

From: [Cunningham, Laura](#)
To: [Hollis, Amanda](#)
Cc: [Graves, Jon](#); [Schmidt, Leslie M.](#); [De Vries, Mike W.](#); [Altieri, Stephen](#); [J. Mitchell Jones](#)
Subject: RE: IPR2014-00003
Date: Tuesday, June 03, 2014 5:45:07 PM

Amanda,

Your claim that “Neptune has been resisting our efforts to resolve this matter by agreement and needlessly prolonging the dispute” couldn’t be further from the truth. In the ITC and in this proceeding, Aker has put up a stream of denials and excuses as to why it does not have or will not produce these documents. As a result of outright misrepresentations by Aker, we were denied this discovery in the ITC. Here, Aker attempted to block us from discovering who had these documents in the Haugsgjerd deposition – the record of the improper instructions not to answer speaks for itself. Aker then strenuously objected to producing the documents in this proceeding until after the Board call, late in the day our motion was due and after the time we told Judge Greene we would file. This belated proposal sought Neptune’s agreement to vague conditions and arbitrary discovery limits in exchange for documents to which Neptune is clearly entitled in the first place.

Notwithstanding this context, we considered your proposal in good faith and provided a prompt and fair response. We have had to file two motions to compel documents that are not privileged, highly relevant, and should have been produced in the first instance. Since Aker is refusing to pay Neptune’s attorneys’ fees associated with the May 30 motion, we reserve all rights to seek relief as appropriate, for example, to address Aker’s unsubstantiated objections to production (as represented to the Board during the May 28 call) that necessitated the filing of our May 30 motion.

Finally, I note that we appear to have just received a link to download a document production from Aker – please confirm that this production includes all documents requested in Neptune’s May 30 motion.

Regards,
Laura

Laura J. Cunningham

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From: Hollis, Amanda [<mailto:ahollis@kirkland.com>]
Sent: Tuesday, June 03, 2014 2:44 PM
To: Cunningham, Laura
Cc: Graves, Jon; Schmidt, Leslie M.; De Vries, Mike W.; Altieri, Stephen; J. Mitchell Jones
Subject: RE: IPR2014-00003

AKBM 1083

Laura,

The tenor of Neptune's email is unwarranted and the substance of its accusations is incorrect. AKBM has endeavored to work cooperatively to attempt to address and resolve this issue, and AKBM's attempt to work this issue out by mutual agreement should not be met with escalation.

Neptune's suggestion that a cooperative resolution should depend on AKBM agreeing to pay Neptune's attorneys' fees is unwarranted and unreasonable, as are Neptune's accusations. The parties have had a legitimate dispute about discoverability of these materials, which AKBM has been trying to confer with Neptune about, but Neptune has been resisting our efforts to resolve this matter by agreement and needlessly prolonging the dispute. There also were no improper "block[ing]" privilege instructions at Mr. Haugsgjerd's deposition. Neptune repeatedly asked Mr. Haugsgjerd whether the documents were given to AKBM, without any objection at all, and as for the few questions about these documents that raised privilege concerns, I volunteered to confer with you about those concerns and have the parties call the Board at the time to resolve them. Our request for guidance from the Board about available remedies for the several hours of cross-examination Neptune conducted of Mr. Haugsgjerd outside the scope of his declarations further was in no way "retaliatory" or connected to the dispute over Mr. Haugsgjerd's documents, and had clear support in the rules and case law. See, e.g., *Corning Inc. v. DSM IP Assets*, IPR2013-00043, 2013 WL 5970163 (Patent Tr. & App. Bd.), 1 ("We . . . repeat the admonition: excessive questioning beyond the scope of a witness's direct testimony may be considered an abuse of discovery. See 37 C.F.R. § 42.12(a)(5).").

We regret that Neptune is attempting to condition a cooperative resolution on acceptance of unreasonable conditions. Nevertheless, in light of Neptune's agreement that production of the requested documents will not amount to a waiver, as well as the comments made by the Board at the hearing on Neptune's request for authorization to file its motion, we plan to go ahead and arrange for their production to Neptune.

Regards,
Amanda

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From: Cunningham, Laura [<mailto:lcunningham@cooley.com>]
Sent: Monday, June 02, 2014 1:19 PM
To: Hollis, Amanda
Cc: Graves, Jon; Schmidt, Leslie M.; De Vries, Mike W.; Altieri, Stephen
Subject: RE: IPR2014-00003

Amanda,

It is unfortunate that this attempt at cooperation did not come sooner. Not only has Aker consistently refused to produce these documents both before and after our call with the Board, it

attempted to smear us by raising a baseless, retaliatory sanctions motion. Moreover, you tried to block us from discovering that Aker has these documents by issuing improper privilege instructions during the Haugsgjerd deposition, which you now appear to concede were without basis, *after* Aker already misrepresented to us and the ITC that it had no such documents.

In short, Neptune has had to incur substantial expense and delay to pursue these critical documents, and has been met with nothing but resistance and outright false representations by Aker. We are confident our motion will prevail. However, in the interest of obviating the need for the Board to resolve a disputed motion, we would agree to the following:

- Aker agrees to produce all documents sought by the motion on or before Thursday, June 5
- Aker agrees to pay Neptune's attorney fees associated with preparing and filing the motion for additional discovery
- Neptune agrees that Aker's voluntary production of these documents will not constitute a waiver of any attorney-client privilege that may attach to other documents or information

We find the second "condition" you reference too vague to understand and are not willing to agree to it, as we have no way to know how Aker may attempt to interpret it. For example, we don't think that requesting an additional deposition of Mr. Haugsgjerd would be "us[ing] Aker's willingness to compromise on a disputed issue against Aker," and in any event, we see no reason why we should agree to forego potential future discovery before we even see the documents, particularly in light of the egregiousness of Aker's past conduct outlined above.

Regards,
Laura

Laura J. Cunningham

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From: Hollis, Amanda [<mailto:ahollis@kirkland.com>]
Sent: Friday, May 30, 2014 10:54 PM
To: Cunningham, Laura
Cc: Graves, Jon; Schmidt, Leslie M.; De Vries, Mike W.
Subject: IPR2014-00003

Laura,

As mentioned in our call today, this is our proposed compromise: We would agree to produce copies of the laboratory notebook excerpts and reports you seek (i.e. those created by Mr. Haugsgjerd that document the Beaudoin & Maruyama recreations he conducted on which AKBM relies) if Neptune will agree such production does not constitute a waiver of privilege for any purpose or with respect to any other document or information, and further on the condition that

Neptune will not use Aker's willingness to compromise on a disputed issue against Aker (for example, Neptune will not argue this should trigger a new deposition of Mr. Haugsgjerd).

Please let us know your response by Monday.

Regards,
Amanda

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