

1 UNITED STATES DISTRICT COURT  
 2 WESTERN DISTRICT OF TEXAS  
 3 WACO DIVISION

3 EIGHT KHZ, LLC ) Docket No. WA 22-CA-575 ADA  
 4 )  
 4 vs. ) Waco, Texas  
 5 )  
 5 META PLATFORMS, INC, META )  
 6 PLATFORMS TECHNOLOGIES, )  
 6 LLC, TWISTED PIXEL GAMES, )  
 7 LLC ) October 3, 2023

8 TRANSCRIPT OF MOTIONS HEARING VIA VIDEOCONFERENCE  
 9 BEFORE THE HONORABLE DEREK T. GILLILAND

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)*

13:01:49 1 THE COURT: All right. Good afternoon,  
14:02:49 2 everybody.  
14:02:50 3 We're for a Markman hearing and I'm going to  
14:02:52 4 start by asking Ms. Copp to please call the case.  
14:02:55 5 THE CLERK: Yes, your Honor.  
14:02:56 6 Calling case NO. WA-22-CV-575, styled, Eight kHz,  
14:03:01 7 LLC vs. Meta Platforms, Incorporated, et al. Called for a  
14:03:05 8 Markman hearing.  
14:03:06 9 THE COURT: All right. Could I get announcements  
14:03:07 10 starting with the plaintiff.  
14:03:11 11 MR. ROBINSON: Hello, your Honor.  
14:03:12 12 This is Erick Robinson for the Plaintiff Eight  
14:03:18 13 KiloHertz, LLC. And with me, I've got my partner DJ  
14:03:22 14 Healey and also first-year associate, John Spisak, who  
14:03:29 15 will be arguing for the first in his legal career.  
14:03:31 16 THE COURT: Excellent. Well, good to see you  
14:03:33 17 all, plaintiff, and especially welcome to Mr. Spisak.  
14:03:37 18 And announcements for defendant -- or defendants,  
14:03:38 19 excuse me.  
14:03:40 20 MS. AMSTUTZ: Yes, good afternoon.  
14:03:41 21 Judge Gilliland, it is Paige Amstutz with Scott,  
14:03:45 22 Douglass & McConnico. I'm here with my client on behalf  
14:03:48 23 of the Meta defendants. I'm here with my client  
14:03:50 24 representatives Nikki Vo and Katie Brockway. Also, my  
14:03:55 25 colleagues from Latham & Watkins, we have Doug Lumish,

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Eight kHz, LLC  
Exhibit 2013  
IPR2023-01003  
Page 3

14:04:00 1 Jeff Homrig, Chris Henry, Gaby LaHatte and Joe Akalski.  
14:04:06 2 And it's my understanding that Mr. Lumish, Ms. LaHatte and  
14:04:11 3 Mr. Akalski will be addressing the Court and we are ready  
14:04:14 4 to proceed.

14:04:14 5 THE COURT: All right. Very good. And good to  
14:04:16 6 see you, Ms. Amstutz, and team and especially Ms. Vo for  
14:04:19 7 taking the time to attend the hearing.

14:04:21 8 So the Court's provided the parties with the  
14:04:23 9 preliminary constructions and I am told if I followed it  
14:04:28 10 correctly that there are really three, I'll say, terms,  
14:04:32 11 two terms and one group of terms, the "processor" terms  
14:04:36 12 that the Court needs to address. Also, I need to issue a  
14:04:43 13 ruling on -- I know we've got the pending motion to  
14:04:46 14 transfer venue, but I'm denying the motion to transfer  
14:04:50 15 venue. We'll have an order out on that shortly. The  
14:04:53 16 basis will be failure to show that Twisted Pixel could  
14:04:58 17 have been sued in the Northern District of California and  
14:05:00 18 in the alternative that the factors do not show ND  
14:05:05 19 California is clearly more convenient. So that's going to  
14:05:08 20 -- that is denied and we'll get an order on the record  
14:05:10 21 with more detail shortly.

14:05:13 22 And with that, I've got the first term -- let me  
14:05:18 23 flip back to my other chart here -- that I have is the  
14:05:21 24 "away from" and "proximate to" term. I have a note that  
14:05:25 25 that's one the parties wanted to argument. Then they

14:05:27 1 wanted to argue the "digital signal processor." And then,  
14:05:37 2 finally, the "processor" group of terms, the  
14:05:39 3 means-plus-function terms if I have that right. Is that  
14:05:44 4 -- start with Mr. Robinson. Is that your understanding,  
14:05:46 5 as well, or are there other terms that plaintiff wants to  
14:05:48 6 address?

14:05:49 7 MR. ROBINSON: Well, we don't want to address  
14:05:51 8 anything, your Honor. We think that the preliminaries are  
14:05:54 9 perfect. But my understanding is the defendants would  
14:05:57 10 like to go through those -- and I think that their order  
14:06:01 11 and Ms. LaHatte and counsel can correct me if I'm wrong  
14:06:04 12 but they wanted to go through the "processor" terms first,  
14:06:08 13 then the "away from" and "proximate to," and then,  
14:06:11 14 finally, with the DSP.

14:06:12 15 THE COURT: Okay. And let me ask, yeah, Ms.  
14:06:15 16 LaHatte, or whoever wants to speak on behalf of  
14:06:17 17 defendants, first, did I miss any terms? And, then,  
14:06:19 18 second, what order do you want to address them in?

14:06:22 19 MS. LAHATTE: Mr. Robinson summarized it  
14:06:25 20 correctly, your Honor. We wanted to address the three  
14:06:28 21 terms today, the "processor" terms, the "away from,"  
14:06:32 22 "proximate to" term followed by the DSP, in that order.

14:06:36 23 THE COURT: Okay. Very good. Well, let's go  
14:06:38 24 ahead and start with the "processor" terms and I'll turn  
14:06:41 25 it over to whoever wants to address those on behalf of

14:06:44 1 defendant.

14:06:47 2 MR. LUMISH: Thank you, your Honor. Doug Lumish  
14:06:49 3 Latham & Watkins for Meta.

14:06:52 4 On the "processor" terms, we reviewed your  
14:06:54 5 tentative, your Honor. We understanding where you're  
14:06:55 6 heading and we're mindful of the Court's guidance that you  
14:06:58 7 prefer that we focus on trying to suggest refinements to  
14:07:00 8 the construction. I don't have any refinements to offer.  
14:07:04 9 What I would use my time on today with your Honor's  
14:07:07 10 permission would be to try to convince you that, in fact,  
14:07:10 11 the terms are those that should be construed under 112(f)  
14:07:14 12 as means-plus-function terms, in which case, I think  
14:07:18 13 inextricably, then they are invalid for indefiniteness and  
14:07:22 14 that it would be legal error to find otherwise.

14:07:25 15 But I don't want to be disrespectful to the  
14:07:27 16 guidance we got from the Court. I don't want to take your  
14:07:29 17 time if your Honor doesn't want to hear it and I don't  
14:07:31 18 mean that in the way it might sound. It's just I would  
14:07:34 19 like to find out from your Honor if you'd like to hear a  
14:07:36 20 few minutes of argument on that and if not, I'd be happy  
14:07:39 21 to proceed.

14:07:40 22 THE COURT: Certainly. And I'm more than happy  
14:07:42 23 to give you the opportunity to persuade me the  
14:07:45 24 preliminaries are wrong. It's always more helpful to the  
14:07:49 25 extent that there are -- there's some additional

14:07:54 1 illumination you can provide aside from just repeating  
14:07:59 2 what's in the briefs. But it's your time, it's your  
14:08:01 3 hearing, so you can use your time how you best see fit.

14:08:04 4 MR. LUMISH: Well, thank you, your Honor. And  
14:08:05 5 I'll try not to be overly redundant with our papers. I  
14:08:08 6 did try to organize my thinking around some ways to  
14:08:11 7 present this that weren't maybe as clear through the  
14:08:13 8 papers as they might have been.

14:08:15 9 And I think the first point I'd make is in  
14:08:19 10 thinking about what you have in the claims in this case,  
14:08:23 11 in 8K's claims, what you see is an effort by patent  
14:08:27 12 prosecution counsel to sidestep 112(f). I think if the  
14:08:31 13 claims had said a means for performing all of the  
14:08:34 14 functions that were listed, there'd be no dispute here  
14:08:37 15 that these were 112(f) claims, and that there was  
14:08:40 16 insufficient structure if all they found -- if they found  
14:08:44 17 in the specification was a processor, or an ASIC, or the  
14:08:48 18 digital signal processor, the kinds of things that 8K has  
14:08:52 19 told you are the structures in this case. That would not  
14:08:54 20 be sufficient. You'd have to find an algorithm or  
14:08:57 21 performing those functions and the claims would be  
14:08:59 22 indefinite.

14:09:00 23 And so, the only real difference here is instead  
14:09:03 24 of saying a means for performing those instructions, they  
14:09:05 25 said a processor for performing those functions and I'll

14:09:09 1 show you that in the claims in a moment. And under  
14:09:12 2 Williamson and its progeny, we submit to your Honor that  
14:09:15 3 you just can't do that anymore. And so, I'd like to focus  
14:09:18 4 my time on the law. May I share my screen, your Honor?

14:09:21 5 THE COURT: You may.

14:09:23 6 MR. LUMISH: Okay. You should see now my title  
14:09:28 7 slide here.

14:09:29 8 THE COURT: I do. I see slide 53, the  
14:09:32 9 "processor" terms.

14:09:34 10 MR. LUMISH: Yes, your Honor, and going to slide  
14:09:35 11 54 --

14:09:37 12 MR. ROBINSON: Your Honor, I'd just like to  
14:09:38 13 object because I don't think we got these slides.

14:09:41 14 THE COURT: Okay. Well, we'll just have the  
14:09:45 15 defendants make sure to send those over to Mr. Robinson  
14:09:47 16 and team. But go ahead and proceed, Mr. Lumish.

14:09:51 17 MR. LUMISH: Thank you, your Honor.

14:09:51 18 So the starting point for this whole 112(f)  
14:09:54 19 debate in modern jurisprudence and patent laws really  
14:09:57 20 comes from the functional claiming prohibition. As your  
14:10:01 21 Honor know well, the Federal Circuit and the Supreme Court  
14:10:03 22 and going back to the Morris case, way back when, has said  
14:10:07 23 that you can't just claim function. You can't claim an  
14:10:10 24 outcome. You can't claim a result. You have to claim the  
14:10:12 25 thing, the process, the new apparatus that performs that

14:10:16 1 or achieves that result or that function.

14:10:18 2           When you get to 112(f) -- 1952 is 112, 6 -- what  
14:10:26 3 happened was the Congress gave patent prosecution counsel,  
14:10:30 4 people writing patent claims, a convenience, a way of  
14:10:32 5 claiming that allowed them to use functional language, but  
14:10:35 6 they had to be limited to only the structures that were  
14:10:40 7 set forth in their corresponding specifications. So you  
14:10:47 8 could use functional language but you didn't get a  
14:10:49 9 functional claim. You could only get what was set forth  
14:10:51 10 in the claim language, in the specification itself. So  
14:10:55 11 it's a quid pro quo or a balance as Williamson puts it.

14:10:58 12           And so, what we're looking for is whether in the  
14:11:00 13 claims here, they give a sufficient structural  
14:11:04 14 identification that what you have before you or a person  
14:11:07 15 of ordinary skill in the art would have is something they  
14:11:08 16 understand to be the name for a structure, a label that  
14:11:12 17 everybody would know is the thing that performs the  
14:11:14 18 functions of the claims.

14:11:15 19           And I don't know if you could see my cursor, your  
14:11:17 20 Honor, probably should have underscored this language  
14:11:19 21 here, because it's not enough that there be name for some  
14:11:22 22 structure, it has to be sufficiently definite structure  
14:11:24 23 for performing the claimed function. So you've gotta look  
14:11:27 24 at what's claimed as the function and say is the thing  
14:11:29 25 there that's performing it a label that's sufficient to a

14:11:32 1 person of ordinary skill in the art to serve as the thing  
14:11:35 2 that does that is the name for it. And the classic  
14:11:38 3 example is the screwdriver. That's functional language,  
14:11:41 4 thing that drives screws. But if it's described in a  
14:11:44 5 patent claim as a screwdriver for turning the screws, then  
14:11:47 6 it would be a proper name for function that everybody  
14:11:50 7 knows it does and that would be sufficient.

14:11:54 8 Here, when you get to the "processor" claims,  
14:11:57 9 you'll see it's not a label for those functions. This is  
14:12:01 10 the Egenera case, your Honor. I'm on slide 56. It's just  
14:12:05 11 an excerpt from that claim -- from that case, excuse me,  
14:12:10 12 and it reenforces the point I made a moment ago that the  
14:12:14 13 term has to be -- the structure has to be one for the  
14:12:16 14 specific function of the claim. It can't be just for any  
14:12:19 15 function or some generic function. It's gotta go to what  
14:12:23 16 the function is that's claimed in the claim language  
14:12:25 17 itself.

14:12:26 18 The Apple vs. Motorola case, this is in our  
14:12:31 19 papers, your Honor, tells us that the structure when  
14:12:33 20 you're talking about a software claim, which there's no  
14:12:35 21 question that's what we have here, when you're talking  
14:12:37 22 about a software claim, just saying a computer or in this  
14:12:41 23 case a processor -- I don't think there's a meaningful  
14:12:43 24 difference for this analysis -- cannot be relied upon  
14:12:47 25 typically to provide sufficiently definite structure for a

14:12:51 1 software claim. You need something more than just saying  
14:12:53 2 a processor or a computer. So that's the Apple vs.  
14:12:56 3 Motorola case.

14:12:57 4 And to reach your conclusion, your Honor, to  
14:13:01 5 reach the tentative that it's just plain and ordinary  
14:13:04 6 meaning and a processor just means a processor and we all  
14:13:06 7 have heard that term and we know what it means, you would  
14:13:08 8 have to find that these claims fall within what we refer  
14:13:12 9 to in our paper as the Katz exception.

14:13:17 10 For processor claims, the Federal Circuit has  
14:13:20 11 carved out this Katz exception that comes from the In Re:  
14:13:24 12 Katz case, and what it says is, well, if what the  
14:13:27 13 processor does is nothing more than any other  
14:13:30 14 off-the-shelf processor would do, then that's enough.  
14:13:33 15 Then you can just say a processor for processing or a  
14:13:36 16 processor for storing. But it's really at that level of  
14:13:40 17 generic function where it begins and ends. So that's what  
14:13:44 18 you should be looking for, your Honor, we submit, which  
14:13:46 19 is, is the claim here or are the claims here ones that are  
14:13:48 20 simply claiming functions that any off the shelf processor  
14:13:52 21 that you might go down to Lowe's or Fry's, or whatever  
14:13:55 22 store, and buy a processor off the shelf that it could  
14:13:57 23 perform inherently.

14:14:00 24 That's the In Re: Katz case. That's also the Eon  
14:14:04 25 Corp case, which we could see on the bottom of this slide

14:14:06 1 58. It's also in the papers. So that Katz exception,  
14:14:11 2 though, your Honor is one the Federal Circuit calls in Eon  
14:14:14 3 narrow and rare and they say it's only in the rare  
14:14:17 4 circumstances where any general purpose computer without  
14:14:21 5 special programming can perform the function of the  
14:14:24 6 software claim like the ones we have here.

14:14:26 7 We are not asking you to go out on a limb, your  
14:14:29 8 Honor. We are not asking you to find something that's  
14:14:31 9 unusual, that's exceptional. This is the law and it's  
14:14:35 10 been applied across the country. It's been applied in  
14:14:37 11 this court in the WSOU Investments case versus Google.  
14:14:42 12 It's been applied in the Joao Control case here in this  
14:14:46 13 court. East Texas has applied it in the St. Isidore case.  
14:14:50 14 And could see on my slide 59 a host of other cases that  
14:14:53 15 have found that claims that claim a processor for  
14:14:57 16 performing some specialized set of functions do, in fact,  
14:15:00 17 fall within 112(f).

14:15:03 18 So this is an exemplar claim. I'm on slide 60  
14:15:07 19 now, your Honor. And what you see is the same -- this  
14:15:10 20 goes back to where I started. The language that's used,  
14:15:13 21 it doesn't say means for but it might as well. It says a  
14:15:17 22 processor that executes functions to and then, it's all  
14:15:20 23 functional. It's pure functional language.

14:15:23 24 And it's not -- what I'd ask your Honor to look  
14:15:26 25 for is whether what's in blue, the function that's being

14:15:30 1 described is one that any off-the-shelf general purpose  
14:15:34 2 generic processor would perform, and the answer to that is  
14:15:37 3 emphatically no. Because the function here is adjusting  
14:15:42 4 binaural voice of a second person during an electronic  
14:15:46 5 phone call in order to position a sound localization point  
14:15:49 6 of the binaural voice to a location that is away from and  
14:15:53 7 proximate to the first person. There is no computer you  
14:15:55 8 can buy or processor you can just go buy that comes ready  
14:15:58 9 made to do. That is a special function that has to be  
14:16:02 10 specially programmed which converts this claim or takes it  
14:16:04 11 out of that Katz exception and makes clear it's a special  
14:16:07 12 purpose processor because it has to be specially  
14:16:09 13 programmed to achieve this.

14:16:10 14           Going to slide 61, you can see 196 -- just for  
14:16:16 15 the record, your Honor, slide 60 was the 090 patent, claim  
14:16:20 16 15. Turning to the 196 patent, claim 15 on slide 61, you  
14:16:26 17 see it actually gets worse. They compound the problem.  
14:16:30 18 You have that same structural format, a processor to might  
14:16:34 19 as well be a means for. And then, it has a host of  
14:16:37 20 different functions, receiving commands from a person to  
14:16:40 21 move an SLP. You're moving it from one location to a  
14:16:43 22 second location. You're moving an SLP of the voice of the  
14:16:48 23 computer in response to the command. And I won't go  
14:16:51 24 through each one of the functions. I've color-coded them  
14:16:54 25 and point out all the different functions and they're in

14:16:56 1 our papers. And again, this is not something any general  
14:17:00 2 purpose, generic, off-the-shelf computer ever could do,  
14:17:03 3 and so, it can't possibly be that these fall within the  
14:17:06 4 Katz exception and it's just any processor, which is what  
14:17:08 5 your plain and ordinary meaning tentative would invoke.

14:17:10 6 If you go to -- I won't go through each of these,  
14:17:14 7 your Honor. We submitted these to you. But slide 62  
14:17:16 8 shows the same thing for the 628 patent, claims 9 and 12.  
14:17:21 9 Slide 63 shows the same concerns for the 628 patent, claim  
14:17:25 10 16. Slide 64 shows claims 1, 4, 14 and 15 of the 737  
14:17:33 11 patent have the same problem. Slide 65 shows the 836  
14:17:39 12 patent, claims 8 and 10, have the same issue. And I think  
14:17:43 13 this is the last one, slide 66 shows the 179 and 184  
14:17:48 14 patents, both claims 14 have the same issue. All of these  
14:17:51 15 claims are reciting specialized functions that no general  
14:17:56 16 purpose, off-the-shelf computer could perform. And so,  
14:17:59 17 because they're not saying a processor for processing or  
14:18:03 18 processor for storing, a processor for calculating. These  
14:18:06 19 claims have to be specially programmed or they require  
14:18:09 20 special programming to make the processor do what they're  
14:18:11 21 saying it does and that through all the cases that I've  
14:18:14 22 just cited to your Honor establishes that they're 112(f).

14:18:19 23 This was, I think, cited in our papers, your  
14:18:22 24 Honor, but here's what I think was not really illuminated.  
14:18:25 25 What you see in front of you is an excerpt from Dr.

14:18:28 1 Begault, which is 8K's expert in his deposition, page 156  
14:18:33 2 line 20 through page 157, line 2, and he was asked, well,  
14:18:38 3 how would you determine if the processor is capable or not  
14:18:41 4 actually capable but actually executes the instructions to  
14:18:45 5 adjust the binaural voice as recited in this claim? So  
14:18:48 6 he's being asked about one of the specialized functions in  
14:18:50 7 one of the claims. And the answer's illuminating. He  
14:18:53 8 says, well, you would know from examining the software and  
14:18:56 9 that's our point exactly.

14:18:58 10 To practice these claims, to know if the  
14:19:00 11 processor practices these claims, you would have to look  
14:19:02 12 at software to see what they're doing. That tells you, I  
14:19:07 13 think emphatically or definitively, this is not a general  
14:19:10 14 purpose processor or you could just say, well, it's got a  
14:19:12 15 processor. All processors process, all processors store,  
14:19:16 16 that's all I need to know. He says he'd have to look at  
14:19:19 17 the software. And to their infringement case, of course,  
14:19:21 18 they're going to have to look at our source code and prove  
14:19:23 19 that all these functions are performed through the  
14:19:25 20 instructions.

14:19:26 21 That tells us it's 112(f), your Honor. If I get  
14:19:31 22 you past that hurdle and I know I have an uphill battle  
14:19:34 23 there, your Honor, the rest of it kind of falls into place  
14:19:37 24 because the law becomes extremely clear. The Aristocrat  
14:19:40 25 case, Function Media, a number of cases tell us that once

14:19:43 1 you establish that it's a special purpose processor and  
14:19:46 2 not a general purpose processor, it was required for 8K to  
14:19:52 3 lay out its algorithm in its specification for how it  
14:19:55 4 would program the claims to achieve the results or the  
14:19:59 5 functions of the claims.

14:20:00 6           It's not a question of whether somebody else  
14:20:03 7 could do it. If you sat ten programmers down, they come  
14:20:06 8 out with ten different programs. It's did they show us  
14:20:08 9 how they did it. Did they lay out in their specification  
14:20:11 10 corresponding structure in the form of an algorithm to  
14:20:14 11 show how those results are achieved. That's the  
14:20:18 12 Aristocrat case. And then, the Williamson case says as  
14:20:22 13 much, which is, when you have a claim limitation that's  
14:20:25 14 subject to 112, paragraph 6, implemented in a special  
14:20:28 15 purpose computer, we require that the specification  
14:20:33 16 disclose an algorithm for performing the claimed function.

14:20:35 17           So no question that if this is a special purpose  
14:20:38 18 processor performing special purpose functions, they had  
14:20:41 19 to disclose an algorithm to get there and they don't do  
14:20:45 20 it. This is their reply brief where they made their, I  
14:20:49 21 thought, most direct argument. "They" being 8K. I'm on  
14:20:52 22 slide 70, your Honor. This is 8K's reply brief, docket  
14:20:56 23 No. 115, lines 14 -- that's not correct. It's not 14  
14:21:00 24 through 15. It's obviously longer than that but it's in  
14:21:03 25 that paragraph.

14:21:04 1 And here's their citation to where they say they  
14:21:06 2 laid out an algorithm. They point to the 090 patent at  
14:21:11 3 column 41, lines 20 through 31, and they cite the same  
14:21:14 4 passage in two other patents of theirs. So let's look at  
14:21:17 5 what that passage says. This is on slide 71, that  
14:21:23 6 language from those three patents. The 090 patent at  
14:21:26 7 column 41, lines 20 through 31. And there is no algorithm  
14:21:29 8 here.

14:21:31 9 What they really do is just double down on the  
14:21:33 10 notion that, well, our structure is a processor. We knew  
14:21:37 11 that from the claim language, but we gotta get to a  
14:21:40 12 special purpose processor that's specially programmed.  
14:21:44 13 Their first sentence here just says that processor  
14:21:46 14 includes a processor such as a CPU, or a microprocessor,  
14:21:51 15 or an ASIC for controlling the operation of memory. The  
14:21:55 16 next sentence says the processing unit communicates with  
14:21:57 17 memory and performs operations. Doesn't tell us how.  
14:22:00 18 Just says it does what processors do. And then, the last  
14:22:04 19 sentence says what the memory does. It doesn't even  
14:22:06 20 really tell us what the processor does. Memory stores  
14:22:09 21 applications and data and programs, and interestingly, it  
14:22:12 22 stores algorithms, including software to implement or  
14:22:16 23 assist in implementing example embodiments.

14:22:19 24 So right here in their best passage that they  
14:22:22 25 cite to your Honor is the disclosure for their algorithm.

14:22:25 1 What it says is we have a processor that interacts with  
14:22:29 2 memory and somewhere in the memory, there's going to be an  
14:22:32 3 algorithm. They even use the word right here for  
14:22:35 4 performing the structure -- or for performing the  
14:22:37 5 functions, excuse me, of the claim. That is exactly the  
14:22:40 6 problem here. That is 112(f), at best, it's functional  
14:22:45 7 claiming for sure. They want to leave, you know, open to  
14:22:49 8 every algorithm and every disclosure without having to  
14:22:51 9 address 112(f) and its equivalents requirements any way of  
14:22:55 10 programming it.

14:22:56 11 So anybody who uses any kind of processor and  
14:22:58 12 achieves the same outcomes, they're going to say is  
14:23:01 13 infringing their patent and that's -- that is  
14:23:04 14 quintessential functioning claim. I'll skip through this,  
14:23:08 15 your Honor. I don't think this is really in dispute  
14:23:10 16 anymore whether the disclosure of convolution is  
14:23:13 17 sufficient.

14:23:13 18 And I'm going to skip here, as well, but I'll  
14:23:15 19 make the one basic point on this slide, slide 75. If your  
14:23:18 20 Honor gets to what the functions are, they have to come  
14:23:21 21 straight from the claim language. The law from the  
14:23:23 22 Federal Circuit is axiomatic on this. It's very clear  
14:23:28 23 that you take the function straight from the claim  
14:23:30 24 language and what you see is in trying to rebut whether  
14:23:33 25 112(f) applies and then, in trying to rebut the functions

14:23:36 1 that we've identified, Dr. Begault has issued this  
14:23:40 2 supplemental declaration with a large chart, and in each  
14:23:44 3 instance, he doesn't address most of the functioning.

14:23:46 4           So this is one example from the 090 patent, claim  
14:23:49 5 15, where he cites the function is executing the  
14:23:52 6 instructions to adjust binaural voice. And if you look at  
14:23:56 7 what's in blue there, it doesn't stop there. It goes on  
14:24:00 8 to illuminate what that function is and he would just  
14:24:03 9 excise all of that function. And 8K would just excise all  
14:24:07 10 of that function in hopes of reducing the functions down  
14:24:10 11 to something that feels more generic, that feels more off  
14:24:14 12 the shelf. It's not. So I won't go through each of  
14:24:18 13 these, but claim 76 shows you the same thing for the 196  
14:24:23 14 patent and so forth.

14:24:24 15           With that, your Honor, I will just end on, I  
14:24:28 16 think, the obvious point that if you find that there's a  
14:24:34 17 requirement for an algorithm because these are special  
14:24:37 18 purpose processors that are specially programmed, and if  
14:24:41 19 you find as I think the evidence militates that there's no  
14:24:44 20 such algorithm in the specification, the only outcome  
14:24:47 21 under Aristocrat and Williamson, under Function Media and  
14:24:52 22 a host of other cases is that the claims are indefinite  
14:24:53 23 under 35 U.S.C. 112, paragraph 2. That's what we'd ask  
14:24:59 24 your Honor to find. Unless you have questions for me,  
14:25:00 25 I'll pass the lectern on that point.

14:25:02 1 THE COURT: Just the one quick question, too.  
14:25:05 2 And I think it was clear from the briefs and the argument  
14:25:07 3 but it makes no difference whether the term we're looking  
14:25:11 4 at is "processor" or the "processing." Your analysis is  
14:25:17 5 pretty much the same?

14:25:20 6 MR. LUMISH: Yes, your Honor. I think processor  
14:25:23 7 is clearly a structural element that they're trying to  
14:25:26 8 shoehorn as a means. It's more of an apparatus  
14:25:29 9 orientation of it. But when you look at the claims that  
14:25:31 10 say processing, I may be wrong, but I think in each  
14:25:34 11 instance, it talks about a processor for processing, or a  
14:25:37 12 computer for processing, or something for processing which  
14:25:41 13 ultimately devolves or collapses into the same problem for  
14:25:44 14 them. So the short answer is yes but there are some  
14:25:47 15 nuanced differences, I think, in the claims.

14:25:49 16 THE COURT: Okay. All right. Thank you, Mr.  
14:25:52 17 Lumish.

14:25:52 18 Who -- Mr. Robinson is going to respond on behalf  
14:25:55 19 of plaintiff?

14:25:57 20 MR. ROBINSON: We're going to have Mr. Spisak  
14:25:59 21 respond on behalf of plaintiff.

14:26:03 22 THE COURT: Yeah, Mr. Spisak, whenever you're  
14:26:05 23 ready.

14:26:06 24 MR. SPISAK: Thank you, your Honor. May I share  
14:26:09 25 my screen?

14:26:09 1 THE COURT: You may. And you're kind of soft so  
14:26:11 2 I don't know if you can move a little closer to the  
14:26:13 3 microphone. Just want to make sure Ms. Reznik can hear  
14:26:15 4 you okay.

14:26:18 5 MR. SPISAK: I'll definitely speak up, your  
14:26:20 6 Honor. Does that help?

14:26:23 7 THE COURT: Little bit.

14:26:33 8 MR. SPISAK: Your Honor, the first thing I'd like  
14:26:35 9 to start off with is because in reality, Meta actually  
14:26:42 10 agrees with all of our constructions in its IPRs. So the  
14:26:45 11 issue isn't whether defendants can legally take an  
14:26:47 12 alternative position on claim construction in parallel  
14:26:50 13 proceedings. It's that only one of their constructions  
14:26:53 14 can be correct. And the answer is it's plaintiff's  
14:26:56 15 constructions and Meta's IPR constructions that are  
14:26:59 16 congruent with the facts.

14:27:02 17 Meta's factual assertions should bind them both  
14:27:05 18 in the PTAB and in here. You know, while the litigants  
14:27:09 19 can have opposing viewpoints on the law, they can't have  
14:27:14 20 both opposing viewpoints on the facts. The facts are the  
14:27:16 21 facts. And it's clear because especially with the  
14:27:23 22 means-plus-function terms, sufficiently definite structure  
14:27:27 23 is always defined through the eyes of the POSITA and what  
14:27:31 24 is known in the art.

14:27:32 25 Here, they claim a POSITA would not know that a

14:27:36 1 processor is sufficiently definite structure to perform  
14:27:39 2 audio processing. However, in their IPRs, they claim that  
14:27:45 3 it's taught in the prior art and I'll get into more detail  
14:27:49 4 later. But they're making two different factual  
14:27:51 5 assertions, depending on the proceeding here.

14:27:54 6 And I'll just brief through this but this is sort  
14:27:59 7 of a summary of how they have basically taken our position  
14:28:03 8 on claim construction for all of these patents. It is our  
14:28:12 9 contention that the Court was correct. These terms are  
14:28:15 10 not written in means-plus-function and are, therefore,  
14:28:20 11 definite. However in the alternative, the specification  
14:28:24 12 does disclose sufficient structure to perform all the  
14:28:26 13 functions and are, therefore, definite.

14:28:32 14 The two-step process is important because there  
14:28:33 15 is a distinction between step one and step two.  
14:28:37 16 Determining whether a term is written in  
14:28:42 17 means-plus-function format is the only -- it's necessary  
14:28:47 18 because the only time we're actually looking to the spec  
14:28:50 19 for structure such as an algorithm is if and only if it is  
14:28:56 20 written in means-plus-function format.

14:28:57 21 There's only three correct instances in which  
14:29:01 22 it's written in means-plus-function format. Either the  
14:29:06 23 patentee specifically invoked it was means-for language or  
14:29:09 24 when the claims recite sufficient -- or when the claims  
14:29:12 25 fail to recite sufficient definite structure, sort of that

14:29:17 1 black box scenario, or they just don't disclose any  
14:29:20 2 structure and just recite function. And the difference  
14:29:27 3 between the whole step one and step two analysis that they  
14:29:30 4 blur in pulling this algorithm requirement in is that the  
14:29:34 5 question is the meaning in step one. It's a question of  
14:29:39 6 meaning. Does the structure that's claimed, will it  
14:29:42 7 perform what it claims to do versus when you don't have  
14:29:50 8 something that is -- you have something that is vague like  
14:29:52 9 a black box where in step two, you try and limit the claim  
14:29:56 10 via how much structure is disclosed via the  
14:29:59 11 specifications.

14:30:01 12           Simply put, the processor terms are not  
14:30:03 13 means-plus-function format. Because the word "means for"  
14:30:08 14 are not used, there is a presumption. Doesn't matter what  
14:30:10 15 the strength of the presumption is, there's nonetheless a  
14:30:12 16 presumption, and it is the burden on the challenger to  
14:30:15 17 rebut that presumption. It's not a court on a snipe hunt  
14:30:21 18 looking for whether or not it's defined as sufficiently  
14:30:25 19 definite structure. But it is their burden to prove by a  
14:30:29 20 preponderance of the evidence that the term used is not  
14:30:31 21 sufficiently definite structure. If they haven't done  
14:30:34 22 that, the failure to rebut leaves that presumption intact  
14:30:36 23 and means-plus-function -- or Section 112(f) does not  
14:30:43 24 apply.

14:30:45 25           In doing so, they basically used the wrong

14:30:47 1 standard. One, they kind of look at a processor in a  
14:30:50 2 vacuum and they mostly try and pull this algorithm  
14:30:58 3 requirement when none exists. The answer is that Apple  
14:31:03 4 vs. Motorola specifically ruled against what they're  
14:31:05 5 trying to propose and that is that an algorithm  
14:31:07 6 requirement is required in step one. Apple -- the Apple  
14:31:13 7 court was very clear when a claim is not drafted in  
14:31:15 8 means-plus-function format, an algorithm therefore is not  
14:31:19 9 necessarily required. It is not drafted in  
14:31:21 10 means-plus-function format.

14:31:26 11           So part of it is how they're defining a black box  
14:31:30 12 and they're making a black box definition very narrow in  
14:31:34 13 the sense that a processor, you know, isn't so specific  
14:31:39 14 down to this sort of granular detail. The black box has  
14:31:44 15 been defined by the Federal Circuit pretty clearly.  
14:31:47 16 That's the idea of means for. It's literally all possible  
14:31:50 17 means to perform a function. Or if something that  
14:31:55 18 incorporates any structure capable of providing certain  
14:31:58 19 functions. In other words, the term itself fails to limit  
14:32:04 20 itself to a sufficiently definite class of structure.

14:32:11 21           In our case, plaintiffs do not engage in purely  
14:32:16 22 functional claiming. The processor is recited. Processor  
14:32:19 23 is inherently structural; it connotes something like a  
14:32:22 24 circuit. This is an integrated circuit. It's not  
14:32:26 25 ambiguous -- it's not an ambiguous word like "device" or

14:32:29 1 "do-dad," which could mean anything. We're not claiming  
14:32:32 2 that you could use a vacuum tube that does process HRTS.  
14:32:38 3 It's possible, sure, but we're not claiming that. We're  
14:32:40 4 claiming something structural we're claiming the  
14:32:42 5 processor. And this is consistent with this court's  
14:32:46 6 rulings in the past. For example, in Sonrai Memory vs.  
14:32:51 7 Oracle, the courts have concluded in many instances such  
14:32:55 8 terms as "processor," "circuit" and "logic" may connote  
14:32:57 9 sufficiently definite structure.

14:33:00 10 Furthermore, the idea that function is paired  
14:33:03 11 with structure suddenly makes means-plus-function apply is  
14:33:07 12 also contrary to the law. Functional language can help  
14:33:12 13 define structure. So in this case, you know, this is very  
14:33:19 14 similar to when you have like linear circuit is used and  
14:33:24 15 then, they look at the operation of the circuit to help  
14:33:27 16 convey what that structure is. Here, all of these terms  
14:33:30 17 that they challenged are all based on audio processing.

14:33:34 18 Now, they said that we tried to narrow it because  
14:33:36 19 this is attached to an SLP, but the SLP is simply a  
14:33:39 20 coordinate data set that is sent to explain where the  
14:33:45 21 sound is supposed to be produced. It's all part of  
14:33:48 22 producing spacial sound. So at the end of the day, you  
14:33:51 23 know, we haven't narrowed it because, at the end of the  
14:33:55 24 day, all we're asking the processor to do is recreate some  
14:33:57 25 sort of spacial sound. And the fact that we're -- all the

14:34:02 1 functions are limited to producing sound tells the POSITA,  
14:34:07 2 hey, this is a processor that is made for processing sound  
14:34:13 3 so it helps limit and define that structure.

14:34:16 4           The key here is this algorithm requirement is one  
14:34:22 5 that only sprouts after 112(f) determination has been  
14:34:28 6 made. There's not one piece of Federal Circuit law that  
14:34:32 7 requires an algorithm be cited or recited to make sure  
14:34:36 8 that structure such as the generic computer or a processor  
14:34:41 9 is definite or sufficient -- or is defined as sufficiently  
14:34:46 10 definite structure.

14:34:48 11           In fact, this is in line with, for example, in  
14:34:51 12 Samsung Electronics vs. Prisia. There, only a  
14:34:56 13 general-purpose computer was recited. In fact, they used  
14:35:00 14 digital processing unit but they said it was a standalone  
14:35:03 15 for general purpose computer. That general purpose  
14:35:05 16 computer was found sufficient and no algorithm was ever  
14:35:07 17 required in that analysis to prove that it was a  
14:35:10 18 sufficiently definite.

14:35:16 19           Again, if you look at another case, ThyssenKrupp  
14:35:23 20 Elevator, the computer unit, it was a commercially  
14:35:28 21 available personal computer and they looked at the fact  
14:35:31 22 that there was other recited structure around with it and  
14:35:35 23 never required an algorithm be disclosed to find that it  
14:35:38 24 was sufficiently definite structure. So, in essence, it's  
14:35:44 25 not really about sufficiency issue in this case, it's a

14:35:49 1 burden issue.

14:35:50 2           Has the challenger provided compelling evidence  
14:35:53 3 to the contrary? The answer is no, no, they haven't  
14:35:56 4 because they haven't said that a processor can't perform  
14:36:00 5 these functions. They certainly can perform these  
14:36:03 6 functions. And because the terms are not unlimited, they  
14:36:09 7 are limited to processors, we're not looking to an  
14:36:13 8 algorithm to create definition. If we said a means for  
14:36:16 9 providing binaural voice, that's unlimited so that's why  
14:36:20 10 there is an algorithm requirement in step two because, at  
14:36:23 11 some point, we have to limit the claims, but the claims  
14:36:25 12 are already limited to sufficient definite structure here,  
14:36:31 13 processor is required.

14:36:37 14           And this is evident right here in the 737 patent  
14:36:40 15 where, you know, we have the claim processing, by a  
14:36:43 16 processor, sound with head-related transfer function and  
14:36:48 17 then, we look at how processor's defined, it's even a  
14:36:51 18 little bit more narrower than just the processor. We're  
14:36:53 19 saying the CPU, the digital signal processor, the  
14:36:58 20 microprocessor in that particular patent. That is a  
14:36:59 21 class-limiting sort of list and we're also limiting via  
14:37:03 22 the function. In other words, it has to be something  
14:37:06 23 capable of performing the HRTF simulations. And just kind  
14:37:12 24 of going through all the patents so it's not just a  
14:37:17 25 processor. There is at least some level of additional

14:37:21 1 structural disclosure processing art, pointing to it in  
14:37:28 2 order to perform this function as well as other things  
14:37:30 3 that define the processor. So like in the 184 and 179,  
14:37:37 4 sound localization system is more radically defined as a  
14:37:41 5 digital audio converter, a decompressor decoder, a digital  
14:37:45 6 signal processor, and then, includes the hardware and  
14:37:47 7 software that process and localize sound.

14:37:55 8           At the end of the day, structure is defined how a  
14:37:58 9 POSITA would define it. In other words, would the POSITA  
14:38:01 10 in seeing the word recognize that it's sufficiently  
14:38:04 11 definite structure? And so, this is something their  
14:38:08 12 expert actually admits. In their expert's declaration,  
14:38:13 13 their biggest complaint is the reason that we didn't  
14:38:16 14 define it sufficiently is that there's so many structures  
14:38:20 15 algorithms and processes that are well known and existed  
14:38:22 16 in the prior art that we just simply wouldn't know what to  
14:38:28 17 choose. Sort of bizarre. And they go on to list the  
14:38:33 18 various structures and algorithms and other functions that  
14:38:38 19 POSITAs are well aware of on how to do this.

14:38:40 20           So the reality of it is, naming a processor to  
14:38:44 21 perform spacial audio processing is just known in the art.  
14:38:48 22 They knew it. We don't really need to provide any  
14:38:51 23 definition to it because it's just known. Something they  
14:38:54 24 admit. And then, they even go much farther to admit it as  
14:39:02 25 a whole in their IPR. So, for example, the IPR on the 184

14:39:07 1 patent, they specifically state that, you know, our  
14:39:13 2 disclosure -- our admission that a DSP would be found -- a  
14:39:17 3 POSITA would know what a DSP is and that a DSP is able to  
14:39:20 4 do this is an admission that it was found in the prior  
14:39:24 5 art. Okay. It's either one or the other. Either a  
14:39:27 6 POSITA wouldn't know that a DSP could process spacial  
14:39:31 7 audio or they do and the answer is they do.

14:39:34 8           So once it's determined that there's structure in  
14:39:45 9 the claim and it has sufficiently definite meaning, the  
14:39:49 10 inquiry ends. We don't need to be worried about  
14:39:51 11 algorithms. We don't need to be worried about additional  
14:39:53 12 structure. Simply put, 112 doesn't apply and the patents  
14:39:59 13 are definite. However, if the Court were to find any of  
14:40:05 14 these terms do, in fact, invoke 112 or in some way not  
14:40:11 15 sufficiently definite, we agree a computer-operated term  
14:40:17 16 does require an algorithm.

14:40:22 17           An algorithm is simple. It is just any set of  
14:40:25 18 instructions for the computer to follow and it can be  
14:40:28 19 expressed in any way, shape or form using mathematical  
14:40:31 20 formulas, prose or flowchart. And what is a sufficient  
14:40:39 21 algorithm? Doesn't have to be super particularized. It  
14:40:42 22 doesn't have to eliminate all the choices a skilled  
14:40:44 23 artisan might make in submitting an algorithm. Doesn't  
14:40:47 24 need to disclose code. It's all dependent on the  
14:40:52 25 technological depth and knowledge of people in the field,

14:40:55 1 and does it provide enough information to a POSITA to  
14:40:59 2 perform the function. You know, in Enfish-Microsoft, the  
14:41:04 3 issue is just a four-part algorithm, where I think the  
14:41:06 4 second or third element recited commonly known code, and  
14:41:10 5 at that point, the Federal Circuit found that sufficient.  
14:41:13 6 You can invoke commonly known software as part of the  
14:41:16 7 algorithm as long as there is enough steps to convey what  
14:41:20 8 is necessary to be done.

14:41:23 9 And the answer is here, a POSITA would need very  
14:41:28 10 little algorithmic structure provided, if any is required  
14:41:32 11 at all. As the McMullen deposition points out, there are  
14:41:41 12 numerous algorithms, 3D audio processing software and  
14:41:44 13 things that are available in the art that was known to a  
14:41:47 14 POSITA for a very long time. So the answer is any sort of  
14:41:54 15 algorithmic disclosure that's required would be very  
14:41:56 16 minimal because it's definite knowledge that a POSITA  
14:42:00 17 would have.

14:42:01 18 And here's just some more examples of additional  
14:42:05 19 sort of algorithm disclosures and software that's  
14:42:09 20 available to a POSITA. Before I get into sort of their  
14:42:16 21 admissions of algorithms, I just want to say that, you  
14:42:21 22 know, a big part of this is when Meta had described our  
14:42:27 23 sort of point to the 090 patent, I'd also like to point to  
14:42:31 24 other parts in our reply brief where we listed a table of  
14:42:35 25 where the algorithms were. Algorithm is required to

14:42:39 1 provide structure. You know, interconnections of other  
14:42:42 2 devices can provide structure, as well, and their argument  
14:42:47 3 today limited us not to the algorithms that were disclosed  
14:42:50 4 but disclosure of other structure. And if you look at the  
14:42:55 5 chart in our reply brief of algorithmically disclosed  
14:42:59 6 structure, we often cite to a figure. These are multipart  
14:43:02 7 flowcharts that are designed to actually explain these  
14:43:06 8 algorithms and there is also additional prose that when  
14:43:08 9 discussing these charts that sort of explain sort of the  
14:43:12 10 processes that are involved in each block of the  
14:43:16 11 flowchart. And so, we've briefed that and the Court can  
14:43:19 12 look at it further.

14:43:22 13 But most compelling on the algorithm side is the  
14:43:27 14 defendants have admitted that there is sufficient  
14:43:29 15 algorithmic disclosure in their IPRs. I think they point  
14:43:34 16 to in this example just our citation to the convolution  
14:43:39 17 mathematical formula, which they say is an algorithm  
14:43:43 18 called convolution, a well-known mathematical operation.  
14:43:47 19 They argue that this points to facts that a POSITA would  
14:43:52 20 know what this is.

14:43:54 21 But here, they argue that that's an insufficient  
14:43:56 22 disclosure and that a POSITA wouldn't know and they would  
14:43:59 23 need more information, which is an inconsistent statement  
14:44:04 24 and this just goes on. There is other admissions that  
14:44:08 25 using DSP, common industry programming techniques bolster

14:44:13 1 their obviousness and novelty arguments. They even cite  
14:44:18 2 to some of our citations, various sort of off-the-shelf  
14:44:24 3 software. And here's just a complete list of all the  
14:44:34 4 times where they just basically admit that this is  
14:44:36 5 commonly known and therefore --

14:44:45 6 THE COURT: I'm sorry, I'm having a real hard  
14:44:48 7 time hearing you.

14:44:48 8 MR. SPISAK: I'm sorry.

14:44:50 9 THE COURT: Kind of faded out there towards the  
14:44:51 10 end of that last little bit.

14:44:54 11 MR. SPISAK: How long? Like 30 seconds? A  
14:44:56 12 minute?

14:44:56 13 THE COURT: Yeah, about 30 seconds or so. It was  
14:44:58 14 kind of slowly getting quieter. I just couldn't make out  
14:45:01 15 the last little bit you said there.

14:45:03 16 MR. SPISAK: I apologize. Basically I was just  
14:45:06 17 going through all the various times of which they have  
14:45:09 18 admitted that the prior art disclosed a lot of algorithms  
14:45:13 19 and software for performing these type of functions in  
14:45:21 20 sort of audio processing functions and again and again in  
14:45:23 21 their IPRs. And I was just saying that these slides just  
14:45:27 22 sort of summarize all of their -- this -- for example,  
14:45:30 23 this is from paragraph 5 in the Robinson declaration, the  
14:45:34 24 supplemental where basically it's a summary of all the  
14:45:39 25 times they've admitted to disclosed structures in prior

14:45:42 1 art. So these all sort of belie the idea that we need to  
14:45:45 2 disclose additional structure; and therefore, these  
14:45:48 3 patents are -- these terms are definite. And that's it.

14:45:56 4 THE COURT: All right. Thank you, Mr. Spisak.

14:46:01 5 Mr. Lumish, do you want to respond real quick?  
14:46:06 6 Especially how do you reconcile the IPR positions to your  
14:46:09 7 positions in the litigation?

14:46:12 8 MR. LUMISH: Thank you, your Honor. Yes, I do  
14:46:14 9 want to address that point.

14:46:15 10 So Mr. Spisak started and ended there. The  
14:46:18 11 suggestion being we're talking out of both sides of our  
14:46:22 12 mouth. What he fails to mention are two things. One is  
14:46:24 13 we can't make an indefiniteness argument in an IPR. IPRs  
14:46:28 14 are restricted only to prior art invalidity arguments. We  
14:46:33 15 could not bring a 112(f) argument under -- and say it was  
14:46:37 16 indefinite and ask the PTAB to rule upon that. And so,  
14:46:41 17 there's no basis for us to seek it.

14:46:44 18 Second thing he didn't tell your Honor is  
14:46:46 19 expressly in our IPRs, we noted that we were going to ask  
14:46:49 20 your Honor in district court for a 112(f) indefiniteness  
14:46:54 21 finding that we think that's the proper construction of  
14:46:56 22 the claims, but for the purpose of the IPR, we were  
14:47:00 23 embracing their constructions. And under their  
14:47:02 24 constructions, the claims are invalid under the prior art.  
14:47:06 25 So for both those reasons, this whole argument that, you

14:47:08 1 know, the IPRs somehow has any bearing on this proceeding  
14:47:11 2 we say is wrong.

14:47:14 3 Another thing you heard from counsel was, well,  
14:47:16 4 it doesn't matter what the strength of the presumption is,  
14:47:18 5 there was a whole discussion of the presumption. That's  
14:47:20 6 because Williamson, the en banc Federal Circuit made clear  
14:47:25 7 it is not a strong presumption and that all of the case  
14:47:28 8 law that leads up to that case, which is mostly what was  
14:47:30 9 cited to you by counsel, by the way, most of the cases  
14:47:33 10 they cited, including especially the Linear Technologies  
14:47:36 11 case which they hung their hat on in multiple slides,  
14:47:38 12 that's all law pre-Williamson. And pre-Williamson, if you  
14:47:42 13 didn't use the word "means," it meant pretty much  
14:47:45 14 everything. The case was going to live or die on 112(f)  
14:47:48 15 or 112, 6, depending on whether the word "means" was used.

14:47:53 16 Williamson changes all of that and your Honor  
14:47:55 17 needs to -- you're going to be doing it but I would ask  
14:47:58 18 your Honor to look at the cases that come Williamson and  
14:48:00 19 later to see that it really reset the table on this issue.  
14:48:04 20 And so, most of the cases you heard and most of the  
14:48:07 21 argument you heard has actually been obsoleted by  
14:48:09 22 Williamson on that front.

14:48:11 23 There was an argument about Apple v. Motorola  
14:48:17 24 that, well, if it's not a means-plus-function format,  
14:48:19 25 well, you don't need an algorithm. Of course not. We

14:48:22 1 agree with that. The algorithm requirement comes from a  
14:48:26 2 finding we asked your Honor to make that the limitation is  
14:48:30 3 one that is 112(f). If it's 112(f) and  
14:48:34 4 means-plus-function, then that's where the algorithm  
14:48:37 5 requirement comes in. So we don't disagree with them  
14:48:38 6 there. We disagree with the suggestion that we -- somehow  
14:48:41 7 we're trying to get around that because we embrace it.

14:48:43 8 Let me address two other points, if I might, your  
14:48:53 9 Honor. One was counsel brought up this chart that they  
14:48:55 10 have in their reply brief. May I share my screen again,  
14:48:58 11 please?

14:48:59 12 THE COURT: You may. Yeah.

14:49:01 13 MR. LUMISH: Thank you, your Honor.

14:49:02 14 So this is really what I was getting at before  
14:49:04 15 and I didn't spend a lot of time on it. I wasn't sure if  
14:49:06 16 I need to, but it's clear that I do, which is that chart  
14:49:09 17 if you go to their reply brief and look at what Mr.  
14:49:12 18 Begault does is, he purports to say, well, there's some  
14:49:15 19 structure and some algorithmic support in the  
14:49:19 20 specifications of 8K's patents, but in every single  
14:49:22 21 instance, he truncates the function.

14:49:25 22 And this on the slide 76 that I have up on the  
14:49:28 23 screen, your Honor, is an example. On the left side, you  
14:49:32 24 have 196 patent, claim 15, and we would color-coded it to  
14:49:35 25 show all of its many functions. And on the right, you

14:49:39 1 have an excerpt from Dr. Begault's supplemental  
14:49:41 2 declaration where he says what he's mapping the algorithm  
14:49:45 3 to. The only function he maps algorithm to there is  
14:49:49 4 executing the instructions to receive a command from the  
14:49:52 5 person to move the SLP. He ignores that it's gotta be an  
14:49:57 6 SLP of the voice of the computer program. That the  
14:50:00 7 movements from the first location and empty space to a  
14:50:04 8 second location in empty space, that that second location  
14:50:08 9 is one that's proximate to the first location and yet,  
14:50:11 10 away from and proximate to the person. That the  
14:50:15 11 instructions tell the processor also to -- this is the  
14:50:18 12 green part -- move the SLP of the voice of the computer  
14:50:21 13 program in response to the command from the first location  
14:50:24 14 in empty space. In the pink function, you have to provide  
14:50:29 15 binaural sound to the person through the wearable  
14:50:34 16 electronic device, and so forth. I won't go through all  
14:50:34 17 of them.

14:50:36 18 But Dr. Begault ignores all of this. And if you  
14:50:38 19 look at our slides, beginning at 75 and carrying on  
14:50:43 20 through slide 81, your Honor, you'll see in every  
14:50:50 21 instance, Dr. Begault maps, at best, some algorithmic  
14:50:55 22 structure he says exists in the specification to only a  
14:50:59 23 truncated version of the function.

14:51:02 24 And so, they've never met their obligation to  
14:51:04 25 show you that if you do find it's 112(f), that there's

14:51:07 1 actually algorithmic support for all of the functions that  
14:51:10 2 are claimed, which is essential. And by the way, you  
14:51:12 3 don't even get to this unless you have agree with us that  
14:51:16 4 these are 112(f) claims. This notion that you go to the  
14:51:19 5 specification to look for support, you only do that if  
14:51:22 6 your Honor agrees that processor was not enough as a name  
14:51:26 7 of structure for these functions to begin with. So we  
14:51:30 8 take it as sort of a tacit admission that they keep going  
14:51:35 9 to the specification to show you where support is for this  
14:51:37 10 because it's not in the claims. It's not in the word  
14:51:39 11 "processor" on its own.

14:51:40 12           Going to slide 82, your Honor, I'll end on this  
14:51:44 13 if I might unless your Honor has further questions for me,  
14:51:46 14 counsel said it was, quote, bizarre, our argument that we  
14:51:51 15 were telling you here that there wasn't sufficient support  
14:51:53 16 in the spec when our expert admits that a person of  
14:51:57 17 ordinary skill in the art could program this. You'll  
14:52:00 18 recall that argument and that we haven't said that a  
14:52:03 19 processor can't perform these functions. That's exactly  
14:52:06 20 the wrong question. They're marching you right down the  
14:52:09 21 wrong law into reversible error because the question is  
14:52:13 22 not could a person of ordinary skill in the art write her  
14:52:16 23 or his own program to achieve these functions. We don't  
14:52:19 24 deny that you can program a processor to do it. That is  
14:52:22 25 not the question.

14:52:24 1 On the screen is the Function Media case. It's  
14:52:26 2 the Federal Circuit, it's still good law, and what they  
14:52:29 3 say is a patentee cannot avoid providing specificity as to  
14:52:34 4 structure simply because someone of ordinary skill in the  
14:52:37 5 art would be able to devise a means to perform the claimed  
14:52:40 6 function. To allow that form of claiming under Section  
14:52:46 7 112, 6 would allow the patentee to claim all possible  
14:52:49 8 means of achieving a function.

14:52:50 9 That's exactly what they want to do here, your  
14:52:52 10 Honor. They want to cover every way of programming a  
14:52:55 11 processor to achieve these functions and they're just not  
14:52:58 12 allowed under the law. So it doesn't matter if my expert  
14:53:01 13 could come up with a way and it doesn't matter if every  
14:53:04 14 person of ordinary skill in the art could come up with a  
14:53:06 15 way.

14:53:07 16 The question is, how did they do it, how did the  
14:53:09 17 named inventors do it, and did they write that down in  
14:53:12 18 their specification so we all could see it as the actual  
14:53:16 19 algorithmic support for their approach to achieving the  
14:53:19 20 functions? If not, which they didn't do it, then they're  
14:53:22 21 trying to claim every way you might program a processor to  
14:53:25 22 achieve a function, and again, your Honor that's just  
14:53:29 23 quintessential functioning claiming and not allowed.

14:53:31 24 THE COURT: How are all of these patents related  
14:53:35 25 and does that affect this means-plus-function analysis?

14:53:39 1 Or do we just take them -- take each claim term on its  
14:53:43 2 own?

14:53:43 3 MR. LUMISH: I think you need to take them each  
14:53:45 4 on their own, your Honor. It's a claim-by-claim analysis  
14:53:47 5 indefiniteness. There's some shared specifications, we've  
14:53:49 6 tried to cite to those where we can, but there's some  
14:53:52 7 differences. At the end of the day, we've bundled this  
14:53:54 8 together because the legal argument for all of them is the  
14:53:58 9 same. They all -- all the claims follow this same format  
14:54:01 10 of a processor for performing these functions without any  
14:54:05 11 algorithmic support to be found in the specification for  
14:54:07 12 all of those functions. That's why we bundled them. But  
14:54:10 13 we also tried in our papers to make sure we were showing  
14:54:12 14 you whenever there were differences, here's where we see  
14:54:15 15 it, you know, this patent group versus that patent group.

14:54:18 16 THE COURT: Okay. And then, how do you square,  
14:54:23 17 you know, the argument in the proposed construction on the  
14:54:25 18 term we'll get to in a minute, the digital signal  
14:54:28 19 processor as -- you don't attack that processor for being  
14:54:34 20 means-plus-function with the idea that these others are  
14:54:37 21 being attacked for being means-plus-function.

14:54:39 22 MR. LUMISH: I think we did, your Honor. And I  
14:54:41 23 think maybe sort of the way it was grouped was a little  
14:54:45 24 confusing. The digital signal processor has its own  
14:54:47 25 problems in construction that we addressed separately, but

14:54:49 1 it also is one of the processor terms that's claiming  
14:54:53 2 function that we say is 112(f).

14:54:54 3 THE COURT: Okay. I kind of saw it nested in the  
14:54:57 4 other one and I wasn't quite sure if that meant digital  
14:55:00 5 signal processor standing alone, you had no  
14:55:02 6 means-plus-functions concern about but when it was nested  
14:55:05 7 with the processor or producing term, you did. So I  
14:55:07 8 wasn't sure about that.

14:55:10 9 MR. LUMISH: We probably should have been more  
14:55:11 10 clear on that, your Honor.

14:55:12 11 THE COURT: That's -- well, that's on me. Okay.  
14:55:15 12 Let me go off the record just briefly.

14:55:17 13 MR. LUMISH: Thank you, your Honor.

15:00:19 14 THE COURT: Okay. Back on the record.

15:00:21 15 The Court's going to stay -- I'm going to stay  
15:00:24 16 with the preliminary construction and I just am not quite  
15:00:27 17 convinced that defendant has -- defendants have overcome  
15:00:31 18 the presumption. That's the main basis for the decision.

15:00:36 19 All right. So with that, let's switch to, I  
15:00:39 20 think, if I understood Ms. LaHatte correctly, we're  
15:00:43 21 talking about "away from" and "proximate to." Is that the  
15:00:45 22 next one you wanted to address?

15:00:48 23 MS. LAHATTE: Yes, your Honor.

15:00:48 24 And just as a housekeeping note, I don't know if  
15:00:52 25 you heard that we did send the slides at the requested

15:00:56 1 time. So just wanted to make that clear, as well.

15:00:59 2 THE COURT: Perfect. Thank you very much and  
15:01:01 3 they should have reciprocated with theirs, as well.

15:01:07 4 MR. ROBINSON: Nobody on my team has received  
15:01:10 5 them. So if you can send it by a link because if you send  
15:01:13 6 more than 25 megabytes at a time, most e-mail servers clog  
15:01:18 7 up. So if you could send it by a link that would be  
15:01:21 8 great. Thank you.

15:01:21 9 THE COURT: Mr. Robinson may have put you into a  
15:01:24 10 spam filter, too. That may be...

15:01:27 11 MS. LAHATTE: That would explain a lot of the  
15:01:28 12 responses of late.

15:01:31 13 MR. ROBINSON: That's okay. My wife's put me in  
15:01:34 14 her spam filter so that's fair.

15:01:38 15 MS. LAHATTE: Well, your Honor, I'm going to take  
15:01:42 16 a similar tack that Mr. Lumish, my colleague, just took  
15:01:46 17 with respect to the "processor" terms. Basically asking  
15:01:50 18 your Honor to take a second look at the "away from" and  
15:01:54 19 "proximate to" term because in our opinion, your Honor, in  
15:01:56 20 light of the claims in the specification, the term should  
15:02:00 21 be found indefinite due to lack of guidance or objective  
15:02:03 22 boundaries in the specification. May I share my screen,  
15:02:09 23 your Honor?

15:02:10 24 THE COURT: You may. Go right ahead.

15:02:12 25 MS. LAHATTE: I won't belabor with the law, your

15:02:26 1 Honor, but a term is indefinite when it fails to inform  
15:02:28 2 with reasonable certainty those skilled in the art about  
15:02:34 3 the scope of the invention.

15:02:35 4 Now, the claims that we're talking about here,  
15:02:36 5 the language is away from and proximate to and the claim  
15:02:40 6 uses this term "away from" and "proximate to" to describe  
15:02:46 7 where a sound localization point is located.  
15:02:49 8 Specifically, as you can see here in the 090, claim 8 and  
15:02:53 9 claim 14, you're using the term "away from" and "proximate  
15:02:57 10 to" to describe a sound localization is located away from  
15:03:01 11 and proximate to the first individual.

15:03:04 12 Now, your Honor, unfortunately, the claims don't  
15:03:07 13 explain or, you know, describe what that means. When is  
15:03:12 14 the sound localization point away from and also proximate  
15:03:16 15 to the first individual and that's particularly  
15:03:18 16 problematic here because when you look at the term "away  
15:03:23 17 from" and "proximate to," these terms mean two different  
15:03:27 18 things. You have, on one hand, away, which means distant  
15:03:32 19 in space or time and, on the other hand, you have  
15:03:35 20 proximate, which means very near or close. So when you're  
15:03:38 21 looking at the claims through this lens through what these  
15:03:42 22 terms mean, one skilled in the art doesn't understand how  
15:03:46 23 the SLP can be both away from and proximate to the first  
15:03:53 24 individual.

15:03:53 25 And this problem isn't explained in the

15:03:57 1 specification. The specification, most of the time, just  
15:04:01 2 recites the same language that you find in the claim. It  
15:04:04 3 just merely repeats that the sound localization point is,  
15:04:08 4 again, located away from and proximate to the listener,  
15:04:13 5 but it's not giving examples of when that actually  
15:04:16 6 happens. And it's also not explaining when a sound  
15:04:20 7 localization point is not located away from or proximate  
15:04:25 8 to the listener. And there's no other objective  
15:04:27 9 boundaries or an explanation about how to figure out when  
15:04:32 10 this SLP is at this certain distance.

15:04:35 11 Again, you can see this in the body of the  
15:04:38 12 specification. You just have the recitation of the  
15:04:41 13 language, but that's not giving any guidance to a person  
15:04:44 14 of ordinary skill about the meaning of this term. At  
15:04:48 15 best, your Honor, there are very few limited examples that  
15:04:53 16 explain either when a sound is proximate to the listener,  
15:04:56 17 for example, in the same room, or you have an example as  
15:05:01 18 shown here away from, which is 20 feet away from the  
15:05:05 19 listener. But again, the claim doesn't just say proximate  
15:05:09 20 to or away from. It says away from and proximate to. And  
15:05:13 21 the specification doesn't describe at all when an SLP is  
15:05:17 22 both things and that's the problem here.

15:05:20 23 And it's not just us that are having trouble  
15:05:24 24 defining this term. 8K, themselves, have proposed not  
15:05:29 25 just one but four different definitions in their briefing

15:05:33 1 and in their papers about what away from and proximate to  
15:05:37 2 means. They first said it means a distance from and then,  
15:05:42 3 they said it's a sound that's externalized at some  
15:05:45 4 distance outside the head. And then, they said, well,  
15:05:48 5 that distance outside the head, that's when two people are  
15:05:50 6 having a normal conversation, or that's when two people  
15:05:55 7 are having a conversation and the speech is intelligible.

15:05:59 8           Unfortunately, there's these definitions don't  
15:06:03 9 actually explain what away from and proximate to mean.  
15:06:07 10 Turning first to a distance from, that could cover any  
15:06:11 11 distance. It could cover, you know, an inch from my head,  
15:06:14 12 it could be a foot, a mile, 10 miles, but that's not what  
15:06:20 13 the claim says. The claim doesn't say any distance. It  
15:06:23 14 says a particular location that is both away from and  
15:06:27 15 proximate to the listener. And because a distance from,  
15:06:32 16 it would be improperly rewriting the claims, this  
15:06:35 17 construction has to be rejected.

15:06:37 18           And similarly with respect to the other  
15:06:40 19 definitions that 8K is proposing, for example, where the  
15:06:44 20 sound is located some point outside the head with respect  
15:06:47 21 to, you know, when people are having a conversation,  
15:06:51 22 there's no support in the patent for these definitions.

15:06:57 23           8K's own expert, Dr. Begault, he admitted that  
15:07:00 24 the patent doesn't mention at all, doesn't discuss speech  
15:07:05 25 intelligibility. But it's not just the patents don't

15:07:09 1 support these other definitions, they also raise more  
15:07:13 2 questions. For example, what is normal speech? Is it  
15:07:17 3 what I'm doing right now? What if I spoke a little bit  
15:07:20 4 louder? Is that still normal? I don't know. What about  
15:07:24 5 distance, as well? If I'm talking to my colleague, Mr.  
15:07:28 6 Lumish, is it when we're talking two feet away from each  
15:07:32 7 other, 10 feet, 20 feet? There's no explanation in the  
15:07:35 8 patent.

15:07:36 9           And how do we know this definition doesn't work?  
15:07:40 10 Well, we put this definition back to Dr. Begault. We  
15:07:44 11 asked him under your definition of the term, how you  
15:07:47 12 understand it, would 10 feet meet the claim limitation?  
15:07:52 13 He said it depends on the type of sound. He couldn't say  
15:07:56 14 yes or no. And we asked him again, well, what about 15  
15:08:00 15 feet? Would that be -- would that meet your definition?  
15:08:04 16 He said it could, it might not.

15:08:07 17           And, your Honor, this is the crux of the problem.  
15:08:11 18 A person of ordinary skill is supposed to be able to read  
15:08:14 19 the claims in light of the specification and understand  
15:08:18 20 what is and what is not met by the claims and you can't do  
15:08:23 21 that here, and that's why, your Honor, we submit that  
15:08:26 22 these terms should be found indefinite.

15:08:30 23           THE COURT: Okay. All right. Let me hear from  
15:08:33 24 whoever wants to address this on behalf of plaintiff.

15:08:38 25           MR. ROBINSON: All right, your Honor.

15:08:39 1 Unfortunately you're going to get me. This is Erick  
15:08:43 2 Robinson. Let me see if I can figure out how to share my  
15:08:48 3 screen.

15:08:50 4 THE COURT: All right. And your video is still  
15:08:52 5 turned off, too, Mr. Robinson.

15:08:55 6 MR. ROBINSON: Oh, okay. Let me try to fix that.  
15:09:01 7 Your Honor, I'm not a cat if that helps. There we go. So  
15:09:07 8 can you see my screen now?

15:09:09 9 THE COURT: I do. I see the kind of the user  
15:09:13 10 interface as opposed to in a presentation mode. Oh,  
15:09:15 11 there's the presentation mode. I'm good now.

15:09:18 12 MR. ROBINSON: Okay. So what I will say is that,  
15:09:24 13 you know, if you look at this term in a vacuum, you know,  
15:09:29 14 it may be confusing, but, you know, luckily we don't have  
15:09:34 15 to look at it in a vacuum. We have a specification. We  
15:09:38 16 have the claims. We have a very specific art. We have  
15:09:43 17 two experts and both experts agree that away from  
15:09:49 18 basically means outside the head. Because again, we're  
15:09:52 19 talking about the perspective of, you know, virtual  
15:10:01 20 reality and away from simply means outside the head. And  
15:10:03 21 I'll go into details, but before I complicate, I want to  
15:10:07 22 try and keep it simple.

15:10:08 23 And proximate to, it sounds like both of these  
15:10:10 24 are distances but away from is not. It's just means  
15:10:15 25 outside the head, and in this area of art, that's very

15:10:20 1 important and both experts understood that. Proximate to  
15:10:25 2 is a relative distance and it depends on if the room is  
15:10:33 3 loud, you know, and there's some -- and there is some  
15:10:37 4 relativity to that. But many, many cases have, you know,  
15:10:42 5 allowed the term "proximate" to be definite. And here,  
15:10:50 6 it's basically required because we can't give a specific  
15:10:53 7 distance.

15:10:56 8 If everybody's voice were the same, hopefully not  
15:10:59 9 mine, at the same level, at the same pitch, at the same,  
15:11:05 10 you know, wavelength, at everything, then maybe we could.  
15:11:10 11 But, you know, sometimes you're in a quiet room. We're in  
15:11:14 12 a wonderfully quiet room here. You know, what if I'm in,  
15:11:17 13 you know, I don't know, an Indian airport because I lived  
15:11:21 14 in India for several years, there's nothing more chaotic  
15:11:26 15 than an Indian airport and it's not quiet. Now that  
15:11:30 16 you've heard that, hopefully that at least, you know, away  
15:11:34 17 from and proximate to are not both distances. Away from  
15:11:39 18 simply means outside the head and proximate to means, you  
15:11:45 19 know, kind of close to.

15:11:47 20 So the Court should apply the ordinary and  
15:11:50 21 customer meaning. So, you know, Meta said that we came up  
15:11:55 22 with all these different constructions. The reality is we  
15:11:58 23 always said it's ordinary and customary or, depending on  
15:12:01 24 which case you're looking at, plain and ordinary and we  
15:12:07 25 still agree with that. Viewed in light of the associated

15:12:12 1 claims and specifications, you know, this term is very  
15:12:16 2 clear to one of skill in the art.

15:12:21 3           And again, not to rehash the arguments and I'm  
15:12:24 4 not going to go through this in detail, but again, in  
15:12:29 5 paragraphs 4 and 5 of my declaration, you know, Meta takes  
15:12:35 6 contrary factual positions, once again. The defendants  
15:12:41 7 seek to construe this term in a vacuum. In the context of  
15:12:46 8 spacial audio, one of skill in the art would understand  
15:12:48 9 the phrase "away from" to describe a sound that is  
15:12:52 10 externalized, that is, localized at a distance outside the  
15:12:56 11 head. A distinct -- basically as distinct from a sound  
15:13:00 12 that's located like it sounds like it's inside the head of  
15:13:04 13 a listener.

15:13:05 14           Then the other part of the term "proximate to"  
15:13:10 15 clearly modifies the extent of the distance at which an  
15:13:14 16 externalized, outside-the-head sound is intended to  
15:13:18 17 appear. Proximate to does have an outer boundary and that  
15:13:23 18 can change, depending on as both experts have pointed out,  
15:13:27 19 you know, the various conditions in a room. Block 110,  
15:13:37 20 for example, states -- designates an SLP, a sound  
15:13:46 21 localization point at a location in empty space that's  
15:13:49 22 away from and proximate to a location of the listener such  
15:13:52 23 that the sound localization point, basically, you know,  
15:13:57 24 this is part of -- I believe this would be technically an  
15:14:01 25 algorithm. Designate a sounds localization point at a

15:14:04 1 location in empty space that is away from and proximate to  
15:14:08 2 the location of the listener such that the sound  
15:14:11 3 localization point simulates the origin of the sounds that  
15:14:14 4 the listener hears. That is entirely consistent with what  
15:14:19 5 we're saying.

15:14:20 6 And, you know, it doesn't help to tell, you know,  
15:14:24 7 either a jury -- juror what exactly this means because if  
15:14:31 8 you try to describe something that's already described, it  
15:14:35 9 just gets more confused. The other thing is that somebody  
15:14:39 10 of skill in the art would clearly know in the context of  
15:14:44 11 an SLP, you know, what proximate to means because, again,  
15:14:49 12 it has a functional meaning.

15:14:51 13 Meta's expert conceded that in the context of  
15:14:55 14 spacial audio, away from using the typical definition  
15:14:58 15 could mean away from like outside the head of the person.  
15:15:03 16 Okay. I'm inclined to believe their expert on that one.  
15:15:09 17 Their expert also admits that our expert published the  
15:15:14 18 seminal reference in the chart -- in the art, sorry. I've  
15:15:17 19 got charts on my minds.

15:15:19 20 As plaintiff's expert has stated, persons having  
15:15:21 21 a conversation at a normal sound level within the same  
15:15:25 22 room are clearly proximate to one another as opposed to  
15:15:29 23 communication between two persons over a longer distance,  
15:15:32 24 say, 20 or more feet, which might require a raised voice  
15:15:36 25 or shouting.

15:15:40 1 For example, claim 1 of the 196 is directed to  
15:15:43 2 movement of a sound localization point, SLP, of a voice of  
15:15:51 3 a computer program. The claim describes an earphone  
15:15:54 4 located at the head of a user providing binaural sound to  
15:15:57 5 the user such that the origin of the voice of the computer  
15:16:00 6 program occurs at the SLP at a first location in empty  
15:16:05 7 space that's away from and proximate to the user. Based  
15:16:09 8 on this claim, the voice of the -- from the SLP is located  
15:16:12 9 in empty space outside the head of the user. Defendants'  
15:16:17 10 expert agrees at least to an understanding of the phrase  
15:16:20 11 away from as used in the context of spacial audio that  
15:16:23 12 this means outside the head of a person.

15:16:27 13 So the specifications further support the  
15:16:31 14 conclusion that the SLP is a distance from, you know, the  
15:16:36 15 user. Basically it supports our construction that this is  
15:16:40 16 plain and ordinary meaning because the SLP is described in  
15:16:45 17 terms of the point of view of the listener. That's the  
15:16:49 18 entire point of this patent. And in terms of -- so away  
15:16:55 19 from, everybody agrees. The question is proximate to and,  
15:17:00 20 you know, that is a relative term, and as I said, it does  
15:17:07 21 depend on factors that one of skill in the art would be  
15:17:12 22 able to understand and then, make adjustments to what is  
15:17:18 23 determined to be proximate based on those factors.

15:17:23 24 So to the patentee and to one of skill in the  
15:17:26 25 art, when the SLP is an empty space not at the head of the

15:17:29 1 user but in the same room as the user is simply distance  
15:17:33 2 from the user because as the patent explains, the listener  
15:17:38 3 of the detected sound can localize the sound to determine  
15:17:41 4 a distance and direction from the sound. The association  
15:17:47 5 between an SLP that is a distance from and in the same  
15:17:50 6 room as the listener is further fully represented in  
15:17:54 7 several patent figures, which I promise I will not go  
15:17:57 8 through.

15:17:58 9           The specification provides these and many other  
15:18:01 10 examples describing and showing the meaning of away from  
15:18:04 11 and proximate to. So it's not like this hasn't been  
15:18:07 12 defined. Do we give an infinite number of examples? No.  
15:18:12 13 Just as no patent is, has, or is required to. The 090 and  
15:18:17 14 the 196 patents were also issued without office actions  
15:18:23 15 indicating that the USPTO did not view the term "away  
15:18:27 16 from" and "proximate to" as being defective in view of  
15:18:30 17 Section 112. Just because the examiner viewed the claim  
15:18:35 18 in light of the specification and area of the art instead  
15:18:38 19 of just reviewing away from and proximate to and then,  
15:18:43 20 running to a general Texas -- a general technical  
15:18:48 21 dictionary. Whatever a Texas dictionary is. That would  
15:18:53 22 really screw stuff up.

15:18:55 23           8 Kilohertz's proposal for ordinary and customary  
15:18:58 24 meaning should be adopted. The term "away from" and  
15:19:02 25 "proximate to" simply indicates that the SLP must be

15:19:05 1 outside of the user's head but in a vicinity as  
15:19:08 2 exemplified in the claims and specifications. And I'm  
15:19:14 3 going to actually conclude early but the defendants'  
15:19:19 4 analysis is used to arrive at an unsupported premise that  
15:19:23 5 the term provides two seemingly contradictory conditions  
15:19:26 6 occurring in parallel. And if you just look at those two  
15:19:30 7 different terms within this term in a vacuum, that makes  
15:19:34 8 sense, but as I've explained, that's not the actual case.  
15:19:38 9 And I will stop.

15:19:42 10 THE COURT: All right. And just out of  
15:19:45 11 curiosity, too, you went past it there, but I noticed in  
15:19:50 12 the briefing that you had the phraseology that the term  
15:19:54 13 "away from" and "proximate to" simply indicates that the  
15:19:57 14 SLP must be outside of the user's head but in a vicinity  
15:20:00 15 as exemplified in the claims and specifications. Why was  
15:20:05 16 that not your alternative proposal as opposed to a  
15:20:07 17 distance from?

15:20:09 18 MR. ROBINSON: Because I've got mad cow disease  
15:20:12 19 and I'm not all that bright. To be honest, we probably  
15:20:15 20 should have done that. I mean, ultimately, the way that I  
15:20:17 21 do things, we're not in Delaware, we don't -- when we say  
15:20:21 22 ordinary meaning, we don't have to come up with what  
15:20:23 23 ordinary meaning is and what our argument was ordinary  
15:20:28 24 meaning. And honestly, you know, we should have done  
15:20:33 25 better. A distance really doesn't say much and I get that

15:20:38 1 and I'm not arguing that you oughta say that. But it's  
15:20:43 2 clear that plain and ordinary meaning makes sense and  
15:20:45 3 should carry the day.

15:20:47 4 THE COURT: Okay. Let me. Let me hear, Ms.  
15:20:50 5 LaHatte, would you like to respond?

15:20:51 6 MS. LAHATTE: Yes, your Honor. Just a couple of  
15:20:53 7 quick points.

15:20:54 8 I will say I think counsel on the other side just  
15:20:58 9 admitted that you can't just say ordinary meaning. It  
15:21:02 10 doesn't say much at all just to say what a distance from  
15:21:04 11 is and that's exactly what our point is. The  
15:21:07 12 specification claims you can't say what this distance  
15:21:11 13 actually is.

15:21:13 14 And I think, your Honor, I think we need to  
15:21:15 15 reframe the argument here a little bit. There's been a  
15:21:18 16 lot of talk about away from means that it's outside the  
15:21:22 17 head, and so then, what you're really trying to construe  
15:21:24 18 is when is something proximate to the person's head. But,  
15:21:29 19 your Honor, the claims and the specification don't talk  
15:21:31 20 about away from and proximate to together in that manner.  
15:21:37 21 The specification describes away from -- and let me share  
15:21:41 22 my screen again, if I may, your Honor.

15:21:43 23 THE COURT: Certainly.

15:21:54 24 MS. LAHATTE: So as you can see here, again, in  
15:21:56 25 the specification, it talks about away from in terms of

15:22:00 1 distance only. It doesn't talk about away from in terms  
15:22:04 2 of externalizing outside the head and there's good reason  
15:22:07 3 for that, your Honor. The patent says that you can -- you  
15:22:11 4 don't have to externalize the sound. You can have an SLP  
15:22:14 5 located within a listener, for example, at column 38, line  
15:22:21 6 34.

15:22:22 7 And so, it's really important to actually see how  
15:22:25 8 the specification is describing the terms at issues here.  
15:22:30 9 They're only using away from and proximate to to describe  
15:22:34 10 the distance between the SLP and the person. It's not  
15:22:38 11 talking about externalization at all. So the fact that  
15:22:41 12 our expert said that away from could include a point that  
15:22:47 13 includes externalization doesn't matter, your Honor. What  
15:22:49 14 really matters here is what is required by the claim and  
15:22:52 15 how are these terms used in the specification? And  
15:22:55 16 they're used to claim some sort of distance. The real  
15:22:59 17 problem is we don't know what that distance is. It's this  
15:23:03 18 ambiguous away from and proximate to, your Honor, and  
15:23:06 19 that's why the terms are indefinite here, your Honor.

15:23:11 20 THE COURT: Okay. Thank you, Ms. LaHatte.

15:23:14 21 MR. ROBINSON: Very quickly, just say that, you  
15:23:17 22 know, you have to assume -- and I believe there's a legal  
15:23:20 23 doctrine. DJ's far smarter than me so maybe she can tell  
15:23:24 24 me that. But, you know, the claims have to be construed  
15:23:26 25 as to make some sense. And if the construction were as,

15:23:33 1 you know, Meta would have it, then, you know, close to but  
15:23:38 2 far away, that doesn't make any sense, you know. And one  
15:23:42 3 of skill in the art would also understand that that  
15:23:45 4 doesn't make any sense.

15:23:47 5           You know, the fact that it is away from simply  
15:23:51 6 means, I guess, you know, maybe we should have said  
15:23:54 7 outside the head. But, you know, we can be our own  
15:24:00 8 lexicographer and we don't even need to do that because  
15:24:03 9 one of skill in the art, including their expert,  
15:24:05 10 understood what this mean. I'll shut up now. My  
15:24:10 11 apologies.

15:24:10 12           THE COURT: All right. Thank you, Mr. Robinson.

15:24:14 13           On this term, I believe that in light of the  
15:24:19 14 context of both the invention and the specification, away  
15:24:24 15 from and proximate to do have a plain -- or should be  
15:24:31 16 given their plain and ordinary meaning, which I will say  
15:24:34 17 and will provide in more detail the order in due course,  
15:24:39 18 but it requires more than just a distance from read in  
15:24:44 19 context of the claim terms. So I do not believe it's  
15:24:46 20 indefinite will ascribe its plain and ordinary meaning at  
15:24:52 21 this time. So I'll stay with the preliminary proposal.

15:24:55 22           And then, the last term we have is the diagnostic  
15:24:59 23 -- or where did it go, digital, sorry. Not diagnostic.  
15:25:04 24 "Digital signal processor" so I'll turn that over to  
15:25:09 25 whoever is going to address it. Mr. Akalski?

15:25:13 1 MR. AKALSKI: Yes. Good afternoon, your Honor.

15:25:14 2 I'll be addressing that terminate. May I share  
15:25:16 3 my screen?

15:25:16 4 THE COURT: You certainly may.

15:25:37 5 MR. AKALSKI: Your, Honor, for the term "digital  
15:25:40 6 signal processor," the parties --

15:25:41 7 THE COURT: I'm going to stop you real quick, Mr.  
15:25:43 8 Akalski. All I see is a little -- I don't know, little  
15:25:47 9 text that says you have started sharing your screen but I  
15:25:50 10 don't see a presentation. So before you launched into it,  
15:25:53 11 I wanted to make sure if I'm supposed to be seeing a  
15:25:56 12 presentation, I want to let you know I'm not seeing it.

15:25:58 13 MR. AKALSKI: Thank you, your Honor. I just see  
15:25:59 14 a message on my screen that says the screen share is  
15:26:02 15 loading.

15:26:02 16 THE COURT: Ah, okay. That's probably what it is  
15:26:04 17 then. We may have lost you, Mr. Akalski.

15:26:24 18 MR. AKALSKI: Let me stop the share and try to do  
15:26:26 19 that again.

15:26:29 20 THE COURT: All right. Okay. I see you now.  
15:26:34 21 Okay.

15:26:43 22 MR. AKALSKI: Can you see my screen yet, your  
15:26:45 23 Honor?

15:26:45 24 THE COURT: I cannot. And it looks like your  
15:26:47 25 video may have frozen. I'm not sure. Well, now the video

15:26:50 1 went black on my end. I don't know, something about the  
15:26:54 2 screen sharing seems to be giving your computer a little  
15:26:57 3 headache, I guess.

15:27:01 4 MR. AKALSKI: It looks like it is not working.  
15:27:04 5 Can I ask my colleague, Ms. LaHatte, if she could share  
15:27:09 6 her screen.

15:27:11 7 MS. LAHATTE: I was just about to make the same  
15:27:13 8 offer, Mr. Akalski. I just couldn't get my finger on the  
15:27:17 9 mute button quick enough.

15:27:18 10 THE COURT: That will be just fine if you can  
15:27:21 11 share yours, Ms. LaHatte.

15:27:23 12 MR. AKALSKI: And we'll be at slide 39, please.

15:27:25 13 THE COURT: There you are. You're back, Mr.  
15:27:27 14 Akalski, so at least I see you now.

15:27:29 15 MR. AKALSKI: Thank you, your Honor. If we can  
15:27:56 16 go to the next slide.

15:27:56 17 Your Honor, for the term "digital signal  
15:27:59 18 processor," the parties agree that a digital signal  
15:28:02 19 processor is a specialized processor. The principal  
15:28:05 20 disputes between the two constructions are that in the  
15:28:10 21 context of the patents is a DSP hardware -- a hardware  
15:28:14 22 component, which is what Meta proposes, or can it be  
15:28:18 23 software running on a general purpose processor, which is  
15:28:22 24 what 8K's construction would encompass. And although the  
15:28:27 25 Court has issued a preliminary construction of ordinary

15:28:32 1 and customary meaning, the fact that 8K's alternative  
15:28:37 2 construction includes this software component indicates  
15:28:43 3 that the parties will be at a dispute or a potential  
15:28:47 4 dispute in the future in this case.

15:28:51 5 In addition, the other dispute with respect to  
15:28:54 6 these terms is whether the DSP should be construed  
15:28:58 7 according to what it is and the properties that it has as  
15:29:01 8 Meta proposes or based on its function as 8K proposes.  
15:29:06 9 The intrinsic record here supports Meta. And if we could  
15:29:10 10 please go to the next slide, slide 40.

15:29:17 11 Here, DSPs and general purpose processors are  
15:29:20 12 different. You can see that in the claims. You see on  
15:29:23 13 the left side of the screen, claim 8 from the 836 patent  
15:29:27 14 recites one or more processors that process sound for the  
15:29:30 15 image to generate binaural sound. And then, later in the  
15:29:33 16 claim, you see wherein one or more of those processors  
15:29:38 17 includes a digital signal processor that processes the  
15:29:42 18 sound for the image and it continues.

15:29:46 19 You can also see that in the specification that  
15:29:50 20 digital signal processors are different from general  
15:29:52 21 purpose processors. You see from the 836 patent at column  
15:29:58 22 39, the specification says consider an example in which an  
15:30:06 23 HPED includes a customized or dedicated DSP that executes  
15:30:10 24 one or more blocks discussed herein. Such a DSP has a  
15:30:13 25 better power performance for power efficiency compared to

15:30:17 1 a general purpose microprocessor.

15:30:19 2 So that language from the specification is where  
15:30:23 3 Meta takes its construction and that language making that  
15:30:27 4 comparison demonstrates that digital signal processors are  
15:30:31 5 a component that are different -- that is different from a  
15:30:34 6 general purpose microprocessor.

15:30:37 7 Similarly from the 179 patent on the right below,  
15:30:42 8 an example embodiment uses a DSP or other processor. So  
15:30:46 9 again, it's distinguishing between digital signal  
15:30:49 10 processors, on the one hand, and other types of processors  
15:30:52 11 on the other. If we could go to the next slide, please.  
15:30:57 12 This will be slide 41.

15:31:00 13 Technical dictionaries also support Meta's  
15:31:02 14 construction that digital signal processors are not  
15:31:06 15 software. Here, this is from the Comprehensive Dictionary  
15:31:09 16 of Electrical Engineering and it says digital signal  
15:31:12 17 processors are microprocessor specifically designed for  
15:31:16 18 processing digital signals. DSPs are typically well  
15:31:19 19 suited to perform multiplications and additions in chain,  
15:31:23 20 et cetera. If we can please move to slide 42.

15:31:32 21 So we can see again from the specification that  
15:31:35 22 the digital signal processor is a term of art. The  
15:31:38 23 specification of the 836 patent here distinguishes between  
15:31:42 24 a processor programmed to process digital signals and a  
15:31:46 25 DSP. And here, you see it says the DSP can also provide a

15:31:49 1 lower cost solution compared to a general purpose  
15:31:52 2 microprocessor that executes digital processing and  
15:31:56 3 convolving algorithms. A general purpose processor that  
15:32:00 4 executes digital signals is exactly what 8K proposes would  
15:32:05 5 also be a digital signal processor.

15:32:07 6 In 8K's construction, 8K's construction rather  
15:32:10 7 attempts to capture within it the software running on a  
15:32:17 8 general purpose processor that processes -- that performs  
15:32:22 9 digital signal processing algorithms, but you see that the  
15:32:25 10 specifications specifically distinguish between the two.  
15:32:27 11 So a DSP, again, is not software. If you could please  
15:32:32 12 move to the next slide. This is slide 44.

15:32:37 13 The specification of the 737 patent also supports  
15:32:40 14 Meta's construction here. The digital signal processor is  
15:32:44 15 described as having a hardware architecture optimized for  
15:32:48 16 convolving sound. So again, the digital signal  
15:32:52 17 processor's not defined by software, although you can have  
15:32:55 18 software running on a general purpose processor that  
15:32:58 19 performs digital signal processing. The term "digital  
15:33:03 20 signal processor" refers to a hardware architecture  
15:33:08 21 optimized for doing certain tasks. Here, convolving sound  
15:33:11 22 and executing one or more example embodiments. Next  
15:33:15 23 slide, please. This is slide 44.

15:33:20 24 Other courts also agree. So when faced with the  
15:33:23 25 same question, other courts have found that a DSP is a

15:33:27 1 specific hardware, not just a processor that can process  
15:33:30 2 digital signals. This is from the Vocalife vs. Amazon  
15:33:34 3 case and the issue in dispute appears to distill to  
15:33:38 4 whether a digital signal processor is just anything  
15:33:40 5 capable of processing digital signals. The Court found  
15:33:43 6 that it was not. This is a term of art that refers to a  
15:33:48 7 microprocessor specialized for mathematical processing of  
15:33:51 8 digital signals. Next slide, please.

15:34:00 9 Now onto slide 45, I wanted to address the other  
15:34:05 10 part of 8K's construction which attempts define a digital  
15:34:10 11 signal processor by the functions that it performance and  
15:34:14 12 here, that would be improper as a matter of law. In the  
15:34:18 13 IDB Ventures case, which is cited in our brief, the Court  
15:34:21 14 found that a construction that includes a reworded version  
15:34:25 15 of the functions of the digital signal processor that are  
15:34:27 16 recited in the claims is either redundant of the functions  
15:34:31 17 set forth in the claims themselves or would be confusing  
15:34:33 18 to the extent that the language in the proposed  
15:34:37 19 construction differs from the language in the claims. If  
15:34:41 20 we could jump to the next slide, please. And I think one  
15:34:47 21 more click, please, Ms. LaHatte.

15:34:51 22 Here, we see the language of the claims and for  
15:34:53 23 each of the claims that include the term "digital signal  
15:34:55 24 processor," claim 8 from the 836 patent, claim 14 from the  
15:34:59 25 179 patent, and claim 14 from the 184 patent, the claim

15:35:05 1 includes in it the functions that the digital signal  
15:35:06 2 processor is supposed to be performing or is required to  
15:35:10 3 perform with respect to the claims.

15:35:13 4           So because the functions are included in the  
15:35:17 5 claim, are recited in the claim, defining the digital  
15:35:21 6 signal processor using a reworded version of those  
15:35:25 7 functions or just different functions altogether would be  
15:35:27 8 redundant or confusing to the jury. If we could jump to  
15:35:35 9 the next slide, please.

15:35:40 10           In closing on this term, your Honor, a digital  
15:35:44 11 signal processor is not software. It's a term of art that  
15:35:46 12 refers to a specific type of hardware with better power  
15:35:50 13 and performance efficiency than a general purpose  
15:35:54 14 microprocessor. 8K's construction is redundant and  
15:35:57 15 confusing and it is overly broad because it attempts to  
15:36:03 16 capture within it software processing on a general purpose  
15:36:07 17 microprocessor which is specifically distinguished in the  
15:36:10 18 specifications. And if there are no further questions,  
15:36:12 19 your Honor, I'll rest there.

15:36:16 20           THE COURT: Okay. I don't have any questions at  
15:36:19 21 this time. Thank you, Mr. Akalski.

15:36:22 22           Who is going to respond on behalf of plaintiff on  
15:36:25 23 this one?

15:36:29 24           MS. HEALEY: This is Danielle Healey and I'm  
15:36:32 25 going to respond. And I'm going to put up a share screen

15:36:34 1 so if you'd just give me a moment, your Honor.

15:36:39 2 THE COURT: Certainly.

15:36:48 3 MS. HEALEY: So our proposed construction is  
15:37:14 4 plain and ordinary meaning. And one of the things that  
15:37:18 5 jumps out from the expert's depositions and from the  
15:37:25 6 evidence that was submitted both in this court and to the  
15:37:28 7 PTAB as well as the dictionary definitions is that there  
15:37:32 8 is a plain and ordinary meaning to what is a DSP.

15:37:39 9 Now, to the extent, you know, in one of the  
15:37:42 10 claims, it says, you know, what the function is, well,  
15:37:45 11 that keeps the plain and ordinary meaning a lot simpler  
15:37:49 12 for everyone to understand. On the other hand, takings  
15:37:55 13 examples in what we saw quoted from the specification were  
15:37:59 14 examples largely and putting them into claim language  
15:38:07 15 through a definition, that's improper. That's just not  
15:38:11 16 close to how you should define claims by limiting them  
15:38:14 17 according to examples such as just one example in the  
15:38:19 18 spec.

15:38:19 19 Now, take a look here about what Dr. McMullen  
15:38:23 20 says. Well, she says they're a special form of general  
15:38:28 21 processors. And one thing I want to point out or remind  
15:38:33 22 everybody of and maybe it's just because I'm older and I  
15:38:36 23 forget these things is processor is a lump of metal with a  
15:38:42 24 plastic cap on it unless it has software. Software is a  
15:38:47 25 bunch of stuff written on a medium unless it has hardware.

15:38:52 1 You need hardware and software together for that part to  
15:38:55 2 do anything.

15:38:57 3 So what does that mean? Well, you have a general  
15:39:02 4 processor, you can load it with software to perform  
15:39:05 5 different functions. And one of those function you can  
15:39:09 6 load it with is software to perform digital signal  
15:39:14 7 processing. They're going to say, well, that's not as  
15:39:17 8 efficient or it's not better. It's not as efficient or  
15:39:22 9 it's not better and, you know, when I look at their  
15:39:25 10 definition, I'm like better or more efficient than what?

15:39:28 11 You know, a 2010 DSP processor from you know,  
15:39:38 12 let's say, NVIDIA versus a 2022 processor, general  
15:39:47 13 processor unit from Intel, you know, what are we comparing  
15:39:50 14 here? Their comparison without context is meaningless and  
15:39:55 15 that is going to confuse the jury more than anything else.

15:39:59 16 But here's their expert. It's a form of a  
15:40:02 17 general processor. And yeah, there's plenty of things in  
15:40:09 18 the evidence in the art that talks about how well its  
15:40:14 19 architecture of a DSP can be specially designed to  
15:40:19 20 maximize its availability and its ability to do  
15:40:22 21 mathematical functions and that gives it the superior  
15:40:27 22 ability or more efficient ability to function in that role  
15:40:32 23 as opposed to general processing unit. But a general  
15:40:38 24 processing unit can process digital signals if it's  
15:40:42 25 programmed to do that.

15:40:42 1 The other thing we see and here, you know, we get  
15:40:46 2 to that same place. This is evidence from their IPR,  
15:40:50 3 okay? The evidence from the IPR that they've put in and  
15:40:54 4 this is evidence that was so important to their IPR that  
15:40:59 5 it's actually quoted in the text to the IPR itself, not  
15:41:02 6 just an exhibit attached. And here, it talks about, you  
15:41:08 7 know, was it well known to have these DSP structures in  
15:41:12 8 common industry programming techniques and software  
15:41:15 9 libraries.

15:41:17 10 And they're trying to sweep it all in. This is  
15:41:18 11 our IPR. We're going to invalidate this patent, let's  
15:41:21 12 sweep it all in. And they're asking him that. They're  
15:41:23 13 not asking him in terms of a legal definition of DSP.  
15:41:26 14 They're saying factually, what was the understanding at  
15:41:32 15 the time? And they're asking this factually, was this the  
15:41:36 16 understanding at the time?

15:41:36 17 And, you know, our rules let creative lawyers  
15:41:41 18 come up with contradictory arguments in different forums,  
15:41:44 19 in different briefs, but there's no creativity allowed  
15:41:49 20 with the facts. As my colleague Mr. Spisak said, the  
15:41:53 21 facts are the facts. And any rule you look at about what  
15:41:55 22 a lawyer's allowed to do or not do and what his signature  
15:41:59 23 means or doesn't mean, that creativity is limited to how  
15:42:02 24 they argue the law. Doesn't affect how they argue the  
15:42:05 25 facts.

15:42:06 1 And again, you have Dr. McMullen talking about  
15:42:13 2 the function of the DSPs and the software and that is,  
15:42:16 3 what is audio signaling processing? You know, there's  
15:42:21 4 hundreds of algorithms and transformations that can be  
15:42:24 5 worked on a digital signal inside of a system to change  
15:42:28 6 its output. Okay. Well, again, you know, that hunk of  
15:42:35 7 metal doesn't do anything without the software and they're  
15:42:37 8 saying no, no, it has to be a specialized processor. It  
15:42:40 9 has to be a specialized processor that has specific  
15:42:45 10 circuitry that's designed to perform math really  
15:42:48 11 efficiently and it has to be, you know, better, more  
15:42:50 12 efficient than that.

15:42:51 13 And we're going to, I guess, run tests on what's  
15:42:54 14 better, more efficient and try to get the jury to  
15:42:57 15 understand what's better, more efficient, but none of  
15:43:01 16 that's really relevant because the experts will be  
15:43:04 17 speaking in terms of the plain and ordinary meaning and  
15:43:06 18 the plain and ordinary meaning is, we're going to process  
15:43:10 19 digital signals and we're going to have some tool that we  
15:43:13 20 use to make that better and that's going to be a  
15:43:15 21 combination of hardware and software, whether it's a  
15:43:19 22 specialized form of a processor or now, you know, a system  
15:43:24 23 on a chip. Been very popular for a long time.

15:43:27 24 This is a figure of a Texas Instruments system on  
15:43:32 25 a chip. And, you know, as Texans, we should all be very

15:43:36 1 proud of DSPs because the DSP is what brought Texas  
15:43:41 2 Instruments back to the forefront of high technology  
15:43:45 3 companies and that's their flagship product. So, you  
15:43:50 4 know, as someone who adopted Texas as their home 45 years  
15:43:56 5 ago, I will tell you that DSPs are very meaningful to us.  
15:44:04 6 And here's the example of just the layout in a multicore  
15:44:09 7 process. Now, again, you know, we have quotes in the  
15:44:16 8 IPRs. This is, I believe, a excerpt out of Mr. Robinson's  
15:44:22 9 affidavit that's attached to the sur-reply.

15:44:25 10 This is a chart in Mr. Robinson's declaration  
15:44:29 11 that's attached to the sur-reply and, you know, as we sit  
15:44:36 12 here, the DSP is either just better defined as it is in  
15:44:44 13 the claim or as the experts understand it to be as opposed  
15:44:50 14 to making some vague comparison based on examples out of a  
15:44:55 15 specification to the 836 and another example out of the  
15:44:59 16 specification of another patent.

15:45:02 17 So, you know, where I think we come out here,  
15:45:06 18 your Honor, is plain and ordinary meaning works really  
15:45:09 19 well for this term because this term is well known to the  
15:45:16 20 experts. As my learned colleague pointed out, it actually  
15:45:23 21 has some defining language in the specification. And  
15:45:26 22 reading into the claim language, this comparison without  
15:45:31 23 context special -- I mean, reading it in, period, from the  
15:45:36 24 specification is wrong, flat wrong. That contradicts all  
15:45:41 25 kinds of Federal Circuit law. And it also is without

15:45:47 1 context, which makes it really confusing to me when I  
15:45:53 2 don't know what it's comparing it to. And it also just  
15:45:58 3 doesn't make sense without firm parameters of what it's  
15:46:01 4 being compared to.

15:46:02 5 Now, I went back and checked the briefs, your  
15:46:05 6 Honor, and I looked at the definitions. There was no  
15:46:07 7 means-plus-function argument made as to this DSP and  
15:46:11 8 that's another tell to me that everybody understands what  
15:46:16 9 this DSP does and how it works and that it's a combination  
15:46:20 10 of hardware and software, whether that's one of the cores  
15:46:25 11 in one of these multicore, 10 core, 20 core, whatever  
15:46:29 12 cores we're up to now, general processing units that Intel  
15:46:35 13 sells or that other people make, or whether it's separate  
15:46:39 14 chip, or whether it's part of a system on a chip, or  
15:46:44 15 whether you're taking that DSP software and you're using  
15:46:50 16 it on the general purpose core or the general purpose  
15:46:52 17 processing unit to come out with a more efficient way to  
15:46:59 18 process digital signals.

15:47:00 19 But limiting this according to the specification  
15:47:06 20 where there's no disclaimer, no language defining it,  
15:47:10 21 just, oh, here's an example of something you can do,  
15:47:13 22 that's just not appropriate under the law. It's not  
15:47:17 23 helpful to anybody. And I think the Court definition of  
15:47:22 24 plain and ordinary meaning on this term is going to be  
15:47:26 25 noncontroversial when we start hearing the evidence at

15:47:29 1 trial because apparently when I look at the experts and  
15:47:31 2 what they say in both this court and the IPR, they all  
15:47:36 3 seem to understand it and don't seem to disagree with each  
15:47:39 4 other.

15:47:41 5 So I'll pass the -- pass on that, your Honor.

15:47:44 6 THE COURT: All right. Ms. Healey, let me ask  
15:47:49 7 just for clarification purposes, it sounded like from your  
15:47:51 8 argument that you are not arguing that a digital signal  
15:47:56 9 processor can just simply be software. It's gotta be  
15:48:01 10 software in conjunction with some piece of hardware?

15:48:05 11 MS. HEALEY: Right, your Honor. It has to be  
15:48:07 12 software that's running on a piece of hardware.

15:48:10 13 THE COURT: Okay. All right.

15:48:15 14 Mr. Akalski, I'll give you a few minutes to  
15:48:20 15 respond.

15:48:21 16 MR. AKALSKI: Thank you, your Honor.

15:48:23 17 First, I just wanted to clarify that with respect  
15:48:25 18 to the issue on whether DSPs were challenged under 112(f),  
15:48:31 19 they definitely were challenged under -- the DSP terms  
15:48:34 20 were definitely challenged in our briefing on 112(f) for  
15:48:37 21 the 836 patent and the 184 and 179 patents. Those are  
15:48:43 22 part of the processor terms and included in that -- in  
15:48:46 23 those arguments.

15:48:47 24 Second, I wanted to clarify when I was arguing  
15:48:54 25 earlier that a DSP is not software. I did mean that a DSP

15:48:58 1 is not software running on a general purpose processor.

15:49:03 2 In other words, running digital signal processing software

15:49:05 3 on a general purpose processor would not convert that

15:49:08 4 general purpose processor into a digital signal processor.

15:49:12 5 And I think that the slides that we went through,

15:49:15 6 specifically with the 836 patent, made that distinction.

15:49:19 7 Similarly, the claims made that distinction in

15:49:23 8 speaking about processors and digital signal processors.

15:49:26 9 And if there were no distinction between that hardware,

15:49:29 10 there would be no reason for the patentee to recite

15:49:33 11 different language in the claims if it was just a general

15:49:37 12 purpose processor in both instances running different

15:49:40 13 software or running perhaps the same software.

15:49:44 14 So I think that, you know, I would -- there's one

15:49:48 15 thing I would agree with Ms. Healey that yes, those of

15:49:53 16 skill in the art do know what digital signal processors

15:49:56 17 are. I think that Meta disagrees with 8K on what that is.

15:50:02 18 It is a term of art and it is a specialized piece of

15:50:06 19 hardware.

15:50:06 20 And going back to the image of the Texas

15:50:10 21 Instruments system on a chip that they showed, I did take

15:50:14 22 a moment to look that up, and even on that system on a

15:50:18 23 chip, the Texas Instrument system on a chip, the

15:50:21 24 description from Texas Instruments says that it's the --

15:50:26 25 it's TI's, Texas instrument's first time combining a

15:50:30 1 quad-Arm Cortex A15 MP core -- so that would be equivalent  
15:50:34 2 to more of the general person processor -- with up to  
15:50:38 3 eight TMS320C66x high performance DSPs. And you can see  
15:50:45 4 those two components, different physical components on  
15:50:48 5 that chip.

15:50:49 6           So I don't think that anything that 8K argued  
15:50:55 7 supports including in the construction of digital signal  
15:50:59 8 processor software running on a general purpose processor.  
15:51:04 9 Now, I'll close, your Honor, with if your Honor is  
15:51:08 10 inclined to maintain the preliminary construction of plain  
15:51:14 11 and ordinary meaning, we'd respectfully request that the  
15:51:17 12 Court clarify that the plain and ordinary meaning of a  
15:51:21 13 digital signal processor does not include software running  
15:51:25 14 on a general purpose processor. And with that, I thank  
15:51:29 15 the court for its time.

15:51:31 16           THE COURT: Okay. Thank you.

15:51:34 17           MS. HEALEY: Your Honor, could I have a moment,  
15:51:36 18 please?

15:51:36 19           THE COURT: Go ahead, Ms. Healey.

15:51:37 20           MS. HEALEY: First of all, they never briefed  
15:51:39 21 that. Second of all, quite simply is not true. The  
15:51:42 22 general purpose processor can run on any kind of software  
15:51:47 23 that it's programmed to run on it and it can perform all  
15:51:52 24 kinds of applications, all kinds of functions. That's the  
15:51:55 25 thing that runs all kinds of stuff on a computer and it

15:51:58 1 could certainly process signals if you have software on  
15:52:01 2 there. It's not that it can't process signals. So that's  
15:52:05 3 a misnomer.

15:52:07 4 To the extent the claims draw a distinction, well  
15:52:10 5 then, we have the claim language to rely on and we don't  
15:52:13 6 have to add to it something that is really being just  
15:52:19 7 thrown out now that wasn't in the briefing. And if you  
15:52:21 8 look at their definitions and you look at the system on a  
15:52:24 9 chip, that's going to be one chip. That's one chip. Not  
15:52:28 10 a separate chip in terms of a separate processor. That's  
15:52:31 11 a single chip that does all kinds of different things.

15:52:34 12 And, you know, a processor can process whatever  
15:52:41 13 types of mathematical equations you want to run through  
15:52:44 14 it. It's just a matter of how you do it and, you know, is  
15:52:51 15 it better or more efficient to use a DSP? Well, my guess  
15:52:55 16 is it's probably better, more efficient to use an Intel  
15:52:58 17 2022 core in one of their multicore GPUs than a 2010  
15:53:08 18 NVIDIA DSP as a standalone chip.

15:53:12 19 Bottom line, your Honor, their description is  
15:53:14 20 based on examples, it's out of context. All software has  
15:53:20 21 to run on hardware. And as their own expert said, a DSP  
15:53:27 22 is a form of a general processing unit. You know, it's  
15:53:33 23 not something that you have to have a separate processor  
15:53:37 24 to do. Or in fact, even if you want to have a separate  
15:53:41 25 core or separate set of circuits, it can always all be on

15:53:46 1 one chip.

15:53:48 2           So their definition for a separate processor is  
15:53:52 3 -- it's not valid. They're better, more efficient out of  
15:53:56 4 context makes no sense. And given the claim language  
15:53:59 5 especially as counsel's pointed out, plain and ordinary  
15:54:02 6 meaning here works best of anywhere that I've seen in most  
15:54:06 7 patent cases in a long time. So we submit that the  
15:54:09 8 Court's definition's correct.

15:54:12 9           THE COURT: How is Mr. Akalski's point that it  
15:54:19 10 can't be a general purpose processor much different than  
15:54:23 11 the parties -- both parties' proposed constructions begin  
15:54:26 12 with a specialized processor and even defendants -- I  
15:54:30 13 mean, excuse me, plaintiff's briefs says the parties agree  
15:54:32 14 that a DSP is a specialized processor. So it sounds like  
15:54:36 15 that was agreed to coming in that it's not just a general  
15:54:40 16 processor, it's a specialized processor.

15:54:44 17           MS. HEALEY: Two ways, your Honor. Well,  
15:54:45 18 actually, more than two ways. One, in today's  
15:54:54 19 architectures, as you can see, it can be a system on a  
15:54:53 20 chip and that can be part of that system on a chip.  
15:54:57 21 Second of all, it can be a core inside of a general  
15:55:02 22 processor that's programmed to run the software to serve  
15:55:05 23 the function as a DSP. And finally, it can be as it was  
15:55:12 24 in the past a separate clip.

15:55:15 25           The bottom line is that any processor is what the

15:55:24 1 software programs it to be and do. Any processor can  
15:55:28 2 perform mathematical operations. Any processor can become  
15:55:33 3 a DSP if it's programmed the right way and that's the only  
15:55:38 4 thing it's used for. That software is going to give it  
15:55:44 5 and that dedicated function is going to make it a DSP.  
15:55:47 6 And so, it's a processor that is specialized because it's  
15:55:52 7 been dedicated to that function.

15:55:56 8 THE COURT: Okay. Mr. Akalski, I'll give you  
15:55:59 9 just a few minutes to get the last word in if you want to  
15:56:03 10 respond to any of that.

15:56:05 11 MR. AKALSKI: Thank you, your Honor.

15:56:06 12 I think, yeah, we don't -- software has to run on  
15:56:13 13 a processor. And it's true, any processor can do  
15:56:15 14 mathematical operations but that is not the question. A  
15:56:18 15 digital signal processor is a term of art, it has a  
15:56:22 16 specific meaning to persons of skill in the art, and that  
15:56:24 17 meaning attaches to the digital signal processor being a  
15:56:28 18 piece of hardware. Whether that hardware is incorporated  
15:56:31 19 on a larger chip with other processors that may or may not  
15:56:35 20 be digital signal processors is not the point.

15:56:38 21 The main question is or the main point is that  
15:56:41 22 the digital signal processor itself, however it's  
15:56:44 23 implemented in hardware, is a piece of hardware. That's  
15:56:48 24 how it's understood in the art and that's how it's  
15:56:52 25 understood in the art as we saw from even the Amazon case

15:56:55 1 that we cited. And with that, I thank you, your Honor.

15:56:59 2 THE COURT: All right. Thank you, Mr. Akalski.

15:57:01 3 Let me go off the record just briefly.

16:00:15 4 Okay. We're back on the record.

16:00:17 5 So the Court -- I'm going to stay with the  
16:00:21 6 preliminary construction of plain and ordinary meaning,  
16:00:25 7 and at least as of today, I'll offer the clarification  
16:00:29 8 that it cannot be software alone and note that the parties  
16:00:37 9 previously agreed that it has to be a specialized  
16:00:40 10 processor. But defining it beyond that or adopting either  
16:00:44 11 parties' specific definition I believe incorporates --  
16:00:47 12 improperly incorporates additional limitations into it.

16:00:51 13 So at this stage, I think that's as much clarity  
16:00:54 14 and as much construction as the Court can provide without  
16:00:59 15 improperly importing limitations into the claim. So that  
16:01:03 16 will be the ruling on this one. And I think that's  
16:01:06 17 everything we're going to address today.

16:01:09 18 Is there anything else for plaintiff? Mr.  
16:01:14 19 Robinson? Ms. Healey? Who else? All right. I saw what  
16:01:20 20 I'm hopeful was Mr. Robinson saying no, your Honor, but I  
16:01:23 21 couldn't hear anything.

16:01:25 22 MR. ROBINSON: (Moving head up and down.)

16:01:30 23 MS. HEALEY: I'm sorry, your Honor. Mr. Robinson  
16:01:32 24 did say no. He has to start paying us overtime after 5:00  
16:01:34 25 so he's trying to wrap things up.

16:01:36 1 THE COURT: Understood. Anything else for the  
16:01:37 2 defense?

16:01:39 3 MR. LUMISH: No, your Honor.

16:01:40 4 THE COURT: All right. Thank you, Mr. Lumish.

16:01:41 5 We'll get an order with the constructions as of  
16:01:46 6 today, we'll get that entered pretty quickly, and then,  
16:01:48 7 we'll get a more detailed analysis in due course. And  
16:01:52 8 with that, thank you all very much and we'll be adjourned.

16:01:52 9 Ms. HEALEY: Thank you, your Honor.

16:01:52 10 MR. LUMISH: Thank you, your Honor.

16:01:59 11 MS. AMSTUTZ: Thank you, your Honor.

12 (Proceedings concluded.)

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UNITED STATES DISTRICT COURT )

WESTERN DISTRICT OF TEXAS )

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