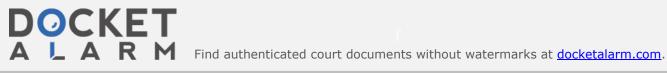1   ROUGH DRAFT TRANSCRIPT

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18   JUDGE PETTIGREW: This is Judge

19   Pettigrew. Also on the call with me are Judges

20   Chung, Hudalla, Melvin and Leni. Who do we have

21   on the call for Petitioner?

22   MR. SEITZ: This is Adam Seitz for

23   Petitioner Apple. Also joining me is my partner

24   Paul Hart.

25   JUDGE PETTIGREW: Thank you. And

 1   who do we have on the call for Patent Owner?

 2   MR. PLUTA: Good afternoon, your

 3   Honor. This is Robert Pluta on behalf of Patent

 4   Owner Maxell. And also on the call with me is my

 5   colleague Saqib Siddiqui.

 6   JUDGE PETTIGREW: Which party

 7   arranged for the court reporter?

 8   MR. SEITZ: That was Petitioner's

 9   counsel. This is Adam Seitz. We arranged for the

10   reporter.

11   JUDGE PETTIGREW: All right, thank

12   you. So we ask you to file a transcript as soon

13   as possible as an exhibit after the call.

14   So we scheduled this call to address an

15   email we received from Petitioner requesting

16   authorization to file a two-page supplemental

17   brief along with appropriate exhibits relating to

18   a summary judgment motion that Maxell filed in

19   the parallel District Court proceeding involving

20   the three patents that are challenged in the

21   three IPRs before us.

22   Petitioner states in an email that the

23   summary judgment motion may impact our analysis

24   of Fintiv Factor 4, the potential overlap of

25   issues between the District Court litigation and

 1   IPRs.

 2   The emails do not specify whether Patent

 3   Owner opposes the request. In the future please

 4   make sure the parties meet and confer before

 5   contacting us with any requests. And also you

 6   should specify in the email whether the other

 7   party opposes the request.

 8   Let's start with Petitioner. Please

 9   explain briefly why you believe there's good

10   cause for the requested briefing and in

11   particular we'd like to hear the subject of the

12   summary judgment motion and why it's relevant to

13   our Fintiv analysis.

14   MR. SEITZ: Yes, your Honor. This

15   is Adam Seitz on behalf of Petitioner. Thank you.

16   Your Honor, in the summary judgment argument

17   submitted to the District Court, Maxell challenges

18   the invalidity case against the three patents that

19   are subject to the IPRs that we are here

20   discussing.

21   And we believe it is relevant to your

22   Honor's proceeding specifically in the Fintiv

23   analysis regarding the alleged overlap with the

24   District Court. In its sur-reply that was

25   granted to Maxell to discuss the Fintiv factors,

 1   Maxell argued that there was overlap between

 2   these proceedings at the P tap and the District

 3   Court and that the same issues would be decided

 4   and that under Fintiv that was an independent

 5   grounds for denial raising the questions of

 6   whether there would be inconsistent rulings, et

 7   cetera.

 8   The summary judgment motion itself that

 9   Maxell has filed challenges the reference Abowd

10   A.B. O W D and its public availability. That is

11   one of the issues that the parties have briefed

12   here as well. The question of Abowd and its

13   public availability was the subject of additional

14   briefing in the reply and the sur-reply in these

15   petitions or in these matters as well.

16   One of the most fundamental -- there's two

17   things I want to point out here, your Honor.

18   First, probably the most fundamental thing,

19   Maxell bases its summary judgment motion to the

20   District Court on the fundamental premise that

21   the Abowd article, the question of whether it is

22   publicly available, whether Apple has proved that

23   it's publicly available at the District Court, is

24   one of clear and convincing, a standard that is

25   one of the highest if not the highest at the

 1   civil level for district courts. They say that

 2   Apple has failed to show clear and convincing

 3   evidence.

 4   The board, however, applies a different

 5   standard. Under the board's precedential

 6   decision in Hulu, the board examines whether

 7   Petitioner has shown a reasonable likelihood that

 8   the reference, here Abowd, was publicly

 9   accessible and a reasonable likelihood of whether

10   the reference qualifies as a printed publication.

11   So looping back to the question of

12   overlap, there is no scenario where there will be

13   inconsistent positions here. The District Court

14   could find on the highest burden of proof, that

15   clear and convincing evidence, that Apple made a

16   very strong showing but failed to meet the clear

17   and convincing standard. The board could find

18   that very same evidence meets a reasonable

19   likelihood standard. That is not an

20   inconsistency such of the type that Fintiv is

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