

THIS OPINION IS BINDING PRECEDENT OF THE TRIAL SECTION

Paper 82

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Entered
23 November 1999

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

DONALD J. THERRIAULT and MICHAEL J. ZAJACZKOWSKI,

Junior Party,
(Patent 5,573,778),

v.

JAMES E. GARBE, DANIEL C. DUAN, CHERYL L. MOORE,
JAMIESON C. KEISTER and CHAN U. KO,

Senior Party
(Application 08/968,519).

Patent Interference No. 104,263

MEMORANDUM OPINION and ORDER
(granting motion for leave to issue a subpoena)

Before: McKELVEY, Senior Administrative Patent Judge, and
SCHAFFER, LEE and TORCZON, Administrative Patent Judges.

McKELVEY, Senior Administrative Patent Judge.

A. Introduction

Therriault has filed a miscellaneous motion under Rule 635 seeking entry of an order under Rule 671(g) authorizing issuance of a subpoena under 35 U.S.C. § 24 to compel certain testimony and production of documents from non-party Alza Corporation of Palo Alto, California. THERRIAULT MISCELLANEOUS MOTION 11 (Paper 77). Garbe has filed an opposition (Paper 78). Therriault filed a reply with additional evidence (Paper 80), but it is being returned (Paper 81) as an improper reply.

The motion raises important issues with respect to the administration of justice in interferences cases. Rule 1.610(b) [37 CFR § 1.610(b)] provides that "[a]t the discretion of the administrative patent judge assigned to the interference, a panel consisting of two or more members of the Board may enter interlocutory orders." In view of its precedential nature, the interlocutory order entered today is being decided by a panel consisting of all judges assigned to the Trial Section.

B. Findings of fact

The record supports the following findings by a preponderance of the evidence.

The parties

1. On the issue of priority in an interference, a junior party stands in the position of a plaintiff and a senior party stands in the place of a defendant.

2. The junior party is Donald J. Therriault and Michael J. Zajaczkowski (**Therriault** or **inventors**).

3. The real party in interest with respect to Therriault is Adhesives Research, Inc. (**Adhesives**).

4. The senior party is James E. Garbe, Daniel C. Duan, Cheryl L. Moore, Jamieson C. Keister and Chan U. Ko (**Garbe**).

5. The real party in interest with respect to Garbe is Minnesota Mining and Manufacturing Company (**3M**).

The interference count

6. A "count" of an interference defines the interfering subject matter between two or more applications or between one or more applications and one or more patents. 37 CFR § 1.601(f), first sentence.

7. A count is a vehicle for contesting priority and determines what evidence is relevant on the issue of priority. Squires v. Corbett, 560 F.2d 424, 433, 194 USPQ 513, 519 (CCPA 1977).

8. This interference involves Therriault's patent and Garbe's application.

9. The count of the interference specifically calls for, or has been interpreted to be directed to, a transdermal

drug delivery device comprising an adhesive matrix together with a softener or percutaneous penetration enhancer with additional presence of a drug (if the softener is not therapeutically effective). Therriault, motion, page 2; Garbe opposition, page 3.

Therriault's alleged conception and
actual reduction to practice

10. Therriault alleges, or it reasonably can be inferred that Therriault alleges, that:

a. The invention of the count was conceived by the inventors while working for Adhesives. Motion, page 2, ¶ 5, last line.

b. An adhesive matrix material was made at Adhesives. Ex 1032, ¶ 4.

c. Thereafter, the adhesive matrix material was delivered to Alza Corporation (**Alza**) for the purpose of having a transdermal drug delivery device made and tested for drug delivery. Ex 1032, ¶ 4.

d. In due course, representatives of Adhesives, including the inventors, had a meeting with representatives of Alza, including Robert Gale (**Gale**). Ex 1032, ¶ 5.

e. At the meeting, the representatives of Adhesives received confirmation that the adhesive matrix

material, provided by Adhesives to Alza, had been employed to make a transdermal drug delivery device. Ex 1032, ¶ 5.

f. According to inventor Zajaczkowski, representatives of Alza stated that the transdermal drug delivery device was made with the adhesive matrix material provided by Adhesives to Alza. Ex 1032, ¶ 5.

g. Further according to Zajaczkowski, the transdermal drug delivery "device meets the limitations of the counts (sic--count) in this interference." Ex 1032, ¶ 5.

h. The inventors were informed by representatives of Alza that the transdermal drug delivery device made by Alza "had been found to serve satisfactorily as a transdermal drug delivery device during drug flux testing." Ex 1032, ¶ 5.

i. Gale is said to have supervised evaluation of the transdermal drug delivery device at Alza. Ex 1032, ¶ 5.

Discussion between counsel for Therriault
and counsel for Alza

11. There came a time when counsel for Therriault, James W. Hellwege, Esq., (**Hellwege**), had a discussion with Alza's patent counsel Steve Stone, Esq. (**Stone**). Ex 1033, ¶ 3.

12. Hellwege represents that Stone indicated that any testimony Alza would provide to Adhesives and the inventors would

occur only in response to the issuance of a subpoena. Ex 1033, ¶ 4.

13. Stone is said to have indicated that:

a. Gale is an employee of Alza. Ex. 1033, ¶ 5.

b. Gale would not be available to provide testimony during the period 1 December 1999 through 3 January 2000. Ex 1033, ¶ 6.

The priority testimony phase of an interference

14. An interference is divided into a preliminary motion phase and a priority testimony phase.

15. This interference is in the priority testimony phase, a decision on preliminary motions having been entered on 27 October 1999 (Paper 73).

16. In an interference, a rebuttable presumption exists that the senior party (Garbe in this case) made the invention first. 37 CFR § 1.657(a).

17. Junior party Therriault, in this case, must establish priority by a preponderance of the evidence because the Therriault application was copending with the application which matured into the Garbe patent. 37 CFR § 1.657(b).

18. Testimony in an interference is taken as follows.

a. The junior party is required to establish its priority case by filing affidavits. 37 CFR § 1.672(a). The normal experience in interference cases is that the individuals

whose testimony is needed to establish priority are within the control of the real party in interest. Hence, there is little, if any, difficulty obtaining needed testimony. Former employees of the real party in interest are generally under an employment contract obligation to provide needed testimony even after retirement. On occasion, however, a third-party--not under any contractual obligation to the real party in interest--participates in some significant manner in making the invention. A third-party may or may not voluntarily provide an affidavit. When the third-party will not voluntarily provide an affidavit, the law (35 U.S.C. § 24) authorizes the issuance of a subpoena by a U.S. District Court to compel testimony by the third-party. Patent and Trademark Office (**PTO**) regulations require that permission be obtained from an administrative patent judge before a party may apply to the U.S. District Court for issuance of a subpoena under 35 U.S.C. § 24. 37 CFR § 1.671(g).

b. Normally, an entire case-in-chief of the junior party is served on the senior party. 37 CFR § 1.672(b).

c. The senior party then has an opportunity to object to the admissibility of any of the evidence relied upon in the case-in-chief of the junior party. 37 CFR § 1.672(c). The Federal Rules of Evidence, with minor exceptions, apply in interferences. 37 CFR § 1.671(b).

d. If an objection to the admissibility of the evidence is made by the senior party, then the junior party may file supplemental evidence to overcome the objection. 37 CFR § 1.672(c). The supplemental evidence may include affidavits of individuals who have not previously testified. For example, the junior party may file an affidavit by an additional witness to overcome a hearsay objection or an objection based on failure of the junior party to authenticate a document.

e. If there is no objection to the admissibility of evidence or after supplemental evidence is filed following any objection, then the senior party may cross-examine the witnesses relied upon by the junior party. 37 CFR § 1.672(d).

f. Cross-examination takes place by deposition in the United States. 37 CFR § 1.672(d)

g. If there is no cross-examination, or after cross-examination occurs, the case-in-chief of the junior party terminates and the interference proceeds to its next step.

Testimony taken by subpoena under 35 U.S.C. § 24

19. Testimony taken pursuant to a subpoena under 35 U.S.C. § 24 is usually taken by deposition, but, it need not be taken by deposition.

20. The experience of the board is that often a third-party requires the issuance of a subpoena for business reasons.

Among other things, the third-party often does business with both parties in the interference.

21. For example, as applied to the facts of this case, Alza may fully intend to cooperate with both Adhesives and 3M. Alza, however, may prefer to take the position that it will not favor Adhesives or 3M. Issuance of a subpoena helps to avoid any appearance of favoritism by Alza with respect to either Adhesives or 3M.

22. It is possible to comply with a subpoena by providing an affidavit. Issuance of a subpoena may provide a third-party with an incentive to help prepare an affidavit because preparation of an affidavit, in cooperation with counsel for a party, can take less time and avoid the formal nature of a deposition setting. Thus, proceedings under a § 24 subpoena may be (1) formal, difficult and/or costly or (2) informal, simple and inexpensive. The third-party under subpoena may agree to less formal procedures thus saving itself some expense and time.

23. At some point, an opposing party in the interference has an opportunity to cross-examine by deposition, whether testimony is presented by affidavit or through a transcript of a deposition.

C. Discussion

1. Policy behind 37 CFR § 1.671(g)

The PTO does not have authority to issue a subpoena for production of documents and/or compel attendance at a deposition to give testimony. Attendance is compelled through a subpoena. 35 U.S.C. § 24; 37 CFR § 1.671(g). Permission for Therriault to proceed by subpoena under 35 U.S.C. § 24 is warranted in this interference. However, entry of an order in an interference authorizing a party to proceed under § 24 should not be construed as an authorization to permit that party to engage in a fishing expedition. See the commentary in the Notice of Final Rule, Patent Interference Proceedings, 49 Fed. Reg. 48416, 48417 (cols. 2-3) (Dec. 12, 1984), reprinted in 1050 Off. Gaz. Pat. Office 385, 386 (Jan. 29, 1995):

In the event a party needs testimony from a third-party who will not appear unless a subpoena is issued, including a hostile witness, direct and cross-examination testimony may be taken on oral deposition. The rules provide that prior authorization of an examiner-in-chief is required before a party can take testimony by issuance of a subpoena under 35 U.S.C. 24. The rule thus adopts the policy of Sheehan v. Doyle, 513 F.2d 895, 898, 185 USPQ 489, 492 (1st Cir.), cert. denied, 423 U.S. 874 (1975), and Sheehan v. Doyle, 529 F.2d 38, 40, 188 USPQ 545, 546 (1st Cir.), cert. denied, 429 U.S. 870 (1976), rehearing denied, 429 U.S. 987 (1976), and rejects the policy announced in Brown v. Braddick, 595 F.2d 961, 967, 203 USPQ 95, 101-102 (5th Cir. 1979).

See also 49 Fed. Reg. at 48428 (col. 1) (Dec. 12, 1984),
reprinted in 1050 Off. Gaz. Pat. Office at 397:

Under § 1.671(g), a party is required to obtain permission from an examiner-in-chief prior to proceeding under 35 U.S.C. 24. This requirement insures that a subpoena is necessary (e.g., a subpoena ordinarily should not be necessary where testimony of an opponent is sought) and that testimony sought through a section 24 subpoena is relevant before a subpoena is issued. The motion seeking permission to proceed under section 24, any opposition thereto, and the order of an examiner-in-chief authorizing the moving party to proceed under section 24 will be of assistance to a federal court in the event a party is required to resort to a court to enforce the subpoena or to compel answers to questions propounded at any deposition where a witness is appearing pursuant to a subpoena. See Sheehan v. Doyle, 529 F.2d 38, 188 USPQ 545 (1st Cir.), cert. denied, 429 U.S. 870 (1976), rehearing denied, 429 U.S. 987 (1976).

2. Resolution of Therriault's motion

a.

Therriault's motion and Garbe's opposition reveal that the parties are divided with respect to the conditions under which proceedings under § 24 should take place in this case. In fact, Garbe goes so far as to suggest they should not take place at all.

Therriault makes the argument that it will be prejudiced because it cannot effectively prepare its overall case-in-chief unless it first has an opportunity to obtain information from Alza. Without addressing each of Therriault's arguments and Garbe's responses thereto, we have no difficulty finding that Therriault's argument is entirely plausible.

Garbe makes the counter-argument that it will be prejudiced if it does not receive that part of Therriault's case-in-chief which could be presented by witnesses under the control of Adhesives prior to cross-examination. The prejudice would come about because Garbe might not be able to effectively cross-examine the Therriault case if it has to cross-examine the Alza witnesses before Garbe sees the rest of Therriault's case. As in the case of Therriault's argument, we have no difficulty finding that Garbe's counter-argument is also plausible.

The board finds itself in the position of "King Solomon" trying to figure out how to fairly "divide" the prejudice which plausibly might be visited on Therriault to the advantage of Garbe vis-a-vis the prejudice which plausibly might be visited on Garbe to the advantage of Therriault. There is a solution which will accommodate the needs of both parties while at the same time preserving the underlying manner in which a case-in-chief is to be presented in interference cases in the PTO. Thus, unlike King

Solomon, we can "divide" the baby without the consequences King Solomon faced had he done so.

b.

Among other principles, the following are relevant to an evaluation of whether a party has established an actual reduction to practice.

(1) Whether an inventor has established an actual reduction to practice is a question of law to be determined on the basis of the facts. Estee Lauder, Inc. v. L'Oreal, S.A., 129 F.3d 588, 592, 44 USPQ2d 1610, 1613 (Fed. Cir. 1997); Scott v. Finney, 34 F.3d 1058, 1061, 32 USPQ2d 1115, 1117 (Fed. Cir. 1994).

(2) Establishment of an actual reduction to practice requires that a party show that every limitation of the interference count must exist in an embodiment and the embodiment must have performed as intended. Estee Lauder, Inc. v. L'Oreal, S.A., 129 F.3d 588, 593, 44 USPQ2d 1610, 1613 (Fed. Cir. 1997); Newkirk v. Lulejian, 825 F.2d 1581, 1582, 3 USPQ2d 1793, 1794, (Fed. Cir. 1987).

(3) An evaluation of whether testing is sufficient to establish an actual reduction to practice is made on a case-by-case basis. Scott v. Finney, 34 F.3d 1058, 1061, 32 USPQ2d 1115, 1117-18 (Fed. Cir. 1994); Gordon v. Hubbard, 347 F.2d 1001, 1006,

146 USPQ 303, 307 (CCPA 1965); Blicke v. Treves, 241 F.2d 718, 720, 112 USPQ 472, 474, 475 (CCPA 1957).

(4) An inquiry into the sufficiency of testing is not what kind of test was conducted, but whether the test conducted shows that the invention would work as intended in its contemplated use. Scott v. Finney, 34 F.3d 1058, 1061, 32 USPQ2d 1115, 1117-18 (Fed. Cir. 1994); Eastern Rotocraft Corp. v. United States, 384 F.2d 429, 431, 155 USPQ 729, 730 (Ct.Cl. 1967).

(5) Any evaluation should be guided by a common sense approach, applying a "reasonableness standard," in weighing the sufficiency of any testing. Scott v. Finney, 34 F.3d 1058, 1061, 1062, 32 USPQ2d 1115, 1118 (Fed. Cir. 1994).

(6) An actual reduction to practice of a composition is established when an inventor (i) actually prepares the composition of matter satisfying the limitations of the claim, (ii) recognizes the composition of matter and (iii) recognizes a specific practical utility for the composition. Estee Lauder, Inc. v. L'Oreal, S.A., 129 F.3d 588, 592, 44 USPQ2d 1610, 1613 (Fed. Cir. 1997).

(7) Invention of a composition is not complete unless its utility is obvious or is established by proper tests. Blicke v. Treves, 241 F.2d 718, 720, 112 USPQ 472, 474, 475 (CCPA 1957).

(8) Although testing under actual operating conditions of use is not necessarily a requirement for an actual reduction

to practice, the tests must prove that the invention will perform satisfactorily in the intended functional setting. Koval v. Bodenschatz, 463 F.2d 442, 447, 174 USPQ 451, 455 (CCPA 1972) (tests in the 7-13 volt range hopelessly out of line with that which would be employed in any normal use of circuit breaker of the count); Knowles v. Tibbetts, 347 F.2d 591, 594, 146 USPQ 59, 61 (CCPA 1965).

(9) In determining what tests are necessary to constitute an actual reduction to practice, it is proper to take into consideration statements in the specifications of the applications involved in the interference, as well as limitations appearing in the counts. Tomecek v. Stimpson, 513 F.2d 614, 618-19, 185 USPQ 235, 239 (CCPA 1975) (where specification revealed automobile and non-automobile uses, testing for non-automobile use was sufficient); Blicke v. Treves, 241 F.2d 718, 721, 112 USPQ 472, 475 (CCPA 1957).

(10) In deciding whether sufficient utility has been established, it is further proper to take into account the primary object of an inventor's research. Knapp v. Anderson, 477 F.2d 588, 590, 177 USPQ 688, 690 (CCPA 1973) (CCPA found "that the only utility contemplated for the amines [of the count] is as ashless dispersants in lubricant compositions. The compositions are clearly intended to be used in internal combustion engines. We cannot accept appellants' argument that sufficient utility is

demonstrated [for an actual reduction to practice] if the amines are useful for 'dispersing sludge' and the compositions are useful for 'maintaining sludge in suspension,' regardless of the setting or the type of sludge suspended. The record makes it clear that such was not an objective of the Knapp research"); Morway v. Bondi, 203 F.2d 742, 744, 749, 97 USPQ 318, 323 (CCPA 1953) (while counts were not restricted to any particular use, to determine whether testing for utility was sufficient, it was proper to take into account to determine whether testing for utility that Morway was primarily seeking a high performance lubricant in order to meet the shortcomings of his company's existing product, although it was not necessary for Morway to show that new grease was "superior" to existing product).

(11) After sufficient testing has occurred to establish an actual reduction to practice, continued experimentation does not negate an actual reduction to practice. Tomecek v. Stimpson, 513 F.2d 614, 619, 185 USPQ 235, 239 (CCPA 1975); Breen v. Miller, 347 F.2d 623, 628, 146 USPQ 127, 131 (CCPA 1965).

(12) To establish an actual reduction to practice, it is not necessary to show that the invention has proceeded to the point where it is ready for commercialization. DSL Dynamic Sciences, Limited v. Union Switch & Signal, Inc., 928 F.2d 1122, 1126, 18 USPQ2d 1152, 1155 (Fed. Cir. 1991); Koval v. Bodenschatz, 463 F.2d 442, 447, 174 USPQ 451, 455 (CCPA 1972).

(13) An invention may be actually reduced to practice by a non-inventor on behalf of an inventor. Applegate v. Scherer, 332 F.2d 571, 573, 141 USPQ 796, 799 (CCPA 1964). In the future, parties relying on a third-party to actually reduction to practice a conceived invention may wish to place the third-party under a contractual obligation to assist in prosecuting any patent application which might be filed or in any subsequent interference. Cf. In re RCA Corp., 209 USPQ 1114, 1117 n.4 (Comm'r Pat. 1981).

c.

In view of the principles set out in Part "b", it is manifest that Therriault needs to "talk" to Alza personnel to determine what occurred with respect to the making and testing of the transdermal drug deliver device at Alza.

At this time, it reasonably can be concluded that Therriault does not, and we cannot know precisely what documentation exists and which individuals would need to testify to establish an actual reduction to practice. Alternatively, it may turn out that after talking with Alza personnel, Therriault may conclude that it cannot prove an actual reduction to practice.

In our opinion, the best course of action is to permit Therriault to communicate ex parte under subpoena with Alza personnel so that Therriault and Alza can determine who should

testify and Therriault can determine documents should be made part of its case-in-chief. It may turn out that Alza, under subpoena, will determine from a cost point of view that it is easier to authorize its personnel to sign affidavits. If not, Therriault can take ex parte depositions of Alza personnel to prepare and present its case-in-chief on priority.

Garbe will then be in a position to evaluate Therriault's entire case-in-chief in the manner contemplated by the rules as though no subpoena had been necessary. Testimony in the Therriault case-in-chief ultimately may be entirely by affidavits or it may be partly by affidavits and partly by a transcript of ex parte depositions.

Garbe would then be in a position to make objections to the admissibility of evidence based on the entire case--not just part of the case.

Therriault could then supplement its evidence, including if necessary through supplemental ex parte depositions. For this purpose, Therriault may wish to leave the first subpoena open until it can be determined whether supplemental evidence is needed in response to any objection to the admissibility of evidence made by Garbe.

Garbe would then be in a position to determine which witnesses (affiants and deponents), if any, it would have to cross-examine. If Garbe determines that it must cross-examine an

Alza witness, Therriault would then have to issue a second subpoena under 35 U.S.C. § 24 for the purpose of conducting an inter partes deposition so that Garbe can accomplish any cross-examination needed.

The two-step procedure eliminates a concern expressed by Garbe in its oppositions with respect to what documents Therriault would compel Alza to produce in the first instance. In its first subpoena, Therriault can ask Alza to designate the Alza employees who can provide relevant information and documentation. It would be for Therriault and Alza to work out any concerns. There is no need for Garbe to be involved in connection with proceedings under any first subpoena. On the other hand, if a second subpoena is necessary, Garbe would be in a position to advise Therriault what additional documentation might be compelled to effect cross-examination. Any dispute between the parties could be resolved by the board prior to issuance of any second subpoena. Therriault would then be required to seek a second subpoena consistent with Garbe's requests, or if disputed, consistent with the board's resolution of differences between Therriault and Garbe.

We will not seek in this MEMORANDUM OPINION and ORDER to resolve all possible contingencies which might arise as a result of a procedure which requires issuance of two separate subpoenas.

Rather, we leave for another day resolution of matters beyond those necessary for decision today.

An order will be entered authorizing Therriault to cause a subpoena directed to Alza to be issued by an appropriate U.S. District Court. Therriault must present the proposed subpoena to be issued to the board prior to seeking its issuance by a U.S. District Court. The gathering of evidence under the first subpoena will be ex parte in the sense that Garbe will not participate or otherwise be involved and it will be for Therriault and Alza to resolve differences, if any should arise.

d.

Authorizing a party involved in a patent interference proceeding before the PTO to proceed under 35 U.S.C. § 24 means that a third-party, not involved in the interference, will be put to some inconvenience. Alza is such a third-party. But, Alza involved itself in the Therriault effort. We believe Alza is in business to make a profit. Even if Alza is a benevolent entity, a reasonable amount of inconvenience is the price we pay as a society to resolve conflicts in an orderly fashion. It is the duty of all citizens, when called, to testify in a cooperative manner.

Nevertheless, the parties in this interference are expected to minimize any inconvenience to any third-party to whom a

subpoena is issued. A third-party has a right to move the district court issuing the subpoena to issue a protective order. Fed. R. Civ. P. 26(c)(4). The motion may be based, inter alia, on the relevance in this interference of documents and deposition testimony sought.

In the event a motion for a protective order is filed in a U.S. District Court based on relevance in this interference to documents and/or deposition testimony sought to be compelled, Therriault is required to hand-deliver two (2) copies of the motion to the Clerk's Office at the Board of Patent Appeals and Interferences within 24 hours if the PTO is open, otherwise within one (1) business day, of its receipt by counsel.

If any party in the interference responds in the U.S. District Court to any motion for protective order, the party is on the same day required to hand-deliver two (2) copies of the response at the Clerk's Office at the Board of Patent Appeals and Interferences. The papers filed in the U.S. District Court will be reviewed immediately to see if a memorandum opinion should be entered discussing the relevance in the interference of the documents and/or deposition testimony sought. The purpose of the memorandum opinion would be to aid the U.S. District Court in determining whether a protective order should be issued limiting the scope of documents and deposition testimony. Also, the parties shall advise the U.S. District Court that it may certify

to the board, through counsel or directly, any question it would like addressed by the board.

D. Order

Upon consideration of THERRIAULT MISCELLANEOUS MOTION 11 (Paper 77), and for the reasons given, it is

ORDERED that the motion is granted.

FURTHER ORDERED that on or before **6 December 1999**, Therriault shall file and serve a copy of the subpoena proposed to be issued by an appropriate U.S. District Court.

FURTHER ORDERED that, subject to review by, and approval of, the proposed subpoena by an administrative patent judge or the board, Therriault is authorized to proceed under 35 U.S.C. § 24 in a manner consistent with the views expressed in this MEMORANDUM OPINION and ORDER.

FURTHER ORDERED that a copy of this MEMORANDUM OPINION and ORDER shall be served immediately by Express Mail or its commercial equivalent by counsel for Alza.

FURTHER ORDERED that proof of service on counsel for Alza shall be filed in the Office of the Clerk of the Board of Patent Appeals and Interferences.

_____)	
FRED E. McKELVEY, Senior)	
Administrative Patent Judge)	
)	
)	
_____)	
RICHARD E. SCHAFER)	
Administrative Patent Judge)	
)	
)	BOARD OF PATENT
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)	
)	
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