

FLIR Systems, Inc. v. Leak Surveys, Inc: Order Regarding Discovery

Article By:

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Takeaway: If a party requests a recess during a deposition between cross-examination and re-direct, and the other party believes that the recess is inappropriate because it may result in witness coaching, the opposing party may contact the Board to discuss whether a recess should be permitted and under what conditions.

In its [Order](#), the Board addressed Patent Owner's suggestions, raised during a conference call, that (1) the authenticity of certain prior art had not been established and (2) "inappropriate witness coaching may have occurred after cross-examination and before redirect" during a deposition. The Board also addressed Petitioner's request, which was made in a second conference call, for leave to file supplemental information.

The Board determined that the issues concerning the authenticity of certain prior art documents could be addressed in a motion to exclude. The Board also ruled that Patent Owner could address the alleged witness coaching in a Motion to Exclude all or a portion of the testimony and, assuming the motion is denied, an argument as to the weight that should be given, if any, to the witness's testimony on the authenticity issue.

Next, the Board denied Petitioner's request to rely on supplemental information, namely a second declaration concerning the challenged exhibits. As the Board explained, if it permitted supplemental information, the normal procedure would then permit cross-examination of the witness, and "[o]ne can immediately appreciate that there could be no end to relying on supplemental information followed by cross-examination."

Finally, the Board discussed the "problems associated with off-the-record discussions between counsel for a party and a witness testifying on behalf of a party taking place during any recess after conclusion of cross-examination." It noted that "when recess conversations occur a party runs a risk that the Board may find that there was witness coaching and may exclude or give little, or no, weight to the testimony of a coached witness." Accordingly, "[i]f a recess is requested and a party believes a recess is not appropriate, a conference call may be placed to the Board for a determination of whether a recess should occur and, if a recess is authorized, the conditions under which the recess is to occur."

In this case, the Board concluded that Patent Owner waived “any possibility of developing further information or evidence relating to what occurred during Petitioner’s off-the-record recess conference with the deponent” when it “did not seek the assistance of the Board when Petitioner declined to permit its witness to answer Patent Owner’s questions during the deposition.” The Board noted that developing any further information and/or evidence on this topic would require giving Petitioner an opportunity to respond. The Board then summarized its concern as: “When would it end?”

FLIR Systems, Inc. v. Leak Surveys, Inc., IPR2014-00411, 434

Paper 12: Post Conference Call Order

Dated: February 10, 2015

Patents: 8,426,813 B2 and 8,193,496 B2

Before: Fred E. McKelvey, James T. Moore, and Trevor M. Jefferson

Written by: McKelvey

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