

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ORTHOCISION, INC.,
Petitioner,

v.

PTL OPCO, LLC.,
Patent Owner.

IPR2023-00625
Patent 11,020,129 B2

Record of Oral Hearing
Held: July 1, 2024

Before: MICHAEL L. WOODS, RYAN H. FLAX, and
MICHAEL A. VALEK, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

WILLIAM K. NELSON, ESQUIRE
SIERRA IP LAW, PC
7030 N. Fruit Avenue
Suite 110
Fresno, CA 93711
wnelson@sierraiplaw.com
(559) 436-3800

ON BEHALF OF THE PATENT OWNER:

ANDRIY LYTVYN, ESQUIRE
HILL WARD HENDERSON, P.A.
101 East Kennedy Blvd.
Suite 3700
Tampa, FL 33602
andriy.lytvyn@hwhlaw.com
(813) 222-3149

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P R O C E E D I N G S

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JUDGE FLAX: All right. Good afternoon, everybody. We are here today in Orthocision, Inc., Petitioner, v. PTL Opco, LLC, Patent Owner. And I hope I said that right, please let me know if I did not. This is IPR2023-00625. So, this is the final oral argument in this IPR. Each party has requested, or I guess the parties are getting 60 minutes each, only Patent Owner actually requested any time. But each party will have 60 minutes to argue today. Each party can divide their argument into an opening and a rebuttal portion. So, when it is time for you to give your opening argument, let me know how much time you would like to reserve out of your 60 minutes for rebuttal.

And I will mark that down and I will time you and let you know when you're approaching the limit that you've set for yourself in for opening. You're under a no obligation to stop arguing then because it is *your* time. But I will give you that warning. So, what we will do today is begin with the Petitioner who has the burden in this case. And then we'll follow that with Patent Owner's arguments. So, if the parties' counsel could introduce themselves now for the record, starting with the Petitioner.

MR. NELSON: William Nelson for Petitioner, Orthocision, Inc.

JUDGE FLAX: Mr. Nelson, if you wouldn't mind speaking up or maybe bringing the mic closer to your mouth, it's a little bit quiet.

MR. NELSON: Apologies.

JUDGE FLAX: Better, thank you.

1 MR. NELSON: William Nelson -- okay.

2 JUDGE FLAX: And who do we have arguing for Patent Owner
3 today?

4 MR. LYTVYN: Andriy Lytvyn arguing for Patent Owner, PTL
5 Opco. Also, in the conference room here with me is the lead counsel for
6 Patent Owner, Stephen Kelley.

7 JUDGE FLAX: Okay. So, Mr. Nelson, you will have the podium
8 first and you can begin when you're ready. Let me know how much time
9 you'd like to reserve and I'll mark that down for you.

10 MR. NELSON: I'm anticipating 20 minutes for rebuttal.

11 JUDGE FLAX: Okay. So, 40 minutes to start. You can start
12 when you're ready.

13 MR. NELSON: Okay. Thank you. May it please the Court.

14 JUDGE FLAX: Oh, and by the way, we have the full record in
15 front of us. So, anything you want to talk about, you can cite to it by page
16 number. Please identify it. Exhibit number, please identify that. If you're
17 talking about a specific slide and I haven't started your time yet, so, you're
18 not losing time. If you want to talk about a specific slide that you've
19 provided as a demonstrative, please identify which slide number we should
20 be looking at. We have those in front of us too so that we can have a nice,
21 clean record. So, Mr. Nelson, when you're ready.

22 MR. NELSON: Okay. I want to thank the Board for being
23 flexible, by the way, in scheduling -- rescheduling this hearing and bringing
24 the parties more time. In the present case, we're going with U.S. Patent
25 number 11,020,129 which deals with a posterior approach to sacroiliac

1 fusion. Say, an orthopedic, excuse me, it's a sacroiliac fusion approach
2 where an implant is inserted between the articular surfaces of the sacroiliac
3 zone of the patient. And the prior art in this case is largely the same kind of
4 approach, the same kind of procedure, sacroiliac, posterior sacroiliac fusion,
5 where an implant is inserted between the articular surfaces. So, four of the
6 prior art references are essentially the same kind of method, they're highly
7 related.

8 The other references are orthopedic surgery techniques, two of
9 them, Martz, Otte, are spinal fusion techniques, which are highly related as
10 well. And then Sharma, which is a universal, discloses a universal slap
11 hammer for orthopedic surgery purposes. So, all the prior art is highly
12 related and relevant. The -- in Supreme Court case law set forth in *KSR*
13 *International Co. v. Teleflex Inc.*, an expansive and flexible approach to
14 obviousness, recognizing that a person of ordinary skill in the art is also a
15 person having creativity commensurate with the level of -- of ordinary skill
16 in the art. A person of ordinary skill in the art is not in automaton. And the
17 level of ordinary skill in this case is fairly high. We're talking about
18 mechanical or biomechanical engineers or biomedical engineers with three
19 years of experience in the field of orthopedic implants or related
20 technologies, or a spinal orthopedic surgeon with at least three years of
21 experience, and at least some experience in design over use of spinal
22 orthopedic implants.

23 Also, we should remember that once there is motivation to
24 combine the law of obviousness allows for some experimentation or
25 adaptation, according to KSR, the analysis need not seek out precise

1 teachings directed to specific subject matter of the challenged claim, or a
2 court can take account of their inferences and creative steps that a person of
3 ordinary skill in the art would employ. And in this case, we're talking about
4 an engineer or a surgeon with experience. So, they would have an ability to
5 adapt tools and methods from related surgical techniques with a fair amount
6 of change and adaptation.

7 We look at, I'd like to go to the demonstratives, slide number 2 of
8 Petitioner's demonstratives. And this deals with the relatedness of the prior
9 art cited in the grounds of unpatentability that relate to sacroiliac fusion
10 techniques, Compton, Schifano, Donner, and Black. The -- all these
11 references disclose a posterior approach for sacroiliac fusion. They all
12 disclose insertion with use and implants between the articular surfaces of the
13 sacrum and ilium. And they all disclose preparing articular surfaces with
14 cutting instruments and some kind of rasp or toothed instrument like a
15 broach. So, you have an instrument to cut the joint, at least on the
16 instrument.

17 JUDGE FLAX: Can ask you a question about the combination of
18 these references? The one thing that's striking me now is that Patent Owner
19 made the argument that the references were being combined with Compton,
20 for example, Donner being combined with Compton, in terms of using
21 Donner's devices or parts of Donner's devices in Compton's method. Does
22 that matter to us, or does that make a difference when we're rendering our
23 final decision here?

24 MR. NELSON: Are you asking whether or not Patent Owner's
25 argument with respect to Donner not being compatible or I mean I'm not

1 sure.

2 JUDGE FLAX: So, this is what I'm taking from Patent Owner's
3 argument. They are saying that you failed to specify how the devices of
4 Compton would be modified in view of the other prior art. I think what their
5 argument is, is that you just said use Donner's tool in Compton's method,
6 which may or may not necessarily get you where you need to be. So, why
7 does it get you where you need to be if -- or am I misunderstanding the
8 parties' positions?

9 MR. NELSON: I think that is the Patent Owner's position. With
10 respect to applying Donner to Compton, Donner discloses using a tool that
11 includes both cutting elements and rasping elements in combination with a
12 slide hammer. So, you have one tool that allows you to both cut and abrade
13 the bone surface, as well as, you know, drive, and remove the cutting head in
14 the joint. Now, I think that the Patent Owner's argument is based on the fact
15 that the implant isn't the same perhaps. And, you know, with respect to that,
16 there's a couple of ways that they could be combined. One is that in the
17 approach from the Petitioner was, you know, Otte has a rectangular cutting
18 head with a rasping surface, and the box is with a rasping surface that could
19 be applied to create a box-like rectangular void in the sacroiliac joint. That
20 is close to the shape of the implant in Compton. And Compton could also be
21 essentially modified to have a different shaped implant. Compton isn't
22 limited to a single embodiment. It talks about having different
23 embodiments. For instance, different shapes of the broach to create different
24 shape voids in the separate lag joint.

25 JUDGE FLAX: So, okay, --

1 MR. NELSON: So --

2 JUDGE FLAX: Let's do this. Walk me through what your petition
3 says, what your arguments were that you presented in the petition in terms of
4 how are these references being put together, right? So, you had a very
5 specific section under, let's say, Ground 1 that cited to all this prior art.
6 When you start combining these things, what would the person of ordinary
7 skill in the art do and what would they end up with at the end that you're
8 saying would render the claim obvious?

9 MR. NELSON: Right. So, the approach would be, in one sense,
10 would be to have the slap hammer combination with a cutting and rasping
11 head used to create the implant void in Compton with a rectangular cutting
12 head like that of Otte.

13 JUDGE FLAX: So, you need Otte?

14 MR. NELSON: Instead of using a drill and a broach and so forth.

15 JUDGE FLAX: Is Otte a required reference here, or is it an
16 alternative Donner?

17 MR. NELSON: It's an alternative. I think one of ordinary skill in
18 the art take the teachings of Donner and adapt Compton.

19 JUDGE FLAX: But what I took from the description was that you
20 were focusing most on Donner and then you sort of added Otte as a, almost a
21 parenthetical at the end of Donner to say, hey, look at this also. Is that, am I
22 reading that right? Or are you relying on both of them?

23 MR. NELSON: I think that's the former. I think you don't
24 necessarily need to rely on Otte, but if you were to maintain a rectangular
25 implant, Otte shows, you know, here's an example of a box chisel, rasp

1 combination with a rectangular shape.

2 JUDGE FLAX: Okay. So, you're to the point now where you've
3 got a tool that's an abrading tool, right? So, either Donner or Otte, and then
4 what? So, what do you do with those? Are you changing the shape of
5 something in Compton to be like those? Or are you using Donner's tool
6 inside of Compton's tube when you're going into the space?

7 MR. NELSON: Yeah, you would be using Donner's tool in
8 combination with the cannula or, well, I forget the exact term they used for
9 the cannula, but the cannula of Compton for the approach into the sacroiliac
10 joint so that you have -- you're performing a method like that of Compton,
11 but instead of using the drill and the separate broach, you've combined in
12 single tool, right, in single step to create that void.

13 JUDGE FLAX: Okay. Thank you. And then, Sharma is required
14 because that's what you rely on -- on every ground, for the release means of
15 a slap hammer?

16 MR. NELSON: Right.

17 JUDGE FLAX: Or a slide hammer, which is, these are
18 synonymous terms, are we correct on that?

19 MR. NELSON: Yes.

20 JUDGE FLAX: Okay. So, maybe walk us through Sharma in
21 terms of considering our claim construction provided in the institution
22 decision. How does Sharma, if you know that claim construction, if it does?

23 MR. NELSON: Sharma discloses an additional functionality of a
24 locking mechanism, which would allow for additional stability in using a
25 slide hammer and impact.

1 JUDGE FLAX: So, let's talk about Figure 4 of Sharma, because
2 that is a cross-sectional view. It looks like it has all the components, I guess,
3 that we care about. I'm not sure if that's right or wrong, but it appears to be
4 the best, most detailed view in Sharma.

5 MR. NELSON: Okay.

6 JUDGE FLAX: Is that -- am I right on that? Is there a better
7 figure to talk about?

8 MR. NELSON: Yeah, I agree it's got the internal components.

9 JUDGE FLAX: So, when we're looking at this cross-section, I can
10 see the thing that would be the slide hammer, right, that would slide along
11 that shaft that I can see a shaft there. So, what part of this is the releasing
12 means, including whatever might be the base that is argued so strenuously
13 over at this point in this case? What is the base in this?

14 MR. NELSON: Well, in this case, the base would be the structure
15 to which the releasing means is secured, to think, comports with the
16 definition provided by the claim construction provided by the Board, which
17 is the structure 23, 22 inside the slide handle. So, it's like a bullet-shaped
18 structure attached to the proximal end of the slide hammer shaft. And so,
19 when the slide handle is moved in a distal manner towards the front of the
20 instrument, the push button 42 and the securing structure 45, I believe, is the
21 correct number. When engaged with that bullet shaped structure to lock
22 slide handle into position. So, that would be the thing functioning as the
23 base. Right. You have the releasing means 42 and the connected structures
24 attaching to that bullet shaped structure to secure the handle.

25 JUDGE FLAX: Well, in this Figure 4 of Sharma, are we seeing it

1 in its locked position or in its --

2 MR. NELSON: No.

3 JUDGE FLAX: -- sliding position?

4 MR. NELSON: No. It would be advanced towards the distal end
5 so that the locking mechanism or releasing mechanism would engage with
6 and be next to the bullet shaped structure 22, 23.

7 JUDGE FLAX: So, this is not locked or it is locked? I'm sorry.

8 MR. NELSON: Not locked.

9 JUDGE FLAX: This is not locked.

10 MR. NELSON: Right.

11 JUDGE FLAX: Okay. And then when it is locked, where does
12 that bullet shaped structure go and to what does it connect?

13 MR. NELSON: There is a detent or other, you know, structure
14 that wraps around the neck, I believe, of the bullet structure. So, 45, I
15 believe, is the right number, would engage with the collar 23 to create an
16 abutting connection that wouldn't allow the handle to be pulled past the
17 bullet structure 22.

18 JUDGE FLAX: So, okay. So, somehow --

19 MR. NELSON: Like if a U-shaped kind of collar,

20 JUDGE FLAX: Yep.

21 MR. NELSON: -- 45 that goes around 23.

22 JUDGE FLAX: I see that. So, the bullet and that part, so the
23 bullet tip, let's call that 22. And it would slide down towards the button 42,
24 and the whatever you would call 45. And that then locks it together at that
25 end. Is that correct?

1 MR. NELSON: Right. To where the slide handle would be
2 abutting, the number's a little near 37. So, there's a collar down there, and
3 then a recess that you can see in the slide handle that meets it.

4 JUDGE FLAX: Okay. So, then when it's locked, what you would
5 really see is that that hammer sleeve would basically be all you would see
6 between the two ends. Is that correct? And you wouldn't see --

7 MR. NELSON: That's my understanding.

8 JUDGE FLAX: Okay. All right. Well, that's a useful explanation.
9 Thank you.

10 MR. NELSON: Okay.

11 JUDGE FLAX: All right. So, I know I've interrupted your
12 argument. So, I hope it didn't throw you off-track. You can go ahead and
13 get back to what you were saying.

14 MR. NELSON: Okay. So, I think we're wrapping up on slide 2.
15 We have these highly related prior art disclosures, the SI, the SI fusion
16 references. And these references have common combinations, familiar
17 elements, and they're used in these kinds of methods all the time, like rasps
18 and chisels and slide hammers, and so forth. And these are the kinds of
19 things that one of ordinary skill in the art would have no issue adapting to
20 new methods, different methods in a manner that worked without, you
21 know, undue experimentation.

22 We go to slide 3, please of the Petitioner's demonstratives. So,
23 I've mentioned some of this already. They're both, all these references are
24 in spinal orthopedic surgery, particularly SI fusion surgeries. And they're
25 mostly known combinations of known instruments and, you know, adapted

1 to known anatomical features. So, the petition makes these kinds of
2 statements with reference to Mr. Drewery's first declaration, for instance.
3 And combinations from these references are merely simple combinations of
4 known methods and instruments that have known anatomical attributes,
5 which is not stated explicitly, but essentially in petition pages 21 through 22.
6 And every reference of the sacroiliac fusion references expressly relates to
7 orthopedic surgery, excuse me, I mean, all the references actually expressly
8 relate to orthopedic surgeries, and all but Sharma relates to fusion surgeries
9 involving the spine. That's all the prior art references are highly related.
10 Those arguments remain in petition page 24 and supported by the
11 declaration, the first declaration of Troy Drewery.

12 We move on to slide 4 of the Petitioner's demonstratives. As
13 mentioned before, all of the sacroiliac fusion references are a posterior
14 approach. These images are exemplary of that, showing that each of these
15 references approach the sacroiliac between the sacrum and ilium and from
16 the posterior aspect. And slide 5 provides the petition references for
17 establishing this posterior approach which includes all four of these
18 separately effusion references, Compton, Schifano, Black, and Donner.

19 Motivation to combine is discussed in slide 6, which we've touched
20 on. These are all the same kind of fusion methods, SI fusion methods, using
21 very similar instruments. All of them discuss inserting an implant between
22 the sacrum and ilium, references to the petition. For each of these
23 references, Compton, Schifano, Black, and Donner are provided in slide 7.
24 Slide 8 shows that each of these sacrum iliac fusion references discuss using
25 multiple tools, cutting instruments, and rasp for toothed instruments in order

1 to create the void in the sacroiliac joint.

2 Slide 9 provides the references to the Petition rather for each of
3 these references on these tools, including Compton discloses a drill for
4 making initial cut in the joint and a broach for shaping the joint, excuse me,
5 the implant void in the joint for the implant. Schifano discloses a drill, as
6 well as a box chisel and a rasp to create the void in the joint and shape it to
7 match the implant shape. Black discloses a method that uses both a box
8 chisel and a rasp without the use of a drill, which is an alternative
9 embodiment, but Black discloses that no drill is necessary. And then
10 Donner, which is the single slide hammer and cutting head with both cutting
11 elements and rasping elements.

12 Slide 10 demonstrates that all of the use of an impactor and a
13 hammer or a slide hammer is commonplace in these types of surgeries, in
14 orthopedic surgeries in general. Each of the Compton, Schifano, Black, and
15 Donner used some kind of impactor. Donner has the combined instruments
16 that the combined instrument that and uses a slap hammer and Compton,
17 Schifano, and Black all use a slap hammer in combination with an impactor.

18 Slide 11 provides the references to petition for each of these prior
19 art references. So, this, going through those slides, establishes that there are
20 just general steps that these kinds of methods utilize. All of these types of
21 methods of sacroiliac fusion coming from a posterior aspect, finding the
22 joint, creating an incision, and inserting a cannula into the SI joint space.
23 I'm sorry, I forgot to mention we're on slide 12 of the demonstrates. There's
24 a step of, in each of these, a step of cutting the connected tissue in the SI
25 joint using a drill or chisel, a step of rasping and decorticating the bone

1 surfaces, and the utilization of an impactor and hammer in order to drive
2 those tools into the joint. And the step of inserting fusion implant into
3 sacroiliac joints. So, these are just shared general steps across all of these
4 methods.

5 So, looking now at slide 13, look at the claim language from the
6 '129 Patent, Claim 1, and comparing those general steps to the claim
7 language. So, the highlighted portions are covered by those general steps
8 which are locating an insertion point in sacroiliac joint, introducing working
9 channel into the insertion point, having an insertion, and working in this
10 standard procedural steps. The unhighlighted portions we'll cover with other
11 references.

12 JUDGE FLAX: These things are not contested, I don't think, are
13 they?

14 MR. NELSON: Well, --

15 JUDGE FLAX: I don't think there's any argument here from
16 Patent Owner until you get down to the abrasion tool, whether it has an open
17 tip, for example, and showed the releasing means. I may be wrong, but I
18 guess we'll hear from Patent Owner in a minute, but I don't feel like these are
19 contested.

20 MR. NELSON: I'll move through the next couple of slides
21 quickly. So, the general step 2.3 -- 2 to 3, excuse me, you have a drill, you
22 have a rasp or a broach, and while they don't cover the combined tool, they
23 cover these steps that are highlighted using the rasping tool, the cutting tool
24 to create the void. And then you have the insertion of the implant into a void
25 shaped by those tools. Which is all covered in these general steps for these

1 kinds of methods. The limitations that aren't found across those references
2 are those that were cited by the Patent Office for the reasons for allowability.
3 So, you have a canula with a first iliac contours and a first sacral contour.
4 But those limitations are found in both Compton and Black. So, they're not
5 novel. And then the abrasion tool, where you have to come up with a
6 combination of a cutting edge and a rasping surface, abrading surface, and a
7 slide hammer are all disclosed by Donner, the exemplary tool that we've
8 discussed, tool 50 with cutting edge 52, which has cutting edges, as well as
9 rasping surfaces.

10 JUDGE FLAX: So, looking at Donner, what part of Donner is the
11 open tip? Can you just walk through that?

12 MR. NELSON: It would be the open space between --

13 JUDGE FLAX: What figure should I look at? Let's say I'm
14 looking at --

15 MR. NELSON: It is 22A through D, or --

16 JUDGE FLAX: Okay.

17 MR. NELSON: -- probably --

18 JUDGE FLAX: I'm looking at that. So, I see a -- 22C shows a
19 cross-section from the end, I suppose, of the device, and it looks like a U
20 shape. So, understanding that cross-section, walk me through here what is
21 the open tip part of this?

22 MR. NELSON: The open tip would be the end of the cutting head,
23 where the three sides meet. So, you have two opposing sides, the cutting
24 elements 196, that have the leading cutting edge 216, and then the broader
25 structure could be referred to as well, 202 would be the tip of that. So, you

1 have -- you create a rectangular shape that has an open tip, it just doesn't
2 have -- it has three sides instead of four.

3 JUDGE FLAX: What would require four sides, according to
4 Patent Owner?

5 MR. NELSON: Well, Patent Owner's position is that in order to
6 have an open tip, you have to have an enclosed void. That's my
7 understanding of Patent Owner's position.

8 JUDGE FLAX: You disagree with that?

9 MR. NELSON: I disagree with that. I mean you have a void
10 created -- you have a space or void created between these three sides. It
11 creates a three-dimensional kind of implant shape or cut in the joint.

12 JUDGE FLAX: So, that -- would that label of 206 in Figure 22C,
13 is that the open void area that you're talking about? I mean maybe that's not
14 the way it is used in the Patent but it shows where a void is?

15 MR. NELSON: Right, right, that open space between the three
16 sides.

17 JUDGE FLAX: Okay. Thank you.

18 MR. NELSON: All right.

19 JUDGE WOODS: And Mr. Nelson?

20 MR. NELSON: Yes.

21 JUDGE WOODS: If I could interrupt to ask question. So, do you
22 provide a definition for open or, you know, I understand Petitioner's, or I'm
23 sorry, Patent Owner's position to be that it is some sort of enclosure, but
24 what could you point to in the record to support your position that that U-
25 shaped, the gap between those two lateral sides is an opening?

1 MR. NELSON: I believe we find that in the petition, I'm looking
2 for the particular reference. Can we address that in rebuttal? Save that until
3 the end? I'm having difficulty locating it at the moment. But in the petition,
4 what I'm finding is that we're defining that the cutting tool creates an implant
5 void in the sacroiliac in Compton.

6 JUDGE WOODS: Okay. Thank you.

7 MR. NELSON: Yeah. Okay. So, the last limitation that we
8 haven't covered yet, is if we go to slide 19 of the demonstratives, is the use
9 of, or the method without the use of a rotary cutting instrument, which both
10 Donner and Black disclose, which we discussed before, and we explained in
11 the petition at page 11. With respect to the Donner in page 36, with respect
12 to Black.

13 We go to slide 21, reading motivation, complying all of the
14 sacroiliac fusion references, disclose methods and instruments in the field.
15 Combinations are merely simple combinations as we've discussed. And one
16 of ordinary skill in the art would be able to take these instruments and
17 without any real ingenuity or new experimentation to adapt them to a single
18 method utilizing the more efficient aspects such as Donner's slap hammer
19 tool with cutting and rasping head, blocking mechanism of Sharma to arrive
20 at a method like that in the '129 Patent.

21 With respect to Sharma, we go to slide 23. Again, the universal
22 impactor of Sharma is expressly directed towards orthopedic procedures.
23 So, you can reference the petition, page 53. There's a modular in that can be
24 connected to different types of instruments, such as chisels and wraps, or
25 combined chisel, rasp head like that of Otte or Donner. So, you have

1 improvement there with Sharma in being able to lock the handle into
2 position to --

3 JUDGE FLAX: Counsel, you've got about five minutes until
4 you're out of your time. But you -- so you won't eat into your reserve time.
5 Of course, you don't have to stop. You can divide it up as you'd like. I just
6 wanted to give you a warning. And perhaps you might use some of the time
7 to explain the Martz reference. And first of all, is it a required reference in
8 the petition for any your grounds? And secondly, what is your actual
9 argument that the very end of Martz's device cuts bone in the SI joint use?

10 MR. NELSON: Well, okay. So, Martz is in, for instance, Ground
11 5, whereas the combination with Donner and other references, I would treat
12 it like Otte. You can utilize this rectangular structure to create a rectangular
13 void in the joint, right, whereas Donner would cut a bit of a different shape.
14 With respect to the cutting edges, Martz is, of course, adaptable by one of
15 ordinary skill in the art to have a leading cutting edge. But also, it discloses
16 that the rasping surface isn't necessarily on structure 369, and 369 find in
17 Figures 76A through 76B. It discloses that the rasp services 372 and 374
18 move to different locations on the cutting edge. That statement is found at
19 paragraph 306 of Martz. And so, Martz itself discloses that it can be in a
20 different location. But of course, one of ordinary skill in the art would be
21 able to, you know, without --

22 JUDGE FLAX: I guess here's the answer. I get it. The rasp is the
23 abrading part of it, right? But the claims require basically that the leading
24 edge has an open tip and it has a cutting part for cutting bone. And what I
25 understand Patent Owner's argument is -- is that this Martz reference has

1 various cutting edges. But the ones that are most distal that you would
2 consider, you know, to be the claimed, what does the claim say exactly? It
3 says, to be the open tip comprising a cutting edge. So, that open tip and that
4 cutting edge of Martz at the leading edge of the open tip, which is what
5 matters per the claim, Martz says that that doesn't cut bone, but says that that
6 cuts disc tissue. And then that rasping surface that's immediately adjacent to
7 it can cut bone, according to paragraph 306. So, how do you, what's your
8 response to that? Like why would that be -- what is it? Is it made of a
9 different material that couldn't cut bone? Is it not shaped correctly to cut
10 bone? What is your argument about Martz being suitable for cutting bone
11 with that tip?

12 MR. NELSON: Well, a couple of things. One, that the guide
13 members 368, excuse me, looking at the -- 368 and 368 prime can cut bone.
14 But you can scrape bone, right? So, it can be used to scrape disc material
15 and bone from the adjacent vertebrae. So, it's made of a material that's
16 capable of cutting bone. Now, that, it doesn't expressly say so in Martz.
17 You know, it's a -- that the leading edge of 368 and 368 prime can't cut bone.
18 It just says, you know, that it's positioned to attack the boundary between the
19 intervertebral disc and the intervertebral body. That doesn't mean it can't cut
20 bone. That's just, that was the job described in Martz. But it does say,
21 Martz does say that those structures are capable of scraping away bone
22 material from adjacent vertebrae. That's found in our paragraph 306.

23 JUDGE FLAX: Part 368 of Martz, which is on the outside of
24 those leading, I don't know if you'll call them, arms coming out of the end of
25 it. Those can cut bone, they're for abrading bone, and in the tips of it, which

1 are 369. So, your point is that all that can cut bone? I mean, if 368 can cut
2 bone and 369 can cut bone, is that your point?

3 MR. NELSON: I'm saying the material is sufficient to cut bone.
4 Is it sharp enough to cut bone at the very tip? It doesn't say yes or no in
5 Martz.

6 JUDGE FLAX: Okay. Well, you're passed your point that you
7 wanted to reserve. Do you want to stop now and save your time, or do you
8 want to keep going?

9 MR. NELSON: Well, if I address the questions that the Board had
10 on Grounds 1 and 5, if not.

11 JUDGE FLAX: I don't know that I have any specific questions on
12 it. Judge Woods or Valek, do you have any specific questions about that?

13 JUDGE WOODS: No further questions.

14 JUDGE FLAX: I think we don't have any right now, but maybe
15 we'll ask you later based on what your opposing counsel says.

16 MR. NELSON: Okay. I'll reserve the rest of my time then.

17 JUDGE FLAX: All right. So, you'll have 18 minutes at the end
18 rather than 20.

19 MR. NELSON: Thank you.

20 JUDGE FLAX: All right. Patent Owner's counsel, you're up, and
21 you can start when you're ready. If you'll tell me how much time you want
22 to reserve.

23 MR. LYTVYN: Fifteen minutes, please.

24 JUDGE FLAX: Okay. So, you'll have 45 then. Let me -- you can
25 start when you're ready.

1 MR. LYTVYN: May I please the Board? Today we're discussing
2 the patentability of Claim 1 in light of the arguments presented in the
3 petition. The reason why Patent Owner requested for this oral hearing is I
4 would like to offer myself to the Board's disposal to help the Board reach the
5 correct decision in this case. Fortunately for Patent Owner
6 (INDISCERNIBLE) the correct decision. In this case, alliance was finding
7 that the Petitioner has not carried his burden of proving unpatentability of
8 any of the challenged claims. And I'm very well familiar with technology as
9 a record, the prior art, and the law governing various aspects of this trial.
10 So, at any point, please ask me any questions that you feel like would help
11 you answer to arrive at the correct decision in this case.

12 JUDGE FLAX: Okay. Thank you.

13 MR. LYTVYN: So, if we could go to, I think it was 2009. This is
14 Patent Owner's demonstratives.

15 JUDGE FLAX: Okay.

16 MR. LYTVYN: On slide 2 is the listing of the obviousness
17 grounds. So, there are five obviousness grounds. Ground 1 relies on
18 Compton, Donner, Otte, and Sharma. The remaining Grounds 2 through 5
19 rely exclusively on Martz for the open tip and the cutting edge of limitations
20 and all five Grounds in the case involve Sharma. If you go to slide 3, here's
21 an excerpt from Claim 1 of the '129 Patent. And I highlighted the best of
22 limitations in this case. So, the Claim 1 '129 Patent is directed to method of
23 performing sacroiliac joint fusion procedure, and this method involves an
24 abrading device which has a combination of these features that involve an
25 abrading head with an open tip. An open tip must have a cutting edge

1 disposed of the leading edge, and the cutting edge must be configured to cut
2 bone. In addition, the abrading device must have a slide hammer assembly
3 that includes a releasing means for transitioning the slide hammer assembly
4 between the lock position and the release position.

5 If we go to slide 4.

6 JUDGE FLAX: Let me ask you a question. So, before I
7 interrupted your opposing counsel and said that I didn't think Patent Owner
8 seemed to be contesting anything up to the point where this claim gets to an
9 open tip, right. And then your argument seemed most focused on whether or
10 not that aspect would be obvious based on the prior art and the releasing
11 means would be obvious based on the prior art. Am I accurate there or am I
12 mistaken?

13 MR. LYTVYN: You're accurate, Your Honor.

14 JUDGE FLAX: Okay. Thank you very much. Sorry for
15 interrupting. You can go ahead.

16 MR. LYTVYN: If you go to slide 4, it's a very important slide.
17 This is an excerpt directly from the petition. It shows for limitation 1(d) and
18 the petition provides a chart on pages Roman numerals 9 to Roman numeral
19 11 where Petitioner assigns these numerical values and names to various
20 limitations. So, for example, the limitation that discloses the operating
21 device is limitation 1(d). For that limitation, Petitioner relies on Schifano,
22 Compton, and Black, which are the base references. And then for the
23 limitation 1(d), Roman numeral 1(d), which is the open tip and the cutting
24 edge limitation that we just saw a second ago on the previous slide,
25 Petitioner relies on Donner, Otte, and Martz.

1 And finally, for the limitation that requires a slide hammer with the
2 releasing means, Petitioner relies on Sharma across all five Grounds. So,
3 this assortment of prior art references is important because in order for the
4 Petitioner to establish obviousness of the challenged claim, Petitioner must,
5 at the very least, set forth a cohesive combination of the prior art references,
6 and the Petitioner's demonstrative of telling 27, 27 of the 30 slides that the
7 Petitioner just presented, all pertain to alleged relatedness of the prior art
8 overlap between the prior art. Here's a quote from Petitioner's previous
9 presentation. There will be no issue adopting prior art to combine it
10 together, but even if Petitioner is correct in that regard, it is still not
11 sufficient to establish obviousness. I'm just going to read a case law
12 statement into the record. This is from the Board's decision in ADT v.
13 Vivint, IPR2022-00634, paper seven, this is from non-institution decision on
14 October 4, 2022. It is well established that similarity in subject matter is
15 insufficient by itself to establish that a person having ordinary skill in the art
16 would have been motivated to combine the references. And that decision
17 cites multiple Federal Circuit cases, most prominently *Microsoft*, *Lee*, and
18 *Fish*.

19 JUDGE FLAX: So, counsel, I think you're right on that. But what
20 I understood the Petitioner's position to be is that they are replacing what
21 would have been several tools to be used, in maybe Compton or Black's
22 systems, with a single tool for the sake of efficiency. Now, why is
23 efficiency not a good motivation to do that?

24 MR. LYTVYN: Absolutely. So, let's start with the petition itself,
25 because as the case law requires, Patent Owner and the Board in this case is

1 limited with the arguments that are presented in the petition. So, the petition
2 itself sets the four corners of what the Petitioner's challenge is. So, if we go
3 to page 55 of the petition, this is Ground 1. Is everybody on the same page?

4 JUDGE FLAX: Okay.

5 MR. LYTVYN: I want to give you a second so we can all read
6 this together.

7 JUDGE FLAX: Page 55. Yes.

8 MR. LYTVYN: So, at the very bottom, that limitation that we just
9 highlighted about the abrading device. Petitioner explained exactly which
10 structural feature Petitioner realized to show obviousness of this abrading
11 device. But there are actually three limitations grouped together. So, it's a
12 braiding device with abrading surfaces. And here, it's a very short quote, I'm
13 just going to read it into the record. Compton discloses a broach, 148, in
14 parenthesis, abrading device, having an incising member, 164, having
15 cutting teeth, 166, on the closing size of the incising member, 164, for
16 preparing the bone tissue in this eye joint for fusion. And the broach, 148, is
17 inserted into the side joints through the retraction guide, 122, parenthesis
18 working channel. That's the end of Petitioner's argument with respect to
19 obviousness of the abrading device, having an abrading head with resting
20 surfaces.

21 Now, if we move on to the next limitation, which talks about an
22 open tip and the cutting edge, we can see that Petitioner relies on Donner,
23 and then separate it relies on Otte. And nowhere in the petition does it
24 explain how, why, or even says that the broach, 148, which is the only
25 structural feature in Ground 1 that is being cited for the abrading device with

1 an abrading head, having resting surfaces. As to why it's being combined
2 with Donner or Otte, that's simply not even mentioned, the petition rely
3 alone, having any kind of motivation for making that combination. And we
4 don't even know what combination would be, because again, there's no
5 argument in the petition about combining broach 148 of Compton with any
6 other structural element. And then if we proceed to Ground 2 --

7 JUDGE VALEK: Yeah, counsel, before you move on, what about
8 the, if you turn to page 51 to 52 of the petition, there seems to be some
9 argument there about why it would have been obvious to combine the joint
10 preparation tool of Donner with the SI joint method of Compton. And I
11 think this is what Judge Flax was alluding to earlier. What the petition says
12 there is that this would allow you to do all this with a single tool rather than
13 have multiple separate tools, such as a chisel, a rasp, and other tools. Why
14 isn't that sort of general efficiency motivation sufficient? Even if they don't
15 get down to this very detailed level about the broach and combining that,
16 they seem to be saying you would do it the way they talk about doing it in
17 Donner because this lets you do everything with one tool or a smaller
18 number of tools.

19 MR. LYTVYN: Well, again, there's a reason why case law
20 requires Petitioners to plead their case with particularity, and why the burden
21 is on the Petitioner, so this way it's very clear to understand exactly what
22 combination of prior art is being secured. In order for Petitioner to prevail,
23 Petitioner must explain not just why Compton is being combined with
24 Donner, but specifically why Compton's broach 148, which is the only
25 structural feature cited for the multiple limitations, including abrading

1 device, abrading head, and resting surfaces, why that structural feature is
2 being combined with some Donner feature. Petitioner fails to do that. In
3 this section, the motivation to combine Petitioner provides this conclusory
4 reason for combining Compton with Donner, which states, and I'll quote it,
5 predictable improvements in efficiency. Again, Petitioner leads us to the
6 Board and the Patent Owner to read between the lines what these predictable
7 improvements in efficiency are because none of them are stated here outside
8 of that Donner's tool is efficient and it's being used to replace, or I guess in
9 addition to Compton's chisel and rasp. But Compton does not even disclose
10 a chisel and a rasp. So, again, I guess the argument of Patent -- and this is us
11 filling in the gaps because we don't have enough particularity here. I guess
12 what the Petitioner meant but didn't say is that the drill and the broach of
13 Compton are being replaced with the joint preparation tool of Donner
14 because Donner combines the -- it performs the functions of the drill and the
15 rasp with a single tool. But again, that's me filling in the gaps of the
16 petition. I want to be really clear for the record that that's not something
17 that's stated in the petition. And then again, if that were the argument that
18 the Petitioner was making, then subsequently in the part that we just
19 addressed, why is Petitioner relying on the broach 148 for the operating
20 head, operating device, and resting surfaces limitation instead of the
21 Donner? And I read this petition without exaggeration probably close to 200
22 times over the course of the last year. And I could not give you an answer
23 because it's not included in here. And if you look at this --

24 JUDGE FLAX: Counsel, on this point you made, I will be
25 interested to see how your opposing counsel responds to that point.

1 MR. LYTVYN: Thank you, Your Honor.

2 JUDGE FLAX: What is more efficient about using Donner's
3 abrading tip over Compton's tip? I'm sorry. I just wanted to say it out loud
4 so that everyone can hear it. You can go ahead.

5 MR. LYTVYN: Okay. So, if you look at this motivation to
6 combine section, it's important to know that's the only section where any
7 kind of motivation or rationale for any combinations are being made because
8 as you'll see as we just went through Ground 1 after this, Petitioner just
9 provides these short names for limitations and then provides direct citations
10 to prior art without any further explanation. So, if you look here, the first
11 paragraph, and by the way, in Patent Owner response, we take this
12 motivation to combine section and literally break it down sentence by
13 sentence to show how deficient it is. And in many cases, it is actually
14 factually erroneous. Not that it matters anyway, but the tools that are being
15 mentioned are not even mentioned. So, Compton does not recite a chisel
16 and rasp. So that's factually wrong. And then when we look at different
17 overlap and instrumentation methodology, again, the instruments that are
18 being used across these references are not even related. And that's beyond
19 even the point because even if they were related, it's still insufficient to
20 prove motivation to combine. Again, just because the references could
21 potentially be combined doesn't mean that there's motivation to combine
22 them. So, if you look at this first paragraph, it talks about combining
23 Compton's method with the tool of Donner to achieve these predictable
24 improvements in efficiency, which Petitioner doesn't explain to us what they
25 are. When we look at the second paragraph on page 52, the one about Otte,

1 I'm glad that Judge Flax mentioned that it almost feels like Otte is included
2 as a parenthetical because there is no explanation as to why Otte would be
3 combined with anything or even what tool is being combined. It just says to
4 combine teachings of Otte with the joint fusion methods of Compton and
5 Donner. So, previously Petitioner talked about how the tool of Donner
6 being combined with Compton, and now he's referring to a method of
7 Donner. So, again, I'm just not clear exactly what is being combined with
8 what you achieve, what, and why. And then when we get to final paragraph,
9 it talks about Sharma. Sharma is being combined with Compton's non-
10 existent box chisel and rasp. So, again, it's not a cohesive combination of
11 prior references because even if Petitioner's argument that Judge Valek just
12 referenced, for example, if Donner's tool was used in Compton as a
13 substitute for some subset of Compton's tools, Sharma is not being combined
14 with Donner here. Sharma is being combined with chisel and rasp of
15 Compton. So, it's at the joint this assortment of these different prior art
16 references that Petitioner asserts are related to one another because they're
17 used either in a side joint or spinal surgeries. And Petitioner merely maps
18 various claim elements to these various tools without even setting forth a
19 cohesive combination of these elements, let alone providing motivation for
20 doing so. And that was Ground 1. Any questions regarding Ground 1?

21 JUDGE WOODS: I have a question, Mr. Lytvyn. So, I see your
22 point and I'm looking at the petition and I'm going to challenge you on the
23 reasoning for combining Compton with Donner. And so, I understand that
24 on page 56 of the petition, it appears that the Petitioner acknowledges that
25 Compton does not disclose an open tip with the leading cutting edge for

1 cutting bone tissue and relies on Donner for teaching that open tip for cutting
2 bone tissue. Wouldn't a skilled artisan make that combination for the
3 purpose of creating a void, which is discussed on page 56 for the purpose of
4 accommodating that implant?

5 MR. LYTVYN: Sorry, Mr. Woods, could you -- I don't know if I
6 caught what combination exactly are -- would you like me to explain?

7 JUDGE WOODS: Yeah, let's talk about the combination of
8 Compton and Donner, Ground 1. And so, I understand if you refer to page
9 56 of the petition.

10 MR. LYTVYN: Yes. So, page 56, we're talking about the
11 paragraph, the very first paragraph that starts with slide hammer, lock
12 position heading? So, in the first paragraph, the Petitioner on page 56 talks
13 about using Compton's approach. So, we're back to using Compton's
14 approach. And then in the second paragraph, I'll just read it out loud.
15 Donner discloses a slide hammer assembly for use in a side joint fusion
16 procedure. The joint preparation tool 50 of Donner includes a slap hammer
17 assembly and a cutting tool assembly 56. The tooling head 52 can be backed
18 out of the side joint using the slap hammer assembly by proximately sliding
19 the proximal handle 58 until it contacts a proximal stop feature 82. To
20 transmission, the transmission of proximal --

21 JUDGE WOODS: Mr. Lytvyn?

22 MR. LYTVYN: Yes.

23 JUDGE WOODS: I apologize. I think we might be on different
24 pages. So, let's step back. I am referring to page 56 of the petition, I
25 believe. And the heading is element 1(d)(i)(b) and the open tip cutting edge.

1 MR. LYTVYN: Sorry, my fault. I was on page 56 and then I kept
2 scrolling down the other thing.

3 JUDGE WOODS: Okay. I want to focus specifically on the open
4 tip with the cutting edge. And so, it appears to me that the Petitioner
5 acknowledges that Compton doesn't disclose an open tip with the leading
6 cutting edge. And I understand the Petitioner's position to be that Donner
7 teaches an open tip with the cutting edge and that's on that same page. And
8 so, I'm going to ask you, wouldn't a skilled artisan have modified Compton
9 based on Donner's teaching to include that open tip with the cutting edge for
10 the purpose of creating a void to accommodate the implant?

11 MR. LYTVYN: So, I think what you just stated is telling. And if
12 the reason for combining Compton with Donner is to achieve this open,
13 allegedly that Donner teaches this open tip with the cutting edge, then the
14 rationale for this modification is just hindsight bias in order to match these
15 various elements to the claim. There's no articulated advantage of why
16 Donner's alleged open tip, which is actually not open, why it would provide
17 any benefit over Compton's broach. It just, the first sentence says Compton
18 discloses an abrading device without an open tip and then we jump into
19 Donner which allegedly discloses an open tip, and there is no explanation as
20 to why we would replace Compton's broach with Compton's open tip tool
21 outside of that it seems to match the limitations of the claim that we are
22 trying to challenge.

23 JUDGE WOODS: What it -- is it fair to say though that that
24 opening at the tip provides a space for the removed tissue to be excavated
25 from the surgeon so that he could then have space to deploy the implant?

1 MR. LYTVYN: Yes. So, that's not stated in the petition. So, just
2 to be clear, we're again filling in the gaps that the petition leaves to our
3 imagination, which is exactly why Federal Circuit requires that the petition
4 must state its arguments with particularity so this way, we're not making up
5 arguments that Petitioner didn't even make. And second, if we want to -- so,
6 I'm struggling how to answer your question about combining Donner's
7 alleged open tip with Compton, when Donner doesn't allow for the dislodged
8 tissue to exit. And that's not my argument, this is testimony of both experts,
9 including Petitioner's. So, if you look at Donner, and I don't know if you
10 still have that cross-sectional view that we were talking handy, if you look
11 at, I believe that's Figure 22C. Do Your Honors have that in front of you?

12 JUDGE FLAX: Yes, go ahead.

13 MR. LYTVYN: So, when we look at that figure, there are two
14 rasping surfaces. One is 196, and the other one is 218. Donner discloses
15 that the whole point of having these two rasping surfaces on opposite sides is
16 so that you can simultaneously abrade the ilium and sacrum. So, there's no
17 void through which the dislodged issue can exit. And if we go to Patent
18 Owner's demonstratives slide number 32, that's Exhibit 2009. Slide 32 for
19 the record. So, here's a direct excerpt from Mr. Drewry's first deposition,
20 Exhibit 2004. And the question was, is there a void in this cutting head,
21 meaning Donner's cutting head, let me just take a look at, through which this
22 large bone can exit when the cutting surfaces, cutting ridges 210 embedded
23 in the bone, and the rasping surface, 196, is scraping the bone. Mr. Drewry's
24 answer, not in that configuration. So, even though Petitioner's argument is
25 not explained anywhere in the petition, during Mr. Drewry's deposition, we

1 got to the bottom of this issue as to why he believes that in his declaration.
2 He's changed his position during his testimony about why Donner has an
3 open tip? And allegedly, it's because according to Mr. Drewry, Donner's
4 tooling head could be used in a manner where this rasping surface 196
5 doesn't actually rasp the bone and doesn't make contact with the bone. And
6 then this, what Judge Flax pointed out is element 206. And if this rasping
7 head were to be used without element 196 performing its intended purpose,
8 then theoretically, the tissue could exit through that void. But that is not
9 what Donner discloses on slide 33. If you take a look at the figure, there's
10 that Figure 22C, the cross-section, it shows that there's no interior void
11 between these two rasping surfaces. And this is actual testimony of Patent
12 Owner's expert, Dr. Bovinet, who explained that when rasping surfaces 196
13 and 218 simultaneously contact the surfaces of sacrum and ilium as Donner
14 discloses that this large debris is precluded from exiting.

15 JUDGE WOODS: Hey, Mr. Lytvyn, if I could follow up with
16 another question. So, I see the point you're making with respect to Donner,
17 but the claim, I'm referring back to the claim and please help me if I'm
18 misunderstanding something, but it doesn't recite that the open tip be
19 positioned between a superior and inferior rasping surface. It just simply
20 recites an open tip comprising a cutting edge, disposed at a leading edge.

21 MR. LYTVYN: You also are correct, Judge Woods. So, it recites
22 an open tip, and that's the Board already construed this claim term and its
23 institution decision. Open tip requires an interior void. And if we could go
24 to slide 30. So, in slide 30 of Patent Owner's demonstratives, Exhibit 2009.
25 There's the Board's construction at the institution phase with the term

1 interior void emphasized. And if you'll go to the next slide 31, here's the
2 testimony from Petitioner's expert, Mr. Drewry. When asked about, so there
3 are two types of surgical tools. There are open tip tool and a closed tip tool,
4 and if you look at testimony of Mr. Drewry and Dr. Bovinet, they both have
5 no difficulty immediately understanding what an open tip tool is and what a
6 closed tip tool is. And here was the question that I asked Mr. Drewry during
7 his deposition. So, what is your construction of the term open tip? And
8 here's the answer that he provided. You can tell that it's open because there
9 is a void behind those papered edges that allow for tissue removal and kind
10 of passage of that material during that abrading and cutting process. And
11 there are additional citations and Patents on them. And there are additional.
12 Sorry, I heard somebody's voice coming.

13 JUDGE FLAX: It's an artifact. You can keep going.

14 MR. LYTVYN: Yes. So, there are additional citations to this
15 deposition transcript where Mr. Drewry multiple times explained that the
16 key features that distinguishes an open tip instrument or a closed tip
17 instrument is that in an open tip instrument, there is this interior void behind
18 the cutting tip, again, his words, not mine, that allows for removal of the
19 tissue. And what's failing if we go to slide 32, you're just on this slide a
20 second ago, we talked about the quote pasted at the top about Mr. Drewry
21 admitting that it's not -- that Donner does not have an open tip. And then if
22 you'll look at the second quote, he was explaining that when you use the,
23 when a person of skill in the art, if they were to use Donner's tool in a joint
24 procedure, it would just break tissue and you may have to go back in there
25 afterwards and have it removed or you flush it out with a kind of irrigation

1 during the surgical procedure.

2 So, I know we took the original questions that Judge Wood's posed
3 was about combining Donner's open head with Compton's method, but we
4 could not talk about that combination without addressing that Donner doesn't
5 actually teach an open tip and the motivation that Judge Woods proposed for
6 combining Donner with Compton is because Donner has this open head that
7 permits tissue to exit is actually -- that's not a motivation to combine because
8 Donner does not have that feature as confirmed by both experts.

9 JUDGE WOODS: Thank you.

10 MR. LYTVYN: I know I've been going for a while, but I really
11 want to just touch on limitation releasing means. I know Judge Flax
12 indicated in the pre-hearing conference that he's heard enough arguments
13 about claim construction already, but I really want to address Sharma
14 because it really is dispositive to all grounds. There's a whole body of law
15 that governs how means plus functions limitations are interpreted. And
16 during the course of working on this case, I have learned more about
17 construction of means plus function limitations than I ever knew existed.
18 So, if you have any legal questions regarding this area of law, I can
19 hopefully provide some insightful answers.

20 If we go to -- so if we go to slide 11, Exhibit 2009, slide 11, Patent
21 Owner's demonstratives, here's an excerpt from institution decision where
22 the Board, excuse me, found that we find no reason why the structure for the
23 releasing means should exclude Sharma arrangement of hammer sleeve
24 locking mechanism and shaft. So, if you go to slide 12, this is an excerpt
25 from Patent Owner's sur-reply. So, here's the reason. The Federal, and this

1 is direct quote, the Federal Circuit case law is clear that a means plus
2 function limitation claim is limited to the structure disclosed in the
3 specification and equivalents. And then to quote another case, *J & M*
4 *Corporation v. Harley Davidson*, the literal scope of a properly construed
5 means plus function limitations does not extend to all means for performing
6 certain functions. Rather, the scope of such claim language is sharply
7 limited to the structure disclosed in the specification and its equivalents. So,
8 if we go to slide 13, here's a side-by-side comparison of Sharma Figure 4
9 that Your Honors just discussed with Petitioner, and the Figure 21 from the
10 '129 Patent. So, the reason why Sharma doesn't teach the releasing means is
11 because that bullet tip and configuration where the proximal end of the
12 camera sleeve clicks into the proximal tip of the shaft is simply not disclosed
13 in the '129 Patent. So, if '129 is a releasing means limitation, it's sharply
14 limited to the structure disclosed in the '129 Patent, and these structures are
15 not disclosed in the '129 Patent. It means that Sharma's locking mechanism
16 is outside the scope of their releasing means in the '129 Patent. And Your
17 Honor is certainly correct. If you go to slide 20, the Board only needs to
18 construe the terms that are in controversy, which releasing means here is in
19 controversy, and only to the extent necessary to resolve the controversy. So,
20 the claim construction that Patent Owner provided, while it's correct and
21 definitely adhere to every legal tenant set forth by the Federal Circuit
22 regarding limiting the structures of the means plus functions limitations to
23 what is disclosed in the specification of the Patent. The Board is at liberty to
24 adopt whatever claim construction it wants and read whatever structural
25 elements that it needs. But the key here is that Sharma does not disclose the

1 releasing means of the '129 Patent, and therefore, irrespective of how the
2 Board construes the releasing means, specifically the corresponding
3 structure for the releasing implementation, that construction must be
4 sufficiently specific to exclude Sharma's locking mechanism because it is
5 simply outside the scope of the '129 Patent.

6 There any questions regarding that? I know it's a very complex
7 area of Patent law that I didn't know existed a few years ago, and I feel like
8 I'm -- don't want to call myself an expert in it, but I'm well versed in it. So,
9 if you have any questions regarding means plus function releasing means I
10 would love to answer them.

11 JUDGE FLAX: I don't have any questions on that, but I would
12 like to revisit the motivation and the combination of the prior art. Now, I
13 know that in our pre-hearing conference we focused you on Grounds 1 and
14 5, but, you know, you sort of made me look back at the rest of the petition to
15 see what it had to say exactly about motivation to combine. And what I'm
16 seeing is that in the sections where, you know, it's clearly the motivation to
17 combine sections of each ground. For Ground 1, the point being made is
18 that the combination of Compton and Donner would combine separate tools
19 such as a chisel, a rasp, and other tools. So, I understand that's a bit of a
20 broad statement, but why is that not sufficient? Why is that not sufficiently
21 explaining what's happening when you make that combination?

22 MR. LYTVYN: Sure. So, let's go to page 55 of the petition,
23 which is where we started. So, even had the petition and Judge Flax,
24 yourself, just stated that it's a pretty broad statement which synonym for
25 broad would be conclusory and on specifics. But let's go to page 55 and let's

1 look at exactly what Petitioner is citing for the limitations abrading device,
2 abrading pad, and resting surfaces. And the only structure that's being cited
3 for those limitations is broach 148 of Compton. So, the motivation to
4 combine that Petitioner would have to set forth in order to establish
5 obviousness would be how is it broach 148 but being cited for the abrading
6 head with abrading surfaces, how's it being combined with references that
7 are being cited for the open tip which is Donner's joint preparation tool that
8 we just discussed and Otte's abrading hat. And Petitioner does not even
9 contemplate that combination let alone provide motivation for making it.

10 JUDGE FLAX: Okay. And then I explored further as you were
11 talking about claim construction, the motivation on the other grounds. And
12 so, what I found was, for example, under Ground 2, one of the points is that
13 same thing, you know it's saying that you combine them, a function of a rasp
14 with the function of a chisel. Some grounds do make the point that when
15 you do that you can omit the use of a drill. It is relying on Martz for that
16 purpose, but it is saying that. Why is that not sufficient? So, if you could
17 use another tool instead of Compton's abrading tool that would allow you to
18 do it without a drill, why is that not more efficient?

19 MR. LYTVYN: That's not an argument that Petitioner made, so
20 I'm not sure how to respond to it. Again, so let's say theoretically, I think
21 you're talking about Ground 2 now, or still Ground 1?

22 JUDGE FLAX: I'm talking about Ground 2 and I'm looking at
23 page 62 of the petition.

24 MR. LYTVYN: So, if we could scroll down, sure, if we could
25 scroll down just a few pages to 65.

1 JUDGE FLAX: Okay.

2 MR. LYTVYN: So again, the limitation is about abrading device
3 grouped together, if you go to the bottom of page 65. And the structure, so
4 not the reference, the reference is a very broad term and these references are
5 250 pages long, so there's a lot of subject matter in these references. So,
6 instead of talking about references, I'd rather talk about specific structure,
7 specific method steps, because that's what's being combined. Saying
8 combine Donner with Compton is combining two 200 page references and
9 their infinite number of combinations that could be.

10 JUDGE FLAX: So, let me interject here. What it's saying is that
11 Schifano reference has a chisel and a rasp, and then Martz puts these two
12 things in one tool with an open tip, and that would be the two into one. Am
13 I reading that correctly?

14 MR. LYTVYN: You're reading correctly, depending on which
15 section of the petition you're reading. So, if you're reading the section that
16 talks about motivation for combining the tools under the motivation to
17 combine heading, you're absolutely correct. But if we scroll down to page
18 65, we're on into the same issue that we just discussed about Ground 1. So,
19 at the bottom of page 65, the limitations with respect to the abrading head,
20 abrading device, and rasping surfaces, again, all addressed under single
21 heading, and the only structure cited for these limitations is Schifano's rasp.

22 JUDGE FLAX: Okay.

23 MR. LYTVYN: There's no other structure cited for those
24 limitations. So, when they keep scrolling through the open tip cutting edge
25 limitation, now we get Schifano's box chisel. So, it's a whole separate tool.

1 And then we also get Martz's chisel thrown in there as well. So, the
2 combination that Petitioner would have to prove obviousness of is not
3 merely proving that Schifano is combinable with Martz is that Schifano's
4 rasp, which is the structure that is being cited for three of the sub-limitations,
5 1(d), 1(d)(1)(a), et cetera. The abrading device with the abrading head
6 rasping surfaces, that's Schifano's rasp must be combined with either
7 Schifano's box chisel, which is what's being cited for open tip/cutting edge
8 limitation, or Martz's chisel head. And that limitation -- that combination is
9 not even contemplated in the petition, let alone there's some kind of
10 motivation for making that. And if we continue with Grounds 3, 4, and 5,
11 they're just as deficient. And all of that is addressed in Patent Owner's
12 response and reply.

13 And then when you get to Sharma, there's no combination of
14 Sharma with any of these abrading devices. Sharma is being combined with
15 Compton's non-existent chisel and rasp in Grounds 1 and 3. Sharma is being
16 combined with Schifano's chisel and rasp in Ground 2 and in Grounds 4 and
17 5, Sharma is being combined with Black's chisel and rasp. So, there's
18 absolutely zero combination of Sharma with any abrading tools that's being
19 cited for the open tip cutting implementation. So, even if theoretically,
20 petition set for the combination of using one of these multifunctional tools
21 instead of the rasp and chisel or drill and a rasp. So, even if theoretically,
22 petition set a clear argument that such combination tool would be used in the
23 base method, every single ground still lacks any reasoning for combining
24 that tool with Sharma's slap hammer. And it's not just reasoning for
25 combining, it doesn't even contemplate combining that tool with Sharma's

1 slap hammer.

2 JUDGE FLAX: So, your time has expired if you want to stop
3 now, or you can keep going. It's up to you.

4 MR. LYTVYN: If you have any questions about anything just
5 discussed that you would like me to answer, I think it'd be a wise use of my
6 time to answer those. If not I'll reserve the rest of my time. So, you can
7 finish your discussion with Petitioner.

8 JUDGE FLAX: So, under Ground 3, for example, one of the
9 points that Petitioner makes is that when you combine Martz with Compton,
10 you now have a system where you don't need to use a drill. Is that not a
11 good motivation for combining the references in the way that they proposed
12 doing it?

13 MR. LYTVYN: But why wouldn't you want to use a drill?
14 There's zero argument in any of these grounds as to why using a drill is not
15 desirable outside of that what's claimed in Claim 1. So, again, if our
16 motivation here is to try to invalidate Claim 1 using impermissible hindsight
17 then that could be a motivation. But other than that, there is zero reason in
18 this petition as to why using a drill is somehow undesirable. And, in fact, if
19 you look --

20 JUDGE FLAX: Following their efficiency point, isn't it always
21 more efficient to omit an extra step?

22 MR. LYTVYN: I'm glad you brought up that point, and I know
23 I'm using my rebuttal time but this is very excellent use of my time I believe.
24 So, with respect to efficiency. So, the drill, and again, we are so outside of
25 the four corners of the petition but I just want to address this hypothetical

1 argument that the Petitioner never made. So, let's -- drills are a power tool
2 that is extremely efficient at making a hole. If I'm trying to make a hole, I
3 am taking out my Milwaukee drill instead of getting a chisel and a hammer
4 and trying to make a hole that way. But outside of that, so reducing the
5 number of steps, I would like to direct you to exhibit, excuse me, I'll get my
6 exhibit number straight in a second. Mr. Drewry's second declaration
7 Exhibit 1022.

8 JUDGE FLAX: Okay.

9 MR. LYTVYN: Give me one second, I'll give you the --
10 paragraph 60 on page 38.

11 JUDGE FLAX: Okay.

12 MR. LYTVYN: So, here, Mr. Drewry is trying to explain about
13 why there is a void in Donner's tool and why that rasping surface 196 doesn't
14 contact the bone, even though Donner says it does. And in doing that, what
15 the process that Mr. Drewry is describing is that there are multiple passes.
16 So, he's referring to initial passes and then referring to multiple passes. And
17 I'm trying to find a good excerpt to read into the record. Because cutting the
18 cortical bone with the cutting elements 192 of Donner requires multiple
19 passes for the keys 214, referred as 218 in my deposition, of cutting
20 elements 192 to essentially saw to their full depth in the ilium, such that
21 surface 196 in contact with their particular surface within their particular
22 space of the sacroiliac joint. So, basically what Mr. Drewry is describing
23 here is if you were to use this tool of Donner, and you were to hypothetically
24 make this combination with Compton, instead of having a single pass, you
25 would be jamming that thing in and out of the patient's joint until you make

1 a sufficiently deep cut in the ilium or sacrum. So, I don't know how many of
2 these passes, each of which could count as a step you need to make in order
3 to compensate on efficiency of having a drill that can make a very nice
4 round hole in a matter of seconds. Instead of hammering this Donner tool in
5 and out, in and out, in and out multiple times into the patient. So, if I don't
6 know how that increases the efficiency with respect to using a drill. And
7 again, all of this is so outside of the scope of the petition, but I just wanted to
8 address this hypothetical argument.

9 JUDGE FLAX: Okay. All right. Thank you. Unless someone
10 else has a question for you, what I'll say is you'll have, instead of 15, 12
11 minutes for rebuttal.

12 MR. LYTVYN: Thank you, Your Honor.

13 JUDGE FLAX: Okay. All right. Mr. Nelson, you can return to
14 the virtual podium here. And you'll have 18 minutes for rebuttal. You can
15 start when you're ready.

16 MR. NELSON: Okay. On the last point, Mr. Lytvyn makes the
17 argument that a drill is more efficient, and broach versus a chisel. But you'd
18 still have to do both steps. You'd still have to jam the tool in and out in
19 order to rasp the joint. So, the combination of a chisel and a rasp together is
20 one step instead of forming the step of the drill and then jamming the rasp in
21 and out.

22 JUDGE FLAX: Okay. So, with regard to Ground 1, in which
23 Compton is a reference that uses a drill, where do you make that point in
24 your petition?

25 MR. NELSON: Beyond just saying that it's more efficient to use a

1 combined cutting and rasping tool, I don't make any particular point beyond
2 that. So, Mr. Lytvyn addressed the fact that there is a clerical error risk, you
3 know, talking about a chisel instead of a drill in Ground 1, and the Board
4 acknowledged that in the decision to institute. It doesn't change the fact that
5 Compton has two tools that it uses to create the implant void in the sacroiliac
6 joint, the drill and a broach. The efficiency is performing those two
7 functions with a single tool and a single setup. And the fact that a drill is
8 efficient doesn't change the fact that you still have to go in there with a
9 broach and set up a new tool and engage in that multiple pass exercise in
10 order to shape the joint or shape the void in the joint.

11 JUDGE WOODS: Okay. Mr. Nelson, if I could interrupt to ask a
12 question I would find it helpful. So, is your position that you would
13 maintain using a drill in your -- with your proposed combination before
14 using a broach?

15 MR. NELSON: No. No. It's the combination of a chiseling and
16 rasping tool replaces the drill and the broach.

17 JUDGE FLAX: I do know that you say the SI joint can be
18 prepared in the absence of a drill or any other rotary cutting instrument. I
19 mean I get why you have to say that because it's a claim limitation. Does
20 that apply? Should we apply that statement to your reason for modifying
21 something? Sort of -- that's on page 59. So, it's a little bit disjointed. But I
22 guess my problem is I'm not seeing a direct statement as to what is more
23 efficient when you use Donner's combination head in Compton's system
24 without having to fill in some gaps with, you know, my reading of the
25 references, or a bit of common sense on my part. Tell me why I don't have

1 to do that.

2 MR. NELSON: Tell you why you don't have to do what exactly?

3 JUDGE FLAX: Why do I not have to use my common sense?

4 Because I don't think you should be relying on the panel's common sense in
5 filing a petition with your arguments for unpatentability. They should be
6 made in your petition. So, walk me through why I don't have to fill in any
7 gaps.

8 MR. NELSON: Okay. So, okay. So, Compton, sorry, I'm having
9 to grab.

10 JUDGE FLAX: Here's my analogy for you.

11 MR. NELSON: Disclosures.

12 JUDGE FLAX: By analogy, this is a yard full of all the hardware
13 and tools that I need to build a house. And I could go ahead and build you
14 that house. And it may look like the house on the plans that I don't have, but
15 it might not also. So, explain to me where I'm getting the plans for building
16 that house from your petition.

17 MR. NELSON: Right. So, the petition expressly states, it would
18 be obvious to combine use of the preparation tool of Donner with the SI
19 joint method of Compton because the joint preparation tool of Donner
20 prepares the SI joint services.

21 JUDGE FLAX: I'm sorry. I'll read along with you.

22 MR. NELSON: The petition, page 54.

23 JUDGE FLAX: Okay. Thank you. I'm there.

24 MR. NELSON: Sorry. Sorry about that. I'm scrolling through the
25 petition and talking at the same time. So, it would be obvious to combine

1 the use of the joint preparation tool of Donner with the SI joint method of
2 Compton because the joint preparation tool of Donner prepares the SI joint
3 or particular surfaces of the SI joint with a single tool instead of multiple
4 separate tools such as a chisel, a rasp, and other tools. And this is, I think,
5 the section Mr. Lytvyn addressed and said, you know, it doesn't have a
6 chisel, therefore, it doesn't make the argument. It says other tools and it's a
7 bit of a clerical error there by not mentioning the drill, but the drill is another
8 tool for cutting the joint.

9 JUDGE FLAX: And we're at page 54? Is it on page 54?

10 MR. NELSON: Yes.

11 JUDGE VALEK: Counsel, I think you may mean page 52.

12 MR. NELSON: Oh, I'm sorry, 52.

13 JUDGE FLAX: Okay.

14 MR. NELSON: And that's for an error. Yeah, it's the paragraph
15 bridging 51 and 52, my apologies.

16 JUDGE FLAX: So, within -- I have that same paragraph
17 highlighted that you just read and I had it highlighted before you read it. So,
18 your point is that the drill is a part of this list in terms of other tools?

19 MR. NELSON: Yes. Yes. So, again, acknowledging clerical
20 error with respect to chisels. It should have said, drill but. It's -- we're
21 talking about joint cutting tools, and we say other tools.

22 JUDGE FLAX: Okay. Let's move on to the other grounds. Same
23 question. So, is there a more explicit explanation about motivation to
24 combine and how to combine under Ground 2, which admittedly I have a bit
25 of a problem with the Martz reference. So, it's not as attractive as Ground 1,

1 but is there a better reason for combining these references? I mean, why
2 would you combine a chisel and rasp, I guess is the question, or how is
3 Martz's tool giving you the two for one that Schifano doesn't give you?

4 MR. NELSON: Schifano uses separate box chisels and a box
5 chisel and rasp. Okay, and while, you know, Martz is not configured for the
6 SI joint, it would present to one of ordinary skill in the art, which is again, a
7 high level of skill in this case, the concepts for the combined tool. Now, can
8 you take Martz and apply it directly without any modification whatsoever?
9 It doesn't expressly say that in Martz. It doesn't say that cutting edges don't
10 cut bone. But it doesn't say that they do. The front (INDISCERNIBLE)
11 cutting edge that it does. But it does say that the rasping surfaces around
12 and at the edge without leaving cutting edge are able to cut through bone.

13 JUDGE FLAX: So, the point with Ground 2 is that Martz puts
14 Schifano's two separate tools into one? That's the idea?

15 MR. NELSON: Right. And so, that's, yeah, you could.

16 JUDGE FLAX: Okay.

17 MR. NELSON: The Martz teaches the combination. Yeah.

18 JUDGE FLAX: Let's talk then about Ground 3. Is it basically the
19 same thing? But you've now got Compton instead of Schifano. So, it's my
20 understanding that you replace Schifano's abrading device and drill? Is that
21 right? Because here it says such as a drill, right? It says on page 69, you've
22 included the word drill --

23 MR. NELSON: Right.

24 JUDGE FLAX: -- here. So, using Martz, you can replace the drill
25 and rasp of Compton with a single device?

1 MR. NELSON: Correct.

2 JUDGE FLAX: Okay. And then what about Black? Black has
3 two separate tools, the chisel, and the rasp. Same thing, Martz puts that into
4 one? Is that right?

5 MR. NELSON: That's right. You have the chisel and rasp.
6 Martz --

7 JUDGE FLAX: Does it say that?

8 MR. NELSON: The teaching of, I'm sorry, does the petition say
9 that it has a chisel?

10 JUDGE FLAX: Does the petition say that Martz would make it so
11 you could combine those into a single tool without the -- ?

12 MR. NELSON: Yes. Page 74.

13 JUDGE FLAX: Okay. I see that. And then moving to Ground 5,
14 which is sort of an alternative to Ground 4, but you're using Donner.

15 MR. NELSON: Right.

16 JUDGE FLAX: Is Donner doing the same thing that Martz is
17 doing in this combination?

18 MR. NELSON: So, Donner has a different -- the implant is a little
19 bit different shape, but it teaches the combination of cutting edges and the
20 rasp and Martz teaches the, I'm sorry, Martz is not (INDISCERNIBLE).
21 Yeah, so,

22 JUDGE FLAX: Martz is included, but I don't believe it's
23 necessary for Ground 5 to your advantage.

24 MR. NELSON: Yeah. Sorry, the heading is off. The shape, it
25 teaches the shape, the rectangular shape with cutting edges on opposing long

1 sides of the broach. So, it's similar to the chisel arrangement of Black.

2 JUDGE FLAX: And then when you're actually discussing how the
3 things are combined under Ground 5 in relation to Claim 1. There's a lot of
4 see above. So, --

5 MR. NELSON: Right. So, there's --

6 JUDGE FLAX: What are we seeing above exactly?

7 MR. NELSON: The combination of Martz with Black. So, that
8 the chisel rasp head of Martz in combination with the method of Black for a
9 combined.

10 JUDGE FLAX: Where does Donner come into play here? I don't
11 even see it mentioned.

12 MR. NELSON: Donner, it's in the first paragraph of motivation to
13 combine. Donner discloses somewhat a posterior approach implants, and
14 certain articulate space between. So, page 81.

15 JUDGE FLAX: Right, that makes sense. But then when you're
16 actually filling in the blanks of the combination you don't mention Donner
17 except for the fact that it uses a slap hammer. Slap hammer. So, and then,
18 you know, it does then below that advancing the abrasion, but you do site
19 Donner there using the joint preparation tool having its parts. Is that --

20 MR. NELSON: Right.

21 JUDGE FLAX: Is that referring to using Donner's tool, or Martz's
22 tool, or how does that work?

23 MR. NELSON: So, admissions that tool 50 having abrading head
24 to prepare (INDISCERNIBLE). So, yeah, the idea of using the cutting in of
25 Donner's incorporated into Ground 5. It's an oversight and I put it in the

1 specific elements of 1(d).

2 JUDGE VALEK: Counsel, I have a question for you. What about
3 the Patent Owner's argument that for each of the grounds, when you look at
4 the introducing of abrading device limitations, I guess it's limitations 1(d),
5 1(d)(i), and 1(d)(i)(a), that for each of those you only rely on sort of the
6 primary reference for that. And so, for example, for Ground 5, you're
7 relying on Black. But what you're saying the combination would be is that
8 you're getting rid of Black's tool and you're going to use Donner's tool and
9 now you only have to use one tool. But for those other limitations, you're
10 actually relying on Black's tool. Doesn't that create a problem with your
11 theory here?

12 MR. NELSON: Well, the approach is that to demonstrate that
13 Black discloses these limitations. It discloses introducing an abrading
14 device.

15 JUDGE VALEK: But if the combination or the rationale for the
16 combination is that we're not going to use Black's abrading tool anymore,
17 we're now going to use Donner's, for example, shouldn't you be showing
18 that Donner discloses those limitations, not Black?

19 MR. NELSON: Now, the motivation to combine talks about using
20 the tool of Donner. And then the combined tool is discussed in the open tip
21 cutting edge where Black doesn't disclose that limitation. That was the
22 approach. Perhaps it would have been clearer to mention Donner in the
23 foregoing limitations, but Donner is mentioned as replacements for the
24 motivation to combine.

25 JUDGE FLAX: You have about a minute left, counsel, if you

1 want to wrap up.

2 MR. NELSON: Okay. Try to get through. I wanted to do address
3 opposing counsel's arguments regarding the case law on means plus function
4 limitations. I think counsel misreads what it doesn't. I mean for instance,
5 quoting J & M Corp. on slide 12, it says literal skills are properly
6 constrained means plus function. Limitation does not extend to all means.
7 That doesn't mean that you need to incorporate the structures from the
8 embodiment into the claim. It means that it only covers the means described
9 in the application. So, that they've list of the quick release, the threaded
10 means, et cetera. Now, it wouldn't extend to rationale for including a
11 location of a base, for instance, into the claim limitations.

12 JUDGE FLAX: All right, counsel. I think we are confident in our
13 understanding of the case law on means plus function limitations and how to
14 construe them. I appreciate your argument and will turn now to hear Patent
15 Owner's rebuttal. So, sir, I said you had 12 minutes and you can go ahead
16 whenever you're ready.

17 MR. LYTVYN: Excellent. So one, since you left off on Ground
18 5, the discussion with a petitioner. I kind of want to touch base on that. And
19 again, I think it's just telling us to how convoluted these grounds are, which
20 is the antithesis of particularity, which is one of the requirements for a
21 petition. So, if you go to page 83 of the petition. Sorry, I should have been.

22 JUDGE FLAX: Okay.

23 MR. LYTVYN: Okay. So, in the institution decision the Board
24 made a comment that Ground 4 relies on the same prior art references, and
25 Ground 5 relies on the same prior art references as Ground 4, but it swaps

1 out Martz's tool for Donners. And I just wanted to point out that if you go to
2 page 83 and I think you just got to this point during your discussion. If you
3 look at for the open tip cutting edge limitation is this combination of Black
4 and Martz. So, Grounds 2 through 5 rely exclusively on Martz for the open
5 tip cutting edge limitation. So, Ground 5 doesn't swap Martz with Donner.
6 It still relies on Martz for this limitation.

7 JUDGE FLAX: Maybe. It's confusing. I agree.

8 MR. LYTVYN: I don't know if I should continue or that kind of
9 sums it up this entire case and I should stop talking before I say something
10 that's not as obvious for my case as the comment Judge Flax just made.

11 JUDGE FLAX: Well, you will not have points deducted for not
12 using all your time.

13 MR. LYTVYN: Judge Flax just alluded to common sense. I think
14 it's worth noting the case that explained in some detail and sur-reply, a
15 recent case from March 2024, *Virtek Vision v. Assembly Guidance Systems*.
16 I'm not going to go into the details. I'm sure the panel is there are familiar
17 with this case. But it's similar to the present case as except the petition
18 wasn't nearly as efficient as here and the Board filled in some gaps with
19 common sense regarding combination of prior art references which was
20 much simpler than we have here, and Federal Circuit was very unequivocal
21 in its reversal.

22 So, we've touched on a lot of things here. I don't know if it's worth
23 talking about the conclusory statements from Petitioner's expert who
24 basically has declarations, copy of work awards the petition. But then
25 during --

1 JUDGE FLAX: I think we understand your arguments about the
2 witness.

3 MR. LYTVYN: Okay. We talked about the open tip of Donner.
4 Hopefully, I've shed some light on that limitation by citing to expert
5 testimony. Any questions about that? I didn't mention anything about
6 Martz, but I think again, expert testimony speaks for itself on that subject.
7 Any questions regarding that?

8 JUDGE FLAX: I don't think so.

9 MR. LYTVYN: None. And then I don't want to beat the dead
10 horse to the ground, but I was just so fascinated. I feel like I need to write a
11 legal paper about construction of means plus function limitations. And I was
12 really hoping to have a discussion with somebody who thinks that a lot of
13 those ideas. And if you don't want to hear any more about means plus
14 function limitations, I'll just stop talking.

15 JUDGE FLAX: Well, I'm not too excited to hear any more about
16 means plus function limitations. Anyone else on the panel want to talk
17 about means plus function limitations?

18 JUDGE WOODS: No. No questions. Thank you.

19 JUDGE VALEK: I think we're good.

20 MR. LYTVYN: Okay. So, I'll yield the rest of my time. I'm sure.
21 No point to getting deducted for that.

22 JUDGE FLAX: All right. Well, thank you. And thank you both.
23 I think we have a lot to think about in this case. We will consider your
24 arguments today in view of the record. We will now consider this hearing
25 adjourned.

1 (Whereupon the above-entitled matter went off the record at 1:01
2 p.m.)

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PETITIONER:

William K. Nelson
Mark D. Miller
SIERRA IP LAW, PC
wnelson@sierraiplaw.com
mmiller@sierraiplaw.com

PATENT OWNER:

Stephen E. Kelley
Andriy Lytvyn
Thomas J. Banks
HILL WARD HENDERSON, P.A.
stephen.kelly@hwhlaw.com
andriy.lytvyn@hwhlaw.com
thomas.banks@hwhlaw.com