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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

BLUE SPIKE, LLC,)	
)	
Plaintiff)	
)	
vs.)	
)	
AUDIBLE MAGIC)	CASE NO.
CORPORATION,)	6:15-cv-00584-RWS-CMC
)	
)	AUGUST 25, 2015
)	
Defendant)	10:00 A.M.

ORDER SETTING HEARING
BEFORE THE HONORABLE JUDGE CAROLINE CRAVEN
UNITED STATES MAGISTRATE

COURT REPORTER:	MS. SHAWNA GAUNTT-HICKS, CSR Deputy Court Reporter United States District Court Eastern District of Texas Texarkana Division 610 Cedar Street Maud, Texas 75567 (903) 276-1090 CSR NO. 9353
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(Proceedings recorded by oral stenography,
transcript produced on a CAT system.)

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1 THE BAILIFF: All rise.

2 THE COURT: Good morning.

3 ALL PRESENT: Good morning.

4 THE COURT: All right. I'm going to call
5 the case that's scheduled for hearing this morning. It
6 looks like Blue Spike, LLC v. Audible Magic Corporation,
7 Case Number 615 CV 584. We have four motions that the
8 Court is going to take up today. And before we get
9 started, if the parties would like to make announcements
10 for the record?

11 MR. HONEA: Your Honor, Christopher Honea
12 and Kirk Anderson on behalf of Blue Spike.

13 THE COURT: Good morning.

14 MR. FINDLAY: Good morning, Your Honor.
15 Eric Findlay on behalf of the defendant, Audible Magic.
16 Also with me is Mr. Gabe Ramsey, Mr. Christopher
17 Higgins, and Ms. Alyssa Caridis. And Mr. Higgins and
18 Mr. Ramsey will be handling the argument for our side.

19 THE COURT: Okay. Great. Thank you. All
20 right. All right. All right. As I said, we've got
21 four motions. I know that some of these are quite old,
22 but I think this case is sort of taking all kinds of
23 different forms, and I apologize for that. It is old,
24 but I think other things have been moving in other areas
25 with regard to this litigation at a pretty good clip, so

1 maybe that sort of compensates for it.

2 I've given you guys two hours per side,
3 which if you use it, great; if you don't, that's fine,
4 too. I have no preference on the order in which you
5 present these motions. I know that the plaintiff only
6 has one motion filed that I've set, and we've set three
7 for the defendants. So if the plaintiff wants to choose
8 how to proceed, I have no problem with that, given
9 you've just got the one motion.

10 MR. HONEA: Do you guys want to start with
11 your license motion?

12 MR. RAMSEY: In some ways, Your Honor --
13 well, from the defendant's position, it makes sense, at
14 the very least, to group plaintiff's motions on the
15 counterclaims and the defendant's own motion to dismiss
16 its own patent counterclaim. That's the only preference
17 that I would have, because, again, grouping together, it
18 would make it a little more efficient. Other than that,
19 the plaintiff will go along with the Court's discretion.

20 MR. HONEA: We're fine with that as well,
21 Your Honor. So if you'd like, we can start with
22 plaintiff's motion for summary judgment.

23 THE COURT: That sounds great. Could you
24 get me a legal pad, because I've been taking -- go
25 ahead.

1 MR. HONEA: Your Honor, I think that the
2 briefing is pretty plain on this law. I'll keep it
3 relatively short for efficiency's sake.

4 THE COURT: All right. I think you need to
5 come up to this podium, because I think our court
6 reporter can hear you better there. The sound system in
7 this courtroom is terrible.

8 MR. HONEA: Yes, Your Honor. My apologies.
9 Again, I was going to just make sure that we're going to
10 keep this short. I think the briefing is relatively
11 clear on this. So for efficiency's sake, the
12 Counterclaim 9 fails from Audible Magic because there's
13 no evidence of inequitable conduct. They failed to cite
14 what would be actual misrepresentations of admitted
15 material to the patent office.

16 Counterclaim 10, again, is -- fails for --
17 as a matter of law because they've shown no evidence of
18 unjust enrichment, that Blue Spike or Scott Moskowitz or
19 any of his entities were somehow unjustly enriched on
20 something that never took place. And I think the
21 evidence is lacking there, so there's not much to
22 discuss.

23 THE COURT: I believe that your argument
24 was that the elements, which I can't recall off the top
25 of my head, for unjust enrichment are inapplicable here

1 with regard to the relationship.

2 MR. HONEA: Inapplicable in there's just no
3 evidence to support it in -- on grounds of bringing a
4 claim.

5 Again, with Counterclaim 11, they've failed
6 to meet the burden of several stand-alone reasons for
7 the Lanham Act violations. There's been no proof that
8 anything that Blue Spike has done is materially
9 prejudiced or was actionable in the first place or
10 materially prejudiced of Audible Magic.

11 On Counterclaim 12, I believe that,
12 obviously, they agreed that the 308 patent has not been
13 infringed by Blue Spike. There was never a product to
14 have found infringement.

15 And, finally, on Counterclaim 13, there's
16 no evidence, again, of unfair competition, that they've
17 met any of the elements to show common law unfair
18 competition. There's no statements from Blue Spike that
19 would show that there was unfair competition through its
20 press release that they've stated to. They've taken two
21 different statements and they've tried to put them
22 together, and it's a disjointed argument on their part.
23 It's -- again, it's not actionable. And they failed to
24 show any sort of misappropriation of -- from unfair
25 competition. Again, there's no proof that Blue Spike or

1 Scott Moskowitz ever took anything from Audible Magic
2 and the evidence -- or the lack of evidence from their
3 own deponents shows that is true. So, again, I was
4 going to keep this short, Your Honor --

5 THE COURT: Okay.

6 MR. HONEA: -- so I'll conclude with that.

7 THE COURT: Thank you.

8 MR. FINDLAY: Your Honor, may I approach
9 with some handouts from opposition?

10 THE COURT: Absolutely. Thank you.

11 MR. RAMSEY: All right, Your Honor. Good
12 morning. Gabriel Ramsey for the defendants and
13 counter-claimant, Audible Magic. I'll also keep it
14 short, maybe take a little bit more time than the
15 plaintiff did. And I've handed the Court some slides to
16 walk through the logic of the argument.

17 I'm going to start with Audible Magic's
18 patent counterclaim since it's sort of a discrete issue
19 and overlaps with Audible Magic's own motion to dismiss
20 the -- that counterclaim that was filed back in
21 February.

22 The long and the short of it is this: At
23 the beginning of this case, Blue Spike offered for sale
24 for \$10,000, on its website, the Giovanni Abstraction
25 Machine, described it in a way that, to this moment,

1 Audible Magic contends violates its 308 patent. We
2 proceeded with the counterclaim. We put in expert
3 reports that that offer for sale is, in fact, infringed.
4 We have not conceded that it's not infringed. And that
5 report is un-rebutted. Blue Spike did not submit an
6 opposing expert report.

7 Nonetheless, the reason that Audible Magic
8 has moved to dismiss its own counterclaim is as the case
9 went along, it became evident that there was, in fact,
10 no product at work. So to recall the actionable acts
11 under the Patent Act art, any making, using, selling, or
12 offering for sale, so we were aiming at the "making" and
13 the "using." They told us they hadn't sold any. But
14 they did not say that they've not actually created this
15 product, so there was an actual making or use.

16 And the reason this is -- this relates to
17 the rest of the counterclaims by Audible Magic. There's
18 a history of relationships here between Mr. Moskowitz
19 and Audible Magic, that this was not just -- this was
20 not just a gratuitous act. If, in fact, Mr. Moskowitz
21 was incorporating code, for example, that he received
22 from Mr. Berry, his co-inventor from Audible Magic, and
23 his predecessor, Blue Spike, it would be a serious
24 competitive issue.

25 So the case proceeded. The rest of the

1 counterclaim. We cited a couple of cases in our summary
2 judgment briefing that, in fact, when one is attempting
3 to dismiss one claim, if a party filed a Rule 41 motion,
4 the Court can consider it under the standard of Rule 15
5 to amend pleadings. The cases there are Lowery versus
6 Texas A&M 117 F.3d 242 and Orthoflex v. ThermoTEK, 2011
7 U.S. District, LEXIS 107540. And the standard there is
8 that -- need to amend the complaint shall be freely
9 given if justice so requires. And here, it simplifies
10 the issues. There's no prejudice. There was very
11 little litigation around that counterclaim at all
12 because, obviously, there was no -- a couple of
13 documents regarding the offer for sale, there was no
14 code discovery sort of thing, and plaintiff didn't --
15 rather, counterclaim defendant did not put in an expert
16 report.

17 So we request that the case be pared down,
18 which I think is the general goal of today's activity is
19 to see if that can happen, and simply dismiss the case
20 with that claim with prejudice -- without prejudice, in
21 the event that Blue Spike offers or makes this device or
22 a similar device in the future, and everyone walk away
23 from that claim.

24 And I note that because Blue Spike's
25 counsel just stated that Audible Magic agrees that

1 there's no infringement there, that's not true at all.
2 We've already got an expert report and we are prepared
3 to proceed to trial if the Court is not inclined to
4 grant the motion. And we've asked for alternative
5 relief that we just substitute a Claim 9 for Claim 1.
6 There's a single claim asserted. It's a method claim,
7 that we can aim for that offer for sale since it turns
8 out there's no product.

9 With that, I'll turn to the slides, Your
10 Honor, in front of you. So the highest level, Audible
11 Magic's counterclaims are very fact-intensive. They're
12 just multiple determinations of witness credibility.
13 This -- these are the kinds of counterclaims there's not
14 clear admissions, there's not a clear, discrete set of
15 facts. It's what did Mr. Moskowitz do and intend out of
16 memories of the events? How do they survive today?
17 Is -- are any of these witnesses, including
18 Mr. Moskowitz, evading the real facts?

19 We've got a lot of documents. I apologize
20 for the bulk of material put in opposition, but it was
21 necessary to explain the chronology of facts that led to
22 the reasonable inferences that a jury or a trier of fact
23 if the case were tried to the judge -- we might want to
24 talk about that at some point. The inferences from
25 those documents support Audible Magic's counterclaim.

1 Slide 3, now, all reasonable doubts must be
2 on these factual impressions most of you made in Audible
3 Magic's favor. It's not appropriate, at this juncture,
4 to be weighing evidence. And again, these are highly
5 factual credibility-specific determinations. This is
6 not the right type -- these are not the right type of
7 claims for summary judgment.

8 Slide 4, again, we've put in a number of
9 documents that lay out and explain the chronology of
10 Mr. Moskowitz's learning about Muscle Fish's technology,
11 his leveraging of that in his business, and then later
12 making statements about what he'd created and when in
13 the market for marketing purposes, for commercial
14 purposes that were simply not true. Blue Spike did not
15 put any evidence, notably, in response. This is not --
16 the basic structure of Blue Spike's motion is to say,
17 No, you haven't shown any evidence in a very general
18 way. In response, Audible Magic has put in a lot of
19 evidence, we believe, that support the counterclaims,
20 and there was no response to that at all except a sort
21 of general denial.

22 All right. I'm on Page 5 now. We'll start
23 with inequitable conduct. Blue Spike says Audible Magic
24 has not been clear about what material information Blue
25 Spike allegedly misrepresented or omit -- omitted. In

1 Audible Magic's -- that's just not true, first of all.
2 In Audible Magic's interrogatory response -- that's
3 Exhibit 53 to our briefs -- we laid out a very complete
4 story of all the documentation of the prior art that
5 Mr. Moskowitz was aware of and did not disclose.

6 First and foremost, he was aware of the
7 same Audible Magic technology that is accused in this
8 case. It used to be owned by a company called Muscle
9 Fish that effectively became Audible Magic. So as a
10 sort of kernel of the inequitable conduct theory,
11 knowing about the thing that you are ultimately going to
12 accuse in a patent infringement case before you filed
13 for those patents and not disclosing it, materiality
14 can't be denied because it's a virtue of the claims
15 itself. Blue Spike and Mr. Moskowitz conceded it's
16 material. And intent to deceive can be inferred from
17 the facts -- and I'll get into the back and forth and
18 relationships a little bit in a moment.

19 Beyond that, Mr. Moskowitz knew about a
20 bunch of other prior art. As the filing date of his
21 patent approached, lots of fingerprinting companies --
22 this case, to remind the Court, is about audio and video
23 fingerprinting, creating small representations of a
24 sound that you want to look up in the database to
25 identify, Tuneprint, Imagelock, RCS, BDS.

1 After Muscle Fish sort of began this
2 business -- and we're getting into the year 2000 -- a
3 number of these companies showed up, and Mr. Moskowitz
4 knew about them and did not disclose them. Each of them
5 were material to his broad patent claims that he filed
6 on saying that, I claimed the idea of representing
7 content based on the characteristics of the content
8 itself.

9 On to Page -- on to Slide 6, now, Your
10 Honor. Mr. Moskowitz knew about Muscle Fish's
11 technology. Back in 1997, the summer of 1997,
12 Mr. Moskowitz reached out to Muscle Fish. When I say
13 "Muscle Fish," we're talking about Audible Magic.

14 THE COURT: Right.

15 MR. RAMSEY: And says, And -- I -- I'm
16 going to work with you guys. Can you help me with your
17 watermarking? Other documents that have come to light
18 at that time suggests that he learned -- he recently
19 learned about Muscle Fish's fingerprinting technology.
20 He was having exchanges with an audio engineering
21 society that has just issued a release about Muscle
22 Fish's technology a couple of days before he reached
23 out. And he admitted in his deposition that he reached
24 out to Muscle Fish because he'd heard about one
25 particular commercial embodying of their fingerprinting

1 technology called DataBlade.

2 So he calls up Muscle Fish and he has
3 extended negotiations with them about whether they were
4 going to help him with his watermarking, and they
5 exchange with him information about what they were
6 doing. Mr. Blum of Muscle Fish says he was trying to
7 explain to Mr. Moskowitz what Muscle Fish was doing with
8 fingerprinting was different than the digital
9 watermarking that Blue Spike and Mr. Moskowitz were
10 doing. And just to, at the highest level, Your Honor,
11 just to remind the Court: What Mr. Moskowitz is doing
12 at this time, digital watermarking where you're
13 inserting a specific piece of information into a song or
14 image that says, This is what this song is, and then
15 you've got technology in this world that's looking for
16 that particular identifier. The approach that our
17 client was taking was to look at the perceptual features
18 of a song, the pitch, brightness, timbre, some of the
19 things that can be perceived by the signal and creating
20 a separate set of numbers that represents those things.

21 So our client told Mr. Moskowitz about this
22 in the summer of '97. The e-mails back and forth were
23 marked "confidential" by Mr. Moskowitz. There was a
24 misstatement, I believe, in Blue Spike's brief that
25 somehow we were arguing that the label in this case,

1 designation of confidentiality in this case, is what we
2 were referring to. It's not, Your Honor. I'll get you
3 the exhibit number in a moment. Mr. Moskowitz is
4 calling these exchanges with Muscle Fish, in the summer
5 of '97, confidential. Don't talk about my -- don't
6 disclose my stuff, so the understanding was they
7 wouldn't be disclosing -- Mr. Moskowitz wouldn't be
8 disclosing Muscle Fish's information.

9 On to Slide 7, Your Honor. As of August of
10 '97, after this back and forth happened, finally
11 Mr. Moskowitz said, Well, you know, Muscle Fish, I don't
12 want to work with you after all. At least not right
13 now. And then he makes some very interesting statements
14 that become clear in later documents. He wants to work
15 with Muscle Fish in the future. He wants to port with
16 Muscle Fish's own proprietary database technology.
17 Those are his words. He's recognizing that this is
18 proprietary, confidential information that he's talking
19 to Muscle Fish about. And he's saying, I'd like to --
20 this is pretty interesting. In the future, I'd like to
21 use this. This is a good idea, this fingerprinting
22 thing. And at the very end of this excerpt in
23 Exhibit 7, he says, I want to work with you, Muscle
24 Fish, on a number of extension projects. In a little
25 bit later, we'll see how this played out later, a couple

1 years later, when Mr. Moskowitz's watermarking business
2 was failing.

3 Exhibit 8, another example of
4 fingerprinting prior art that Mr. Moskowitz knew about
5 before he filed his patent. So we knew he knew about
6 Muscle Fish's fingerprinting, which he accuses in his
7 case. He also knew -- this is about a week before he
8 filed this patent. Again, I'm on Slide 8. He's
9 exchanging e-mails with internal folks at Blue Spike,
10 and he sees that there's a system out there called
11 Tuneprint, that does fingerprinting of audio files. And
12 it's important to note that the stipulated date of
13 conception of Blue Spike's patents is a week after this
14 document. They stipulated in this case that they didn't
15 come up with the idea fully-formed in the patent
16 application until the date of filing of the patent. So
17 this document in -- Slide 8 -- is a week before he
18 conceived fully of his intention by his own stipulation
19 where he says, Hey, there's this fingerprinting out
20 there by Tuneprint, another example. And he did not
21 disclose that.

22 Let's proceed to Slide 9, Your Honor.
23 Slide 9 is about a week and a half after he filed his
24 patent application. Now he's referring back to
25 Tuneprint, which he knew about, as we've just seen,

1 before he filed or conceived of his invention fully.
2 And he's telling his team, We just filed a patent on
3 monitoring of signals exactly like this, exactly like
4 Tuneprint, based on the massive production of data. So
5 he's saying, I knew about this Tuneprint thing. I then
6 filed a patent application on it, and I don't disclose
7 it. I knew about Muscle Fish, but I've just filed a
8 patent to cover what's already out there in the market
9 before my stipulated date of conception in this case.

10 That's an admission of materiality. He
11 says, That Tuneprint stuff is exactly like -- exactly
12 the same as my patent that I filed. So we've shown
13 materiality. Those are just two examples. There's a
14 number of other references -- not enough time to address
15 them all today -- but the Muscle Fish -- knowledge of
16 the Muscle Fish fingerprinting, knowledge of Tuneprint
17 are both fingerprinting material references that were
18 not disclosed. And he admitted this is the same, at
19 least as to Tuneprint, this is the same as what's in my
20 patent and implicitly admits that the Muscle Fish
21 fingerprint is the same as his patent because he's, in
22 fact, accusing this technology in this case.

23 Slide 10, Your Honor, Mr. Moskowitz, who is
24 marketing lead at his company, said that Mr. Moskowitz
25 is "a hawk." He's keeping apprised of industry

1 developments. He knows what's out in the fingerprinting
2 space. His name is Mr. Cassidy. Mr. Cassidy testified.
3 What is your recollection of why Mr. Moskowitz and
4 you -- your team, was talking about partnering with
5 companies that provide signal abstracting? This is at
6 the 1999-2000 time frame. Mr. Cassidy said, Well,
7 that's what they did. We were looking up -- so at the
8 time, Muscle Fish was going to partner with someone else
9 who was creating abstracting. Not that they invented
10 it, that it would be a compliment to the watermarking.

11 Slide 11, Your Honor, the similarities
12 between the Muscle Fish prior art, that Mr. Moskowitz
13 learned about back in 1997, and the language that he
14 uses to describe his intention -- at least in broad
15 strokes -- is very similar. It's words such as taking
16 an audio object. So by "audio object," it means the
17 original signal. Segmenting. Uses the word
18 "segmenting." "Analyzing 'perceptual features'"
19 or "subjective features" to reduce the sound to a small
20 representation.

21 Those were all words that were used in the
22 Muscle Fish materials that Mr. Moskowitz received. So
23 the materiality's clear. It's clearly similar. It's
24 the same words. But it's similar in a more specific
25 way. It's similar in that Mr. Moskowitz, Audible Magic

1 contends -- and we think the evidence supports it --
2 looked at what Muscle Fish was doing, expressed
3 interest, and a few years later writes a patent that
4 adopts, at the highest level anyway, the same concepts
5 of why use a fingerprint instead of a watermark and
6 lists the same language. It seems like a bit of a
7 defensive move. This is how I'm going to deal with this
8 industry out here, this fingerprint industry; that is
9 usurping this digital watermarking thing I've been
10 trying to do which is not working as a business.

11 Again, materiality and intent can be
12 inferred from the facts we've shown in many documents in
13 our opposition brief.

14 On to Page 13, Slide 13, there was no
15 fingerprinting prior -- fingerprinting prior art cited
16 at all by Blue Spike in that first patent application
17 filed in September 2000. None. He goes out of his way
18 to describe copiously the history of watermarking,
19 injecting an identifier and signal. In general,
20 signaling processing concepts. Just enormous amount of
21 prior art was disclosed that first time. Had nothing to
22 do with fingerprint. Didn't disclose Muscle Fish,
23 didn't disclose Tuneprint or any of the other handful of
24 fingerprinting companies and work that he knew about at
25 that time, because he wanted the patent. He needed that

1 patent. In later applications, he did disclose the
2 Muscle Fish patent and other references. By -- it was
3 pretty thin. By and large, he's hiding those -- by
4 Audible Magic's contention, hiding and bearing those
5 couple of handful of relevant references in hundreds and
6 hundreds of watermarking references. And there's law
7 that this bearing of prior art can also indicate -- can
8 indicate intent to deceive.

9 I just want to pause for a moment. The
10 inequitable conduct theory and the facts regarding
11 Muscle Fish and Mr. Moskowitz's exposure to Muscle
12 Fish's listing of language from their technology in his
13 patent application overlaps substantially with the
14 unjust enrichment theories. Blue Spike does not
15 challenge Audible Magic's unjust enrichment theory under
16 the patent law. So as we prepare for trial in this
17 case, we put forth to the Court the patent law theory,
18 where we would ask for correction of inventorship in
19 that the Muscle Fish gentlemen contributed, in our
20 theory, to the invention. Not just that he knew about
21 it. He took the ideas.

22 So the factual history of his exposure of
23 these ideas and use of them that I just described of an
24 equitable conduct also supports Audible Magic's unjust
25 enrichments counterclaim.

1 So on Slide 14 now. So we're a couple of
2 months after Mr. Moskowitz has filed his initial patent
3 application in December 2000. It's clear what his
4 strategy is. He's looking around. Signal abstracts may
5 be better than the watermarking they've been doing. "We
6 do not have the technology to do this." This is the
7 turn of the century and he's not created any signaling
8 abstracting technology as he's claimed it, or any
9 fingerprinting technology of any kind. We don't have
10 this technology. This is back in -- in the day.

11 There's a number of companies which
12 currently do have this technology. It's clear there
13 he's talking about companies like Muscle Fish and
14 Tuneprint. We don't have a problem implementing this
15 technology as part of our business, especially if we can
16 get the technology from elsewhere. So he's just filed
17 patents on what others were doing. We know he knew
18 about it before he filed that patent. And now after
19 he's filed that patent, he's saying, Okay, great. I've
20 got some patent in my back pocket. Now, I'm going to go
21 out to these people who really invented this and see if
22 I can partner with them and get some value from this
23 stuff that they're doing.

24 This is, we believe, very serious evidence
25 of Mr. Moskowitz's intent to deceive. His intent to

1 leverage other folks' intellectual property,
2 particularly our client, Muscle Fish and Audible Magic,
3 and summary judgment of these types of factual issues is
4 just not appropriate.

5 If you could turn to Slide 15, Your Honor.
6 This is two months after that last e-mail. He's already
7 said internally, We want to go out there and see who we
8 can work with and get this fingerprinting technology.
9 He's, at this point, told his coinventor and business
10 partner, Mike Berry, in a document here, Please reach
11 out to Muscle Fish and others. See who we can partner
12 with. Remember, he learned about Muscle Fish back in
13 '97.

14 And Slide 15, this is Exhibit 71. Now,
15 this is an Audible Magic e-mail from that time. We just
16 got a call from Mike Berry from Blue Spike. They're
17 interested in partnering with Audible Magic to come up
18 with a hybrid watermarking CBR system. CBR is a word
19 that means content-based recognition; that's Muscle
20 Fish's and Audible Magic's technology. So now we see
21 the result of that strategy of, we know about
22 fingerprinting companies. We're going to file a patent
23 on their stuff that's already out there, get it in our
24 back pocket. We're going to reach out and try to
25 partner with the companies who've already been doing

1 that so we can get some value. And, of course, the
2 first on the list that they reach out to is our client,
3 Audible Magic.

4 He's not -- Mr. Moskowitz is not saying, I
5 invented CBR. He's saying, I want to use yours, Audible
6 Magic. Again, evidence of knowledge and intent to
7 deceive through this chronology.

8 Slide 16, "intent can be inferred 'based'
9 on contradictory assertions," from "testimony regarding
10 knowledge and possession of documents lacked
11 credibility." This chronology is the kind of evidence
12 that a jury or a trier of fact can reasonably infer
13 intent from. The allegations are of a taking on our
14 unjust enrichment counterclaims. A trier of fact may
15 look at them and come to the conclusion, after assessing
16 the witnesses and their credibility, whether, in fact,
17 something was taken and whether or not they're telling
18 the truth. The type of dispute that's well suited for a
19 trier of fact, not summary disposition.

20 Under the inequitable conduct standard --
21 it's true there's a heightened standard now under the --
22 Therasense case, but it's still recognized in Therasense
23 itself, that deceptive intent is rarely proved by direct
24 evidence. It's often inferred from the facts. Folks
25 who deceive do not write memos about it outlining the

1 plan, typically. And here would be evidence that we
2 submit is overwhelming and the inferences are clear.
3 They are the most reasonable inference from the sequence
4 of evidences and the activities that happen and when
5 they happen.

6 And also from Mr. Moskowitz's deceptive
7 behavior at his deposition, and we cite some specific
8 examples of that, but again, this indicates that this is
9 the type of issue where one must look at the witness and
10 determine whether they are telling the truth.

11 On to Page 17, Your Honor, mentioned "Blue
12 Spike did not challenge Audible Magic's patent law-based
13 unjust enrichment claim." They challenge the common --
14 there's a corresponding common law unjust enrichment
15 claim under Texas law, that after Audible Magic had
16 invested resources into developing value that that value
17 was unfairly usurped by Blue Spike and Mr. Moskowitz.
18 And by that, I mean two specific things under the common
19 law claim. It is true, if it's public -- if what was
20 taken was public information, purely public
21 information -- for example, an article or a public
22 relief about Muscle Fish's material -- it would be
23 actionable under the patent law. They don't dispute
24 that cause here. It would not be actionable under the
25 common law. It would be -- because it would be

1 preempted by the Patent Act. Common law unjust
2 enrichment can't protect public information that way.
3 Only the Patent Law regime can.

4 But there's a piece of the allegation that
5 is confidential information. It's not the notion of
6 perceptual features, per se. That was in publications
7 and in Muscle Fish's public products which Mr. Moskowitz
8 knew about. But it was the benefits over watermarking.
9 Remember, 1997 through 2000, this is the moment when the
10 internet audio and music on the internet was just
11 starting.

12 And so there was -- things are taken for
13 granted now in terms of many companies thinking about
14 this -- it's just evident because we're all on the
15 Internet all the time, and using technology to identify
16 music is not an uncommon thing. But at the time, the
17 music industry faced a real problem and there was lots
18 of folks vying for the solution. And the biggest public
19 conversation, the only public conversation was
20 watermarking.

21 That's what -- there's an entire industry
22 standard process for the record industry and all the
23 tech companies to get together and say, Okay. We're
24 going to solve a problem in the way that Mr. Moskowitz
25 is (unintelligible). Yet, our client, these engineers

1 sitting in California, working at a very small shop and
2 came up with this idea, Oh, gosh, we could have a more
3 flexible way to do this. That was not a public -- there
4 was not a public conversation about the mode of
5 application of fingerprinting. That was their
6 confidential information they exchanged in an exchange
7 with Mr. Moskowitz that he recognized was confidential.
8 He's marking their e-mails "confidential." And he's
9 saying, This is your proprietary database technology.
10 Your applications that you've described for me and
11 Mr. Blum, one of our engineers, told him -- I was
12 talking with Mr. Moskowitz about the benefits over
13 watermarking, our approach to the problem in these
14 confidential discussions.

15 So at least as to that information, the
16 common law unjust enrichment theory, is not preempted.
17 They've not asserted at all that that information was
18 not confidential. The document says those exchanges
19 were confidential. And that's really their only
20 argument as to the common law unjust enrichment claim.
21 It's -- that aspect of the claim is not preempted. It's
22 appropriate for the jury.

23 And on Slide 18, we've -- some law is
24 cited, circuit law and Texas law, about what can -- what
25 can create an implied contractual confidentiality

1 relationship. University of Colorado Foundation vs.
2 American Cyanamid Company is a good case to look at. It
3 lays out a case law -- a law -- a lot like this where
4 the counterclaim plaintiff was -- perhaps it was the
5 plaintiff, I've forgotten -- was saying we both have a
6 patent law based on unjust enrichment claim. And then
7 for a certain portion of the confidential exchanges
8 we've had with the other side, we also have a common law
9 claim based on an implied contract. And it's our
10 contention that it implied a confidential relationship
11 that arose in those exchanges that Mr. Moskowitz marked
12 "confidential."

13 On to Slide 19, Your Honor. So with all
14 that background, we move forward to the year 2012.
15 Mr. Moskowitz now has four patents and he initiates a
16 wave of patent infringement lawsuits in this Court. And
17 on the surface of that, it appears that he purported to
18 have a product called the Giovanni Abstraction Machine.
19 It did not exist. He's telling the world, You can buy
20 this thing for \$10,000. And he says this technology of
21 his -- and he claims he has technology, and I quote from
22 his website, from Blue Spike's website. "This
23 technology has powered his Blue Spike products since the
24 turn of the century."

25 So we've just seen a document from

1 December 2000, I think that qualifies as the turn of the
2 century. When Mr. Moskowitz is saying, We do not have
3 this technology yet. He didn't have the technology. He
4 made the story up to serve these lawsuits to put out
5 publically, either to potential defendants to settle,
6 leverage to get them to settle or potentially for those
7 in the community to see if they are going to be trying a
8 case in this matter. And that is of great concern. And
9 I hate to put it that bluntly, but I believe that is
10 what is going on.

11 In his deposition transcript, and this is
12 as of January of this year, I asked him:

13 "As of February 2001, had you created this
14 technology that you now say powered your products since
15 the turn of the century? You've not done that, right?"

16 "That's right. That's exactly what I've
17 said."

18 So he admitted it. That kind of false
19 statement in the market is injurious to companies like
20 Audible Magic. Both because it creates confusion in the
21 market. And we don't even have to show actual confusion
22 around the Lanham Act. The standard here is, is there
23 likelihood of confusion? Is this the kind of statement
24 that is likely to cause confusion in the substantial
25 number of the consuming public? The answer is yes.

1 When reading those statements whether it's a commercial
2 partner to a prospective juror or Audible Magic's
3 investors, putting pressure on them to settle, these are
4 valid forms of injury and they're likely to be cause of
5 confusion. And it's the likely confusion that we'd like
6 to address through this counterclaim.

7 On Slide 20, Your Honor, if we may proceed
8 there. Similar, another press release on Blue Spike's
9 website says the signal abstract technology is "the same
10 technology powering its own products such as the
11 Giovanni Abstraction Machine." I asked Mr. Moskowitz
12 and this, again, led -- finally led, once I got this
13 admission, led to our dismissal -- request for dismissal
14 of our patent counterclaim. Is there a Giovanni
15 Abstraction Machine that can be purchased that powers,
16 you know, your own products with this signal abstracting
17 technology? And he admitted finally, in his deposition,
18 "I said the Giovanni Abstraction Machine was never
19 built." That statement is not true. It's on Blue
20 Spike's website. It's misleading, to -- has a
21 likelihood of being misleading to the substantial
22 portion of the public and, therefore, constitutes a
23 violation of the Lanham Act. It's unfair competition.

24 On Slide 21, again, the Giovanni
25 Abstraction Machine itself, that offer, we're no longer

1 pursuing that under the patent theory, but it is still
2 patently false. And with that, I'll conclude. The law
3 is, Your Honor, that where a defendant puts out a
4 product that was patently fraudulent and the advertising
5 accompanying those products was the vehicle employed to
6 perpetrate the fraud, that type of activity is
7 actionable under the Lanham Act, and so summary judgment
8 should be denied on that claim as well. And that's all
9 I have on that, Your Honor, thank you.

10 THE COURT: Thank you. Any response?

11 MR. HONEA: Just briefly, Your Honor. With
12 the inequitable conduct claim, again, there's no
13 evidence that anything confidential was actually
14 provided to Scott Moskowitz or Mike Berry. And, in
15 fact, Mike Berry hasn't been brought into this lawsuit
16 for anything that they allege he took. They allege it,
17 but they didn't even try to bring him in the lawsuit, so
18 it seems to be a little thin there. And they failed to
19 address that the 223 patent of Audible Magic was
20 subsequently put into the patent -- to the -- into the
21 patent office and was deemed to be the closest to the
22 invention for purposes of prosecuting the remaining of
23 the patents. So it -- they failed to show anything
24 could have been material even if they had shown that
25 there was something provided.

1 So that -- would -- with inequitable
2 conduct, I want to make that point. And then -- and
3 with the Lanham Act claims, that -- Blue Spike offered a
4 product, but similar to a builder offering to build a
5 home, it doesn't have to actually be built yet for there
6 to be an offering. So I don't think it's misled anyone
7 in the public, and I think the facts in the briefings
8 show that it wasn't misleading or caused any injury. So
9 thank you.

10 THE COURT: Thank you. All right.

11 MR. RAMSEY: Nothing further, Your Honor.

12 THE COURT: All right.

13 MR. ANDERSON: Your Honor, Mr. Ramsey
14 covered two motions, so if I could just go on with the
15 other motion?

16 THE COURT: Sure.

17 MR. ANDERSON: Thank you, Your Honor. So
18 I'll be responding to Audible Magic's motion to dismiss
19 its counterclaim. And I'd just like to begin by
20 pointing out that there is prejudice to Blue Spike. It
21 would be prejudiced to Blue Spike if Audible Magic is
22 able to dismiss that claim without prejudice. As Your
23 Honor knows, this case has been going on for two and a
24 half to three years, so we have -- Blue Spike has
25 drafted claim construction briefing on the 308 patent,

1 obviously argued in claim construction and had claim
2 construction on that issue. Blue Spike created a
3 tutorial on the 308 patent. We've had over a dozen
4 depositions of Audible Magic and Blue Spike, actually of
5 just Audible Magic employees and representatives, and
6 some of them on multiple days. And the 308 patent is at
7 issue in each of those depositions as well. There have
8 been discovery requests and responses and there have
9 been e-mails and meet-and-confers, so we have spent a
10 considerable amount of time on this 308 patent.

11 So at this point in the case, the time to
12 amend the pleadings has long passed, discovery has
13 ended, and it's inappropriate at this time for Audible
14 Magic to be asking to withdraw that counterclaim without
15 prejudice, so they'd have their cake and eat it too.

16 So Audible Magic talks about being
17 confused. They're saying in their briefing, and here
18 today, that Blue Spike --

19 THE COURT: Excuse me.

20 MR. ANDERSON: Bless you.

21 THE COURT: Sorry. Thank you.

22 MR. ANDERSON: -- that Blue Spike gave
23 conflicting statements about whether this Giovanni
24 Abstraction Machine actually existed. And I believe
25 that's misleading, Your Honor. We -- from very early

1 on, Blue Spike expressed to Audible Magic that the
2 program, that the product did not actually exist. In
3 the -- you know, turning to the actual -- to Audible
4 Magic's motion to dismiss -- I'm sorry I don't have a
5 copy here handy for you.

6 THE COURT: Well, I've got it in front of
7 me. What page are you looking at?

8 MR. ANDERSON: I'll be looking at Pages 4
9 and 5.

10 THE COURT: Okay.

11 MR. ANDERSON: So Blue Spike here, in its
12 response to whether it had offered the Giovanni
13 Abstraction Machine, says that -- in the middle there,
14 it did not. Instead -- let's see. Blue Spike, LLC
15 provided, for a brief period of time, a product offering
16 named Giovanni Abstraction Machine, which was a service
17 that Blue Spike, LLC offered to build, akin to a builder
18 being hired to build a house because he has the
19 knowledge to do so in his possession.

20 So -- and then on the next page, Blue Spike
21 was asked to admit that it has never written any source
22 code relating to the Giovanni Abstraction Machine. And
23 I'd like to point out how broad that statement is.
24 We're not asking -- they're not asking now whether a
25 product existed. They're asking if somebody started, if

1 there was -- we're talking about relating to the
2 Giovanni Abstraction Machine. It's potential -- it's
3 possible that it's some basic code from the watermarking
4 product could be used. I mean, it's a very, very broad
5 statement, and Blue Spike's answer is that employees may
6 have written some source code relating to that product
7 or service over a decade. But that's not to say that
8 the product didn't exist. And so Audible Magic followed
9 up on that, and they said, well -- they would like --
10 they would like to have access to whatever source code
11 did exist. And Blue Spike said that to the extent that
12 any code exists, Blue Spike would provide that. And
13 Ms. Caridis, for Audible Magic, responded -- recognizing
14 that statement and said, Okay, to the extent that that
15 code exists, then we do want to review that code. And
16 this is in an exhibit attached to Audible Magic -- Blue
17 Spike's opposition.

18 Now, Blue Spike looked and found no code
19 and expressed that to Audible Magic. And said, Not only
20 is there not a product, we don't even have any code.
21 And then to the extent that any third parties might have
22 some code that we don't know, but we have done our due
23 diligence on that. So Audible Magic still maintains
24 that they were confused about whether or not this
25 product existed despite the fact that Blue Spike has

1 said explicitly that it didn't exist.

2 Now in Blue Spike's claim construction
3 briefing, Blue Spike said specifically that the product
4 had never existed. And this is in a footnote in Blue
5 Spike's claim construction briefing. Blue Spike says,
6 Blue Spike did not, in fact, sell the product that
7 Audible Magic accuses. Blue Spike offered a product for
8 sale. Again, as a custom home builder advertises the
9 ability to build a home. But Audible Magic said that --
10 they actually ignored that very explicit statement.
11 They didn't mention that in their briefing at all. They
12 said they were confused about what they claim was some
13 sort of implied admission that this product existed.
14 They said in Blue Spike's tutorial when Blue Spike was
15 discussing how that product would work that that
16 confused them about whether the product actually
17 existed. And so we have a lot of examples here. The
18 evidence that -- we believe all the evidence is there in
19 the briefing. But there is a lot of examples where Blue
20 Spike has continually admitted and told Audible Magic
21 that the product does not exist. And so -- excuse me,
22 Your Honor.

23 I'd like to refer to Defendant's Exhibit --
24 or Slide Number 20, that Mr. Ramsey brought before the
25 Court.

1 THE COURT: I got it.

2 MR. ANDERSON: And you'll notice that we
3 need to look at the question again that was asked again
4 of Mr. Moskowitz. He said, "Is it true that the
5 Giovanni Abstraction Machine, that product never existed
6 in any tangible form that could actually be purchased?"
7 Now, he's not talking about there's any related code,
8 whether anything had been started. He's asking if
9 there's a product for sale. And Mr. Moskowitz says, No,
10 that machine was never built.

11 So for Audible Magic to say, Well, that was
12 fine in a definitive answer, I don't think it's
13 convincing, Your Honor. That's the same answer that
14 Blue Spike has been giving since the very beginning.
15 And so this idea that Audible Magic was confused, I
16 don't think applies today. And so when you take that,
17 of course, again, with this prejudice, compare that to
18 the prejudice faced by Blue Spike, it just doesn't make
19 sense to allow them to dismiss so late in the case,
20 that claim.

21 Now, another issue here is Audible Magic
22 and their saying, Well, we can't dismiss without
23 prejudice. We'd like to substitute that claim. And
24 again, the problem there is -- extensively, the reason
25 is because they were confused. But, of course, they

1 could have asserted that Number 9 claim from the very
2 beginning. They had three amended complaints in which
3 they could have asserted that claim. And there was no
4 reason why they would wait until they felt definitive --
5 that it was definitive that no product existed before
6 they would assert that claim.

7 So to allow them to assert that now, post
8 claim construction, when there are terms within that
9 claim that would need to be construed, would, again, be
10 very prejudicial to Blue Spike and it's just beyond --
11 it's just not appropriate at this late stage in the
12 case.

13 And so Blue Spike cites to, I believe,
14 Elbaor v. Tripath Imaging, 279 F.3d 314. And there, the
15 Court says that in situations like this, where
16 dismissing without prejudice is not appropriate, that
17 the Court can craft conditions that will cure that
18 prejudice. So Blue Spike wants the counterclaim gone as
19 much as Audible Magic, but Blue Spike doesn't want to be
20 prejudiced by dismissal of that claim. So dismissal
21 with prejudice, we believe, is a more fair result here.

22 And also, Blue Spike believes that it
23 should be awarded its fees for everything that it did in
24 conjunction with preparing for this 308, in defending
25 this 308 patent.

1 One thing that I didn't mention, too, here
2 is that the 308 patent clearly applies to song data that
3 is presented on this client media player. And I won't
4 rehash the claim construction where Blue Spike was
5 saying client should mean user, but it still says
6 "client." So there's this data that's being displayed
7 elsewhere on this computer, and so it's simply not the
8 case that the -- that the little description on my
9 Shopify -- let me say it this way: That description of
10 the Giovanni Abstraction Machine on my Shopify, no one
11 indicated that there was this client media player,
12 and -- the -- in fact, Audible Magic has products that
13 do not display the information. It might transmit it or
14 keep it or have some action that's tied to that, but not
15 necessarily displaying. And so, it's Blue Spike's
16 position that that counterclaim wasn't even -- didn't
17 even -- that obviously the Giovanni Abstraction Machine
18 did not infringe that counterclaim and that was
19 relatively -- or very obvious. So, again, Blue Spike
20 then asks the Court to dismiss that counterclaim with
21 prejudice and then allow Blue Spike its fees related to
22 that claim. Thank you.

23 THE COURT: Thank you, Mr. Anderson.

24 MR. RAMSEY: May I respond to some of that,
25 Your Honor?

1 THE COURT: Yes, sir, Mr. Ramsey.

2 MR. RAMSEY: All right. I'll be brief.

3 In -- the timeline of the parties' interactions around
4 this topic is salient. I mentioned before that, really,
5 this case didn't get going until about March/April of
6 2014. As of May 2014, parties were asking to look at
7 each other's code. We asked Blue Spike to review the
8 Giovanni Abstraction Machine code that corresponds to
9 the product that they were offering for sale, and they
10 said, Yes, you can come to Tyler and look at it there.
11 Ms. Caridis had purchased a plane ticket to come down
12 here and look at the code. Mr. Brazier (phonetic) said
13 it will be available. It was shortly after she had
14 scheduled to come down there, in a call, they said, No,
15 the code's not going to be available. And Mr. Gart
16 [sic], who's not in the courtroom today, made an
17 interesting comment. I don't remember the exact
18 substance of it, to be honest, but it did suggest that
19 there may not be code. He's not coming out and telling
20 me there's no code. There's not product. It's not that
21 clear at all. It was, Well, maybe there's a code.
22 We're going to see if it's there. You can come look at
23 it. And so it got me thinking. A caucus with Audible
24 Magic -- and this is in May of 2014, and we said, Look,
25 we determined, well, if there's really not a product and

1 they will agree to take down the offer for sale, then we
2 may sell -- dismiss the claim right there. So I invited
3 him to a settlement conversation to just clarify that
4 fact in a concrete enough way that we could rely on it.
5 And if that turned out to be the case, then we could
6 have done -- could have dismissed it right then and not
7 had the proceeding. No response to that at all.

8 So throughout the summer, as discovery was
9 getting (unintelligible) in summer of 2014, we sent
10 request for admissions and interrogatories. Request for
11 admission asked, Is there code related to the Giovanni
12 Abstraction Machine, because I just heard a suggestion
13 that it might not be? At the same time, I'd been
14 offered to come and review it. And the answer was
15 denied. Admit there is no such code, denied. All
16 right. So there is such code, so please produce it. At
17 the same time, in their interrogatory responses, this is
18 response to Interrogatory 18, we're asking about the
19 Giovanni Abstraction Machine and I quote, Blue Spike
20 says, "The Giovanni Abstraction Machine was a software
21 product offering that could be utilized to create
22 abstracts that would be utilized in a system to monitor
23 signals." So we've got interrogatories telling us this
24 is how this thing works, this is what it does. It's
25 talking about it in operational terms.

1 It's also true that in the same
2 interrogatory responses -- their interrogatory responses
3 that say we've not sold this product. It's not been
4 created. So I'm just getting conflicting messages for
5 almost a year now. Sometimes they're saying, Well, it
6 might exist. Sometimes they're saying, Well, there
7 might be a code related to it, but maybe not all the
8 code. At other moments, they're saying, Come look at
9 the code. And then in other places, they're saying,
10 Yeah, it doesn't exist. We show up at the Markman
11 hearing -- we had been thinking of this for a long
12 time -- we hear presentation that describes the
13 operation of the Giovanni Abstraction Machine. This is
14 what it does. We're trying to simplify the case, not
15 make it more complicated. If we'd just get a firm
16 answer when I invited that conversation in May, it would
17 have been a much simpler process to simply come to an
18 agreement and say, Look, the thing doesn't exist. Let's
19 not waste our time. We would have asked that -- is --
20 that the offer for sale be removed because it is
21 confusing. Ultimately, they did that anyway. Once that
22 happened, then -- I have a patent counterclaim on a
23 couple of years of prior offer for sale that doesn't
24 seem like it's worth burdening anybody with.

25 I think it's not fair to fault Audible

1 Magic for this. We can't waive our rights to assert a
2 patent claim against a -- and by the way, a patent claim
3 that is viable to this moment. We've got an expert
4 report and it's not rebutted. I want to make that
5 absolutely clear. We're not running away from our
6 patent claim. It's just a matter of it not being worth
7 it at this point because they removed the offer for sale
8 and we have confirmation that it doesn't exist.

9 I think it would -- I think it is fair to
10 take that Blue Spike -- for sending these conflicting
11 messages over the course of a year. When we asked, Does
12 the product exist, simply tell us, No, Mr. Ramsey, the
13 product does not exist. It's that simple. There is no
14 such thing. They didn't want to do that. They didn't
15 want to do that because they kind of want to have --
16 Mr. Anderson mentioned having it both ways. That's
17 exactly what they want. They want to be able to pitch
18 this product and we're a real company. We've got this
19 product that implements our patents, so they don't want
20 to be on the record as saying, No, the thing doesn't
21 exist. It's actually just a fabrication. So throughout
22 the course of the case, that played out in our
23 exchanges. We finally got sworn testimony from two
24 people that said it doesn't exist now and it's never
25 existed. Once that happened, instead of the conflicting

1 messages I'm getting through the written discovery and
2 then in our informal interactions, then it's sufficient
3 for me to look at my client and say, Okay, you're not
4 going to waive some potential patent rights by walking
5 away from this claim. Until this happens, we can't rely
6 on these conflicting messages.

7 There is not a big investment in this part
8 of the case. The 308 patent's also prior art. I'll
9 note that the deposition questions of Audible Magic's
10 witnesses talked about it as prior art, not about the
11 patent counterclaims. There's no questions at all about
12 the patent counterclaims. There is no substantial
13 written discovery. It was not a big list. And if only
14 Blue Spike had taken me up on my letter in May and said,
15 Okay, the thing doesn't exist, let's have a settlement
16 talk and not send me conflicting messages for a number
17 of months while I'm trying to sort out, shall I waive
18 this right, shall our client waive this right, or shall
19 we proceed and try to get an answer through discovery,
20 we elected the latter because we're not going to waive
21 our patent rights.

22 So I think that's all I have to say, Your
23 Honor. There's no prejudice. This is not a big piece
24 of the case. The case that Mr. Anderson cites is a Rule
25 41 case about dismissing the entire case when there's a

1 summary judgment motion pending. That's not the
2 situation here. We're just asking to pare it down.
3 Perhaps we should have filed under Rule 15 to amend the
4 pleadings to simply drop a claim. And their leave to
5 amend shall be freely given. We ask the Court to grant
6 that relief. We're happy to submit an amended complaint
7 that simply drops the patent counterclaim and proceed
8 with the rest of the case. Thank you, Your Honor.

9 THE COURT: Thank you. Anything else on
10 this issue?

11 MR. ANDERSON: Actually, just a very small
12 point. Your Honor, Blue Spike already mentioned a lot
13 of specifics that I pointed out specifically in
14 construction and whatnot and the RFAs. I just wanted to
15 direct the Court's attention to Exhibit 12 of Docket
16 Number 1617; that's Blue Spike's sur-reply. And that is
17 a letter from Mr. Garteiser to Mr. Higgins for Audible
18 Magic that says, There's no code to produce in response
19 to your request with respect to the accused device.
20 That's Mr. Garteiser responding to the May request that
21 Mr. Ramsey is talking about. And so Mr. Ramsey said if
22 only Blue Spike had given us this clear indication that
23 wasn't -- the code wasn't there, then we would have been
24 able to drop it. And so that is that clear indication.

25 I'd also point the Court to Page 3 of that

1 sur-reply of docket 1617 that has a timeline that's also
2 instructive of how those events played out. Thank you.

3 THE COURT: Thank you. Anything else from
4 Audible Magic on that?

5 MR. RAMSEY: Nothing else, Your Honor. I
6 think I've said enough.

7 THE COURT: Okay. If y'all don't mind,
8 let's take 10 minutes before we embark on the other
9 ones. We'll be in recess.

10 THE BAILIFF: All rise.

11 (Whereupon, a recess was had from 10:57
12 a.m. to 11:10 a.m.)

13 THE BAILIFF: All rise.

14 THE COURT: Please be seated.

15 THE BAILIFF: Court is now in session.

16 THE COURT: Okay.

17 MR. RAMSEY: May we proceed, Your Honor?

18 THE COURT: Yes, you may.

19 MR. FINDLAY: May I approach, Your Honor,
20 again, with some slides?

21 MR. RAMSEY: All right. Your Honor,
22 Audible Magic moves for summary judgment of
23 non-infringement on Blue Spike's patents. I'll take
24 that issue up next.

25 So the core of Audible Magic's summary

1 judgment motion and this is -- I'm on Slide 2 of the
2 PowerPoints --

3 THE COURT: Okay.

4 MR. RAMSEY: -- that the Court's been
5 handed. It's whether Blue Spike repeated an emphatic
6 testimony and admissions that a set of numbers called
7 "MFCCs" constitute the abstract element that appears in
8 every single claim of the asserted patent. And
9 correspondingly whether -- if that's not the case,
10 whether Audible Magic infringes the asserted patent.
11 Audible Magic contends that Blue Spike has judicially
12 admitted that MFCCs are not abstracts and, therefore,
13 Audible Magic cannot infringe.

14 Claim -- in Slide 3, the representative
15 claim, this is the lead claim that appears in Blue
16 Spike's contentions, the 700 patent, Claim 1. We can
17 see simply that the word "abstract" appears repeatedly.
18 It appears that way in every claim that's asserted in
19 every patent.

20 On to Slide 4, in broad strokes, the
21 abstract, as it's been mentioned before, can be thought
22 of as a kind of fingerprint. It's a representation of a
23 signal, an audio signal, or some other type of signal.
24 And the Court may recall the claim construction
25 conversation about that. The fingerprints that Audible

1 Magic uses are simply a set of numbers called "MFCCs,"
2 Mel Frequency Cepstral Coefficients. It is a mode of
3 looking at an audio signal and generating -- preparing
4 an appliance of algorithms that generate these numbers,
5 analyzing the spectrum, basically. Ten numbers per
6 second, as it turns out. And that ten numbers per
7 second represents the signal. And that's the accused
8 fingerprint.

9 On Slide 4, we see that Audible Magic's Mel
10 Frequency Cepstral Coefficient, MFCC, is the thing that
11 Blue Spike is now trying to say, This is the fingerprint
12 we accused. So if MFCCs are abstracts, then there would
13 be a finding of infringement. If MFCCs are not
14 abstracts, then there can be no infringement.

15 It's important to note this reality that
16 the -- that Audible Magic's fingerprints are these MFCC
17 numbers is the same both for Audible Magic's own systems
18 that it directly controls, and it's true -- it's the
19 same fingerprint used by all of the customer defendants
20 that are now stayed but important to note this would
21 dispense with the entire action of Blue Spike's claims.

22 On Slide 5, I'm going to walk through a
23 couple of slides that -- just to get some nomenclature
24 down because we're going to hear admissions later and
25 they're references to sort of the words I'm going to

1 explain here in the first couple of slides.

2 So MFCC fingerprints are created by a
3 little module of code. It's about 15 files, something
4 like that, called the "MFCBR" Library. An MFCBR library
5 stands for Muscle Fish Content Based Recognition or
6 Retrieval. So it's a very discrete body of code, source
7 code, that has existed since the '90s, 1997-'98, and it
8 exists to this day and it uses exactly the same
9 methodologies. So the accused MFCC fingerprints are
10 created by the Muscle Fish MFCBR Library.

11 Slide 6, please, Your Honor. Muscle Fish,
12 and later Audible Magic, filed for a patent; shorthand
13 is the 223 patent. Filed for it originally back in
14 1996. It was issued in 1999. This is -- it doesn't
15 deal with broad system level, everything having to do
16 with all kinds of content recognition, but it does
17 describe the MFCC fingerprints, and it is the patent
18 that corresponds to the MFCBR Library. It describes the
19 accused products today, the core fingerprinting piece,
20 in any event. And here we see on Slide 6 -- this is all
21 undisputed, by the way.

22 And Slide 5, which I'd just been speaking
23 about, Blue Spike's own expert says that the MFCBR
24 Library "was the internal basic technology on which all
25 the other applications are built on." In other words,

1 their own expert is saying, Yeah, that's what I'm
2 talking about when I'm -- when we're asking the question
3 is an abstract or not, I'm talking about MFCBR Library
4 who creates these MFCC fingerprints. So that's
5 undisputed.

6 THE COURT: You have to pronounce the other
7 expert's name on Page 6.

8 MR. RAMSEY: The long version of MFCC.

9 THE COURT: I just love it. No, Mr. -- I
10 can't even say it --

11 MR. RAMSEY: Papakonstantinou. I've
12 practiced for a long time.

13 THE COURT: That is a great name.

14 MR. RAMSEY: It's quite a name.

15 THE COURT: Love it. Okay.

16 MR. RAMSEY: So it's undisputed that these
17 MFCCs are created by the MFCBR Library and that MFCBR
18 Library is what Blue Spike is saying, Okay, that's where
19 the abstract's going to be if there's an abstract at
20 all.

21 Slide 6, again, Blue Spike's expert,
22 Dr. Papakonstantinou says this MFCBR Library embodies
23 the teaching of the 223 patent. So that's not me saying
24 that. That is an admission. It's undisputed that the
25 223 patent describes these Audible Magic fingerprints in

1 the MFCBR Library.

2 Slide 7, please, Your Honor. Again,
3 Audible Magic -- Blue Spike's own expert says that this
4 223 patent describes the MFCBR Library and does so rely
5 on Audible Magic's own testimony about the accused
6 products today. That's really important to note. When
7 Blue Spike's expert says the 223 patent describes what's
8 in this MFCBR Library, he's not -- just -- not that it
9 creates an issue of dispute. I just want to be clear.
10 He's not pointing to MFCBR Library in the past. He's
11 quoting testimony of our engineer, Thom Blum, talking
12 about the accused products today. And Blue Spike's
13 counsel's asking Mr. Blum, our engineer, Does the MFCBR
14 Library -- does your core technology in this MFCBR
15 Library practice the 223 patent?

16 "Yes, I believe that's true."

17 Because it is true. And then
18 Dr. Papakonstantinou relies on that to opine that the
19 223 patent reflects the accused products today. This
20 will all become -- why this is important will become
21 clear in a moment.

22 Slide 8, Your Honor. The accused MFCC
23 fingerprints are created by the MFCBR Library. These
24 are the accused products today. And it's admitted, it
25 is undisputed, that the 223 patent describes the core

1 technology of those -- that MFCCR Library and these MFCC
2 fingerprints. So when we hear admissions about the 223
3 patent, those are admissions about what is in Audible
4 Magic's product today. It is undisputed. Blue Spike's
5 own experts have equated these things.

6 Slide 9, please, Your Honor. So here's the
7 rub in today's motion for summary judgment.

8 Mr. Moskowitz, who's the sole representative of Blue
9 Spike, LLC, he is the driver of this case, he's one of
10 the co-inventors. He's the person that Blue Spike, LLC
11 put forward in its complaint as coining the term "signal
12 abstract," testified and admitted repeatedly --
13 judicially admitted -- that MFCCs are not abstracts.
14 I'm going to read them -- he did this multiple times.
15 He -- I asked him questions about MFCCs and he states in
16 his deposition: "Your contention that an MFCC is
17 somehow equivalent with a signal abstract, I contend
18 that this is not the case."

19 He testified under oath: "The mathematics
20 of MFCCs are not equivalent with a signal abstract on --
21 in any way, shape, or form."

22 I said it many times. A signal abstract is
23 not the same thing as the MFCCs. And, again, the claim
24 construction which you based your arguments on was
25 rejected. So he's saying, You lost claim construction,

1 in my view. This is what Mr. Moskowitz says. And under
2 that claim construction, a signal abstract is not the
3 same as the MFCCs. He says that, "The U.S. Patent and
4 Trademark Office of these [sic] United States agrees
5 with me." By that, he means, not in the first
6 application where prior art was withheld, but he
7 disclosed this 223 patent that describes the accused
8 fingerprints in the later of the three patent
9 applications.

10 And he's saying to the patent office, let
11 me have my Blue Spike patents over that 223 patent,
12 which describes MFCC fingerprints. So he's going out of
13 his way to point out that the patent office agrees with
14 me that these MFCC fingerprints are not abstracts.

15 And finally he testifies, "A[n] MFCC, as I
16 understand, is not equivalent to a signal abstract based
17 on the description...as well as the specification and
18 the prosecution history."

19 Please turn to Slide 10, Your Honor. At
20 another point in Mr. Moskowitz's deposition, I walk him
21 through the figures in the 223 patent that describe the
22 creation of Audible Magic's MFCC fingerprints. You
23 can't see it in the picture on the right. It didn't
24 come out very well in the printout, but you can see in
25 these figures, it concludes -- it was 2 through 13 -- it

1 concludes with MFCC computation. That's what you get at
2 the end of the process. You get this MFCC fingerprint
3 at the end. So we're talking through that -- those
4 figures. Mr. Moskowitz, do Figures 2 through 13 of the
5 223 patent describe your process of creating signal
6 abstracts? He says, No, that's not true at all. So
7 he's saying that that patent that describes the accused
8 fingerprints, as I've just shown -- Blue Spike's experts
9 say the 223 patent describes those fingerprints. He's
10 saying, That's not my -- those are not my abstracts.
11 That's not how you create them. Again, another
12 admission that MFCCs are not the abstracts of the
13 asserted patents.

14 On Slide 11, Your Honor, it's clear that
15 when Mr. Moskowitz is testifying as to what is not an
16 abstract -- he says, MFCCs are not an abstract, he was
17 using this Court's claim construction. In his
18 deposition over the course of six days, he referenced
19 the claim construction 114 times, I believe. I've
20 forgotten the exact number. Certainly over 100. He
21 repeatedly testified, I was involved in the claim
22 construction process. I helped craft it. I
23 participated and, in fact, showed up at the claim
24 construction hearing. And when I asked him, What is
25 your definition of a signal abstract, he says, I will

1 refer you to the Court's claim construction, which was
2 just done on October 1st. He knows the hearing down to
3 the day. That definition is suitable. He states under
4 oath, "I will rely on the claim construction...and know
5 them very well." The third quote down, When I'm talking
6 about signal abstracts, he's talking about
7 abstracts, "as the Court has issued their ruling on the
8 claim construction." And finally, again, about signal
9 abstracts, "It's in the claim construction in which the
10 term 'signal abstract' was defined...I'll stick by those
11 definitions."

12 Mr. Moskowitz knew exactly what he was
13 saying when he testified repeatedly, indeed emphasized
14 and urged upon it, that MFCCs are not the abstracts of
15 his patents.

16 Turn to Page -- Slide 12, Your Honor.
17 There's also no question that Mr. Moskowitz knew what
18 MFCCs are. There's no confusion there. We're
19 discussing MFCCs and he proceeds to describe to me, in
20 great technical detail, "You've asked the question
21 several times about what are MFCCs, or Mel-spaced
22 overlapping triangle filters, which is the way it's
23 described here." And he proceeds to describe it to me
24 in technical terms what an MFCC is. He understands what
25 MFCCs are. There's no confusion in these admissions.

1 Slide 13, Your Honor. So Mr. Moskowitz
2 clearly has repeatedly admitted, urged that, that MFCCs
3 are not the abstracts of the asserted patents. So who
4 is Mr. Moskowitz? Why should this Court hold Blue Spike
5 and Mr. Moskowitz to these judicial admissions? Why
6 should they be binding? You hear the undisputed facts.
7 Blue Spike, LLC, the party plaintiff, put forward in its
8 complaint and repeated in every amended complaint that
9 Mr. Moskowitz is the person who, quote, "coined the term
10 'signal abstract.'" That's what it says in the
11 complaint.

12 They stand by his -- this person as being
13 the one who knows what that term means. In their view,
14 he coined it. He's the co-inventor of the asserted
15 patent. I've mentioned he's helped craft Blue Spike's
16 position and claim construction. He's Blue Spike's sole
17 representative, its only principal, its only investor,
18 certainly as of the time he made these admissions. He's
19 the architect of this litigation.

20 It's important to understand why he made
21 these admissions. It's obvious. I've explained that
22 the fingerprints used today are the same as the prior
23 art fingerprints in this 223 patent and elsewhere. And
24 Mr. Moskowitz and Blue Spike are trying to have it both
25 ways in this case. They're trying, on the one hand, to

1 say, Well, when we're talking about Muscle Fish and
2 Audible Magic's prior art, MFCCs are definitely not
3 abstracts. Then they put the other hat on and they
4 say, Well, when we're talking about infringement, please
5 let us accuse MFCCs as abstracts. They're abstracts
6 when you have that hat on. Can't have it both ways,
7 Your Honor. That -- Mr. Moskowitz made all these
8 admissions because he's trying to avoid Audible Magic's
9 own MFCC fingerprints as prior art.

10 We'll get to it in a little while about why
11 that's not allowable, not only as a matter of law and
12 policy, but as a practical matter. That is one very
13 good reason that this Court should apply the judicial
14 admissions document in this case and rule that Blue
15 Spike is bound to their admissions that MFCCs are not
16 abstracts.

17 On to Slide 14, Your Honor. It's not just
18 Mr. Moskowitz and Blue Spike itself who are saying MFCCs
19 are not abstracts. Now, in early July -- it took us a
20 while to get the deposition scheduled. We submitted
21 this deposition excerpt a bit late, and then Blue Spike
22 has responded to it on paper so it's in the record.
23 But, again, Dr. Papakonstantinou, Blue Spike's witness,
24 I asked him, "Do you think Muscle Fish's feature vectors
25 containing MFCC values anticipate the abstract element

1 of the Blue Spike patents?" There's no mystery what my
2 question was. I used the word "anticipate."

3 Dr. Papakonstantinou's report was about
4 anticipation. It's what -- that's why Blue Spike put it
5 in. I'm asking do these MFCC values meet that word
6 "abstract" in patent claims. "No, I don't believe
7 this," was his sworn testimony. Blue Spike's expert is
8 agreeing with Mr. Moskowitz and Blue Spike that MFCCs
9 are not abstracts.

10 If you turn to Slide 15, Your Honor. One
11 thing about Slide 14, Your Honor -- sorry about this --
12 there's a lot of white text and a lot of un-highlighted
13 text. Why is that there? Dr. Papakonstantinou goes on
14 to explain why he believes -- he doesn't just say it.
15 It's not an offhand remark. He explains to me why MFCCs
16 are not abstracts. He says, Counsel, this is mixing
17 abstracts. In other words, he's telling me when I ask
18 him, Are MFCCs abstracts, I'm mixing things up. He's
19 saying the patents are talking about data-reduced
20 representations. These are what abstracts are. And the
21 MFCCs do not meet that. This is a reasoned, thorough,
22 intentional admission. And for the same, Mr. Moskowitz
23 is making the admission. He doesn't want to get -- he
24 doesn't want to get saddled with Audible Magic's own
25 prior art. They're in a bind here.

1 On to Slide 15, please. On Slide 15, we
2 have the deposition testimony of Michael Berry, who's
3 the co-inventor with Mr. Moskowitz on the Blue Spike
4 patents. And I asked him, When you were writing this
5 patent in 2000, it was not your intent to try to cover
6 prior systems, techniques of creating feature records
7 containing MFCC values? You're trying to claim that."

8 "That was not my intent."

9 Mr. Berry worked at Muscle Fish as a
10 contractor in the '90s and he's admitting, as did
11 Mr. Moskowitz, that these Muscle Fish MFCC fingerprints
12 that are used by Audible Magic to this day, are not
13 abstracts of theses patents.

14 Slide 16, Your Honor. Just to conclude
15 that chain of evidence and admissions with Audible
16 Magic's own expert. Audible Magic's own expert opines
17 and we put in the portions of the opinion detailing
18 precisely why MFCCs are not abstracts. Mr. Moskowitz
19 agrees with them, Dr. Papakonstantinou agrees with him,
20 and Mr. Berry, the other co-inventor of the patent,
21 agrees with our expert. There is overwhelming evidence
22 that MFCCs are not abstracts, which that's accused as
23 the fingerprint, as the abstract in this case.

24 So, to the law, Your Honor, on Slide 17,
25 these admissions constitute judicial admissions, the

1 type of admission that this type of court has the
2 discretion to hold Blue Spike to. A judicial admission
3 is one that's "made in a judicial proceeding," no
4 question about that here. It's "contrary to a fact
5 essential to the theory of recovery." No question that
6 that's the fact here.

7 If MFCCs are not abstracts, there is no way
8 that Audible Magic can infringe the patents. Those
9 admissions must be "deliberate, clear, and unequivocal"
10 in such a way as to -- that giving these admissions,
11 conclusive if that, meets with public policy and have to
12 be about facts on which a judgment can be based. Again,
13 no dispute about that. If MFCCs are not abstracts,
14 there can be no infringement. That's the only thing
15 that Blue Spike's pointing to is the abstract.

16 Slide 18, Your Honor. So first, is this
17 this category of admission that may be called a judicial
18 admission? Yes, in fact, it can be. There's lots of
19 case law in the Fifth Circuit, the Jonibach case, which
20 says the testimonial of admissions may be judicial
21 admissions.

22 There's a number of cases in the Eastern
23 District and Northern District of Texas. The Fifth
24 Circuit adopted the judicial admission test from the
25 Texas state courts, so we relied also upon cases such as

1 Austin versus Miller that say deposition admissions can
2 be binding judicial admissions. The Court can hold a
3 party to those admissions. Austin v. Miller is
4 particularly relevant the way that it's framed this
5 test. Judicial admissions are appropriate in matters in
6 which witnesses quote things that are "well within his
7 competence, and his peculiar experience, knowledge,
8 training, and, indeed, in his official
9 responsibilities." No question Mr. Moskowitz, this --
10 that issue, is MFCC an abstract, are within his peculiar
11 experience. Blue Spike even says that in its complaint.
12 He coined the term "abstract." So he's the one who
13 knows best, they say. And it's certainly within his
14 official responsibilities as the party who prepared the
15 claim construction positions in prosecuting this case.

16 Both "Mr. Moskowitz's and
17 Dr. Papakonstantinou's admissions that MFCCs are not
18 abstracts are contrary to a fact essential to Blue
19 Spike's theory of recovery and may form the basis of
20 summary judgment."

21 Slide 19, Your Honor. This is an important
22 component of the judicial admission doctrines. Were
23 "Mr. Moskowitz's admissions deliberate, clear, and
24 unequivocal?" You bet they were, Your Honor. They were
25 "emphatic and repeated." He understood the Court's

1 claim construction. He understood what "MFCCs" are.
2 These were not offhand comments by an employee far away
3 from the action. These were thoughtful admissions based
4 on the Court's claim construction.

5 He made these admissions even when there
6 was no question pending about the issue. In other
7 words, he's going out of his way to assert from the
8 record and establish that MFCCs are not abstracts.

9 In particular, I was asking a question, and
10 Mr. Moskowitz, described for me the mathematics of how
11 you compare two abstracts. We were on the comparing
12 topic. He didn't answer that question. He went -- he
13 decided to answer a different question and go out of his
14 way and state what is at the bottom of Slide 19. He
15 goes, well, "What I will say is that the mathematics of
16 MFCCs are not equivalent with a signal abstract on -- in
17 any way, shape, or form."

18 That is deliberate, clear, and unequivocal.
19 He's going out of his way to assert it for the record.
20 And, again, the reason is important. He's trying to
21 avoid Audible Magic's own prior art, the same systems
22 that he's accused as they existed in the prior art.
23 He's in a trap. So he's deciding to make the decision,
24 the litigation decision, to admit this fact so that he
25 can attempt to save his patents. That kind of a

1 deliberate choice to concede that MFCCs are not
2 abstracts. They meet the consequences. That
3 consequence should be that if he's going to rely upon
4 that admission to try to save his patent's validity,
5 Audible Magic also cannot infringe by using those same
6 structures.

7 There's no evidence that Mr. Moskowitz
8 didn't understand -- there's some cursory argument, but
9 he never put in a declaration that said, I didn't
10 understand. He did understand.

11 Slide 20, we talked about this a bit
12 already. "Dr. Papakonstantinou's admission was also
13 deliberate, clear, and unequivocal." "Do you believe
14 that Muscle Fish's feature vectors containing MFCC
15 values anticipate the abstract?"

16 "No, I don't believe this."

17 Can you explain to me why?

18 "Deliberate, clear, and unequivocal" reason
19 of intentional admissions.

20 On to Slide 21. So one of the factors in
21 the judicial admission doctrine in the Fifth Circuit and
22 in Texas state law is let's -- we must think about the
23 public policies underlying why one holds a party to
24 clear admissions like this in a deposition. Does it
25 meet public policy? Should the Court exercise its

1 discretion and hold the party to these admissions?

2 In this case, holding Mr. Moskowitz and
3 Blue Spike, LLC to the repeated judicial admissions that
4 MFCCs are not abstracts does meet public policy. I've
5 mentioned repeatedly, but it's very important, he was
6 making the decision to avoid Audible Magic's own
7 fingerprints, the same ones accused in this case, so
8 that he could save the validity of his patent and make
9 admissions in this context.

10 It is fair, and in good public policy
11 and -- as you'll see in a moment -- as a matter of
12 law -- should be held to those admissions.
13 Dr. Papakonstantinou was doing the same thing.

14 On Slide 22, Your Honor, the Court doesn't
15 have to take my word for the fact that this is good
16 public policy. It's also the law. That when a party
17 makes an admission about a structure in the prior art to
18 save the patent validity, they can't take the opposite
19 position in their infringement theories. There's a very
20 old Fifth Circuit case that gets quoted a lot in federal
21 authority that existed before the Federal Circuit even
22 existed. It's Sterner Lighting versus Allied Electric
23 Supply, and the quote is, "A patent may not, like a
24 'nose of wax,' be twisted one way to avoid anticipation
25 and another to find infringement."

1 Blue Spike can't say on the one hand, MFCCs
2 are decidedly not abstracts to avoid anticipation in the
3 prior art, and then at the same time say, But, please
4 let us extract some money from Audible Magic where we
5 want to say MFCCs are abstract. You can't have it both
6 ways. That's the law.

7 Connell versus Sears Roebuck, this is a
8 Federal Circuit case, where the plaintiff in a patent
9 case tried to do exactly this. The Federal Circuit
10 calls it "improperly carrying water on both shoulders."
11 It's an analogy. In the Court below, in the Connell
12 case, the plaintiff had tried to point to a structural
13 element in the prior art and say, This does not meet the
14 claims at the same time that accuse that structure in
15 the accused products.

16 District court cited Sterner and said, No,
17 you can't do that, summary judgment non-infringement.
18 So the plaintiff appealed and the Federal Circuit was
19 having none of it and explained, the plaintiffs on
20 appeal, ignoring the trial court's opinion, ignoring the
21 Fifth Circuit Sterner case, and that reflects a
22 "regrettable lack of candor." And so, again, this --
23 these cases articulate the policy by the Judicial
24 Admission Doctrine should be applied here [sic].

25 Other Federal Circuit and court of claims

1 cases, the predecessor to the Federal Circuit, says that
2 "It is a fundamental principal of patent law that a
3 claim cannot be narrowly construed to avoid invalidity
4 and then broadly construed to encompass the accused
5 device."

6 Again, that's what Blue Spike's trying to
7 do here. They have made their election. They have
8 elected repeatedly through their sole principal, through
9 their expert, and it's supported by the co-inventor of
10 the patent and Audible Magic's experts. MFCCs cannot be
11 abstracts if that patent's going to survive. That's
12 what they want. So they should be held with that. The
13 necessary result of that is that Audible Magic's MFCCs
14 also cannot be abstracts, that are accused in this case.

15 Slide 23, Your Honor. Another reason why
16 it's good public policy for the Court to exercise its
17 discretion and apply the Judicial Admission Doctrine
18 here is Moskowitz is front and center, central to this
19 dispute, it's "not a rogue, uninterested employee" far
20 away in a department who gets pulled into a deposition,
21 doesn't know what's happening in the case. He's crafted
22 the case. He's crafted the claim constructions. He's
23 guiding the litigation strategy and said, in his
24 deposition under oath, I participated in the claim
25 construction. He is the person who, as the inventor, is

1 qualified to admit that MFCCs are not abstracts and
2 mentioned Blue Spike in its complaint stands by
3 Mr. Moskowitz as the person who coined this term.

4 Slide 24. A couple more cases to direct
5 the Court's attention to because I think they are very
6 supportive of Audible Magic's position on this motion.
7 Most recently in GTX versus Kofax, and that was before
8 Judge Davis a few years back. There we're on a motion
9 for summary judgment of non-infringement just like this
10 case. The co-inventor of the patent admitted during his
11 30(b)(1) deposition -- it wasn't a corporate rep
12 deposition -- "that key element of asserted claims did
13 not encompass defendant's approach." That's what's
14 happened here when Mr. Moskowitz, co-inventor and the
15 only principal of the plaintiff, says the MFCCs are not
16 abstracts.

17 In that case, there was actually the
18 plaintiff put in in opposition to summary judgment, and
19 it's some expert evidence -- at least something --
20 saying that -- trying to take the contrary position.
21 But the Court -- Judge Davis noticed that it was
22 cursory. It was not a lot of detail, not enough to
23 overcome the inventor's submission. And beyond that,
24 Judge Davis noted its attorney argument. In this case,
25 we've got repeated strong admissions from Mr. Moskowitz

1 from Dr. Papakonstantinou, from Mr. Berry, and we have
2 the evidence of Audible Magic's own expert why MFCCs are
3 not abstract in the summary judgment record. It is
4 detailed. Blue Spike cannot put it in any event that
5 MFCCs are actual abstracts. They're stuck in a bind
6 here, Your Honor, and they're trying to have it both
7 ways.

8 The GTX case, in that regard, is analogous
9 and the decision can be made under that case. Similarly
10 in the Teashot case from the District of Colorado, it's
11 a case like this where the plaintiff was a sole -- the
12 sole owner and inventor of the party plaintiff, just
13 like Mr. Moskowitz here who admitted in his deposition
14 that his patent didn't cover the type of structure that
15 the defendant used and the Court held him for that. And
16 summary judgment of non-infringement was granted.

17 In general, the Federal Circuit has
18 repeatedly explained that inventors' admissions
19 regarding scope of an invention can limit patent claims
20 and they should in this case as well.

21 On to Slide 25, Your Honor. Really, Blue
22 Spike's only response to the motion is not to say that
23 he did, in fact, make the admissions. It's somehow the
24 one person who represents Blue Spike, LLC, there's
25 nobody else there. He's the only person, the sole

1 director, sole shareholder -- at least at the time he
2 made these admissions -- the only representative somehow
3 doesn't bind the entity that he represents. Who else
4 could it be? They didn't put in any evidence that if he
5 happened to be sitting for a 30(b)(6) deposition at that
6 time that he would have given another answer. He
7 wouldn't have. He would have said exactly the same
8 thing, because everybody's trying to avoid invalidity
9 from Audible Magic's own prior art.

10 But it doesn't matter. He testified that
11 he didn't distinguish between his own testimony and that
12 of Blue Spike, LLC. We've had a number of days of
13 deposition, he goes -- I'm asking questions. He
14 goes, "I mean, it all comes to me so I'm not really
15 clear how you're differentiating between the two
16 entities."

17 He got frustrated when I was trying to
18 slice things that finely because it all -- Blue Spike,
19 LLC is just Mr. Moskowitz. He testified when he was
20 preparing for his deposition, his 30(b)(6) deposition,
21 he would keep referring me back to his 30(b)(1)
22 testimony in December. This was in January. So the
23 fact that some of these admissions were made when
24 Mr. Moskowitz was sitting as a 30(b)(1) representative
25 of Blue Spike as opposed to under a 30(b)(6) notice, in

1 his view, there's no distinction. And I was explaining
2 to him it just doesn't matter as a matter of law.

3 In Slide 26, it's clear -- and this has
4 been the law forever. A "corporation may be deposed by
5 30(b)(6) deposition of 'officer, director, or managing
6 agent.'"

7 "Parties seeking the deposition may
8 identify the specific officer, director, or managing
9 agent to be deposed and notice their deposition under
10 Rule 30(b)(1). The testimony of such a person will be
11 binding on the party."

12 There's no dispute that Mr. Moskowitz is
13 such an officer, director, or managing agent. He's the
14 only one, the only possible person. So we send him a
15 deposition notice under 30(b)(1). His testimony on
16 matters within the scope of the case and what's
17 happening with the company are binding on Blue Spike,
18 LLC. There was no Rule 30(b)(6) for a long time. This
19 is the only way you would take the deposition of a
20 corporation. You would send a 30(b)(1) notice to an
21 agent, an officer, a director, or managing agent,
22 somebody who's able to speak for the company, and ask
23 them questions.

24 Moving to Slide 27. The reason Rule
25 30(b)(6) came into being is because when the parties

1 would do that, the party proffering the witness would
2 inevitably send an individual who said, Oh, my gosh, I
3 only have the this sliver of knowledge. I can't talk
4 about this or that or the other thing. So it's not that
5 that 30(b)(6) is the only way to elicit binding
6 testimony of your company. The opposite is the truth.
7 30(b)(1) was the mechanism for -- since the inception of
8 the Federal Rules of Civil Procedure as far as I know
9 that that happened, that that binding corporate
10 testimony was elicited. 30(b)(6) was just created to
11 fill the hole where you've got a company where somebody
12 shows up and says, Well, I'm an officer and I know these
13 few facts, but I'm going to deny to disclaim corporate
14 knowledge. That happens with three or four 30(b)(1)
15 depositions. We needed a procedural device to solve a
16 problem. You've got to go educate yourself. That's all
17 that 30(b)(6) means, on things beyond your personal
18 knowledge. It's not an issue here.

19 Mr. Moskowitz is Blue Spike, LLC. And we
20 made submissions with -- regarding issues that only
21 involve Blue Spike, LLC, the patent plaintiff in this
22 case. And numerous courts have found that.

23 Phillips versus American Honda, "30(b)(1)
24 testimony of a corporate 'officer, director or managing
25 agent' is 'testimony of the corporation.'" Quote, "such

1 testimony will be, quote, 'binding on the party.'"

2 Numerous cases support that idea. He's
3 bound by his testimony even if he was sitting as a
4 30(b)(1) witness as Blue Spike, LLC's officer, director
5 and managing agent.

6 On Slide 28, Your Honor. Your Honor, they,
7 Blue Spike, attempts to suggest there's some special
8 procedure. There's no special procedure. The cases say
9 the procedure is you "identify a specific officer,
10 director, or managing agent to be deposed and notice
11 that person under Rule 30(b)(1)."

12 And that's what happened here. We sent
13 Mr. Moskowitz his deposition notice and he made these
14 admissions as a corporate officer, director, and
15 managing agent admitting a way that MFCCs are not
16 abstracts. That's the law.

17 It's also important to note at this point,
18 now Dr. Papakonstantinou has similarly admitted that
19 MFCCs are not abstracts. There's no dispute that
20 Dr. Papakonstantinou is being affirmatively put forward
21 as the representative of Blue Spike, LLC about what is
22 and is not an abstract. And he testified under other
23 oath that MFCCs are not abstracts. So we've got two
24 binding representatives.

25 On Slide 29, it's important to recognize

1 that "Blue Spike does not rebut all of this evidence
2 that MFCCs are not 'abstracts.'" They just come back
3 with attorney argument. They put in no evidence to the
4 contrary. And that's fatal to Blue Spike's opposition
5 to this summary judgment motion. As the Court knows,
6 the summary judgment process, the party moving for
7 summary judgment comes forward and puts forward their
8 case, puts forward their evidence. And we've put forth
9 these overwhelming admissions are that MFCCs are not
10 abstracts.

11 The burden then shifts to Blue Spike to
12 come back and go beyond the pleading and designate
13 specific facts that there's a genuine issue for trial.
14 They would have to come back and show that MFCCs are, in
15 fact, abstracts and they didn't do it. Your Honor,
16 didn't do it. Searched the record high and low for
17 actual evidence that MFCCs are abstracts and it's not
18 there. And the reason is, again, Your Honor, they're in
19 a bind. They're trying to avoid invalidity and somehow
20 sustain an infringement case on the same theories that
21 they've waived under their invalidity, their attempt to
22 avoid invalidity. That's just not right. It's not
23 right as a matter of law or a matter of policy. And
24 they've not put any evidence to refute Audible Magic's
25 motion.

1 So to sum up on Slide 30, for all of these
2 reasons, "no reasonable jury could conclude that an
3 accused product infringes where the plaintiff admits
4 that accused products do not meet element of asserted
5 claims." Blue Spike's admitted that MFCCs are not
6 abstracts. If MFCCs are not abstracts, then Audible
7 Magic, through its MFCC fingerprints, cannot infringe.

8 Applying the Judicial Admission Doctrine
9 here would be the most efficient mode to proceed.
10 There's a number of issues in this case. It would
11 streamline the case. It might even, frankly, Your
12 Honor, allow the parties a meaningful conversation, you
13 never know. At a glance, right at this point, these
14 judicial admissions are so clear that simply reducing
15 the breadth of the case and narrowing it based on
16 admissions is consistent with the purpose of summary
17 judgment in general. And for those reasons, Audible
18 Magic respectfully requests granting of its summary
19 judgment motion non-infringement. Thank you.

20 THE COURT: Thank you, Mr. Ramsey.

21 MR. ANDERSON: Your Honor, as you know,
22 this motion for summary judgment or any motion for
23 summary judgment is a drastic decision. There's a high
24 bar. And Audible Magic simply fails to show that there
25 is not disputed issue of fact. And one thing that I

1 would just like to -- one major failing that, I think in
2 this argument that we've heard, there's a lot of focus
3 on the element of the abstract rather than the claims of
4 this invention. And I'll come back to that repeatedly,
5 but that's very important here.

6 So as Mr. Ramsey pointed out, there are
7 criteria for the Court to look to to determine if
8 testimony in a deposition might be considered a judicial
9 admission. And I'd like to say, too, that those cases
10 are not settled. As we pointed out in our briefing,
11 this is not settled black letter law. But some Courts
12 have held that a judicial admission may be found in a
13 deposition testimony. And that is only when those five
14 prongs are met. And I'm going to point out two: One,
15 again, that the testimony must be deliberate, clear, and
16 unequivocal. And the second one is that to give it the
17 conclusive effect of a judicial admission, removing that
18 fact in evidence meets public policy. And neither of
19 those prongs are met in this case.

20 So one thing that Mr. Ramsey said there was
21 that Blue Spike's only argument is that the testimony
22 that Mr. Moskowitz gave as a 30(b)(1) representative is
23 not binding as a 30(b)(6) representative -- and I'll
24 touch on that again later -- but that is not Blue
25 Spike's only position. In fact, Blue Spike agrees with

1 another one which is that we need to look at the entire
2 testimony of Mr. Moskowitz. And there's six days of
3 deposition transcripts. We need to look at that entire
4 transcript in order to understand what Mr. Moskowitz is
5 saying.

6 And Mr. Ramsey pointed out that
7 Mr. Moskowitz is -- the sound bites were repeated and
8 emphatic. But that doesn't rise to the level of clear
9 and unequivocal. And when taken in context of the
10 entire deposition testimony, it's -- those statements
11 that Mr. Ramsey has pointed to, we can see that they're
12 not meaning exactly -- what -- we can see that in
13 context, it means something more than that. And
14 what's --

15 THE COURT: Are there portions that you can
16 cite the Court to, or are you speaking of just having to
17 look at the entire six-day deposition transcript?

18 MR. ANDERSON: I apologize, Your Honor.
19 And let me point to one in particular. I'm not sure if
20 this was admitted as an exhibit and we'd be happy to add
21 that. But it is in our briefing, in Blue Spike's
22 briefing.

23 MR. RAMSEY: I just object to the
24 introduction. That's not in the summary judgment
25 record, Your Honor.

1 THE COURT: Is it mentioned in your
2 briefing?

3 MR. ANDERSON: It is mentioned in the
4 briefing, Your Honor. So this is not new. So this is
5 Page 780, line 18. Mr. Moskowitz refers to his
6 invention as being -- as having the ability to
7 differentiate between versions of a signal, the ability
8 to anticipate an unknown work -- this is the idea of a
9 null set, and the ability to prevent replication of the
10 original signal.

11 So when asked about what an abstract is,
12 this is his definition of an abstract.

13 THE COURT: Was that what the court order
14 said? I can't remember.

15 MR. ANDERSON: No, Your Honor. The court
16 order said that the abstract is a dated representation
17 that retains perceptual characteristics to the original
18 signal. What Mr. Moskowitz is referring to are other
19 teachings within the claim language. So the ability to
20 differentiate between versions, for instance, is in the
21 language of at least three of the four patents-in-suit,
22 the 494, the 700, and the 175. So it's clear that when
23 Mr. Moskowitz is referring to an abstract, he's
24 referring to his invention. And Mr. Moskowitz does
25 understand his invention. But the question is: Did he

1 understand when he was being asked about an abstract,
2 that he was being limited specifically to not the rest
3 of the invention and to the Court's claim construction.

4 You know, and opposing counsel does point
5 out that he mentions the claim construction. He's
6 obviously aware of it. But his deposition testimony,
7 his answers about what an abstract is illustrates what
8 he's talking about here is the entire invention. The
9 same thing with the ability to prevent -- I'm sorry --
10 to anticipate unknown works. The Null case is something
11 that's also brought up in separate claims. So we have
12 an inventor talking about his invention. So for the
13 Court to determine that the sound bites are unequivocal,
14 it really would have to do so in the context of -- like
15 I said, in the context of this entire transcript
16 testimony.

17 You know, just to offer an example, if a
18 driver admits -- during testimony -- that he ran a red
19 light, then maybe that would rise to the level of a
20 judicial admission. Of course, if we found out in the
21 rest of his six days of testimony that he was color
22 blind or didn't understand what red was, and that would
23 inform that position. Now, that's -- now -- that's
24 unlikely to happen, obviously when we're talking about
25 the definition of red, but I think the Court would look

1 to this other information.

2 What we're dealing with here is something
3 much more -- forgive the word -- abstract. We're
4 talking about something that is not as concrete. We're
5 talking about the invention and the definition of this
6 abstract here. There's a reason that we have claim
7 construction, because we're talking about the meanings
8 of these terms.

9 THE COURT: And so -- at some point in
10 time, though, wouldn't you agree that there's got to be
11 an end? I mean, something's got to have a definition
12 that we can all rely upon, something true. You know,
13 and shifting it around -- I mean, I don't think you're
14 telling the Court that Mr. Moskowitz didn't understand
15 the question or didn't understand the subject matter or
16 was somehow confused about what was being asked. I
17 don't --

18 MR. ANDERSON: Right, Your Honor. In fact,
19 Blue Spike -- it's not Blue Spike's position -- Blue
20 Spike is not trying to pull back and say that MFCCs are
21 not abstracts. It's Blue Spike's position that MFCCs
22 are abstracts. And so, Mr. Moskowitz's testimony, we
23 believe just in the entire context, when he's saying
24 that MFCCs aren't abstracts -- when he's saying that the
25 entire invention isn't. And that's why I began with

1 saying what's really at issue here is the difference
2 between the elements and the claims themselves, because
3 Audible Magic is narrowing this down to this term of
4 "abstract."

5 Mr. Moskowitz is talking about the
6 invention as a whole and whereas the MFCC itself or --
7 sorry -- that the -- yes, the MFCC itself is an
8 abstract, the claims as a whole is much more than that.
9 That's consistent with Mr. Moskowitz's testimony. So
10 nothing is being taken back. All Blue Spike is -- let's
11 read this in context. And so --

12 THE COURT: So he didn't really mean what
13 he said he meant when he answered the questions?

14 MR. ANDERSON: It goes back to the position
15 that he -- if you substitute invention for abstract,
16 that the MFCCs are not the entire invention, which I
17 will get to later on. Because there's more than the
18 MFCC at issue here. And that's another thing that I
19 believe Audible Magic is narrowing this too much on is
20 that there is more at issue than the MFCC. So if we
21 take Mr. Moskowitz's testimony in context, what he said,
22 he understood that he was talking about his invention.
23 And it's true, the MFCC is not the invention. The MFCC,
24 however, is an abstract.

25 And that is something that Dr. Tewfik

1 testified to or that he had, in his expert report. And
2 that exhibit -- there is an exhibit, Number 2, attached
3 to Blue Spike's opposition that cites to that evidence.
4 So contrary to what has been said, Blue Spike did put
5 forth evidence of these abstracts.

6 So we have Dr. Tewfik saying that the MFCC
7 is the abstract. We have Mr. Moskowitz's clarified
8 testimony where the invention is not the abstract which
9 is still consistent.

10 THE COURT: So has the clarified testimony
11 been submitted to the Court? Do I have this clarified
12 testimony?

13 MR. ANDERSON: It's mentioned --

14 THE COURT: It's referenced?

15 MR. ANDERSON: It's referenced repeatedly
16 in the briefing, Your Honor.

17 THE COURT: I'm sorry. Go ahead.

18 MR. ANDERSON: So going again to that
19 prong, it's deliberate, clear, and unequivocal. It --
20 his testimony is equivocal. His testimony -- Audible
21 Magic can't -- would not be able to explain his --
22 Mr. Moskowitz 's description of what an abstract is.
23 And somehow in a way that would make sense when compared
24 to what Mr. Moskowitz said about the abstract itself.
25 And so only Blue Spike's definition or description here

1 makes sense of his testimony as a whole.

2 Now, I'd like to point out, too, here --
3 I'll use other -- we'll talk about these other
4 statements as well, but, again, because of the issue
5 here is -- this shows there is a dispute of material
6 fact, especially since we have Dr. Tewfik saying that
7 that MFCC is an abstract. We have a statement by the
8 inventor that requires to be read in context. It is a
9 little vague.

10 So I'd like to turn to Slide 14 of Audible
11 Magic's slides here.

12 THE COURT: I'm sorry. You said 14?

13 MR. ANDERSON: Slide 14, yes, Your Honor.

14 THE COURT: Okay.

15 MR. ANDERSON: So Blue Spike disagrees that
16 there is no mystery in this question that was asked to
17 Dr. Papakonstantinou. It said -- he was asked, "Do you
18 believe that Muscle Fish's feature vectors containing
19 MFCC values anticipate the abstract element?" Now,
20 there are a couple problems with that. First of all, he
21 is being asked to make a legal conclusion. And more
22 than that, there's this issue again of misidentifying
23 the element versus the claim because -- because the MFCC
24 is not going to anticipate an element, because
25 anticipation only occurs on a claim-by-claim basis. And

1 so, of course, that would be confusing. To the extent
2 that this expert understood the legal definition of
3 "anticipation," it would entirely -- it would make sense
4 that he would respond by saying, No, I don't believe
5 that that would be anticipated because you can't
6 anticipate this element. But, overall, again, we've got
7 this -- we've got a dispute. We have a material fact
8 that is not clear.

9 In turning to the next slide, Slide 15,
10 this is Michael Berry's testimony. And I need to point
11 out a couple of words here in what was asked of him,
12 because, again, we need to take these statements in
13 context. Mr. Berry was asked, "Is it fair to say it was
14 not your intent to try to cover some prior system --
15 technique of creating feature vectors containing MFCC
16 values? You weren't trying to claim that, were you?"
17 Now, Audible Magic reduces that to say, Michael Berry
18 doesn't believe that abstracts are MFCCs. And that's
19 not what he's saying at all. His intent as a
20 co-inventor to specifically capsule these MFCC values.
21 That day, what was specifically on his mind, was that
22 his intent that he was trying to create this patent that
23 specifically covered those. And so the one thing I need
24 to point out is, although an MFCC can with an abstract,
25 there are other digital representations that can also be

1 abstracts. And so he's working at a higher level than
2 that.

3 So this is -- I think it's faulty logic to
4 say when he's being asked whether he was intended to
5 cover the specific prior art system, that does not
6 necessarily mean that an MFCC is not an abstract. And
7 interestingly, he was not asked that question. If
8 that's the answer that Audible Magic wanted, they could
9 have asked that question. Interestingly also,
10 Dr. Papakonstantinou was also not asked that question.
11 Neither of them was asked this clear question: "Do you
12 think an MFCC is an abstract?"

13 Now, Your Honor, this is not Blue Spike's
14 attempt to have infringement and non-invalidity. Blue
15 Spike's position is very clear. The MFCC is an
16 abstract, but that the claims teach much more than what
17 the MFCC alone can do. And that is why there's
18 additional claim language. And as you'll see, when you
19 look at Exhibit 2 of Blue Spike's opposition, that
20 sections from Dr. Tewfik's report. Dr. Tewfik shows
21 that it is extra XML data, this GUID and, more
22 importantly, the AMIMD, that, when added to the
23 fingerprint, when added to this MFCC abstract, are able
24 to do what the claims teach. And so Blue Spike is not
25 changing its position, nor is Mr. Moskowitz or the

1 experts. And, I think, when all this is taken into
2 context, that becomes much more clear.

3 The -- and, again, so in order for
4 Mr. Moskowitz's testimony to rise to the level of
5 judicial admission, it's going to take that evidence out
6 of play if that were the case. And that really is too
7 drastic of a result when we have Dr. Tewfik saying the
8 opposite and when we have Mr. Moskowitz's testimony in
9 context showing that he was speaking about the
10 invention.

11 So that also goes to the public policy
12 issue at play here, which is there's too much of a
13 dispute of these material facts for summary judgment to
14 be found on this point. And more than that, it's
15 interesting Audible Magic hasn't done an analysis on the
16 -- of the claims at issue here. Audible Magic's summary
17 judgment motion is simply whether Scott Moskowitz's
18 testimony can be judicial admission. And their -- that
19 legal issue -- so as I've stated here, that legal issue
20 must be decided in favor of Mr. Moskowitz.

21 So on the issue of 30(b)(1) versus 30(b)(6)
22 testimony, Your Honor, you'll again notice from the
23 slides here that Audible Magic isn't citing any local
24 case or any binding case law. These are cases that are
25 in other districts and I think that that's telling. And

1 it's also important that Audible Magic went to great
2 lengths to distinguish between 30(b)(1) and 30(b)(6)
3 testimony. And everything that Scott Moskowitz said
4 that they're referring to here was done as a 30(b)(1)
5 testimony. So if they are one and the same in this
6 context, then why would Audible Magic go to such great
7 lengths to make it very clear during those depositions
8 that they were switching back and forth?

9 THE COURT: I'm looking for that slide that
10 talked about when Mr. Moskowitz talked about that he
11 is -- it's all one and the same. I think it's on Page
12 25, where he says he's not sure how they're
13 differentiating between the two entities.

14 MR. ANDERSON: Yes, Your Honor. How would
15 I respond to that?

16 THE COURT: Yes. Yes.

17 MR. ANDERSON: So, it is -- what I would
18 say is this: In the 30(b)(6) testimony, deposition
19 context, the attorneys are going to have different
20 objections to make sure that things are limited to those
21 deposition topics. I think a deponent, too, is on
22 notice what that deponent will be saying will be binding
23 on the company rather than on the part of that deponent
24 itself. And it's not to say that the deponent's going
25 to say one thing and then it's something entirely

1 different and perjure himself. But when recognizing
2 that one is speaking for the company as a whole, I think
3 that we could -- it's safe to say that Mr. Moskowitz may
4 have been more deliberate or more retrospective in what
5 those answers would be and recognize whether or not he
6 was speaking for the company as a whole versus himself.

7 THE COURT: But is he the company really?
8 I mean, isn't he really the company? Who else would he
9 be harming besides himself if he were to give testimony
10 that's different, whether it's 30(b)(1) or 30(b)(6)?

11 MR. ANDERSON: There are -- I know that
12 there are other interested parties, at least in the Blue
13 Spike, Incorporated. And I believe that there may be
14 some dispute about whether or not there are now or there
15 will be other principals. But I actually -- I couldn't
16 say that it didn't, Your Honor.

17 THE COURT: But his answer wouldn't be
18 different that there are other principals. He wouldn't
19 have given different answers, would he?

20 MR. ANDERSON: I would just say this again.
21 I've been in depositions where the attorney will clarify
22 under 30(b)(1) or under 30(b)(6), and it might even
23 instruct the other side not to continue this line of
24 questioning because it's off the topic or also where
25 somebody might recognize, well, this isn't just my

1 personal opinion about the statement of affairs as a
2 whole but as a company. And I'd even say this, like,
3 Mr. Moskowitz -- even assuming that he were the
4 company -- has paid for counsel, has paid for experts,
5 has paid for a lot of help in understanding and putting
6 together his case. And so, if he answers a question as
7 himself, that may be different than what he would answer
8 as a company. I'm just saying, again, he might just be
9 a little more hesitant. And not to say that it would be
10 certainly drastically different.

11 For instance, let me point out one thing.
12 In fact, it was mentioned by Audible Magic that he
13 repeatedly said, you know, this is answered in the claim
14 in the specification, it's answered in the patents. And
15 he tried to -- he tried to answer these questions by
16 referring counsel to the -- for the patent themselves.
17 And had that remained, then we wouldn't -- he wouldn't
18 have had this issue because, again, as I'm saying, he
19 was talking about the invention as a whole and not the
20 claims itself. And so, I would just like the Court to
21 consider that maybe he would be a little more deliberate
22 in those answers.

23 THE COURT: Less emphatic?

24 MR. ANDERSON: Less emphatic. And he might
25 have stopped to consider how what he's saying might

1 coincide or conflict with what he was saying about what
2 the invention as a whole is.

3 THE COURT: But it was truthful. I mean,
4 there's no question as to that.

5 MR. ANDERSON: Absolutely, Your Honor. And
6 so, again, this is not the main issue. This motion is
7 not centered on this specific issue. It's merely
8 something that just kind of highlights that this isn't
9 as clear as Audible Magic would like it to seem. But
10 the real issue in play here is what I mentioned earlier
11 about whether this is unequivocal, and we've got some
12 other facts that -- we saw the fact in question.

13 THE COURT: Thank you. Anything else on
14 this issue?

15 MR. RAMSEY: May I respond, Your Honor,
16 just briefly?

17 THE COURT: Yes.

18 MR. RAMSEY: All right. So a couple
19 specific things and a couple of general things. The
20 motive of Blue Spike's response, at the highest level,
21 is to point to things other than the abstract. So you
22 heard Mr. Anderson just now mention versions of the
23 reference signal, Null case. This is all attorney
24 argument standing here right here, right now attempting
25 to change what it is they're pointing to as the

1 abstract.

2 In Slide 4, and the portion of their expert
3 report about which is an abstract, was submitted by
4 Audible Magic. But Slide 4 as the excerpt. The only
5 thing that Blue Spike points at as an abstract in that
6 report is the MFCCs. It's not AMIMIDs. Mr. Anderson
7 said in Exhibit 2 to our opposition, somehow they're
8 changing their infringement very frankly standing right
9 here. Oh, no, no. But abstract meaning that MFCCs
10 combined with AMIMIDs.

11 Exhibit 2, where AMIMIDs is mentioned in
12 discussion of the matching element, wherein a match
13 indicates the query signal, et cetera, et cetera. It's
14 not about the abstract. So just to back up a couple of
15 steps. When Mr. Anderson is talking about versions,
16 when he's talking about the AMIMD, when he's talking
17 about the Null case, he's pointing to elements that are
18 other claims and their specifics. So, for example, 700
19 Patent Claim 1 has a particular (unintelligible) about
20 differentiating versions. Other claims do not have
21 that. That's not about what an abstract is. That's
22 about what does it mean to differentiate versions under
23 their theory. What is an abstract is a single
24 conversation. It's -- the thing they point to is just
25 MFCCs, and that's in the quote that's in Slide 4.

1 Enough about that.

2 To avoid this problem, this bind that
3 they're in, they either got to change their infringement
4 theories and now, on the fly, change their infringement
5 theory and say, Oh, no, we're pointing to this other
6 thing in combination with MFCCs. It's not in the
7 reports. It's not in the summary judgment record.
8 That's just arguments from an attorney today.

9 When he's talking about versions of a
10 reference signal in the Null case, he's trying to just
11 also speculate about what it is that Mr. Moskowitz
12 really meant in his deposition. The formulations that I
13 just heard were things such as, Well, Mr. Moskowitz, I
14 believe, was talking about the invention as a whole and
15 he must have other ideas about the Null case and
16 versions and other things in his mind when he made these
17 clear and deliberate admissions. It's attorney
18 argument, Your Honor. It's Mr. Anderson's speculation
19 of what he hopes Mr. Moskowitz might have meant. There
20 is no declaration by Mr. Moskowitz or any evidence that
21 Mr. Moskowitz meant something other than exactly what it
22 was he said.

23 If I may direct your attention, again, to
24 Slide 11 that has the quotes, the admissions.
25 Mr. Anderson's point, he says, Well, I don't think that

1 Mr. Moskowitz when he says what was not a signal
2 abstract, I don't think he had the claim construction in
3 mind. He must have been thinking about something more
4 general. I will point Your Honor to -- I'm sorry. It's
5 actually Slide 10, Your Honor. Not Slide 9. Slide 10.

6 "I've said it many times, a signal abstract
7 is not the same thing as the MFCCs and, again, the claim
8 construction which you based your arguments was
9 rejected." He didn't say this, way deep in the record,
10 I'm -- by single abstract, I'm adopting this court's
11 claim construction and then make an ill-informed
12 admission later in the deposition. In the admission, he
13 says -- he's saying under the Court's claim
14 construction, a signal abstract is not the same as the
15 MFCCs. That's in the middle of Slide 9.

16 And again, at the bottom, the very last
17 quote on Slide 9, "An MFCC, as I understand, is not
18 equivalent to a signal abstract based on the
19 description, the specification, the prosecution history,
20 and the claim construction." Again, he's adopting the
21 claim construction specifically in his answer what is
22 not an abstract. MFCCs are not abstracts.

23 So, again, the high level point is --
24 standing here today, Blue Spike has not really joined
25 the arguments. They're pointing -- the issue is: Are

1 MFCCs abstracts or not? They're -- the only theory of
2 of what is an abstract that they put forward ever -- and
3 things are closed now, is that it's the MFCC thing.
4 Yet, to avoid -- to save the patents, they've conceded
5 it away in every other place. And it is deliberate and
6 unequivocal.

7 Mr. Anderson's arguments about what
8 Mr. Moskowitz intended and meant is just attorney
9 argument. There's no evidence that Mr. Moskowitz meant
10 anything other than exactly what he said. And even if
11 it were the case, there's still binding admissions by
12 Dr. Papakonstantinou. There's no lack of clarity about
13 what it means for an ex- -- when an expert witness comes
14 forward and is asked, Well, does this -- do these MFCCs
15 anticipate the abstract element? That was what he was
16 hired to talk about. The whole report is what he
17 anticipates. You know, he's supposed to be matching
18 things up to the claim language, not in making opinions.
19 And his opinion, as he expresses in his deposition,
20 admitted that MFCCs do not meet the abstract limitation.
21 That was Dr. Papakonstantinou's job. So I'd just like
22 to point that out. Independently of Mr. Moskowitz's
23 admissions, we've also got the expert admitting this.

24 And so, really just again, we've heard a
25 lot of attorney argument to shift the focus away from --

1 to other things in patents and other elements not
2 related to abstract at all. It's just not relevant,
3 Your Honor.

4 And I'll just -- the final point is, Your
5 Honor, there's an alternative basis here even if
6 Mr. Moskowitz were deemed only to have made evidentiary
7 admissions. Let's just assume that all these admissions
8 are purely evidentiary. The Court may still grant
9 summary judgment and should. Under the GTX versus Kofax
10 case, Judge Davis -- there was not a judicial admissions
11 conversation there. There, the inventor just admitted
12 the cue structures didn't meet the elements and there
13 was no rebuttal evidence. Here, there's no rebuttal
14 evidence. There's no expert opinion explaining in any
15 detail why the MFCC is an abstract or that it even is.
16 And there's no explanation of Mr. Moskowitz's testimony
17 to contradict what is plain on its face.

18 There is no disputed issue of fact. Even
19 as a theoretical disputation of a fact when there's such
20 overwhelming evidence on one side of the scales and
21 just -- the only thing on Blue Spike's side, the only
22 evidence in the record is what we submitted which is
23 just to say they point to this MFCC as an abstract in
24 their infringement theory. No reasonable jury could
25 find that an MFCC is an abstract. Therefore, no

1 reasonable jury could find that Audible Magic infringes.
2 And like the GTX case, this Court should grant summary
3 judgment if that's appropriate. Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Ramsey.
5 Anything else, Mr. Anderson?

6 MR. ANDERSON: Yes, briefly. Your Honor,
7 again, it's untrue that Blue Spike hasn't put forth any
8 expert testimony or any evidence here. And, again, I
9 apologize for not having this exhibit for you. But in
10 Exhibit 2 of Audible Magic -- or excuse me -- Blue
11 Spike's opposition, there are excerpts from Dr. Tewfick.
12 And I'll read to you from Page -- it's Page 38. It's
13 Page 4 of the document, but it's Page 38 of the
14 document.

15 MR. RAMSEY: If I may hand Exhibit 2 to the
16 Court, Your Honor?

17 THE COURT: Sure, that'd be great. And you
18 have it in front of you also, Mr. Anderson?

19 MR. ANDERSON: I do.

20 THE COURT: Okay. Thank you.

21 MR. ANDERSON: So if Your Honor would turn
22 to Page 4. It begins with the Audible Magic slide
23 below.

24 THE COURT: Yes.

25 MR. ANDERSON: It says, "this Audible Magic

1 slide below depicts that a metadata tag called an AMIMD
2 or GUID, this is extra information that's attached onto
3 the MFCC -- is added to the MFCC. This metadata tag
4 provides the mechanism to which Audible Magic's software
5 makes the differentiation between versions of a song by
6 different artists." That continues and -- throughout
7 these slides. For instance, on the second-to-last page,
8 on Page 7, the last paragraph, it says, "not only is
9 Audible Magic software capable of differentiating
10 versions, it does differentiate," and then it talks
11 about -- I apologize, Your Honor. That was not the one
12 I was looking for. It's Page 6.

13 THE COURT: Okay.

14 MR. ANDERSON: And again, it says here in
15 this last paragraph, "That the GUIDs or metadata tags
16 provide Audible Magic with the ability to effect the
17 differentiation between versions of songs as evidence
18 from this list."

19 And so it has been Blue Spike's position
20 now for quite some time that the MFCC is the abstract
21 and that the MFCC alone as the abstract, cannot do
22 everything that is in the claims. And so, again, I
23 think Mr. Ramsey is reducing this issue here to the
24 abstract itself. And it has never been just about the
25 abstract. Blue Spike, in no way, is changing its

1 position. It's in this expert report. And when Scott
2 Moskowitz's deposition testimony is read in context,
3 especially in context of this exhibit, it's evident that
4 his testimony does not conflict either. He is saying
5 that as a whole, the invention has the ability to create
6 this fingerprint and then differentiate between these
7 versions. The MFCC abstract alone can't do that.

8 So no matter how you look at it, Your
9 Honor, either right in context, Mr. Moskowitz's position
10 supports what Dr. Tewfik says, or if taken out of
11 context and just in a sound bite, we have this conflict
12 of a material fact. And either way, both of those show
13 that the -- that summary judgment isn't warranted.

14 I believe also, we covered in our briefing
15 that the cases that Audible Magic cites to on this --
16 are otherwise not applicable here.

17 But I'd like to respond at least, just
18 briefly, to that GTX case that opposing counsel has
19 mentioned a couple times. And just point out that in
20 that case, you have an issue where a declaration from
21 one expert has been submitted trying to -- in relation
22 to another expert's report and this expert is saying
23 something very specific, that the black pixels are
24 loaded into memory. And, of course, that's not at all
25 what this original expert report had said. He said

1 something much more general, that object-grabbing is met
2 by reading in the input image into memory.

3 So you have one expert opining about what
4 another expert said in this declaration which is
5 entirely different than what's going on here. Where we
6 have Dr. Tewfik has stated that the MFCC is an abstract.
7 But that the claims, in general, teach much more than
8 that, and that more than the abstract is required in
9 order to -- in order to perform the invention and the
10 Blue Spike patents-in-suit. And that we don't have
11 another expert opining about what this expert said that
12 he did. And, again, Mr. Moskowitz's testimony is when
13 read in light of what Dr. Tewfik had said makes much
14 more sense than it does when restricted to those sound
15 bites. That's all, Your Honor.

16 THE COURT: Okay. Thank you, Mr. Anderson.

17 MR. RAMSEY: If I may make two more quick
18 points, Your Honor?

19 THE COURT: All right.

20 MR. RAMSEY: Real quickly, in Exhibit 2
21 that Mr. Anderson has been talking about, the Court's
22 been handed. Just to point out on Page 37, that entire
23 conversation is about an element wherein a match
24 indicates the query signal is aversion at least in one
25 of the reference signals. It has nothing to do with

1 abstracts. And it may be true that Mr. Anderson was
2 pointing to other claim elements, but those aren't at
3 issue in this motion. The question is whether it was
4 not counted abstract. It's a form of misdirection, Your
5 Honor. It's just not relevant.

6 And, again, on the differentiation of
7 versions point, I'll just also note that some claims
8 include that limitation, that language, and some claims
9 do not. So it's pointing to a different limitation
10 that's in some claims and some not, that doesn't have to
11 do with abstract. So trying to raise that argument at
12 such a high level that it's mixing together elements is
13 just really attempting to avoid the issue.

14 The second point, Your Honor, is, again, a
15 lot of testimony from the attorney about what
16 Mr. Moskowitz meant or didn't mean. There's no evidence
17 in the record. Mr. Moskowitz had the opportunity to
18 amend his answers in his errata in great detail; didn't
19 change a thing, with respect to the testimony at issue
20 today.

21 And finally, with the GTX versus Kofax
22 case, I think what Mr. Anderson just pointed out
23 actually proves Audible Magic's point. In that case,
24 there were, in fact, competing expert declarations put
25 in. And nonetheless, Judge Davis looked to the inventor

1 admissions, said the plaintiff's expert statement was
2 too cursory in combination with this inventor admission.
3 I'm going to grant summary judgment and
4 non-infringement.

5 In this case, we've got a huge amount of
6 clear admissions. We've got in the record, Audible
7 Magic's expert opinion as to exactly why MFCCs are not
8 abstracts. And there was no evidence, other than this
9 Exhibit 2 that we just talked about, that doesn't bear
10 on this issue showing that there was -- that MFCCs are
11 an abstract. So that way, there's less -- more of a
12 record here appropriate for summary judgment, we
13 believe, in that case. That's it, Your Honor. Thank
14 you.

15 THE COURT: All right. Thank you.
16 Anything else, Mr. Anderson?

17 MR. ANDERSON: No, Your Honor.

18 THE COURT: All right. I think that leaves
19 just the one motion that has to do with -- it's a
20 partial summary judgment based on license. We're going
21 to take a break regardless, at least for a few minutes.
22 Did you all want to take a lunch break or take like 15
23 minutes and let's get started?

24 MR. ANDERSON: I'm fine with just a
25 15-minute break, Your Honor.

1 MR. RAMSEY: We're fine with that.

2 THE COURT: All right. Let's do this,
3 then, let's take a 15-minute recess and then we'll be
4 back.

5 THE BAILIFF: All rise.

6 (Whereupon, a recess was had from 12:29
7 p.m. to 12:55 p.m.)

8 THE BAILIFF: All rise. Court is now back
9 in session.

10 THE COURT: Please be seated.

11 MR. FINDLAY: May I approach, Your Honor?

12 THE COURT: Yes, you may. Thank you. All
13 right.

14 MR. HIGGINS: Your Honor, you've been
15 handed a printout of some PowerPoint slides and also an
16 extra handout. You can set the handout aside for now.
17 We'll get to that later. I'll be starting with these
18 slides.

19 THE COURT: Okay.

20 MR. HIGGINS: And I'll try to make this
21 argument as efficient as possible and get through this
22 quickly. But I do want to spend a little time and go
23 through a background of some of the facts related to the
24 license at issue and the products here, and better frame
25 the issue so it's clear as possible before you make this

1 decision. Because what this really boils down to is the
2 definition of a single term the "patent license."
3 That's the key issue to be decided here. And that
4 patent license is a license that Blue Spike entered into
5 with RPX Corporation. RPX paid and negotiated with Blue
6 Spike, \$4 million so that it could rid its customers --
7 its members and their customers of the Blue Spike
8 patents. And this broad RPX license includes any
9 portion of a product that an RPX member contributes to.

10 That entire product, then, whether the rest
11 is supplied by a third party or an RPX sublicensee,
12 that's covered by a licensed product under this RPX
13 agreement, and that's the sole issue to be decided here.

14 If you look at Slide 2, Your Honor. Before
15 I get into the specific arguments here, I'll spend a
16 little time on the background. As I mentioned, I'll go
17 through the representative claim, explain the RPX
18 agreement, what RPX is and what they do and what's their
19 purpose. And then I'll hit the arguments Audible Magic
20 products are licensed under this agreement. And I'll
21 spend just a little time on the alternative issue of the
22 third party beneficiary.

23 If you go to Slide 3. We have this in our
24 motion, but I wanted to put it here on our slide to
25 emphasize it again. This is the single issue to be

1 decided in our motion. And it's whether the license
2 agreement between RPX and Blue Spike, Audible Magic and
3 its customers' accused products are included in what's
4 defined as "combined license products and services" in
5 the RPX agreement. To the extent they are, that
6 provides a license to Audible Magic and its customers to
7 the Blue Spike patent portfolio.

8 If you turn to Slide 4, provided is the
9 high level overview of what Audible Magic's position is.
10 And if you look in the blue box, Audible Magic supplies
11 software. In order for the software to do anything, it
12 has to be combined with some form of hardware. That
13 hardware is supplied by, for example, Dell computers and
14 servers, and iOS, Android and Windows devices. When I'm
15 referring to "iOS devices," I'm referring to Apple
16 devices. Android would include, for example, Samsung
17 and HTC mobile devices and tablets. And then Windows
18 devices may include IBM, HP, and Dell computers. But
19 once the Audible Magic software's combined with these
20 elements that are from RPX licensees, that creates a
21 combined licensed product and service as defined in the
22 RPX agreement. And because of that, Audible Magic
23 products accused in this case are licensed under the
24 agreement.

25 If you turn to Slide 5, Blue Spike, in

1 response to our motion, takes the extraordinary position
2 that we can't rely on their infringement contentions to
3 show that the Audible Magic products are combined with
4 an RPX member's product to meet this definition in the
5 agreement. They put forth no case law to support this
6 counter-intuitive argument.

7 The other argument that they make is that a
8 third-party product is not included in the RPX license.
9 And as I'll explain shortly, the definition of "combined
10 licensed product and service" in the RPX agreement
11 includes the term "third-party." So it's not clear how
12 Blue Spike can make this argument that third parties
13 can't contribute to this combined license and servers
14 when it's expressly part of that definition.

15 On Slide 6, this is in our brief, I wanted
16 to note a few of the basic legal principles here. These
17 are fairly basic points of law, but I just wanted to
18 bring them to the Court's attention. "Infringement
19 contentions are admissions" on a party. Blue Spike
20 seems to dispute this in its opposition with no
21 supporting case law. But the law is clear, the Federal
22 Circuit is clear: Infringement contentions are
23 admissions. Parties rely on those contentions to frame
24 the issues in the case.

25 And then the final two points in the slide

1 just emphasize that the choice of law in this contract
2 is Delaware law. Delaware law is controlling. These
3 aren't disputed points of law. But just putting it in,
4 I just remind the Court that Delaware law is the choice
5 of law in this contract.

6 THE COURT: I'm not trying to hurry you up,
7 but I want to make sure you know that you have 27
8 minutes and you've got 23 slides, and so --

9 MR. HIGGINS: I'm moving quickly. So we go
10 to Slide 7. Now, this is the same representative claim
11 that Mr. Ramsey had in his presentation and this is also
12 the representative claim that Blue Spike's expert uses
13 in their infringement analysis. I put it on the slide
14 here.

15 You'll notice in our motion, we use Claim
16 11 from the 472 patent. The elements are nearly the
17 same for purposes of this motion. Same elements, same
18 principles apply.

19 Now, in Claim 1, there's six elements here.
20 There's a lot to this claim. What we're really focused
21 on in this motion is everything from the second input
22 down. "Second input," "second processor," "reference
23 database," and prepping device. And for purposes of
24 this motion, we don't need to get into the technical
25 details of these claim elements. All we need to look at

1 is what Blue Spike is pointing to and its infringement
2 contentions. What is it -- what it's accusing Audible
3 Magic software of running on. That's what we need to
4 look at for this motion. If those elements come from an
5 RPX member, then we're within the scope of the license.
6 We don't need to get through claim constructions and
7 technical details and MFCCs again for purposes of this
8 motion.

9 If you turn to Slide 8, Your Honor. Before
10 we get to the actual RPX agreement, I just want to
11 briefly mention the purpose of RPX. RPX is a company
12 that has large corporations, Apple, Dell, HP, Samsung as
13 its members. What RPX does is it goes out and it
14 obtains rights to certain patents or licenses to settle
15 certain lawsuits. And it does that, as it's on the
16 slide here, "to clear the ecosystem." It wants to get
17 rid of the threat of any patent rights for certain
18 patents -- for example, the Blue Spike patents here --
19 for all of its RPX members that are paying millions of
20 dollars to be members in this and for those customers.
21 They don't want to hear anything from the patent owners
22 again once they've paid, in this instance, \$4 million.

23 If you turn to Slide 9, this is the key
24 provision from the RPX agreement between RPX and Blue
25 Spike. That's the focus of this motion. So there's a

1 couple parts of this definition, so I want to break it
2 down a little bit. At the very beginning, it's
3 important to note that the "'combined license product
4 and service' means any combination...whether by a
5 Sublicensee" and here's the term, "'third party,' of a
6 Licensed Product and Service." The licensed product and
7 service is what's supplied by the RPX member.

8 So if a third party supplies something, RPX
9 member supplies the other part and meets any element of
10 the claim. Actually, it's in whole or part of an
11 element or separate claim. It doesn't have to meet the
12 entire elements of the claim. "In whole or in part," a
13 third party RPX member of supplying parts to what Blue
14 Spike is accusing of infringement. That falls within
15 the definition of the combined licensed product and
16 service that was negotiated between RPX and Blue Spike.

17 If you turn to Slide 10, Your Honor. This
18 settlement agreement can be seen at very broad spectrum.
19 It's including third-party products. But these type of
20 settle agreements have been routinely upheld by the
21 Courts and found to include third-party products.
22 Earlier this year in the Southern District of New York,
23 there was a patent, nonpracticing entity, PDIC. They
24 asserted two patents against Hewlett Packard and Fuji
25 Film. Previously, in that litigation, they settled with

1 Microsoft. And in that agreement, Microsoft included
2 "any past, present, or future combination, hybrid
3 aggregation that incorporates any offering -- meaning a
4 Microsoft offering...with any third-party offering."

5 What the Court found here, and as the quote
6 on the page says, certainly, it was Microsoft's
7 contention to clear the ecosystem. Anyone that's using
8 Windows has a license to those patents via Microsoft
9 settlement. And that's exactly what the Court found for
10 HP and Fuji Film there.

11 This license of the Court applied to
12 third-party products. It's even broader than the
13 license here. There's no restriction on it meeting a
14 certain element of the claim. So it's not like this RPX
15 agreement is some overbroad agreement that has never
16 been construed to, you know, by the Federal Circuit of
17 district courts, the whole third-party products under
18 the license.

19 If you look at Slide 11, I want to briefly
20 summarize, mentioning RPX members here. So who are
21 these RPX members that are supplying these components
22 that Audible Magic uses as part of its system that Blue
23 Spike is accusing of infringement? I bolded a few at
24 the top here that pretty much cover 99.9 percent of the
25 products out there on the market that are using Audible

1 Magic. Importantly, Dell, Apple, Samsung, Hewlett
2 Packard, HTC, IBM, LG and the list goes on and on. It
3 covers every major mobile device manufacturer computing
4 company out there.

5 If you turn to Slide 12, now that we've
6 covered what the RPX agreement covers and who are those
7 RPX members, this slide is meant to demonstrate the
8 ecosystem and the system that Audible Magic employs and
9 what's accused by Blue Spike. If you see the elements
10 that are highlighted in green, those are elements that
11 are supplied by RPX licensees via iOS, Android, and
12 Windows devices. Audible Magic does not supply those
13 devices, yet those are parts of the asserted claims in
14 this case. And in red, those are elements that are met
15 by Dell servers, Dell computers. For example, Audible
16 Magic's reference database of all of its fingerprints.
17 That's housed on a Dell computer or a Dell server. That
18 is not supplied by Audible Magic.

19 And along with the slide that I gave Your
20 Honor, that extra handout there, that shows this diagram
21 next to the claim language. Just for easy reference as
22 we walk through this later in reference to the RPX
23 agreement so you can see how it relates to the claim
24 language as well.

25 Now, if you turn to Slide 13, the important

1 comparison we need to make here in this motion is what
2 Blue Spike is accusing of infringement here, what is
3 covered by a combined license product and service. So
4 I'm starting here with the second processor limitation
5 from Claim 1 of the 700 patent.

6 And I started with this element because
7 it's very clear. If you look at Blue Spike's
8 infringement contentions, this element is met by Audible
9 Magic's libraries on an iOS, Android, Windows, and Linux
10 operating system. Those are RPX member licensee
11 components. Audible Magic does not supply the second
12 processor that's part of this claim element.

13 If you turn to the next slide, Slide 14, a
14 very similar issue. This is the second input. Audible
15 Magic does not supply the second input. That second
16 input could be a microphone on your smartphone that
17 receives the audio signal that's coming in. Again,
18 that's on an iOS, Android, or Windows device. It's not
19 supplied by Audible Magic.

20 And the last example I'll cover here is
21 with respect to the claims that's on Slide 15. And this
22 is with respect to the reference database. Blue Spike
23 points to cited here "Audible Magic's hosted Content ID
24 database." As I mentioned earlier, this is the
25 reference database of the IDs, the fingerprints. It's

1 what you look up and compare the incoming signals to
2 find a match. Those are on Dell servers. They're on
3 Dell computers. So this reference database that's on an
4 RPX licensing product is not supplied by Audible Magic.

5 On Page 16, after this briefing was
6 completed, Blue Spike took the depositions of Audible
7 Magic's employees and they asked the question: "Do you
8 know the models or manufacturers of any of those
9 servers" that host these databases? The response:
10 "It's from Dell." And the second quote at the bottom of
11 the page here is just emphasizing, well, how long have
12 you used these Dell computers? As long as I've been
13 part of the company. They've always used Dell. They've
14 always used an RPX license component to host the
15 reference database. That's what Blue Spike's pointing
16 to in its infringement contentions. That's what makes
17 the Audible Magic accused product a combined license
18 product and service. It's combined with a Dell
19 computer, Dell server that is an RPX licensed product
20 and service.

21 On Slide 17, I'm not going to walk through
22 all the text that's on this slide. This is just to show
23 that Audible Magic's non-infringement expert, Dr. John
24 Strawn, went through every single asserted claim, every
25 element and demonstrated how they were met by either a

1 Dell service, an iOS, Android, Windows device. Blue
2 Spike took his deposition. They didn't ask him a single
3 question about this. This has gone unchallenged.

4 On Slide 18, during discovery, Audible
5 Magic asked Blue Spike for its contentions of whether an
6 Audible Magic accused product constitutes a portion of a
7 combined licensed product or service. Rather than
8 provide any substantive response or its contention, Blue
9 Spike invented a new theory of patent infringement where
10 it says "proportional liability." This is not a tort
11 that has to do with negligence. This is no proportional
12 liability. As best I can make sense of their answer
13 here, they're saying if an RPX supplies three elements
14 of a claim, Audible Magic supplies four elements of the
15 claim. Well, then they're proportionally liable and we
16 divide up the claim and divide up damages. But that's
17 not how patent law works.

18 This proportional, was there a response to
19 this interrogatory; that's their contention. They are
20 no rebuttal to our facts or our portion that we have
21 combined licensed product or services during discovery.

22 And if you look at the next slide, that's
23 Slide 19, nor did they have any response when we filed
24 the motion. In the left block over here is Audible
25 Magic's statement under rule 56(a)(2) of undisputed

1 material facts stating that Audible Magic combines its
2 products of a licensed product or service of an RPX
3 member. Blue Spike's response, in its opposition to
4 this motion, was that it's without knowledge to know how
5 Audible Magic's products work. If it doesn't have
6 knowledge of how Audible Magic's products work, how did
7 it submit infringement contentions in this case? What
8 it did put in infringement -- its infringement
9 contentions was that certain components are supplied by
10 RPX members. Therefore, it's a combined license product
11 or service.

12 It's also important to note that, and Your
13 Honor may remember, we moved to strike the Blue Spike
14 infringement contentions and they ended up
15 supplementing. But they had professed the whole time
16 that those infringement contentions were adequate. They
17 included all of their theories. Well, on January 9th,
18 2015, they served updated infringement contentions well
19 after this briefing was completed in which they claim
20 that they needed more discovery to figure this issue
21 out. Discovery was closed. They didn't address any of
22 these issues. In fact, those citations that we just
23 went through in the infringement contentions are from
24 these updated contentions. So discovery is closed.
25 They don't need any more discovery. Their contention is

1 that certain elements of the claims are supplied by RPX
2 members.

3 Audible Magic doesn't supply them. The
4 only outcome here, and it appears to be -- there's
5 nothing Blue Spike puts forward to dispute this is that
6 what they're accusing is a combined licensed product and
7 service that they've already licensed the rights away
8 to.

9 If you look at Slide 20, it's not just
10 Audible Magic's expert that agrees with this. Blue
11 Spike's only infringement expert, Dr. Tewfik, in his
12 expert report after the close of fact discovery, after
13 Audible Magic depositions, stated that the comparing
14 device is housed on the back end server. That server is
15 a Dell server. Therefore, that's an RPX member's
16 product that's combined with Audible Magic software. In
17 addition, Dr. Tewfik stated that it is evident to him
18 that a second processor is required to run the software
19 that Audible Magic provides to its OEM manufacturers.
20 If you look at the very bottom, this includes iOS
21 devices such as iPhones and then it goes on to note
22 Android devices. Those are all RPX member products.
23 None of that is supplied by Audible Magic.

24 And finally, here, I want to preemptively
25 address a few points that Blue Spike raised in its

1 opposition that should just have no relevance to this
2 motion. And that is that they complained that we didn't
3 walk through every single asserted claim, all 32,
4 because this motion does address the customer
5 requirements, and do an element by element analysis
6 showing how, for each asserted claim, that they're
7 accusing a combined license product or service. But the
8 plain language of the RPX agreement says we don't have
9 to. If you look at the highlighted language in combined
10 license product or service and the definition for
11 licensed product or service, it only requires that you
12 satisfy an element or step of a claim in the patents.

13 Patents is defined to include the entire
14 Blue Spike portfolio here. You meet one step or one
15 claim with this product that you're supplying that's
16 combined to make a combined licensed product or service,
17 you've now gained a license to the entire Blue Spike
18 portfolio. No element-by-element, claim-by-claim
19 analysis was required. We picked representative claims
20 and, in fact, our expert, Dr. Strawn, did go through
21 every single -- all 32 asserted claims, and show how
22 this is met. In our motion, there's a footnote where we
23 go through other claims from each patent to show how
24 this is met. They don't dispute that. They put forth
25 no facts to show how there's any difference in the

1 claims that makes any difference with respect to this
2 issue.

3 Another misconception by Blue Spike -- and
4 I've now turned to slide 22, Your Honor -- is that the
5 so-called Patent Laundering Activities clause in the RPX
6 agreement applies. There can be no dispute that this
7 clause has no effect on Audible Magic's motion. If you
8 look at the highlighted language here, it says "Patent
9 Laundering Activities shall not include" -- and if you
10 go to Part D -- "any combined license, product, and
11 service."

12 So, again, I go back to the sole issue to
13 be decided here which is: Are the Audible Magic
14 products part of a combined license product and service?
15 If they are, they're specifically excluded from Patent
16 Laundering Activities. And if that wasn't enough, if
17 you actually look at what this clause says, this is
18 meant to prevent an end-around to paying royalties to
19 Blue Spike.

20 And it says specifically in the definition,
21 if someone, a third party, supplies a substantially
22 completed form to a manufacturer. So Company A designs
23 the entire product, supplies it, and has an RPX member
24 who has a license to Blue Spike portfolio, manufactures
25 it, just to avoid paying royalties. That's clearly not

1 what's happening here. Audible Magic has been doing the
2 same thing prior to these Blue Spike patents. There was
3 nothing meant to avoid paying royalties to Blue Spike.
4 And even so, it's specifically excluded from Patent
5 Laundering Activities here.

6 And then finally, on Slide 23, I just want
7 to briefly note the alternative argument that we raised
8 in our motion is that to the extent Your Honor doesn't
9 find that Audible Magic products, themselves, are
10 licensed under the agreement as part of the combined
11 license product or service, Audible Magic itself has an
12 intended third-party beneficiary under Delaware law to
13 the RPX agreement. RPX's whole purpose and the purpose
14 of putting third party -- the term "third party" -- in
15 the definition for combined license product and service,
16 showed a clear intent to provide a benefit to third
17 parties that are providing portions of a system that are
18 combined with RPX members. RPX didn't want to hear from
19 Blue Spike ever again. That's why they negotiated this
20 deal.

21 THE COURT: You've got nine minutes.

22 MR. HIGGINS: I'll save those nine minutes
23 for a reply, Your Honor.

24 THE COURT: I thought you might want to.
25 Okay.

1 MR. HONEA: Thank you, Your Honor. I'll be
2 efficient and try and wrap this up quickly because I
3 know it's been a long day.

4 THE COURT: You have plenty of time.

5 MR. HONEA: Well, it's been a long day, and
6 I think we can talk about these things rather
7 efficiently and the briefings are on point. So the
8 important thing to remember here is that I think we want
9 to point out that within the RPX agreement, there's
10 specifically a clause 5.3 Third-Party Infringement which
11 contemplates and clearly shows that the parties did not
12 intend that third-party products would be licensed. So
13 I think that's the key fact that shows that this isn't
14 something that was contemplated.

15 In fact, if we think about how RPX does
16 business, they have to obtain customers and if they want
17 to obtain customers, those customers must think they
18 have a risk of being sued for patent infringement. But
19 if their theory, Audible Magic's theory's correct,
20 anybody that uses a Dell computer or Apple products in
21 some sort would be automatically licensed and would
22 never have a need to go to RPX for sublicense. Does
23 that make sense? It would be counterintuitive to RPX's
24 business venture to create an agreement that, all of a
25 sudden, everything that someone may use from one of its

1 member's products, which are used in everything we do
2 nowadays, would, all of a sudden, be licensed.

3 Second point with this is Patent Laundering
4 Activities were specifically provided and Audible Magic
5 points out that it excludes combined licensed products,
6 but that begs the question of what's a combined licensed
7 product or service. And we're arguing that it cannot be
8 here in this circumstances because it's a third party
9 that specifically is excluded from or from contemplation
10 as being a license -- a sublicensee eventually.

11 As far as a third-party beneficiary, I
12 think the Delaware law is very clear that it needs to be
13 materially expressed in the agreement itself as it tends
14 to have benefit third parties -- and nowhere in this
15 agreement does it expressly make that clear. So, again,
16 I think that's a thin argument.

17 So those are the main points that I wanted
18 to bring up, but I think the briefing is complete. So
19 thank you.

20 THE COURT: Thank you.

21 MR. HIGGINS: I just want to briefly
22 address one point that Mr. Honea raised in this
23 third-party infringement clause. It doesn't mean what
24 he says it means. This is nothing more than a standard
25 clause in patent licenses where the patentee, the patent

1 owner of Blue Spike, retains the rights to enforce its
2 patents. RPX is not getting the right to sue third
3 parties for infringement of the patents. That's what
4 this clause is for. This has no effect on whether Blue
5 Spike granted RPX and third parties that it combines its
6 products with, a license under the patents. This simply
7 says that Blue Spike, as it says here, "shall have the
8 sole right, under its own control, to prosecute any
9 third-party infringement." Well, this third-party
10 infringement can't include Audible Magic because we're
11 licensed under the combined license and products
12 definition of the agreement, which specifically includes
13 the term "third party."

14 If they didn't mean to include third
15 parties in that definition and within the license, then
16 they wouldn't have included the term "third party"
17 within the definition's combined licensed product and
18 service. It clearly was meant to encompass those
19 situations that we have here where Dell or Apple or
20 Samsung are providing part of the system that Blue
21 Spike's accusing of infringement. That's why these
22 companies paid millions of dollars for this license.
23 And that's what's included here. It's a combined
24 licensed product or service. This third-party
25 infringement clause has no effect on this motion. Thank

1 you, Your Honor.

2 THE COURT: Thank you.

3 MR. HONEA: Very briefly on the third-party
4 infringement clause, if you look at the very bottom of
5 Page 9 of this agreement -- and I could just read it out
6 loud.

7 THE COURT: Okay.

8 MR. ANDERSON: "The parties acknowledge
9 that RPX may, through no action of its own, be named a
10 party to a suit relating to the patents," and this is
11 where the important part starts. "Provided, however,
12 that neither Blue Spike nor its affiliates will take or
13 initiate any action to join or name RPX or any RPX
14 members or tier companies that have a valid patent
15 license or existing sublicense under this agreement,
16 which is in full force and effect as a party." So it's
17 basically saying you can't sue RPX on these patents and
18 you can't sue our members and the tier companies that
19 have been outlined in the RPX agreement. You can't
20 bring this -- they don't say anything about a third
21 party, interestingly enough, of a combined license or
22 product. So I think the point being that that's
23 consistent with the idea that neither party contemplated
24 that some third party would be able to say, I'm licensed
25 all of a sudden because it uses a Dell server in running

1 its business. So that's all. Thank you, Your Honor.

2 THE COURT: Thank you. Anything else?

3 MR. RAMSEY: No, Your Honor.

4 THE COURT: All right. I believe that
5 concludes everything that the Court had set for hearing
6 today. Before I forget, here is Exhibit No. 2 that you
7 gave the Court. I'm going to pass it to the courtroom
8 deputy, so don't forget that. Again, I acknowledge that
9 a lot of these motions are -- have been on file for a
10 long time. I'm going to make my best efforts to have
11 everything out in the next three weeks, so if that
12 changes in any way, I will let you know. So you can
13 tell your clients it'll be within the next three weeks.
14 And, again, hopefully, I can have it a lot sooner than
15 that, but I will make my best efforts.

16 Is there anything else we need to take up?

17 ALL PRESENT: No, Your Honor.

18 THE COURT: Okay. I appreciate everybody's
19 good preparation. We'll be adjourned.

20 THE BAILIFF: All rise.

21 (End of proceedings at 1:25 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the oral stenographic notes of the proceedings in the above-titled matter to the best of my ability.

/s/ Shawna Gauntt-Hicks

09-10-2015

Shawna Gauntt-Hicks
Deputy Reporter
State of Texas No. 9353
Expiration Date: 12/31/2017

Date

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