

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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REGENERON PHARMACEUTICALS, INC.,

Petitioner,

v.

NOVARTIS PHARMA AG, NOVARTIS TECHNOLOGY, LLC,

NOVARTIS PHARMACEUTICALS CORPORATION,

Patent Owner.

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Cases IRP2020-01317  
and IRP2020-01318

Patent 9,220,631

HEARING BY TELECONFERENCE

October 29, 2020

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Hearing by Teleconference, commencing at  
11:00 a.m., on the above date, before the  
Honorable Robert L. Kinder, the Honorable Erica A.  
Franklin, and the Honorable Kristi L.R. Sawert,  
preliminary panel, pursuant to the rules of the  
Patent and Appeal Board.

1 APPEARANCES:  
2  
3 Anish Desai, Esq.  
4 Elizabeth Weiswasser, Esq.  
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22  
23  
24 Also Present: Petra Scamborova and James Evans  
25

1                   This cause came on to be heard on  
2 the 29th day of October, 2020, before the Patent  
3 Trial and Appeal Board, preliminary panel, when  
4 the following proceedings were had, to-wit:

5                   THE COURT: Since there is a  
6 court reporter, if the party that's  
7 sponsoring the court reporter could  
8 please file the transcript as an  
9 exhibit, we would appreciate it.

10                   To begin again, this is Judge  
11 Kinder; and with me on the call are  
12 Judges Franklin and Sawert.

13                   As I mentioned, this panel is  
14 preliminary until the Board actually  
15 starts issuing orders or decisions in  
16 the proceeding. So most likely, this  
17 will be the panel, though.

18                   Now, if we can get a roll call  
19 for petitioner, please.

20                   MR. DESAI: Yes. Good morning,  
21 Your Honor. This is Anish Desai here  
22 for petitioner. Also on the line is  
23 Elizabeth Weiswasser and Brian Ferguson  
24 from my firm. And we have two client  
25 representatives, I think, also sitting

1 in, Petra Scamborova and James Evans.

2 THE COURT: Mr. Desai, who is  
3 going to speak for petitioner today?

4 MR. DESAI: I will be.

5 THE COURT: All right. Thank  
6 you. And since you do have client  
7 representatives, I presume there is not  
8 going to be any confidential information  
9 discussed today, party-sensitive  
10 information. But if that is incorrect,  
11 please let me know now.

12 MR. DESAI: That is correct.

13 THE COURT: Okay. For the patent  
14 owner?

15 MS. HOLLAND: Yes. Good morning.  
16 This is Elizabeth Holland of Goodwin  
17 Procter for patent owner. With me are  
18 Bill James and Linnea Cipriano, also  
19 from Goodwin Procter.

20 THE COURT: Ms. Holland, who is  
21 going to speak today on behalf of patent  
22 owner?

23 MS. HOLLAND: I will.

24 THE COURT: All right. Very  
25 good. So I understand petitioner has



1 requested potentially additional  
2 preliminary briefing. So I'll let  
3 petitioner present their case.

4 Again, we don't want to get into  
5 the merits on this particular phone  
6 call. This is to determine whether  
7 we're going to justify additional  
8 briefing. Hopefully, both parties have  
9 looked at some of our recent decisions  
10 related to discretionary factors, and  
11 our decisions to allow additional  
12 briefing to address those or not to  
13 allow.

14 So, petitioner, if you can open  
15 it up, please.

16 MR. DESAI: Thank you, Your  
17 Honor.

18 So Regeneron submits that there  
19 is good cause for reply brief. I'll  
20 address the 314 and the 325 issues  
21 separately.

22 But before I get into those  
23 issues, to the extent -- I don't know  
24 that it will be, but if the issue  
25 becomes about the amount of pages,

1           Regeneron is flexible on that point. I  
2           think in our email exchanges with  
3           Novartis, it didn't appear the issue was  
4           page limits. But our understanding is  
5           that they oppose the reply regardless of  
6           how many pages.

7                     We propose 20, because that was  
8           how many pages they roughly dedicated to  
9           the issue. But on further  
10          consideration, we would be fine with 15  
11          pages, roughly split 10 and 5, between  
12          the 314 and the 325 issues.

13                    Also, Novartis has not asked.  
14          But if Novartis wants a sur-reply, we  
15          don't have a problem with that. I  
16          think, ultimately, we want the Board to  
17          have the complete set of facts and the  
18          perspective from both parties on these  
19          issues.

20                    Let me start with a reply on 314.  
21          We've seen a number of decisions from  
22          the Board granting replies on a 314  
23          issue. I have like a list of eight at  
24          least. I don't think I need to run down  
25          those lists.

1                   So it seems that it's fairly  
2                   common for replies to be given on 314  
3                   issues. Here, there is certainly good  
4                   cause.

5                   Regeneron filed these IPRs five  
6                   days before the ITC case was instituted.  
7                   In these circumstances, if 314 precludes  
8                   PTAB review, then the PTAB review is  
9                   effectively foreclosed for patent  
10                  asserting ITC.

11                  I think that's even more  
12                  problematic here where the petition is  
13                  based on prior art that was never  
14                  considered by the patent office.

15                  As far as good cause goes,  
16                  Novartis hinged its argument to the  
17                  Board's decision in IPR2020-00772  
18                  involving FitBit. That case is heavily  
19                  cited in the patent owner preliminary  
20                  response, and that decision issued on  
21                  October 19, 2020.

22                  So, obviously, our petition was  
23                  filed in July. We could not have  
24                  addressed and distinguished that  
25                  specific case. We should certainly be

1 permitted to discuss and explain why  
2 that case doesn't control here.

3 THE COURT: Can you refresh me?  
4 The specific case you're referring to,  
5 the recent one, is there any  
6 precedential or informative value on  
7 that case?

8 MR. DESAI: I do not believe it  
9 has been identified as precedential.

10 THE COURT: I just wanted to make  
11 sure.

12 MR. DESAI: There are also  
13 additional facts regarding the ITC case  
14 that Regeneron should be allowed to put  
15 in the record in a reply brief.

16 I think, first, Novartis's brief  
17 says, quote, "The ITC investigation will  
18 be tried in approximately nine months  
19 and decided in approximately six  
20 months," before any final written  
21 decision here.

22 And, then again, in the brief,  
23 the POPR, it says, quote, "The ITC is  
24 set to issue a decision on validity of  
25 the 631 patent by July 29, 2021."

1 To say that the ITC's decision  
2 will issue on July 29th is just flat out  
3 wrong. That is the date for the ALJ  
4 initial determination, which is very  
5 different than the Commission's  
6 decision.

7 The Commission's decision is due  
8 November 29, 2021, and the 60-day  
9 precedential review period ends January  
10 29, 2022. The Board's final decision on  
11 these IPRs would fall within that  
12 precedential review period on or about  
13 January 22, 2022.

14 There is also a dispute at the  
15 ITC regarding whether another company is  
16 a necessary party to that investigation.  
17 I can't get into the details of that  
18 because of the ITC protective order.  
19 But our reply brief will identify this  
20 as an issue at a high level, as creating  
21 uncertainty regarding the ITC schedule  
22 and whether the ITC will actually reach  
23 the merits.

24 This third party also has rights  
25 in the patent that provide a reason why

1 the IPR should proceed irrespective of  
2 the ITC case. So those are facts  
3 that --

4 MS. HOLLAND: I'm sorry. To the  
5 extent you're getting into confidential  
6 information in front of your client, I  
7 do object to that.

8 MR. DESAI: Elizabeth, that is  
9 not confidential. That information is  
10 in a public antitrust complaint that was  
11 filed in the Southern District of New  
12 York. So I am not --

13 MS. HOLLAND: I just want to make  
14 sure you're not discussing any  
15 particularities about the agreement  
16 between patent owner and the third  
17 party.

18 MR. DESAI: I was not intending  
19 to.

20 THE COURT: Mr. Desai, go ahead  
21 and continue.

22 MR. DESAI: So from our email  
23 exchanges, to sort of summarize, those  
24 are -- I think I've listed off what I  
25 think are some facts and relevant

1 information that we should be permitted  
2 to put in our reply.

3 From our email exchanges, I  
4 understand Novartis's position that  
5 Regeneron should not get a reply because  
6 it should have addressed 314 in our  
7 petition. I think they hinge this on  
8 the Fintiv case, having been made  
9 precedential before our petitions were  
10 filed. We don't agree that that means  
11 Regeneron should have predicted  
12 Novartis's argument and addressed it in  
13 the petition.

14 Prior to our petition being  
15 filed, the Panel in IPR2018-01545  
16 rejected a 314 argument based on an ITC  
17 case, noting that the ITC does not have  
18 authority to invalidate a patent and  
19 also noting the different evidentiary  
20 standards and burdens that apply.

21 There was only one other decision  
22 from the Board we found prior to the  
23 filing of our petitions, where the Board  
24 denied a petition based on a 314 in view  
25 of a pending ITC case. That was in

1 Bio-Rad, IPR2019-00568.

2 In the Bio-Rad case, the ITC case  
3 was instituted on February 14, 2018; and  
4 the IPR was filed 11 months later on  
5 January 15, 2019, so right on the cusp  
6 of the one-year statutory deadline.

7 That case bears no resemblance to  
8 the Regeneron situation. There's really  
9 no reason why Regeneron should have  
10 predicted that Novartis would be making  
11 this argument in this case. And I think  
12 suggesting that a petitioner needs to  
13 predict any and all 314/325 procedural  
14 arguments and deal with those in the  
15 petition is really contrary to the  
16 statutory requirements for the content  
17 of a petition.

18 That's 35 U.S.C. 312; the Board's  
19 role in the content of that petition,  
20 37 CFR 42.104; and the Trial Practice  
21 Guide, none of which make it a  
22 requirement for a petitioner to address  
23 314 and 325 arguments in the petition.

24 I think I would say, for the  
25 Board's benefit, briefing on these



1 procedural arguments will be far more  
2 focused and issues will be properly  
3 joined if petitioners are responding to  
4 actual arguments made by patent owner  
5 rather than trying to predict what a  
6 patent owner might say.

7 So unless Your Honor has any  
8 questions, I can turn to the 325 issue.

9 THE COURT: Give me one second,  
10 Mr. Desai.

11 Okay. You can proceed to 325.

12 MR. DESAI: As I mentioned, we  
13 can address the 325 issue in fewer  
14 pages. And our petition already  
15 explained how the prior art used in the  
16 petition was not before the examiner,  
17 and it's different from the art that was  
18 before the examiner. We're not going to  
19 rehash those points in our reply.

20 What we would like is for our  
21 reply to address a handful of statements  
22 by the patent owners that, in our view,  
23 misrepresent the prosecution history.  
24 Specifically, an example stating that  
25 the examiner was aware of terminal

1 sterilization art and that terminal  
2 sterilization was a focal point of the  
3 examiner's argument during prosecution.

4 Now, I appreciate that we had the  
5 opportunity to address the prosecution  
6 history in our petitions, and we did at  
7 pages 20 and 21 of our 1318 petition,  
8 for example -- sorry, 1317 petition. We  
9 pointed out how the examiner was focused  
10 on silicone for three office actions.  
11 In the fourth office action, the  
12 examiner continued to reject and pointed  
13 out that the patent owner was making an  
14 argument based on terminal sterilization  
15 that was not claimed. The claim was  
16 amended to allow terminal sterilization,  
17 and the examiner allowed the claim.

18 It was clearly missing from the  
19 prosecution history as any terminal  
20 sterilization history prior art. So  
21 even though we do address the  
22 prosecution history in our petition, we  
23 couldn't predict that petitioner would  
24 try to recast its prosecution history as  
25 somehow involving terminal sterilization

1 prior art that was considered a focal  
2 point of the examination.

3 While Your Honors certainly can  
4 read the four office actions and the  
5 notice of allowance and figure that out  
6 on your own, it would certainly be  
7 easier if you have briefing from both  
8 sides.

9 I know the patent owner replied  
10 to our email to the Board, asking for  
11 the details on what we believe was  
12 misrepresented so that they could  
13 address those issues on this conference  
14 call. But we don't believe that this  
15 conference call is the right place for  
16 these issues to be argued without the  
17 benefit of a reply brief from Regeneron.  
18 It makes far more sense for us to brief  
19 these issues and let Your Honors make a  
20 fully-informed decision.

21 Ultimately -- this is an  
22 important issue -- this is a patent that  
23 is being used by Novartis in an attempt  
24 to limit availability of an important  
25 drug that's relied on by millions of

1 patients suffering from eye diseases  
2 that cause vision loss and blindness.

3 Let's put together a complete  
4 record; allow us a reply brief; if  
5 Novartis needs a sur-reply, we don't  
6 oppose that; and let Your Honors make an  
7 informed decision.

8 Thank you.

9 THE COURT: Mr. Desai, I  
10 appreciate it. Before I have any  
11 questions for you at the end or  
12 follow-up after patent owner gets an  
13 opportunity, we will bring those up at  
14 the time.

15 Ms. Holland, if you can, present  
16 your case and why the patent owner  
17 opposes additional briefing.

18 MS. HOLLAND: Yes, I can. Thank  
19 you.

20 I want to -- before I get into  
21 the meat of what I want to say, I just  
22 want to address the last point that  
23 Mr. Desai made about this being an  
24 important issue.

25 Patent owner also thinks it's an

1           important issue. That's why we brought  
2           suit against Regeneron in the ITC. The  
3           point here is not for this Panel right  
4           now to decide how important the issues  
5           are. The point is that the issue is  
6           being decided by another forum as we  
7           speak. That case is well under way. So  
8           I just wanted to make that clear before  
9           I started.

10                   So let me get to the 314(c)  
11           argument. Mr. Desai acknowledged that  
12           the Fintiv decision did issue before  
13           petitioner filed this petition. To be  
14           clear on the dates, Fintiv decision  
15           issued in March. And what's most  
16           important, I would say, is that it  
17           became precedential in May. And that  
18           was two months before petitioner filed  
19           its petition.

20                   Now, Mr. Desai said, Well, how  
21           were we supposed to anticipate that  
22           patent owner was going to address this?  
23           He points to an IPR that was a 2018 IPR  
24           that went the other way.

25                   But what's important is that the

1 decision in Fintiv became precedential  
2 in May. At that point in time, what  
3 came before it in terms of  
4 nonprecedential, noninformative  
5 decisions really doesn't bear on the  
6 issue.

7 As of May, petitioner should have  
8 known about the Fintiv decision, either  
9 knew or should have known about the  
10 decision, about its precedential value,  
11 and also understood that the decision  
12 explicitly addresses the situation we're  
13 in now, which is the possibility of the  
14 Board exercising its discretion not to  
15 institute based on parallel ITC  
16 proceedings. That was very clear in the  
17 Fintiv position.

18 As of the time that petitioner  
19 filed this petition -- I know it says  
20 that it was three days before -- there  
21 was not really any doubt at that point  
22 in time that it was going to be  
23 instituted. But, regardless, petitioner  
24 had the opportunity to take some number  
25 of words in its petition to address this

1 issue.

2 And it's not a matter of  
3 responding to our argument. There are  
4 several factors. Those factors could  
5 have been addressed from the  
6 petitioner's point of view in the  
7 petition as filed.

8 There was obviously a strategic  
9 position here not to take up the words  
10 in the petition to address Fintiv,  
11 which, as I said, was a precedential  
12 opinion directly applicable to the  
13 matter before the panel today.

14 This is, in our view, essentially  
15 a way to backdoor in this argument  
16 without expanding the word count in  
17 their petition but expanding the word  
18 count by addressing it in a reply.

19 I understand that now Mr. Desai  
20 is saying that they don't really mean  
21 they want 20 pages, but I think that's  
22 an indication that this really is a way  
23 of addressing an issue that should have  
24 been addressed in its petition.

25 Mr. Desai also said that the

1 reason they wanted 20 pages is because  
2 that's the number of pages that patent  
3 owners took in their preliminary  
4 response on this issue. But, again, I  
5 want to note that that was a decision on  
6 patent owners' part.

7 We also had a limited number of  
8 words, and we chose to use some of those  
9 limited number of words on this issue  
10 rather than making more extensive  
11 arguments on the other issue.

12 So this is all a choice of how to  
13 use word count. We chose to use our  
14 word count in that particular way. The  
15 petitioner chose not to address it in  
16 his petition, even though it was or  
17 should have well been aware of Fintiv  
18 and Fintiv's discussion and specifically  
19 directing the issue of parallel ITC  
20 proceedings.

21 THE COURT: Ms. Holland, this is  
22 Judge Kinder again. Can I interrupt you  
23 real quick?

24 MS. HOLLAND: Sure.

25 THE COURT: Since that Fintiv



1 decision came out, we have a very  
2 limited number, I think, of cases that  
3 address it at the preliminary phase,  
4 because it takes about six months for us  
5 to start issuing initial decisions,  
6 preliminary initial decisions.

7 Are there any other initial  
8 decisions from the Board where we've  
9 refused to allow petitioner a response  
10 when they didn't address Fintiv up  
11 front?

12 MS. HOLLAND: Since the time that  
13 it has become precedential?

14 THE COURT: Correct. I mean, it  
15 would be a pretty limited window, three  
16 or four months, I believe, that we've  
17 been issuing initial decisions after  
18 petitions were filed after the Fintiv  
19 decision.

20 MS. HOLLAND: Let me ask my  
21 colleague, Ms. Cipriano, if she's aware  
22 of any cases like that.

23 MS. CIPRIANO: No, Your Honor,  
24 I'm not aware of any.

25 THE COURT: I think that's

1 something that's important for your  
2 position, if there were other cases  
3 where we've done what you're requesting  
4 to not allow additional briefing.

5 But go ahead. Continue, please,  
6 Ms. Holland.

7 MS. HOLLAND: Thank you very  
8 much.

9 So I understand what you're  
10 saying. And, again, I want to stress  
11 that it is very -- it is, you know,  
12 several months since the Fintiv  
13 decision, that period of time. But I  
14 think the critical thing is that it was  
15 two months prior to filing the petition  
16 here. So there's no reason why it  
17 shouldn't have been addressed at least  
18 to some extent in this petition, and it  
19 wasn't.

20 And to take up words now, you  
21 know, 20 pages or even 15 pages, on the  
22 issue, seems unfair, given that it is an  
23 issue that should have been addressed.

24 THE COURT: Okay.

25 MS. HOLLAND: Let me just say a

1           few more things that -- address a couple  
2           of more things that Mr. Desai brought up  
3           in his argument.

4                     First of all, the facts about the  
5           ITC case, if you look at almost every  
6           Fintiv decision or decision even  
7           preceding Fintiv where the discretion  
8           was exercised to deny institution based  
9           on a parallel proceeding, you'll see  
10          that the trial of the matter is the  
11          decisive time point that's looked at.

12                    So we've emphasized in our papers  
13          that the ITC case is going to be tried  
14          nine months prior to any final written  
15          decision here. It will be decided, at  
16          least by initial determination, as of  
17          July 29th.

18                    And the only time frame that will  
19          not have been satisfied, as Mr. Desai  
20          conceded on this call, would be the  
21          60-day precedential review. And that is  
22          a formal kind of review that is not  
23          often or almost never used to overturn a  
24          decision of the ITC. And it would not  
25          be something that affected the merits of

1 the patent decision that the -- in any  
2 event.

3 So the merits of the dispute  
4 between the parties on the validity of  
5 the 631 patent will be finally decided  
6 prior to the Board's final written  
7 decision, if institution should be  
8 granted.

9 The other point that Mr. Desai  
10 made is -- and I didn't know we were  
11 going to be getting into this on the  
12 call today, but I want to address it  
13 just because it was brought up.

14 This issue about another company  
15 being a necessary party in the ITC case,  
16 I don't want to discuss the merits here.  
17 I just want to say that the motion  
18 hasn't been filed. We think it is a  
19 very unmeritorious motion that is not  
20 going to be granted, and we don't  
21 believe that the remote possibility that  
22 something happens like that should in  
23 any way affect the decision here with  
24 respect to institution because, as of  
25 now, there's absolutely no indication

1           that there will be any delay in the  
2           proceedings or trial of the proceedings.

3           Unless there are any questions, I  
4           can move to the 325(d) point.

5           THE COURT: Ms. Holland, this is  
6           Judge Kinder. Just give me one minute.

7           Okay. Go ahead and proceed,  
8           Ms. Holland -- thank you -- with the  
9           325(d) issue.

10          MS. HOLLAND: Thank you. I want  
11          to start off by saying that the email  
12          that was sent to the Board had a serious  
13          accusation about misrepresentations. I  
14          didn't believe that that word was used  
15          purposefully. I thought it was just a  
16          poor word choice, but it was used again  
17          on the call today.

18          I want to point out that words  
19          have meaning. We were really taken  
20          aback when we saw Mr. Desai's email  
21          using that word. As he said, we had  
22          asked him to list with particularity  
23          what those misrepresentations were.

24          We got a list back that  
25          essentially showed that it was a simple

1           disagreement with our argument, that  
2           they interpret the prosecution history  
3           one way, the patent one way, and we  
4           interpret it another way perhaps.

5                     But I would say that everything  
6           in our papers was backed up by citations  
7           to the prosecution history and to the  
8           patent specifications. So, certainly,  
9           there's nothing there that requires more  
10          briefing.

11                    It's an issue that Mr. Desai said  
12          the petitioner knew was a dispute in  
13          terms of terminal sterilization. That's  
14          one of the arguments that they make in  
15          their petition. So it should have been  
16          clear that we would have been addressing  
17          that accusation in response.

18                    I would say that the fact that  
19          terminal sterilization was in the prior  
20          art is right in the specification of the  
21          patent. I don't think there's any  
22          dispute on that. So to say that we  
23          somehow misrepresented anything by  
24          saying the Board knew that terminal  
25          sterilization -- the Examiner knew that

1 terminal sterilization was in the prior  
2 art is just -- it's not untenable on its  
3 face. I mean, it's right there in the  
4 specifications.

5 So we don't see any reason for  
6 giving more word count and word space to  
7 this argument right now for petitioner.  
8 It is certainly something that is an  
9 issue that was the crux of their  
10 petition. We responded to it, saying  
11 that it was cumulative, because it was;  
12 and there's nothing that can be in any  
13 way, shape, or form construed as a  
14 misrepresentation in our papers.

15 So I can address any questions on  
16 325(d).

17 THE COURT: Ms. Holland, thank  
18 you. I was just conferring with the  
19 panel.

20 I want to give Mr. Desai a chance  
21 to respond really quick just to the  
22 things you brought up, if there's any  
23 response needed. And then if he raises  
24 anything new, I'll allow you a chance to  
25 address it.

1                   Mr. Desai, do you have any  
2                   further response?

3                   MR. DESAI:   Just a few quick  
4                   points.

5                   We've looked, and we're not aware  
6                   of a case where PTAB disallowed a reply  
7                   brief on a 314 issue.  We just haven't  
8                   seen it.  Even in the FitBit case, they  
9                   relied on -- it's confusing, because  
10                  there's Fintiv and FitBit.  FitBit is  
11                  the October 19, 2020, decision that  
12                  Novartis relied on, and the petitioner  
13                  got a reply.

14                  We've seen PTAB decisions  
15                  allowing 314 and 325 replies even where  
16                  the petitioner addresses those issues in  
17                  the petition.  So whether or not you  
18                  address it in the petition is not the  
19                  determinative factor.  It's whether  
20                  there's good cause.  And here, there is.  
21                  I went through those issues.

22                  And then this argument about the  
23                  word count, I mean, the requirements for  
24                  a petition are set by statute and rule,  
25                  35 U.S.C. 312, 37 C.F.R. 42.104.  None



1 of those require addressing 314 and 325  
2 issues, and neither does the Trial  
3 Practice Guide.

4 So I think if the Board is now  
5 going to set a requirement that  
6 petitions have to address 314 and 325  
7 issues, that's something that should  
8 probably go in the Trial Practice Guide.  
9 But it's not there right now. So I  
10 think there's tons of precedent here for  
11 giving a reply.

12 And then on the 325 issue, let me  
13 just say the misrepresentation here --  
14 that word was used properly, because the  
15 issue here is, was their terminal  
16 sterilization art disclosed to the  
17 Examiner? That's the language that the  
18 patent owner used in their POPR, "prior  
19 art." And the answer is there was not.  
20 And we would like that to be made clear  
21 in our reply brief.

22 THE COURT: Mr. Desai, I  
23 appreciate your response. I don't  
24 necessarily mean we agree with you on  
25 that response.

1                   You know, there is certainly -- I  
2                   certainly understand your point about it  
3                   not being in the rules or statute. But,  
4                   you know, you have to consider granting  
5                   institution is completely discretionary  
6                   on our part. So when we're talking  
7                   about discretion, then we have a  
8                   precedential decision out there in  
9                   Fintiv. The patent owner does raise  
10                  some very valid points, that that should  
11                  be addressed up front. But I'm not  
12                  going to go into that any further.

13                  You also raise some questions  
14                  about why we haven't put that guidance  
15                  out, and we certainly understand your  
16                  position on that.

17                  So, Ms. Holland, do you have any  
18                  response to Mr.Desai and just the points  
19                  he made?

20                  MS. HOLLAND: Yeah. I don't  
21                  agree with the kind of global point of,  
22                  you know, if we really had to address  
23                  these issues in our petition, that we  
24                  should have known about it. I mean,  
25                  there are plenty of decisions that I

1 can't cite them chapter and verse right  
2 now -- there are plenty of decisions  
3 that say you need to anticipate things  
4 that should be reasonably anticipated in  
5 your petition. And one issue that  
6 should have been reasonably anticipated  
7 here was Fintiv.

8 On the misrepresentation point, I  
9 don't want to get into that any more. I  
10 think it's a grossly improper use of the  
11 word, when you have a disagreement with  
12 someone's argument, to make that  
13 accusation. But I'll leave it there.

14 THE COURT: All right. This is  
15 Judge Kinder again. Let me confer with  
16 the Panel real quick, and then we'll let  
17 you know if we have any other questions.

18 (Panel Discussion off-the-audio  
19 record.)

20 THE COURT: All right. We thank  
21 you both for your time today. You've  
22 certainly laid out the issues well  
23 enough at this point for us to decide  
24 them, and the issue being whether or not  
25 we will grant additional briefing by the

1           petitioner.

2                       Ms. Holland, a real quick  
3           question:  If we do go that route and  
4           grant petitioner any extra briefing,  
5           would you also want the same number of  
6           pages for a response?

7                       MS. HOLLAND:  Yes, we would.  
8           Thank you.

9                       THE COURT:  All right.  There are  
10          no other questions at this time from us.  
11          Petitioner, anything else?

12                      MR. DESAI:  No, Your Honor.  
13          Thank you.

14                      THE COURT:  Ms. Holland, anything  
15          else?

16                      MS. HOLLAND:  No, Your Honor.  
17          Thank you very much.

18                      THE COURT:  We appreciate your  
19          time, and we'll take this under  
20          consideration.  The Panel is going to  
21          confer on this one.  So we're not going  
22          to issue an order verbally.

23                      But we would like you to file the  
24          transcript within a few days.  If both  
25          parties can agree on the transcript and

1 review it, that makes life easier. And  
2 then the party that had it taken, just  
3 file it as an exhibit.

4 And we are now adjourned. Thank  
5 you.

6 MS. HOLLAND: Thank you very  
7 much.

8 MR. DESAI: Thank you.

9 (Hearing adjourned 11:36 a.m.)

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1                                    CERTIFICATE OF COURT REPORTER

2                                    I, Marilyn Morgan, Licensed Court  
 3 Reporter and Notary Public for the State of  
 4 Tennessee, do certify that the above hearing was  
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 6 is a true and accurate record to the best of my  
 7 knowledge, skills, and ability.

8                                    I further certify that I am not an  
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