EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

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AMBERWAVE SYSTEMS CORPORATION,

Plaintiff,

v.

INTEL CORPORATION,

Defendant.

: CIVIL ACTION

: NO. 05-301 (KAJ)

- - -

Wilmington, Delaware
Wednesday, November 22, 2006 at 11:33 a.m.
TELEPHONE CONFERENCE

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BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

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APPEARANCES:

MORRIS NICHOLS ARSHT & TUNNELL
BY: JACK B. BLUMENFELD, ESQ.

and

IRELL & MANELLA, LLP
BY: JASON G. SHEASBY, ESQ.,
SAMUEL K. LU, ESQ., and
ALEXANDER C.D. GIZA, ESQ.
(Los Angeles, California)

Counsel for AmberWave Systems Corporation

YOUNG CONAWAY STARGATT & TAYLOR
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KAREN E. KELLER, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

APPEARANCES: (Continued)

SIMPSON THACHER & BARTLETT, LLP
BY: GEORGE M. NEWCOMBE, ESQ., and
PATRICK E. KING, ESQ.
(Palo Alto, California)

and

SIMPSON THACHER & BARTLETT, LLP
BY: KERRY L. KONRAD, ESQ.
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and

INTEL CORPORATION
BY: ALLON STABINSKY, ESQ.
(Santa Clara, California)

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 11:33 a.m.)

THE COURT: Hi, this is Judge Jordan. Who do I have on the line?

MR. BLUMENFELD: Good morning, Your Honor. On the AmberWave side is Jack Blumenfeld along with Sam Lu, Jason Sheasby and Alex Giza from Irell.

THE COURT: All right.

MS. KELLER: Good morning, Judge Jordan. It's Karen Keller at Young Conaway. Also with me on the line are John Shaw from my office, and George Newcombe Kerry Konrad and Patrick King from Simpson Thacher and also on the line is Allon Stabinsky, in-house counsel for Intel.

THE COURT: All right. Thank you for waiting while I wrapped up a criminal matter I had to attend to in court.

I have the letters that were sent in to me on the competing issues that you want assistance with here today. Before we turn to those, I want to knock out something.

First, there is a motion by AmberWave for leave to amend and supplement its complaint in the 05-301 case and a filing by Intel indicating that it does not oppose that.

It wants some other steps taken but leaving those other steps aside for the time being, that's something that can be addressed at another time either by stipulation of the parties or further discussion with the Court, if necessary. I take it that the notion of the amendment and supplementation is itself not objected to so I'm granting that as unopposed and you'll get a one-line order on that; all right?

Now, let's turn to the exchange of letters that we've got. And first we'll take up AmberWave's letter of November 20th which, as I understand it, basically says Intel pulled a fast one, they promised you they weren't going to seek reexamination of patents. They fiddled with the system to in fact challenge patents other than the ones that were instantly at suit but which they should have understood would be in suit and therefore as a remedy, we, AmberWave ought to be able to put our litigation counsel on the team dealing with the reexamination that Intel has sought with respect to these patents.

Now, I may not have done it elegantly but that is how I understand your position. Am I correct that about that, Mr. Blumenfeld, or whoever is speaking on behalf of AmberWave?

MR. BLUMENFELD: I think Mr. Sheasby is going to address this.

MR. SHEASBY: Your Honor, this is Jason Sheasby.

I think you are correct. I would make one modification, which is that AmberWave does not want its litigation counsel to be a full fledged member of the reexamination team. We obviously recognize that we're not going to participate in anything relating to the amendment of claims. But with that caveat, I believe your characterization is accurate.

THE COURT: All right.

Now, you saw the letter that they sent in response from the Intel side where they took a couple pages to point out to me things I said before about your folks being involved in reexamination proceedings and then on the third page of their letter, basically say, well, we didn't violate any stipulation. So why don't you go ahead and give me any response you have to their November 21st letter.

MR. SHEASBY: Certainly Your Honor. I'll take them in order.

I think it's important to understand that Intel is slightly misrepresenting the history of the negotiation. At a November 8th hearing, Intel's counsel acknowledges there was some role that litigation counsel could appropriately play in the reexamination of patents in suit. The Court had sent the parties back to negotiate what that role would be. They were unable to agree and that resulted

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in the stipulation preventing Intel from seeking reexamination on patents that may be added.

The reason why I bring that up is that I think that some of the quotes Intel uses in its letter is from a separate issue which is whether litigation counsel can be set up into two bubbles, which is litigation counsel that didn't have access to technical information and litigation counsel that could.

I think it's important to understand the unique nature of reexaminations. In a litigation, the central issue is infringement and that pervades all aspects of the case; and, of course, Intel technical information is a central issue in infringement. And so I think what the Court recognizes that it was not really possible to cabin out certain litigation counsel who would have technical information and those who wouldn't and could prosecute patents because they all need to discuss infringement.

A reexamination is completely different. In a reexamination, the central issue is prior art. Intel's technical information is irrelevant to that. In addition, the examiner doesn't want its litigation counsel to play a complete role in the reexamination. We aren't counsel of record in the reexamination. We're not going to be talking to the PTO. We're not going to be filing the papers. We're going to be playing a very narrow and cabined role.

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THE COURT: And what exactly is that? What is it that you want your person to be doing or people doing?

MR. SHEASBY: We want them to be able to discuss prior art, which is to say that Intel has cited -- nine of the 12 references that Intel has cited in the reexamination are part of this litigation. And the reality is that we're in the best position to give advice on what those references mean and what they say. And we want that to be able to do that for our client.

I think one thing that Mr. Newcombe has said in an earlier oral argument is that the prosecution bar, what scope it should have should depend on how it impacts AmberWave's ability to litigate this case. Well, I would submit blocking AmberWave's litigation counsel from participating in reexamination of patents in suit does just that. It harms our ability to defend these patents. It creates a risk of inconsistency, of confusion, of a waste of resources. At the end of the day, protective orders are about protecting. They shouldn't be used as swords and I think that is exactly what Intel is trying to do. They're trying to gain a strategic advantage by using this protective order, by using the protective order to block us from defending patents that are in suit that are before this Court.

The second issue --

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THE COURT: Now, let me ask you a question there. Doesn't that presuppose that your attorneys on the examination side are less capable of addressing prior art issues than your folks on the litigation team? When you say it's being used for strategic advantage, I may or may not agree with you, but I've got to test you on this a little bit because it sounds like you are saying those poor guys over at the PTO working on our patents, they just are not picking up on this prior art the way we are. We need to help them. Is that what you are saying to me?

MR. SHEASBY: That's a fair question, Your Honor. Let me put it this way. This litigation has been going on for 17 months. I think AmberWave's litigation counsel have lived the prior art issue in this case in a way that frankly reexamination counsel have not. These reexaminations have just been filed. More to the point, it's not just about us having better knowledge, it's about making sure there is consistency, that we're not taking inconsistent positions, because that can become very dangerous, if it were to occur. I'm sure Intel would be very happy to accuse us of inequitable conduct if there were inconsistencies that ended up being material.

THE COURT: Now, let me ask you a question, which in the abstract would make any attorney uncomfortable, but since the question here is preventing any leakage of

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technical information and your representation to me is we want to make sure we have consistent positions about prior art, what is your response to something that was floated previously perhaps in another context; and, that is, exposing any communication between litigation team and the reexamination team to the view of the other side? That is, on this narrow set of prior art questions, there would be a limited waiver to the extent of showing the other side, the Intel folks, this is the question they asked about, hey, what is your prior art position in the litigation? And this is the response we gave them about the prior art. I'm not saying I'm going to do that. I just want your response to that.

MR. SHEASBY: Sure. Obviously, we would be deeply uncomfortable with that. I think that no one likes to see how sausage is made, Your Honor. And the reality is we're going to be discussing a very detailed level what are Intel's arguments on this prior art. Why is it good for them? Why is it good for us? What is our weakness? What is our strength? And I think it would be deeply unfair to allow Intel to have access to that.

I think the reality is that it's sort of a slippery slope, Intel has access to our confidential information as well. And, of course, perhaps we would like a transcript of every transcript that Intel has with its

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other attorneys to make sure that they're not disclosing our confidential information.

THE COURT: Well, I suppose if you were seeking reexamination of their patents, you know, then you really would be in parallel positions; but that is not going on, right?

MR. SHEASBY: Well, Your Honor, I think one of the concerns that we would have, and this is sort of maybe distracting from the major issue, but the point I was trying to get at was that the idea that our conversations that happen to be privileged conversations about a subject matter that has no relevance to Intel's technical information should be exposed to Intel strikes me as not striking a fair balance. I think it does exactly what protective orders shouldn't do which is inhibit our ability to defend this case.

THE COURT: Okay. I've got your position. Thanks very much, Mr. Sheasby.

Mr. Newcombe, are you speaking for Intel?

MR. NEWCOMBE: I am, Your Honor, on this.

THE COURT: Well, I want you in the first instance to respond to Mr. Sheasby's point that, look, there is no danger of any leaking of technical information here because there is not going to be any discussion of technical information. The only thing that is going to be discussed

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is prior art, and we wouldn't be in this position if you folks on the Intel side hadn't gone ahead and done what you said you weren't going to do.

MR. NEWCOMBE: Well, first, let me take the last point first. We didn't go ahead and do what we said we weren't going to do. I could not disagree more with the way AmberWave is concerning the stipulation. Throughout the negotiating history, we made it narrower and narrower. To read "may later be added" to encompass anything that could be added would broaden this way beyond any of the expectation of the parties, certainly, Intel, at the time we negotiated that.

THE COURT: Well --

MR. NEWCOMBE: We view -- I'm sorry. Go ahead.

THE COURT: Let me ask you a question on that point. Here is what they said on page two of their letter. This is the third full paragraph on page two.

"Intel may argue that it did nothing wrong in filing a reexamination request on the '449 patent because when Intel filed the request, there was only a pending motion to add the patent that had not been acted on by the Court. Only the most disingenuous reading of the stipulation and its purpose could support such an argument. The parties had long contemplated the continuations of the '371, '632 and '292 patents would be added to the suit.

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Indeed, the parties have made a special accommodation for this in the schedule."

Now, You're trying to say, I take it from your last comment to me, that AmberWave wants to throw the doors wide open. What they say to me in their letter is, wait, we're talking about a couple of things here. One, the '449 patent that everybody knew was something that they were going to seek to add to the litigation because there was already a pending motion on it, so you could not have understood anything other than that that was going to be in the mix and, therefore, filing reexamination on that was out of line. What is your response to that?

MR. NEWCOMBE: I disagree with that characterization. I think that, first of all, that reexam a was filed the morning that patent issued and at a time when, you know, we still don't believe this case should be in the 301 case. It should be in the 655, which is not covered by this stipulation at all.

THE COURT: Well, whether you agree with that or not, which case is it in?

MR. NEWCOMBE: Which case?

THE COURT: Yes.

MR. NEWCOMBE: Which case is it in now?

THE COURT: Right.

MR. NEWCOMBE: As of this morning, it's in the

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301.

THE COURT: Okay. So whether you like it there or not, it's in the case. But go ahead and take me further on your argument.

MR. NEWCOMBE: Okay. Let me go on to the second point. I could not disagree more with Mr. Sheasby's characterization that our technical information is not relevant. It is highly relevant and these communications between people who have full access to all of our most highly sensitive confidential information. They're going to sit down with prosecution counsel now, unmonitored, unchecked; and as Mr. Sheasby said, you don't want know how sausage is made. Well, that is exactly our concern. Because to suggest that infringement is irrelevant ignores the reality of what goes on in a reexamination.

What happens, Your Honor, is that, let's assume that, as the PTO has already done, found that their claims appear to be invalidated by prior art. What happens then is they can go back -- and they have done this in the past, already. We gave a reference to it in our papers -- and say to the PTO, well, okay. We're not going to fight you on that but we're going to amend our claim and now we're going to put in the following additional limitations.

Now, guess what advantage they have at that point? And they can say all they want that this isn't

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going to come out in the conversation, but the people who are sitting down discussing this, making the sausage, with prosecution counsel have access to our process flows, our cookbooks and they're having the ability.

THE COURT: But we're not talking prior art anymore, are we?

MR. NEWCOMBE: We're talking about how to get around prior art. And then --

THE COURT: Right. So help -- I've got to interrupt you. You got to help me because you are in a realm that, frankly, I don't have experience in, you do. Help me out.

MR. NEWCOMBE: Okay.

THE COURT: They tell me, judge, we only want to be able to communicate about prior art and that's a defined term in the patent law. It's got a pretty specific meaning and it doesn't mean Intel's secret internal technical information, and we only want to be able to talk about that to the extent necessary to make sure we're taking consistent positions between the PTO and this litigation and allowing a communication of that sort doesn't implicate the legitimate confidentiality concerns of Intel in any fashion because it doesn't touch on their confidential information.

That's the point I need you to answer because so far, you've told me that they'll sit down and it will

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all come out. I need you to explain to me why, in having communication of the sort they say they want to have, limited, the technical information is going to, is at risk of coming out.

MR. NEWCOMBE: Let me give you an example. There is a piece of prior art, whatever it says, that the Patent Office has found anticipates the claim as written. So in the course of analyzing this, and analyzing the art, AmberWave's counsel could say, well, here are certain things that are not covered by this art. And in that discussion of what is not covered, which would just be the converse of what is covered, the discussion could very easily slip into issues that are "not covered by the prior art" and those comments are going to be informed by what is in our processes, wink-wink, nod-nod. That is how you draft your claim here, both to get around the prior art which is how it's a prior art analysis but also what emerges is a claim that is now informed by people who have access to the most intimate details of our processes and products, which means the claims now could be so narrowly drafted that they'll clearly not be covered by prior art, because they got so many limitations in them and those limitations are going to be informed even inadvertently by discussions that will involve how to get around the prior art and those discussions of necessity will be informed by their knowledge

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of our products, which is an unfair advantage.

THE COURT: All right. Mr. Sheasby, go ahead and respond to that argument.

MR. SHEASBY: I think that Mr. Newcombe just proved a point against himself. His characterization of the conversation was we would go on and say, and this prior art doesn't disclose, XY&Z, so this is how you should draft your claims. We can't say that and we wouldn't be able to say that.

The reality is when you amend claims in a reexamination, it's a very narrow tool, Your Honor. You're only allowed to narrow the claims, you can't make them broader. So if a claim doesn't already cover Intel, we can't suddenly, AmberWave couldn't make it cover Intel. More to the point, you can't just make up limitations to add to your claims. It has to be your invention. It has to be in the disclosure.

At the end of the day, I think it comes down to this, Your Honor.

THE COURT: Well, hold on just a second. Because maybe I'm reading too much into Mr. Newcombe's argument, but I take it that the concern goes beyond this specific reexamination proceeding. In other words, you may narrow the claim in this reexamination proceeding but if, in the course of discussing how to narrow it, you communicate

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to them information about what you couldn't get here but you might get in another application, that you will have let the cat out of the bag.

MR. SHEASBY: Your Honor.

THE COURT: Respond to that. Like I said, maybe I'm reading more into his argument than he meant to say but that is how I was understanding his concern to reach. Go ahead.

MR. SHEASBY: Your Honor, the point to make is that by limiting what the communications subject matter is, which is the prior art, the risk of what Mr. Newcombe is suggesting might occur or would occur is really, it's not a meaningful risk. At the end of the day, I think you have to weigh the analysis this way: Is that Intel did not need to seek these reexamination. Intel had every ability to present the prior art or present it to the PTO in the litigations before this Court. It chose to create another forum in which to have a collateral attack of these patents.

I think at the end of the day, there has to be consequences to that. I think that we have presented a program and a limited role we were playing in reexamination that gives substantial confidence that there is just no meaningful risk of disclosure of confidential information, and to suggest because of Intel's own creation of this morass that AmberWave has to fight with one hand tied behind

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its back regarding these patents in suit doesn't strike me as a proper balance.

THE COURT: All right. Now, I am going to ask them about the morass. Don't worry. But I just have to go back to the question I asked you before. When you say fight with one hand tied behind your back, are you telling me that the lawyers you've got dealing in the reexamination proceeding aren't as capable of understanding prior art as you folks are? Because you make it sound as if -- I'm not saying you don't have something that could maybe be helpful, but if you weren't around, they would be conducting this in a competent and sensible way regardless; right?

MR. SHEASBY: Your Honor, I think it comes down to three issues. One is the scope of our knowledge. We've lived with this case for 17 months.

THE COURT: Yes, I got it. I understand that you want your reexam folks to have the benefit of the learning curve you will have already been up. I'm not confused about your position on that. You seem to be arguing, though, that without the benefit of that information, somehow in the reexam process you're denied due process or it's unfair that the Intel people have got a special advantage over you. I mean if this litigation didn't exist, you'd have Intel and you'd have AmberWave and they would be fighting in a reexam and the fact that some

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other lawyer knew a lot about the prior art would be irrelevant; right?

MR. SHEASBY: I understand your point, Your Honor. I think there is two other issues, and I think they're pointed out in our letters, which is that it creates just an unacceptable risk of inconsistency in which we're going to take positions regarding characterization of the prior art that may be different from reexamination counsel. We just can't have that. It's not appropriate. It creates issues with inequitable conduct and it creates a potential very difficult situation for us. It needs the coordination on positions regarding prior art.

THE COURT: All right. Now, let me ask you, Mr. Newcombe, your opponents say we never would have had this problem if you guys hadn't opened another front in the war.

Now, I want you to explain to me if my looking equitably at how the chips ought to fall here, whether that shouldn't play a factor in my thinking.

MR. NEWCOMBE: Your Honor, I don't think it should. And let me address it. This application was something Intel had been tracking all along. It was one in which it intended to file a reexam regardless of what they intended to do. We had the absolute right to do that. We did it. Intel's litigation counsel was not involved at all in that process. So it's not as if, boy, we got the guys

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at Intel who were working on this case as long as we have, have gotten into it as deeply as we have. We didn't have anything to do with that. So this is a separate team of prosecution counsel that are doing that for Intel. There is no reason in the world why the separate prosecution team for AmberWave shouldn't do it. We're not involved.

THE COURT: Well, they've pointed out. When you say there is no reason in the world, they've pointed out a reason which is hardly frivolous, which is good lawyers, doing their utmost, may still come up with a different spin on prior art and take positions which are not entirely consistent and which an aggressive litigant, which Intel clearly is in these cases, would seize on and say, aha, inequitable conduct, less than truthful before the PTO, et cetera, et cetera. Why should they be is exposed to that risk because Intel chose to fight in the PTO as well as here?

MR. NEWCOMBE: Your Honor, there are parallel proceedings like this that go on all the time in litigation. And the prosecution bar, I'm not aware of any cases and I don't think they have cited any, that say when there is a parallel reexam, that somehow all the concerns that underlie why the prosecution bar is repeatedly endorsed by courts over and over again goes out the window.

And one of the things we agreed to is the

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procedure by which any art that we uncover can be sent to their prosecution counsel. All that has been taken care of. We've really gone through all of these issues previously and all those mechanisms are in place. And the mere fact that there is a parallel reexam on this one now added patent doesn't change any of that calculus. We, litigation counsel are not involved in that process. Their litigation counsel shouldn't be involved in that process. They can send over any art they want. We've gone through that. There is a procedure and mechanism for that to be done. And beyond that, the risk is just too great that in these unmonitored conversations that something is going to happen.

And I want to respond to something Mr. Sheasby said which he said well, Your Honor, all we can do is narrow the claims. That is exactly the point. Because let's hypothetically posit a claim which, broadly read, would read on Intel's products but it's invalid because it's too broad the way the claim was written. So they go back in now and narrow it, and how do they narrow it? Well, they narrow it by putting from our cookbook. I know they're saying they wouldn't overtly do this but inadvertently, something is going to leak out where now, all of a sudden, the claim will be narrowed so it avoids all the prior art and now reads smack on our product. That is what our concern was. That is what we're afraid of. And there is no reason why we

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should allow that risk to go forward.
THE COURT: All right. Now, a last question for you, and then I will ask this to Mr. Sheasby as well.
Is there any reason why this reexamination procedure which you began has to continue in the face of this litigation? Should one or the other of these things give way so that we're dealing with a one front war, not a two front war? In short --
MR. NEWCOMBE: Let me just address that first. Because if, in fact -- we don't know if the reexam has been granted yet on the '449. But let's assume it is. What is the procedure that really accommodates that, that courts routinely do? And, in fact, we're going to make a motion on the 655 that relates to this as well. Is that if the reexam is granted, what happens is the Court then stays the proceeding with respect to that patent to allow that reexamination process to conclude in the PTO so there isn't any parallel track. You wait for the PTO to rule on it because in fact the patent may never issue, and, therefore, you're litigating for nothing. So I think the mechanisms that are normally employed in these situations absolutely obviates the concern Your Honor has.
THE COURT: All right. Mr. Sheasby, why should the case proceed with two fronts if, either by the reexamination stopping or the litigation with respect to the

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patent that you've got concerns about being stayed, we can address the challenge you are facing?
MR. SHEASBY: Your Honor, the reexamination relates to a very narrow set of issues. Intel has presented nine of 12 -- 12 prior art references that it wants the PTO to consider between the two patents. Obviously, there are a host of other issues in this case. And the reality is the reexamination is not going to give full relief to AmberWave. AmberWave needs to have a litigation to stop Intel from infringing that patents.
THE COURT: I'm not suggesting that the whole case would be stayed. I guess what I'm asking is if the PTO says, okay, we will reexam the '449 patent, if that were in fact to be the case, and I was to say all right, well, then we're not litigating that for the time being, the rest the case moves forward, what is your response to that?
MR. SHEASBY: Your Honor, I've actually encountered this in another District before and I think in this context, because I think there was a clear violation of the stipulation regarding reexamination, I think there may be an appropriate remedy and it goes something like this.
Intel would not, by my reading of the stipulation -- and we can talk about this after I make the proposal. Intel is not entitled to file reexamination on

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the '449 patent as an example. So what I would suggest occurs is Intel has made a decision that they want to have a collateral attack on the '449 patent at the PTO on 102, 103 grounds, anticipation and obviousness. Well, they made their attack. So that is their attack on validity and that's where they're going to have to be able to have the challenge on validity on 102, 103 grounds.
In this case, they should not be able to have to have any more challenges on validity on 102, 103 grounds. And what we can do in this case, is we can do infringement, and Section 112, written description and enablement.
THE COURT: All right. Well, that is --
MR. SHEASBY: That way, there is no duplication of efforts.
THE COURT: All right. That is a nonstarter. And I'm still not getting a response to my question, which is, not doing what you are saying here, which is telling them they can't make validity arguments here, what is your response to the point I'm trying to draw from you and that is could the '449 patent be stopped pending reexamination, that is, the '449 litigation, while the rest of the case proceeds or, alternatively, does the PTO ever stay consideration of reexamination?
MR. SHEASBY: Your Honor, the PTO does not stay consideration of reexamination. And I think that is why

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Intel filed it before, when it did. Because once it gets started, it can't -- an Article III Court doesn't have the power to stop it.
Having said that, I think the '449 is a continuation of the '371 patent and so the same issues regarding infringement, and I'm assuming the same -- Intel will make similar arguments regarding enablement and written description of both patents. As a result, I don't really see how there is any benefit to slowing down the '449. The '449 should be part of the consolidated litigation. At some point, the '449 may drop out because the PTO may conclude that their patent claim's invalid, the claims may change, so at some point we may need to adjust. But I think there is enough time left in the litigation that at this point it's not necessary to stay it.
I will point out that most patents, I think the number is greater than 90 percent, survive reexamination. Claims may be slightly modified but they do come out.
THE COURT: All right. Well, here is the upshot. You know, we've had to take a lot of time to try to deal with this. And I have to say while I don't feel myself in high dudgeon the way the folks the AmberWave side do, it's pretty hard for me to believe the folks on the Intel side of the fence could not have foreseen that this '449 case patent was going to be in the case. In fact, if I

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hear it right, and read a little bit between the words Mr. Newcombe has spoken on this call, this might have been a case of the right hand not knowing what the left hand is doing on behalf of Intel where somebody rushes in and files for reexamination without being fully informed about what is going on in this litigation.

But however it happened, it happened, and it certainly, I will agree with AmberWave, was contrary to the spirit the agreement that the parties had reached, at least with respect to that one specific patent that was already the subject of a motion before this Court. And so Intel has created a problem that did not otherwise exist. Now, the question is, what is right way to handle that?

I disagree with AmberWave that the right way to handle that is to throw out the window months of work in coming to a protective order. So I'm not doing that. I'm not revisiting what was carefully calibrated. The only thing I'm prepared to do is to say if you want to have a communication in writing that is from examination counsel that says tell us what has gone on with the positions you have taken on prior art in the litigation, and then a written response that says that these are the prior art issues we've addressed in the litigation and here is how we've done it, which, by the way, I don't see why you couldn't handle just by forwarding publicly filed documents

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anyway, I would permit that.

We talked about this back when we were facing some of these issues a year ago, November 8, 2005. It's attached as Exhibit B to the November 21st letter that I got from Intel. And the at page 13 of that, there was this exchange where I said:

"So what you are saying" -- in response to something Mr. Sheasby had said -- "is you want to be able to talk about, you want to be able to confer, confining any discussion to a statement about the meaning of prior art. Have I understood that right?

"Mr. Sheasby: Yes. The discussion about the prior art, yes. That's correct, Your Honor.

And I said: "All right. Now, Mr. Newcombe, I want you to help me out. How would a discussion of that be problematic," et cetera? "How would knowledge of your client's technical information be violative if somebody said, hey, what are the parties competing positions in front of the District of Delaware with respect to the Gadzooks reference?" I guess that was my attempt at humor. "How does that implicate your technical information?"

And then there is a response from Mr. Newcombe. The point is we had been over this ground before. We've been over exactly this ground before. And so I'm coming out exactly where I was before, saying only this, which is

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something I had I think alluded to in this earlier call I've just referenced. If your concern is we don't want to have inconsistent prior art reference positions, you're going to be taking those prior art positions in Answers to Interrogatories, in deposition testimony, in things that are going to either be public or at most will be under some protective order because they contain technical information, but they will be positions that are going to be directed at the prior art. And if you want to limit your communications to making sure you don't have inconsistent prior art positions, you ought to be able to do that, exposing just that much of the sausage making.

No sit-down discussions, no talking about how you are going to position it at the reexam but letting them know this is what we've done in the litigation with respect to the prior art so that they have the benefit of your experience and learning curve. But the other side is going to know this is what you told them about the prior art, something that they, in all logic, would already have known because you would have told them that in the front of me or in front of them in discovery.

So that is where it rests. We've plowed this ground again and again. And I don't want to have to plow it again after this. I think you have got fully competent reexam counsel so I don't think you are denied on the

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AmberWave side any due process. The only issue that you've raised that rings with me at all is let's not have inconsistent prior art dealings between two adjudicative bodies or administrative body and a court and what I have just cold you ought to be able to handle that adequately. So we're putting that to rest. And I hope everybody understands what I just said, whether they're happy about the or not. It's where the ball comes to rest.

Do you have any questions about what I have just ruled, Mr. Sheasby?

MR. SHEASBY: No, Your Honor. No questions.

THE COURT: Mr. Newcombe?

MR. NEWCOMBE: No, Your Honor. Thank you.

THE COURT: All right. Now, let me say this as we close the door on this issue. When I say I don't want to revisit again, that also means, Mr. Newcombe, that I don't want to be dealing with Intel starting the third front or the fourth front or the fifth front in the war. Because, otherwise, I'm going to feel like you're not taking seriously what I take to be a legitimate concern by AmberWave. You disagree with it, you said, vehemently, but I don't. You had that '449 issue in front of you when, whether you knew it or not, somebody acting for Intel ran in and started a reexam. And I view that as problematic and I don't expect that to occur again. I hope I'm communicating

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that both politely but directly enough that there is no mistaking it; okay?

MR. NEWCOMBE: Understood, Your Honor.

THE COURT: All right. Now, let's turn to the other set of letters that I've got here, which is a request by Intel for three things. And given the timing here, I'm just going to have to handle these first. We'll deal with the last two first, the MIT license and Intel's fifth set of interrogatories.

And, Mr. Newcombe, you had the benefit of seeing the November 21 letter that I got from Mr. Blumenfeld where where he says, hey, those two issues were just raised prematurely. We wanted to meet and confer but they ran to court and they're raising them now. What is your response and why is this something I should take up now if this is something that the parties can and should work out?

MR. NEWCOMBE: Okay. First, with respect to MIT, they agreed to produce it so I don't there is an issue with the MIT license.

And with respect to the interrogatories, we have, we believe -- and with me on the line by the way is Kerry Konrad who actually engaged in the meet and confer. So to the extent we get into an area where I just can't give details, with Your Honor's permission, I'd ask that he jump in.

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THE COURT: All right.

MR. NEWCOMBE: The issue on the interrogatories we believe is ripe and they're the ones that we're moving on, and these are very simple. They ask for, what do you contend your date of conception and reduction to practice is?

These are very fundamental things, as Your Honor knows, in any patent case. The facts related to these are 100 percent in the control of AmberWave. Because they relied on the inventors, all of whom are either under the control, represented by AmberWave's counsel and AmberWave has all documentation on this. So in our view, there is no reason in the world, 18 months or 17 months into this litigation, why we should not get from them a response to when did you conceive each of these inventions and when did you reduce it to practice?

THE COURT: Okay. I'm trying to get an answer from you about the state of the discussion because they write back and say, whoa, we really haven't had an opportunity to have much in the way of conversation about them. I'm paraphrasing broadly. Do you disagree with that?

MR. KONRAD: Your Honor, this is Kerry Konrad. If I may?

THE COURT: Sure.

MR. KONRAD: I think the issue is actually very

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simple. They agreed they need to supplement those at some time.

THE COURT: Yes.

MR. KONRAD: What we want is a date certain --

THE COURT: Good enough. Let me ask them.

MR. KONRAD: -- for when this is going to be in hand, because there is a lot of lead time involved in prior art analysis that pegs off of that. And if we don't get these answers, the expert reports, we won't have enough time to deal with a newer theory about when these things were conceived so we just wanted a date certain.

THE COURT: Okay. Well, let me ask.

Mr. Sheasby, is this yours as well?

MR. SHEASBY: It's Mr. Giza's, Your Honor.

THE COURT: All right. Mr. Giza, you know, they're making a lot of sense to me. Eighteen months, how come you can't tell them, conception, reduction to practice? What is the hold up?

MR. GIZA: Your Honor, the conception, reduction to practice issue is based upon analysis, primarily upon the analysis of the inventor lab notebooks and AmberWave is in the process of reviewing and producing those. The problem with --

THE COURT: And that's their issue.

MR. GIZA: Right.

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THE COURT: They're saying, hey, we're a year and-a-half into this and we don't want to keep to hearing we're in the process and I want to know when you're done. And I think that is a fair question 18 months into a case. When are you going to give them to them?

MR. GIZA: We producing them now. We produced some yesterday. Our review is ongoing. One of the issues is that there is a lot of third-party confidential information in these lab notebooks. AmberWave is a technology company and a lot of their work is joint development projects. And this we think is actually irrelevant but what we're doing is redacting the information and as we get approval to produce it, we'll produce that. But it takes a lot of time reviewing these documents before we can produce them. We've gotten some approval to produce third-party confidential information recently. So we've gone through and unredacted that material and we're going forward and we'll have all this material reviewed and produced and then we'll be able to supplement our contention interrogatories on conception.

THE COURT: So the question stands. When? Because I understand you're telling me it's hard. I'm not missing that. I understand you are saying a third-party paragraph is involved, it's difficult, but they're asking when and I'm asking when.

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MR. GIZA: Yes, Your Honor. We proposed a mutual supplementation deadline of January 15th where both parties will supplement on the logs we discussed in the letter.

THE COURT: And that is not just a partial supplementation. If I understand you right, you are saying at that point we're going to give you what we've got with respect to this issue; right?

MR. GIZA: Right. As of that point, what we know, that will be our response. There may be other information that comes up later in discovery but it will be our best understanding as of that date.

THE COURT: All right. Mr. Konrad, you can live with January 15th or not?

MR. KONRAD: Well, we would have preferred it to be sooner, but if January 15th is doable and they're going to give us complete and full answers, if the Court finds that appropriate, then we would accept that.

THE COURT: Well, I'm asking you, because you have a sense, you folks are going to have a better sense of how this shakes out in terms of what you just said a few moments ago, which is other deadlines that are coming down the pike at you.

MR. KONRAD: Your Honor, I believe that in terms of that, the distinction between December 15th or

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January 15th would not seriously impede our ability. We just need to get on with it well before the expert reports are due.

THE COURT: Done.

MR. KONRAD: January 15th would accomplish that. We would like to talk about interrogatories they mention in their letter, though, and the idea of reciprocity because we don't stand on equal footing if the Court would want to hear it.

THE COURT: Yes, I will want to hear it, but at least insofar as this issue which I'm sticking with until we're finished with it, they're going to supplement by January 15th, completely as far as their knowledge will allow, the issues, the information associated with the issues of conception, reduction to practice that you have identified in these interrogatories. So that is taken care of.

Now, I'm not getting into the reciprocity issue. You guys talk about that. I mean I'm just not taking that up right now. If you think it's not reciprocal, you talk to them about it. If you guys can't come to agreement, we'll go through the right process to get me here, but I'm not sort of taking that on the fly and I don't view that as the issue that was teed up for today.

As to the first issue that was identified in

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Intel's letter, that is, the one associated with Mr. -- probably Dr. Fitzgerald and Dr. Antoniadis, if I'm saying it correctly, these two professors from MIT. Mr. Konrad, if this is still yours, let me ask you first and foremost, why is it is this in front of me at all, when as the folks from AmberWave point out, you've got a third-party, two third parties and you've got subpoenas issued out of the District of Massachusetts?

MR. KONRAD: AmberWave counsel is representing these inventors and we've been negotiating with them. The Court certainly has powers of preclusion with respect to this. And I would think the Court's views as to the relevance of this information would be instructive and given comity by the District of Massachusetts if we had to go there, this does seem to be the forum that is more informed about the overall case.

THE COURT: But everybody would agree, wouldn't they, including you folks on the Intel side, that I'm not the right person to say that subpoena will be enforced; right? I mean that is the District of Massachusetts subpoena.

MR. KONRAD: The District of Massachusetts would be the place to turn for an order for contempt, Your Honor, if we had to go there in order to compel.

THE COURT: Right. Okay.

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Second issue. Their argument to me is that you haven't even given the slightest foundation for weighing through the documents of these two gentlemen beyond the MARCO and SRC research because only the SCR and MARCO research could possibly implicate any of the rights that you have identified in your special licensing agreement. What is your response to that?

MR. KONRAD: Well, my response to that, Your Honor, is sort of captured in their letter where when they begin by saying that our allegations have no merit, they say AmberWave funds this research and development on its own. Well, that is a question of fact. And at some point, they're going to have to prove that. We can prove that we provided them with funding pursuant to the terms of an agreement which say that if we funded this research in whole or in part, we have a license to it.

Beyond that, our agreement provides that they had an obligation to disclose to MIT and MIT, in turn, to us any background intellectual property, anything that they claim to own outside the scope of the research that they were doing for us that they were intending to hold apart and that might block our ability to use the fruits of the research that we helped to pay for.

THE COURT: All right.

MR. KONRAD: The contract itself begins to

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implicate all the disclosures that they made and the other things that they claim to have owned independently. Now, we need to be able to prove that we in fact funded this research in whole or in part.

THE COURT: Now, let me ask you a question. In order to do that then, it's your position that anything these gentlemen worked on over the last five years is fair game? Because without looking at everything they worked on, there is no way to limit and focus on where you might have rights. That is your position?

MR. KONRAD: The position is that we would like to -- we think it's going to involve tracing funds and trying to exclude these other possibilities. If they're going to come in and say it was funded by somebody else, then they're going to have to prove this. What this ends up with is they're precluded --

THE COURT: Okay. I'm sorry to interrupt you, Mr. Konrad, but I'm trying to -- and I may not be doing this artfully, but I'm trying to get a specific understanding of the breadth of the position, and it will help me if -- and maybe you can't give me a yes or no, but try to give me a yes or no to this, if you can.

Is it your position that everything they worked on for the last five years is something you ought to be able to look at because without doing that, you won't be able to

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know whether this is something Intel helped fund or not? In short, there is no way to narrow your request and still meet your desire to figure out whether they have wrongly gypped you guys out of your rights under the licensing agreement?

MR. KONRAD: Your Honor, with apologies for not saying yes or no, what I would say is that we believe that to get to the truth, we will need to know all the sources of funding that they claim to have had and what the scope of that funding was, which is why we proposed a compromise to begin by simply obtaining from them the information about what the other potential sources of funding were or the research that led to these patents that they put in their own pocket. And if one of those is plainly irrelevant, if it's research relating to some medical device or it's something that has nothing to do with it, then obviously, there is no need to go further. But if it's something that implicates the closely related technology, if it's AmberWave funding, if it's some other research grant, we may need to explore that further to try to trace these funds.

THE COURT: So, short of saying give us all your work papers for the last five years, your initial position -- initial -- I should say, you call it your compromise position, but what you are saying what you can live with as a starting point for analysis is tell us your funding sources and what those funding sources were related

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to with a description of a research project for the last five years. Is that right or wrong?

MR. KONRAD: That is right, Your Honor.

THE COURT: So if you presented that question to them, tell us what you worked on for the last five years, and by research project, who funded it, that answers the question you are trying to get?

MR. KONRAD: That would be the beginning point. And it might exclude a great deal of, it might exclude some things that we don't need to pursue further.

THE COURT: All right. Now, Mr. Giza, is this you again?

MR. GIZA: Yes, Your Honor.

THE COURT: Okay. What is wrong with that question?

MR. GIZA: Well, the problem with Intel's proposal is it's really a two-step process and as Intel counsel has admitted here right before you, it's a beginning.

THE COURT: Well, sure. I mean obviously any time you start to try to find something out, there is going to be a follow-up. The question is not whether the follow-up will be objectionable. The question is what is wrong with that question?

MR. GIZA: Well, the problem is that although

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they're more reserved about how they're relating it to you, Your Honor. During meet and confer, they told me make no mistake we're going to get all these documents.

THE COURT: Well, that will really be up to me, won't it? So I reiterate I'm not talking about step two, I'm talking about step one. You know, they may feel pretty bold. They may feel pretty confident but if it ever comes to me, as a step two discussion, we'll find out whether they "get everything" or not and who made the mistake, if anybody did. But that's not what I'm dealing with now.

So I reiterate, last shot, what is wrong with the question that I just posed to them and the way they say, yes, we would be satisfied with that as the starting point for further discovery?

MR. GIZA: I have two concerns, Your Honor. First, this is starting a multiple step process which is going to be more burdensome on the inventors, on these professors at MIT. The second point is they're saying that if there is something that is totally irrelevant, they'll be able to not follow-up on it. Well, you know, these are technical professors. Their research is all in a related field. It's going to end up that -- I don't know for certain but it will very likely end up that all their research is impacted by the scope of what they're looking for.

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THE COURT: Okay. If what you are telling me is they don't have anything that is clearly outside the field of research that Intel is helping to fund, then what I guess I'm hearing you say is taking that initial step won't be helpful because maybe they're right on the Intel side.

Here is the short of it. I have what I take to be a good faith position put before me that Intel has some rights to stuff that these gentlemen are doing. You may want them to say unilaterally we'll only give you this and that, which is another way of saying to Intel, trust us when we tell you this is all we did with your money. But the whole discovery process is based on the premise that trust is limited so you show.

So I'm not going to order anybody up there in Massachusetts to do anything. That's the District of Massachusetts job. But the question about relevance, I do think they were overbroad in trying to say, hey, we're not going to take the inventors' word for it, we want to see what they've been doing because we think they may be doing stuff that we were entitled to some rights then. That doesn't strike me as out of line at all. So if you think their step process is inappropriate because it really won't narrow it, you are in a position much better to know than I am. I agree with you, why stage it. Go ahead and let them pose the broad question. As to relevance, I'm not having

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the problem with it you folks are.

Okay. That's all the guidance I can give you, though, because this is out of my jurisdiction. They'll do what they're going to do. And if it comes to it later on here, I guess we'll be arguing about preclusion and things like that, if they don't get appropriate responses, and they want to argue about that in front of me. But I'll leave that in your court now. I've said all I can really say I think that is probably going to be helpful or meaningful. You pursue your rights as you think you need to up in the District of Massachusetts.

MR. KONRAD: Thank you, Your Honor.

MR. SHEASBY: Your Honor?

THE COURT: Yes.

MR. SHEASBY: This is Jason Sheasby. I'd like to seek the Court's clarification on two issues.

The first is I know in Intel's letter on interrogatories, they suggested that we would be ordered to supplement, it would be the final supplementation.

THE COURT: It won't be your final. Let me say that. I'm not saying final, I'm saying it has to be everything you know at that point in time. As your colleague Mr. Giza said, it's conceivable something could come up after that point that you had no idea about. But if that is your point of clarification, don't worry, it

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won't be final in that respect.

MR. SHEASBY: Thank you, Your Honor. Your Honor one other point, which is that on the stipulation issue, AmberWave feels quite strongly there was a violation of the stipulation which was entered into the Court. And I know that the Court had suggested that the Court was not going to give us relief on the protective order as a result of this but we still believe there should be some consequences for the violation of the stipulation.

THE COURT: Yes. And what did you have in mind?

MR. SHEASBY: Your Honor, I think that two things would be appropriate. The first is that I think it would be helpful for there to be an Order from the Court, at least a statement on the record that there was a violation of the stipulation, a stipulation that was entered by the Court. I believe, you know, it was an act of contempt to do what Intel did.

And I think the second issue is that AmberWave is a small company. And Intel, by playing these games, is going to cost us money. We're going to have to support this reexamination at the same time as the litigation and we believe it would be appropriate for Intel to pay the cost of the reexamination that they started.

THE COURT: All right. Well, here is what you guys do. If there isn't -- and let me just say this. If

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AmberWave, the small company that can ill afford litigation costs, wants to fund filing a motion and briefing it, seeking sanctions, go ahead. I'm not dealing with it on this call but I'm not going to say no to you in the abstract either. If you think that, with the limited litigation resources you've got, a wise use of those resources is to pursue sanctions, file your motion. They'll respond. I'll address it in the ordinary course. Okay?

MR. SHEASBY: I understand, Your Honor.

THE COURT: All right. Thanks for your time. Good-bye.

(The attorneys respond, "Thank you, Your Honor.")

(Telephone conference ends at 12:31 p.m.)