

# EXHIBIT A

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

3 AMBERWAVE SYSTEMS CORPORATION, - - -  
4 Plaintiff, : CIVIL ACTION  
5 v. :  
6 INTEL CORPORATION, :  
7 Defendant. : NO. 05-301 (KAJ)  
- - -

8  
9 Wilmington, Delaware  
10 Wednesday, November 22, 2006 at 11:33 a.m.  
11 TELEPHONE CONFERENCE  
- - -

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

13 APPEARANCES:

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

16 and

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

20 Counsel for AmberWave Systems  
21 Corporation

22 YOUNG CONAWAY STARGATT & TAYLOR  
23 BY: JOHN W. SHAW, ESQ., and  
KAREN E. KELLER, ESQ.

24 and

25 Brian P. Gaffigan  
Registered Merit Reporter

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1 APPEARANCES: (Continued)

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

5 and

6 SIMPSON THACHER & BARTLETT, LLP  
 BY: KERRY L. KONRAD, ESQ.  
 7 (New York, New York)

8 and

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

11 Counsel for Intel Corporation

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1 It wants some other steps taken but leaving those other

2 steps aside for the time being, that's something that can

3 be addressed at another time either by stipulation of the

4 parties or further discussion with the Court, if necessary.

5 I take it that the notion of the amendment and supplement-

6 ation is itself not objected to so I'm granting that as

7 unopposed and you'll get a one-line order on that; all

8 right?

9 Now, let's turn to the exchange of letters that

10 we've got. And first we'll take up AmberWave's letter of

11 November 20th which, as I understand it, basically says

12 Intel pulled a fast one, they promised you they weren't

13 going to seek reexamination of patents. They fiddled with

14 the system to in fact challenge patents other than the ones

15 that were instantly at suit but which they should have

16 understood would be in suit and therefore as a remedy, we,

17 AmberWave ought to be able to put our litigation counsel on

18 the team dealing with the reexamination that Intel has

19 sought with respect to these patents.

20 Now, I may not have done it elegantly but that

21 is how I understand your position. Am I correct that about

22 that, Mr. Blumenfeld, or whoever is speaking on behalf of

23 AmberWave?

24 MR. BLUMENFELD: I think Mr. Sheasby is going to

25 address this.

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2 P R O C E E D I N G S

3 (REPORTER'S NOTE: The following telephone

4 conference was held in chambers, beginning at 11:33 a.m.)

5 THE COURT: Hi, this is Judge Jordan. Who do I

6 have on the line?

7 MR. BLUMENFELD: Good morning, Your Honor. On

8 the AmberWave side is Jack Blumenfeld along with Sam Lu,

9 Jason Sheasby and Alex Giza from Irell.

10 THE COURT: All right.

11 MS. KELLER: Good morning, Judge Jordan. It's

12 Karen Keller at Young Conaway. Also with me on the line are

13 John Shaw from my office, and George Newcombe Kerry Konrad

14 and Patrick King from Simpson Thacher and also on the line

15 is Allon Stabinsky, in-house counsel for Intel.

16 THE COURT: All right. Thank you for waiting

17 while I wrapped up a criminal matter I had to attend to in

18 court.

19 I have the letters that were sent in to me

20 on the competing issues that you want assistance with

21 here today. Before we turn to those, I want to knock out

22 something.

23 First, there is a motion by AmberWave for leave

24 to amend and supplement its complaint in the 05-301 case and

25 a filing by Intel indicating that it does not oppose that.

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

2 I think you are correct. I would make one

3 modification, which is that AmberWave does not want its

4 litigation counsel to be a full fledged member of the

5 reexamination team. We obviously recognize that we're not

6 going to participate in anything relating to the amendment

7 of claims. But with that caveat, I believe your

8 characterization is accurate.

9 THE COURT: All right.

10 Now, you saw the letter that they sent in

11 response from the Intel side where they took a couple pages

12 to point out to me things I said before about your folks

13 being involved in reexamination proceedings and then on the

14 third page of their letter, basically say, well, we didn't

15 violate any stipulation. So why don't you go ahead and give

16 me any response you have to their November 21st letter.

17 MR. SHEASBY: Certainly Your Honor. I'll take

18 them in order.

19 I think it's important to understand that Intel

20 is slightly misrepresenting the history of the negotiation.

21 At a November 8th hearing, Intel's counsel acknowledges

22 there was some role that litigation counsel could

23 appropriately play in the reexamination of patents in suit.

24 The Court had sent the parties back to negotiate what that

25 role would be. They were unable to agree and that resulted

1 in the stipulation preventing Intel from seeking  
 2 reexamination on patents that may be added.  
 3 The reason why I bring that up is that I think  
 4 that some of the quotes Intel uses in its letter is from a  
 5 separate issue which is whether litigation counsel can be  
 6 set up into two bubbles, which is litigation counsel that  
 7 didn't have access to technical information and litigation  
 8 counsel that could.

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

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

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

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

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

25 The second issue --

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

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

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

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

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

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

1 other attorneys to make sure that they're not disclosing  
 2 our confidential information.  
 3 THE COURT: Well, I suppose if you were seeking  
 4 reexamination of their patents, you know, then you really  
 5 would be in parallel positions; but that is not going on,  
 6 right?  
 7 MR. SHEASBY: Well, Your Honor, I think one of  
 8 the concerns that we would have, and this is sort of maybe  
 9 distracting from the major issue, but the point I was trying  
 10 to get at was that the idea that our conversations that  
 11 happen to be privileged conversations about a subject matter  
 12 that has no relevance to Intel's technical information  
 13 should be exposed to Intel strikes me as not striking a fair  
 14 balance. I think it does exactly what protective orders  
 15 shouldn't do which is inhibit our ability to defend this  
 16 case.  
 17 THE COURT: Okay. I've got your position.  
 18 Thanks very much, Mr. Sheasby.  
 19 Mr. Newcombe, are you speaking for Intel?  
 20 MR. NEWCOMBE: I am, Your Honor, on this.  
 21 THE COURT: Well, I want you in the first  
 22 instance to respond to Mr. Sheasby's point that, look, there  
 23 is no danger of any leaking of technical information here  
 24 because there is not going to be any discussion of technical  
 25 information. The only thing that is going to be discussed

1 Indeed, the parties have made a special accommodation for  
 2 this in the schedule."  
 3 Now, You're trying to say, I take it from your  
 4 last comment to me, that AmberWave wants to throw the doors  
 5 wide open. What they say to me in their letter is, wait,  
 6 we're talking about a couple of things here. One, the '449  
 7 patent that everybody knew was something that they were  
 8 going to seek to add to the litigation because there was  
 9 already a pending motion on it, so you could not have  
 10 understood anything other than that that was going to be  
 11 in the mix and, therefore, filing reexamination on that  
 12 was out of line. What is your response to that?  
 13 MR. NEWCOMBE: I disagree with that  
 14 characterization. I think that, first of all, that reexam a  
 15 was filed the morning that patent issued and at a time when,  
 16 you know, we still don't believe this case should be in the  
 17 301 case. It should be in the 655, which is not covered by  
 18 this stipulation at all.  
 19 THE COURT: Well, whether you agree with that or  
 20 not, which case is it in?  
 21 MR. NEWCOMBE: Which case?  
 22 THE COURT: Yes.  
 23 MR. NEWCOMBE: Which case is it in now?  
 24 THE COURT: Right.  
 25 MR. NEWCOMBE: As of this morning, it's in the

1 is prior art, and we wouldn't be in this position if you  
 2 folks on the Intel side hadn't gone ahead and done what you  
 3 said you weren't going to do.  
 4 MR. NEWCOMBE: Well, first, let me take the last  
 5 point first. We didn't go ahead and do what we said we  
 6 weren't going to do. I could not disagree more with the way  
 7 AmberWave is concerning the stipulation. Throughout the  
 8 negotiating history, we made it narrower and narrower. To  
 9 read "may later be added" to encompass anything that could  
 10 be added would broaden this way beyond any of the  
 11 expectation of the parties, certainly, Intel, at the time we  
 12 negotiated that.  
 13 THE COURT: Well --  
 14 MR. NEWCOMBE: We view -- I'm sorry. Go ahead.  
 15 THE COURT: Let me ask you a question on that  
 16 point. Here is what they said on page two of their letter.  
 17 This is the third full paragraph on page two.  
 18 "Intel may argue that it did nothing wrong in  
 19 filing a reexamination request on the '449 patent because  
 20 when Intel filed the request, there was only a pending  
 21 motion to add the patent that had not been acted on by the  
 22 Court. Only the most disingenuous reading of the  
 23 stipulation and its purpose could support such an argument.  
 24 The parties had long contemplated the continuations of the  
 25 '371, '632 and '292 patents would be added to the suit.

1 301.  
 2 THE COURT: Okay. So whether you like it there  
 3 or not, it's in the case. But go ahead and take me further  
 4 on your argument.  
 5 MR. NEWCOMBE: Okay. Let me go on to the  
 6 second point. I could not disagree more with Mr. Sheasby's  
 7 characterization that our technical information is not  
 8 relevant. It is highly relevant and these communications  
 9 between people who have full access to all of our most  
 10 highly sensitive confidential information. They're going  
 11 to sit down with prosecution counsel now, unmonitored,  
 12 unchecked; and as Mr. Sheasby said, you don't want know  
 13 how sausage is made. Well, that is exactly our concern.  
 14 Because to suggest that infringement is irrelevant ignores  
 15 the reality of what goes on in a reexamination.  
 16 What happens, Your Honor, is that, let's assume  
 17 that, as the PTO has already done, found that their claims  
 18 appear to be invalidated by prior art. What happens then  
 19 is they can go back -- and they have done this in the past,  
 20 already. We gave a reference to it in our papers -- and say  
 21 to the PTO, well, okay. We're not going to fight you on  
 22 that but we're going to amend our claim and now we're going  
 23 to put in the following additional limitations.  
 24 Now, guess what advantage they have at that  
 25 point? And they can say all they want that this isn't

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

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

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

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

13 MR. NEWCOMBE: Okay.

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

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

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

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

1 of our products, which is an unfair advantage.

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

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

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

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

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

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

4 MR. SHEASBY: Your Honor.

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

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

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

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

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

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

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

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

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

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

25 And one of the things we agreed to is the

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

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

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

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

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

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

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



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

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

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

1 Intel filed it before, when it did. Because once it gets  
 2 started, it can't -- an Article III Court doesn't have the  
 3 power to stop it.  
 4 Having said that, I think the '449 is a  
 5 continuation of the '371 patent and so the same issues  
 6 regarding infringement, and I'm assuming the same -- Intel  
 7 will make similar arguments regarding enablement and written  
 8 description of both patents. As a result, I don't really  
 9 see how there is any benefit to slowing down the '449. The  
 10 '449 should be part of the consolidated litigation. At some  
 11 point, the '449 may drop out because the PTO may conclude  
 12 that their patent claim's invalid, the claims may change, so  
 13 at some point we may need to adjust. But I think there is  
 14 enough time left in the litigation that at this point it's  
 15 not necessary to stay it.  
 16 I will point out that most patents, I think the  
 17 number is greater than 90 percent, survive reexamination.  
 18 Claims may be slightly modified but they do come out.  
 19 THE COURT: All right. Well, here is the  
 20 upshot. You know, we've had to take a lot of time to try to  
 21 deal with this. And I have to say while I don't feel myself  
 22 in high dudgeon the way the folks the AmberWave side do,  
 23 it's pretty hard for me to believe the folks on the Intel  
 24 side of the fence could not have foreseen that this '449  
 25 case patent was going to be in the case. In fact, if I

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

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

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

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

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

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

1 anyway, I would permit that.

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

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

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

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

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

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

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

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

12 THE COURT: Mr. Newcombe?

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

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

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

3 MR. NEWCOMBE: Understood, Your Honor.

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

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

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

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

1 THE COURT: All right.

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

7 These are very fundamental things, as Your Honor  
8 knows, in any patent case. The facts related to these are  
9 100 percent in the control of AmberWave. Because they  
10 relied on the inventors, all of whom are either under the  
11 control, represented by AmberWave's counsel and AmberWave  
12 has all documentation on this. So in our view, there is  
13 no reason in the world, 18 months or 17 months into this  
14 litigation, why we should not get from them a response to  
15 when did you conceive each of these inventions and when did  
16 you reduce it to practice?

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

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

24 THE COURT: Sure.

25 MR. KONRAD: I think the issue is actually very

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

3 THE COURT: Yes.

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

5 THE COURT: Good enough. Let me ask them.

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

12 THE COURT: Okay. Well, let me ask.

13 Mr. Sheasby, is this yours as well?

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

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

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

24 THE COURT: And that's their issue.

25 MR. GIZA: Right.

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Done.

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

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

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

25 As to the first issue that was identified in

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

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

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

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

25 THE COURT: Right. Okay.

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

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

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

24 THE COURT: All right.

25 MR. KONRAD: The contract itself begins to

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

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

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

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

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

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

3 MR. KONRAD: That is right, Your Honor.

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

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

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

13 MR. GIZA: Yes, Your Honor.

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

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

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

25 MR. GIZA: Well, the problem is that although

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

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

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

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

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

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

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

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

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

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

1 won't be final in that respect.

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

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

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

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

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

1 the problem with it you folks are.

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

12 MR. KONRAD: Thank you, Your Honor.

13 MR. SHEASBY: Your Honor?

14 THE COURT: Yes.

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

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

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

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

9 MR. SHEASBY: I understand, Your Honor.

10 THE COURT: All right. Thanks for your time.

11 Good-bye.

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

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

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