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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NANOBEBE US INC.,

Plaintiff,

v.

21 CV 8444 (JLR)

MAYBORN (UK) LIMITED, et al.,

Defendants.

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New York, N.Y.
February 22, 2023
11:00 a.m.

Before:

HON. JENNIFER L. ROCHON,

District Judge

APPEARANCES

WIGGIN & DANA LLP

Attorneys for Nanobebe

BY: JOHN MATTHEW DOROGHAZI

MICHAEL JOSHUA KASDAN

THOMAS LANDMAN

FISH & RICHARDSON PC

Attorneys for Mayborn

BY: JOHN STEPHEN GOETZ

MATT COLVIN

MEREDITH M. BAYER

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1 (Case called)

2 MR. GOETZ: Good morning, your Honor. John Goetz, of
3 Fish & Richardson, on behalf of Mayborn.

4 THE COURT: Good morning, Mr. Goetz.

5 MR. GOETZ: I can let the other folks introduce
6 themselves.

7 THE COURT: Please.

8 MR. COLVIN: Good morning, your Honor. Matt Colvin,
9 Fish & Richardson, on behalf of Mayborn.

10 THE COURT: Good morning.

11 MS. BAYER: Good morning, your Honor. Meredith Bayer,
12 Fish & Richardson, on behalf of Mayborn.

13 MR. GOETZ: And Anthony Hulse and Dennis Jaskoviak, of
14 Mayborn as well, your Honor.

15 THE COURT: Welcome. Thanks for being here.

16 MR. KASDAN: Good morning, your Honor. Nice to see
17 you again. Michael Kasdan, from Wiggin & Dana, for Nanobebe.
18 I'll let the others introduce themselves.

19 MR. DOROGHAZI: Good morning, your Honor. John
20 Doroghazi, from Wiggin & Dana, for Nanobebe.

21 THE COURT: Good morning.

22 MR. LANDMAN: Good morning, your Honor. Thomas
23 Landman, from Wiggin & Dana, on behalf of Nanobebe.

24 MS. LARRORY: Good morning, your Honor. Marie Belle
25 Larrory, on behalf of Nanobebe.

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1 THE COURT: Good morning.

2 MR. GOETZ: We also have client representatives here.
3 We also have joining us, from the client, Ayal, who was here
4 last time for the tech tutorial, and his cofounder, Asaf, and
5 Elli, who was also here last time.

6 THE COURT: Welcome. Thanks for being here.

7 I will take your lead, but, as I understand it, we
8 have ten claims to go over today, although there's a few that
9 refer back to the others. I assume we'll hear first from
10 Mayborn, because it's your patent, and then Nanobebe. I think
11 we're going to go claim by claim. I think that was suggested
12 last time. So we'll hear from Mayborn, then Nanobebe.

13 I have questions on each. You should not take from my
14 questions that I have decided anything. I have an open mind,
15 but I also have a lot of questions. I find this very
16 interesting. I've spent a lot of time with this. I am very
17 excited about today. So we'll take the time that we need to
18 get through everything.

19 We will take breaks periodically for the court
20 reporter's benefit, everyone else's benefit, too, although I
21 could go for hours. And I have the exhibits from the tech
22 tutorial here – premarked – so if you want to refer to them as
23 the exhibit numbers that we used previously, that's absolutely
24 fine.

25 And then I know the parties have been waiting a bit.

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1 You have two tech tutorials. This *Markman* hearing took a
2 little while, et cetera. So, I'm going to try to get to this
3 as fast as I can. If the parties wish to get an expedited
4 transcript, that would help me. I can't promise that I will
5 get to it - I have TROs and other things - but that would make
6 it easier for me to rule earlier. So you guys decide if you
7 want to do that, split the cost to get an expedited transcript,
8 and then please let the court reporter know.

9 And those were my preliminary remarks.

10 Mr. Goetz, how would you like to proceed today?

11 MR. GOETZ: Yes, thank you, your Honor.

12 We spoke before, and we have a short sort of program
13 plan. We thought maybe we could do short openings to set the
14 stage, maybe ten minutes or so, and then we'd jump into the
15 term-by-term debate, as we had discussed, if that's okay with
16 your Honor.

17 THE COURT: That sounds fine.

18 Mr. Kasdan, is that what you propose as well?

19 MR. KASDAN: Yes. We spoke briefly beforehand, and
20 we're fine if we need to go term by term.

21 I wanted to mention one thing before we begin and get
22 into the claim construction. I know we've had two tech
23 tutorials, and I know you do have some questions. It is very
24 important to my client, there are a couple of issues that came
25 up in the tech tutorial, factual issues, where we'd just like

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1 to clarify the record and reserve a few minutes at the end to
2 do that. I think it might even answer some of your background
3 questions. So, I know it's not formally part of the claim
4 construction process, so we're happy to do, of course, the term
5 by term, as we laid out, but if we could reserve, at the end, a
6 few minutes to do that, we'd appreciate that.

7 THE COURT: Is there a reason you wouldn't do that at
8 the beginning during your remarks, or would it break up the
9 flow?

10 MR. KASDAN: I think it would break up the flow a
11 little bit.

12 THE COURT: Mr. Goetz, do you have any objection to
13 him --

14 MR. GOETZ: No, your Honor, that's fine. And we have
15 some housekeeping matters that we have to discuss at the end as
16 well.

17 THE COURT: I'm happy to hear from the parties on
18 whatever they need to present. That's no problem at all.

19 MR. GOETZ: Thank you, your Honor.

20 THE COURT: Okay. No problem.

21 So we'll start with openings, and, Mr. Goetz, the
22 floor is yours.

23 MR. GOETZ: Thank you, your Honor. I have some slides
24 to distribute. May I approach?

25 THE COURT: Yes, please.

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1 MR. GOETZ: Thank you.

2 I have two sets for you.

3 THE COURT: Thank you.

4 Okay. Before you begin, are we going to mark these
5 with continuous markings? I think that's probably best. Does
6 that work for you?

7 MR. GOETZ: Yes, your Honor, of course, that's fine.
8 Actually, we had spoken before your Honor came in. We actually
9 were working on a plan to organize the exhibits from all of the
10 hearings, including the previous ones as well, and so if we
11 just continued with the numbering that we stopped off from last
12 time, that would be helpful. I think we're at -- that would be
13 Defendants' 11, what I just handed up, I think, your Honor.

14 THE COURT: Right, that would work for me.

15 Mr. Kasdan, that works for you?

16 MR. KASDAN: That works for us. And we'll do the
17 housekeeping at the end. Mr. Goetz mentioned to try and clean
18 up the record.

19 THE COURT: That would be great.

20 So this presentation that's been handed to me will be
21 marked Defendants' Exhibit 11.

22 And you may proceed.

23 MR. GOETZ: Thank you, your Honor. May it please the
24 Court:

25 So, just to start, just to set the stage a little bit,

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1 we talked about term by term. I think last time, we discussed
2 maybe ten terms. I actually think it's going to turn into
3 eight because there is some overlap, and we'll see that as it
4 goes.

5 We have the slides, your Honor. The first two slides
6 are just the patents in suit. And just to remind the Court
7 what these patents are about, they are about baby bottles and
8 nipples that are used with baby bottles. The two patents are
9 in the same patent family, which means they have identical
10 specifications. That means they have the same text, the same
11 figures. The difference is the claims and the claim language,
12 and we'll see that and, of course, discuss that today.

13 Before we dive in here, I did have a few slides just
14 on the claim construction process and just trying to provide
15 the big picture of the claim construction, sort of, process,
16 how the claim construction fits into a patent case, to sort of
17 give an overview so that we can kind of see what's going on.
18 And then after that, I've got a couple of slides about what
19 I've labeled as sort of claim construction dos and don'ts, and
20 this is sort of the guideposts that we get from the Federal
21 Circuit – not from us, your Honor, from the Federal Circuit –
22 and from the Supreme Court as how to think about it.

23 So, the first thing to think about is the claims of a
24 patent are what define the invention. They're sort of the
25 survey lines of the intellectual property, right, so they're

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1 the sentences at the end, and that's how you determine where
2 the property starts and stops, and using the English language,
3 which makes it tricky.

4 The claim language is given the meaning that it would
5 have to those of skill in the art, and so it's not language
6 that's for laypeople, it's not language that's for even judges
7 or lawyers; it's supposed to what the skilled artisan
8 understands, and it's supposed to be the meaning that's
9 understood at the time of the invention. So, here, if you're
10 actually going to teleport yourself back to the 2004/2005 time
11 period, I actually don't think that that timing is really an
12 issue in this case, but just to understand the process, that's
13 the idea.

14 The courts are charged with construing claim language
15 as a matter of law. It's very much like construing the
16 language of a contract. And it's very similar to that.

17 The way I like to think about it is that the Court's
18 constructions are going to be provided, of course, to the jury
19 at the trial. I mean, they're going to be part of the jury's
20 charge in a sense. In a sense, one way to think about the
21 *Markman* process is this is really the very first charge
22 conference in the case. We're arguing, really, about the jury
23 instructions as they relate to specific terms.

24 And then so sometimes the Court's instruction will
25 resolve the question of infringement — that does happen. It

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1 doesn't always happen, though, and it doesn't have to happen.
2 A lot of times there are still factual debates after the Court
3 has construed the disputed claims, and that's just what
4 happens, and that's sort of the big picture.

5 On the claim instruction dos and, again, after the dos
6 and don'ts slide, we've got a series of slides with the law
7 that sort of supports each point really as a reference for your
8 Honor and for your staff and for us during the proceedings
9 today. I don't want to go through the case in detail. I just
10 want to try to get the big picture.

11 So the claim construction dos are, you know, consider
12 the plan and ordinary meaning. So the claims are written in
13 the English language, and English often has a plain meaning,
14 and that's sort of the default. And what the Federal Circuit
15 has said, and made pretty clear, that that's what governs,
16 absent something like a disclaimer or disavowal or a
17 lexicographical situation, which is where the patent applicant
18 defines a term to mean a specific thing.

19 There's a lot of lingo in these cases, your Honor.
20 We're going to try to work through that today. I want try to
21 be as helpful as we can on that. So, plain and ordinary
22 meaning is just sort of what do these words mean. The goal,
23 really one goal, is to help the jury understand the plain
24 language. Your Honor is supposed to consider the intrinsic
25 evidence. That's a term of art, and what does that mean? That

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1 means the patent itself. So that means the claims themselves,
2 like the language of the claims, the specifications. The
3 specification meaning sort of written description of the
4 invention and the summary and the background. And then, of
5 course, the figures as well.

6 So that's part of the intrinsic evidence.

7 The other part of the intrinsic evidence is the record
8 of the Patent Office proceedings. And every patent will have a
9 back-and-forth with the Patent Office when the application is
10 filed, there will be a back-and-forth before the patent is
11 issued, that's usually called the file history. But the
12 proceedings, particularly today's day and age, can proceed
13 after the grant of the patent. So, if there are postgrant
14 proceedings — like reexaminations in the old days, IPRs are
15 more likely here, that's what we have in this case, and we'll
16 talk about that today — that's a part of the Patent Office
17 proceedings, and that's a part of the intrinsic evidence that
18 can be used to construe the claims. And that makes sense
19 because that's all open to the public, and part of the reason
20 you should, and you're allowed, to look to the file history is
21 because that's the public record of what's been said about the
22 meaning of the terms, and so it's important evidence for your
23 Honor to consider when construing the meaning of the claim
24 terms.

25 So, the Patent Office proceedings is both the file

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1 history sort of in the past and the postgrant proceedings like
2 IPRs.

3 And then the other thing that you're doing, your
4 Honor, in a case like this, in a claim construction, is you're
5 addressing the debates between the parties, you're providing a
6 formal construction for the disputed terms, basically ruling,
7 as a matter of law, as to how persons of skill in the art would
8 understand them, and, like I said, they'd be submitted then to
9 the jury, and the jury would be required to apply those
10 constructions in rendering its decision on infringement and
11 invalidity and the issues in the case.

12 So that's sort of big picture dos.

13 On the don'ts, and, again, these are guideposts that
14 we get from the Federal Circuit. You've seen it in the briefs,
15 you'll see -- I'm sure we'll be talking about some of these
16 cases today, and they're sort of guideposts. They're not
17 hard-and-fast rules, but they are guideposts that are going to
18 apply in this case.

19 One is do not import limitations from the
20 specification into the claims. Now, this notion of importing a
21 limitation is kind of a funny way to say it, but, basically,
22 it's you're not supposed to take the examples in the
23 specification, which are sometimes called embodiments -- that's
24 another term of art. What does embodiment mean? Embodiment
25 really is a working example that's in the description.

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1 And so what you are not supposed to do is to take
2 particular aspects of the embodiments in the specifications and
3 put them into the claims if the claim does not recite them.
4 And that's what this notion of importing limitations from the
5 specification into the claims is.

6 And, in general, you're not supposed to do that. And
7 the reason for that, as the cases make clear, is that the
8 inventor is sort of entitled to the claims as he has
9 articulated them in his claim, and you're allowed to claim in a
10 way that's broader than just your examples. And that's fair,
11 and that's the reason for that.

12 Another sort of don't we've got on the list is do not
13 adopt a construction that reads out preferred embodiments
14 disclosed in the patent specification. And the idea here is if
15 you adopt a construction, and then you go back and look at some
16 of the preferred embodiments, and it doesn't cover that, that's
17 sort of a red flag to your Honor to say, hey, maybe I'm not
18 construing this the right way because it doesn't actually cover
19 one of the preferred embodiments or the preferred embodiment.
20 So that's not a hard-and-fast rule, but it's a good sort of red
21 flag of things that courts typically shouldn't do, as the
22 Federal Circuit said.

23 We talked a little bit about this next one during the
24 last hearing. In general, do not refer to the accused device
25 or use it for a basis for construing the claim language. And

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1 the reason for that -- it's clear why you would want to do
2 that, right, but it's a little bit of putting the cart before
3 the horse. It should be claim construction has a meaning, it
4 has a meaning as of the time of the invention, which is often a
5 long time before the case, as it is here, and so the reference
6 to the accused device is not sort of appropriate because it
7 didn't exist oftentimes, as is the case here, at the time of
8 the invention. So that's sort of conceptually why you're not
9 doing it, but it's also not the intrinsic record, right? It's
10 not the patent itself, it's not the specification, it's not the
11 history, it's public about the file history or the IPRs. So
12 that's another reason. So, in general, you don't do that.

13 Two more.

14 One, in general, is you don't adopt a construction
15 that injects ambiguity or uncertainty into the claim. So that,
16 of course, makes sense. It's sort of a common, sort of,
17 drafting concept. You would never do that in a contract, for
18 example, you would never construe it in a way that injects
19 ambiguity or uncertainty. And it makes sense that you don't
20 want to do it here because, again, this is all going to go to
21 the jury, and the idea here, the goal there, is to help the
22 jury with the issues in the case.

23 And, finally, do not adopt a construction that
24 requires proof of an infringer's intent. We'll talk a little
25 bit about that. The reason for that is patent liability -- is

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1 patent infringement is a strict liability offense. And so if
2 you develop this clicker, and you take a patent, and you map
3 the patent claim to the clicker, this clicker infringes, it
4 doesn't matter whether or not the designer wanted it to
5 infringe -- that's an issue for willful infringement. That can
6 be an issue, but straight patent infringement is strict
7 liability. It doesn't matter what the designer was thinking
8 when they developed this if this maps to the claim. And so you
9 don't want to add that notion of *mens rea* into the claim as a
10 general matter.

11 So, those are the sort of does and don'ts, your Honor.
12 You'll see the importation, for example, in the variable wall
13 thickness, which we think has been rewritten and imported
14 helical groove. So you'll hear some of these notions as we go
15 through the day.

16 I'm not going to go through the slides on the law. I
17 just want to touch, very briefly, on the timeline, just a quick
18 sort of refresher. We're talking about -- we talked a little
19 bit about this in the tutorial. The technical field here is
20 baby bottles with a nipple. On the left on the timeline, on
21 slide 12, we have the sort of vintage classic baby bottle with
22 the square collar and --

23 THE COURT: Just one moment.

24 MR. GOETZ: Yes, ma'am.

25 THE COURT: Do we have the slide on the screens?

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1 MR. GOETZ: I do have the slide on the screen, your
2 Honor. You do not see it?

3 THE COURT: Do the parties have it? I have it on
4 mine.

5 MR. GOETZ: Can we publish to the jury box? Maybe
6 that's the same feed.

7 THE COURT: Maybe.

8 MR. GOETZ: You can see it, your Honor?

9 THE COURT: We're fine.

10 MR. GOETZ: Very good.

11 Just back to the timeline, the classic baby bottle
12 sort of on the left, the problems, it was nothing like a
13 woman's breast. The baby experienced nothing like actual
14 breastfeeding when using it. And then in the early 2000s - I
15 got 2001 on the timeline - people were starting their first
16 attempts really to mimic a woman's breast to make it more
17 realistic. So we weren't the first ones to try to do that - we
18 don't claim to be - but we were improving on those first
19 attempts, and that's when we came, around 2004 and 2005,
20 improvements in these first attempts to try to mimic the
21 breast. So there were a bunch of improvements, and I'm not
22 going to go through them all, but I'll just touch on -- we
23 talked about them at the tech tutorial, it's more like a breast
24 in shape, more like a breast in function, better control of the
25 nipple, you know, particularly during the peristaltic feeding

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1 motion the baby uses, stiff enough to prevent nipple collapse –
2 that's one of the problems identified in the specification with
3 these first attempts in the early 2000s – and then better
4 venting. The venting was a problem, not working consistently,
5 and, of course, that improves the feeding.

6 So, finally, your Honor, we're trying to be helpful
7 here today, so we've got these presentations, but what we
8 really want to do is answer your questions. We've studied your
9 questions from the last hearing, and we've got answers for all
10 those, we're going to talk about those, but we're, of course,
11 happy to answer any questions along the way.

12 I'll be splitting our presentation time with
13 Mr. Colvin, and that's all I have for an opening, your Honor.

14 THE COURT: Thank you, Mr. Goetz.

15 Mr. Kasdan.

16 MR. KASDAN: Thank you.

17 If you can go with the slide show from the beginning,
18 that would be great.

19 We can go to the next slide.

20 May it please the Court: Thank you, your Honor.

21 So, again, we're going to also open – coincidentally,
22 I think we have the exact same structure to our presentations –
23 with some opening comments and also make some comments.

24 Just to reset context, I know it's been a few weeks
25 since we talked about the tech tutorial, just a few comments on

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1 the patents to frame the issues, and then also a number of
2 comments on the law, like Mr. Goetz did.

3 I should say, we agree with the dos and don'ts of
4 claim construction, and we agree with the rules of the road -
5 that you shouldn't be importing preferred embodiments. We
6 don't have a disagreement on the law, but we do disagree that
7 that is, in fact, what we're doing. The claim constructions
8 that we've proposed, we think, are fully consistent with and
9 necessary under the law consistent with the intrinsic record,
10 and I think if you look at Mayborn's constructions, they're
11 really divorced from what this invention is all about. So I
12 want to start by talking about what this invention is all
13 about.

14 We have two patents here. Like Mr. Goetz said,
15 they're related, so they share the same disclosure, and the
16 only difference is the claims.

17 The '930 patent, which is what we're going to start
18 with, the claims are drawn to a particular nipple structure,
19 and we have claim terms to talk about, like what's the teat
20 portion, what's the areola portion, what's the base, what does
21 it mean for the base to be domed. The claims are drawn to this
22 structure that's described in terms of these elements, and it's
23 important, as a matter of claim construction, to have a
24 construction that actually distinguishes one element from the
25 next.

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1 The '244 patent is claimed a little bit differently.
2 It's drawn more to the nipple function and claims increased
3 flex in the vertical directions. And the claim term there, we
4 have a couple of disputes, but the first and main dispute is on
5 the flex region and what that means.

6 Both patents, the sort of centerpiece of both patents,
7 and the heart of both patents, are these regions of increased
8 flex to mimic the breast motion in and out or what was thought
9 to be the human breast motion in and out.

10 Go to the next slide.

11 So the '930 patent, we just have a shorthand here to
12 frame it, and we'll get to the claim terms later, and on the
13 right is an annotated version of Figure 4 from the patent, on
14 the left is just a 3D rendering of that that might be useful.
15 But what's disclosed, and what the invention is there, is a
16 nipple with flex regions, and there are two areas where
17 increased flexibility is provided. There's radial grooves on
18 the areola, and that's shown by these undulating patterns –
19 120 – circled in red in the middle, and by helical grooves on
20 the teat portion that have a variable thickness.

21 Go to the next slide.

22 The other components of the '930 patent that turned
23 out to be important didn't seem very important when you read
24 the specification, it's really only a few lines in the
25 specification, but if you look at the file history, and we

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1 agree, again, with Mr. Goetz, that it's really important to
2 look at the record of what the applicants said back and forth
3 to the Patent Office in order to get these claims. This is a
4 very long journey for Mayborn here. I think it was
5 seven years, there were a number of rejections, and there were
6 a number of amendments to the claims, which are really
7 important to look at, and what the claim ends up claiming is
8 this -- what we're shorthand referring to here as the fancy
9 vents. It's this portion at the very bottom and includes some
10 of the elements we'll be talking about today, like the domed
11 base and this vent passage that's attached to the collar,
12 extends through the domed base portion, and it's a very
13 specific type of venting system. So, that's just something to
14 keep in mind.

15 We're going to get to this when we talk about the
16 importance of claim constructions like domed base and also the
17 indefiniteness of the partially inwardly language.

18 Next slide.

19 So, '244 patent -- I know we're going to do the '930
20 patent -- but the main point there is that there's a flex region
21 that increases flexibility. We've studied that portion here,
22 and it's configured to allow this vertical in outflexing of the
23 mouthpiece.

24 Next slide, please.

25 In terms of the highlights and to frame some of the

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1 issues, as we see Mayborn's constructions, they're really
2 litigation induced and designed to broaden the scope of these
3 patents outside of what was invented and disclosed. That's
4 another really important don't. It's really important to look
5 at the intrinsic record, see what was invented, see what they
6 gave up during prosecution, and have a construction that's
7 consistent with that. And Mayborn's constructions are not
8 consistent with that.

9 And what we showed a little bit in the tech tutorial,
10 just to frame the parties' disputes, is how they're asserting
11 these patents, and they're accusing a product that's completely
12 different both structurally and functionally from the patents
13 and, in fact, functions in the opposite way.

14 Next slide, please.

15 You asked a couple of questions, which we'll get to,
16 and I know Mayborn will have comments on it as well, but there
17 are two examples of this that we just wanted to highlight.
18 Domed configuration in the '930, you asked, well, why is
19 Mayborn proposing this arc-shaped cross-sectional profile? It
20 seems like a very complicated phrase to interpret a pretty
21 simple term that we all kind of are familiar with. So geometry
22 dictates that dome. We all know what a dome is — it's the
23 upper half of a sphere, it's rounded in three dimensions. Why
24 is Mayborn proposing an arc-shaped cross-sectional profile?
25 Yesterday they shared with us that they have a new alternative

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1 construction that uses the term convex cross-sectional profile,
2 which I'm sure we'll talk about today, too, but I think that's
3 one example of, well, why exactly are we going with such a
4 complicated confusing sentence here when arc-shaped and convex,
5 terms like that, aren't used in the patent, and domed is a
6 pretty simple thing.

7 The second dispute that I think sort of frames this is
8 flex region. And in the '244 patent, that was another question
9 that your Honor asked, which is why does the construction
10 control flexing, which, as we explained, would encompass not
11 only the increasing flexing, which was what's disclosed in
12 these patents, and the whole focus of these patents if you read
13 them, but also resisting flexing, right, which is not disclosed
14 or discussed anywhere in these patents.

15 So I think those are just two examples that really
16 frame up the issues well.

17 We can go to the next slide.

18 We'll get to this, too, but when we talk about teat
19 portion and areola portion and base portion, the consistent
20 theme in Mayborn's constructions is that they're very
21 imprecise. The lines between these things are blurry. And as
22 a patentee, that enables you to draw boxes around different
23 things very freely when you're asserting infringement. The
24 constructions that we've proposed are definite, they have start
25 points and end points, they say why something is the areola

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1 region, why something is the teat portion. These things
2 correspond to things in nature, right, the point was to mimic
3 the human breast.

4 So, the imprecise construction is also
5 litigation-induced and also go well beyond what the patent
6 discloses.

7 Next slide, please.

8 We pretty much agree on the law. I had a couple of
9 slides on this, but I do want to emphasize a few things.

10 If you look across our constructions, they're well
11 supported by the intrinsic record. And when I say that, I mean
12 the three primary sources for claim construction according to
13 *Markman*, according to *Vitronics* and *Phillips*, kind of the
14 seminal type construction cases. They're the claim language
15 itself, so you start by looking at the claim language.
16 Sometimes that gives clues as to how something should be
17 construed. For example, areola portion in the claim language
18 has to be between the teat portion and the base portion. So,
19 that informs claim construction of start points and end points.
20 The specification, right, which is the disclosure and
21 description of what this invention is, and the file history.
22 And the claim language -- the claim scope should align with
23 what's disclosed in the specification and during prosecution.

24 So, I don't have to belabor this too much -- I know you
25 know the law -- but I think the last quote from *Phillips* is

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1 really apt here: That the construction that stays true to the
2 claim language and most naturally aligns with the patent's
3 description of the invention will be in the end the correct
4 construction.

5 There are also certain terms that Mayborn has said,
6 you know, we're just going to rely on plain meaning or that
7 term doesn't need construction, and, in those cases, we have a
8 dispute about those. Plain meaning is often not adequate to
9 resolve the parties' dispute, and the constructions that we
10 proposed are those that are true to the patent.

11 As to the products, we talked about them a little bit,
12 gave you some background, and you had some questions, you have
13 a bunch of them up there. Of course, we're talking about the
14 patents here. And, of course, the issue of infringement is a
15 separate issue, and it is a two-step process. And we agree, of
16 course, you look to the intrinsic record, you construe the
17 claims, and the question of infringement or noninfringement
18 comes after that.

19 But, importantly, the Federal Circuit has said that
20 you don't have to look at this with blinders or in a vacuum or
21 with no context. And what the accused product looks like and
22 how they're trying to read their patent dose inform why they've
23 chosen to propose certain constructions.

24 And that's the reason that we've shared a little bit
25 about the product in the tech tutorial and a little bit here -

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1 it just frames the disputes.

2 So, I think we're going to get into the disputed terms
3 of the '930 patent. I have a little intro to the '930 patent.
4 If it pleases the Court and counsel is okay with it, I can do
5 that, and then we can get into the terms?

6 THE COURT: Any issue with that, Mr. Goetz?

7 MR. GOETZ: No issue, your Honor, that's fine.

8 THE COURT: Thank you.

9 Go ahead, Mr. Kasdan.

10 Mr. Kasdan, do you have a copy of your presentation?

11 MR. KASDAN: I'm so sorry. Of course.

12 THE COURT: You don't happen to have two, do you? If
13 you don't, that's fine. It's just I mark one.

14 MR. KASDAN: Sure.

15 THE COURT: And this is going to be marked Plaintiff's
16 Exhibit 6.

17 MR. KASDAN: Great.

18 (Pause)

19 THE COURT: Apologies for interrupting you. Go ahead.

20 MR. KASDAN: I'm sorry we didn't get that to you
21 earlier. I thought it had happened.

22 THE COURT: No problem.

23 MR. KASDAN: So, let's start a little bit with the
24 '930 patent, just to frame up our discussions to follow.

25 Next slide, please.

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1 So, this is the asserted Claim 14 of the '930 patent.
2 As you've seen, patents have a number of claims. They're not
3 asserting certain claims, they're asserting others. So this is
4 the claim that we've been focused on, and we highlighted some
5 of the portions that I have been talking about. Nipple having
6 a -- these are all components of the nipple. So, you have a
7 teat portion, the variable wall thickness, the base portion
8 having a domed configuration, the areola portion that's between
9 the two, as I just referred to, and then we'll also be talking
10 about that one-way air inlet valve, the fancy venting system I
11 talked about, when we get to the partially inwardly limitation,
12 but this is just a good visual.

13 This claim defines what's invented in terms of these
14 regions, and these regions have meaning. They have start and
15 end points, and they have functionality.

16 Next slide, please.

17 So, the first point that I think across all these
18 portions is where are they? Where does it start and end? We
19 think if you look at the patent and its disclosure
20 consistently, it's pretty clear that the teat portion, which
21 another way to say is that is the nipple stem, is highlighted
22 in green in the figure to the upper right, and that's the
23 entire part of the nipple stem. And that's what goes into the
24 baby's mouth, that's what the baby will latch.

25 Did you have a question, your Honor?

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1 THE COURT: No.

2 MR. KASDAN: Okay.

3 The areola portion is highlighted in, I guess, light
4 orange, I'd call it. That's below -- it's in between the teat
5 portion and the base portion. And that extends beyond the
6 baby's lips. And, remember, this is a 3D structure, so the
7 areola portion surrounds and extends beyond the bottom of the
8 teat portion, just like in nature on the woman's breast. Base
9 portion is not something that exists in nature. The base
10 portion is not part of the nipple anatomy. It's not in
11 communication with the baby's lips. It's the part that is
12 mounted to the collar at the very bottom shown in blue.

13 So, the location of these portions is important. And
14 if we go to the next slide, what these portions do is also
15 important. And it's not importing functional limitations to
16 describe a portion by what it's doing. The word areola portion
17 doesn't have a meaning outside this patent. It's what the
18 patent says it is, is what it is. So if you look at the
19 disclosure, which we'll do when we get to the arguments, the
20 teat portion is disclosed as having increased flex with helical
21 grooves and uses the term variable wall thickness in the claim,
22 which we'll talk about. The helical grooves are the only
23 disclosure in the patent, the only embodiment that discloses a
24 variable wall thickness. The areola portion, which is in the
25 '930 patent -- it's this portion in orange, it's with those wavy

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1 grooves that I highlighted earlier – and that's giving the
2 increased flex with the radial grooves. That's so you get that
3 increased flexibility in and out to mimic what they thought was
4 the function in nature. In the '244 patent, that's referred to
5 as the flex region. And then you have the base portion, and
6 that's the part at the bottom mounted to the collar and
7 includes that fancy venting arrangement that's described in the
8 claim, and they had to amend their claims during prosecution to
9 narrow and cover.

10 Next slide, please.

11 So, why is this important? We touched on this in the
12 tech tutorial, but just to remind the Court, because I think
13 it's important, it's important to distinguish between these
14 portions, because that's what the claim does, and that's what's
15 disclosed in the invention.

16 So, in human anatomy, you have the nipple, like the
17 nipple stem, you have the areola, which has a different surface
18 characteristic, it surrounds it circumferentially. I probably
19 didn't get that right, but I think you get the idea, it's a big
20 word. The '930 patent, similarly, in green, the teat portion
21 is the part that corresponds to the nipple stem. Surrounding
22 that in 3D is the areola portion. And below that is the base
23 portion.

24 And it's really important where these portions are for
25 Mayborn, because in order to get this patent during

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1 prosecution, they had to have this fancy venting structure go
2 through the base portion, through a domed base portion. So,
3 it's interesting when you look at the product on the right, the
4 green box is the entire nipple stem. But what Mayborn has done
5 is they have a construction that's different from that, that's
6 broader, that's fuzzier, and what they have done is they've
7 called just like the upper part of that the teat portion, and
8 then the lower part of that is the areola portion, and then
9 they say, okay, everything else is the base portion.

10 So, that's wholly inconsistent with the way the patent
11 describes what these portions are and what they do and where
12 they are, and that's what informs our construction -- what the
13 patent says -- where the patent says these different portions
14 are and what they do. So that's why this is all important.

15 So I think now we're getting to the disputed
16 constructions, and so I've been up here for a while, and I
17 think we're going to go downward starting at the teat portion
18 is our plan.

19 THE COURT: Thank you. Thank you, Mr. Kasdan.

20 The openings were very helpful.

21 Mr. Colvin?

22 MR. COLVIN: Yes, your Honor.

23 Good morning, your Honor. Matt Colvin, for Mayborn.

24 Can I get the slides, please?

25 Your Honor, the first term, or I should say set of

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1 terms, that we're going to talk about today is the teat portion
2 and mouthpiece. Now, the argument that I'm going to go through
3 here is directed towards teat portion, but, of course, the
4 parties agree that mouthpiece is going to get the same
5 construction. Mouthpiece shows up in the '244 patent,
6 Claim 21; teat portion is the term used in the '930 patent,
7 Claim 1.

8 THE COURT: Can I ask a question on that: I do
9 understand that the parties agree that the construction should
10 be the same, but when I looked at the '930 and the '244 patent,
11 I see differences, such as the '244 patent doesn't talk about
12 areola or the base in Claim 21, et cetera. There's just no
13 disagreement that it will be treated the same as teat portion
14 from the '930 patent; is that correct?

15 MR. COLVIN: That's our position, your Honor.

16 THE COURT: Mr. Kasdan?

17 MR. KASDAN: Yes, we agree. Mouthpiece is a different
18 way of saying teat portion in that patent. And we agree --

19 THE COURT: Even if I define or construe the term teat
20 portion in a way that references an areola, for example, that's
21 permissible even though that term is not used in Claim 21 of
22 the '244 patent, Mr. Colvin?

23 MR. COLVIN: Yes, your Honor, I believe it would be
24 permissible. And the reason is that these terms are going to
25 be construed as a way that an expert or that a person of

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1 ordinary skill in the art would understand that term. And so
2 when the rubber meets the road here, we're both going to have
3 experts that are going to draw a circle around the teat and be
4 able to explain to the jury that this is the teat and this teat
5 sits above what would be the areola portion. I think when it
6 actually comes down to it, I understand your Honor's concern,
7 but I think it will work out pretty easily.

8 THE COURT: That's fine. As long as there's no
9 disagreement.

10 Mr. Kasdan, do you want to add anything?

11 MR. KASDAN: Yes. Just to add, we don't think it
12 poses an issue. Like we said, the specifications of these two
13 patents are the same, and they use, for example, the term
14 areola. So it's no problem to construe the claim with
15 reference to that. I don't think it's because we're going to
16 have different experts circling different things, I think it's
17 because it's based on the same intrinsic record. So we don't
18 think it's a problem. We do agree that in the '244 patent,
19 they chose to use different language – mouthpiece – but they're
20 talking about what we both consider to be the teat portion, and
21 it should be the same construction for both.

22 THE COURT: Thank you, Mr. Kasdan.

23 You can continue, Mr. Colvin, and thanks for that
24 clarification.

25 MR. COLVIN: Thanks for the question, your Honor.

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1 So, fortunately, we're starting off with a term where
2 there's a lot of agreement. As I've shown with the green, our
3 construction is fully subsumed in Nanobebe's construction.
4 Both parties agree that the words "part projecting generally
5 perpendicular to the mouth of the vessel and disposed above the
6 areola portion" should be in the claim. Of course, Nanobebe
7 doesn't think that Mayborn's construction goes far enough, and
8 we're, no doubt, going to talk about that.

9 Nanobebe also mentions in their brief, and said
10 briefly in their opening, that they don't think our
11 construction is precise. But what we find is that our proposed
12 construction is very consistent with the claim language.

13 The claim requires a spatial relationship between the
14 teat portion, the areola portion, and the base portion. And
15 the claim is very explicit about this. And it's important to
16 understand what the claim says and what the claim doesn't say,
17 because, remember, the words of the claim define the property
18 right. And, so, the claim says that an areola portion is
19 between the teat portion and the base portion. And our
20 proposal is consistent with that. I don't think there's a
21 disagreement among the parties.

22 You see at the bottom of this slide, on the bottom
23 left, we have the Figure 4, and Nanobebe just showed in their
24 opening, and they have in their brief, a very similar picture.
25 And so, there's just not a disagreement about the spatial

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1 relationship between these three different portions.

2 And these figures are colored, both Figure 4 and
3 Figure 1 on the slide, these figures are colored based on what
4 the claim language itself tells us. Certainly, we look at the
5 specifications, and it identifies those things, but you don't
6 need anything else, other than what the claim tells you, in
7 order to properly place the teat portion, the areola portion,
8 and the base portion on the product.

9 Now, Nanobebe's construction has two main problems:

10 The first is that it adds confusion and not clarity.
11 The additional words of Nanobebe's construction, "the entire
12 part which extends into the baby's mouth for feeding," creates
13 a situation where how the product is used would determine what
14 is and what is not a teat portion. Imagine, hypothetically,
15 that you have a baby that has trouble latching, can't latch
16 properly, that baby may only put a portion of what has been
17 termed perhaps the nipple stem or the perpendicular part in its
18 mouth. In that situation, in that particular use case, with
19 that particular hypothetical child, what's a teat portion would
20 change because not all of this perpendicular part would extend
21 into the baby's mouth. So, we think that adding those words
22 doesn't help the trier of fact in this situation. We think it
23 would, in fact, hurt.

24 Secondly, those additional words are just unnecessary.
25 You just don't need them, as I showed in the previous slide, in

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1 order to orient teat portion with respect to the areola
2 portion. Recall that your Honor has to construe these claims
3 as they would be understood by a person of ordinary skill in
4 the art at the time of the invention. A person of ordinary
5 skill in the art has no trouble understanding where the teat
6 starts and where the areola starts. These are very common
7 terms in the art.

8 I should also note that both parties agree that the
9 teat portion is the perpendicular part. It's in our
10 construction, it's in their construction, it's the part
11 projecting generally perpendicular to the mouth of the vessel.
12 And everything beyond that just ends up being extra.

13 The second main problem with Nanobebe's additional
14 language is that the phrase "which extends into the baby's
15 mouth for feeding" is a functional limitation not found in the
16 claim.

17 Now, this issue of adding limitations that are not
18 found in the claim is going to come up a lot in this particular
19 *Markman* hearing, and so it's important to really understand
20 what we're talking about. The claim language at no point
21 requires a teat portion to be something that extends into the
22 baby's mouth for feeding. This is just something extra.

23 Now, could Mayborn have chosen, at the time of
24 drafting its claims, to insert that language and insert that
25 limitation? Absolutely. As part of the back-and-forth with

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1 the Patent Office, could Mayborn have narrowed its claim to
2 include that? Of course, it could have. But it didn't do
3 that. Mayborn stuck with teat portion, and those were the
4 terms that were issued, and that is the scope of Mayborn's
5 property right.

6 Adding "which extends into the baby's mouth for
7 feeding" is a functional limitation, and the Federal Circuit
8 has said very specific things about this. The Federal Circuit
9 said, in the *Ecolab* case, "Where the function is not recited in
10 the claim itself by the patentee, we do not import such a
11 limitation."

12 And the Southern District of New York has echoed that,
13 functional limitations expressed in the specification, but not
14 in the claim may not be read into the claim.

15 And perhaps the most important part of this entire
16 discussion is that we put forward this argument in our opening
17 brief. We listed these two cases in our opening brief. We
18 talked about this. Nanobebe was silent in their brief on this
19 issue. They just didn't address it at all.

20 And so, in conclusion on this term, your Honor, I
21 would just urge you to adopt our, Mayborn's, construction. It
22 is consistent with the claim, it's consistent with the
23 specification, it doesn't introduce new limitations, it's
24 clear, and could be easily understood by a person of ordinary
25 skill of art at the time and the jurors in this case.

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1 THE COURT: Mr. Colvin, before you end, I have a few
2 questions.

3 MR. COLVIN: Yes.

4 THE COURT: Would Mayborn still object if the word
5 "entire" was added, but not the functional qualification at the
6 end? So, if it was simply "the entire part projecting
7 generally perpendicular to the mouth of the vessel and disposed
8 above the areola portion"?

9 MR. COLVIN: Mayborn would have no objection to that,
10 your Honor.

11 THE COURT: Okay.

12 My second question, then, and it's a bit related to
13 that is: What about the transition portion? I see references
14 to a transition portion, which appears to me to still be on
15 that perpendicular stem, perhaps, or maybe not. Can you talk
16 to me about the transition portion?

17 MR. COLVIN: Yes, your Honor. So the patent, in
18 regards to, I believe, the first embodiment, references a
19 transition portion, and this is something that could have been
20 claimed. It's another, perhaps, feature. It's certainly not
21 in our claim, and I don't think it would be something to
22 insert, if you will, into these constructions because it's just
23 not in the claim.

24 THE COURT: And then, finally, the concept of defining
25 something in relation to where it exists above the areola if

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1 it's the areola portion between the teat portion and the base
2 portion, that sort of locational definition, do you have any
3 cases that you can cite to of other products where the terms of
4 a utility patent are defined vis-a-vis their location to each
5 other as opposed to any functionality or any specific
6 characteristics, but simply based on location?

7 MR. COLVIN: Your Honor, I know it has happened. I
8 don't have a case for you now. We can certainly do a bit of
9 research on that and provide you some evidence to that. I'm
10 certain it's happened. I suspect Nanobebe would agree with
11 that.

12 THE COURT: Thank you. Thank you very much.

13 Okay, that's all I have for now. Thank you,
14 Mr. Colvin.

15 MR. COLVIN: Thank you, your Honor.

16 THE COURT: Mr. Kasdan.

17 MR. KASDAN: Thank you, your Honor.

18 So, before I get to my slides, just because it's top
19 of mind, I just wanted to respond to a few things that
20 Mr. Colvin said first.

21 First of all, he said there's a lot of agreement.
22 What I wrote down when he said that was, but the disagreements
23 are important. I think that the disagreement is now narrower,
24 if I heard correctly, that Mayborn would be okay with the
25 clarification of entire. But a couple of comments:

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1 First of all, we agree the claim requires a spatial
2 relationship. And Mr. Colvin said a few times the claims
3 define the property right. And he's right, you do look to the
4 words of the claims as part of claim construction, but you
5 don't stop there, because the exercise that we're here doing is
6 we're construing the claims, and you do that with reference to
7 what they said their invention was, what they did during
8 prosecution. So, just because the exact claim construction
9 isn't written out en haec verba in the claim, that's not the
10 end of the inquiry. So we're here to construe the claims, and
11 you do that with reference to the specification.

12 And Mayborn's construction, as proposed, the "part
13 projecting generally perpendicular to the mouth of the vessel
14 and disposed over the areola portion," doesn't fully define
15 even that spatial relationship, for the reasons that we pointed
16 out.

17 Now, one argument that they made was that the size of
18 the baby's mouth shouldn't affect the claim construction. And
19 we agree with that. But the example that he gave was confusing
20 to me. What he said was, well, let's say you have a baby that
21 is having a problem latching, and it only latches onto a small
22 portion of the nipple stem, shouldn't that small portion be the
23 teat portion? Well, my answer is no. Like he said, the teat
24 portion isn't something you construe with reference to the size
25 of the baby's mouth or how difficult -- the teat portion is a

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1 structural thing on the nipple, and it is disclosed in this
2 patent as the entire nipple stem.

3 As to this importing of functional limitation, I want
4 to touch on that because I think this is a dispute that I think
5 we'll talk about quite a bit today, but it's important to
6 distinguish between importing a functional limitation and
7 simply construing what the words of the claim means. We're not
8 importing a functional limitation that isn't there. There's
9 nothing in there -- if you look at the two cases that they
10 cited, we didn't address those cases because those cases are
11 irrelevant. We're not importing a functional limitation. If
12 you look at those cases, that's where the claim says, and this
13 element must function and operate in a certain way.

14 All we are saying here is clarifying that we're
15 talking about the entire nipple stem, and we're clarifying that
16 structurally on the nipple, it's the outer part, it's the part
17 that extends into the baby's mouth for feeding in nature and in
18 this patent.

19 And I think we disagree that this adds any confusion
20 at all. I think it's pretty clear.

21 If we can go to the next slide, I'll walk through this
22 a little bit more carefully.

23 So, teat portion -- this is just framing us in the
24 claim as we march through, starting with the teat portion. The
25 teat portion -- and they highlighted it in their figures as

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1 well - it's this entire nipple stem, and it sounds like they
2 don't have an issue with entire anymore.

3 Next slide.

4 That is or was the difference between the parties'
5 construction, that it has to be the entire nipple stem, the
6 part that goes into the baby's mouth. Part of the support for
7 this is that the claim also requires a teat portion having a
8 variable thickness, and we'll get to our disagreement about
9 that claim term, but as it relates to teat portion, the
10 disclosure of the element that corresponds to the teat portions
11 have a variable thickness is that helical groove, 122, which is
12 shown towards the bottom of the nipple stem.

13 So, a construction that lets you just circle the tip
14 or circle a portion and not the whole thing is inconsistent
15 with the claim language itself.

16 Next slide, please.

17 And this is the language about helical groove just for
18 reference. I don't have to belabor that point.

19 Next slide, please.

20 The other place where this is made crystal clear by
21 Mayborn is in the prosecution history. As I mentioned, there's
22 a long history of prosecution, many records, many applications
23 in this chain, making arguments, trying to get the claim
24 allowed, repeatedly getting rejected. So, in 2011, a dozen
25 years ago, there was an Office Action in this case in a

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1 grandparent application of this patent application, sharing the
2 same spec, related in the same way these two patents are, where
3 during the prosecution, there was prior art that was cited -
4 this is the Renz patent - and they said, as shown above, stem,
5 20, in Renz, which is circled in red at the left, corresponds
6 to the teat, 114, which is what corresponds to the teat portion
7 in the '930 patent. And if you look, we have a next slide that
8 shows that in a little bit more detail. There's a figure in
9 Renz, Figure 4, that shows that 20 is the entire nipple stem.
10 It has a first end, a second end, and a length L, which is the
11 entire length of the stem.

12 If you can go back one slide.

13 And they said, during prosecution, those things
14 correspond. So a construction that now says it's not the
15 entire stem, it's some smaller portion of it, is not consistent
16 with what they said to the Patent Office.

17 THE COURT: So, Mr. Kasdan, if I accept what appears
18 to be okay now with Mayborn, that it's "the entire part
19 projecting generally perpendicular to the mouth of the vessel
20 and disposed towards the areola portion," do I need to consider
21 the Renz application at all?

22 MR. KASDAN: The Renz application supports that
23 argument on entirety, your Honor. So the answer would be no.

24 THE COURT: Thank you.

25 MR. KASDAN: Next slide.

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1 One more, please.

2 So, here we are, this issue about importing functional
3 limitations. We're not adding any confusion. I think if you
4 look at the construction, it's pretty clear and easy to
5 understand. It simply describes what the teat portion is by
6 where it is, confirms it's got to be the entire, which they now
7 agree with, and basically says this is what is in nature, it's
8 the outer portion that the baby latches to. So we don't think
9 there's anything confusing about it. We don't think it imports
10 any sort of functional requirement. We're really talking about
11 what it is, which is exactly what we should be doing on claim
12 construction.

13 Next slide, please.

14 Again, this is why it matters, and I think we've been
15 through this a few times, but it matters because if you can
16 call the very tip of it the teat portion, and call what's below
17 the areola portion, and what's below that, the base, you get
18 this cascading effect where you end up with something that's
19 very divorced from the claims and from this invention. And
20 that's not consistent with the patent. That's why we're
21 proposing the simple clarification that we have.

22 A little bit more on this. Their inventor also
23 agreed, when he was deposed in this case, that the region
24 that's commonly described as the teat region or teat portion is
25 the part on the nipple that's in contact with -- that's where

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1 the baby -- the tongue squeezes as part of feeding. So that's
2 also consistent, fully consistent, with kind of commonly how
3 the teat portion is understood and with what their inventor
4 said and with what he showed.

5 That's all we have on teat portion, your Honor, unless
6 you have any questions.

7 THE COURT: I do.

8 MR. KASDAN: Okay.

9 THE COURT: So, why do you need -- if the Court were
10 to construe the term "a teat portion" as "the entire part
11 projecting generally perpendicular to the mouth of the vessel
12 and disposed above the areola portion," why do you need the
13 additional language, "which extends into a baby's mouth for
14 feeding"?

15 MR. KASDAN: I think that the crux of our dispute was
16 about "entire." I think that that language just sort of
17 clarifies it for the jury. Especially we're sort of
18 analogizing to what happens in nature and in bottles, we
19 thought it was a helpful clarification.

20 But I think the construction of the dispute is on this
21 issue of "entire" and whether it can be less than the entire
22 stem.

23 THE COURT: The reason I was asking that is because it
24 seemed to me the argument about the size of a baby's mouth or
25 where they're latching or all those different things would be

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1 obviated if it was the entire portion, and for you to have --
2 for Nanobebe to rely on the portion that extends into the
3 baby's mouth for feeding, that seems to me that may result in
4 less than the entire portion, and, therefore, it seems like
5 you're arguing for the entire perpendicular portion; is that
6 right?

7 MR. KASDAN: Yes, we're arguing for the entire
8 portion, your Honor, that's right.

9 THE COURT: Okay.

10 So, do you have any -- maybe I'll just get an
11 agreement here. Do you have any issue, and maybe there's no
12 objection between the parties, if we construe a teat portion as
13 "the entire part projecting generally perpendicular to the
14 mouth of the vessel and disposed above the areola portion"?
15 Would Nanobebe object to that?

16 MR. KASDAN: No, I think we'd be okay with that, your
17 Honor.

18 THE COURT: Okay. So that's one term off the table.

19 Let's move to the next term, Mr. Goetz.

20 MR. GOETZ: Yes, your Honor. Mr. Colvin will do this
21 one as well.

22 THE COURT: Oh, Mr. Colvin, please.

23 MR. COLVIN: Mr. Goetz really wanted to do all of
24 them, your Honor. So he doesn't need any more encouragement.

25 Your Honor, for the second term we're going to

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1 discuss, the term "a teat portion having a variable wall
2 thickness."

3 As your Honor is aware, Mayborn believes that the
4 plain meaning is sufficient for this term, and Nanobebe
5 proposes that this term should be construed as a teat portion
6 having a helical groove.

7 Now, why does Mayborn propose a plain meaning? We do
8 this because we think that the words of the claim are just very
9 easy to understand, your Honor. These are not confusing words,
10 these are not words that have special meaning in the field.
11 The jurors will know what a variable wall thickness is and will
12 have no trouble considering it.

13 We think that giving these terms their plain meaning
14 is the way to ensure that Mayborn is allowed the full scope of
15 its invention. Mayborn chose these words, again, to define its
16 property right. The Patent Office examined them, and examined
17 them for a long time, your Honor. There was a lot of
18 back-and-forth with these claims. And, ultimately, the Patent
19 Office granted Mayborn's claim with these words, and Nanobebe
20 shouldn't be allowed to change them now. But that's exactly
21 what Nanobebe is attempting to do.

22 Nanobebe is trying to remove the applicant's chosen
23 words, "variable wall thickness," and replace them with their
24 own words, "helical groove."

25 Now, this absolutely reads a limitation into the

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1 claim. I've got another Federal Circuit case here, the *Kara*
2 *Tech* case. It says: The patentee is entitled to the full
3 scope of his claims, and we will not limit him to his preferred
4 embodiment or import a limitation from the specification into
5 the claims. Your Honor, this is very settled claim
6 construction law, and I'm going to show you a bunch of cases
7 throughout this hearing that say this. And there's a reason
8 that this comes up so many times, and it's because accused
9 infringers very frequently want to narrow the claims by trying
10 to read limitations from the specifications into them. So the
11 Federal Circuit is constantly having to tell courts and tell
12 the parties don't do this, you cannot import limitations into
13 the specification.

14 Now, what Nanobebe is trying to do, I think, is best
15 seen when you look at it like I've shown on this slide.
16 Nanobebe would have this Court redline out "variable wall
17 thickness" from this claim and replace it with the words
18 "helical groove." That's what will happen if the Court adopts
19 Nanobebe's construction.

20 Again, as I mentioned in the first term, Mayborn could
21 have written a claim with helical groove here. In fact, we'll
22 see in Claim 15, Mayborn did include "groove" in one of its
23 claims, but for this Claim 14, Mayborn chose "variable wall
24 thickness," not helical groove.

25 THE COURT: Mr. Colvin, let me just ask a question.

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1 Again, I'm probably oversimplifying, but are you saying, then,
2 that the reason why "helical groove" should not be part of the
3 term definition is that Mayborn's patent covers teat portions
4 that don't contain a helical groove?

5 MR. COLVIN: Yes, your Honor.

6 THE COURT: And that the helical groove is a
7 preferred --

8 MR. COLVIN: That's right.

9 THE COURT: -- embodiment, and only one of the -- I'll
10 use the word example, which is not a patent term -- one example
11 of the type of inventions that could fall under this patent?

12 MR. COLVIN: That's right, your Honor. What you see
13 in the patent is the patent describes an embodiment that has a
14 helical groove, and Nanobebe would like to import that
15 limitation from the specification into the claim, but it just
16 doesn't exist. This is such a big deal in patent law, your
17 Honor, that the Federal Circuit has said, reading a limitation
18 from the written description into the claims is one of the
19 cardinal sins of patent law. Now, those are strong words, but
20 that's just how big of a deal it is to the Federal Circuit,
21 that you don't do this.

22 There's another case, *Hill-Rom*: We do not read
23 limitations from the embodiments in the specifications into the
24 claims.

25 Now, Nanobebe's excuse here is that, well, the only

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1 disclosure of a teat portion having a variable wall thickness
2 is the helical groove, 122, shown in Figure 4. Now, that's not
3 true, as we point out in our brief, but even if it were, that
4 still would not be enough to do what Nanobebe is asking the
5 Court to do.

6 Here's two Federal Circuit cases. *Altiris*: Merely
7 because the specification only describes one embodiment is not
8 a sufficient reason to limit the claims to that embodiment.

9 There are a litany of other cases that we string-cite
10 in our brief, your Honor. I just have two here. Nanobebe
11 points to the *Watts* and *Wang* cases for support, and they say
12 that under such circumstances, as Mayborn's patent, courts have
13 construed the claims to be limited to what is disclosed and
14 linked to the limitations at issue. But that's just not right.
15 *Watts* and *Wang* are not applicable here, and I'd like to tell
16 you why.

17 Let's start with *Watts*. *Watts* used very specific
18 language to limit the scope of its invention in its
19 specification. In patent speak, we call this disclaimer or
20 disavowal. And the key language from *Watts* is in the second
21 bullet on this slide. *Watts* says: The specification actually
22 limits the invention to structures that utilize misaligned
23 taper angles, stating that – and this is the important bit –
24 the present invention utilizes the varying taper angle feature.

25 It's that present invention utilizes language that is

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1 what makes *Watts* separate and distinct from our case. *Watts*
2 isn't talking about an embodiment; *Watts* is using these magic
3 words, and we're going to talk about them more, "the present
4 invention utilizes."

5 Now, I've got an excerpt on this slide from the
6 *Hill-Rom* case, and the *Hill-Rom* case is -- if the Court is
7 interested in doing a deep dive on this issue, it's definitely
8 worth a read. The *Hill-Rom* case says: Disavowal requires that
9 the specification make clear that the invention does not
10 include a particular feature. For example, when the patentee
11 makes statements such as the present invention requires, or the
12 present invention is, or all embodiments of the present
13 invention are...

14 This is very special language that the applicant has
15 to use to make clear its intention to disavow certain claim
16 language.

17 And, just generally, what is disavowal? So if an
18 applicant says in its specification, or at the Patent Office to
19 the examiner, my invention is X, I have invented a chair with a
20 seat cushion, okay, if the applicant says that, my invention is
21 a chair with a seat cushion, then it's not fair later for the
22 applicant to say, just kidding, I don't actually have a seat
23 cushion in my invention. But that requires very, very clear
24 language.

25 Here's some more excerpts from the *Hill-Rom* case. It

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1 says: The standards for finding disavowal are exacting. An
2 applicant doesn't stumble its way into disavowal or disclaimer.
3 These standards are exacting.

4 Further, *Hill-Rom* says: The claims of the patent will
5 not be read restrictively unless the patentee has demonstrated
6 a clear intention to limit claim scope.

7 And, again, later: Disavowal requires the
8 specification to make clear that the invention does not include
9 a particular feature, or is clearly limited to a particular
10 form of the invention.

11 The takeaway here is that clear intention is required.
12 Not just description of an embodiment, but clear intention.

13 Now, the '930 patent does not use this language, your
14 Honor. If we look to Nanobee's brief on this issue, we see
15 that in their paragraph where they're asking the Court -- where
16 they're asking the Court to look and see support for this clear
17 disavowal, they say that, well, this limitation, meaning their
18 helical groove limitation, is shown in the second embodiment.
19 And then they cite two parts of the patent, and I'm going to
20 show you both of them.

21 The first, in this top box, starts with: According to
22 a second embodiment. Now, they left that part out of their
23 quote that they put in their brief, but that's a very important
24 part of that sentence. According to the second embodiment is
25 not a clear disavowal of everything else that the *Hill-Rom* case

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1 and other cases have told us that we're required to have in
2 order to have disavowal.

3 In the second portion of the specification that they
4 cite to, you see that it's a tight pitch helical groove, 122,
5 and that 122 piece lets you know that it's the tight pitch
6 helical groove of a particular embodiment. This is not
7 limiting language where Mayborn is saying the present invention
8 is a tight pitch helical groove. The present invention
9 requires a tight pitch helical groove, that's not what's
10 happening here, your Honor. This is just not enough.

11 Adopting a construction, such as Nanobebe is asking
12 the Court to do here, would go directly against a large body of
13 Federal Circuit law.

14 Nanobebe also points to the *Wang* case. The *Wang* case
15 fails for similar reasons.

16 The third bullet here is important: Importantly, for
17 our analysis, the Federal Circuit said, the inventors
18 disclaimed the broader construction in a statement during
19 prosecution.

20 There's no allegation of that here, your Honor. In
21 fact, there's no real allegation of disclaimer here.

22 But there's another reason why Nanobebe's proposed
23 construction fails, and this is the doctrine of claim
24 differentiation. Now, this doctrine of claim differentiation
25 is getting pretty deep into patent weeds, your Honor, so I'm

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1 going to give you an example to hopefully drive the point home.

2 The doctrine of claim differentiation is based on the
3 presumption that different claims have different meanings. For
4 example, dependent claims would limit the scope of independent
5 claims.

6 So, imagine if we have a claim in a patent that's
7 directed towards a shirt. And that shirt is described in
8 Claim 1, and Claim 1 describes a fastening mechanism to close
9 the front of the shirt. Dependent Claim 2 may limit that
10 fastening mechanism to a button. So, Claim 1 just is broad,
11 fastening mechanism; Claim 2 would limit it to a button.

12 Because of the doctrine of claim differentiation,
13 fastening mechanism is presumed to be broader than a button and
14 include other types of fastening mechanisms, like a zipper or a
15 snap. And so, in these circumstances, a court wouldn't
16 construe fastening mechanism in Claim 1 to be a button, because
17 if it did that, the scope of Claim 1 and the scope of Claim 2
18 would be the same. And the doctrine of claim differentiation
19 says claims are presumed to have different scopes, different
20 meanings.

21 So, when you apply that to the situation in our case,
22 you arrive at a very clear result. I'll start with *Phillips*.
23 So *Phillips* is a seminal patent case, your Honor. If your
24 Honor is looking to really get into some of the weeds of claim
25 construction, *Phillips* is a great place to start. It says:

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1 The presence of a dependent claim that adds a particular
2 limitation gives rise to a presumption that the limitation in
3 question is not present in the independent claim.

4 So, let's look at the claims at issue here.

5 Claim 14 has our term, "a teat portion having a
6 variable wall thickness." But then dependent Claim 15 says,
7 "the teat portion has a groove." Based on that, the Court can
8 determine that "variable wall thickness" has to be broader than
9 "a groove," and it certainly can't be more narrow than "a
10 groove," which is what Nanobebe is asking this Court to do.
11 Nanobebe is asking this Court to strike out "variable wall
12 thickness" and include the words "helical groove," and if that
13 was the case, Claim 15 just would not make sense because you
14 would have a dependent claim that's now broader, in some sense,
15 than the independent claim from which it depends.

16 So, your Honor, in summary here, we think plain
17 meaning controls. These are easily understood terms. Variable
18 wall thickness is something that the jury will have no trouble
19 with, the experts will have no trouble with, and, your Honor,
20 to strike out "variable wall thickness" and include "helical
21 groove," as Nanobebe would have this Court to do, runs right
22 into the teeth of a lot of Federal Circuit case law.

23 THE COURT: Give me one moment, Mr. Colvin.

24 MR. COLVIN: Yes, your Honor.

25 (Pause)

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1 THE COURT: Is there any argument -- and maybe there's
2 not -- that the inclusion of groove imposes any functional
3 requirement onto the claim, or is that doctrine not applicable
4 here?

5 MR. COLVIN: I don't believe that particular argument
6 is applicable here, your Honor. Grooves, by themselves, would
7 not necessarily be functional. Functional would be something
8 like grooves that do something. I think with respect to
9 importing limitations here, you sort of have the thou shalt not
10 import limitation and then thou shalt not import functional
11 limitations as kind of a subset of that.

12 THE COURT: Okay. Let's end with the commandments.
13 Thank you.

14 MR. COLVIN: Thank you, your Honor.

15 MR. KASDAN: So, let me start just with some rebuttal
16 points, and then I'll get into our slides.

17 So, I'm not a sinner, your Honor, and I don't think
18 I'm a cardinal one, so I know Mr. Colvin was trying to get
19 biblical, but let me explain what this dispute is really all
20 about. And I will start by saying that, as a patent lawyer,
21 we're both citing cases to you, we're saying this is -- I
22 remember in law school, these are like the canons of claim
23 construction, right, that rule of dos and don'ts. And as in
24 many things that parties dispute and that you're charged with
25 deciding in determining in litigation, looking at a pulled

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1 quote from a case out of context doesn't really get you all the
2 way there, and you can probably see cases that seem like they
3 say the opposite thing sitting next to each other, so I do want
4 to explain why we think that this is a situation where it is
5 appropriate to limit the construction of variable wall
6 thickness to having a helical groove, and I want to address the
7 cases that Mr. Colvin discussed.

8 We view the *Watts* and --

9 THE COURT: *Wang*?

10 MR. KASDAN: Thank you.

11 -- the *Wang* and *Watts* cases not just as, you know,
12 magic words must say present invention or disclaimer and
13 disavowal cases, but, actually, as standing for the fact that
14 claims cannot, as a matter of law, be broader than what's
15 disclosed in the specification. If you have a construction --
16 when you draft a patent, you write a disclosure to support the
17 claims. And you can have numerous embodiments, right, you can
18 have one, two, three, four, ten ways to do something. You can
19 claim one of them, you can claim five of them, you can claim a
20 range of them, but you can't just take the broadest possible
21 word and say that's broader than anything I disclosed in the
22 patent. It's always with reference back to the patent, back to
23 the specification, the construction that best aligns with the
24 specification is usually the correct claim construction. And
25 the situation that we have here is a situation -- and I will

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1 talk about the cases that Mr. Colvin talked about -- where the
2 sole embodiment is "of variable wall thickness," is are these
3 helical grooves.

4 We focused on the second embodiment -- there are two
5 embodiments -- you'll notice that we talk a lot about Figure 4
6 in these briefs. Figure 4 is the embodiment that has that
7 fancy venting system that looks like what is claimed. But we
8 focused on the second embodiment because that's the only
9 embodiment that shows something with the variable wall
10 thickness, and it's disclosed as the helical groove.

11 The other embodiment, which is Figure 1 of the '930
12 patent, just has a teat portion with uniform thickness.
13 There's no variability. And the specification, in fact,
14 describes -- it tells you what the thickness of that is. The
15 specification says it's a thickness, and I will pull it out in
16 a second when we get to that slide, it specifies the thickness.

17 So that's the reason that we talk about the second
18 embodiment, not as any sort of sleight of hand or trick or
19 ignoring anything. It's because that's what's relevant.

20 I also just wanted to make one point on their claim
21 differentiation argument. And Mr. Colvin is correct, it's a
22 patent-lawyery in-the-weeds kind of argument, but this is on
23 page 33 of Mayborn's slides, where they put up Claim 15, and
24 they said that's a dependent claim, and, therefore, because
25 that says a teat portion has a groove, variable wall thickness

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1 must be broader than that. I have two comments on that.

2 First of all, Claim 15 doesn't only add teat portion
3 with a groove, it adds another limitation - that's configured
4 to flex in a particular direction. So that claim is of a
5 different scope, and so that claim differentiation argument,
6 that if you construe variable wall thickness to mean helical
7 groove, that those two claims would have the same scope, that's
8 just not true, because Claim 15 is still narrower because it
9 still specifies further a direction of flex.

10 The second point about claim differentiation, and
11 we're happy to provide cases on these if it's useful to your
12 Honor, but claim differentiation, like Mr. Colvin said, it's a
13 presumption. Generally speaking, you like claims to have
14 different scopes, but there are plenty of cases that say just
15 because you have a claim that specifies a narrower element, if
16 there's no support for a broader construction, that's not going
17 to convert the independent claim to something broader than
18 what's disclosed.

19 So, it's a presumption, it's a rebuttable one, and I
20 don't think the evidence that they cited really makes that
21 argument at all.

22 So, let me walk through, in a little bit more detail,
23 why we have taken this position and explain it.

24 So, again, this is that familiar picture, Figure 4,
25 embodiment, with the teat portion having the variable wall

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1 thickness, which the sole disclosed embodiment of is these
2 helical grooves, 122, that wrap around -- wrap around. And the
3 thickness varies because there are grooves in the teat portion,
4 right. So that's what that is showing if you think of it in
5 three dimensions.

6 Next.

7 And this is the disclosure. I think Mr. Colvin also
8 cited it. It's helical groove formed around that inner surface
9 of the teat portion. That's what gives it its variable
10 thickness. It's around the inner cylindrical vertical surface
11 of the teat portion, and that's where that is disclosed in the
12 patent, the only place that it talks about that.

13 We did cite these two cases -- I want to talk about
14 them in more detail -- the *Watts* case and the *Wang* case.

15 In the *Wang* case, I think you'll see, when you take a
16 look at these cases, that these cases are similar and do
17 control, because just like here, in the *Wang* case, the district
18 court, the issue was the term "frame," and frame on its own, if
19 you just look at the claim, seems like a broad thing. It could
20 be any different type of claim. It could be a character-based
21 frame, it could be a bit-mapped frame. This was in the context
22 of computer display systems.

23 And the only embodiment that was disclosed was
24 character-based and the Court's construction was limited to
25 that, it was limited to that even though the word "frame," if

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1 you just looked at it in a vacuum, is broader, because you're
2 not supposed to look at it in a vacuum. What the Court said
3 here, I think, was really interesting. It says: The usage
4 preferred -- so just because you called something a preferred
5 embodiment doesn't itself broaden the claims beyond their
6 support in the specification. And that's what this is really
7 about, it's about where is the support in the specification for
8 a broader construction. The deal with getting a patent is it's
9 a deal, right, you disclose your invention so that somebody can
10 practice it and reading it and knowing it, and in exchange, you
11 get a claim, right, you get a 20-year monopoly on that claim.

12 The first part of the deal is it's what you disclose.
13 So, you can't have a disconnect between this incredibly
14 impossibly broad claim term and a disclosure that's far
15 narrower. In those circumstances, like in *Wang*, it's
16 appropriate to limit the construction. So, in *Wang*, the court
17 said the only embodiment described in the '699 -- that was the
18 patent at issue -- is the character-based protocol, and the
19 claims are correctly interpreted as limited thereto.

20 You can go to the next --

21 THE COURT: Mr. Kasdan, having an unreasonably broad
22 claim, in the context of an arguably single embodiment, which
23 is what you're arguing here, is that something that the patent
24 examiners would pick up in looking at your claims, to say your
25 claim language is too broad because you're only seeking to

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1 patent, essentially, one embodiment that has -- the embodiment
2 has X, and, therefore, your claim is too broad? Is that
3 something a patent examiner looks at?

4 MR. KASDAN: It's something the patent examiner could
5 pick up, and sometimes does pick up, and in this context, as
6 you'll see later, there's lots of amendments and claims and
7 language changing. So, just like patent examiners are supposed
8 to look at all the prior art and figure out if it's valid or
9 not, oftentimes afterwards, you know, someone looks at it and
10 says, hey, this particular issue, did you really look at that
11 issue. So it's something that they can pick up.

12 What's also interesting about your question is if you
13 do end up with a construction that makes the claim far broader
14 than what's disclosed in the specification, that is a grounds
15 for invalidating the patent based on Section 112 of the Patent
16 Act.

17 But one of those other canons of claim construction,
18 and that's one that's relied on in these cases, is that courts
19 are supposed to construe claims to preserve their validity.
20 So, the court is not supposed to adopt a really, really broad
21 construction that would render the claims invalid for that
22 disconnect.

23 THE COURT: Thank you.

24 MR. KASDAN: Yes.

25 And I think just to make a couple of comments on what

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1 is disclosed:

2 I highlighted -- if you could just go back one slide.

3 One more slide.

4 One more. Thank you.

5 I highlighted the disclosed part of the patent where
6 we talked about this helical groove, and I mentioned before,
7 there's another part of the patent where it says the teat
8 portion generally has a rectangular cross-section with a wall
9 thickness of 1.8 millimeters and a diameter of 13 millimeters.
10 So, in other instances in this specification, it discloses like
11 a uniform wall thickness, but that's not what's claimed here.

12 So if we can just go back to the cases. Thank you.

13 Just back one. Thank you.

14 Let's just go to the next one.

15 On *Watts*, again, we disagree that *Watts* requires the
16 sort of magic language or disavowal disclaimer. *Watts* -- and
17 we've quoted like the portion here -- *Watts* was about a
18 connector patent, and what was at issue was what it means to be
19 sealingly connected. And the patent only described one way to
20 do it. It was this very specific way using taper angles that
21 were misaligned to make the seal. That's what their invention
22 was, that's what they disclosed. The claim language said so
23 they only connected, and the court limited the construction to
24 that specific sole one embodiment. And in the last paragraph,
25 they said: We're not persuaded by *Watts'* two arguments that

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1 the specification was not limiting.

2 First of all, the fact that you could get an expert in
3 there, and there might be lots of ways to do it, that's not
4 relevant because it's about what the patent says. And it
5 doesn't overcome the fact that the specification specifies that
6 that's what this is all about.

7 So, that's our position on variable wall thickness,
8 and we think it's consistent with the cases that we've cited.

9 THE COURT: Thank you.

10 MR. COLVIN: Your Honor, if I could have a brief
11 response?

12 THE COURT: Sure.

13 MR. COLVIN: I'm sorry, you may have had questions.

14 MR. KASDAN: That's okay. Go ahead.

15 THE COURT: No, I didn't have a question, Mr. Kasdan.

16 Mr. Colvin? You can stand right there if you want.

17 MR. COLVIN: Well, if we can leave this slide up for a
18 moment.

19 The last sentence here that's in Mr. Kasdan's blue
20 box, I think, is important. *Watts* says: Does not overcome the
21 fact that the specification specifies that the invention uses
22 misaligned taper angles, and you'll recall, your Honor, that
23 *Watts* also had very clear language that disavowed that scope.

24 But what I really want to talk about – if I can have
25 the document camera now – so, Mr. Kasdan spoke a bit about

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1 there just not being any disclosure in the specification for
2 something other than a helical groove and saying there's just
3 no disclosure for variable wall thickness. And that's just not
4 true, your Honor.

5 So, in the '930 patent, column 4, starting at line
6 11 - I'll zoom on it here in the document camera - it says:
7 The teat is formed from an elastomer with walls of decreasing
8 thickness from the base portion through to the teat, 114.

9 And then, further, it notes that: The teat can have
10 decreasing wall thickness, providing a more natural stretching
11 characteristic.

12 And then yet further: The teat can be textured on its
13 outer or inner surface to enhance the operation or realism of
14 the teat as appropriate.

15 And so these are all things that could certainly be
16 variable wall thickness, and so I just want to make sure the
17 Court understands that it is not as though the patent says the
18 teat shall have a helical groove and nothing else. The patent
19 is actually quite clear that it can be other things as well.

20 MR. KASDAN: Just to address this point of the spec,
21 because I think the specification does not clearly disclose
22 anywhere else variable wall thickness. So this part that
23 Mr. Colvin just cited - "the teat is formed from an elastomer
24 with walls of decreasing thickness from the base portion
25 through the teat" - that just means that the walls of the base

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1 extending through the areola might be a decreasing thickness
2 relative to that other portion. That does not disclose
3 variable wall thickness. That's not what it says. So the fact
4 that you can have decreasing wall thickness from portion to
5 portion is not a teat portion having variable wall thickness.

6 THE COURT: Thank you. Thank you, both.

7 MR. KASDAN: I have one more slide I forgot.

8 THE COURT: Please. Go ahead.

9 MR. KASDAN: Thanks.

10 This is the why it matters slide, your Honor, and we
11 think that our position is completely consistent with the
12 intrinsic record, as we've explained, and with the case law.
13 But, again, this variable wall thickness, if you look at this
14 patent, you have a teat portion with the variable wall
15 thickness, you have an areola portion -- in this patent, you
16 have a teat portion with variable wall thickness with these
17 helical grooves, you have an areola portion that has this flex
18 region, the other radial grooves. The whole purpose, and we
19 touched on this in the tech tutorial, is to increase
20 flexibility. And what you have in our product, and the way
21 they're asserting this patent, we have flex ribs that are
22 strengthening, that are doing the opposite, and the way they're
23 trying to read variable wall thickness, it has nothing to do
24 with increased flex or what's disclosed in the patent. They're
25 basically looking at these microscopic sort of manufacturing

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1 variations that are shown on the right and saying that's a
2 variable wall thickness. That's not what this patent is about,
3 that's not what's disclosed, and that's not how the claim
4 should be construed.

5 THE COURT: Yes, but, Mr. Kasdan, separate and apart
6 from your product, couldn't you have increased flexibility
7 through variable wall thickness without grooves?

8 MR. KASDAN: I think you could in many ways, but none
9 of those ways are disclosed by this patent.

10 THE COURT: Okay. Thank you.

11 I could keep going forever, but I think the court
12 reporter may need just a pause, so why don't we take just a
13 ten-minute break, everyone can stretch their legs, use the
14 restroom. I will be back promptly at 12:55 so that we can
15 start again.

16 Everyone should plan to sort of eat their power bars
17 because we're not going to take a lunch break. I think we
18 should just keep going ahead unless anybody has an objection.
19 I know we're only on Claim 2, but I'm really finding this
20 helpful. So, thank you very much.

21 MR. GOETZ: Patents for lunch sounds good.

22 (Recess)

23 THE COURT: Now, on to the insignificant base portion.
24 Just kidding. Where are we now? Mr. Colvin is back?

25 MR. COLVIN: Yes, your Honor.

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1 We've got a long run of terms to start this. So, your
2 Honor, we're happy to take whatever term you want next, be it
3 areola portion or base portion.

4 THE COURT: Oh, I had, on my list, base portion.

5 MR. COLVIN: No problem, your Honor, we can do that.

6 THE COURT: No, no, if the parties did areola portion,
7 let's do that.

8 Is that the order you did it as well, Mr. Kasdan?

9 MR. KASDAN: Yes, we had discussed going in order from
10 the top down.

11 THE COURT: That's fine.

12 Let's do areola portion. Go ahead.

13 MR. COLVIN: So, your Honor, areola portion is term 4
14 in our slide that starts on slide number 43, for the record.

15 Your Honor, for areola portion, Mayborn is asking the
16 Court to construe this as a part extending beyond the bottom of
17 the teat portion. Nanobebe's construction is quite long here
18 on the slide.

19 The parties do have some agreement, though, your
20 Honor, and that's both parties agree that the areola portion is
21 what extends beyond the bottom of the teat portion. That shows
22 up in our construction, that shows up in their construction,
23 and one would think that that would end the issue, but, of
24 course, it does not.

25 I think it's also worth pointing out that the parties

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1 agree about this relative positioning thing. The parties agree
2 that teat portion can be construed as disposed above the
3 areola, and that areola can be construed as extending beyond
4 the bottom of the teat portion. And I think that's a
5 significant agreement.

6 Of course, that is consistent with the claim language.
7 This is a slide that we have looked at previously. But the
8 parties agree here, and the claims are actually quite clear,
9 the areola is just between the teat portion and the base
10 portion. There are no other limitations in this claim about
11 the areola portion. They just aren't there.

12 So, let's talk about Nanobebe's construction and why
13 it's wrong.

14 Nanobebe takes the simple term "areola portion" and
15 redlines it out and replaces that term with "a surface area,
16 that includes a different characteristic and functionality than
17 the rest of the nipple, surrounding and extending beyond the
18 bottom of the teat portion."

19 Now, this is a prime example of shoehorning
20 limitations into claims. Of course, the real explanation for
21 what's going on here is that Nanobebe is trying to make this
22 claim include a flex region that just isn't there. I'm not
23 making that up, your Honor. This is absolutely in their brief.

24 If I can have the document camera for a moment.

25 In Nanobebe's brief, on page 14 - I'll just show it

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1 here on the document camera – they say that their proposed
2 construction simply requires that the areola portion is (a) the
3 surface that extends below the bottom of the teat portion, and
4 (b) includes the flex region. This is very outside of the
5 norm, your Honor, for a party to go to such lengths to try to
6 include a limitation. And, frankly, it's quite impermissible
7 when you look at the Federal Circuit law that we looked at, and
8 I won't harp on again here, but, of course, there's a large
9 body of this that says you can't import a limitation.

10 THE COURT: Mr. Colvin, what page of the Nanobebe
11 brief were you pointing to?

12 MR. COLVIN: That was page 14, your Honor.

13 THE COURT: Thank you.

14 MR. COLVIN: The top paragraph on page 14.

15 THE COURT: Thank you.

16 MR. COLVIN: So, Nanobebe's construction is also
17 inconsistent. They start their construction with the surface
18 area, and that's a bit strange here, and it's also inconsistent
19 with how they are asking the Court to construe a teat portion
20 and a base portion.

21 So Nanobebe asks that the teat portion be construed as
22 an entire part and the base portion to be construed as a
23 portion of the nipple, but then areola sort of seems different,
24 based on their construction, as a surface area. It just
25 doesn't seem consistent with what they're asking the Court to

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1 do for other terms.

2 And then, finally, here's another bit of law, your
3 Honor, about -- I guess I'll do what I said I wasn't going to
4 do and point your Honor to some more law about why you
5 shouldn't import limitations from the specification. But the
6 big takeaway here is that Claim 14 just does not require the
7 areola portion to have any different characteristics in
8 functionality. It's not in there. We could have put it in
9 there, in the '930 patent. We have a whole section of
10 limitations about flex region, but that isn't in the '930
11 patent. Nanobebe wants it to be in there badly, but it just
12 doesn't exist in these claims. They're asking the Court to
13 bring them in through the construction of areola portion, and
14 that's just not what the Federal Circuit permits in this
15 situation, your Honor.

16 Unless the Court has any questions here?

17 THE COURT: I do.

18 Other than being, as you put it, sort of quizzically
19 inconsistent with its definition of teat portion and base
20 portion, what's the issue with including surface area?

21 MR. COLVIN: Thank you, your Honor.

22 So, surface area would just be the top or the bottom
23 surface. And that's not consistent with sort of the structure
24 of what's described in these patents. If you look at the
25 '930 patent, you see a cross-section, because these things have

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1 a structure to them. And it's not the surface that is the
2 areola portion; it's actually the entire part of the teat that
3 is there, that's the areola portion. It would include the
4 outer surface and the inner surface. I'm sure that Nanobebe is
5 going to tell you that the surface area needs to have flexible
6 grooves, as they have discussed in the flex region. Well,
7 that's on the inside. But they'll also tell you that the
8 baby's lips have to touch the areola portion, and that's on the
9 outside. So it just doesn't make sense that you would have a
10 surface area that is both the inside and the outside of this
11 areola portion. A surface area would just be sort of one of
12 those, and we think that it's best thought of as sort of the
13 material of the nipple that is at this location, extending
14 below the teat.

15 THE COURT: Okay. I have a couple of other questions.

16 Is there any argument to be made regarding Claim 18, a
17 dependent claim to Claim 14, that talks about a groove
18 extending around the inner surface of the areola portion? Can
19 you talk to me about that?

20 MR. COLVIN: Yes, your Honor.

21 I think the discussion we had previously about claim
22 differentiation could come into play here. I think the reason
23 for that is they're going to tell you that the surface
24 characteristics, they really believe, and they've said this in
25 their brief, should be grouped on the areola portion. And I

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1 think that Claim 18 says groove. So, the same arguments we
2 discussed with respect to claim differentiation, I think, is a
3 reason that you know their construction here isn't correct.

4 THE COURT: Okay.

5 MR. COLVIN: I guess I would call it certainly a data
6 point trending in that direction.

7 THE COURT: Okay.

8 MR. COLVIN: I think you could also say that Claim 18
9 discusses an inner surface of the areola portion, which would
10 imply that the areola portion has more than just an inner
11 surface, that there's more to it there. It doesn't say the
12 inner surface -- if areola portion was just a surface area,
13 they wouldn't have to say an inner surface. They could just
14 say areola portion. If areola portion was construed to mean an
15 inner surface, that would be superfluous in the claim language,
16 but because it says an inner surface, you know that areola
17 portion is more than just an inner surface.

18 THE COURT: Okay.

19 The other issue that I have is, your definition,
20 Mayborn's definition, is "part extending beyond the bottom of
21 the teat portion," but it doesn't say where it ends.

22 It seems to me, from the pictures and from the
23 discussion, that it is potentially the part extending beyond
24 the teat portion bounded by the base. Would that be
25 appropriate?

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1 MR. COLVIN: I believe it would be appropriate, your
2 Honor. And I think you'll have the same -- I think this issue
3 will come up when we talk about the base. Where does base end
4 going up? Well, it ends at the areola. We think a person of
5 ordinary skill in the art would understand that, but we
6 wouldn't have a problem with that being included in the claim
7 language. I think that makes complete sense.

8 THE COURT: Okay. Thank you very much.

9 MR. COLVIN: Thank you, your Honor.

10 THE COURT: Mr. Kasdan?

11 Mr. Kasdan, you're trying to keep me on my toes by not
12 putting any page numbers on your presentation, but I can follow
13 you.

14 MR. KASDAN: Because it's on the presentation on the
15 slides, but maybe they didn't print out so we can replace that,
16 your Honor.

17 THE COURT: Okay.

18 MR. KASDAN: You can go to the next page.

19 So, areola portion: Again, as Mr. Colvin said -- I
20 guess this is an ongoing theme -- we do agree on some stuff,
21 but, again, the disagreement part is very significant.

22 And so, yes, relative positioning is important --
23 that's part of the claim, that's part of what should be in a
24 claim construction -- but, as you just asked, and we're going to
25 address it, you also have to define where it starts and where

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1 it ends. So, if we're talking about relative positioning,
2 relative to these other portions, where it starts and where it
3 ends is important. And when you just say "part extending
4 beyond the bottom of the teat portion," well, there's a lot of
5 parts down there, and it's really imprecise, and I think it's
6 intentionally imprecise.

7 So, we tried to remedy that imprecision in our
8 construction. We actually gave some thought to where it ends
9 and proposed the clarification you see on the slide, and I will
10 talk about that.

11 But relative positioning is one piece of it, an
12 important part, where it starts, where it ends, but the other
13 thing that you have to do, which their construction doesn't do,
14 is construe what it is. And so they've couched our
15 construction of what areola portion is as -- again, they've
16 taken our whole construction, they've shown a little red line,
17 and put it in the claim. That's the process of claim
18 construction, that's what we're here to do. Sometimes terms
19 are just plain English words that you see every day, and we
20 don't have to construe those terms, we can agree it's just
21 plain meaning. Before I read this patent, I didn't walk around
22 talking about areola portions with my friends and knowing
23 exactly what we're talking about. Areola portion has a
24 specific meaning in this patent.

25 So, we can talk about surface area and whether

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1 there's --

2 THE COURT: Before you get there -- I'm sorry,
3 Mr. Kasdan. Before you get there, about how you are going to
4 define what is the areola portion, would you have any issue
5 with the language "bounded by the base to capture at least the
6 starting and ending point of the areola portion"?

7 MR. KASDAN: I think the issue with that is that we
8 also have a dispute on base, because I think their base
9 construction is imprecise. So, I think if we have a precise
10 construction of the base, that could work, but what we tried to
11 do here was be really precise as to where the endpoint was in a
12 way that's consistent, maybe independent, of the base
13 construction.

14 THE COURT: Fair enough.

15 MR. KASDAN: I guess that's a long-winded way of
16 saying maybe.

17 What I was saying is you need to define what it is.
18 And when you look at the patent, when you look at the two
19 figures that Mayborn just put up on slide 47 showing the
20 Figure 4 and Figure 1, what makes that portion that's
21 underneath the teat an areola portion? What makes it an areola
22 portion -- this is on Mayborn's slide 47 -- what makes it an
23 areola portion, yes, its relative position, it surrounds and
24 extends beyond the bottom of the teat -- that's describing
25 precisely its location -- but what also makes it an areola

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1 portion is it's not just the same as the teat, it's not just
2 the same silicone material, it's different, it has different
3 characteristics and functionality.

4 And we didn't choose a precise single embodiment. We
5 didn't say groove or undulating groove. We said what you do
6 need, what's clear from here, is that if you look at the
7 portion that's designated the areola, no matter what embodiment
8 you look at, it has a different characteristic and
9 functionality. That's what makes it an areola portion. And if
10 you don't define that as part of the construction, you're not
11 defining what the areola portion is. You're just saying it's
12 just this region that's below this other region. And I think
13 that's really imprecise.

14 As to your question on Claim 18, the claim
15 differentiation question you asked about whether Claim 18 has a
16 bearing on this, and that's where an inner surface of the
17 areola portion has a groove extending circumferentially, I
18 don't think that's inconsistent at all with our construction.
19 Our construction for Claim 14 is that there is a different
20 characteristic and functionality, and, here, it specifies that
21 that different characteristic and functionality is, in this
22 dependent claim, narrower, it's a groove that extends in a
23 certain direction. So I think that's perfectly consistent with
24 our construction.

25 So, let me go to our slide. So, first, I want to just

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1 pause here for a second because you asked a question of
2 Mr. Colvin that we've been thinking about and talking a lot
3 about as well, which is, hey, we talked about in order to
4 define something spatially, you really have to talk about where
5 the start is and where the stop is, and in our construction, it
6 says surrounding extending beyond the bottom of the teat. So
7 we talk about where it starts, but the question is about where
8 it ends, as construed by Nanobebe. What we believe is the
9 proper construction for where it ends, is that it extends
10 beyond the part where the baby's lips touch to the widest
11 diameter above the top rim of the vessel, and I will explain
12 that with pictures.

13 THE COURT: Yes, please.

14 MR. KASDAN: I will get to that slide in a moment.

15 On the other issues about the areola portion:

16 As a first matter, we all agree, and that's what the
17 claim says, it has to be between the teat portion and the base
18 portion. And what we're talking about here, figure 4, and what
19 the other figure also shows, it's a separate region, and what
20 distinguishes it from the teat portion is that it has different
21 characteristics and functionality than the rest of the nipple.
22 And that's what the specification says. It says it in multiple
23 places. It says -- it clearly defines a point of flexure, it
24 talks about these grooves visually defining the areola portion,
25 and, again, the whole point, just so we're not too divorced

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1 from what the patent is all about, is to have a region that
2 allows for this inward and outward flexing in the vertical
3 direction. So if you don't include what it is, then nothing
4 really distinguishes it from the teat. It's just more
5 silicone.

6 So, the reason that we're proposing a construction
7 that says it's got to have a certain characteristic and
8 functionality is not to do some impermissible thing that we're
9 not supposed to do on claim construction, it's to do the very
10 thing we're supposed to do on claim construction, which is to
11 define what areola portion means in this patent.

12 Next slide, please.

13 So, this is the portion of the patent that describes
14 that different characteristic and functionality. It talks
15 about these two things, where it is and what makes it
16 different. What makes it different is that, in this
17 embodiment, it includes these undulating grooves that form this
18 wavy profile, and what that -- again, that's for providing the
19 bellows action, increasing flexibility in the vertical
20 direction, in the direction from the nipple to base and base
21 to -- I'm sorry, from the teat portion to the base up and down,
22 as the baby feeds. So, it's defined in those two places.

23 And this is another part of the disclosure. This is
24 where it talks about the areola portion effectively forming
25 circular thin regions parallel concentric with each other about

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1 in axis A, and it shows that. This is one example in
2 figure 2A.

3 So, what you can see here is that you have the teat
4 portion, right, the entire nipple stem, you have the part where
5 the baby's lips start to touch, which is the beginning of the
6 areola, and then it continues to go out wider to that part
7 marked 16, that's all areola, and this forming circular thin
8 regions parallel concentric with each other, that's another
9 example in this spec of, hey, this is what makes the areola the
10 areola, it has this different characteristic.

11 And so that's support, that's why we're asking for the
12 construction we're asking for.

13 THE COURT: So, Mr. Kasdan, you're not saying what the
14 characteristic and functionality is, you're simply saying or
15 proposing that the definition of the term include that it has a
16 different characteristic and functionality than the rest of the
17 nipple?

18 MR. KASDAN: Correct.

19 THE COURT: And why is that?

20 MR. KASDAN: Because if you don't -- well, first of
21 all -- two reasons: One, that's the way the areola is
22 described throughout the specification, and I'm starting to go
23 through some examples of that, and I will continue doing that.
24 And the second reason is, we have a claim that claims these
25 regions, and if it doesn't have a different characteristic,

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1 there's nothing to distinguish it from the region above it or
2 below it, for that matter.

3 THE COURT: But it would be impermissible to say
4 different characteristic and functionality by use of an
5 undulating groove or something like that, because that would be
6 too specific and too relational to an embodiment to include in
7 the definition?

8 MR. KASDAN: Right. That's not our construction, and
9 this is not an example, like in the teat -- like in the
10 variable wall thickness, that very specific example where it's
11 really the only thing and it's proper to limit it to that, this
12 is not that. That's not our construction, correct.

13 So this is a portion that I referenced earlier, where
14 it says the grooves are channels, right -- this part where
15 there's a different characteristic -- visually defined an areola
16 area, and it talks about where they are -- they're placed in the
17 area of the teat, which is also a nonbite area. So, it extends
18 past where the baby bites down, but also into this other area,
19 the wide area shown in 16, also for providing this pumping
20 action. But relative to our claim construction, this is what
21 the patent is telling you about this areola region. It's
22 saying it's visually defined by this region. The hallmark
23 characteristic that makes it different from other things that
24 makes an areola portion an areola portion is where it is and
25 having this different characteristic.

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1 Next slide, please.

2 In terms of how far it extends out, this is, again,
3 something that the inventor admitted during his deposition, and
4 it's shown that in figure 2A, 16. He said: On this teat, it
5 shows they are approaching the widest part, the widest
6 diameter.

7 Next slide.

8 And this is just using the figures to kind of
9 highlight what I'm talking about.

10 THE COURT: Mr. Kasdan, before you go ahead, why
11 wouldn't the widest part of the teat be the base?

12 MR. KASDAN: Yes, I will get to that, to explain that.

13 THE COURT: Okay, sure. Go ahead.

14 MR. KASDAN: That's a good question.

15 That's actually why we propose the construction about
16 where it ends. We need to distinguish it from the base. So,
17 if you can just hold that question for a slide, and we'll jump
18 to it.

19 THE COURT: Sure.

20 MR. KASDAN: But the grooves visually define an areola
21 area. All the drawings that disclose these undulating grooves,
22 everywhere it's shown, that's what makes the areola the areola.

23 Next slide.

24 So this goes to your question. The areola portion is
25 required by the claim to be distinct from the base portion.

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1 That's what the claim says. And so, it is important, and the
2 clarification we made today is intended to state where the
3 endpoint is.

4 So, in the figure 4, embodiment, that we focused on
5 that's on the right, we think that what defines the end of the
6 base is extending to the widest diameter above the rim, above
7 the top rim of the vessel.

8 So, if you look at where the top rim is, it's shown
9 right underneath the sort of marked in the line underneath the
10 vessel, the areola portion extends beyond the bottom of the
11 teat portion, it's between the teat and the base, and what
12 defines that space is it starts where the baby's lips touch, it
13 goes out to a wider point, and it's the widest diameter above
14 the top rim of the vessel.

15 So, if you look at figure 4, that shows this base,
16 that's kind of the breast-shaped wide embodiment, that's where
17 the base portion ends. And if you look at our construction of
18 the base, what we've done is try to line those things up. If
19 you look at our construction of the base, which we'll get to
20 next, the base begins at the mounting point to the top rim of
21 the vessel. So, we think that these things should come
22 together to define where the base ends and where the areola
23 starts. And we think this is also consistent with the other
24 embodiment, this figure 1 embodiment, which is this different
25 kind of nipple. This doesn't show a lot of things that are in

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1 the claim, including that fancy vent system, including the
2 helical groove, but it's a different type of shape, and in
3 that, that's where we would say the areola ends. We think the
4 language that we've proposed in our construction base
5 distinguishes exactly where one ends and the next begins.

6 THE COURT: I know this is only one embodiment of the
7 Mayborn product, and I'm looking at Defendants' Exhibit 2, but
8 are you suggesting the base is just like a tiny little bit
9 above the rim?

10 MR. KASDAN: No, your Honor.

11 So, I think -- you're looking at the Mayborn product?

12 THE COURT: I am.

13 MR. KASDAN: And as a first -- so, the product and
14 whether it practices the patent, that's kind of an open issue,
15 but if we look at the figure 4 embodiment, which I think in the
16 base, it's very similar in the product -- and we'll talk about
17 it as we get to the domed portion -- it's very interesting, and
18 it's actually very different from our product, from the
19 Nanobebe product, and it's shown pretty well in the figure on
20 the right. So, what you have showing in blue is the collar,
21 the plastic collar that it's screwed to, and in this patent,
22 and I believe in that product, the base portion traces over the
23 top of that plastic. So, the base portion follows that domed
24 curvature of the plastic, and there's silicone there. And
25 that's their base portion in the patent.

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1 THE COURT: Over the plastic --

2 MR. KASDAN: Exactly. That's what gives it its
3 rounded configuration, and we'll talk about that a little bit
4 more when we get to domed, but, yes, that's exactly right.

5 THE COURT: You're saying figure 4 is not consistent
6 with what I'm looking at with Exhibit 2 because I don't see any
7 silicone over the plastic collar? Maybe I'm mishearing you.

8 MR. KASDAN: No. I think, first of all, the nipple
9 in -- the nipple -- first of all, I think you have to take the
10 nipple out and look at it. And when you take our -- the
11 Nanobebe nipple out -- I can demo it later, I can show you -- the
12 tracing of the base in the collar is different on our product.
13 As to their product and whether it's exactly the same as
14 figure 4, I don't think that's something that has a bearing on
15 claim construction. I think we're going to have to look at
16 what the patent says, so that's what we focused on.

17 THE COURT: Okay. I'm just trying to figure out where
18 visually the base is vis-a-vis a plastic collar.

19 MR. KASDAN: Yes, and in the patent, it's overmolded.

20 THE COURT: Over?

21 MR. KASDAN: Overmolded over the plastic. That's
22 what's described in figure 4.

23 THE COURT: Thank you.

24 MR. KASDAN: I think this has probably become clear by
25 now, so I'll sit down and stop talking, but the issue we have

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1 with their construction is that it's vague -- again, we think
2 intentionally and problematically -- and it ignores what the
3 '930 patent says makes an areola an areola. So, to be between
4 something, as the claim requires, it has to be bounded on both
5 ends. If those things are indefinite or unclear, you're not
6 consistent with what the claim itself says.

7 So, we don't think that just -- if you think about how
8 they're asserting this, and why we said this stuff was
9 important in the beginning, to allow it to just mark the lower
10 end of the nipple stem as the areola, it's really inconsistent
11 with what this patent and how this patent defines an areola
12 portion.

13 When you think about it, if you go to their definition
14 of areola, which is just a part extending beyond the bottom of
15 the teat portion, as I said, there's lots of things below the
16 teat portion -- there's a transition region, there's a flange
17 there's the collar, the vessel. So we think it's just too
18 imprecise to make it meaningful and inconsistent with the
19 patent.

20 THE COURT: I don't disagree with you, and that's why
21 I asked about having some bottom boundary because there is a
22 lot below the teat portion.

23 MR. KASDAN: Yes, we think it's important to have a
24 bottom boundary.

25 THE COURT: Right. So if it was the part extending

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1 beyond the bottom of the teat portion bounded by the base, I
2 know you can't agree with that because you're not sure what the
3 definition of base is, I understand, but that gives me at least
4 a bounding on the lower end. I guess what's troubling to me
5 is, I hear you saying that we need something beyond location to
6 define what this area is, and so we're going to propose
7 including something like a different characteristic and
8 functionality than the rest of the nipple.

9 Does that not inject -- I'm not suggesting you be more
10 specific than that, because perhaps you can't be, based on
11 patent rules, but does that inject a level of uncertainty?
12 Because what is the different characteristic? What is the
13 different functionality? Does that create any issues if I were
14 to include that?

15 MR. KASDAN: No, I don't think so, your Honor. I
16 think we wanted to be true to the patent, we wanted to follow
17 the rules and not just make it this very, very specific thing.
18 As I showed, the patent does have a couple of different
19 examples of different types of characteristics, so we thought
20 stating it generally, that that's okay with us, and that, I
21 think, does the trick in terms of distinguishing it.

22 THE COURT: Do you need a surface area, or would you
23 be okay with saying the part? Because it's compelling to me
24 that it's more than just a surface area, but I'd love to hear
25 why you think it needs to be a surface area.

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1 MR. KASDAN: I was looking at that and thinking about
2 that as we were both talking about it, and I think we would
3 be -- if we got the rest of the construction, I think we would
4 be okay specifying a portion or region to make it more
5 consistent.

6 THE COURT: Thank you.

7 Before we leave this, Mr. Colvin, I had a couple of
8 more questions, you may have something to add.

9 MR. COLVIN: Please, your Honor.

10 THE COURT: One second.

11 MR. COLVIN: Would you like for me to respond a bit
12 first or go to your questions first?

13 THE COURT: You can respond a bit, but can you pause
14 one second while I write something down?

15 (Pause)

16 THE COURT: Okay. Why don't you go ahead, Mr. Colvin.

17 MR. COLVIN: Thank you, your Honor.

18 So, first, your Honor, this is the first we've heard
19 of this clarification proposal by Nanobebe, that they've put in
20 their slides, so I'm a bit unprepared to rebut it, but there
21 are certainly some things I'd like to say on the fly about it,
22 particularly if your Honor is inclined to go with him.

23 THE COURT: Yes, I do want to hear that, but let me
24 clarify, too.

25 So, Mr. Kasdan, the construction that you're proposing

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1 now is what exactly, given this new clarification?

2 MR. KASDAN: That we talk about surface area --

3 THE COURT: Yes.

4 MR. KASDAN: -- "that includes a different
5 characteristic and functionality than the rest of the nipple
6 surrounding and extending beyond the bottom of the teat portion
7 and extending beyond the baby's lips to the widest diameter
8 above the top rim of the vessel." So that defines the start
9 point and endpoint.

10 THE COURT: Okay. So just so I'm clear, it's part or
11 portion "that includes a different characteristic and
12 functionality than the rest of the nipple surrounding and
13 extending beyond the bottom of the teat portion and extending
14 beyond the baby's lips to the widest diameter above the top rim
15 of the vessel"?

16 MR. KASDAN: You got it, your Honor.

17 THE COURT: Okay. That's a mouthful.

18 Okay. Mr. Colvin, go ahead.

19 MR. COLVIN: Thank you, your Honor.

20 So, first, I just want to direct the Court's attention
21 to figure 1, and I am going to draw on the document that I have
22 here. So, figure 1 has a few labels that are important.

23 The first is 16, which is areola, and then 14 is the
24 base. Now, based on the figure that we just saw from Nanobebe,
25 they would have areola go from roughly here all the way down to

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1 here. And then they would say, well, the base is presumably
2 this little part beyond that, which isn't really where the
3 embodiment shows the base to be, and it's just odd that they
4 would do that.

5 The same thing happens with figure 4. Figure 4 shows
6 the areola is 118 and the base is 116, and they would have the
7 areola go from this curve all the way down to, I guess, 116,
8 and then they would say, well, the base is just this little
9 part afterwards. That just doesn't seem consistent with what
10 the specification describes. I think it's a much more apt
11 reading and consistent with what the parties have shown in
12 their briefing and in our little tricolored figure, where we
13 have the teat, the areola, and the base, that the base actually
14 comes up to here. And I think that distinction is important
15 and is just one more reason why I think your Honor's
16 inclination that the areola just stops at the base, sort of
17 what the experts will tell us it is in any particular
18 application to any particular product, is the better way to do
19 this than to say it goes to the widest part of the nipple above
20 the vessel. That just seems a bit contrived, your Honor.

21 MR. KASDAN: Could you just leave that up for one
22 moment?

23 MR. COLVIN: Yes.

24 MR. KASDAN: May I respond, your Honor?

25 THE COURT: Yes.

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1 MR. KASDAN: Actually, the drawings that Mr. Colvin
2 just made are completely consistent with the way the patent
3 shows and describes the areola and the base. And so I think if
4 you look at the figures and how things are annotated, all the
5 intrinsic evidence that we cited, including the inventors
6 agreeing that it's extending up to this widest portion across
7 both embodiments, although I would say figure 4 is really
8 relevant here because it includes all the claim elements that
9 they relied on to get the claim that's asserted issued at the
10 bottom portion of the fancy venting, but for both portions, I
11 think the way that Mr. Colvin annotated it actually shows that
12 it's completely understandable, it shows that there is a
13 starting point and ending point, and it's consistent.

14 THE COURT: Mr. Kasdan, with the new term definition
15 that you're suggesting, in the portion that says "extending
16 beyond the baby's lips to the widest diameter above the top rim
17 of the vessel," aren't we then injecting an imprecise
18 definition depending on the baby's lips? Babies' lips are
19 different sizes, areolas, in the real world, are different
20 sizes, but I'm sure babies' lips are at least different sizes,
21 and one baby's lips may not extend as far down as others. So
22 if you're going to define the base as beyond where the lips
23 touch, doesn't that create some imprecision?

24 MR. KASDAN: That's not the intent, your Honor. Let
25 me try to explain further.

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1 Let me go back to the picture.

2 Could we get control of this back? Can we put up our
3 slide 42.

4 So, we agree that different babies have different
5 sized lips, and that's not the intent of this language. If you
6 look at the figure at the right that shows the baby latching
7 onto the nipple stem, you have like the entire nipple stem
8 there in the mouth, that's the teat portion, and then below
9 that and surrounding it is the areola portion, and it starts at
10 the point where the baby's lips touch the surface. So, the
11 lips could touch the surface, I should say.

12 So, some lips might go right down like around the
13 teat, some might go out wider. The areola portion should be
14 that whole portion below the teat. So that that starts where
15 the lips could contact what's also called the bite region and
16 extends out to that wide part that's shown at 16, which is
17 marked as the areola region in the patent.

18 So, it's not intended to say that if the baby's lips
19 are one size, it's a certain structure, and if the lips are a
20 different size, it's a different structure. The areola region
21 should be that whole part, and inner construction is the part
22 that's beyond the teat, and that's where it starts, it starts
23 where the baby's lips could touch and goes out to that widest
24 portion.

25 THE COURT: If you're not using the baby's lip

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1 placement as the boundary between areola and base, what's the
2 point of referring to the baby's lips in your ostensibly
3 bottom-bounding part of your definition?

4 MR. KASDAN: The baby's lips part is actually maybe
5 inartful. Bounding of the top part, that's what it's intended.
6 The lower part is the widest diameter above the top rim –
7 that's where it goes out to, like shown at 16 – and what we're
8 trying to capture through that language is that after the teat,
9 we know what happens is the part where the lips contact the
10 bottle, that's where it starts. That's what we were going for.

11 THE COURT: You're arguing that the base starts at the
12 widest portion of the teat?

13 MR. KASDAN: Yes, the bottom portion of the teat, yes,
14 that's right.

15 THE COURT: Okay.

16 Mr. Colvin, what's your response to Nanobebe's
17 argument that a locational definition would essentially just
18 create teat portion – and I am gesturing for the court
19 reporter – teat portion is at the top, and then you've got your
20 areola portion, which is between the teat portion and the base
21 portion, and without any sort of indication as to what – not
22 functionality – what differentiation that areola portion
23 brings? It's just one big piece of silicone. Would you have
24 an issue with including something like a part that includes a
25 different characteristic and functionality than the rest of the

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1 nipple, if you don't describe that functionality -- increased
2 flexibility, including grooves, whatever it is -- but just some
3 difference in characteristic and functionality from the rest of
4 the nipple? What's your issue with that?

5 MR. COLVIN: I would, your Honor. I believe there's
6 two main problems with that.

7 The first is that what you're doing is, the suggestion
8 would be to import a limitation into the claims. Although it
9 may be a small one, that's what's happening. The claims don't
10 require that. As we see in the '244 patent, we could do those
11 things. We could have defined various limitations flowing from
12 the areola portion, but we didn't do that.

13 If you look at the claims -- if I can just have the
14 document camera briefly?

15 I'm just going to show Claim 14 for reference.

16 All that's happening here in this portion of the claim
17 is setting up some structure, some spatially organized
18 structure, so that the rest of the claim makes sense. Really,
19 it's just getting down to the base, right? Because this claim
20 has a teat, it has a base, it's got an areola portion between
21 them, and then you have a flange depending from a base, you
22 have an air valve going through the base. And so this idea
23 that this claim is really something about the areola just isn't
24 right. The areola is just here to sort of spatially set up
25 what this nipple is. The nipple has three regions, and this is

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1 what they are.

2 Other parts of this claim require a collar and a
3 vessel. So this is sort of the introduction to this limitation
4 that's talking really about the air vent. And so, importing
5 the limitation of some sort of surface characteristic on the
6 areola, I think, goes too far.

7 I think it's interesting that Nanobebe wouldn't go so
8 far as to import a limitation such as a groove, because, well,
9 that's importing a limitation, but stepping back from that just
10 a little bit and saying, well, it's got to have some surface
11 characteristic, that's okay? No, it's not. That fails for the
12 exact same reason. Just because you're importing a broad
13 limitation isn't okay, when you could import a narrower
14 limitation, and that's also wrong. The problem is importing a
15 limitation. The breadth of that limitation doesn't factor into
16 this analysis.

17 MR. KASDAN: May I respond to that?

18 THE COURT: Yes, you may.

19 MR. KASDAN: Could you put up slide 44? Thanks.

20 The next one.

21 There's lots of words on there, but I can just jump to
22 it. Mr. Colvin said a couple of things that we disagree with
23 and that I think are not correct in terms of this patent. He
24 did a lot of hand waving, and he said, well, this patent isn't
25 about the areola, all this is just window dressing, so we can

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1 get down to the stuff at the base. These are words in the --
2 and he said it has a bunch of other stuff, like vents and
3 collars. Well, lots of products have vents and collars, and we
4 think what's unique about this invention, as we've talked about
5 a lot, is the whole purpose of defining this areola region and
6 what made it different from the prior art, and they also had to
7 add and distinguish to make this very specific base vent type
8 arrangement, but what makes it different is this structure that
9 was different from the prior art that allowed for this
10 increased flex. And we are not importing limitations here. We
11 are defining it. And there's nothing functional about what
12 we're importing. We are structurally defining what the areola
13 is. That is the task on claim construction. And if you look
14 at the specification, our guide to what this invention is,
15 right, and what these claims mean, is it talks about what the
16 areola portion does, it allows this movement of the teat
17 portion towards and away from the base portion. We're not
18 impermissibly incorporating any sort of functional thing that's
19 not said in the claim, but the structure that gets that done,
20 what makes the areola portion the areola portion, is this
21 structural disclosure of a different characteristic than the
22 rest of the teat.

23 And we explain why we're not limiting it to one thing.
24 There are these examples. There are undulating grooves, this
25 is this wavy profile, there are thin regions. I went through

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1 them before. So the areola portion is consistently described
2 this way. So those two things -- where it's located and what it
3 is -- is part of claim construction. There's nothing wrong with
4 that.

5 THE COURT: Do you need to do that, Mr. Kasdan?
6 Because, for example, with the teat portion, we don't include --
7 I think we've all agreed now what it is -- but we don't include
8 that it's flexible, that it moves. We've only said that it's
9 the perpendicular piece, and I forget the exact language -- I
10 should be exact since I am the judge -- that it is "the entire
11 part projecting generally perpendicular to the mouth of the
12 vessel and disposed above the areola portion." So that's
13 defined just locationally as opposed to what either
14 functionally it does or what it is.

15 So, do we need to do that with respect to the areola?
16 And why?

17 MR. KASDAN: I think we do. And I think we could have
18 had a construction that would have been, I think, equally
19 acceptable of calling the teat portion the nipple stem or the
20 entire nipple stem. I think that it says -- it's kind of a
21 synonym for what the construction is that you just repeated.

22 So, we are calling it what it is. And I think when
23 you have this cascading bunch of portions, and when the areola
24 region -- the areola portion is repeatedly talked about in this
25 patent as this is the special thing. Like if you look at the

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1 parts of these patents that describe the prior art, they
2 weren't -- Mayborn, as Mr. Goetz said, they weren't the first
3 to come up with a nipple or a nipple that was trying to
4 increase flexibility and mimic that motion. They said we think
5 we're doing it better, and the way we do it better is this
6 solution. And it consistently describes the areola portion as
7 a structural thing, and it gives it -- that makes this patent
8 go.

9 So, I think it is important to define it both to
10 distinguish it in this claim, where they chose to claim it as
11 these stacked regions, to distinguish it from what came before
12 it, but also to define, like, what it is. So that's our
13 position.

14 THE COURT: Thank you.

15 Mr. Colvin, anything else on that?

16 MR. COLVIN: Yes, your Honor.

17 I'll just say that this claim -- Mr. Kasdan, in his
18 opening, described the '930 patent as having a fancy vent. And
19 I'll adopt that term for a moment with respect to the Claim 14
20 because Claim 14 -- and we don't need to look at it -- is about
21 this fancy vent. The claim wasn't granted based on some
22 special characteristic of the areola portion. That's not in
23 the claim. And to put that in here now is just too far. You
24 just can't do that. If this claim -- if he was pointing to
25 some discussion in the prosecution history, where there was a

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1 big back-and-forth with the examiner about, well, now we say
2 areola portion, and by areola portion, we really mean something
3 that's different and special, that would be a different
4 conversation. But that doesn't exist here, your Honor.

5 And without that, it's not proper to shoehorn in these
6 extra limitations just because we use the term "areola
7 portion."

8 I realize I'm harping on about this ad nauseam, but
9 this really is the way the law shakes out on this issue, your
10 Honor.

11 THE COURT: Okay. Thank you.

12 MR. KASDAN: Can I get 30 seconds to respond on that?

13 THE COURT: Of course you may.

14 MR. KASDAN: I just want to make it clear that this is
15 their first and main patent. Again, it's about increasing
16 flexibility and defining the point of flexure. I think my
17 response really is look at the record. So internally, like,
18 their team may call this the fancy vent patent, you know, but
19 that's not relevant. And the patent was not granted based on
20 the fancy vent. The patent was granted based on the
21 combination of elements that you see in the claim.

22 They went, and they said, you know, we have a teat
23 portion, we have an areola portion, we have a base portion, and
24 the Patent Office said, you know, no, no other people have
25 that, and they said, okay, well, we also have this really

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1 specific base portion in this dome configuration, this special
2 place. That doesn't make the areola portion unimportant or not
3 part of the invention. It is 100 percent part of the
4 invention. The invention in the claim is the combination.

5 So, Mr. Colvin might stand here and say, well, that's
6 not important, but I think if you look at the record and read
7 these patents and read the claim, it's part of the claim, and
8 it's an important part of the claim.

9 THE COURT: Okay. Thank you.

10 And then, Mr. Colvin, before you leave -- this is a
11 different topic -- in the specification, when it says, for
12 example, the areola has grooves, is what that means is that the
13 specification is describing an independent claim, the existence
14 of the areola, and then the dependent claim of grooves? Is
15 that how it works?

16 MR. COLVIN: Well, I'm sorry, your Honor, are you
17 pointing to a particular claim, or are you pointing to just
18 generally in the specification?

19 THE COURT: Just generally in the specification.

20 MR. COLVIN: Generally in the specification, the
21 specification describes embodiments or examples of things
22 that -- perhaps ornaments you could hang on the Christmas tree
23 of the invention.

24 THE COURT: Okay, got it.

25 So, we're going to move on to the next, which is, I

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1 think, base portion; is that right?

2 MR. COLVIN: Yes, your Honor.

3 THE COURT: Before we do, let's talk process a little
4 bit because this is fascinating, and it does strike me that
5 while I can go without food or rest, maybe not everyone can.
6 And especially Andrew, sorry.

7 Maybe we go through until base portion is done, and
8 then we take a little break for half an hour, and then we come
9 back.

10 Would that work, Mr. Goetz?

11 MR. GOETZ: Of course, your Honor.

12 THE COURT: Okay.

13 And Mr. Kasdan?

14 MR. KASDAN: Of course.

15 THE COURT: And Andrew?

16 THE COURT REPORTER: Yes.

17 THE COURT: Let's go to base portion.

18 Mr. Colvin.

19 Mr. Goetz, I'm missing you. You're not here.

20 MR. GOETZ: I'll be up soon, Judge.

21 THE COURT: Okay.

22 MR. COLVIN: Okay, your Honor.

23 We're going to talk about the base portion term in our
24 slides. This is labeled as term 3, and it starts on slide 34.

25 So, your Honor, we will retread a bit of the same

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1 ground here that we've been discussing, and so I'll go through
2 those parts more quickly than otherwise, but, of course, please
3 stop me if there is an area where you'd like me to focus.

4 So, our construction here is the part below the areola
5 portion. We believe that that is consistent with the claims.
6 Again, the claims just recite a spatial relationship among
7 these portions, and we think our construction properly captures
8 what the claim is intending the limitations to be here.

9 Nanobebe's construction is, frankly, confusing, and I
10 hope to get into that.

11 With respect to this slide, I think it's interesting
12 to note that the parties agree here that the coloring on
13 figure 4, and the green box goes up above 116, what's pointed
14 to there as the base portion, 116 on figure 4. So that may
15 become relevant in a bit, so I just want to point it out here
16 while I have this color on the screen.

17 With respect to figure 1, we believe the base portion
18 goes up quite high to where it's joined to the areola.

19 Let's talk about Nanobebe's construction. I believe
20 that Nanobebe's construction here does the opposite of the goal
21 of claim construction. It adds confusion. I don't say that
22 trivially. There's actually a lot of confusion with regards to
23 their construction. I do not believe it's helpful to the jury.
24 I don't believe it's helpful to the experts, whose job it will
25 be to apply this construction to the products in this case.

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1 When you really study their construction, you come away with
2 these questions that I have on the slide.

3 First, what is the lowest portion of the nipple? And
4 does that include the flange?

5 The patent certainly includes the flange as part of
6 the claims, as being part of the nipple. So, does the lowest
7 portion of the nipple include the flange? If it doesn't, well,
8 how is it different from the flange?

9 What if the nipple doesn't meet the top rim of the
10 vessel at all? That's a requirement in their specification, in
11 their proposed construction. It has to begin where the nipple
12 meets the top rim of the vessel. But what if that doesn't
13 happen?

14 And it says beginning, so you start where the nipple
15 meets the top rim of the vessel, but do you go up or down or
16 both? Frankly, I don't know, your Honor. And I have studied
17 this for months now, and I just don't know. I think if the
18 Court adopts Nanobebe's construction, we're going to be in a
19 position where we need to have a separate *Markman* hearing to
20 construe their construction, because I just don't understand
21 the scope of it.

22 THE COURT: Let's presume this is the only *Markman*
23 hearing we have.

24 MR. COLVIN: Okay. Well, in that case, we're going to
25 end up with the experts completely disagreeing about what this

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1 construction means.

2 So, Nanobebe's construction is just not compatible
3 with the claims. The claim language can be said to be the most
4 important intrinsic evidence in the entire specification. And
5 Nanobebe's construction can't fit in these claims. And it's
6 really perplexing that they would even propose this. The
7 construction requires that -- their construction requires that
8 the base begin where the nipple meets the vessel. Now, this is
9 obviously a new limitation, it's not found anywhere in the
10 claim, and that's a problem for all the reasons that we have
11 discussed, but this is actually worse than that. Claim 14
12 requires a flange to seal with the vessel, not the base. Their
13 construction requires the base portion to be where the nipple
14 meets the top rim of the vessel. But that's the flange,
15 according to the claim. It is the flange that is arranged to
16 seal with the vessel, not the base. Claim 14 never requires
17 the base portion to contact the vessel, but Nanobebe's
18 construction does.

19 Nanobebe's construction also reads out preferred
20 embodiments. This is a bit different from the prohibition
21 against importing limitations. This is another prohibition. A
22 construction -- this is the Federal Circuit talking. The
23 district court's construction is incorrect because it reads out
24 preferred embodiments. A claim construction that excludes a
25 preferred embodiment is rarely, if ever, correct, and would

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1 require highly persuasive evidentiary support.

2 And in the *Primos* case, we also should not normally
3 interpret a claim term to exclude a preferred embodiment.

4 This is claim construction black-letter law, your
5 Honor. This is something that the Federal Circuit has pointed
6 out very specifically in a lot of cases. But Nanobebe's
7 construction reads out these preferred embodiments.

8 Let's take a look at the embodiment of figure 1.

9 Figure 1 shows where the nipple meets the top rim of
10 the vessel is a flange and not the base portion, 14. As you
11 can see on the excerpt of the slide – and we know from the
12 specification – flange, 18, is captured between the top rim of
13 the vessel and a collar. Nanobebe's construction would have
14 the base portion start there. But that's the flange, that's
15 not the base portion, your Honor. And the construction that
16 Nanobebe is proposing would read out this preferred embodiment.

17 The same is true for the embodiment shown at figure 4.
18 And I have colored this slide to help make this point.
19 Figure 4 has a flange, 141. You can see it most clearly on the
20 left side of the figure that's on the right, where I've zoomed
21 in.

22 The orange is the vessel. And you can see where the
23 vessel meets the silicone there. And it does that at flange,
24 141, and it is the flange that meets the vessel. It's not the
25 base portion.

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1 Now, Nanobebe's construction reads that out. It's not
2 compatible. The Federal Circuit tells us that you can't do
3 that.

4 And there's another problem here as well. If I go
5 back to the embodiment of figure 1, presumably -- let's just
6 assume the Court adopts Nanobebe's construction. In this
7 embodiment, you would start at where -- you'd start at the
8 flange, where the vessel meets the nipple, and you would go up
9 to presumably the stopping point of the areola. With respect
10 to claim 4, you start, and then you go down. And so, earlier,
11 where I said it's not clear from their construction whether you
12 go up or down, this is what I mean. In Claim 1 -- and with
13 respect to figure 1, I'm sorry, their construction would have
14 the Court go up to define the base portion, and in figure 4,
15 they would have the Court go down to define the base portion.

16 Just looking at these two examples really strains
17 their proposed construction, your Honor. This is what I'm
18 talking about when it's just not clear.

19 It also excludes the preferred embodiment because if
20 you start where the nipple meets the base, in figure 4, and you
21 go down from there, you don't actually reach where figure 4
22 indicates the base portion is. Now, it's close, I'll give you
23 that it's close, but 116 is higher than where the nipple meets
24 the top of the vessel.

25 We concluded our briefing last year, your Honor, and

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1 since that time, there's been some additional actions that
2 Nanobebe has taken in the Patent Office. One of the things it
3 did was file a petition for IPR on the '930 patent and the
4 '244, and in that petition, your Honor, Nanobebe had to do some
5 additional labeling under their proposed construction. And I
6 would like to mark as what would be Defendants' Exhibit 12,
7 Nanobebe's petition for IPR of U.S. Patent No. 10,952,930.

8 If I may approach, your Honor?

9 THE COURT: Yes, please.

10 MR. COLVIN: And can I have the document camera,
11 please?

12 THE COURT: Are these publicly filed documents?

13 MR. COLVIN: Yes, your Honor.

14 THE COURT: Thank you.

15 MR. COLVIN: So, we see on the front page, this is
16 their petition, Defendants' Exhibit 12 is their petition for
17 IPR of the '930 patent, and they submitted this on
18 January 13th, 2023. So, it's a fairly recent document.

19 I would like to -- let me just give you a little
20 background about what happens in one of these petitions, your
21 Honor. So, in this petition, Nanobebe went to the Patent
22 Office, and they said, the '930 patent should be invalidated,
23 basically, based on the prior art. And in this petition, they
24 put forward their proposed constructions and also Mayborn's
25 proposed constructions. And they told the Patent Office, under

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1 either proposed construction, here's some prior art that would
2 invalidate the '930 patent.

3 And so, if we look to page 94 – and I am going to put
4 it on the document camera --

5 THE COURT: Sorry, what page?

6 MR. COLVIN: Page 94, your Honor.

7 -- at the top paragraph of page 94, we see that
8 they're talking about under petitioner's construction of base
9 portion – and in this IPR, Nanobebe is the petitioner, so it's
10 under Nanobebe's construction – a base portion is – and then
11 this is their construction – the lowest portion of the nipple
12 beginning where the nipple meets the top rim of the vessel that
13 is mountable to the vessel.

14 And then they have claimed to the prior art, Kurkjian,
15 and they say that, under petitioner's construction of base
16 portion, this is met as illustrated in figure J below. And so
17 I'm going to turn to figure J, which is on page 95, and this is
18 very interesting. So, they have identified base portion by
19 these lower dotted lines and the braces you see to the left.
20 And then over here on the box on the right, they say base
21 portion is, and then they give their construction.

22 But what's interesting is that they hadn't actually
23 pointed to the location where the nipple meets the top rim of
24 the vessel. The vessel is down here. This cross-hatching is
25 the collar, your Honor. I'll highlight the collar in orange so

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1 it's easier to see.

2 So, what they've pointed to here is showing how
3 they're attempting to apply their proposed construction. And I
4 just can't make sense of it, your Honor. Their construction of
5 beginning where the nipple meets the top rim of the vessel, as
6 far as I can tell, just can be twisted any way they would like
7 for it to be twisted. I don't know where you're supposed to
8 start, I don't know where you're supposed to stop, I don't know
9 if you're supposed to go up or go down, I don't know how it
10 relates to the flange, and I don't know how it fits with
11 respect to this claim, your Honor. It just doesn't make sense,
12 and it can't be correct for -- the goal of the claim
13 construction is to provide clarity. This just doesn't fit that
14 bill, your Honor.

15 That's the end of my presentation, your Honor. I'm
16 happy if you have any questions.

17 THE COURT: I do have questions.

18 What would be the issue, if any, with defining the
19 base portion as the part below the areola portion and above the
20 flange?

21 MR. COLVIN: If I can have the slides, please,
22 Ms. Meredith?

23 I think, your Honor, that that probably doesn't fit
24 with respect to the embodiment shown in figure 4. You could
25 imagine -- in some ways, it's easy to think about these things

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1 with respect to particular embodiments. And so, with respect
2 to the embodiment of figure 1, I think that fits very nicely,
3 your Honor, because the flange is at the bottom. But the
4 flange may not always be at the bottom. And, in fact, in the
5 embodiment of figure 4, we see that the flange is actually
6 higher up. And you can imagine -- certainly, we're not baby
7 bottle designers here, but I think you can imagine all sorts of
8 fastening mechanisms where the nipple is sealed to a collar and
9 who knows where the flange is.

10 And so --

11 THE COURT: Where is the flange in figure 4?

12 MR. COLVIN: It's 141, your Honor. It's where the
13 green meets the orange.

14 So, Nanobebe would certainly say that the base portion
15 extends lower than that. And I would tend to agree with them.
16 I think the base portion goes from above 116 down below.

17 THE COURT: So, if you were going to have a locational
18 definition for the base portion, what's troubling me is you
19 have a part below the areola portion, but there are other
20 things below the areola portion, including, in some
21 embodiments, a flange.

22 So, what's your bottom line of demarcation?

23 MR. COLVIN: I think it's just the bottom of the
24 nipple itself, your Honor. Just as the teat portion doesn't
25 have an upper bound, the base portion doesn't need to have a

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1 lower bound.

2 THE COURT: That's because with the teat portion,
3 there's nothing more that is there. With the base portion, at
4 least in some embodiments, aren't there things below the base,
5 like a flange?

6 MR. COLVIN: That's right, your Honor. The claim even
7 says that. The claim even requires the flange to depend from
8 the base portion, but the claim doesn't require the flange to
9 depend from the bottom of the base portion.

10 So I think that would be the issue, your Honor.

11 THE COURT: Do you have any bottom boundary to
12 suggest?

13 MR. COLVIN: Just the bottom of the nipple itself,
14 your Honor. I certainly don't think we've seen any embodiments
15 or any products or any proposed designs in this case that would
16 indicate some sort of edge condition there. To the extent that
17 comes up, I think the experts could deal with it, but I
18 certainly haven't seen that in this case, your Honor.

19 THE COURT: Okay.

20 And then I know no one has suggested this, but what
21 would be the issue with including in the definition of a base
22 portion containing an air vent?

23 MR. COLVIN: I think that would be -- let me just look
24 quickly at the claim, your Honor. I seem to have misplaced my
25 patent.

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1 So, your Honor -- if I can have the document camera --
2 that limitation, as it were, the base portion includes an air
3 vent, is actually already in the claim. So, the claim says
4 that there's a one-way air inlet valve, which is the air vent
5 we've been talking about, extending through said base. And so,
6 including that limitation in the claim would render this other
7 limitation superfluous.

8 THE COURT: Say that again.

9 MR. COLVIN: Superfluous is --

10 THE COURT: No, I know superfluous. But walk me
11 through where in the claim.

12 MR. COLVIN: Sure.

13 So, your Honor, I'm looking at Claim 14. And this is
14 in the patent, in the '930 patent, it's in column 8, line 46.
15 And this requires a one-way air inlet valve, which is the air
16 vent we've been describing. And there are several limitations
17 about that valve, and one of them is that it extends through
18 said base.

19 THE COURT: Right.

20 MR. COLVIN: And it projects downwardly from the base
21 portion.

22 So, while it is correct that base portion includes an
23 air vent, I think in this circumstance, it's not necessary, it
24 would be extra in the construction because it's not needed
25 because that limitation of base is already in the claim.

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1 THE COURT: Would it be improper? When you say "not
2 necessary" --

3 MR. COLVIN: I would have to think about the
4 properness of it, your Honor. It would certainly be out of the
5 norm, but I can't tell you that it's improper, sitting here
6 right now.

7 THE COURT: All right. Thank you, Mr. Colvin.

8 Mr. Kasdan?

9 MR. KASDAN: Thank you, your Honor.

10 I just want to respond to a few things. And I think
11 that we're talking about the right things and asking the right
12 questions. And by that, I mean what's important is defining
13 the lower bound of this base. We define the lower bound of the
14 areola with the clarification that we offered right after that
15 widest diameter.

16 I think that the Mayborn construction, which is just
17 the part below the areola portion, suffers from all of the same
18 problems, but far more so that they criticize the Nanobebe
19 construction for. They said that our construction improperly
20 conflates the base and the flange. And, in fact, their
21 construction conflates everything that's below the areola,
22 which can include separately claimed elements, like the flange
23 and the collar, as you were just discussing.

24 So, what's intended -- and our construction, the
25 lowest portion of the nipple, beginning where the nipple meets

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1 the top rim of the vessel, that's mountable to the vessel, what
2 we're talking about is that what defines the lower part of the
3 base, it's the diameter of where the rim of the vessel hits.
4 No one is trying to conflate flange and base together. Those
5 are separate claim elements. And I don't think that if you
6 look at any of the figures that Mr. Colvin went through, that
7 our base construction is somehow inconsistent with that. We're
8 merely trying to define the lower part of this. The
9 language -- and the language is actually how the patent talks
10 about it. It talks about the base in the specification as the
11 part that's mountable to the vessel. So, let me get into that
12 and talk about that a little bit.

13 So, again, we're talking about -- and I really take
14 issue with Mr. Colvin pointing to this 116 element as if that
15 is like the singular place where the base is. That's a general
16 indicator of where the base is, and the base has length to it
17 and extends downward from there, as it must, because to get
18 this patent -- you just asked a question about the one-way
19 inlet valve, right. Ultimately, to get this patent allowed,
20 they had to amend this claim to say to this structure shown in
21 figure 4, to include this one-way air inlet valve that goes
22 through a domed portion of the base. So, the base isn't just
23 at 116, it, of course, extends downward, and it's described, in
24 this figure like we talked about earlier, as the base sort of
25 follows the plastic of the collar.

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1 The flange is shown as a different element, and
2 nothing about our construction is intended to mix the two
3 together. We're simply just defining a lower bound.

4 Next slide.

5 So, this is what I was talking about before, and we'll
6 get into this more, I guess, after we eat, but about the domed
7 portion. But just as a little preview, because it is relevant
8 to the base and where it is, the base portion is the sloping
9 portion. The outer part that's not covered is the base
10 portion. The plastic part that's colored in blue is the
11 collar. And the vessel is the yellow part, and the outer rim
12 of the vessel goes out to the width of where that screw collar
13 is. That's what we're saying — the base comes down to that
14 point, to that location. And that's consistent with what's
15 shown in the figures, and specifically figure 4, which is the
16 embodiment that's claimed here.

17 Next slide.

18 Our language is right out of the spec. We didn't just
19 pull "mountable from the vessel" out of thin air. That's how
20 the base portion is described in the specification. It says
21 the base portion, 116, is mountable to the drinking vessel.
22 That's where it is.

23 It also goes on to say and it also has a flange and
24 all these other things. Those two things are not anywhere
25 close to inconsistent with each other.

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1 Next slide, please.

2 I think we've made this point. Our construction, we
3 think, is consistent with the way it's described in the record
4 and defines lower bound. And theirs just has parts below the
5 areola region, which is extremely vague. Again, kind of a
6 continuing theme.

7 So, they accuse us of contradicting the distinction
8 between flange and base portion. And a flange is just a
9 protrusion. It's often used when you're connecting things to,
10 like, strengthen the connection. It's a separately claimed
11 element in the claim. There's nothing inconsistent about
12 defining that lower base portion to go out to the rim of the
13 vessel and also having a flange, no matter where you want it.
14 And we agree, the claim says, separately requires a flange. We
15 have no dispute over the meaning of flange, that's why we're
16 not talking about it here – a flange is a flange – but that
17 doesn't change our construction or affect our base portion
18 construction.

19 So, that's our conclusion. The Mayborn construction
20 is, we think, exceedingly vague, and our construction is
21 basically what the specification says the base is and where
22 it's mounted, and it describes it locationally.

23 As to the petition for IPR that Mr. Colvin just
24 marked – I think it's Exhibit 12, if I have that correct – when
25 I look at the figure that he showed you, when I look at

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1 figure 1 and figure 4, I see nothing inconsistent about our
2 base construction and the presence of a flange. The intent of
3 our construction is to define the lower bound. It's to the
4 diameter of the lower rim of the vessel. And that's consistent
5 across figures 1 and 4 and this figure that's shown in the
6 inter partes review petition.

7 THE COURT: So, I'm hearing Mayborn argue that,
8 essentially, the base portion is the lowest part of the nipple.
9 So after the areola, it just keeps going, and that's all the
10 base. You may have parts of the flange, et cetera, but the
11 base is below that. And it doesn't sound like they have a
12 need -- and they can correct me -- to have a lower boundary, it
13 just goes to the end, just like the teat portion goes up and
14 there's nothing above that.

15 Why do you need "beginning where the nipple meets the
16 top rim of the vessel" and why do you need the phrase that it's
17 mountable to the vessel? Do you disagree that the base portion
18 is the portion below the areola and the lowest portion of the
19 nipple, just generally?

20 MR. KASDAN: We don't disagree that it's the portion
21 below the areola, but we do think -- but we think it's
22 important to define it the way the specification defines it,
23 which is it's the portion that's mountable to the vessel. Not
24 all nipples have bases. It's not a required part of every
25 nipple design. And the base -- there's nothing in nature about

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1 what a base is, there's no plain meaning. And so base in this
2 patent is the part that's affixed to the lower vessel, and
3 that's an important part of the construction. That's how it's
4 described in the patent.

5 THE COURT: Okay. Thank you.

6 MR. KASDAN: Thank you, your Honor.

7 THE COURT: Mr. Colvin, is there anything you want to
8 add?

9 MR. COLVIN: Your Honor, I would just add that the
10 claim -- when you look at the language of the claim, the
11 spatial relationship is enough. There are other
12 characteristics of base that are defined in the claim, but the
13 claim itself, where it sort of defines the location of these
14 things, just puts it in relation to the areola and the teat.
15 And so, that's what the claim says, and there doesn't need to
16 be more than that. That's okay. The experts are going to look
17 at this, these are common terms in the art, and they're going
18 to know what this is, and they're going to be able to apply
19 them to the products that are at issue in this case. And I
20 think this is actually a pretty easy thing for both the experts
21 and the jurors.

22 THE COURT: So, would you have an issue with the
23 definition being the lowest part of the nipple below the areola
24 portion?

25 MR. COLVIN: I don't think we would, your Honor.

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1 We'll talk to our client over the break about that, just to
2 make sure, but my first impression is that that would be okay.

3 THE COURT: So, how do you define the difference
4 between where the areola ends and the base begins?

5 MR. COLVIN: Well, I think that that can depend on the
6 particular product you're looking at. Just as in nature,
7 different types of areolas and different products, you could
8 have different size areolas, and so I think the specific
9 application of these things to a product is going to be
10 something for the experts to draw the line. I can't sort of
11 put into words some relationship that's going to stand true for
12 all potential products because I just don't know what all
13 potential products would look like, your Honor.

14 THE COURT: I guess what I'm getting at is when I
15 looked at all this and sat in my chambers and read everything
16 and got into this, I was trying to figure out where does your
17 areola end and your base start, which is why I asked you the
18 question, did the base have an air vent. That will help me
19 distinguish between the base and the areola, the base has an
20 air vent.

21 MR. COLVIN: Right.

22 THE COURT: You don't want to do that; that's fine.

23 How do I or a juror, in looking at this, distinguish
24 between where the areola ends and the base begins? Or
25 differentiation between the areola and the base?

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1 MR. COLVIN: Well, your Honor, I would say two things
2 in response to that.

3 The first is, we just have to look at the claim and
4 what it says. And then the application of this, to the
5 particular products, is going to be something for the skilled
6 artisan. It's difficult for us because we're not skilled
7 artisans, but when we have a skilled artisan in the witness box
8 right there, they're going to be able to draw the line and talk
9 about it. I think, as a matter of law, which is what the claim
10 construction will be, what is the precise delineation between
11 base portion and areola, I don't know that I can give you one
12 of those, your Honor.

13 THE COURT: Okay. Again, the reason why I'm
14 struggling a little bit is it's easy -- and I understand that
15 I'm not the expert sitting in the box -- to distinguish between
16 a perpendicular -- a part that is perpendicular to the mouth of
17 the vessel, so I can see the teat -- that's there -- but then the
18 difference between the areola and the base, if they're just
19 being defined, as Mayborn is proposing, in relation to
20 location, I'm not sure where somebody finds the demarcation
21 between the base and the areola.

22 MR. COLVIN: Well, I think that's also an issue with
23 Nanobebe's construction as well, your Honor. If they're
24 starting -- if we look at their construction with respect to
25 figure 1 embodiment, they would start at the bottom of the

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1 flange, and then they would go up until they hit the areola.
2 And, so, I think this is just sort of a natural thing that's
3 going to happen with base and areola because I think it happens
4 with their construction as well.

5 THE COURT: Well, I don't know that that's necessarily
6 so. If I were to accept their areola definition, they have
7 included different characteristics and functionality to try to
8 distinguish it from the base, and they have tried to add things
9 to base portion, including where it's mountable – mountable on
10 the vessel, et cetera – to differentiate between the areola and
11 the base.

12 I'm just not seeing that in your definitions. I'll
13 certainly have to consider whether that's appropriate or not.
14 But just trying to figure out where one starts and one ends,
15 specifically with respect to the base and the areola, is my
16 concern.

17 MR. COLVIN: I understand your concern, your Honor. I
18 think the claim doesn't require -- if that was an important
19 thing in the claim, those limitations would be there, and
20 they're not.

21 And, so, I think when you look at the claim, base
22 portion has a number of things – ornaments, if you will –
23 hanging off of it in the claim – it's got flange, it's got air
24 vent – so I think when you look at the claim in total, and you
25 see base portion, you see the things that your Honor is

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1 pointing to - you see an air vent, and you see a flange -
2 because those are in the claim already. So I don't think we
3 need to shoehorn those things into the construction of base
4 portion because they're already there.

5 THE COURT: I see what you mean. So if somebody is
6 looking at this patent and construing the different portions of
7 the invention, they will know that, for example, if they're
8 looking at a portion that has an air vent, that's the base, or
9 if they're looking at a portion that has a flange, that's the
10 base, et cetera, because of our portions of the claim, not
11 necessarily because of how you define the base?

12 MR. COLVIN: That's right, your Honor.

13 MR. KASDAN: Can I respond to that, your Honor?

14 THE COURT: Yes, please.

15 MR. KASDAN: Because I think you put your finger right
16 on it, the distinction between areola and base and all these
17 portions that we've been talking about so far today. And
18 Mr. Colvin just said, well, that's not in the claim, it just
19 says base and areola and hangs a bunch of ornaments on it like
20 flange and other things. And, yes, flange and other things are
21 in the claim, and they have a meaning, and so does base, and so
22 does areola. And so what we're saying is that base isn't just
23 any other thing that could include some other element. It has
24 a meaning. The patent said the base is the part that is
25 mounted to the vessel. They talked about the location. The

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1 patent said that the areola is visually defined by having this
2 different characteristic.

3 So, in our constructions, that's exactly what we are
4 offering, is the distinction between these regions, which are
5 part of the claim. And it could be -- and, certainly, we'll
6 both have experts that apply our claim constructions, and they
7 might not agree, and that's fine, but on claim construction,
8 the fact that some expert will read it later, that doesn't
9 mean -- this is a claim construction issue, what is the meaning
10 of base, where does it start, where does it end, and we've
11 offered constructions for both areola region, that give you a
12 start point and an endpoint, and for the base region, that
13 gives you a start point and an endpoint in a way that's
14 consistent with the patent.

15 THE COURT: Thank you.

16 Mr. Colvin, would you have any issue adding the phrase
17 that is mountable to the vessel, and, if so, why?

18 MR. COLVIN: Your Honor, I think when you look at the
19 claim, it is the flange, and I will just quote the claim,
20 Claim 14. It says: The flange being arranged to seal with the
21 vessel. And it also says that the flange depends from the base
22 portion.

23 The claim doesn't have the base portion meet the
24 vessel. The claim has the flange meet the vessel. And so,
25 their construction, that requires the base to meet the vessel,

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1 is not compatible with the claim.

2 THE COURT: Thank you. That's what I need.

3 Yes, you want to add something?

4 MR. KASDAN: Yes. I'm sorry, because I know I'm
5 standing in between us and power bars.

6 THE COURT: That's okay.

7 MR. KASDAN: Could we just go back one slide? I just
8 want to get to the picture in figure 4. That's fine.

9 So, it's not inconsistent to have a flange structure
10 like that and a base portion that has a lower bound. And the
11 way base portion is described in this patent, when you read it,
12 and it says the collar is domed and this base -- it's molded
13 over it, and it's mountable to the vessel. And so what defines
14 the lower portion of the base is the outer diameter of the top
15 rim of the vessel. That's the point of our construction.

16 THE COURT: Go ahead.

17 MR. COLVIN: One sentence, your Honor: What he's just
18 described is a limitation in an embodiment and is not found
19 anywhere in the claim.

20 THE COURT: Understood.

21 Now I have one final question.

22 Mr. Colvin, if the construction is the lowest part of
23 the nipple below the areola portion, let's just say, for base
24 portion, is this inconsistent with the notion that the base
25 portion -- and I'm not sure where I saw this -- is as a domed

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1 configuration?

2 MR. COLVIN: No, your Honor, that's not inconsistent.

3 THE COURT: So, it's domed all the way to the bottom
4 of the nipple?

5 MR. COLVIN: If the base portion -- if what gets
6 defined as the base portion is domed, then --

7 THE COURT: No, I'm saying, if you're arguing that the
8 base portion is the lowest part of the nipple going just until
9 the nipple ends, that's the whole base portion, is that entire
10 area domed? It doesn't seem like it is.

11 MR. COLVIN: I don't believe that's required, your
12 Honor. I think as long as some part of the base portion is
13 domed, I think that would -- I think that is consistent with
14 the claim language.

15 THE COURT: Okay.

16 And Mr. Kasdan is going to disagree with you. Go
17 ahead.

18 MR. KASDAN: I'll keep it very brief, your Honor.

19 So, just to clarify, Mr. Colvin said that the flange
20 is the thing that -- the claim describes the flange as sealing
21 with the vessel. The base portion is described in the spec, in
22 the portion we showed, as mounted on the vessel, and the base
23 portion, the round dome part, is molded over the collar, and it
24 does extend all the way out, again to the outer rim of the top
25 of the vessel. And, again, that's what we're proposing, and I

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1 think it's just completely consistent with what the patent says
2 and not inconsistent with the presence of a flange as a
3 separate element.

4 THE COURT: Great.

5 Okay, Mr. Colvin, last word since it's your patent.

6 MR. COLVIN: Your Honor, I'll leave it to you.

7 THE COURT: Okay, great. That's a good last word.

8 So, is a half an hour enough time? Do we need more
9 than that?

10 MR. GOETZ: A half hour is fine with us, your Honor,
11 sure. We're not going anywhere.

12 MR. KASDAN: A half hour is good.

13 THE COURT: So let's take a half hour. I'm going to
14 be known as the tyrant judge that goes for hours and hours, but
15 let's take a half an hour and reconvene, then, at 3:05, and
16 we'll start and go through the rest of these.

17 Thank you very much.

18 COUNSEL: Thank you, your Honor.

19 (Luncheon recess)
20
21
22
23
24
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1 THE COURT: Now that we're all fortified, I guess we
2 are well exceeding our four-hour estimate of time.

3 "At least partially inwardly"?

4 MR. GOETZ: I have domed portion next, your Honor, but
5 we are happy to proceed however you would like to proceed. I
6 do have a few preliminary things to address, though.

7 THE COURT: Okay. Why don't you go ahead, progress
8 however you'd like, and we'll take whatever one you want.

9 MR. GOETZ: Thanks, your Honor.

10 First, on base portion, in light of the discussion, we
11 would be amenable to a construction that said the part below
12 the areola portion other than the flange. That would address
13 some of the issues that Mr. Colvin was pointing out. I don't
14 know if that's helpful to your Honor, but I think that would be
15 fine with us, if that's helpful.

16 THE COURT: Did you discuss whether you would agree to
17 the lowest part of the nipple below the areola portion?

18 MR. GOETZ: As a part of the base portion?

19 THE COURT: Yes, as opposed to just part below the
20 areola portion.

21 MR. GOETZ: Oh. Yes, that's fine with us, your Honor,
22 yes.

23 THE COURT: Okay.

24 MR. GOETZ: So that was first.

25 Second, just to respond to some of the things that

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1 have been said about the '930 patent and just sort of some
2 conceptual things, I'd like to try to sort of see if I can help
3 make some progress on it.

4 There is repeated discussions about, well, that's not
5 what this patent is all about, and that's not what's defined in
6 the specification. There are no definitions in the
7 specification in the sense of -- in the patent law sense of the
8 lexicographical definition. That's very specific. That
9 literally requires the words, "when we say areola, we mean"
10 colon, and then this is what we mean. That's a definition.
11 I'm not sure, counsel may be using the word sort of
12 colloquially, and that's fine. But for patent law purposes,
13 that's what a definition is, and there's nothing like that in
14 these patents. And they haven't even argued it or cited the
15 lexicography.

16 So, I take issue when you say, oh, the patent defines
17 this, the patent defines that. Actually, the specification
18 does not do that.

19 So, what this patent is all about -- this is sort of a
20 shorthand for that -- oh, what this patent is all about is this
21 one thing or the other. That is a fundamental misconception of
22 what a patent document is and what this patent document is. I
23 don't think that's correct, and I don't think that's complete.

24 I don't want to rehash it, but there are lots of
25 improvements in these patent specifications and in these

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1 patents. And that happens all the time. You have a patent
2 application, and it has different embodiments, and it solves
3 maybe a valve problem here, and it solves a shape of a dome
4 breast-like shape over here, and it solves the flexible nipple
5 and better controlling the flex of the nipple over here. Those
6 are different problems. The question of whether they're
7 patentable or not happens during the process of prosecuting the
8 patent.

9 And the inventors are entitled to claim different
10 aspects and to mix and match them. That's exactly what we have
11 in this case. So, Claim 14 of the '930 patent, Mr. Colvin is
12 exactly right, this is essentially about the valve. But,
13 remember, one of the inventions that's disclosed, just one of
14 them -- there's a lot -- and, by the way, sometimes we
15 shorthand, and even I do as a patent lawyer, sometimes we say
16 the invention as a shorthand for sort of the idea in the
17 patent, but, really, the invention is defined by the claim.
18 You don't have an invention until you have a claim that has
19 articulated what it is, it's been examined by the Patent Office
20 over the prior art, it's been found novel and nonobvious, and
21 then you get this claim, and that's what your invention is.

22 So, this notion that there's only one invention, that
23 it's sort of the doc hits his head on the toilet, and it has a
24 flux capacitor, and that's it, and that's okay, it's the flux
25 capacitor and that's it, that is not how it works. And it's

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1 not actually how this works like in fact.

2 Now, one of the things we're not doing right now, your
3 Honor, but you'll hear later in the case, is sort of the story
4 of this invention and how it came to be. And if you understand
5 a little bit about it, it will help to understand.

6 There is an R&D group at Mayborn, and they came
7 together, and they wanted to improve over the prior art, just
8 like the patent says, and they got together, and they had
9 designs - it was multiple people, it wasn't just one inventor -
10 they had meetings, they had prototypes, they did tests, they
11 did studies. And they're proceeding along in the development,
12 but there comes a time when you've got to file for your patent
13 because you run out of time. You have to do it quick. The
14 whole structure is designed to get everyone to race to the
15 Patent Office and disclose their things.

16 So they race to the Patent Office, and they got -- and
17 they filed on the design that they were working on at the time,
18 which was this overmolded design, which is the design you see
19 in figure 4. But the reason they were okay doing that, because
20 they knew that the patent laws aren't going to hold their
21 claimed invention to the particular manufacturing details in
22 the specification. Patent law is very clear that patent
23 specification is not a manufacturing specification, it's not
24 those sorts of details. And so Mayborn knew, like all
25 inventors know, that when you go to the Patent Office, you're

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1 going to be able to get claims that cover your idea, but that
2 are slightly broader than what you've disclosed. That's
3 perfectly appropriate, and that happens all the time.

4 So, I just want to make sure that that's sort of
5 clear, and that's an important sort of backdrop to
6 understanding what's going on here. And I think that is maybe
7 the source of some of the problems.

8 The valve is another good example. They said about
9 this fancy valve, and they point to the disclosure. But, of
10 course, this is Mayborn's product, and I don't remember the
11 exhibit number, your Honor, but I'll find it. You were looking
12 at it earlier, it's --

13 THE COURT: Defendants' Exhibit 2?

14 MR. GOETZ: I think it's 2, yes, your Honor.

15 So, this is the product that came out of that
16 development work. This is it. And this is the one that is
17 covered by these patent claims. And you can see it doesn't
18 have an overmolding, and there's a whole story about why they
19 ended up not going with the overmolding and why they changed
20 it, but that's okay because they knew they could still cover --
21 they could still cover their product with their patent even
22 though the overmolding that you see in figure 4 wasn't there
23 because the other inventive aspects were, and that's okay.

24 THE COURT: Okay. Why don't we get to dome
25 configuration.

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1 MR. GOETZ: Thank you, your Honor.

2 Okay. Dome configuration or dome shape: One of the
3 things -- we have a slight change in the construction, not a
4 complete sort of new construction, like we saw earlier, but in
5 light of your Honor's question, which is a good question, it's
6 like, okay, well, what about convex and concave as it relates
7 to arc? So we have understood your Honor's concern. Really
8 what we're talking about is a convex cross-sectional profile,
9 and, as an alternative, we were suggesting a wide circular base
10 with a convex cross-sectional profile to get the idea that it
11 has a dome shape, sort of convex, when you're looking at it
12 from the outside. So, that would be our suggestion. We've let
13 the Nanobebe folks know about it yesterday, but they did not
14 agree to it.

15 So, first, just to talk about the claims, so you can
16 get a sense: This domed configuration or domed shape is in
17 both sets of claims. And so, I've got on the screen here
18 slide 54 on the left, the '930 patent, Claim 14, the base
19 portion having a domed configuration, and then on Claim 21,
20 it's the collar, and the lower portion of the nipple together
21 define a downward domed shape.

22 And, again, this is about one of the inventions, one
23 of the ideas, was to have a product that has a shape that's
24 more like a woman's breast. That was one important aspect of
25 the story, was that, because the old patents were these very

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1 skinny, very tall nipple, very skinny, and there was no -- it
2 didn't look like a human breast at all, and part of the design
3 team's goal was to make something more breast-like. That was
4 an important aspect of the patents in suit, to proximate the
5 shape of a human breast.

6 That aspect is reflected in the embodiment seen in
7 figure 4. Really, that's the embodiment that sort of reflects
8 that aspect of the invention.

9 The specification makes clear that this dome sort of
10 breast-like configuration is reflected in the shape of the base
11 portion. It says: The shape of the teat is also similar to
12 the human breast, the base portion 116 being shaped like a
13 breast and having a wide, domed configuration.

14 So, that's right out of the specification, in the '930
15 patent. That's at column 4, lines 1 to 3, and that's the
16 source of why we're talking about a wide configuration in our
17 construction, because it comes right from the specification,
18 and it makes sense.

19 The specification also goes on to talk about how the
20 basic domed, breast-like configuration is reflected in the
21 shape of the breast and the collar -- and the shape of the base
22 and the collar together, and that's, again, figure 4. You can
23 see the downwardly domed peripheral portion, 134, which is the
24 combination, really, of the collar and the base in that
25 particular embodiment or that particular example.

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1 And so if we go back to the timeline, your Honor, one
2 aspect, one of the inventions, one of the ideas of the patents
3 that we're talking about was to proximate the shape of the
4 breast. Again, that wasn't the only aspect. And the different
5 claims claimed that aspect and then other aspects. In the
6 '244, it's the flex region aspect, and in the '930 patent, it's
7 the valving stuff, but they both have this notion of a domed
8 shape. And you can imagine going back in time to the R&D time
9 period when they're working on this invention, and the question
10 is, well, how do you claim this sort of aspect, this new shape,
11 that you see on the timeline, which is more like a woman's
12 breast? You can imagine what Nanobebe would be saying if we
13 had said it was a breast-like base, right? That calls into all
14 kinds of questions. Human bodies have all different shapes and
15 sizes and breast-like in what way, and that would be bad
16 because we need a more technical term, a more concrete term,
17 and that term is dome, really, is the term that's used in the
18 specification and in the claims.

19 And people know what domes are. I've got a few on the
20 screen here. I've got slide 59, U.S. Capitol, I've got the
21 Superdome in the middle, I've got the Pantheon below that, and
22 there are some mosques, tombs, from the Middle East, and
23 there's different shapes, but they're all domes. They're
24 all -- I just lost it on my screen. They have the wide
25 circular base, and if you take a cross-section, which is on the

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1 vertical axis, and then cut it in half, it has what we call an
2 arc originally, but your Honor's question was a good one — is
3 it concave or convex. So, really, it's a convex sort of
4 curvature. As you can see from the lines that I've got on
5 slide 59, they all have this convex profile when viewing from
6 the outside, and that's sort of what we're doing here with this
7 shape.

8 So, anyway, that's the source of our construction, and
9 it's consistent with the specification. It sort of comes right
10 from the specification, it comes right from the common
11 understanding of dome, and is supported by the file history.
12 And there's a little bit of explaining to do here on the file
13 history, your Honor. I'm at slide 60.

14 So, one of the things that Nanobebe folks are saying
15 is that, well, we can't be right because the file history, we
16 said that the Uehara reference was not domed, and so that
17 precludes us from putting forward this construction. And this
18 is at page 19 to 20 of their brief. And they're referring to
19 the Uehara reference in some of the file history, and I want to
20 talk a little bit about that.

21 The punchline here is that what we were pointing out
22 was the Uehara flange was not domed, not the part of the base
23 portion that the examiner was saying was domed, and so they've
24 just misunderstood the file history factually.

25 So, to do this, one of the things I realized, your

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1 Honor, is that the actual Office Action, May 20, 2015 Office
2 Action -- oh, it is in the record, it's Docket No. 62-4, and
3 you have to look at that because the later prosecution history,
4 the figure is really blurry. It's like a copy, of a copy, of a
5 copy. But on slide 61, I have it. And this is the Uehara
6 reference. You can see the examiner is doing a bunch of
7 things. I think, ultimately, the examiner is sort of pointing
8 out the different aspects of this particular nipple. One of
9 them, on the right side, you can see there's a dome shape, and
10 it's pointing to the side, and it's doing that because there's
11 a pretty slight curvature there, and that's what the examiner
12 is saying is dome shaped.

13 But notice on the left, where I have in green, the air
14 valve slit is in green, and I put that green circle on there,
15 Judge, but if you look on the document, there's a little arrow,
16 it kind of goes up to the left and then dives down, and there's
17 a little hole that it's pointing at sort of on the left side of
18 where I've circled. So that's the examiner saying, hey, I'm
19 pointing at this Uehara reference, it has this air valve slit
20 right here. Of course, that's in the flange, and that's
21 exactly what Mayborn said. In response, Mayborn argued that
22 that air valve was not in the base having a dome configuration
23 because it was in a flat wall portion or flange. So this is
24 now a snippet from our response, the Mayborn response, which I
25 think is Docket No. 62-34, and at the bottom, what Mayborn is

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1 saying is, and I will just read it, quote, "As shown in Uehara
2 on the right, the vent does not extend through the base portion
3 having a domed configuration. The vent disclosed by Uehara
4 appears to extend through a flat wall portion. This flat wall
5 portion cannot correspond to a base portion having a wall
6 thickness in a domed configuration."

7 So, all we were saying is, no, that's just the flat
8 flange, that's not the side of the base that has this domed
9 shape that the examiner is pointing at. And, basically,
10 Mayborn is agreeing with it, okay, that could be a dome shape,
11 that's fine, that has a curvature, that has a shape that at
12 least is reflective, a query of whether it's a wide circular
13 basis — I don't think it probably is — but at least as it
14 relates to the curvature, yeah, that could be a dome shape,
15 yeah, absolutely. But the problem is that that air vent that
16 you're pointing to, Mr. Examiner, is in the wrong spot.

17 You're going to hear about this when they talk, and
18 they have not construed the file history correctly. I think
19 that's a correct understanding of it, your Honor.

20 The result is that the file history itself supports
21 Mayborn's construction of a wide circular base with a convex
22 cross-sectional profile in the sense that there's an example of
23 a convex cross-sectional profile shown below, and that's where
24 the examiner talks about the domed shape, and it's slight, but
25 it is a convex cross-sectional profile.

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1 So, that brings me, your Honor, to the problems that
2 we have with the Nanobebe's, what I call, the round
3 construction. I'll go back to the Uehara reference. There's a
4 slight curvature there, that's okay, that is dome shaped, but
5 it's not a ball, okay, it's not the shape of half of a sphere.
6 That's absolutely not what it is at all. And that's the
7 problem, really, fundamentally with the Nanobebe's construction
8 or round construction.

9 It's wrong, because at page 18 of their brief, their
10 equating their rounded shape and profile construction with
11 hemispherical or, quote, "having the shape of half a sphere."

12 Now, as we point out in our brief, there's no basis in
13 the specification for this construction, and this construction
14 is actually relying on 2022 dictionary definitions. Dictionary
15 definitions are extrinsic evidence, it's not intrinsic
16 evidence, and, by the way, they're many, many years after the
17 correct time period. But the real problem is that this rounded
18 construction is essentially a nose of wax, which Nanobebe has
19 already, and we worried would continue to suit its own
20 purposes. And, really, the difference is they're treating it
21 one way for purposes of infringement, but a totally different
22 way for purposes of invalidity. And that's the problem with
23 the construction and why you shouldn't adopt it really.

24 So, we have here on the screen – I think you have this
25 already, Judge – the petition that they filed on the '930 is

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1 Exhibit 12. I think what I'd like to do just to complete the
2 record is just mark the petition also for the '244 patent, if I
3 may, Judge? May I approach?

4 THE COURT: Sure. That would be Defendants'
5 Exhibit 13?

6 MR. GOETZ: Yes, your Honor, Defendants' Exhibit 13.

7 So, your Honor, on the slide, I just marked the '244,
8 but I just did that for completeness. I'm really going to be
9 talking about the '930 one right now. The '930 one, and this
10 is on the slide 65, we've got an excerpt of pages 94 and 95.

11 It's a similar figure that you saw earlier, Mr. Colvin
12 talked with you about, and the issue is this: For infringement
13 purposes, Nanobebe is saying rounded means "having the shape of
14 half of a sphere," but for invalidity purposes, rounded just
15 means having a convex profile. How do we know that? We know
16 that because in the IPR petition, which was filed after the
17 briefing in this case was complete, and it was actually filed
18 by a third different law firm, but it's still Nanobebe, and
19 under petitioner's construction – and petitioner, again, is
20 Nanobebe – a domed configuration, a domed configuration is
21 "having a rounded shape in profile." That's their construction
22 here. And they go on to say: This Kurkjian reference
23 discloses this limitation. Kurkjian's domed configuration, as
24 shown in figure J, includes a rounded shape in profile, as
25 shown.

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1 And so they've got to go to the base portion. And so
2 you can see that the rounded shape and profile, for purposes of
3 invalidity is, essentially, a convex profile having a convex
4 shape, which I've got on page 65, slide 65, with the arrows.

5 So, for invalidity purposes, Nanobebe's construction
6 means convex profile, but for infringement purposes, it means
7 half of a sphere, and that's the problem with the construction.
8 If construction is susceptible to that sort of variety in
9 interpretation, that's just a red flag that tells you, Judge,
10 that the construction is not correct.

11 THE COURT: So, Mr. Goetz, is what you're saying that
12 on page 66, if you go back one slide --

13 MR. GOETZ: Yes, ma'am.

14 THE COURT: -- that this is a convex profile as
15 opposed to a rounded shape because it's only slightly angled
16 and not enough to be round in half of the sphere?

17 MR. GOETZ: Well, remember, they're mapping their
18 construction, which is rounded, onto this. So what I'm saying
19 is Nanobebe is saying here that its construction of having a
20 rounded shape and profile is met by this barely curved
21 convexing profile. And the problem that I have is, that's in
22 the IPR, and the problem is, here, in this court, what they're
23 saying is, oh, rounded means having half of a sphere. So, it's
24 almost like it's half of a basketball, and that's just -- and
25 so the fundamental problem is, that just tells you that it's

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1 rounded, it doesn't have a meaning that's helpful. And all it
2 is, is sort of a door to let them argue whatever they want to
3 argue depending on the issue. If it's invalidity, they'll say,
4 okay, well, it's just a convex; if it's infringement, it's got
5 to be half a sphere, so there's no infringement. So that's why
6 the construction is not appropriate, your Honor.

7 So another way to put that is the problem with their
8 construction is you don't really know what it means until
9 you're faced with how they're going to argue it, and that's a
10 problem.

11 And that's not helpful, that's not appropriate, and
12 the truth is that the intrinsic evidence, and really all of it,
13 meaning the specification, the file history, demonstrates that
14 the domed configuration and dome-shaped terms both mean a wide
15 circular base with a convex cross-sectional profile, as we say
16 on slide 67.

17 That's all I have on that, your Honor.

18 THE COURT: Okay. I don't have any questions.

19 MR. GOETZ: Very good. Thank you.

20 THE COURT: Mr. Kasdan?

21 MR. KASDAN: Are you ready, your Honor?

22 THE COURT: I am. Thank you.

23 MR. KASDAN: Great.

24 I just want to start by remarking on a few things that
25 I think are really important that Mr. Goetz just touched on.

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1 First, in his kind of level-setting comments before he
2 got into domed portion, he said, you know, we said defined, and
3 no one -- there are patents in rare cases where someone says
4 this word in this patent means this, they say that in the
5 specification. That's rare. That's not the case here. No one
6 is arguing that's the case here. But you do look to the
7 specification to see how the term is used and what it means,
8 and, in fact, that's what Mr. Goetz went on to do right after
9 he finished saying that, and when he talked about domed
10 portion, he says, okay, where does it say this in the spec, how
11 does it say? So, that's what we've done.

12 He also said Claim 14 is about the valve, and in the
13 next sentence, he said the invention is defined by the claims.
14 Him saying Claim 14 is about the valve doesn't make it true.
15 Claim 14 is about the combination of elements that are recited
16 in that claim, which include the areola portion, and which has
17 a specific meaning in the way it's used in this patent.

18 And we've cited all that law way back in the
19 beginning, about the intrinsic record, and I know your Honor is
20 familiar with the claims and the specification and the file
21 history.

22 He also came up here and showed you the products, and
23 I know the products are useful to see, and it's part of the
24 story telling, but products are extrinsic evidence. They're
25 not what the patent -- they're not really in the record of the

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1 patent they look at for claim construction. And they say our
2 product, you know, uses their patent. We disagree. The issue
3 of whether their product is covered by the patent is a disputed
4 issue, and it's probably not one we're going to resolve in this
5 case.

6 So, looking at the patent to construe these claims is
7 improper, and I think -- I'm sorry. Looking at the product to
8 construe these claims is improper, and I'm pretty sure the
9 folks on the Mayborn side would agree with that.

10 So, now getting to the construction of domed: So,
11 yeah, the prior construction was a wide circular base with an
12 arc-shaped cross-sectional profile. Yesterday, we got this
13 proposed new alternative construction, the wide circular base
14 with a convex cross-sectional profile. And I am going to talk
15 about that in detail, but before I get into the problems with
16 that, I did want to talk about a few things that Mr. Goetz
17 mentioned.

18 So, first of all, he went through the specification,
19 and the specification repeatedly uses the word "domed." It
20 says this shape is domed, this shape is domed, it's a domed
21 configuration. That doesn't really help us to define what
22 domed means other than to see what those shapes look like in
23 the figures, okay, which we've done. All those shapes have --
24 in three dimensions are the upper half of a sphere, or a
25 smushed sphere, and in profile view, they look rounded,

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1 consistently across the spec.

2 So, that's what we're doing here, right, we're looking
3 for a definition. And Mr. Goetz came and said, well, you know,
4 nowhere does it say hemispherical upper portion of a sphere,
5 well, nowhere in this patent does it say arc shaped or convex
6 either, right? So, yes, that's right, we're trying to choose a
7 definition.

8 So, the timeline, I think, is interesting, the
9 timeline that Mr. Goetz just went through on page 58 of their
10 slides. So he showed a bunch of nipples, and nipples can have
11 different shapes in profile, right? Some are rounded, and in
12 three dimensions, you might call them domed, and some are flat,
13 some are cone shaped and are flat. Nipples can have different
14 configurations. What they claimed here is domed, all right?
15 So let's just put a pin in that.

16 I wanted to mention the Superdome in our brief - I
17 don't think that I did - so I'm glad that Mr. Goetz showed it
18 here. So, yes, domes -- so, these are all examples of the
19 hollow hemispherical shapes - basketball, half a basketball,
20 smushed. This last one actually looks pretty flat on the side
21 to me, that looks more like a cone, I don't think that is
22 domed, the one on the right on slide 59. But, yeah, the
23 Superdome, I agree that's domed. We know what a dome is. And
24 I think one thing that jumps out about their construction is
25 they're using a lot of really complicated words to define a

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1 pretty simple thing. The question is kind of like why is that?
2 So, I want to talk about that.

3 So, this is just where we are in the patent. We have
4 this base portion having a domed configuration, and,
5 importantly, that one-way air inlet valve has to extend through
6 the base. And there is file history on that, and we'll talk
7 about why I think it's pretty clear in the file history that
8 they distinguished flat from domed.

9 Next slide, please.

10 So, figure 4 is what we're talking about here, because
11 that's what discloses the specific structure that's claimed
12 here. That's what's relevant.

13 And, yes, the specification describes the base portion
14 as being shaped like a human breast having a wide-domed
15 configuration. That's what Mr. Goetz cited.

16 Next slide.

17 So, what is a dome? So, according to geometry, it's
18 an architectural element similar to the hollow upper half of a
19 sphere. It's the upper half of a sphere, it's a rounded 3D
20 structure, and, yes, I know, this is a definition here from
21 Wikipedia --

22 THE COURT: According to Mr. Geometry?

23 MR. KASDAN: Yes, Mr. Geometry.

24 We do have a cite in there.

25 And, yes, it's from 2022, but, guess what? This isn't

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1 a term that's changed over the years. We know what a dome is.
2 It says the same thing a dome was. And I can supply you with
3 plenty of dictated definitions that were at the filing date of
4 this patent from Webster's that say the same thing. That is
5 what a dome is geometrically speaking.

6 So next slide, please.

7 And we talked about this, also, about the overmolding.
8 And the way it's described is you have this rounded collar,
9 it's marked as the screw collar, 130, and then the domed
10 portion of the base is that curved, rounded part shown in
11 profile in three dimensions, it's spherical, right? That's the
12 domed portion.

13 So next slide, please.

14 And we look at the specification. Like I said
15 earlier, you look at the figures, you look at the base in all
16 these places, and it's got, in profile, the rounded view, and
17 in 3D, this upper half of a sphere. That's what the shape is,
18 as shown consistently in the patent across figures.

19 Next slide, please.

20 So, we have two constructions. We asked Mayborn if
21 they were proposing this as a new construction. They said it
22 was an alternative construction. But I think they're both
23 problematic. So, of course, arc and convex doesn't appear in
24 the '930 patent, we know that, but I think both, when you look
25 at it - and they're actually pretty clear in their brief about

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1 this -- both is really an improper attempt to broaden the scope
2 beyond the domed shape that's disclosed and which they relied
3 on to get the patent because it would include all these shapes
4 that no one would consider domed. And I will show you a couple
5 of slides about that.

6 Next slide.

7 So, this is the problem with convex. So, we just got
8 convex yesterday, so we're a little bit of reacting in realtime
9 to this. But a dome is a 3D shape. If you're talking about
10 the profile view, it appears rounded. Convex describes a 2D
11 shape. And what convex means is a shape can be called convex
12 if for any two points in the shape -- I'm sorry for the geometry
13 lesson, but here's where we are -- the straight line segment
14 joining them lies entirely within the shape. That's the
15 definition of convex.

16 So, a convex, so a triangle, below is convex because
17 when you connect a point from any line -- any point, you draw a
18 straight line segment to any other point, it's inside of the
19 space. So a triangle, a square, a pentagon, a parallelogram,
20 all of those shapes are convex. And even if you're talking
21 about three-dimensionally, when you rotate these around in
22 axis, and you think about these in three dimensions, you get
23 shapes that look like those above shapes on our slide 59. And
24 none of those bear any resemblance to anything that anyone
25 would call domed.

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1 So, I don't think arc gets us there, I don't think
2 convex gets us there, for those reasons.

3 Next slide.

4 The prosecution history, also really important here,
5 because of the history here that I mentioned several times.
6 So, when you say things during prosecution can limit the scope
7 of the claims, and you can't then come back later and try and
8 erase history, and I think that's what's happening here.

9 Next slide.

10 So, in their brief, they made two -- Mayborn made two
11 pretty interesting comments about figure 1 and figure 4. They
12 said, well, if you look at the base portion, it's depicted as
13 nearly flat. Now, I don't agree with that -- I think it's
14 rounded -- you know, you can look at those figures, but that's
15 exactly what -- but I think this makes very clear the goal of
16 their construction. They're trying to use kind of a more
17 complex phrase to get away from shapes that are domed and
18 towards shapes that are more flat. And that's inconsistent
19 with what they told -- first of all, it's inconsistent with the
20 way that that shape is geometrically defined, it's inconsistent
21 with what's in the spec. It's also inconsistent with what they
22 told the Patent Office to get the patent.

23 Let's go to the next slide.

24 So go one more.

25 Because Mr. Goetz already talked about this, about

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1 Uehara, and so if you look at the portion that Mr. Goetz
2 highlighted, it's the same portion that we are showing on our
3 slide. It's on page 62 of Mayborn's slides. It's on the
4 current slide you see in front of you.

5 And what Mr. Goetz said is different from what that
6 says. He says that what they were doing was distinguishing a
7 flange. That's not what the highlighted portion says. If you
8 read it, it says: As shown in Uehara on the right that's
9 shown, the vent does not extend through the base portion having
10 a domed configuration, which is what they were amending the
11 claim to require. The vent disclosed by Uehara appears to
12 extend through a flat wall portion. This flat wall portion
13 cannot correspond to a base portion having a wall thickness in
14 a domed configuration.

15 They're making a distinction between what's domed and
16 what's flat. That's how I read it. That's what it says.

17 Just to finish the story -- I'm sorry, go to the next
18 slide.

19 Eventually, they amended the claim even further to get
20 the patent to issue, and that portion is highlighted on the
21 following slide, where it says, again: Claim 18, which is what
22 became issued Claim 14 that we're talking about today, calls
23 for the vent passage to be located to extend through the domed
24 base portion, a feature not taught or suggested by the prior
25 art.

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1 So this was what was specifically distinguished about
2 this claim. It has all these combinations, and it also has
3 this specific shape and venting system.

4 Next slide, please.

5 So, that's the summary, that basically they required a
6 dome base and a specific venting configuration. They seem now
7 to be running away from that, using a more complicated
8 construction that I don't think works or looks domed. Our
9 construction is consistent. It just depends if you're talking
10 two-dimensionally or three-dimensionally. These are 3D
11 structures. With the patent on paper, the figures are
12 profiles, so it does have a rounded profile. But when you look
13 at what a dome is, it's the upper half of a hemispherical
14 surface. And as he showed in the slide with the picture of the
15 Superdome, they can be perfectly circular or smushed or up and
16 down, but the curvature is what makes them domed.

17 So, there's nothing inconsistent -- I guess the last
18 point I want to finish with is the -- pardon me. The last
19 point on this is what Mr. Goetz was saying about the recently
20 filed IPR petition. And I don't think there's anything
21 inconsistent about that and our position today at all. It's
22 looking at a rounded in profile shape and applying our exact
23 construction, and so we are applying the same construction for
24 infringement and invalidity perfectly consistently. And our
25 construction, unlike the Mayborn construction, actually

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1 specifies a domed shape.

2 THE COURT: Okay. I have just a couple of questions.

3 MR. KASDAN: Yes.

4 THE COURT: One of the elements of the Mayborn - I
5 keep saying definition, but you guys are correcting me -
6 construction is a wide circular base. You don't have any base
7 as part of your construction.

8 Do you dispute that the domed configuration has a wide
9 circular base? All of these -- I won't use products anymore.
10 All of the things in the patent seem to have a circular base.

11 MR. KASDAN: Yes, I think the issue there is the use
12 of base, when you say it, I think you're talking about it as
13 the bottom layer of a shape, but this patent uses base and base
14 portion to mean certain things. I think it's just confusing.

15 So, that's why I would propose a different
16 construction.

17 THE COURT: I just didn't know that you would have had
18 an issue with it having a circular base since you're arguing
19 for sort of a portion of a sphere.

20 MR. KASDAN: Yes, that's right, otherwise I think it's
21 consistent.

22 THE COURT: My other question is: I guess I'm still
23 struggling with the concept of a convex arc. I saw your 2D
24 examples, but there certainly are 3D examples of convex arcs.
25 And my concern with rounded - and maybe you can address this -

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1 is, it seems that Nanobebe is okay with the shape being
2 rounded, not necessarily in the shape of a half of a sphere,
3 because it could be flatter than that, so it's not actually a
4 hemisphere or half of a sphere, it's just sort of round, as you
5 said, but not rounded in a way that's concave, it's round in a
6 way that's convex.

7 So, what's the issue, other than it's a complicated
8 term, with a convex arc-shaped cross-sectional profile?

9 MR. KASDAN: I think two issues.

10 Can we bring up slide 58 again, please?

11 THE COURT: The reason I'm asking you that is:
12 Rounded seems like it could be interpreted in lots of ways.
13 Rounded like a teacup, not that's what this is, rounded like
14 the top of a ball. There's a lot of round configurations.

15 MR. KASDAN: Sure.

16 So, to your point, so rounded was intended -- so,
17 talking rounded in profile, like I said, speaking
18 two-dimensionally when we look at figures, but when we are
19 talking in three dimensions, and a dome is a three-dimensional
20 structure, that's why we use the language of the hemispherical
21 sort of upper hollow hemispherical sphere.

22 So, I don't think we would have a problem specifying
23 rounded and to distinguish it from a shape that goes kind of in
24 the opposite direction.

25 THE COURT: For the record, that's a U-shape?

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1 MR. KASDAN: Yes, a U-shape, like a teacup that your
2 Honor was talking about.

3 But what we're intending to do, and what we think is
4 really important, especially given the file history and what's
5 shown in the patent, is that's something that's like a cone
6 shape or that has flat sides is not rounded in profile. And
7 that's the intent and the import of our proposed construction.

8 Just to go back to the -- the issue with convex, and
9 we were reacting to this in realtime because we got this
10 construction yesterday, but when you look at the definition of
11 convex, convex describes two-dimensional shapes, like the one
12 shown here, including triangular shapes and rectangles, and
13 when you look at those three dimensionally, those aren't domed
14 and might not be rounded in this way.

15 THE COURT: And if there was a modifier, if it was
16 convex arc-shaped cross-sectional profile, meaning the convex
17 is defining the shape of the arc, would you still have an
18 issue?

19 MR. KASDAN: I think I'd have to think about that,
20 your Honor.

21 THE COURT: Sure, sure, okay.

22 Anything else, Mr. Kasdan?

23 MR. KASDAN: No, your Honor.

24 THE COURT: Mr. Goetz, anything?

25 MR. GOETZ: Yes, your Honor, briefly.

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1 We're not claiming that the dome can be flat. That's
2 a complete red herring. Like we're not saying that, that's not
3 what we're saying. And so, on the file history, it seems like
4 we're interpreting it differently, but the point is the same.
5 They're saying, well, we're saying dome can't be flat, and we
6 agree with that. So I don't think there's really any debate
7 there.

8 I do want to emphasize the wideness and the
9 circularness is important because it's in the specification
10 because it's part of that figure 4 embodiment, where it has
11 sort of a wide base of the nipple and the collar combination,
12 and that's a part of sort of the breast-like structure of the
13 product. So that's why -- that's why we have that, it's
14 specifically in the patent, so I do think that's important, but
15 it sounds like, as it relates to the curvature, what your Honor
16 said is right on the money, it sounds like there's not
17 disagreement between the parties on that.

18 THE COURT: Let me ask a couple of questions on that.

19 Wide, it seems to me, as in relation to something, and
20 I'm not sure what wide is in relation to; however, I do
21 understand a circular base because if you have a circular base,
22 that I get in terms of the configuration, do you need the word
23 "wide"?

24 MR. GOETZ: I think it's the correct construction,
25 your Honor.

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1 THE COURT: Can you tell me where it comes from in the
2 specification?

3 MR. GOETZ: I can, yes, your Honor. I'll just use the
4 '930 patent.

5 In the '930 patent, your Honor, it's right at the top
6 of column 4. And this is where the patent is talking about
7 this aspect of the invention that I mentioned that's sort of
8 more similar in shape to the human breast. It's this sentence
9 right here: "The shape of the teat is also similar to the
10 human breast, the base portion, 116, being shaped like a breast
11 and having a wide, domed configuration."

12 So, that's '930 patent, column 4, lines 1 through 3.

13 THE COURT: Thank you.

14 Do you have any issue with a construction that leaves
15 in the arc concept, so a wide circular base with a convex
16 arc-shaped cross-sectional profile?

17 MR. GOETZ: No, I think that's fine, your Honor.

18 THE COURT: All right.

19 Mr. Kasdan, you had a response?

20 MR. KASDAN: Just two quick comments, your Honor.

21 One, the portion of the specification that Mr. Goetz
22 just showed, I think, shows why wide should not necessarily be
23 part of the construction. The specification said, "wide,
24 domed," and now -- so wide is a separate thing, and now you're
25 incorporating wide into the definition of domed. So if you did

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1 that, it would just read wide-wide configuration, and it
2 wouldn't make sense. So, everywhere in the spec shows that,
3 and Mr. Goetz showed one example, it says a "wide, domed
4 configuration." So, wide is a separate modifier; it doesn't
5 have to be part of the definition of domed.

6 But just getting back to your question earlier, I
7 think what's important is the emphasis on being part of a
8 sphere and having that type of curvature, and we had a
9 construction like that, that's what we're going forward, and
10 that's what we think is consistent with the patent
11 specification and file history.

12 THE COURT: Okay.

13 And it's your position that a convex arc-shaped
14 profile is not consistent with a round part of a sphere?

15 MR. KASDAN: Again, I'd have to think about that,
16 because convex, from what I've read in the past day, describes
17 the shapes that I showed, which are not many times rounded, and
18 their proposed construction is a convex cross-sectional
19 profile, which means like rotated in three dimensions, which
20 is, I think, different from what you were suggesting today.
21 So, I think we would have to think about that. If you'd like
22 us to brief it further, we can do that, too.

23 THE COURT: No. Let me make sure that I understand --
24 maybe it's from Mr. Goetz. I was understanding your
25 construction to mean that a convex arc-shaped cross-sectional

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1 profile would mean that if you took a cross-section of the
2 nipple, meaning slicing it perpendicularly from the top through
3 the base, that that cross-section would create an arc-shaped
4 convex angle; is that right?

5 MR. GOETZ: That's exactly right, your Honor.

6 THE COURT: All right.

7 Okay, Mr. Kasdan and Mr. Goetz.

8 Mr. Goetz, anything else?

9 MR. GOETZ: Nothing else on this from me, your Honor.

10 THE COURT: Okay, terrific.

11 Let's move now to the next claim.

12 MR. GOETZ: I have on my list "at least partially
13 inwardly."

14 THE COURT: Yes, that's what I have as well.

15 MR. GOETZ: Very good, your Honor.

16 So we're going to be talking a little bit about
17 Section 112. There was a discussion earlier today, and I just
18 want to touch on it briefly, because it does relate to
19 Section 112, and it has to do with this notion of claim
20 breadth, your Honor, and what I thought I heard Nanobebe's
21 counsel say is that claims, as a matter of law, can't be
22 broader than the specification, and that's not really correct
23 at all. That's a fundamental misunderstanding of patent law.

24 There are these things in patent law called genus
25 claims. Now, you encounter genus claims most often in the

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1 chemical arts and the biotechnology sciences. And what a genus
2 claim is, for example, if you had a chemical structure, you
3 have a picture of a chemical structure, you have the carbon
4 ring, and you have got some substituents to kind of stick off
5 it, and you can draw that, and you can put RXY, and then you
6 can claim all different kinds of substituents. But what you're
7 claiming is a genus – it means a whole family of chemical
8 compounds. Those claims have been around for hundreds of years
9 probably, and the specification doesn't need to disclose each
10 and every one of those to have a valid genus claim.

11 So you can have claims that are broader than the
12 specification. Now, sometimes you can have claims that are too
13 broad. I mean, that's an issue, there's no doubt, but the
14 mechanism in the law that deals with that is 35 U.S.C. 112, and
15 not in the definiteness requirement, which we're going to talk
16 about – that's another part of 112 – but in the enablement and
17 the written description part of 35 U.S.C. 112.

18 That is the first paragraph under the pre-AIA. The
19 enablement requirement just requires that you teach as the
20 inventor those of skill in the art how to make and use what you
21 claim. So, if you claim something that's so broad, that you
22 haven't disclosed, well, then your patent is invalid for lack
23 of enablement because you haven't kept up with your end of the
24 bargain. But that's a challenge that's not at issue right now
25 at all, and I don't think is an issue in this case –

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1 enablement – and it rarely is in the mechanical arts because
2 it's very easy to enable mechanical things unless you're
3 claiming something ridiculous, like a perpetual motion machine.
4 The reason you can't claim a perpetual motion machine is
5 because no one can teach you how to make and use it. It would
6 violate the law of thermodynamics.

7 So, this question of breadth is dealt with in
8 35 U.S.C. 112.

9 And, also, in the written description – that's another
10 aspect of 112, that's an aspect we're not talking about today –
11 that's all about, did the inventor have possession of the
12 invention at the time of the filing. And, again, that's
13 another mechanism that the law deals with on breadth, but it's
14 not an issue here, and it's not raised.

15 So let's turn now to the next term, "at least
16 partially inwardly." This is in Claim 14 of the '930 patent.
17 I've lost my clicker.

18 So, slide 69, we've got the two constructions. Our
19 construction is plain meaning, and it's plain meaning because
20 those words are all very plain, and they have plain meaning.
21 Nanobebe is using these words in an attempt to have the Court
22 validate the claim.

23 So, I just touched on 112 briefly. I've got 35 U.S.C.
24 112, paragraph 2, on slide 70. This is the law, and this is
25 the statute. It says: The specification shall conclude with

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1 one or more claims particularly pointing out and distinctly
2 claiming the subject matter which the applicant regards as his
3 invention.

4 This is the definiteness requirement. And the Supreme
5 Court has a seminal case about sort of what this law means and
6 how to apply it, and I've got bits of that decision, the
7 *Nautilus* case, on slides 71 and 72. And as the Supreme Court
8 is saying, Section 112 is a delicate balance, right, because,
9 on the one hand, "the definitenesses requirement must take into
10 account the inherent limitations of language. Some modicum of
11 uncertainty, the Court has recognized, is the price for
12 ensuring the appropriate incentives for innovation."

13 And so there doesn't have to be this absolute
14 precision in claim language, and, again, this goes back to
15 something we talked about at the very beginning, which is this
16 is sort of a difficult thing that we're doing. We're creating
17 intellectual property, and we don't have a surveyor with survey
18 lines and coordinates on a map, we've got the English language,
19 and it's tricky -- and sometimes it's tricky, but that's okay,
20 the law allows for that, and the definiteness requirement
21 allows for that. And the Supreme Court has said and has sort
22 of given us guidance that we must bear in mind the patents are
23 not addressed to lawyers or even the public generally, but
24 rather to those skilled in the relevant art. So you don't come
25 to the patent disclosure sort of empty headed; you come as a

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1 skilled artisan, and you're entitled to think about that when
2 you apply the definiteness requirement.

3 And so, in light of all that, the Supreme Court has
4 said that they read 112, paragraph 2, which is the definiteness
5 requirement, to require that a patent's claims, viewed in light
6 of the specification and prosecution history, inform those
7 skilled in the art about the scope of the invention with
8 reasonable certainty.

9 And so that's it -- reasonable certainty.

10 The definiteness requirement, so understood, mandates
11 clarity while recognizing that absolute precision is
12 unattainable.

13 So, with that sort of setup, the question that's
14 presented by this issue on slide 73, the question is: Has
15 Nanobebe shown by clear and convincing evidence -- now I say
16 that on purpose, and that's because to show invalidity, you've
17 got to show it by clear and convincing evidence. In a lot of
18 jurisdictions, that's the standard of proof that the court uses
19 to take a baby away from its mother. I mean, this is a high
20 level of proof. It's obviously not beyond a reasonable doubt,
21 but it's a lot of proof. The reason for that is because
22 patents are issued by the Patent Office, the system sort of
23 assumes that the examiners did their job, and so there is a
24 very high burden of proof.

25 So, with that burden in mind, has Nanobebe shown that

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1 the language, quote, "a one-way inlet valve disposed at least
2 partially inwardly from the collar in Claim 14 of the '930
3 patent, when viewed in light of the specification and the
4 prosecution history, fails to inform those skilled in the art
5 about the scope of the invention with reasonable certainty"?

6 That's sort of the question presented by the issue.
7 We think the answer, Judge, is no. I've got a little summary
8 of why here, and we'll talk a little more about that.

9 First and foremost, a person of skill in the art – and
10 that's what a POSITA is, it stands for person of skill in the
11 art. Maybe you've seen that. Some people put an H in it,
12 person having ordinary skill in the art. I like skilled
13 artisan, but anyway.

14 The question is, would a skilled artisan have any
15 trouble understanding the term in the context of the claim?
16 Very important point. The answer to that is no.

17 The second bit is the specification provides context
18 that a skilled artisan would understand, especially as it
19 relates to the placement of the valve in figures 4 and 6.

20 And then Nanobebe's own expert used very similar
21 language in his own patent in a similar field, sort of just
22 demonstrating that there's really no "there" there with this
23 issue.

24 Okay. So the claim language, your Honor, I have on
25 slide 75. A couple of things: The context of the claim

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1 matters. If you're going to invalidate this entire claim,
2 you've got to look at the whole claim. I know they're focused
3 on one little aspect that I've highlighted, but you've got to
4 look at the whole claim. So you can look at the basic
5 structure, it's got these (a), (b), (c), (d), (e), these
6 different parts. This is the basic elements that we're
7 reciting here for this feeding bottle. It's got to be a
8 vessel; (b) it has to have a collar; it has to have a nipple
9 (c), and there's specificity on that; (d) the nipple secured to
10 the collar in a certain way; and (e) the nipple secured to the
11 vessel in a certain way.

12 So, that's the sort of structure. The skilled artisan
13 is looking at that. Okay, I get that.

14 There's a lot of scaffolding in this claim, right, and
15 skilled artisan knows exactly what these terms mean.

16 So, what's the point? The point is it's not a
17 situation where the challenged language is sort of naked and
18 sort of out on its own, and there's not other language around
19 that the skilled artisan is going to be able to look at to
20 determine what's going on with the claim. And, remember, when
21 we're construing the claim, the claim language itself is
22 intrinsic evidence, right, it's a part of the patent. And some
23 people think of the claim language as the king of intrinsic
24 evidence because it's sort of right there, it's right around
25 the language that we're debating. So, you are absolutely

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1 entitled, and you should look at the structure of the other
2 claim language as a part of understanding the claim.

3 And it's very clear, what the skilled artisan
4 immediately sees is what the language is talking about is
5 locating the vent radially inwardly from the collar. There's
6 really no doubt about that.

7 You can see the one-way air inlet valve has got sort
8 of four aspects or characteristics. It must extend through the
9 base, okay, and we know what the base is, we've looked at the
10 specification. The base is at the top, and it's got to come
11 down, and that's what 2 says, even projecting downwardly from
12 the base portion. So there's a direction. It's got to go
13 downwardly. By the way, downwardly is axially. So axially, if
14 you think of the product, it has an axis, sort of, if you look
15 down the center. So if you're moving up and down the axis, the
16 center axis, that's what we're talking about when we're talking
17 about axially, and when we're talking about radially, we're
18 talking about sort of looking at the product like this and
19 going along the radius from the center out to the edge.

20 So, right there, in claim element 14(c)(ii), where the
21 one-way air inlet valve has to be projecting downwardly from
22 the base, you already know it has to project axially down.

23 It has to have a certain length. It can't be too
24 long, it can't extend way down past the collar. And then,
25 finally, it has to be disposed at least partially inwardly from

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1 the collar. Disposed is sort of a word that means located.
2 Patent lawyers like it for some reason, I don't know, but
3 that's what it means.

4 And so the skilled artisan reading that is going to
5 say, okay, I know a lot about this valve -- I know where it is,
6 I know where it's situated, I know what portion it's in, and I
7 know it's got at least partly be inwardly from the collar, and
8 that's clearly talking about a radial understanding.

9 And that's what the specification shows, too. So
10 figure 4 shows the valve projecting downwardly. This is the
11 lip valve. It's actually a valve that Mayborn ended up not
12 using eventually. The valve that we have in our current
13 product is not this lip valve. But, again, they knew that they
14 were going to still be protected because the patents are
15 allowed to protect ideas broader than what's disclosed.

16 But you can see that it's radially inwardly from the
17 collar, the collar we've got colored there sort of a peach
18 color on slide 76, and the valve, which is -- this is in
19 figure 4, 126, is radiating inwardly of that. And we've also
20 got paragraph 34 from the Fletcher declaration. So the
21 specification shows that Mayborn's expert explained it, and
22 figure 4 shows the valve inward, sort of radially from the
23 collar.

24 And on slide 77, we've got figure 6 -- again, the same
25 sort of structure where we've got our expert, Mr. Fletcher's

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1 declaration, and he says -- it says, quote, "In figure 6, a
2 POSITA would understand that the valve is disposed partially
3 inward from the collar because it is seen, and part of the
4 valve is radially outward of the collar's inner rim."

5 So, just sort of explaining what's going on there, and
6 that valve is partially radially inward of the rim. That's
7 what the figure shows -- it's radially. Again, that's what our
8 expert says, expert confirms it.

9 And then if all of -- yes, your Honor.

10 THE COURT: I'm looking at page 76 of your slide here,
11 and the valve you're saying is that purple region, right,
12 figure 4?

13 MR. GOETZ: Yes. I look at it as blue, but my
14 coloring is not good, but, yes, you've got it, we're looking at
15 the same thing, your Honor.

16 THE COURT: Okay.

17 I want to understand what you mean by "at least
18 partially inwardly." It looks like it's going straight down.

19 Did you mean inwardly toward the center of the bottle
20 or straight down?

21 MR. GOETZ: Yes, I will explain.

22 So, this figure is actually not a partial showing,
23 it's fully inwardly. So, if you have here --

24 THE COURT: Wait a second.

25 MR. GOETZ: I'm sorry. I'm going to switch to the

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1 ELMO, please.

2 I've got figure 4 here on the screen, and just to sort
3 of show with a little more detail. So this is the collar,
4 which we had colored peach. It goes like that. And then the
5 valve, which I'd like to not color something close to that --
6 is yellow. So the valve is actually the combination of this
7 hole right here, your Honor, and then this flap right here.
8 What happens is when the negative pressure happens inside the
9 bottle, this little flap pulls away, and then there's a fluid
10 sort of connection between the ambient situation inside the
11 bottle. So that's what this valve is all about. And you can
12 see that this valve in this figure is radially inwardly from
13 the column, and, actually -- so this is the radial direction,
14 and you can look, this valve is along the radial direction,
15 it's radially inwardly, because here's the collar, and then
16 there's the valve, and it's radially inwardly of that.

17 THE COURT: So, it's located inwardly toward the
18 center of the vessel?

19 MR. GOETZ: That's exactly right, your Honor.

20 THE COURT: And it's not that the valve -- I'm going
21 to be very colloquial here. It's not like the valve is like a
22 macaroni that kind of slants inwardly like that, it's
23 straight --

24 MR. GOETZ: Yes.

25 THE COURT: -- but it's in closer to the center of the

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1 vessel than the collar is?

2 MR. GOETZ: That's a good way of thinking about it -
3 it's closer to the center of the vessel than the collar - and
4 that means it's radially inward.

5 THE COURT: Okay.

6 MR. GOETZ: Here is the Mayborn product. You can look
7 at the valve. Here's the valve, here's the collar, and you can
8 sort of look dead center on it, and you can see, is it closer
9 to the center, is the valve closer or is the collar closer?
10 That's a good way of thinking about it. I like, actually, how
11 you said that.

12 And so in figure 6, while we're doing it, your Honor,
13 it's a little tricky. The colored version is a little bit
14 better, but it's sort of you're looking at the collar upside
15 down, and so, basically, someone has taken the collar and sort
16 of looked at it like this, and that's what it is. So here's
17 how it usually is with the nipple, and you've taken it, and you
18 looked at it like that, and that's what this figure is showing.

19 So, this is the sort of yellow part again, this is the
20 valve. And the collar is here. And it's all this bit, sort of
21 all this bit. And what the drawing is trying to show is that
22 this valve is partially inwardly because there's a little bit
23 here where the valve is sort of -- this is the radial
24 direction, this way, so there's a little bit right here where
25 the valve is not inwardly with the collar because the collar

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1 sort of cuts into the valve right there. That's the idea.

2 But, again, what's very clear in the figures in the
3 specifications is that what we're talking about in terms of the
4 direction, and what we're talking about is radially inwardly,
5 meaning towards the center.

6 So that's clear from the spec, and it's clear from the
7 file history, too. I started to say this earlier, but I was at
8 the wrong bit. So this is the part of the file history I
9 realized was not in the record, so I want to put it in the
10 record now. And I'm referring to it on slide 78. This is
11 applicant's response to a final Office Action, September 22nd,
12 2017.

13 May I approach, your Honor?

14 THE COURT: Yes.

15 MR. GOETZ: I think this is going to be Defendants'
16 Exhibit 14.

17 I've got slides about it, but I've handed you the
18 document, so it's in the record.

19 So, what's going on? So, three times, basically, in
20 this file history, the meaning of inwardly from the collar was
21 really made perfectly clear in exactly the way we just
22 discussed. So the first was with respect to this Uehara
23 reference, which is the same reference that was discussed
24 earlier. It's a slightly different point. Again, you can see
25 on slide 78, it says, "The air valve slit of Uehara not located

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1 on the domed-shaped portion of the nipple, but, rather, on the
2 flat portion of the nipple which lies beneath the collar (when
3 assembled). Applicants further noted that, by lying beneath
4 the collar, the air valve slit of Uehara cannot be spaced
5 inwardly from the collar," and, of course, that makes sense
6 because if you're -- if you're not closer to the center, if
7 you're right underneath, right, you're both equidistant from
8 the center.

9 So that's all that's being said there. And it said it
10 another time on slide 79 with respect to a slightly different
11 prior art reference, but it's a similar situation. It has
12 elements 42 and -- 44 and 42, which I think were the air vent
13 elements, and what Mayborn said was, "In addition, by lying
14 below the cap (or the collar), elements 44 and 42 of Lerman
15 cannot be 'spaced inwardly from the collar,' as also called for
16 by amended Claim 18." Again, it's just making clear that what
17 we're talking about is a radial sort of direction.

18 If all that wasn't clear enough, there's another bit
19 I've got on slide 80, which it's got figure 6, which is sort of
20 a top-down view of the collar of the prior art, and elements 42
21 and 44, you can see, are right in the middle of it. And so
22 when you're sort of measuring the distance to the center, the
23 collar is actually closer because those elements are sort of
24 totally covered by the collar.

25 So that's sort of made clear repeatedly, and it's

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1 really not that complicated, if you think about it, and I've
2 got a little demonstration to sort of show what we just kind of
3 went through. On the left, you've got a circle, and you've got
4 ways to be disposed at least partially inwardly from the
5 collar. I used a quarter of a ring, but you can have a quarter
6 all the way inside, you can have it on the line. And then it's
7 very clear, when it's disposed, not disposed at least partially
8 inwardly from the collar, if it's all the way outside the
9 collar, or if, like in the file history, it's sort of sitting
10 right on top, so it's not disposed inwardly from the collar.

11 THE COURT: It would be very unusual to have a valve
12 outside of the --

13 MR. GOETZ: I mean, you could do it, though, your
14 Honor. I suppose you could have a sort of wide thing and have
15 it coming out the side. I agree, I agree.

16 Finally, Nanobebe's expert. So, yeah, we didn't
17 invite him to cross-examination, but everyone agreed that
18 testimony wasn't required for this case. It would have been
19 interesting to talk with him about this, but, basically, he
20 says in this case that, "Claim 14 also uses imprecise language
21 about the degree of how inward it must be in using the
22 modifying phrase 'at least partially.'" But one of his own
23 patents, in one of the claims, says that exact thing, is at
24 least partially contained within the housing, and it's in a
25 similar field.

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1 So we just don't think that's credible, your Honor.
2 Certainly, it's not clear and convincing evidence when we have
3 our own expert and all of these other additional facts. So,
4 for that reason, we think the plain meaning should apply.

5 Thank you, your Honor.

6 THE COURT: Thank you.

7 Mr. Kasdan?

8 MR. KASDAN: So, here we are, last term of the '930
9 patent, "at least partially inwardly." As I've been doing all
10 day, I want to respond to a bunch of things that Mr. Goetz said
11 first, and then I want to go through our slides to explain this
12 in a little more detail.

13 Mr. Kasdan's lead point was that the words are all
14 plain, and I agree — the words are plain. I understand what
15 the word at least means, I think I understand what the word
16 partially means, and I think I understand what the word
17 inwardly means, and those are words that we use every day.

18 The issue here is that when you put them all together,
19 as it happens in this claim, you get a very imprecise phrase
20 that's difficult to understand, and that, I think, is
21 indefinite. We're not saying that every claim in this patent
22 has this problem. In fact, there are other claims in this
23 patent that don't use the language, that don't use at least
24 partially. Mr. Goetz went through a whole bunch of examples
25 where he says, oh, no, this is an example of fully inwardly, or

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1 this is an example of inwardly in the radial direction. And
2 Claim 1 of this patent, of the '930 patent, if you look at it,
3 says -- specifies the radial direction. What you have here is
4 a combination of imprecision about the direction that we're
5 talking about. And I think your Honor's question framed this
6 kind of perfectly. You said -- you asked Mr. Goetz, inwardly
7 towards the center of the bottle or straight down? Like, are
8 we talking in the radial direction or the axial direction?

9 And then you asked, at the tech tutorial, for a little
10 more detail on radial and axial. So, just to explain it, if
11 you have like a circular pipe, the axis that says water flows
12 through a pipe, axial is along the axis; radial is if you're
13 standing in the center of the circle going out towards the
14 edges of the circle, right? So, two different directions that
15 can be specified.

16 So, what you have here is the combination of not
17 specifying in this particular claim that direction and then
18 using a word -- at other points in the claim, it uses the word
19 inwardly. And we understand inwardly. Inwardly, outwardly, it
20 uses other terms, downwardly, directional words. But when you
21 say "at least partially inwardly," I don't think that has a
22 meaning. And, more importantly to what I think, Brian Silver,
23 who's got 27 years of experience in this field, in bottles,
24 says he doesn't know what it means. I think the example from
25 his own patent was quite different, and we'll talk about that,

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1 and the fact that their expert says, oh, it's perfectly clear,
2 and Brian Silver says I don't know what this word means in this
3 claim, I think it shows that -- it demonstrates the
4 indefiniteness of this.

5 I do want to talk about a few things because I think
6 it's interesting, there are a bunch of points, when Mr. Goetz
7 was walking through this, including the claim language.

8 Can I have the ELMO?

9 So, we're talking about this section at the bottom,
10 "the disposed at least partially inwardly from the collar" that
11 we've been talking about. Mr. Goetz is talking about this,
12 and, also, when their expert talks about this in his
13 declaration, they read in the word radially. He said it a
14 bunch of times. I wrote it down. He said this is showing --
15 the claim doesn't say radially inwardly. It does not specify a
16 direction in contrast to other claims.

17 The other point that I want to make is that they have
18 slides in the Mayborn presentation, and they cite
19 Mr. Fletcher -- that's their expert's declaration -- saying that
20 figure 6 of this patent shows an embodiment where the valve is
21 partially inward. So, that figure 6 is not described as
22 partially inward in this patent. The patent doesn't describe
23 anything about what partially inward means.

24 And when I look at this with my eyes, and when our
25 expert, Brian Silver, looked at it with his eyes, it just looks

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1 like fully inwardly. That's the figure 6 embodiment.

2 The other important point is when they're going
3 through the file history -- so this is on Mayborn's slide 78
4 and 79 -- and the heading of the slide is "'930 File History -
5 Radial," okay? The limitation that's being discussed at that
6 point in time is they're talking about being spaced inwardly
7 from the collar. It's not talking about this limitation, this
8 partially inwardly language. That's not what's at issue at any
9 of the points that Mr. Goetz cited where he wrote the word
10 radial on the title.

11 The last point about -- before I get into our slides,
12 one thing we did is, well, how does this happen? You asked a
13 good question. Isn't this issue and definiteness something the
14 Patent Office might pick up? Why would someone write a claim
15 that isn't specific? And we'll trace through at the end of my
16 slides how this happened. They are making lots of different
17 amendments, they know we're on a lot of different prior art
18 repeatedly, and lots of claims at issue, having different
19 scopes, and some claims say radially inwardly, and some say
20 fully inwardly, and this one says "at least partially
21 inwardly."

22 And this is one of the claims at issue in this patent.
23 And if you go through our declaration -- and I'm going to
24 summarize it here, it's in the record, I'll give you the
25 exhibit, it's an exhibit to our answer in the claim

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1 construction brief - it's pretty clear that this is missing the
2 specificity that's required by the law.

3 In terms of Brian Silver's patent, it's a fun gotcha,
4 to say, hey, we looked through your 60 patents, and you used
5 the term "at least partially," also, but we don't think it's
6 relevant here because the issue in this case is using the
7 modifying phrase "at least partially" together with a
8 direction. That's what's being specified - inwardly. We
9 understand inwardly, it's either inward or outward, it's a
10 binary thing, it's one or the other.

11 So in his patent, where they talk about his drive
12 mechanism patent, and they cite "at least partially," just
13 because he says the word "at least partially" doesn't mean it
14 makes sense in this context.

15 So, let's go through the slides.

16 Next, please.

17 So, we're very familiar with the claim by now, but
18 we're talking about the last element, little (iv) in (c), it's
19 disposed at least partially inwardly from the collar.

20 And what this is talking about is the fancy venting
21 system we've been talking about. We can go on from here.

22 I'll be happy to find that we've cited the exact same
23 law and the exact same case, but this is the law of
24 indefiniteness. 35 U.S.C. 112 requires the specification
25 conclude with one or more claims that particularly point out

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1 and distinctly claim the subject matter that they regard as the
2 invention. The reason for this - and there are a couple of
3 reasons for it - one, as I mentioned earlier, the patent is a
4 deal, right, you disclose someone -- the details of how to make
5 a new invention. If it's not understandable, that particular
6 claim isn't holding up their end of the deal, then it shouldn't
7 be entitled to the monopoly you get for it.

8 The other reason that 112 is important is the notice
9 function. So, when other people in the world read the claim,
10 and they say, hey, are we covered by this or not, or what does
11 this claim cover, it should be reasonably clear to people of
12 skill in the art.

13 So, that's why we have an indefiniteness requirement.
14 And the standard is from the *Nautilus* case, and the standard
15 is, if you read it in light of the specification and the
16 prosecution history, it fails to inform with reasonable
17 certainty those skilled in the art about what the scope of this
18 invention is. So that's the standard.

19 Next slide.

20 So, our position is that it's indefinite. I'll
21 explain it.

22 Let's get up the explanation.

23 Next slide, please.

24 So, what does the specification say about this?

25 Nothing. Figure 1 doesn't give you any detail about

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1 this at all. That's the figure 1 embodiment. And as I've been
2 saying, the figure 4 embodiment, which is more relevant to
3 these claim terms, that's the only place that it shows this
4 one-way inlet valve. For figure 1, it says: The base portion
5 can include a one-way inlet valve, but its location is not
6 shown. So, it doesn't tell you anything that's useful in
7 determining what the scope of at least partially inwardly
8 location means, right?

9 So, let's go to figure 4. Figure 4 is the figure that
10 we've been looking at a lot today.

11 Next slide, please.

12 That shows the location of the one-way inlet valve,
13 but it doesn't use partially inwardly, at least partially
14 inwardly, to describe or show the vent passage in the valve's
15 direction. Mr. Goetz, when he was talking about this, said
16 this shows, you know, fully inwardly in the radial direction,
17 but that's not what the claim says, and that's the exact
18 problem with the claim. The problem that Brian Silver pointed
19 out in his declaration is that if you're describing a structure
20 and the location of that structure relative to something else,
21 to your point, you have to say reference point - where you're
22 starting - and the direction - is it axial, is it radially -
23 and then when you introduce a word like at least partially,
24 what does that mean? There's disclosure that says inwardly,
25 fully inwardly, but this is the only time "at least partially

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1 inwardly" is used in this specification, in this one claim.

2 So, I'm not going to go through the Brian Silver
3 declaration at length, you have it – it's Exhibit 29 of our
4 answering claim construction brief, which is item number 62 on
5 the docket – but Brian Silver has a lot of expertise in the
6 industry. He was at Medela for 27 years, one of the leading
7 nipple companies, and he was the director of innovation and
8 design.

9 And I put this really here as a placeholder. At this
10 point in the day, I don't think we have to go through this
11 serially, but I think we can go to the summary slide, because
12 you have this in the record, and the summary is, as I started
13 to say, to clearly define location, you have to have a
14 reference point, you have to specify direction – is it
15 radially, inwardly, is it axially outwardly, right, is it
16 downwardly? That's not what's done here.

17 And then it uses these really confusing words that
18 create an indefinite phrase, what we're here to talk about.
19 Partially, at least, adds to that confusion. That's just the
20 example from Claim 1. Claim 1 says radially inwardly –
21 precise, definite.

22 So if that's used together to say where it starts,
23 what direction it goes, and that it's inward.

24 So, inwardly can be, as you asked, and as Brian Silver
25 pointed out, it could refer to inwardly in either axial or

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1 radial directions.

2 The other thing is there is no partially inwardly, and
3 this is what Brian said. He said I've been working in this
4 industry a long time. Either a valve is disposed inwardly in a
5 certain direction or it's not. And so for these reasons, we
6 think there is a clear and convincing case that this claim --
7 that this term is indefinite.

8 If you go to -- I want to address a couple of things
9 from the declaration of Mayborn's expert, which is an exhibit
10 to their reply claim construction brief. And, as Mr. Goetz
11 mentioned, we thought this was enough, having us here today, we
12 didn't need live testimony, this was a discrete issue, but you
13 do have those two declarations. I think when you read your
14 declarations, I'll point out that, like Mr. Goetz did here, he
15 appears to assume or read in radially inwardly when he's
16 talking about the support for his position. So, both experts
17 reach opposite conclusions -- that says something about the fact
18 that the meaning is uncertain -- but when you look at his
19 support, when he says inwardly, he's assuming the part that's
20 missing, right, so he's reading in the exact detail that we say
21 makes it indefinite.

22 Also, there are other directional words in this claim,
23 like the claim doesn't say fully downwardly or partially
24 downwardly. And so, here, in this one point in this patent, it
25 creates a problem to use this "at least partially inwardly"

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1 language without any indication of direction.

2 Next slide.

3 Again, I covered this to Dr. Silver and I think to the
4 ordinary eye. That's fully inwardly of the collar. That's the
5 one example from the intrinsic record that Mayborn's expert
6 suggests support partially inwardly.

7 Again, the meaning of that is not explained. That
8 term is not used anywhere except in this one claim.

9 Next slide.

10 So, I think I'll leave your Honor with this - this is
11 kind of how we got here in the file history - but I don't think
12 we need to go through the details of this, given what time it
13 is today, but, like I said, many amendments were made, certain
14 claims were amended to require radially inwardly. This one
15 happened to have this problematic language, and we think it's
16 indefinite.

17 THE COURT: I have a couple of questions, and I will
18 read the case law more closely, but in the context of a claim
19 construction issue, as presented here, where one party's
20 suggesting plain meaning and the other party is saying it's
21 indefinite, does the case law teach that it's my role to figure
22 out whether or not it's indefinite, or can I construe the term
23 with terms that might ameliorate any indefiniteness if it
24 exists?

25 MR. KASDAN: Yes. So on the issue of indefiniteness,

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1 indefiniteness is often framed in the context of claim
2 construction, and so it is fully within your discretion to
3 reach that term and find it to be indefinite. You're asking if
4 you can cure that by changing the construction of what that
5 term means?

6 THE COURT: What I'm asking is that I'm not assuming
7 it's indefinite or not, but let's say I were to construe that
8 term, "at least partially inwardly," as radially inwardly from
9 the collar at least partially, or some phraseology that brings
10 in radially, maybe brings in -- well, let's say brings in
11 radially. If I did that and found that that was not
12 indefinite, can I do that on claim construction, or do I have
13 to take it as plain language versus indefinite?

14 MR. KASDAN: I think the issue, as framed by the
15 parties, is plain versus indefinite, and I think it would be
16 correct to make a ruling on the indefiniteness.

17 THE COURT: Sure. But in claim construction, I don't
18 have to stick with one of the party's construal of the term.

19 MR. KASDAN: That's correct, your Honor. It's in your
20 discretion to construe the claim. You don't have to choose one
21 of our constructions.

22 THE COURT: Okay, okay, great.

23 And then that's all I have. Thank you.

24 MR. KASDAN: Thank you, your Honor.

25 THE COURT: Mr. Goetz?

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1 MR. GOETZ: No, I agree, your Honor, you can do
2 whatever you want, you're the judge. You can construe that
3 claim the way -- one suggestion might be at least partially
4 radially inwardly, something like that.

5 THE COURT: One moment.

6 MR. GOETZ: Another version might be at least
7 partially inwardly in the radial direction. That might be
8 something you could consider.

9 THE COURT: Before you sit down, Mr. Kasdan, if I were
10 to add like what Mr. Goetz has suggested, in terms of adding
11 that concept of radially, would that cure your indefiniteness
12 argument?

13 MR. KASDAN: I think that at least partially language
14 is still, on its own, problematic. According to the
15 declaration that we have on the record, that's a separate
16 issue.

17 THE COURT: Okay. Thank you.

18 Mr. Goetz, one other question: In different contexts
19 outside of patent law, there is certain case law that comes
20 into play with clear and convincing evidence --

21 MR. GOETZ: Yes, your Honor.

22 THE COURT: -- and sometimes, for example, if you have
23 a battle of the experts, then you're not going to have clear
24 and convincing evidence because there's going to be a battle or
25 there's a fact issue or there's a jury -- whatever it is.

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1 MR. GOETZ: Right.

2 THE COURT: Is there any such law in the patent field
3 that if you have two experts battling over the meaning of
4 terms, that one party has not met their burden of clear and
5 convincing, or is it not that clear?

6 MR. GOETZ: I think there's certainly law that talks
7 about, in the context of clear and convincing evidence in
8 validity, that summary judgment is often not appropriate when
9 there's a battle of the experts. Certainly, that's the case.
10 When you have claim construction sort of wrapped up in that, I
11 actually don't know the answer to that, your Honor. I do know
12 that courts sometimes rule on this question of 112 during the
13 claim construction process. I don't have a case cite in mind
14 as to how they deal with the clear and convincing burden when,
15 like in this case, there is expert sort of supporting on both
16 sides. I don't know the answer to that, but we'll look at it.

17 THE COURT: Thank you.

18 MR. GOETZ: Thank you, your Honor.

19 THE COURT: Mr. Kasdan, do you have something to add
20 to that?

21 MR. KASDAN: Yes, to respond on that point:

22 Yes, we agree, it is the law that invalidity issues
23 are the clear and convincing standard, but just because you
24 have two experts offering different conclusions doesn't mean
25 that one of the parties hasn't met its burden.

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1 THE COURT: Thank you.

2 What are we moving to now?

3 MR. GOETZ: Okay. Thank you, your Honor. I think
4 we're on flex region now.

5 THE COURT: Oh, an easy one.

6 MR. GOETZ: I'm starting at slide 83, your Honor, flex
7 regions in Claim 21 of the '244 patent. The debate here, on
8 slide 84, is Mayborn's proposed construction is a region having
9 surface characteristics that control flexing. Just to give you
10 an overview, I want to talk a little bit about why we think
11 that's the right construction, I want to talk a little bit
12 about why the Nanobebe construction is incorrect, and with the
13 PTAB's judgment that basically agreed with Mayborn's
14 construction.

15 So, first, the claim: I got Claim 21 of the '244
16 patent up there. And we're in the bit of the claim that
17 begins, a nipple comprising. Comprising is special sort of
18 language that just means sort of including, but not limited to.
19 A nipple comprising, and it goes on to talk about a mouthpiece,
20 and then it picks up, "a flex region configured to allow flex
21 of the mouthpiece towards and away from a lower portion of the
22 nipple."

23 "The towards and away" bit has sort of been separately
24 argued, and we're going to talk about that, I think that's the
25 last term, but the rest of that, we've sort of framed the rest

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1 of that debate as the meaning of flex region. So that's what
2 we're talking about today.

3 If you look at the specification, the specification
4 says prior art nipples were made of, I think the specification
5 says, "any appropriate elastic material," and that's a kind of
6 material, it's specifically designed to enable flexing.
7 Silicone is a good example of that. And that's the material
8 that the nipples in the products that we've seen are made out
9 of.

10 So, flexing was known, materials that enable flexing
11 were known, in the prior art. But as our patent talks about,
12 and as we talked about in the tech tutorial, there were some
13 problems and limitations. One of those problems that's recited
14 right in our patent is in a design where it was a prior art
15 design – the sort of 2001, sort of 2000 attempts to mimic the
16 human breast – quote, "included a series of parallel and annual
17 grooves on the inner surface of the nipple that allowed the
18 nipple to stretch only in a constrained direction with the risk
19 of flow blockage if the nipple collapses."

20 Okay. So there was the prior art, and this was the
21 prior art design that had a bunch of grooves up in the teat
22 portion, and it was basically they were trying to improve the
23 baby's interaction with the nipple as it engages in the
24 peristaltic movement. What happened is if you make it too
25 thin, it collapses, and the baby sort of crushes it, and the

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1 milk doesn't come out. So we're trying to solve that problem.
2 That's one of the problems we're trying to solve.

3 Another problem, and this is again a quote from the
4 specification, "The amount of flexing and the point at which
5 flexing takes place in the prior art was undefined and
6 unpredictable."

7 So, one of the things that these patents in the suit
8 are trying to address is how to fix those problems, and it does
9 that with the flex region, and it does that with surface
10 characteristics that control flexing, and that's what that term
11 means to a skilled artisan as you read through the
12 specification.

13 As you start to read, you start with the abstract, and
14 right at the very beginning of the patent – that's on the face
15 of the patent – and the abstract I've got on slide 87, at the
16 end, it says, "The invention includes a flexible region or
17 regions to provide a more natural feeding by closely mimicking
18 the human breast."

19 So, this is the aspect of the invention, that's the
20 sort of function of the breast, sort of dealing with how the
21 baby interacts with the woman's breast during feeding. And it
22 does that and addresses that issue with the flexible regions.
23 And as we've seen time and again, the two embodiments – really,
24 the figure 4 embodiment and the figure 1 embodiment – they both
25 have examples of this flexible region. It has these grooves,

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1 or you can think of them, also, as sort of ribs with gaps in
2 between, that control the flexing.

3 The specification talks about the impact of the
4 arrangement. And I've got here, on slide 89 from the '244
5 patent, the column 3, lines 35 through 43, and, again, "The
6 back-and-forth motion of the teat portion, 12, mimics very
7 closely the natural movement of the human breast during
8 suckling or sucking of the infant by effectively allowing the
9 teat to move and stretch as the skin moves and stretches."

10 It goes on, and at the end, it talks about, "The
11 flexible portion also provides a pumping action on liquid in
12 the bottle as the teat portion oscillates or reciprocates back
13 and forth." We're going to talk about that in the next term,
14 but this notion of reciprocating is sort of axially like a
15 reciprocating saw, oscillating is more like a metronome, sort
16 of around a point. So it's three-dimensional of the teat, and
17 that pumping action is a reference to the peristaltic movement
18 that the baby is engaged in.

19 On the next slide, slide 90, later in the
20 specification, the '244 patent, this is column 4, lines 13
21 through 27, it talks more about what's going on and the impact
22 of the invention. Goal is to provide a more realistic, flexing
23 characteristic, right - so not to make it more flexible, but to
24 make it more realistic - to more match the way the skin moves
25 and the breast moves when the baby is engaging with it.

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1 And then talks about the embodiments with the grooves
2 adjacent to another, and then it says, "Providing a bellows
3 action as well as a flexing in a direction perpendicular to the
4 flow direction and increasing the flexibility, especially in
5 conjunction with the decreasing wall thickness, providing a
6 more natural stretching characteristic and sensory feedback to
7 the infant."

8 So, that's sort of a summary of the key disclosures.
9 It's using grooves or ribs as an embodiment, which are surface
10 characteristics to control the flexing in a way that's better
11 than the prior art. Can it restrain the flexing? Absolutely,
12 because one of the issues we're trying to address is nipple
13 collapse. Can it create more flexing? It can do that. It can
14 do that if it helps to give the baby a more realistic
15 interaction with the nipple. It could do both, absolutely.

16 And that sort of notion is throughout the
17 specification. The technical field, it does say increased
18 flexibility, but it's and functionality. So, what Nanobebe
19 wants to do is talk about the portions where it says increased
20 flexibility as if that's the only thing it was trying to do or
21 that the invention does, and that's just not correct.

22 It was trying to improve the functionality, it's
23 trying to deal with things like nipple collapse where the
24 nipple is too thin and too weak, and you would need to make it
25 stronger, and it's trying to deal with the prior art where the

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1 movement was undefined and unpredictable.

2 So, the result of all of that, we believe, your Honor,
3 is that Mayborn's construction is correct. And I want to talk
4 about in a minute the PTAB board agreed with us, but before
5 discussing that, I want to spend just a few minutes on
6 Nanobebe's construction.

7 So, I have that on the screen on slide 92. So there's
8 two immediate problems that sort of present themselves with
9 Nanobebe's construction. The first is it includes what amounts
10 to a *mens rea* requirement, it's sort of a specific intent.
11 When it says specifically designed, that's not proper, and
12 we'll talk about that for a second. And then it includes
13 specific structures – as examples, the grooves and channels –
14 and we'll talk about that.

15 So, first, patent infringement – I mentioned earlier
16 at the beginning of this day – patent infringement is a strict
17 liability tort. You infringe once your product sort of is
18 mapped to the claims – that's it. It doesn't matter what you
19 intended when you've built or sold your product. And so the
20 use of the words specifically designed essentially adds an
21 intent requirement that seemingly would require Mayborn to
22 prove the state of mind of the accused infringer. Everyone
23 knows what they're getting at here – they're saying, oh, we put
24 in strengthening ribs, our design was to strengthen, we
25 intended to strengthen, specifically designed to strengthen,

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1 not to enable flexing.

2 Well, the point is that you can't put that in the
3 claim, what's specifically designed, because what they thought
4 they were doing in terms of what their design was and what the
5 purposes of their sort of structure was, that's not a relevant
6 question for purposes of infringement. So it's not a proper
7 construction for a lot of reasons, but not the least of which
8 is it basically converts strict liability offense into one that
9 requires a *mens rea*. I have some cases on slide 94 that get
10 into that, but I'm not going to go into this, but they're there
11 for the record.

12 The second issue, sort of immediate issue, is that the
13 structure examples, a structural sort of examples, are
14 improper. The use of e.g. grooves and channels is importing
15 limitations from the specifications into the claims. This is
16 what we talked about — it's a cardinal sin. You don't do that.
17 And the reason you don't do that is because the inventor is
18 entitled to the scope of the full scope of his claims. And if
19 there's a problem with undue breadth, then you deal with that
20 under the 112 regime. You don't deal with that in claim
21 construction by basically rewriting the claim to narrow it in a
22 way that the inventor did not claim in the particular claim.

23 And the use of e.g., you know, for example, does not
24 make it better. We cite some cases on the next slide that
25 basically say that. It actually sort of makes it worse, right,

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1 because if you're going to import the limitation, import it all
2 the way. If you're saying e.g., then the sort of jury is sort
3 of left to read that and be like, well, for example, does it
4 have to include the grooves or channels or does it not have to?
5 And so it actually makes it worse, and courts have said that.
6 It's sews sort of confusion where there should be clarity. And
7 we have some cases on slide 96 that say that same thing.

8 So, those are sort of the first two more glaring
9 issues with Nanobebe's construction, and so if you take that
10 out, you basically have a region having characteristics to
11 enable flexing. And that leads us right into the PTAB
12 decision, because that's basically the same construction that
13 Comotomo had, and we're going to talk about that. So, the
14 final sort of problem here is that the PTAB has considered this
15 in the intrinsic evidence, the file history of this patent, and
16 considered this construction and rejected it. And I will talk
17 about that for a second.

18 So we already talked a little bit about the PTAB. So,
19 the petition that we talked about was Nanobebe's, so now I want
20 to talk about the Comotomo petition. So this is the one that
21 was filed much earlier. I should mark this and put this in the
22 record, your Honor.

23 May I approach?

24 THE COURT: Yes.

25 MR. GOETZ: This will be Defendants' Exhibit 15, which

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1 is the PTAB decision in the Comotomo petition on the '244
2 patent.

3 THE COURT: This is Defendants' Exhibit 15.

4 MR. GOETZ: Thank you, your Honor.

5 There's another decision in the '930 patent, and I
6 think we may have put -- I think I may have sent those to you
7 by email, I may have filed those on the docket, your Honor, I
8 can't remember. I want to make sure you have those.

9 Do we have the other one? While we're here, I'll just
10 mark, if I may, your Honor, as Defendants' Exhibit 16, the
11 decision in the '930 patent in the Comotomo IPR.

12 THE COURT: Fine.

13 MR. GOETZ: Thank you, your Honor.

14 So these are the Comotomo IPRs. They were filed much
15 earlier than Nanobebe's IPRs, and the institution decisions
16 have issued. IPRs are *inter partes* reviews. They're heard by
17 the Patent Office trial and appeal board, which is a group of
18 administrative law judges. The three-judge panel is assigned
19 to each petition, and the ruling was institution denied on the
20 '244. It is an administrative law proceeding. These are
21 Article I judges. There are three of them that decide the
22 case, and they're all specifically trained in patent law and
23 science.

24 On slide 99, I just have an overview of who they were
25 for the '244, and you can see, and they all have scientific

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1 degrees in either mechanical engineering or molecular biology.
2 Judge Jenks has a Ph.D. They were all prior practicing patent
3 lawyers, including Judge Harmon, for 20 years. Judge Jenks was
4 a patent examiner for seven years, and Judge Jenks and Judge
5 Woods were both PTAB judges for over a decade. So there's a
6 lot of patent law experience that was brought to bear on this
7 question. I think if you add up all the patent law years, it's
8 almost 70 years of patent law experience.

9 What did they do? Well, they looked at the question
10 of what does a flex region mean, they looked at Mayborn's
11 proposed construction, and they agreed with it.

12 What they said, I have on slide 100 – this is at
13 page 13 of the decision – the judges said: Based on these
14 disclosures in the '244 specification, we agree with the patent
15 owner – that's us, Mayborn – that the flex region,
16 quote-unquote, "Flex region is understood to be more than just
17 a region made of flexible material. Specifically, we agree
18 with the patent owner that the flex region contains structural
19 components that provide the 'surface characteristics that
20 control flexing.'"

21 So that's what happened. That was their ruling, and
22 that's, again, part of the file history in the case. I do want
23 to pause here just to note something that the Federal Circuit
24 has made clear, and it's this: Those three judges, patent law
25 judges, were basically in the same situation that you are here,

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1 your Honor, in the following sense: They were free to adopt
2 either proposed construction or make up their own construction,
3 just like you are. And you hear APA proceeding, and you're
4 worried about due process, and sometimes in APA proceedings,
5 you can only sort of decide A and B, what's in front of you.
6 The Federal Circuit has made clear that these judges are
7 totally free to come up with their own claim construction
8 position, and we've got some case law here on slide 101.

9 So, it wasn't like they were forced to pick between
10 our construction and theirs, they were free to pick their own,
11 and they picked ours, and I think they picked ours because ours
12 is right. So that's similar to this proceeding.

13 The other thing that's similar is that the debate
14 there in the IPR was very similar to the debate here. So
15 Comotomo's construction, what they said in the petition was
16 plain meaning, but, of course, to file a petition, you have to
17 map the words of the claim to the prior art. So you've got to
18 say, okay, well, this element, you know, is a collar, and here
19 is where it is here. And when they mapped flex region, all
20 they said was it's just a region made of flexible material,
21 right, and flexible material is going to be designed to enable
22 flexing. So it essentially was the same sort of debate. They
23 said flex region just means a region made of flexible material
24 designed to enable flexing, and in Nanobebe's construction
25 here, it has that bit about the grooves and channels and the

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1 specifically designed, but when you take that out, the debate
2 boils down to the same thing that was before the board.

3 And Mayborn's construction was the same. We were
4 putting the same construction up in all the IPR proceedings
5 because we think it's the right one.

6 THE COURT: Mr. Goetz, tell me again, on page 102, it
7 looks to me that Comotomo came forward with respect to the
8 construction of flex region and said plain meaning.

9 MR. GOETZ: They did.

10 THE COURT: Where do you get the design to enable
11 flexing from?

12 MR. GOETZ: Well, that's what they were doing. It was
13 a sort of a debate by implication. What they said were plain
14 meaning, but all they were mapping it to was flexible material.
15 All flexible material is designed to enable flexing, right?
16 That's what the whole purpose of flexible material is. And so
17 that's what they were doing. So, in that sense, it's similar
18 to the debates here.

19 I don't want you to get me wrong, your Honor, they
20 didn't argue it that way. What they said was plain meaning,
21 but what you can tell, when you look at it, is how they were
22 mapping the term flex region. That was their point.

23 And you can see that that raised itself in the
24 decision, right, because the board said, based on these
25 disclosures, we agree with the patent owner, that flex region

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1 is understood to be more than just a region made of flexible
2 material. And that's what the debate sort of framed itself as,
3 we said, look, judges, all they're doing is mapping flex region
4 to just flexible material, and that's not right, it's got to be
5 more than that.

6 So, what's the impact of the PTAB construction? What
7 do you do with that? Well, the PTAB construction is part of
8 the intrinsic record for the '244 patent. It's a part of the
9 public record. Any member of the public can get it. Anyone
10 interested in our patent is going to look not just at the file
11 history, but they're going to look at all the proceedings of
12 the Patent Office, and they're going to see this construction,
13 they're going to see the debate, and see that the board
14 construed this term in this way.

15 The Federal Circuit has not addressed identical
16 situations, but in a related situation, they held that
17 statements made in an *inter partes* review proceeding were part
18 of the intrinsic record and binding on that patent applicant in
19 that case. So, this is not a situation where it's a binding --
20 we're not saying that this board construction is binding on
21 you, Judge -- we're certainly not saying that -- but what we're
22 saying is that it is a part of the intrinsic record, and it's a
23 part of the intrinsic record that is sparkling clear, that is
24 right on the money, in terms of the debate that's in front of
25 you, and it's not just an examiner saying things, it's a set of

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1 three very experienced judges.

2 THE COURT: Is it binding in the litigation, meaning
3 it's binding in further Comotomo disputes with Mayborn before
4 the PTAB? In what sense is that determination binding by those
5 ALJs?

6 MR. GOETZ: Well, I think it's binding -- in those
7 IPRs, it certainly was, right, that was the construction, but
8 those IPRs are now over, and now that those are over, Comotomo
9 can't file another one, like the law won't allow them to do
10 that. But I think when we're going to be litigating against
11 Comotomo, what we're going to be saying to each other is the
12 things that were said in those IPRs are binding sort of on each
13 other. We are certainly going to be arguing that that court
14 should also treat this decision of flex region as binding. And
15 that's slightly differently situated, right, because, here,
16 Nanobebe wasn't a part of that, and so we won't have the sort
17 of additional sort of issue preclusion estoppel arguments to
18 make. So I think it will be slightly different as it relates
19 to Comotomo.

20 THE COURT: Thank you.

21 MR. GOETZ: Thank you, your Honor.

22 The second bullet I have here is that the PTAB is
23 applying the same *Phillips* standard for claim construction.

24 Now, I'm adding that because it used to be that the
25 board applied a totally different claim construction standard.

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1 They used to apply a thing called the broadest reasonable
2 interpretation. But the law changed a few years back, and so
3 now, all of the board members, all of the boards are applying
4 the *Phillips* standard, which is the standard in this case. And
5 so I guess that's another reason why we think that it's a
6 persuasive bit of the intrinsic record, whereas historically
7 maybe it wouldn't have been, but it is now because they apply
8 the same standard.

9 Finally, your Honor, the PTAB reviewed and considered
10 the same parts of the specification that we've been discussing
11 in this case and in the briefs, and they agreed with Mayborn's
12 construction, and we think you should too, Judge.

13 Thanks.

14 THE COURT: I have some questions, but we've been
15 going for quite a while, so let's take a ten-minute break --

16 MR. GOETZ: Very good.

17 THE COURT: -- and then we'll come back. Come back at
18 5:15.

19 (Recess)

20 THE COURT: Okay, Mr. Goetz.

21 MR. GOETZ: Yes, your Honor.

22 THE COURT: Are you done? I just had a couple of
23 questions.

24 MR. GOETZ: I am done, your Honor, yes. I'm just here
25 for your questions.

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1 THE COURT: Okay.

2 So, what struck me in the PTAB information is very
3 interesting. I hadn't seen that before. So, thank you.

4 What struck me, though, is that the word control
5 flexing, as Nanobebe argues, could be construed as enabling
6 more flexing or constricting flexing because control could be
7 in either way.

8 And so, I started to play around with constructions,
9 such as allowing flexing in an oscillating and reciprocating
10 manner or something that hews closely to what the flexing is
11 intended to achieve in this patent, but can you talk to me a
12 little bit about that control word?

13 MR. GOETZ: Of course, your Honor.

14 So, I think we're saying control because it's more
15 than just increasing flexing, it could be decreasing
16 flexibility as well. And so, really, the thrust of what the
17 invention is about is a set of configurations that allow the
18 flexing of the teat to more accurately mimic the way that the
19 baby interacts with the woman's breast. And you know that from
20 several things: One is, at the very beginning the technical
21 field, it says the whole goal is a baby bottle having a nipple
22 of increased flexibility and functionality. So it does say
23 increased flexibility, but there is this and functionality, and
24 that's more than just sort of increasing flexing. Because,
25 remember, the silicone that's being used is itself inherently

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1 flexible, it's designed to be flexible. So it's not just a
2 question of the structural characteristics, the embodiments of
3 which are the grooves and the sort of ribs, doing that to just
4 increase flexing, it's to manage or control the flexing in a
5 way that better mimics the mother.

6 So, that's why we're saying that, but recognize it
7 doesn't say the word control, we recognize that, but that's
8 what the specification is getting at. And you know that from
9 the language that the specification uses. The goals of the
10 invention in terms of the prior art, as I put on one of the
11 slides, it is twofold that sort of relate to this better
12 mimicking the functionality. One is to have a structure that
13 doesn't collapse, where the nipple doesn't collapse, so that's
14 sort of -- that's a strengthening bit, right? And so to have a
15 nipple that doesn't as easily collapse, you want to make sure
16 it's strong enough.

17 And then the other bit is you want to have something
18 where the flexibility is not undefined and unpredictable. That
19 was another problem in the prior art. And, again, these are
20 the problems that are sort of presented, and the solution is
21 the embodiments that are disclosed in figures 1 and 4 and
22 described in the specification.

23 THE COURT: To address the unpredictability, can you
24 address a potential construction that says, as I just alluded,
25 a region having surface characteristics that allows flexing in

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1 an oscillating and reciprocating manner? I was trying to
2 capture the predictability of the flexing, but can you address
3 that construction?

4 MR. GOETZ: I can, yes. Can I just have a minute to
5 think about that? I want to write it down, your Honor.

6 So, it's having -- can you say it again?

7 THE COURT: Instead of control flexing, it would be
8 allows flexing in an oscillating and reciprocating manner.
9 What I understood you to be arguing is that this particular
10 region was going to help with the unpredictability of flexing.
11 And allowing it to go in both an oscillating and reciprocating
12 manner, I wondered whether that addressed it. Now, it may not
13 because that doesn't address the nipple collapse and the
14 decrease in flexibility that may contribute to ameliorating
15 nipple collapse, but what are your thoughts on the oscillating
16 and reciprocating?

17 MR. GOETZ: So, I like the oscillating and
18 reciprocating, Judge. I guess the problem that I have is sort
19 of this notion of just allowing, because I go back to the sort
20 of debate that we are having in a sense here, and that we had
21 in the IPR, which is, if you have a region that simply allows
22 flexing in that way, that is just inherent in the silicone
23 that's in the prior art. So what we're trying to do here, and
24 the reason that we're proposing this construction, is this flex
25 region, when we use that word, that's a term that we mean

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1 something more than just the inherent flexibility.

2 So, if you have a construction, as your Honor recited
3 it, it would just be sort of a region allowing flexing in an
4 oscillating and reciprocating manner. I understand why you're
5 saying that, but, again, having it like that doesn't really get
6 to this notion of why the flex region is sort of different than
7 the prior art. That's my reaction to that, Judge. I'm only
8 sort of thinking right now.

9 THE COURT: That's fine. I suspect I'll have a
10 question for you after I hear from Mr. Kasdan because I suspect
11 he'll have an issue with control, and I want to ask more about
12 that.

13 Mr. Kasdan, go ahead.

14 MR. KASDAN: Thank you, your Honor.

15 Let me start where you just finished, because the main
16 issue here is control. That's the issue we pointed out in our
17 brief being the issue with their construction, that it
18 encompasses both increasing flex and decreasing flex. And
19 Mr. Goetz said, well, it could be decreasing flex as well. If
20 you look at the intrinsic record, that's not what's disclosed.
21 He said, yeah, there were problems in the prior art, they tried
22 to get a new solution. That new solution is described in the
23 claim. The claim says allow flex. That's what the claim
24 language itself says. It also specifies the direction, which
25 is, I think, the last term we'll be talking about today.

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1 So, I agree that control is a problem, and we'll talk
2 a little bit more about that.

3 I also do agree with Mr. Goetz, though, that if you
4 just -- that the inherent silicone material has some
5 flexibility, and so what we're trying to get at with our
6 construction here, and it's fully consistent with what this
7 patent talks about, this flex region enables flex or increases
8 flex. That's the point of it. It's not just regular silicone,
9 it's something more.

10 So, we agree that you need something more, but the
11 something more is not controlling. Controlling is not found or
12 described anywhere in this patent, and certainly not in the
13 claim.

14 I want to just touch on a couple of points that
15 Mr. Goetz made that I think we can dispose of.

16 In Nanobee's construction, they talked about where we
17 say specifically designed to enable flexing as introducing some
18 sort of *mens rea* requirement. That's not our intent at all. I
19 think it's not intended to be a *mens rea*, or requiring any sort
20 of state of mind. It's specifically designed, just like I
21 said, as a synonym for configured to. So it's describing the
22 material and what it does, enable flexing. And that's what's
23 disclosed throughout this patent, as we'll get to. That's
24 what's important -- does it enable or increase flex is the
25 issue.

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1 The other issue I just wanted to touch on is on
2 Mayborn's slide 95, they said structural examples are improper
3 and took issue with our example, the e.g., grooves or channels.
4 So, the examples are exemplary. They weren't intended to
5 report any limitation. And I think I'll just leave it at that.

6 We're going to get to the PTAB, but the few overview
7 comments are, one, the PTAB doesn't control here, and I will
8 explain why that's important. Mr. Goetz said, oh, it's a very
9 similar dispute, but, as you recognized, it really wasn't.
10 Comotomo didn't propose a construction for this term; they just
11 said plain meaning. They were trying to apply it to some prior
12 art and obviousness combination. And Mayborn proposed their
13 construction.

14 Mr. Goetz said several times that the PTAB agreed with
15 their construction in the end, and that's also incorrect, and I
16 will talk about that because I think it's important.

17 So, the last point I want to make before I jump into
18 our slides and walk through this material is -- I already made
19 it. Let's get to the slides.

20 So, this is the flex region. Importantly, looking at
21 the claim, first thing, it's configured to allow flex. Allow,
22 right? Allow, enable, increase. It's not talking anywhere in
23 this claim, in the claim language, which is the king of the
24 intrinsic record, right here in the claim, it's not talking --
25 it doesn't say anything about control or increasing rigidity or

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1 doing the opposite. It says they're configured to allow flex
2 of the mouthpiece. And in the second part, it talks about the
3 direction that you're doing it, towards and away. So I know
4 your Honor was trying to arrive at a construction that talked
5 about the reciprocating and oscillating. The specific
6 direction is actually claimed in this other part of the claim –
7 it says towards and away – and we'll talk about that in a few
8 minutes.

9 But the important point is in the claim, that's very,
10 very important intrinsic evidence. It says allow flex. And
11 everywhere in the patent that it talks about the flex region,
12 it says the flex region is in the areola portion. When we were
13 talking earlier about the '930 patent, we were talking about
14 these undulating grooves that are marked 120 – that's the flex
15 region – and it says in the patent it increases the
16 flexibility. There's no mention anywhere in this patent,
17 anywhere in the file history, or anywhere in the claim about
18 doing the opposite or about controlling flex.

19 Next slide, please.

20 Let's keep going. Next slide.

21 Next slide.

22 So, I made that first point already. The claim
23 language itself is where we start.

24 Let's go on. Why is this important? As a reminder,
25 we touched on this earlier, but just to frame it, the choice of

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1 controlling flex isn't some accident. Mayborn chose this term
2 to encompass not only increasing flex, but increasing rigidity.
3 If you remember from the tech tutorial, we -- I'm sorry, we.
4 In the Nanobebe product, there are strengthening ribs that are
5 configured to resist flex. That's the part that they're
6 pointing to as the flex region. So it's pretty clear why
7 they're doing this, and it's not consistent with what the
8 patent says about the invention.

9 Next slide.

10 So here are some examples, not all, but if you look
11 through the specification of the '244 patent, it only discloses
12 increased flex. We've highlighted some of that here. It says,
13 baby bottle with flexible nipple regions, not more rigid nipple
14 regions, not controlled nipple regions. It says a nipple of
15 increased flexibility in the technical field. It talks about
16 the bellows action, as well as action in another direction,
17 although that is not claimed, but increasing the flexibility is
18 what's important here. And, again, the flexible portion
19 providing this pumping action, also talking about the
20 reciprocating back-and-forth.

21 And, again, the flex region, like the claim says, in
22 the portions cited at the bottom of this slide, in column 3,
23 flex region allows flexing as described in more detail below.
24 It's talking about increasing flexing below.

25 Next slide.

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1 So, we believe Nanobebe's proposed construction of
2 flex region should be adopted. Clearly and consistently in the
3 claim language, both the claim language and the specification,
4 require flex region to be configured to allow flex, increased
5 flexibility. And Mayborn's construction just ignores this.

6 So, they picked at our construction for two reasons.
7 They said it's a *mens rea* requirement. No, it's not. It's
8 talking about how the material is configured.

9 They talked about the examples that we gave. Those
10 are exemplary.

11 And their last point was on the PTAB, and we'll get to
12 that, but there's no intrinsic support for their construction.

13 Let's move on.

14 Let's get to the PTAB. This is Comotomo, a proceeding
15 that Nanobebe is not involved in. And what's really important
16 here is both in the letter that Mayborn wrote to the Court and
17 throughout his argument, Mayborn said that the PTAB pretty much
18 adopted the construction that Mayborn is proposing here. And
19 they quoted this section here about surface characteristics
20 that control flexing, and they said, as this decision is part
21 of the intrinsic record, it's an important piece of evidence
22 for the Court to consider.

23 Now, the decision isn't binding. The issue wasn't
24 really framed. It is part of the intrinsic record, it happened
25 many years after the patent, but what's important is the part

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1 they left out.

2 So, let's go to the next slide.

3 The second paragraph of the PTAB section on this
4 construction, they go on to say: The board's decision
5 interprets flex region to contain structural components that
6 provide characteristics that control flexing -- sorry, to
7 provide characteristics that control flexing of the structure,
8 such as grooves or flex channels surrounding the teat
9 portion...forming circular thinned regions of
10 parallel/concentric channels, providing for a bellows action,
11 as well as flexing in a direction perpendicular to the fluid
12 flow direction.

13 That's the complete construction from the PTAB.

14 THE COURT: So, you're suggesting we have all that
15 language? I'm kidding.

16 MR. KASDAN: It's not binding on you, and that's not
17 what we frame. It's quite long, your Honor, but that's the
18 full story. So that's what they said.

19 It's quoted in call-out in the next slide, according
20 to the PTAB. That's the same item that I just read from.

21 Let's continue to the next slide.

22 So, what's the effect? You talked about this a little
23 bit; Mr. Goetz talked about it. So, one point, it's a
24 nonfinal, nonappealed construction of the PTAB. It's not
25 binding on you. In particular, Nanobebe wasn't part of the

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1 proceedings, and those parties have now withdrawn the IPR as
2 they have gone forward. There's a case cite for that in the
3 *Baxter* case. So, it's not binding. It could be something you
4 look at certainly.

5 Next slide.

6 THE COURT: What is the precise dispute that was not
7 before the PTAB? When you say it wasn't before the PTAB, is it
8 just because you weren't there, or that they didn't suggest --
9 they being Comotomo -- didn't suggest an alternate construction?

10 MR. KASDAN: Yes, it's two things. It's we weren't
11 there, and it's a matter of preclusion, but the point that's
12 really important is that -- and I am going to get to it in the
13 next slide -- is that Comotomo didn't propose a construction.
14 So, what happened there, Mr. Goetz said, oh, it's very similar,
15 it's just like what's happening here. It's not like what's
16 happening here at all. They're proposing a broad construction.
17 Mayborn is here proposing a broad construction, using the word
18 controlling. That means both increasing or decreasing
19 flexibility. We've explained why that's problematic.

20 We're proposing a narrower construction. We believe
21 it's fully consistent with what the claims and specs says. In
22 Comotomo, they didn't propose any construction, and their
23 position was, hey, anything that's got flexible material is a
24 flex region. That's a very different dispute than what we've
25 framed here. So, they didn't put in any claim construction,

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1 and they were taking the position that all you need is a piece
2 of silicone. Both Mr. Goetz and I have both said clearly you
3 need something more.

4 So --

5 THE COURT: One other question: What's the effect of
6 their holding that they're going to construe flex region in
7 that way? Obviously, if it was to continue on through, it
8 would be controlling in that proceeding --

9 MR. KASDAN: Yes.

10 THE COURT: -- but, in our case here, if I were to
11 construe a term a certain way, that would be how it would be
12 presented to the jury, so I understand those basic
13 fundamentals. But how does the fact that the PTAB has reached
14 a decision -- maybe I'm using the wrong word -- has reached a
15 decision as to how to construe flex region, what impact does
16 that have on the patent generally outside of Comotomo, outside
17 of a proceeding that has already been concluded?

18 MR. KASDAN: It doesn't, your Honor. It's not binding
19 on you. It doesn't flow with the patent. It is like Mr. Goetz
20 said, it's part of the intrinsic record, but it's important to
21 look at it in context with what it's relevant to and what it's
22 not. We think it's a very different concept. The issue you
23 see framed here wasn't framed there. And, really, what
24 happened was, in that situation, the PTAB looked at it and
25 said, you know what, this party challenging the patent of

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1 Comotomo hasn't come up with any construction. They seem to be
2 saying that all you need from the flex region is a piece of
3 silicone. We're not comfortable with that, we're going to
4 adopt a narrower construction. That's not the situation we
5 have here at all.

6 THE COURT: Do you know whether Comotomo argued
7 that -- made any arguments regarding increased or decreased
8 flexibility, either in the context of the word control or
9 otherwise, in support of its plain language interpretation?

10 MR. KASDAN: I don't believe they did, your Honor.

11 THE COURT: Okay. Thank you.

12 MR. KASDAN: Next slide, please.

13 That's all I have on controlling flex, your Honor.

14 THE COURT: One question: One difference between the
15 parties' interpretation is, again, this concept of Mayborn says
16 surface characteristics and Nanobebe just says characteristics.
17 Is that a live issue here? Does Nanobebe have an issue with
18 surface characteristics?

19 MR. KASDAN: Let me just go back to it. I'm just
20 going to get the construction in front of me.

21 THE COURT: Sure.

22 MR. KASDAN: I'm not sure. We're not sure exactly why
23 they chose surface characteristics here. They criticized our
24 earlier construction that used surface, but our issue is really
25 fundamentally with the controlling flex being broad enough to

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1 cover both increasing and decreasing flexibility.

2 THE COURT: Okay. Thank you.

3 Mr. Goetz, you're itching to say something.

4 MR. GOETZ: I am, your Honor, but I don't want to
5 interrupt.

6 THE COURT: Is that it, Mr. Kasdan?

7 MR. KASDAN: No, unless you have another question.

8 THE COURT: Go ahead, Mr. Goetz.

9 MR. GOETZ: A couple of things, your Honor.

10 On surface characteristics, that sort of goes back to
11 the point we were talking about where the prior art has
12 material, soft material, elastic material. That has
13 characteristics, right? So the fundamental distinction about
14 this patent is it was surface characteristics. That's why
15 we've said that, and I think that's why the board -- one of the
16 reasons I think why the board agreed with us.

17 In terms of the board's decision, I think we've
18 characterized it fairly. I just want to put the board's
19 decision on the screen here. So, the first paragraph was, I
20 think, what I had on my slide, and then the next paragraph was
21 what counsel showed. Accordingly, based on the '244
22 specification, we determined that the flex region is reasonably
23 interpreted to contain structural components that provide
24 characteristics that control flexing of the structure, such as,
25 okay? So those are, then, examples of that, so I would submit

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1 to your Honor that the way to fairly read that is that that's
2 an adoption of the Mayborn construction, and the "such as" is
3 going into things that are not a part of the construction
4 itself, if you will, but sort of referencing now to the
5 specification.

6 So, I think it is a fair -- I think it is fairly read
7 to adopt what we said. I think that's absolutely right, your
8 Honor.

9 In terms of the impact, this notion that it has no
10 impact, I think, is just wrong. If you think about it from the
11 perspective of some other company, right, they're worried about
12 patent. They're going to go look at the Patent Office
13 proceedings, just like you would for any other patent, and if
14 you looked at a patent, and you saw in the file history that an
15 examiner had said, well, when I say flex region, I mean this,
16 you're going to know that that patent is going to be encumbered
17 with that, most likely, in litigation, and you're going to make
18 decisions, commercial decisions, about that patent based on
19 that intrinsic evidence because you know how important that is
20 to claim construction. It's the same thing here, only instead
21 of one little examiner, it's like three super examiners.

22 So, it is influential. It has an impact, it has an
23 impact on how the public is going to view this patent and the
24 claims and this language. So to say it has no impact is not
25 right. It may not be binding on your Honor, and if that's what

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1 he meant, that's fine, but it has a massive impact on this
2 patent from the public's perspective.

3 THE COURT: Did Comotomo argue -- this is a question
4 that I asked Mr. Kasdan. Did Comotomo argue that it had an
5 issue with control because that would imply decreased
6 flexibility?

7 MR. GOETZ: No, your Honor, I don't think that debate
8 was had. I don't think so. We will double-check on that, but
9 I don't think that debate was had.

10 THE COURT: Yes, I would be interested whether there
11 was any discussion, dialogue, about the concept of increasing
12 versus decreasing flexibility.

13 MR. GOETZ: Absolutely, your Honor, we'll look at
14 that. I don't think there was, but we'll check on that.

15 THE COURT: Thank you.

16 MR. GOETZ: Finally, I just wanted to make sure I
17 understood what your proposal was previously because it sort
18 of -- it impacts what my response is. So, our current
19 construction is a region having surface characteristics that
20 control flexing. The way I had understood what you're
21 proposing, your Honor, was not including the surface
22 characteristics, but I may have misunderstood what you were
23 saying.

24 THE COURT: No, it was including that. It was
25 including everything that you have there, but I was taking

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1 issue with the control flexing.

2 MR. GOETZ: I understand.

3 THE COURT: And I was trying to add something that
4 would reflect what the flex region was intended to do,
5 seemingly, to allow, maybe enable, whatever the word is,
6 flexing in an oscillating and reciprocating manner. That's
7 what I was asking about.

8 MR. GOETZ: I understand.

9 So my response is slightly different. So, I think
10 that it's important to have those surface characteristics for
11 the reason that I mentioned a second ago, because you need to
12 have characteristics that are different than just the inherent
13 flexibility in the materials that are being used in this art.

14 The problem is, though, what do you say in terms of
15 changing out control if you don't like control? You said,
16 "allow." The issue that I have with allow is that it's a
17 little bit more than allow in the sense that it's not just
18 allowing it, it's actually influencing it — maybe that's the
19 right word — but it's influencing those characteristics in that
20 motion, not simply allowing it, which, to me, suggests sort of
21 like a binary, it allows it or it's on or off.

22 THE COURT: How about enabling? That seems less a
23 passive word.

24 MR. GOETZ: It does. I have to think about that.
25 It's closer. But, again, influences is better because the

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1 problem that I'm having, your Honor, is you're baking this on a
2 material that's already flexible, and so if the notion is that
3 it's just the structures that are solely responsible for that
4 absent from the underlying flexibility of the material, you're
5 sort of getting away from the point of invention, which is to
6 build on flexible material, to use surface characteristics to
7 make the flexing better, to make it -- to control it better, to
8 influence it in a better way over and above the material
9 characteristics.

10 So that's my struggle with that, your Honor.

11 THE COURT: Okay.

12 Anything else?

13 MR. GOETZ: Nothing else from me, your Honor, on this.

14 THE COURT: Mr. Kasdan, you have something to add?

15 MR. KASDAN: Just very quickly.

16 THE COURT: Sure.

17 MR. KASDAN: So, we're good with enabling, but you
18 probably knew that already.

19 Influencing has the same problem with controlling.
20 Influencing doesn't say we're also good with increasing.
21 Influencing is broad enough to say it can do the thing that's
22 disclosed in this patent, which is increasing flex or the
23 opposite. So, it's fundamentally problematic.

24 On the PTAB, just two comments:

25 The part that Mr. Goetz just put up, the part that we

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1 read of the PTAB's construction that was left out, the such as
2 grooves or channels, I just think it's interesting that they
3 came up here, and we have a construction that we've proposed a
4 region having characteristics, e.g., grooves or channels, that
5 uses that very similar exemplary language. He spent two
6 slides, in fact, said having an example is even worse than not
7 having an example. And now they're saying, well, the PTAB
8 construction is just like ours, and they basically said
9 controlling flex. So, I just think that's interesting to note.

10 I think we've beat this one in the horse sense, so
11 I'll stop there.

12 THE COURT: Or horses.

13 Mr. Goetz, one final question, then.

14 MR. GOETZ: Yes, your Honor.

15 THE COURT: I have to just ask, then: Would Mayborn
16 have an issue with the construction that simply said a region
17 having surface characteristics to enable flexing, getting rid
18 of the examples, getting rid of the specifically designed to,
19 just that?

20 MR. GOETZ: I think so, your Honor. I think control
21 is the right one. I think we would stick with control. I
22 think enable is not the right word.

23 THE COURT: Your position is because control is
24 intended to mean restricting flexibility, as well as increasing
25 flexibility, whereas enhance is only one of those two?

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1 MR. GOETZ: Enable seems like it's only one of those
2 two. Control does both, yes, your Honor.

3 THE COURT: Okay. Thank you.

4 MR. GOETZ: Okay, your Honor, the last term is "flex
5 of the mouthpiece towards and away from the lower portion of
6 the nipple." I think this will be shorter than the other ones,
7 hopefully.

8 We have plain meaning on this one, again, your Honor,
9 versus the up and down movement of the mouthpiece relative to a
10 lower portion of the nipple. Again, this goes to the
11 discussion that we've been having about oscillating and
12 reciprocating. The spec clearly says oscillates or
13 reciprocates. As we've talked about, one is sort of moving
14 about a point, like a metronome; oscillating/reciprocating is
15 like a reciprocating saw axially. That's what the language
16 says in the spec. Those are two different sort of sets of
17 motions. The figures show that, too. We've added some color
18 to this figure, which I think you've seen before, where you can
19 see that the nipple – this is figure 2(a) and 2(b) next to each
20 other – you can see that the nipple is moving towards the lower
21 portion both along the axis and also off-axis, like an
22 oscillation moving towards and away in both sort of manners, if
23 you will. That's the same thing that you see in the video that
24 we saw in the tech tutorial. This is the Mayborn product
25 video, and it moves in all of those different directions.

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1 THE COURT: So, is it your view that up and down
2 suggests or requires only movement on a single axis?

3 MR. GOETZ: Correct. That's the fundamental issue,
4 your Honor. We think it's not appropriate to limit that.
5 Towards and away encompasses both.

6 THE COURT: Okay.

7 MR. GOETZ: Thank you, your Honor.

8 THE COURT: Oh, that's it, cut to the chase.

9 MR. GOETZ: That's it.

10 THE COURT: All right, Mr. Kasdan.

11 MR. KASDAN: Once we get our slides up, I'll be brief
12 as well.

13 We're skipping that one.

14 So, Mr. Goetz said the specification discloses both
15 the oscillating and reciprocal motion, and it's true, the
16 specification talks about moving in a vertical along the axis,
17 and talks about that at length. There are also some references
18 to this oscillating.

19 The important point here is what the claim says. And
20 it's improper to import limitations -- to import into the
21 limitations examples from the specification. They've said that
22 a whole bunch of times today.

23 The issue here is what the claim says. The claim
24 doesn't mention the oscillating motion. The claim focuses
25 on -- the claim language says, "flex of the mouthpiece towards

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1 and away from a lower portion of the nipple." I think that
2 describes the motion along the axis. That's what we're trying
3 to capture in our construction, the up and down movement of the
4 mouthpiece relative to a lower portion of the nipple.

5 THE COURT: One question: How can they be importing,
6 meaning from a specification or somewhere else, when they're
7 just arguing for the plain meaning of the claim?

8 MR. KASDAN: Ah. So, what he was saying in his
9 argument was that this should be read to include both
10 oscillating -- the examples he gave -- maybe I overstated that
11 a little bit.

12 THE COURT: Okay.

13 MR. KASDAN: It's not in their construction, but in
14 the support for his argument, he looked to the portion of the
15 spec that talked about two different types of motion. Our
16 position is that if you start with the claim and look at it,
17 it's only describing and claiming one of those types of motion
18 in this claim, and it's the motion along the axis.

19 So, the intent of our proposal here, of the proposed
20 language, up and down -- and you asked what's the difference
21 between up and down and toward and away -- what's important to
22 us is to distinguish that this is talking about movement along
23 the axis in the vertical direction. And their plain meaning
24 construction, I think, as exemplified by Mr. Goetz getting up
25 and talking about the two different types of motion, the plain

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1 meaning doesn't really solve that issue.

2 So, we would be okay with a construction that as long
3 as it emphasizes that the motion we're talking about here is
4 along the axis or in the vertical direction.

5 THE COURT: You don't think the language toward and
6 away from the lower portion of the nipple captures simply --
7 captures on a single axis?

8 MR. KASDAN: I think it does, and I think that's a
9 good construction of it, but it seems to me that there's a
10 dispute about that.

11 THE COURT: What I'm trying to understand is, and I
12 don't want to get too far ahead of how people are going to
13 interpret things or juries are going to interpret things once
14 those things are placed to them, but on the record we have
15 here, we've got a Claim 21 language that is "flex of the
16 mouthpiece toward and away from a lower portion of the nipple."
17 There is no reference to axes, there is no reference to
18 oscillating or reciprocating, nothing like that. And Mayborn
19 is arguing that that should just have its plain meaning.

20 Is it your view that "toward and away" would
21 necessarily imply, or require, flexing of the mouthpiece in a
22 way that is not just along the axis, such that your
23 construction is necessary?

24 MR. KASDAN: I think I'd put it a slightly different
25 way. I think that what's described in this claim language

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1 and -- when this claim language says, "relative to a lower
2 portion of the nipple," I think what that is describing is
3 that's the axis that we're looking at. We're not talking about
4 side-to-side oscillating motion, that's not toward and away
5 from a lower portion of the nipple. The motion that's towards
6 and away the nipple is the in out/up down, however you want to
7 say it, along that vertical axis. That's what we're going for
8 in our construction. And my concern is that plain meaning
9 isn't clear enough that it's along the axis.

10 THE COURT: Okay. Anything else?

11 MR. KASDAN: No, on that term, your Honor, no.

12 THE COURT: Mr. Goetz, anything else on that term?

13 MR. GOETZ: No, your Honor. Thank you.

14 THE COURT: Thank you.

15 I believe we are done with all of the claims. Is that
16 correct, Mr. Goetz?

17 MR. GOETZ: I believe that's correct, your Honor.

18 THE COURT: All right.

19 I know that Mr. Kasdan had a few things he wanted to
20 say at the end of the presentation.

21 Is there anything you would like to add to the end of
22 the presentation?

23 MR. GOETZ: Not sort of in closing. I do have some
24 housekeeping issues I'd like to discuss with your Honor,
25 including the scheduling and things like that.

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1 THE COURT: Okay.

2 Then why don't we let Mr. Kasdan -- why don't you go
3 first, and then we'll deal with housekeeping, and then I have a
4 couple of notes as well.

5 Go ahead, Mr. Kasdan.

6 MR. KASDAN: Thank you, your Honor.

7 In the beginning, I indicated that we wanted to make
8 some clarifications from the tech tutorial, but in deference to
9 the Court, and it's been a long day, we have some
10 clarifications in the slide that we submitted, and there's --
11 it's really about the tech tutorial, and we've been going for
12 many hours on claim construction, so we're happy to skip that
13 portion of the live presentation for today.

14 I think the only thing that we just wanted to
15 emphasize, and it's not a claim construction issue, but just
16 one point, just really by way of explanation --

17 If you can put that up one slide.

18 -- we had some back-and-forth about adjourning this
19 hearing and about why it might be efficient to do that if
20 there's a granted IPR, and then two more IPRs have been filed
21 that are awaiting a decision on their petitions. We just
22 wanted to explain to the Court where we're at on that. We
23 fully understand your position, but when we looked at this
24 issue, we had a granted IPR on the '930, then it was withdrawn,
25 and so we completely understand your position that unless and

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1 until there's a granted petition, you're not inclined to
2 entertain a stay motion, that's why we don't have it, but we do
3 intend to move to stay once our IPR petitions are granted. And
4 we did find prior art that shows grooves and the flexible
5 region, so we're looking to move forward on that front, and
6 we'll keep the Court informed, as we move forward, at the
7 appropriate time.

8 THE COURT: What is the general time frame for
9 decisions on whether or not to grant an IPR petition?

10 MR. KASDAN: So, statutorily, I think there's a
11 three-month time period for the patent owner to file a
12 response, which I presume they will, and then there's a
13 three-month time period after that for the decision. So it's
14 generally statutorily set to six months from filing, and it was
15 filed -- I forget -- January 13th. So, that's the timing.

16 THE COURT: So there essentially can't be a decision
17 before three months after January 13th because you need to have
18 a response, and then it goes for --

19 MR. KASDAN: Right.

20 THE COURT: -- a decision, which could be as rapidly
21 as they like to do.

22 Okay. Anything else you wanted to add?

23 MR. KASDAN: No, your Honor. Thank you very much for
24 your attention today.

25 THE COURT: Of course.

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1 Mr. Goetz?

2 MR. GOETZ: Thank you, your Honor.

3 So, on the clarifications, your Honor, that's all new
4 stuff, we'll have to study it. I guess it's some slides at the
5 end of this presentation, new-review stuff, I don't know what
6 it is, but if your Honor's going to consider it, we'd like the
7 opportunity to respond at some point. So, that's just that.

8 In terms of the schedule, we had proposed a schedule
9 to the Nanobebe folks, and we would like to move quickly,
10 understanding that your Honor is going to rule, and your Honor
11 has as much time as you'd like, but we've been pending in this
12 case for a long time, and we think it's a pretty simple case
13 once the *Markman* is decided. There's very little fact
14 discovery that needs to happen, there's a very sort of quick
15 expert period that needs to happen, and then we're basically
16 going to be trial-ready. I think we could be trial-ready as
17 early as the end of August if you, for example, hypothetically,
18 your Honor, issued your order, say, within 30 days or so of
19 today. If it's a little later than that -- the reason I'm
20 saying that is, of course, the schedule that we've got, a lot
21 of it is triggered on when you issue your order, because that's
22 going to matter a lot to everything.

23 So, when I proposed the schedule to counsel for
24 Nanobebe, he said he would be happy to get back to us ten days
25 after today, and I'd ask for a quicker response to that. One

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1 of the things that I had proposed was sort of fact discovery,
2 final sort of requests, be served by next week. So there's
3 things that we could do while your Honor is working on the
4 *Markman* Hearing, and we would like a faster schedule, your
5 Honor, and I'd just like your guidance on that as to how go
6 forward on -- or what your thoughts are on scheduling.

7 MR. KASDAN: Can I respond to that?

8 THE COURT: Yes.

9 MR. KASDAN: So, they sent us their schedule
10 yesterday, or I think it was the evening of Presidents' Day.
11 Yesterday, we were preparing for today, so we responded that we
12 will look at it, we will consider it, and get them a response
13 in seven to ten days. Ten days, I think, is what we said. So,
14 we haven't really looked at it yet. We will look at it and, of
15 course, confer and come to either a joint proposal or new
16 proposals for your Honor to consider.

17 THE COURT: Is that all on schedule?

18 MR. GOETZ: Yes, your Honor, that's it on schedule.

19 THE COURT: With respect to schedule, I have no reason
20 to believe that the parties are not going to be able to work
21 collaboratively together. That's been every indication that I
22 have seen here. So, like in any other case, I do like the
23 parties to talk about what a reasonable schedule is, so please
24 do that. I think ten days is reasonable, seven days is
25 reasonable. You're both professions, you'll be able to figure

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1 out when you can get back to each other and talk about this,
2 and then propose a schedule to me. If there's an issue, I will
3 decide what the schedule should look like or you can agree upon
4 a schedule.

5 In terms of discovery: I generally don't have an
6 issue with discovery going forward while things are under
7 consideration. So, that's just a little piece of my
8 background, but I will hear whatever the parties think is best
9 in this particular case.

10 That's the discovery piece.

11 What else, Mr. Goetz?

12 MR. GOETZ: So that's it, your Honor.

13 The final bit is we've been having all of these
14 hearings, and we've been putting into evidence exhibits, and I
15 just wanted to let your Honor know that we're working together,
16 we're going to work with counsel and with your clerk, to submit
17 sort of a joint exhibit list that lists them all out, and then,
18 where they're paper copies, include the paper copies just so
19 it's on the docket and on the record, so we have it clear.

20 THE COURT: That would be very helpful.

21 MR. GOETZ: Thank you, your Honor.

22 THE COURT: The other things that I have on my list --
23 Mr. Kasdan, is there anything else you wanted to raise?

24 MR. KASDAN: No, your Honor.

25 THE COURT: Okay.

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1 That would be helpful for the exhibits.

2 So, the few things that are on my list, just to
3 clarify, is: Mr. Goetz, if you do have any examples of cases
4 where claim construction was based on location -- I think we
5 talked a little bit about that --

6 MR. GOETZ: Yep.

7 THE COURT: -- and if you could provide that to me,
8 that would be helpful.

9 MR. GOETZ: Will do.

10 THE COURT: Mr. Kasdan, you said you were going to
11 discuss and think about whether the convex arc-shaped language
12 was satisfactory for Nanobebe in lieu of rounded because
13 rounded could be sort of a teacup shaped, as I'm now motioning
14 for the court reporter, so if you could let me know in a letter
15 in the next -- I'll give a deadline for both of these things --
16 your position on that, that would be helpful.

17 And then, Mr. Goetz, if you could please confirm with
18 me whether there was any discussion of increasing flexibility
19 in the Comotomo IPR proceeding, that would be helpful to me.

20 MR. GOETZ: Yes, your Honor.

21 THE COURT: And then the last thing is: Mr. Goetz,
22 you said you wanted to respond to any of the clarifications
23 that are here.

24 I'm not sure what they are, and so I'm just going to
25 ask Mr. Kasdan -- I don't even know how I would consider them,

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1 if I were to consider them -- so should we just disregard them,
2 or do you want to give Mr. Goetz an opportunity to respond to
3 them, or what's your position?

4 MR. KASDAN: So, they're included in our presentation
5 slides, but without context, it's hard to consider. So, why
6 don't we take it back, and we can address it by a letter, if we
7 want to go forward, and he can respond.

8 THE COURT: Okay. So what we'll do is we'll have a
9 letter -- I think the best thing and the easiest thing for the
10 Court is if we could possibly have a joint letter sent in
11 within maybe -- I'm going to try to do this pretty rapidly. If
12 I could have a joint letter with this information by next
13 Wednesday, would that be possible?

14 MR. KASDAN: That works for us, your Honor.

15 THE COURT: Mr. Goetz?

16 MR. GOETZ: Of course, your Honor, that's fine. We
17 can maybe work on the scheduled then, too.

18 THE COURT: Absolutely, whatever you have.

19 But if I could hear from you at least on what I've
20 asked about by next Wednesday, and if there's an issue getting
21 in touch with each other, and you need to do separate letters,
22 so be it. But if you send that in to me, that gives me the
23 information that I need.

24 Let me pause for just one moment.

25 (Pause)

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1 THE COURT: I think that's all I have.

2 Mr. Goetz, is there anything else that you have that
3 we need to discuss today?

4 MR. GOETZ: No, your Honor, except thank you.

5 THE COURT: And, Mr. Kasdan, anything?

6 MR. KASDAN: No, your Honor. Thank you.

7 THE COURT: Before we close, I do want to tell the
8 parties this has been extremely helpful. It has been very
9 clear, both the underlying papers, as well as the
10 presentations. I had anticipated that I was going to need the
11 transcript very rapidly, but given the overviews that were
12 provided in these presentations, which are quite clear, I will
13 probably need it less. But that is a testament to the
14 preparation and the logical presentation that both parties did.
15 So, I appreciate that.

16 I appreciate the congeniality that the patent bar
17 seems to have with each other - that's always a pleasure. And
18 thank you to your clients for being here. I know this is
19 important to all of you. And I appreciate all the time and
20 effort. Thank you very much.

21 MR. GOETZ: Thank you, your Honor.

22 MR. KASDAN: Thank you, your Honor.

23 THE COURT: Thank you to the court reporter for his
24 extended time.

25 * * *