEN HAVE THEIR
16 INFRINGEMENT CONTENTIONS YET. THAT'S THE PROBLEM IS, YOU KNOW,
17 THEY -- I STILL DON'T -- I DON'T HAVE THEIR INFRINGEMENT
18 CONTENTIONS YET, SO IT'S A LITTLE HARD FOR ME TO SAY, YES, I
19 CAN COMMIT TO ONLY THREE TERMS RIGHT NOW. I DON'T EVEN KNOW
20 WHICH CLAIMS THEY'RE GOING TO ASSERT.

21 THE COURT: IF THE COURT WERE TO GRANT THIS, HOW
22 QUICKLY COULD WE MOVE? BECAUSE IT SEEMS LIKE THE INVALIDITY
23 CONTENTIONS ARE GOING TO HAVE OVERLAP, RIGHT?

24 MR. WALTER: THERE'S GOING TO BE SOME OVERLAP, YEAH.

25 THE COURT: WHAT ABOUT THEM -- HOW QUICKLY DO YOU

1 THINK THE INFRINGEMENT CONTENTIONS COULD MOVE?

2 MR. SALEN: WE'VE AGREED TO, IN THE CASE MANAGEMENT
3 IN THE CMC STATEMENT --

4 THE COURT: YOU SAW, IT'S FOLLOWING THE PATENT LOCAL
5 RULES. SO MY QUESTION IS, CAN WE SHORTEN ANY PARTS OF THE
6 PATENT LOCAL RULES?

7 MR. SALEN: THAT'S JULY 2ND, YOUR HONOR, SO IT'S NOT
8 THAT FAR AWAY.

9 THE COURT: THAT'S TRUE. OKAY.

10 MR. SALEN: MAYBE WE COULD GET IT A FEW DAYS EARLIER.
11 I WOULD -- BUT -- BUT YEAH.

12 YOUR HONOR, I -- I DON'T WANT TO GET US OFF TRACK, I
13 JUST --

14 THE COURT: LET ME ASK A COUPLE OTHER CASE MANAGEMENT
15 QUESTIONS IN TERMS OF --

16 MR. SALEN: IS IT ALL RIGHT IF MR. -- MR. GRAVELINE
17 IS GOING TO HANDLE THE CASE MANAGEMENT PART.

18 THE COURT: THAT'S FINE. THESE ARE MORE DIRECTED
19 TOWARDS BIO-RAD, AND THEN WE'LL WRAP UP ANYTHING ELSE REGARDING
20 CONSOLIDATION.

21 OH, WHAT IS BIO-RAD'S POSITION JUST IN TERMS OF PEELING
22 OFF THE BIO-RAD CASE, SEPARATING OUT THESE CASES AT SOME POINT?

23 MR. WALTER: YEAH. I THINK THE WAY WE LOOK AT THIS
24 IS THAT IF -- IT PROBABLY MAKES SENSE AT THIS POINT TO KEEP THE
25 CASES ON THE SAME SCHEDULE FOR DISCOVERY.

1 THE COURT: UM-HUM.

2 MR. WALTER: OKAY? AND, YOU KNOW, IT MIGHT WELL MAKE
3 SENSE TO SEPARATE THOSE TWO CASES FOR TRIAL. THAT MIGHT MAKE
4 SENSE.

5 WHAT WE WOULD SAY --

6 THE COURT: I DON'T EVEN -- I'M HAVING A HARD TIME
7 EVEN IMAGINING MOTIONS FOR SUMMARY JUDGMENT RIGHT NOW WHICH ARE
8 IN ACCORDANCE WITH THE COURT'S STANDING ORDER, RIGHT? BECAUSE
9 TYPICALLY IT WOULD BE FOUR BRIEFS LOBBYING BACK AND FORTH, BUT
10 WE HAVE TWO DIFFERENT SETS OF PATENTS, DON'T WE? TWO
11 DIFFERENT -- BIO-RAD'S PATENTS VERSUS CHROMACODE'S. IT SEEMS
12 LIKE IN REALITY IT'S GOING TO BE --

13 MR. WALTER: SO THAT MIGHT BE RIGHT. WHEN I SAY
14 BIFURCATING THINGS FOR TRIAL, I DO KIND OF HAVE IN MY HEAD
15 THAT, YES, THE SUMMARY JUDGMENT WOULD BE SEPARATE AS WELL,
16 OKAY?

17 THE COURT: YEAH.

18 MR. WALTER: I SHOULDN'T THINK OF IT THIS WAY. I DO
19 KIND OF THINK OF SUMMARY JUDGMENT AS WRAPPED UP WITH TRIAL.
20 YES, SO I THINK THEY SHOULD BE COORDINATED FOR DISCOVERY, AND
21 PROBABLY FOR EXPERT DISCOVERY AS WELL.

22 BUT THEN, YEAH, IT MIGHT MAKE SENSE TO SEPARATE THOSE OFF.
23 WHAT WE WOULD -- WHAT WE WOULD ASK ON THAT IS THAT IF THAT'S
24 THE APPROACH WE TAKE, IT SEEMS LIKE OUR CASE SHOULD GO FIRST.
25 THIS WAS THE ORIGINAL CASE, YOU KNOW? IT WAS THE CASE

1 REGARDING BIO-RAD PATENTS. THEY KICKED IT OFF WITH A
2 DECLARATORY JUDGMENT ACTION FIRST.

3 THE COURT: WHEN YOU SAY YOUR CASE GOES FIRST, YOU'RE
4 DISCUSSING THE ONE INVOLVING THE BIO-RAD PATENTS?

5 MR. WALTER: YES.

6 THE COURT: OKAY. SORRY, I JUST WANTED TO MAKE SURE.

7 MR. WALTER: FOR TRIAL -- WE MAY NOT SET THE TRIAL
8 DATES NOW, BUT WHEN WE DO SET IT, OURS SHOULD BE FIRST.

9 LIKE I SAID, YOU KNOW, OUR CASE WAS THE ONE THAT GOT THIS
10 KICKED OFF. THAT'S THE ONE THEY FILED ON FIRST WITH THE
11 DECLARATORY JUDGMENT ACTION.

12 AND PRIOR TO THE CASES BEING CONSOLIDATED BY JUDGE DAVILA,
13 OUR CASE WAS AHEAD IN TERMS OF THE SCHEDULE.

14 THE COURT: UM-HUM.

15 MR. WALTER: OKAY? AND THEN THEIRS GOT COLLAPSED
16 INTO OURS. IT WAS TRAILING AND THEN OURS GOT COLLAPSED.

17 THE COURT: WELL, I THINK FOR A VARIETY OF REASONS,
18 IT MAKES SENSE FOR THAT CASE TO GO FIRST IN LIGHT OF -- THEN IT
19 WOULD ADDRESS THE ISSUE OF HAVING CHROMACODE'S CASE HEARD
20 FIRST, THERE'S GOING TO BE LESS PATENTS AT THAT POINT AS THE
21 THAT ISSUES -- MY RECOLLECTION IS THAT THE -- I'M ABOUT TO GO
22 THROUGH THE CLAIMS, BUT ANYWAYS, I THINK THAT MAKES SENSE FOR A
23 VARIETY OF REASONS.

24 AND I ACTUALLY THINK THAT, FROM WHAT I HEARD FROM
25 CALTECH/CHROMACODE TODAY, THAT THEY WOULD AGREE WITH THAT.

1 MR. GRAVELINE: THAT IS THE CASE, YOUR HONOR.

2 BRAD GRAVELINE FOR CALTECH AND CHROMACODE.

3 YOU KNOW, ONE POINT ON CHROMACODE KICKING OFF THE LAWSUIT,
4 YES, WE DID FILE A DECLARATORY JUDGMENT ACTION. BUT WE DID
5 THAT, AS COUNSEL NOTED, AFTER GETTING A THREAT OF PATENT
6 INFRINGEMENT.

7 THE COURT: OKAY.

8 MR. GRAVELINE: BUT, YEAH, I DON'T THINK THERE'S ANY
9 REASON TO DELAY THAT CASE. I DO THINK THE ISSUES ARE DIFFERENT
10 AND I THINK WE SHOULD PROCEED EXPEDITIOUSLY WITH THAT CASE.

11 THE COURT: OKAY. ALL RIGHT. I'M ABOUT TO ISSUE --
12 ANYTHING ELSE REGARDING THE CONSOLIDATION MOTION? AND THEN
13 WE'RE GOING TO GET INTO, LIKE, THE BRASS TACKS OF CASE
14 MANAGEMENT.

15 ANYTHING ELSE? I FEEL LIKE I'VE HEARD EVERYTHING I NEEDED
16 TO.

17 MR. WALTER: JUST ONE MOMENT.

18 MR. SALEN: YOUR HONOR, I DON'T KNOW IF IT'S
19 NECESSARY EVEN TO RESPOND TO THIS, BUT I DID JUST WANT TO --
20 JUST FOR THE RECORD, WE OBVIOUSLY DISAGREE WITH THE VALUE OF
21 DISCOVERY AND THIRD PARTY DISCOVERY THAT -- THAT'S WHAT THIRD
22 PARTY DISCOVERY IS FOR IS YOU LEARN THINGS DURING DEPOSITION
23 SOMETIMES THAT -- YOU DO THEM AND YOU LEARN.

24 SO -- AND THE -- THAT'S WHAT DISCOVERY IS FOR.

25 THERE'S -- COLORADO DEPARTMENT OF HEALTH IS ONE OF MANY, I

1 BELIEVE 19, THIRD PARTIES THAT -- AND THEY --

2 THE COURT: YOU MIGHT NOT BE HELPING YOURSELF RIGHT
3 NOW.

4 MR. SALEN: WELL, BUT I WILL TELL YOU, THERE WAS A
5 POINT ABOUT SUBPOENAS BEING ISSUED TO ONE OF THEM VERY
6 RECENTLY. MOST OF THESE SUBPOENAS HAVE GONE OUT A LONG TIME
7 AGO. MOST OF THE DOCUMENTS HAVE BEEN COLLECTED AND PRODUCED.

8 AND TO THE EXTENT THERE ARE DEPOSITIONS TO MOVE FORWARD,
9 THOSE ARE BEING -- YOU KNOW, THOSE ARE IN THE WORKS AND BEING
10 CONSIDERED AND SCHEDULED AND WE FEEL VERY CONFIDENT WE CAN HIT
11 THE JULY 31ST CLOSE OF DISCOVERY DATE, EVEN WITH THOSE PENDING.

12 SO I JUST WANTED TO MAKE SURE THE RECORD WAS CLEAR.

13 THE COURT: THAT'S A LOT OF DEPOSITIONS.

14 MR. SALEN: WELL, I DON'T KNOW THAT ALL OF THOSE
15 ARE -- NOT ALL OF THE -- THERE'S DOCUMENTS -- THE FIRST STEP IS
16 TO GET DOCUMENTS AND SEE WHAT'S THERE.

17 THE COURT: RIGHT. BUT FOR THAT TO HAPPEN IN TERMS
18 OF GETTING THE DOCUMENTS AND THEN POSSIBLY SCHEDULING THE
19 DEPOSITIONS, PARTICULARLY IF WE'RE LOOKING AT A FURTHER OUT
20 TRIAL DATE TO PRESERVE THE TESTIMONY, BUT EVEN WITHOUT THAT, TO
21 GET THE DEPOSITIONS TO OCCUR AFTER THE DOCUMENTS ARE PRODUCED,
22 RIGHT NOW SIX WEEKS WOULD BE VERY AGGRESSIVE.

23 MR. SALEN: MY POINT IS, YOUR HONOR, MOST OF THOSE
24 DOCUMENTS HAVE BEEN PRODUCED. MOST OF THOSE DOCUMENTS FROM
25 THIRD PARTIES WERE SUBPOENAED A LONG TIME AGO AND THEY WERE

1 PRODUCED.

2 AND THE ONLY ONES I THINK NOW THAT -- SOME OF THE
3 IMPORTANT ONES WE'RE HAVING TROUBLE WITH, AT LEAST IN
4 PARTICULAR, IS AN ENTITY CALLED VERILY WHICH HAS REFUSED TO
5 MAKE A WITNESS AVAILABLE FOR DEPOSITION BECAUSE FACT DISCOVERY
6 WAS CLOSED BASED ON THE LAST ORDER, BUT I THINK THAT HAS BEEN
7 RESOLVED.

8 THE COURT: IT IS.

9 MR. SALEN: THERE ARE OTHERS THAT CAN MOVE ON THE
10 HEELS OF VERILY. I DON'T THINK THERE'S AN ISSUE WITH THAT.

11 IT'S NOT AS BIG A TASK THAT MY COLLEAGUE IS MAKING IT
12 SOUND LIKE BECAUSE A LOT OF THAT WORK HAS ALREADY BEEN DONE.

13 THE COURT: OKAY.

14 MR. SALEN: AND I DON'T THINK I HAVE ANYTHING ELSE TO
15 ADDRESS UNLESS YOUR HONOR HAS MORE QUESTIONS.

16 THE COURT: I DO NOT.

17 MR. SALEN: OKAY.

18 THE COURT: ALL RIGHT. SO -- SO I AM -- SO THE COURT
19 IS INCLINED, JUST IN TERMS OF -- I'LL JUST RULE FROM THE BENCH
20 ON THIS. THE COURT IS GRANTING THE MOTION TO CONSOLIDATE, WITH
21 CERTAIN CAVEATS, AND RECOGNIZING THIS IS WELL WITHIN THE
22 COURT'S DISCRETION.

23 I DO EXPECT THINGS TO MOVE TOGETHER, TO MOVE ALONG
24 EXPEDITIOUSLY, AND I'M GOING FOR ORDERING THE PARTIES, AS PART
25 OF CASE MANAGEMENT, TO MEET AND CONFER IN FIGURING OUT WAYS

1 THAT WE CAN SHAVE TIME OFF OF THE PATENT LOCAL RULE'S
2 TIMEFRAMES. I THINK IT SHOULD BE POSSIBLE WITH THIS, MAKING IT
3 A TIGHTER SCHEDULE SO THAT WE'RE NOT LOSING ALL THE TIME.

4 AFTER THE CLAIM CONSTRUCTION, WE'RE GOING TO HAVE ANOTHER
5 CMC, AND I'M ALSO GOING TO PROPOSE AT THAT POINT THAT WE LOOK
6 AT HOW AND WHEN TO PEEL OFF BIO-RAD, NOT -- I KEEP REFERRING TO
7 IT AS BIO-RAD, BUT THE PREVIOUS CASE NUMBER, THE DECLARATORY
8 JUDGMENT ACTION WHICH ENDED WITH 4823.

9 MR. WALTER: I UNDERSTAND.

10 THE COURT: SO, YEAH, I JUST WAS THINKING THE RECORD
11 IS VERY NOT CLEAR WHEN I KEEP REFERRING TO IT AS BIO-RAD.

12 SO PEELING OFF THE 4823 CASE NUMBER, AND I THINK THE RIGHT
13 TIME TO DO THAT WILL BE WHEN WE COME BACK FROM THE MARKMAN
14 ORDER AND WE'RE LOOKING AT SCHEDULING OUT THE REST OF THE CASE
15 SCHEDULE. I WILL THEN HAVE YOUR PROPOSED SCHEDULE AS TO THE --
16 AND WE'LL HAMMER THAT OUT IF WE NEED TO HAMMER IT OUT, AND
17 HOPEFULLY THE PARTIES WILL STIPULATE.

18 BUT WE'LL HAMMER OUT THE CASE SCHEDULE FOR THE -- TO GET
19 CALTECH II CAUGHT UP FOR THE PRE-MARKMAN, POST-MARKMAN, AND
20 THEN HAVE THEM JOINTLY WALKING ALONG, BUT DIVIDING OUT BIO-RAD.

21 I THINK THAT AT THE MOTION FOR SUMMARY JUDGMENT, MAYBE
22 EARLIER, YOU ALL WILL TELL ME, AT THE MOTION FOR SUMMARY
23 JUDGMENT AND THEN TRIAL STAGES, WITH THE ASSUMPTION THAT 4823
24 DECLARATORY JUDGMENT ACTION WILL GO FIRST FOR TRIAL.

25 REACTIONS AND THOUGHTS?

1 MR. WALTER, YOU LOOK CONCERNED.

2 MR. WALTER: NO. BUT I DO GET THAT. I HAVE PEOPLE
3 SAY THAT TO ME A LOT, THAT I LOOK CONCERNED.

4 THE COURT: GOOD TO KNOW. I WILL REMEMBER THIS FOR
5 OUR COMING HEARINGS.

6 MR. WALTER: NO, I UNDERSTAND EVERYTHING.

7 I HAVE ONE QUESTION. YOU SAID WE SHOULD GET TOGETHER AND
8 PROPOSE A SCHEDULE THAT GOES A LITTLE FASTER THAN THE PATENT
9 LOCAL RULES.

10 HOW SOON DID YOU WANT US TO SUBMIT THAT BY?

11 THE COURT: I'M THINKING THIS THROUGH IN TERMS OF
12 WHEN THE MARKMAN IS COMING, IF IT MAKES SENSE TO --

13 MR. WALTER: THE MARKMAN, I DON'T THINK WE -- WE
14 DON'T HAVE A MARKMAN DATE.

15 MR. SALEN: YOUR HONOR, YOU'RE TALKING ABOUT YOUR
16 ORDER?

17 THE COURT: MY ORDER.

18 MR. WALTER: OKAY.

19 THE COURT: MR. SALEN, WHAT'S YOUR PROPOSAL IN TERMS
20 OF HOW MUCH TIME IT WOULD TAKE TO MEET AND CONFER AND HAMMER
21 OUT AND GO BACK TO THE CALTECH II SCHEDULE?

22 MR. SALEN: I THINK WE CAN HAVE THAT DONE -- WE'RE
23 AVAILABLE TO DO THAT AND ARE HAPPY TO WORK WITH BIO-RAD TO DO
24 THAT IN THE UPCOMING WEEK OR TWO, I WOULD THINK MAYBE BY THE
25 END OF NEXT WEEK, IF WE CAN PROPOSE A SCHEDULE THAT WOULD -- I

1 THINK SOONER IS BETTER. IF WE'RE GOING TO DO THIS, WE SHOULD
2 DO IT QUICKLY.

3 WE ALREADY HAVE A CASE MANAGEMENT SCHEDULE FOR THE -- AN
4 AGREED TO SCHEDULE IN THE NEW CASE THAT ASSUMED IT WASN'T GOING
5 TO BE CONSOLIDATED.

6 WITH THE CONSOLIDATION AND YOUR HONOR'S GUIDANCE TO TRY TO
7 MOVE THE CASE FASTER, I THINK WE CAN WORK ON THOSE DATES AND
8 SUBMIT SOMETHING, WHETHER IT'S OPPOSED OR AGREED TO, AT LEAST
9 SOMETHING FOR THE COURT TO CONSIDER WITHIN THE NEXT, FROM OUR
10 PERSPECTIVE, BY THE END OF NEXT WEEK MAYBE.

11 THE COURT: OKAY. I WILL GIVE YOU A LITTLE BIT MORE
12 TIME, AND WE'LL SAY BY JUNE 30TH, WHICH IS A MONDAY. SO
13 PROPOSE A JOINT PROPOSED SCHEDULE. I'M GIVING YOU A COUPLE
14 MORE DAYS TO MAKE IT JOINT.

15 MR. WALTER: NOW IT'S JUST -- SHOULD THAT SCHEDULE
16 GO -- THAT SCHEDULE SHOULD GO THROUGH MARKMAN?

17 THE COURT: THROUGH MARKMAN.

18 AND I'M REALLY GOING TO PUSH PARTIES TO LIMIT THEIR TERMS
19 TO THE TWO OR THREE THE COURT IS PROPOSING, RECOGNIZING THE
20 OUTER LIMIT OF WHAT BIO-RAD SUGGESTED, THAT THAT WAS THREE TO
21 FIVE, THAT THAT ITSELF COULD SLOW THINGS DOWN, NOT TO THE
22 EXTENT THAT -- WE'RE A RELATIVELY NEW CHAMBERS AND WE'RE
23 ROLLING THAT ORDER OUT, BUT STILL, IT SEEMS -- THERE ARE
24 CERTAIN WORDS WE STARTED -- AS I MENTIONED, WE STARTED
25 CROSS-REFERENCING THE TERMS AND THERE ARE CERTAIN WORDS WHICH

1 CLEARLY DID OVERLAP. SO I'M HOPEFUL THAT THAT WILL REALLY
2 LIMIT CONSTRUCTION.

3 MR. WALTER: OKAY.

4 THE COURT: SO HOW ABOUT THE 30TH? THE MARKMAN --
5 AND THEN WE'LL STICK WITH THE 30TH AS THE DEADLINE FOR THE
6 PROPOSED SCHEDULE IN THE NEW MATTER, THE CALTECH II, WHICH WILL
7 CATCH YOU UP WITH THIS CASE.

8 WE HAVE UNTIL THE 31ST IN THIS CASE, THE IN RE: CHROMACODE
9 LITIGATION, FOR THE END OF FACT DISCOVERY RIGHT NOW, RESERVED
10 ANYWAY, SO DISCOVERY STILL REMAINS OPEN. IT WON'T BE
11 PREJUDICIAL IN TERMS OF GETTING IT CAUGHT UP.

12 THE MARKMAN ORDER WILL ISSUE AND I'LL BRING YOU IN FOR A
13 CMC SHORTLY THEREAFTER, WITH MARCHING ORDERS OF, HEY -- AND YOU
14 ALL CAN GO AHEAD AND START TALKING ABOUT THIS, LIKE WHAT IS
15 THIS GOING TO LOOK LIKE WHEN WE PEEL THESE TWO APART?

16 YOU HAVE A GENERAL TIMEFRAME OF WHEN THAT'S GOING TO BE,
17 AND I WOULD GUESS THAT OUR CMC AT THE LATEST WILL HAPPEN IN
18 EARLY AUGUST.

19 MR. WALTER: SO IN EARLY AUGUST, IT SOUNDS LIKE IN
20 EARLY AUGUST, THAT'S WHEN WE'LL BE SETTING THE DEADLINES FOR
21 CLOSE OF FACT DISCOVERY IN THE CONSOLIDATED CASE.

22 THE COURT: YES. AND YOU MAY HAVE THE CLOSE OF FACT
23 DISCOVERY NOW, I MEAN BY JUNE 30TH, RIGHT, BECAUSE YOU'RE GOING
24 TO BE DOING THE -- OH, I SEE. NO, NO, YOU'RE RIGHT. YOU'RE
25 RIGHT.

1 MR. WALTER: THERE'S NO WAY FACT DISCOVERY IS GOING
2 TO BE DONE BY JULY 30TH. HE SAYS HE'S GOT 19 THIRD PARTY
3 WITNESSES.

4 AND THEN THERE'S THE PARTY WITNESSES. THERE HASN'T BEEN A
5 SINGLE PARTY DEPOSITION. THAT'S NOT HAPPENING BY JULY 31ST.

6 THE COURT: AND THEN YOU'LL BOTH DISAGREE ABOUT IT.
7 BUT YES, I HEAR YOU.

8 I'M JUST TRYING TO FIGURE OUT WHEN TO CHANGE THAT DATE
9 RIGHT NOW, FROM WHEN IT MAKES SENSE, IF IT'S ATTACHED TO THE
10 JUNE 30TH SCHEDULE OR IF IT'S ATTACHED TO THE --

11 MR. WALTER: THAT'S WHAT I'M ASKING.

12 THE COURT: THAT'S WHAT I'M TRYING TO FIGURE OUT.

13 SO IN YOUR JUNE 30TH SCHEDULE, LET'S ASSUME THAT YOU'RE
14 MOVING OUT THAT JULY 31ST DEADLINE AT LEAST, AT LEAST
15 TENTATIVELY FOR YOUR TARGET OFF OF THAT.

16 SO IT SHOULD BE -- IT'S GOING TO BE NEED TO BE MOVED ONCE
17 NO MATTER WHAT, AND PROBABLY TWICE, BUT AT LEAST ONCE LET'S
18 SAY. GO AHEAD AND PROPOSE A NEW DATE FOR THAT.

19 MR. SALEN: BECAUSE THIS NEW CMC STATEMENT -- OR THE
20 NEW SCHEDULE CONTEMPLATES CONSOLIDATED CASES, IS THE COURT
21 STILL UNDER THE IMPRESSION THAT THE FACT DISCOVERY CLOSE DATE
22 WOULD BE DIFFERENT FOR THE -- IN OTHER WORDS, THERE'S GOING TO
23 BE FACT DISCOVERY -- THE FACT DISCOVERY CLOSE IS DIFFERENT FOR
24 THE NEW CASE, FOR THE 797 CASE FOR CALTECH II, RIGHT? THAT HAS
25 TO BE, OBVIOUSLY, WAY FURTHER OUT THAN JULY 31ST.

1 OR IS YOUR HONOR --

2 THE COURT: I'M ASSUMING THAT THE FACT DISCOVERY
3 DEADLINE, WHICH CURRENTLY IS AT JULY 31ST IN OUR EXISTING CASE,
4 IS GOING TO HAVE TO BE MOVED OUT FOR SEVERAL REASONS.

5 MR. SALEN: YEAH.

6 THE COURT: BUT ONE BEING CONSOLIDATION; TWO, ALSO,
7 JUST FROM WHAT I'VE HEARD TODAY, IT SEEMS OVERLY AGGRESSIVE TO
8 TRY TO GET EVERYTHING DONE IN OUR EXISTING CASE BY THE 31ST.

9 BUT THERE'S NOT A QUESTION BEFORE ME ON THAT.

10 MR. SALEN: SO YOUR HONOR IS EXPECTING TO HAVE ONE
11 CLOSE OF FACT DISCOVERY DATE FOR THE CONSOLIDATED CASE?

12 THE COURT: I AM.

13 ANYTHING ELSE? I'M SORT OF THINKING ON THE FLY HERE.

14 WE ACTUALLY HAVE A HEARING COMING IN SHORTLY ON A TRO, BUT
15 ANYTHING ELSE?

16 MR. WALTER: I THINK I UNDERSTAND WHAT YOU WANT US TO
17 DO.

18 MR. SALEN: CAN I ASK ONE MORE CLARIFYING QUESTION?

19 THE COURT: YEAH.

20 MR. SALEN: FOR THE SCHEDULE, NORMALLY UNDER THE
21 LOCAL RULES, THERE ARE SEVERAL DATES THAT GET SCHEDULED OFF OF
22 THE CLOSE OF -- OR THE ISSUANCE OF THE MARKMAN ORDER, WHICH IS
23 WHAT WE'RE WAITING FOR.

24 THE COURT: UM-HUM.

25 MR. SALEN: IN THE NEW SCHEDULE, GIVEN THAT WE'RE

1 TRYING TO BE A LITTLE -- WE'RE TRYING TO BE FASTER THAN THE
2 LOCAL RULES AND SET DATES, IN MY MIND, I THINK WE WOULD WANT TO
3 SET THE DAYS AS ACTUAL DATES THAT WE THINK WE CAN GET, YOU
4 KNOW, MARCHING THE CASE THROUGH TO TRIAL. IS THAT SOMETHING
5 THAT'S -- OR DO YOU THINK THAT YOU STILL EXPECT TO SEE A
6 RELATIVE, YOU KNOW, A RELATIVE DATE AFTER THE MARKMAN ORDER IN
7 THE SECOND CASE? IN OTHER WORDS, THAT WE DON'T SET HARD DATES?

8 THE COURT: RIGHT.

9 MR. WALTER: MY IMPRESSION IS THAT YOU MIGHT BE READY
10 FOR US TO SET A CLOSE OF FACT DISCOVERY, BUT YOU'RE NOT READY
11 FOR US TO GIVE YOU A TRIAL DATE, SET A TRIAL DATE YET.

12 THE COURT: THAT IS CORRECT. AND I HEAR WHAT YOU'RE
13 SAYING OF, OKAY, WELL, OFTEN IT TRIGGERS OFF OF -- SUCH AS IN
14 THIS CASE, I INDICATED THAT MOST LIKELY THERE'S GOING TO BE
15 SOME FACT DISCOVERY AFTER MARKMAN.

16 LET'S HAVE A TARGET DATE TO TRY TO WRAP UP FACT DISCOVERY,
17 RECOGNIZING THAT -- I MEAN, RIGHT NOW I DON'T EVEN KNOW HOW
18 MANY TERMS WE HAVE AND WHAT'S GOING TO HAPPEN WITH
19 CONSTRUCTION, WHAT THE MARKMAN IS GOING TO LOOK LIKE. WE CAN
20 REVISIT AND TALK ABOUT THAT IF WE NEED TO.

21 BUT I NEED TO HEAR MORE FROM YOU ALL REGARDING WHAT THAT'S
22 GOING TO LOOK LIKE ONCE THESE ACTIONS ARE CONSOLIDATED FOR THE
23 MARKMAN.

24 MR. SALEN: OKAY.

25 THE COURT: AND I'M THINKING I WILL KNOW MORE OF

1 THAT -- WE'RE GOING TO HAVE A SCHEDULE, HOPEFULLY AT LEAST JUST
2 TO GET US ROLLING WITH THE NEW CASE. BUT THEN IN THE AUGUST
3 ONE, I'M HAPPY TO REVISIT THAT, AND I FEEL LIKE I SHOULD
4 PROBABLY ISSUE SOME SORT OF CASE MANAGEMENT ORDER JUST TO GIVE
5 YOU ALL A HEADS UP OF, HEY, AT THIS CASE MANAGEMENT, LET'S TALK
6 ABOUT ALL OF THIS.

7 BUT AT THE AUGUST ONE, IN TERMS OF SOME OF THESE OTHER
8 ISSUES WHICH ARE OUT THERE, I THINK IT WOULD BE GOOD TO WRAP
9 THOSE UP BECAUSE THEN WE'LL HAVE A BETTER SENSE OF THE CONTOURS
10 OF THE CALTECH II CASE AND WHAT IT MEANS.

11 MR. SALEN: OKAY.

12 THE COURT: SO DOES THAT MAKE SENSE?

13 MR. WALTER: YES. THANK YOU, YOUR HONOR.

14 THE COURT: NO, THANK YOU FOR YOUR QUESTIONS. IT'S
15 HELPFUL TO HELP ME THINK THROUGH THIS AS WE PIECE HUMPTY DUMPTY
16 BACK TOGETHER AND THEN SEPARATE HUMPTY DUMPTY IN A DIFFERENT
17 WAY.

18 ALL RIGHT. THANK YOU, EVERYBODY.

19 MR. SALEN: THANK YOU.

20 THE COURT: ALL RIGHT. WE'RE GOING TO TAKE A SHORT
21 RECESS AS WE PREPARE FOR THE TRO. THANK YOU.

22 (THE PROCEEDINGS WERE CONCLUDED AT 11:04 A.M.)

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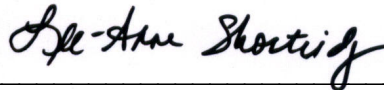
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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 1301 CLAY STREET, OAKLAND, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: JULY 2, 2025