

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CALLWAVE COMMUNICATIONS,)
 LLC,)
)
 Plaintiff,) C.A. No. 12-1701-RGA
 v.)
)
 AT&T MOBILITY, LLC, et)
 al,)
)
 Defendants.)

 CALLWAVE COMMUNICATIONS,)
 LLC,)
)
 Plaintiff,) C.A. No. 12-1702-RGA
 v.)
)
 SPRINT NEXTEL CORP, et al,))
)
 Defendants.)

 CALLWAVE COMMUNICATIONS,)
 LLC,)
)
 Plaintiff,) C.A. No. 12-1703-RGA
 v.)
)
 T-MOBILE USA, INC., et al,))
)
 Defendants.)

 CALLWAVE COMMUNICATIONS,)
 LLC,)
)
 Plaintiff,) C.A. No. 12-1704-RGA
 v.)
)
 VERIZON COMMUNICATIONS,)
 INC.,)
)
 Defendant.)

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1 APPEARANCES CONTINUED :

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CALLWAVE COMMUNICATIONS,)
 LLC,)
)
 Plaintiff,) C.A. No. 12-1788-RGA
 v.)
)
 AT&T MOBILITY, LLC, et al,))
)
 Defendants.)

 BROADSOFT, INC.,)
)
 Plaintiff,) C.A. No. 13-711-RGA
 v.)
)
 CALLWAVE COMMUNICATIONS,)
 LLC,)
)
 Defendant.)

Wednesday, April 9, 2014
10:51 a.m.

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE RICHARD G. ANDREWS
United States District Court Judge

APPEARANCES :

PEPPER HAMILTON, LLP
BY: EDMOND D. JOHNSON, ESQ.
BY: NOAH MALGERI, ESQ.

Counsel for the Plaintiff
CallW ave Communications, LLC

1 APPEARANCES CONTINUED :

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SEITZ ROSS ARONSTAM & MORITZ, LLP
BY: BENJAMIN J. SCHLADWEILER, ESQ.

-and-

DENTONS
BY: MARK C. NELSON, ESQ.

Counsel for the Defendant
AT&T Mobility

10:51:40 **1** THE CLERK: All rise.
 10:51:40 **2** THE COURT: All right. Good
 10:51:40 **3** morning, everyone.
 10:51:40 **4** MR. BLUMENFELD: Good morning.
 10:51:40 **5** THE COURT: This is CallWave
 10:51:40 **6** Communications, LLC versus a number of different
 10:51:40 **7** defendants, including -- you can be seated --
 10:51:40 **8** AT&T Mobility, Civil Action Number 12-1701. And
 10:51:40 **9** I see there's six cases in total. So I guess we
 10:51:40 **10** ought to know who's here.
 10:51:40 **11** Mr. Johnson.
 10:51:40 **12** MR. JOHNSON: Yes, Your Honor.
 10:51:40 **13** Edmond Johnson from Pepper Hamilton on behalf of
 10:51:40 **14** the plaintiff, CallWave. And I have with me at
 10:51:40 **15** counsel table, Noah Malgeri, also from Pepper
 10:51:40 **16** Hamilton.
 10:51:40 **17** THE COURT: All right. And good
 10:51:40 **18** morning.
 10:51:40 **19** And who represents the defendants
 10:51:40 **20** here?
 10:51:40 **21** MR. BLUMENFELD: Good morning, Your
 10:51:40 **22** Honor, Jack Blumenfeld.
 10:51:40 **23** I'm here for Google, along with
 10:51:40 **24** Scott Samay and Peter Lambrianakos from Winston &
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10:51:40 **1** Strawn.
 10:51:40 **2** MS. JACOBS: Good morning, Your
 10:51:40 **3** Honor. On behalf of the defendant, Sprint, Karen
 10:51:40 **4** Jacobs from Morris Nichols.
 10:51:40 **5** THE COURT: I'm sorry, which
 10:51:40 **6** defendant?
 10:51:40 **7** MS. JACOBS: Sprint.
 10:51:40 **8** MR. NEWELL: Ryan Newell from
 10:51:40 **9** Connolly Gallagher on behalf of T-Mobile in the
 10:51:40 **10** 1703 matter.
 10:51:40 **11** THE COURT: All right.
 10:51:40 **12** MR. BARILLARE: Good morning, Jody
 10:51:40 **13** Barillare for Morgan Lewis for Blackberry and
 10:51:40 **14** AT&T Mobility.
 10:51:40 **15** THE COURT: All right. Good
 10:51:40 **16** morning.
 10:51:40 **17** MR. SCHLADWEILER: Your Honor, Ben
 10:51:40 **18** Schladweiler from Seitz Ross on behalf of Verizon
 10:51:40 **19** and AT&T Mobility in the 1701 action.
 10:51:40 **20** With me today is Mr. Nelson from
 10:51:40 **21** Dentons.
 10:51:40 **22** MR. NELSON: Good morning, Your
 10:51:40 **23** Honor.
 10:51:40 **24** THE COURT: Good morning. And
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10:51:40 **1** Mr. Day.
 10:51:40 **2** MR. DAY: Good morning, Your Honor.
 10:51:40 **3** John Day from Ashby & Geddes for Broadsoft in the
 10:51:40 **4** 13-711 action.
 10:51:40 **5** THE COURT: Okay. So I've got these
 10:51:40 **6** various disputes about the Protective Order and
 10:51:40 **7** I've got also the ESI Order. And I guess the
 10:51:40 **8** first letter I got, I guess it was from the
 10:51:40 **9** defendants.
 10:51:40 **10** And I do appreciate that you agreed,
 10:51:40 **11** one of you, to go first and one of you to go
 10:51:40 **12** second as opposed to just submitting two letters
 10:51:40 **13** and then submitting two responses. So thank you
 10:51:40 **14** for that.
 10:51:40 **15** Why don't we just go over these
 10:51:40 **16** things one by one. In the prosecution bar, is
 10:51:40 **17** there anything that the defense counsel wants to
 10:51:40 **18** say about that?
 10:51:40 **19** MR. BLUMENFELD: Just, Your Honor, a
 10:51:40 **20** couple things based on the response letter that
 10:51:40 **21** we got. I don't have much to add about, you
 10:51:40 **22** know, the strategic amendment point that we
 10:51:40 **23** covered.
 10:51:40 **24** We cited a number of cases from Your
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10:51:40 **1** Honor, Judge Stark, Judge Sleet. None of which
 10:51:40 **2** they responded to.
 10:51:40 **3** THE COURT: Even though I thought
 10:51:40 **4** the cases we cited from me, while that may have
 10:51:40 **5** been in the actual order, I don't think that was
 10:51:40 **6** a disputed issue of that case.
 10:51:40 **7** MR. BLUMENFELD: What Your Honor
 10:51:40 **8** said was that you were entering the defendants'
 10:51:40 **9** order and you did enter the order, which applied
 10:51:40 **10** to the post-grant review issue and also was a
 10:51:40 **11** one-way bar. But certainly we argued the issues
 10:51:40 **12** more fully in the two cases before Judge Sleet
 10:51:40 **13** and in the case before Judge Stark.
 10:51:40 **14** And if you want to hear more about
 10:51:40 **15** that, I'll be glad to talk about it.
 10:51:40 **16** THE COURT: No. No. No.
 10:51:40 **17** I had actually just gone back to see
 10:51:40 **18** what I had said in that case, and it did strike
 10:51:40 **19** me that one-way bar, I certainly addressed. I
 10:51:40 **20** wasn't sure how much I had addressed the first
 10:51:40 **21** question.
 10:51:40 **22** But, in any event, go ahead.
 10:51:40 **23** MR. BLUMENFELD: I mean, we can
 10:51:40 **24** address the strategic amendment issue if you'd
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10:51:40 **1** like. I think it's pretty clear, a pretty clear
 10:51:40 **2** issue.
 10:51:40 **3** On the one-way, two-way bar, they
 10:51:40 **4** didn't address that in their letter, so I'm
 10:51:40 **5** assuming that that's no longer an issue. The one
 10:51:40 **6** thing that they did raise that's new is they
 10:51:40 **7** argued that we're willing, we the defendants,
 10:51:40 **8** collectively are willing to accept other defense
 10:51:40 **9** counsel as participants in post-grant reviews.
 10:51:40 **10** And that really isn't much of an
 10:51:40 **11** argument, in our view, because we're not going to
 10:51:40 **12** produce our confidential information to the other
 10:51:40 **13** defense counsel. I mean, I can speak for Google
 10:51:40 **14** and I think it's true for all of the defendants,
 10:51:40 **15** the only party that's requested our information
 10:51:40 **16** is the plaintiff. The only party that we're
 10:51:40 **17** going to produce it to is the plaintiff.
 10:51:40 **18** So we're not producing our
 10:51:40 **19** confidential information to the other defendants,
 10:51:40 **20** so there's just not any risk at all there. In
 10:51:40 **21** fact, you know, to the extent that we've produced
 10:51:40 **22** all -- the defense has produced core technical
 10:51:40 **23** documents. You know, we've only produced them to
 10:51:40 **24** the plaintiff. We're not sharing them with the
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10:51:40 **1** other defendants and there's no intention to.
 10:51:40 **2** So, in our view, this is just a very
 10:51:42 **3** plain prosecution bar issue. They can amend or
 10:51:42 **4** perhaps they can add new claims in post-grant
 10:51:42 **5** proceedings. There's already an IPR pending for
 10:51:42 **6** one of the patents, and we think the law is
 10:51:42 **7** pretty clear that the lawyers who have access
 10:51:42 **8** shouldn't be permitted to participate.
 10:51:42 **9** THE COURT: And so just to make sure
 10:51:42 **10** that I have the background correct, there are
 10:51:42 **11** five patents; right?
 10:51:42 **12** MR. BLUMENFELD: There are. There
 10:51:42 **13** are more than five patents. There's three
 10:51:42 **14** tracks. Two of the tracks have one patent. I
 10:51:42 **15** think there's six patents in the third track.
 10:51:42 **16** So there are --
 10:51:42 **17** THE COURT: Total number of patents
 10:51:42 **18** altogether is how many?
 10:51:42 **19** MR. BLUMENFELD: I think it's eight.
 10:51:42 **20** THE COURT: Oh, okay. And so one of
 10:51:42 **21** them is under IPR review?
 10:51:42 **22** MR. BLUMENFELD: One of them is in
 10:51:42 **23** IPR. Correct.
 10:51:42 **24** THE COURT: And there's no pending
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10:51:42 **1** request or anything in regard to the other seven?
 10:51:42 **2** MR. BLUMENFELD: There have not been
 10:51:42 **3** any requests for the other seven.
 10:51:42 **4** THE COURT: All right.
 10:51:42 **5** MR. BLUMENFELD: And I think I
 10:51:42 **6** mentioned that when we were here at the
 10:51:42 **7** scheduling conference that IPR had happened and
 10:51:42 **8** that there might be even a stay of this, a
 10:51:42 **9** request for a stay of the litigation pending the
 10:51:42 **10** IPR, which also may happen.
 10:51:42 **11** THE COURT: Okay. All right.
 10:51:42 **12** Thank you.
 10:51:42 **13** MR. BLUMENFELD: Anything else you'd
 10:51:42 **14** like to hear on the prosecution bar?
 10:51:42 **15** THE COURT: No.
 10:51:42 **16** MR. BLUMENFELD: Thank you.
 10:51:42 **17** THE COURT: All right.
 10:51:42 **18** MR. MALGERI: Good morning, Your
 10:51:42 **19** Honor. Noah Malgeri from Pepper Hamilton on
 10:51:42 **20** behalf of CallWave.
 10:51:42 **21** Go ahead. Your Honor, you have a
 10:51:42 **22** question?
 10:51:42 **23** THE COURT: Well, so I think I see
 10:51:42 **24** this stuff about Mr. Engellener and Attorney
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10:51:42 **1** Mullagababa, two registered patent attorneys who
 10:51:42 **2** apparently are representing CallWave in the IPR;
 10:51:42 **3** is that right?
 10:51:42 **4** MR. MALGERI: Yes, Your Honor.
 10:51:42 **5** That's right.
 10:51:42 **6** Actually there was a mention of some
 10:51:42 **7** of the circumstances that sort of surround their
 10:51:42 **8** participation in the IPR and the defendant in the
 10:51:42 **9** defendants' letter to Your Honor, but it didn't
 10:51:42 **10** get the facts entirely right. CallWave did not
 10:51:42 **11** appoint the presence for counsel.
 10:51:42 **12** They were the counsel of record at
 10:51:42 **13** the U.S. PTO for the patentee who just sort of
 10:51:42 **14** defaulted into the role of being counsel of
 10:51:42 **15** record for service of the petition, et cetera.
 10:51:42 **16** The first counsel that CallWave appointed and
 10:51:42 **17** selected in its exercise of its discretion to
 10:51:42 **18** choose counsel was naturally counsel from Pepper
 10:51:42 **19** Hamilton.
 10:51:42 **20** And Your Honor, much like the
 10:51:42 **21** defendants' arrangement in the present IPR, they
 10:51:42 **22** have counsel. They have the same individual who
 10:51:42 **23** was on the pro hac for T-Mobile and Sprint, who's
 10:51:42 **24** also appeared as counsel in the IPR.
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10:51:42 **1** And so --

10:51:42 **2** THE COURT: Well, so just, and maybe

10:51:42 **3** it was in here about how far IPR is or maybe it

10:51:42 **4** wasn't. I can't remember now.

10:51:42 **5** But are you saying that Mr.

10:51:42 **6** Engellener and Attorney Mullagababa are not the

10:51:42 **7** people who are representing CallWave in the IPR,

10:51:42 **8** they were essentially just on the docket as such

10:51:42 **9** and now somebody else is or what?

10:51:42 **10** MR. MALGERI: Oh, no, Your Honor.

10:51:42 **11** My mistake, if I wasn't clear.

10:51:42 **12** There was a mention in the

10:51:42 **13** defendants' letter to Your Honor that mentioned

10:51:42 **14** that there was previous counsel before Mr.

10:51:42 **15** Engellener.

10:51:42 **16** THE COURT: Oh, okay. Because it

10:51:42 **17** said substituted, so that implied somebody, yes.

10:51:42 **18** MR. MALGERI: There was no

10:51:42 **19** substitution on CallWave's behalf, Your Honor.

10:51:42 **20** THE COURT: I don't think that

10:51:42 **21** matters.

10:51:42 **22** MR. MALGERI: Okay.

10:51:42 **23** THE COURT: But I did appreciate

10:51:42 **24** that, so thank you for pointing that out.

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10:51:42 **1** MR. MALGERI: Yes, Your Honor. So

10:51:42 **2** basically the argument that the defendants make

10:51:42 **3** in their letter and then also today briefly said

10:51:42 **4** that the prosecution bar that they'd like to see

10:51:42 **5** imposed in this case, that is their burden to try

10:51:42 **6** to justify, goes well beyond the arguments that

10:51:42 **7** they have even made. That prosecution bar would

10:51:42 **8** effectively eliminate CallWave's ability to have

10:51:42 **9** folks who have participated on CallWave's behalf

10:51:42 **10** over the course of awhile in learning the

10:51:42 **11** litigation strategy of CallWave and the validity

10:51:42 **12** theories of CallWave with respect to this

10:51:42 **13** particular patent, and foreclose their

10:51:42 **14** participation in the IPR where the exact same

10:51:42 **15** issues are here.

10:51:42 **16** And, indeed, the only information

10:51:42 **17** that's relevant to those questions in the IPR is

10:51:42 **18** public prior art and the patent claims

10:51:42 **19** themselves, Your Honor. So, in the interest of

10:51:42 **20** efficiency and the ability of this small

10:51:42 **21** company's exercise of its discretion to select

10:51:42 **22** counsel of its choosing, Your Honor, there's no

10:51:42 **23** combination of those interests.

10:51:42 **24** So whatever in the proposed

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10:51:42 **1** prosecution bar that has been provided by the

10:51:42 **2** defendants, in fact, even that level of

10:51:44 **3** participation which goes well beyond the argument

10:51:44 **4** they've made with claim amendments, is foreclosed

10:51:44 **5** as well. And as I mentioned before, they're

10:51:44 **6** enjoying the ability to exercise common counsel

10:51:44 **7** in representation with respect to issues in the

10:51:44 **8** litigation and have done -- so counsel of record

10:51:44 **9** in the cases before this Court, Your Honor, is

10:51:44 **10** the same individual who's arguing before the

10:51:44 **11** Patent & Trademark Office on IPR.

10:51:44 **12** THE COURT: But the only relevant

10:51:44 **13** confidential information those people have is

10:51:44 **14** their own confidential information; right?

10:51:44 **15** MR. MALGERI: Not necessarily, Your

10:51:44 **16** Honor, because as has been made clear in this

10:51:44 **17** case, third-party discovery is going to be very,

10:51:44 **18** very important. And we expect that there will be

10:51:44 **19** issues that involve the confidential information

10:51:44 **20** of third parties who will seek to take advantage

10:51:44 **21** of the protection of this Protective Order in

10:51:44 **22** producing their information.

10:51:44 **23** And that information will be

10:51:44 **24** available to those counsel and will not be

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10:51:44 **1** available to benefit the team from CallWave, Your

10:51:44 **2** Honor, in arguing the IPR. So, nonetheless, our

10:51:44 **3** contention, as made clear in the letter, is that

10:51:44 **4** the prosecution that the Protective Order itself

10:51:44 **5** already contains a protection against using

10:51:44 **6** information that's --

10:51:44 **7** THE COURT: I mean, they always do

10:51:44 **8** because basically we're talking about inadvertent

10:51:44 **9** disclosure here.

10:51:44 **10** MR. MALGERI: Yes, Your Honor,

10:51:44 **11** understood. And it's a good point.

10:51:44 **12** But, Your Honor, the danger is so

10:51:44 **13** outweighed by the patentee's interest in being

10:51:44 **14** able to retain and use as his counsel of choice

10:51:44 **15** because --

10:51:44 **16** THE COURT: Well, I take it that Mr.

10:51:44 **17** Engellener or the second attorney, you know, are

10:51:44 **18** registered patent attorneys of Pepper Hamilton.

10:51:44 **19** So these are two people who are premiere at

10:51:44 **20** representing people before the PTO; right?

10:51:44 **21** MR. MALGERI: I believe that's a

10:51:44 **22** correct characterization, Your Honor. Yes.

10:51:44 **23** THE COURT: But I take it that their

10:51:44 **24** background in CallWave's technology is they're

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10:51:44 **1** starting from zero or near zero.
 10:51:44 **2** MR. MALGERI: Well, that's right,
 10:51:44 **3** Your Honor. In the interest of CallWave being
 10:51:44 **4** able to assemble a coherent strategy with respect
 10:51:44 **5** to validity, that's going to be severely impeded
 10:51:44 **6** by the restriction because CallWave simply can't
 10:51:44 **7** afford to have two dedicated teams handling
 10:51:44 **8** exactly the same issues with respect to validity
 10:51:44 **9** in two different forums at the same time.
 10:51:44 **10** And that's been an interest that has
 10:51:44 **11** been recognized consistently by the courts who
 10:51:44 **12** have addressed the same issue in different
 10:51:44 **13** contexts.
 10:51:44 **14** THE COURT: All right. Anything
 10:51:44 **15** else you want to say?
 10:51:44 **16** MR. MALGERI: Yes, Your Honor. I'd
 10:51:44 **17** just like to add that the danger of claim
 10:51:44 **18** amendments is very, very small, Your Honor,
 10:51:44 **19** because statutorily --
 10:51:44 **20** THE COURT: Well, you know, one way
 10:51:44 **21** that one could take care of the problem entirely
 10:51:44 **22** would be if you just agree not to make any claim
 10:51:44 **23** amendments.
 10:51:44 **24** THE COURT: Right.
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10:51:44 **1** MR. MALGERI: I suppose, Your Honor,
 10:51:44 **2** that much like the litigation where that's not an
 10:51:44 **3** option --
 10:51:44 **4** THE COURT: Okay.
 10:51:44 **5** MR. MALGERI: But the only
 10:51:44 **6** amendments that are statutorily allowed, Your
 10:51:44 **7** Honor, are ones that are narrowed and so --
 10:51:44 **8** THE COURT: Well, right, but that's
 10:51:44 **9** the whole point of what the Deutsche Bank said.
 10:51:44 **10** You know, strategically I think Mr. Blumenfeld
 10:51:44 **11** wants to get strategically amended or surrender
 10:51:44 **12** claim scope during prosecution. I mean, that is
 10:51:44 **13** language that's fully applicable to the situation
 10:51:44 **14** here; right?
 10:51:44 **15** MR. MALGERI: Well, Your Honor, it
 10:51:44 **16** is applicable in one sense, but the other
 10:51:44 **17** interests are that CallWave has interests in
 10:51:44 **18** maintaining the validity of the patents in the
 10:51:44 **19** broadest scope, far beyond this litigation.
 10:51:44 **20** Your Honor, this isn't the only use
 10:51:44 **21** for our --
 10:51:44 **22** THE COURT: Well, but that's the
 10:51:44 **23** reason why it's a strategic decision because,
 10:51:44 **24** yes, CallWave has that interest. But when you --
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10:51:44 **1** if you know that, in fact, even though you're,
 10:51:44 **2** you know, trying to separate it, in the back of
 10:51:44 **3** your mind, if you know, in fact, that you don't
 10:51:44 **4** need that entire breadth, that's where it gets to
 10:51:44 **5** be strategic surrender of claim scope; right?
 10:51:44 **6** MR. MALGERI: It would be, Your
 10:51:44 **7** Honor, although that information isn't
 10:51:44 **8** necessarily available to CallWave about future
 10:51:44 **9** circumstances and where --
 10:51:44 **10** THE COURT: Well, even just present
 10:51:44 **11** circumstances.
 10:51:44 **12** MR. MALGERI: Right, Your Honor.
 10:51:44 **13** Although CallWave is starting from the
 10:51:44 **14** proposition that there's no way that an amendment
 10:51:44 **15** can be made that would capture products that
 10:51:44 **16** don't currently infringe all the accused
 10:51:44 **17** products.
 10:51:44 **18** THE COURT: But, no, that's not
 10:51:44 **19** really the concern. You're right because if
 10:51:44 **20** you're surrendering claim scope, presumably it
 10:51:44 **21** includes things that are now not within the
 10:51:44 **22** scope. The whole point is that if you surrender
 10:51:44 **23** scope, and that you then may still pick up the
 10:51:45 **24** infringement, but now you may get rid of the
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10:51:45 **1** invalidity.
 10:51:45 **2** MR. MALGERI: Right, Your Honor.
 10:51:45 **3** Understood.
 10:51:45 **4** And I understand now the outline of
 10:51:45 **5** the argument, but I think the over-the-counter
 10:51:45 **6** arguments to that, and I think the more weight to
 10:51:45 **7** consideration from CallWave's decision that
 10:51:45 **8** overrides that is to maintain the scope of the
 10:51:45 **9** patent, regardless of the present circumstances,
 10:51:45 **10** because it has a long-term view of the value of
 10:51:45 **11** the patents.
 10:51:45 **12** THE COURT: Yeah, but not so much if
 10:51:45 **13** you're willing to agree that you won't amend it.
 10:51:45 **14** MR. MALGERI: Well, Your Honor, I
 10:51:45 **15** don't know at this juncture that that would -- it
 10:51:45 **16** may be a little premature. That IPR hasn't even
 10:51:45 **17** been instituted at this point.
 10:51:45 **18** There was a petition and a response.
 10:51:45 **19** The Patent & Trademark Office hasn't even made a
 10:51:45 **20** decision on whether or not to institute it.
 10:51:45 **21** But, Your Honor, the law itself
 10:51:45 **22** actually provides a mechanism to protect the
 10:51:45 **23** interest of target companies or companies against
 10:51:45 **24** whom a patent may be asserted when they're
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