

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

- - -

THE HONORABLE JAMES V. SELNA, JUDGE PRESIDING

|                     |   |                      |
|---------------------|---|----------------------|
| RJ TECHNOLOGY, LLC, | ) | CERTIFIED TRANSCRIPT |
| Plaintiff,          | ) |                      |
| vs.                 | ) |                      |
|                     | ) | SACV-22-01874-JVS    |
| APPLE, INC.,        | ) |                      |
| Defendant.          | ) |                      |
| -----               | ) |                      |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

July 31, 2023

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1 SANTA ANA, CALIFORNIA; MONDAY, JULY 31, 2023; 3:44 P.M.

03:44 2 THE CLERK: Calling Item 8, SACV-22-01874-JVS, RJ  
03:44 3 Technology, LLC, versus Apple, Inc.

03:44 4 Counsel, can you please state your appearances for  
03:44 5 the record.

03:44 6 MR. ZAHEER: Good afternoon, Your Honor. Daniel  
03:44 7 Zaheer from Kobre & Kim, LLP, on behalf of RJ Technology,  
03:44 8 and with me today are Zach Ruby and Michael Ng.

03:44 9 THE COURT: Good afternoon.

03:44 10 MR. TURNER: Good afternoon, Your Honor. For  
03:44 11 Apple, I'm Ellisen Turner. With me today is Brandon Brown  
03:44 12 and Sarah Mikosz who will also be speaking today as well as  
03:45 13 Vanessa Sim.

03:45 14 THE COURT: Good afternoon.

03:45 15 Okay, I think I'd like to simply take these up one  
03:45 16 by one, so let's begin with the first term, which is --  
03:45 17 well, number one, are you going to submit on any of the  
03:45 18 terms?

03:45 19 MR. ZAHEER: Plaintiffs are prepared to submit on  
03:45 20 the tentative with respect to all of the terms, but if Apple  
03:45 21 has any comments, we'll obviously respond.

03:45 22 THE COURT: Okay. Is Apple prepared to submit on  
03:45 23 any of them?

03:45 24 MR. TURNER: Your Honor, we are prepared to submit  
03:45 25 on a few, and there's a few we'd like to address.

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03:45 1 THE COURT: Sure.

03:45 2 MR. TURNER: Your Honor, again, Ellisen Turner for  
03:45 3 Apple.

03:45 4 Obviously, of course, Apple maintains the position  
03:45 5 stated in its briefing.

03:46 6 THE COURT: Understood.

03:46 7 MR. TURNER: And most of those constructions were  
03:46 8 provided in order to address some positions that the  
03:46 9 plaintiffs had taken to maintain the validity of the patents  
03:46 10 both during prosecution and in foreign proceedings. And if  
03:46 11 the Court's constructions didn't adopt those constructions,  
03:46 12 we'll raise invalidity issues that we'll address at the  
03:46 13 appropriate time.

03:46 14 For now, just on claim construction, we would  
03:46 15 submit all except for Term 1, Term 2, a typographical issue  
03:46 16 on Term 4, and then the indefiniteness issue on Term 5.

03:46 17 THE COURT: Okay.

03:46 18 MR. TURNER: I can tell you exactly which aspects  
03:46 19 of those as well with respect to each term, or we can go  
03:46 20 through them one by one.

03:46 21 THE COURT: Why don't we take them up, and why  
03:46 22 don't you begin with Term 1 if you're going to argue that  
03:46 23 one.

03:46 24 MR. TURNER: Will do, Your Honor. I think we have  
03:46 25 some slides that we wanted to show. We didn't quite have a

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1 chance to get set up here before you came in.

2 THE COURT: Oh, I'm sorry. If you need another  
3 couple of minutes, please take it.

4 MR. TURNER: Thank you, Your Honor. And we'll  
5 pass out the slide books as well and give a copy to opposing  
6 counsel.

7 Your Honor, the first one is simple enough that  
8 you may be able to use the slide book.

9 THE COURT: Okay.

10 MR. TURNER: So the first term, Term 1, relates to  
11 a charge cut-off Voltage. That appears in Claims 5 through  
12 7 of the patent. And Your Honor's construction -- Your  
13 Honor has adopted the plaintiff's construction for this  
14 term, which says, alternatively, they wanted the plain and  
15 ordinary meaning, which is, "The maximum voltage to which  
16 the battery is configured to be charged."

17 Although we maintain our construction, if that  
18 construction is adopted, it's the "configured to be" part of  
19 the construction that we would object to. That "configured  
20 to be" language does not appear anywhere within the claim,  
21 and, in fact, the claim doesn't use that to refer to that.  
22 It would inject a potential issue of whether or not there  
23 was some intent that that maximum voltage be the limit  
24 rather than address what that claim says the limit is.

25 So we would say this construction if adopted

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03:49 1 should be, "The maximum voltage to which the battery is  
03:49 2 charged," which is what the claim says, what the  
03:49 3 specification says, in terms of something being a cut-off  
03:49 4 voltage as opposed to "configured to be" a cut-off voltage.

03:49 5 If you look at Slide No. 6, what the plaintiff  
03:49 6 argued was that a battery is not configured, i.e., designed  
03:49 7 and manufactured, to be charged above its charge cut-off  
03:49 8 voltage as the patent explains. That designed and  
03:49 9 manufactured aspect of that understanding of the word  
03:49 10 "configured" would result in a situation where the product,  
03:50 11 the battery, was potentially designed to have a certain  
03:50 12 feature, a certain cut-off voltage, but in fact did not have  
03:50 13 that voltage cut-off in actual manufacturing, meaning in  
03:50 14 actual operation and use, but the design was that it should  
03:50 15 have it.

03:50 16 Under plaintiff's construction, it would still  
03:50 17 be -- that claim would still be infringed, or prior art  
03:50 18 would still meet the claim under that mere design intent,  
03:50 19 rather than what the product actually is and does. So we  
03:50 20 think the "configured to be" aspect of the claim should be  
03:50 21 removed from the plaintiff's construction.

03:50 22 And, of course, if Your Honor in revisiting the  
03:50 23 tentative would prefer to adopt our construction, we would  
03:50 24 be fine with that, too.

03:50 25 THE COURT: Okay.

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03:50 1 Mr. Zaheer, are you going to address this? Who is  
03:50 2 going to address this?

03:50 3 MR. ZAHEER: Mr. Ng will be addressing this term.

03:51 4 THE COURT: Okay.

03:51 5 MR. NG: Good afternoon, Your Honor. Michael Ng  
03:51 6 from Kobre & Kim for RJ Technology.

03:51 7 Obviously, we have addressed other aspects of  
03:51 8 this. I would first note that while this in some ways  
03:51 9 relates to arguments that Apple made in their briefing, this  
03:51 10 is by and large a new argument that's being raised.  
03:51 11 Nevertheless, we are prepared to address it.

03:51 12 The batteries at issue, as well as lithium ion  
03:51 13 batteries generally, have physical characteristics, some of  
03:51 14 which are determined by the design and manufacture of the  
03:51 15 battery, some of which are set by, for example, the first  
03:51 16 charge to which the battery is charged. And then,  
03:51 17 obviously, in the process of charging, the charging  
03:51 18 circuitry actually does charge the battery up to a maximum,  
03:52 19 which is the limit that we have addressed in our proposed  
03:52 20 construction.

03:52 21 I think it actually -- again, taking this somewhat  
03:52 22 on the fly because this is a new argument, introduces new  
03:52 23 types of uncertainty, to adopt a claim construction that  
03:52 24 says how it is charged. The physical characteristics of the  
03:52 25 battery are what counts here. There are physical properties

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03:52 1 of the battery that set the maximum to which it is charged.  
03:52 2 And then obviously in the devices themselves, they are  
03:52 3 charged up to a particular level. That is not the  
03:52 4 subjective intent of the designer. It is not the subjective  
03:52 5 intent of the user. It is the physical characteristic of  
03:52 6 the battery.

03:52 7 Now, obviously a user could unplug a phone before  
03:53 8 it's fully charged, as I did before I left to come over here  
03:53 9 to court, but that doesn't mean that that should take it  
03:53 10 outside the scope of what is claimed here, which is an  
03:53 11 appropriately constructed claim construction which addresses  
03:53 12 the physical characteristics of the battery, something that  
03:53 13 can be determined by someone both reading the claims,  
03:53 14 reading the claims as the Court has proposed construing  
03:53 15 them, and from examining the physical characteristics of the  
03:53 16 battery. So rather than essentially mixing a definition  
03:53 17 that includes the physical characteristics of the battery  
03:53 18 plus what someone does actually introduces more uncertainty.

03:53 19 I want to address this notion about the subjective  
03:53 20 intent of the designer. Obviously anything that is designed  
03:53 21 is designed with -- the designer has an intent when he built  
03:54 22 it. With a house or a building, the architect sits down and  
03:54 23 thinks about what he or she wants to have built and designs  
03:54 24 something on a piece of paper and thinks about, you know,  
03:54 25 what they'd like to see. Then when that building is built,

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03:54 1 it has physical characteristics, and either the building has  
03:54 2 those physical characteristics or it doesn't. You don't  
03:54 3 need to go back and divine the intent of the architect to  
03:54 4 know what the characteristics of the building are.

03:54 5 That's what we've done here. That's what this  
03:54 6 construction is. It does not require getting into the mind  
03:54 7 of the designer. It simply says that this is what the  
03:54 8 battery is. Notably, this does not say anything about  
03:54 9 design or intent whatsoever. It is configured to have this  
03:54 10 maximum voltage. It's simply that.

03:54 11 Thank you.

03:54 12 THE COURT: Anything further?

03:54 13 MR. TURNER: First and foremost, Your Honor, we  
03:54 14 take issue with the concept that this is a new argument  
03:54 15 being raised. This appears in Apple's responsive claim  
03:55 16 construction brief at page 6, lines 7 through 23. This  
03:55 17 issue was squarely addressed there but was not addressed in  
03:55 18 the Court's tentative ruling, which is why we raised it. So  
03:55 19 this "configured to be" aspect was not addressed in the  
03:55 20 ruling, and we think it should be.

03:55 21 We think that that portion of the plaintiff's  
03:55 22 construction based on plaintiff's own argument given just  
03:55 23 now should be removed. It's the physical characteristics  
03:55 24 are what counts, not the design somewhere upstream but  
03:55 25 actually what the battery is in operation, the actual

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03:55 1 physical battery.

03:55 2 The "configured to be" adds exactly what counsel,  
03:55 3 my friend, just argued should not be mixed in, which is what  
03:55 4 someone does, some person does. It's what the battery is  
03:55 5 that matters. If you take out the words "configured to be,"  
03:55 6 then we'll be clearly doing exactly what the claim language  
03:55 7 says, which is the battery has a charge cut-off voltage.  
03:56 8 That's the language in Claim 5. In Claim 6, the battery has  
03:56 9 a charge cut-off voltage. Again, in Claim 7, the same.

03:56 10 So we should be referring to what the battery has,  
03:56 11 not what someone configured it to have during design but it  
03:56 12 may not have in actual construction. That's the issue, Your  
03:56 13 Honor, and simply removing those extraneous words that  
03:56 14 appear nowhere in the claim, nowhere in the extrinsic  
03:56 15 evidence, would resolve this issue with the plaintiff's  
03:56 16 construction.

03:56 17 Thank you, Your Honor -- oh, I'm sorry. I'll  
03:56 18 address one point. There was some mention of unplugging the  
03:56 19 phone shouldn't affect things. This is referring to the  
03:56 20 maximum charge cut-off voltage. I'm not sure what  
03:56 21 unplugging the phone would have to do with anything. It's  
03:56 22 the maximum under their construction, and plugging in or  
03:56 23 unplugging the phone from the wall would have no impact on  
03:56 24 that under either party's construction.

03:56 25 THE COURT: So using RJ's formulation, the maximum

03:57 1 voltage to which the battery may be charged? Is charged?

03:57 2 MR. TURNER: Yes, so ours would be the maximum  
03:57 3 voltage to which the battery is charged. I think "may be  
03:57 4 charged" -- I don't know, this might be a little permissive  
03:57 5 but I think "is" in the context of the claim language when  
03:57 6 you plug that definition in is probably at what Your Honor  
03:57 7 is indicating because it's not always of course at that  
03:57 8 maximum voltage. It gets charged up to it. I'd have to  
03:57 9 think about that for a moment, the "may be" charged. Give  
03:57 10 me a moment.

03:57 11 THE COURT: Well, it's physically capable of being  
03:57 12 charged. Aren't those the parameters that define the  
03:57 13 cut-off?

03:57 14 MR. TURNER: Yes, so I think if it was "The  
03:58 15 maximum voltage to which the battery may be charged," that  
03:58 16 would be preferable. "Is" I think is appropriate, but "may  
03:58 17 be" is certainly better than "configured to be."

03:58 18 THE COURT: Do you have any problem with "may"?

03:58 19 MR. NG: Yes, Your Honor.

03:58 20 THE COURT: Okay.

03:58 21 MR. NG: These batteries are configured to be  
03:58 22 charged to a certain -- as we've -- well, let me not rely on  
03:58 23 what we've said previously. You can always overcharge the  
03:58 24 battery. You can force more lithium ions to cross. You can  
03:58 25 force more electrons into the cathode side. That's what

03:58 1 causes overcharging.

03:58 2 THE COURT: Right.

03:58 3 MR. NG: That's what causes problems. It causes  
03:58 4 fast degradation. It causes fires. That's not -- those  
03:58 5 aren't the voltages to which it is configured to be charged.  
03:58 6 That's overcharging. That's charging it too much.

03:58 7 There's a limit as to the maximum to which it's  
03:58 8 configured to be charged. You can physically get more  
03:59 9 electrons into that cathode side. That doesn't mean it's  
03:59 10 the voltage to which it's to be charged. That's  
03:59 11 overcharging. That's why "can" doesn't work in this or  
03:59 12 "may" doesn't work in this. There is a configured charge,  
03:59 13 and while it's physically possible to exceed that, that is  
03:59 14 not the limit to which it's configured.

03:59 15 THE COURT: Okay, let's move on to the next one  
03:59 16 then.

03:59 17 MR. BROWN: Good afternoon, Your Honor. Brandon  
03:59 18 Brown for Apple.

03:59 19 Your Honor, this term -- we're going to start out  
03:59 20 on Slide 10 of the deck. The term is -- this is Term 2,  
03:59 21 Your Honor, the "ratio" term, "ratio of positive electrode  
03:59 22 material to negative electrode material as calculated by a  
03:59 23 theoretic capacity with a charge cut-off voltage set at 4.2  
03:59 24 V."

03:59 25 Your Honor, on Slide 10, I've got essentially the

04:00 1 tentative's construction, Your Honor, which is largely  
04:00 2 agreed to between the parties. The actual ratio calculation  
04:00 3 is agreed to with all of the various aspects. We worked  
04:00 4 hard during all the meet and confers to get there together.  
04:00 5 The issue that's in dispute is just one of the inputs into  
04:00 6 this calculation, which is that theoretic capacity point,  
04:00 7 whether it should be theoretic capacity or whether the claim  
04:00 8 covers any capacity.

04:00 9 Now, Your Honor's tentative and I think largely  
04:00 10 the argument between the parties was really about the  
04:00 11 indefiniteness issue of whether or not there is such a thing  
04:00 12 as a theoretic capacity with a charge cut-off voltage of 4.2  
04:00 13 V. That was largely where the parties were disputing the  
04:00 14 issue.

04:00 15 So putting aside that issue, I won't argue  
04:00 16 indefiniteness now to Your Honor. We'll put that in on the  
04:00 17 papers. But the dispute that remains is whether or not the  
04:00 18 proper construction should include "theoretic" or not or if  
04:00 19 the intention was really to go beyond that and include every  
04:01 20 capacity.

04:01 21 Respectfully, when we review your tentative and we  
04:01 22 look at the arguments, it does appear that that wasn't the  
04:01 23 intent. Your Honor's tentative -- I've got it up on the  
04:01 24 slide here -- notes that the "theoretic capacity" is not an  
04:01 25 isolated term. Rather, it's part of the direction for how

04:01 1 to calculate that appropriate ratio. Putting it in terms of  
04:01 2 what we talked about at a previous hearing, it's one of the  
04:01 3 ingredients in a recipe that the plaintiff has come up with,  
04:01 4 that theoretic capacity at a charge voltage of 4.2 V is one  
04:01 5 of the things that gets plugged into the calculation that  
04:01 6 they claim.

04:01 7 When we look at your tentative, Your Honor, as it  
04:01 8 goes on, you note -- and I think correctly -- that the  
04:01 9 theoretic capacity is modified by a charge cut-off voltage.  
04:01 10 So there's this idea of a theoretic capacity that the  
04:01 11 parties have generally agreed to, which is where all of the  
04:01 12 materials participate in the battery operation. And then  
04:01 13 plaintiff has put forward and Your Honor has agreed that  
04:02 14 that is modified or reduced when you're right at a charge  
04:02 15 voltage of 4.2 V.

04:02 16 So if we look at the claims, we don't need to  
04:02 17 reject the insertion of the word "theoretic" in the claim.  
04:02 18 It's there. The plaintiff has put the word "theoretic" into  
04:02 19 Claim 5. So the only problem is that the construction right  
04:02 20 now crosses that right out. It says theoretic doesn't  
04:02 21 matter anymore. It's just going to be the capacity.

04:02 22 So that's where we come in, and we think we  
04:02 23 actually can put "theoretic" back into claims but remain  
04:02 24 consistent with Your Honor's analysis of the given facts,  
04:02 25 because when we look at Claim 5, there are two aspects to

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04:02 1 this element. There is the theoretic capacity, that is, all  
04:02 2 substances participate, and then we have the second  
04:02 3 language, the second part of that claim, which modifies it.  
04:02 4 So, essentially, there's an equation being laid out in Claim  
04:03 5 5 that says we start with the theoretic capacity and  
04:03 6 subtract whatever it is that modifies it.

04:03 7 THE COURT: I mean, this is the semantic effort I  
04:03 8 raised during construction. I mean, theoretic, where all  
04:03 9 the material is involved, but that may be, you know, a much  
04:03 10 higher number than what you work at at 4.2, but that 4.2 is  
04:03 11 basically the foundation for the analysis.

04:03 12 MR. BROWN: Exactly right, Your Honor, except that  
04:03 13 we would say that the theoretic capacity is the starting  
04:03 14 point. That's what the claims say, and that's what the  
04:03 15 plaintiff said in China. And then you modify that by what  
04:03 16 plaintiff called a coefficient or one of the references  
04:03 17 calls a factor that reduces it. So it's really about what's  
04:03 18 the starting point here.

04:03 19 If we remove theoretic from the claim, there's no  
04:03 20 starting point anymore. It's just capacity. And as  
04:03 21 plaintiff's own brief puts out, there are a number of  
04:03 22 different ways to consider capacity, and we just have to  
04:03 23 figure out what the right starting point is. How do we get  
04:04 24 the theoretic capacity at 4.2 V rather than some other  
04:04 25 capacity at that voltage?

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04:04 1 So when we look at what plaintiff said in China,  
04:04 2 that's actually very consistent with it. In China, they  
04:04 3 defined they're at capacity as capacity that assumes all  
04:04 4 active substances participate. And then as plaintiff  
04:04 5 pointed out in their briefing and so did Your Honor, they go  
04:04 6 on to modify that and say -- and I've got this now, Your  
04:04 7 Honor, on Slide 19. They modify that and say now when you  
04:04 8 do that with the extra language of that charge cut-off  
04:04 9 voltage of 4.2 V, that considers what they call the  
04:04 10 deinterlacing coefficient, which is really just to say you  
04:04 11 don't reach the full theoretic capacity of 4.2 V. You reach  
04:04 12 something less than that.

04:04 13 But they're not changing the language in China,  
04:04 14 and they shouldn't be changing it here. We're not taking  
04:04 15 out theoretic capacity as the starting point for that  
04:04 16 analysis. The dispute is just where does that go to after  
04:05 17 you apply a 4.2 volt charge voltage. So it's not semantics  
04:05 18 because the patent repeatedly says there's a difference  
04:05 19 between theoretic capacity and specific capacity. And  
04:05 20 plaintiff has laid out in their brief how you use theoretic  
04:05 21 capacity with this limitation to get to a voltage.

04:05 22 So really what we're saying is we just need to  
04:05 23 have guidance. And based on everything that's been said by  
04:05 24 plaintiff and Your Honor, theoretic should be part of the  
04:05 25 claim so that we know what capacity we're dealing with, and

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04:05 1 then we make that modification.

04:05 2 THE COURT: Why not define it without using the  
04:05 3 word "theoretic"?

04:05 4 MR. BROWN: I think because there's -- right now  
04:05 5 we aren't defining it with anything. We're just saying  
04:05 6 "capacity." Right now we crossed out "theoretic," and we  
04:05 7 just use capacity in that equation. And there are as we've  
04:05 8 learned a number of different forms of capacity. There's  
04:05 9 specific capacity. There's actual capacity. There's  
04:05 10 theoretic capacity. There's remaining capacity. There's a  
04:05 11 number of those -- and maximum capacity, and they are all  
04:06 12 listed in plaintiff's briefing --

04:06 13 THE COURT: But why not use the appropriate  
04:06 14 adjective rather than "theoretic"?

04:06 15 MR. BROWN: Well, "theoretic" is the adjective  
04:06 16 that plaintiff has put forward in their claim and in their  
04:06 17 patent. They chose that word for Claim 5. They chose a  
04:06 18 different one for Claim 1, and they chose that one for Claim  
04:06 19 5.

04:06 20 THE COURT: But you're concerned that "theoretic"  
04:06 21 is indefinite, so why not resolve that problem --

04:06 22 MR. BROWN: So I think what we're concerned about  
04:06 23 is that --

04:06 24 THE COURT: -- or in other words, why build in  
04:06 25 something that you contend is indefinite?

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04:06 1 MR. BROWN: We don't contend that "theoretic  
04:06 2 capacity" itself is indefinite. We contended -- and Your  
04:06 3 Honor has rejected this argument -- that "theoretical  
04:06 4 capacity at 4.2 V" is indefinite. As far as earlier, we've  
04:06 5 lost that argument. And so now we have to look at claim  
04:06 6 construction and look forward to what are we supposed to do  
04:06 7 to find infringement or invalidity here, and the claim says  
04:06 8 use "theoretic capacity." So the indefiniteness argument is  
04:06 9 out. We focus on what the claim says and what the patentee  
04:07 10 said, and it's consistent with what they said in China.

04:07 11 THE COURT: Okay. Thank you.

04:07 12 MR. BROWN: Thank you, Your Honor.

04:07 13 THE COURT: Mr. Zaheer.

04:07 14 MR. ZAHEER: We have some slides as well. May we  
04:07 15 approach?

04:07 16 THE COURT: Please.

04:07 17 MR. ZAHEER: So I'll start off by saying that I  
04:07 18 have the same question as Your Honor, which is what is the  
04:07 19 substantive impact of reinserting that word into the  
04:07 20 construction? Does it add clarity? Does it add meaning, or  
04:07 21 is it just a matter of semantics, or an attempt I think  
04:07 22 potentially to create an indefiniteness issue that Your  
04:08 23 Honor has already rejected?

04:08 24 I'm at a loss to understand why it would be  
04:08 25 necessary, but I think that it stems from a couple of points

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04:08 1 that Apple has made which I think go to the core issue in  
04:08 2 construing this claim.

04:08 3 So I'm going to start at Slide 23 of our deck. I  
04:08 4 think that fundamental to what Apple has argued is that the  
04:08 5 words "theoretic capacity" or "theoretical capacity" can  
04:08 6 only have one meaning, and it can never have any other  
04:08 7 meaning besides the maximum possible capacity for the  
04:09 8 material in question.

04:09 9 Our view, which we have expressed and which the  
04:09 10 tentative adopts, is that that's not true. Both in the art  
04:09 11 and in the patent, "theoretical capacity" and "theoretic  
04:09 12 capacity" are used in two different ways. And the first and  
04:09 13 most important place to look is at the patent. The patent  
04:09 14 expressly defines "theoretical capacity" to mean the  
04:09 15 capacity at 4.2 V, and that express definition governs.

04:09 16 Counsel started his argument, I believe, by saying  
04:09 17 that everybody agrees that theoretical capacity can only  
04:09 18 mean the theoretical maximum, and that's incorrect. We  
04:09 19 don't agree with that. In fact, the patent disagrees with  
04:09 20 that because the patent has provided, and the law requires  
04:09 21 us to respect it, an express definition that says  
04:10 22 theoretical capacity as used means capacity at 4.2 V.

04:10 23 THE COURT: Right.

04:10 24 MR. ZAHEER: And Your Honor will remember from the  
04:10 25 claim construction -- and everybody agrees -- that capacity

04:10 1 varies with voltage. The more voltage that you pump into  
04:10 2 the battery, the more lithium you pull out. And the more  
04:10 3 lithium you pull out, the more capacity you have available  
04:10 4 to store energy.

04:10 5 So the fact that the patent defines it by dropping  
04:10 6 the word "theoretical" tells you that the construction  
04:10 7 shouldn't have that word reinserted, again, which doesn't  
04:10 8 add clarity, doesn't -- I didn't hear any substantive  
04:10 9 difference that was added there, so it's unnecessary.

04:10 10 And let me jump ahead. So going to Slide 26 of  
04:10 11 our presentation, it's also the case -- and we've reflected  
04:10 12 this in our papers -- that in the art it's true that the  
04:11 13 words "theoretical capacity" are used to describe, sometimes  
04:11 14 the capacity at a particular voltage, meaning the capacity  
04:11 15 modified by a particular factor or coefficient. Here is one  
04:11 16 of the sources we cite which talks about the theoretical  
04:11 17 value of the specific capacity, and it describes -- it lists  
04:11 18 amounts for theoretical specific capacity that are at  
04:11 19 specific voltages.

04:11 20 Our expert, Dr. Yao, in his declaration -- this is  
04:11 21 his second declaration at paragraph seven, describes a  
04:11 22 number of different sources which also use theoretical  
04:11 23 capacity in the way that the patent does, which is to  
04:11 24 describe the theoretical capacity as a specific voltage.

04:11 25 I realized in the preparation today that we didn't

04:11 1 submit these underlying sources to Your Honor, but we're  
04:11 2 happy to do that if Your Honor would like us to complete the  
04:12 3 record, although the declaration is just making the point  
04:12 4 that you can look into the art and see the usage that Apple  
04:12 5 says is not permissive or a usage that is ever actually  
04:12 6 implemented in the art.

04:12 7 I think that there is another sort of mistake at  
04:12 8 the core of Apple's argument, and that is that "theoretical  
04:12 9 capacity" has some unique meaning that is distinguished from  
04:12 10 "specific capacity." And this comes up in a number of  
04:12 11 different ways, but that is also incorrect. They define  
04:12 12 "specific capacity" as what they call "actual capacity,"  
04:12 13 which I believe what they mean by that is that you actually  
04:12 14 have to measure the particular material in front of you to  
04:12 15 determine the capacity. You don't as with theoretical  
04:12 16 capacity in the way that we use it determine it by using a  
04:13 17 particular coefficient, a particular mathematical reference  
04:13 18 adjustment, to determine how much is pulled out at a  
04:13 19 particular voltage.

04:13 20 But the premise that "specific capacity" means  
04:13 21 "actual capacity" is not correct. And I'll go back to what  
04:13 22 we we were talking about a couple weeks ago at the  
04:13 23 technology tutorial. The words "specific capacity" just  
04:13 24 means capacity over a certain mass. So in our case, it's  
04:13 25 capacity per gram, and that's what our expert says. Our

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04:13 1 expert says that in his declaration. And that's what  
04:13 2 Apple's expert says as well, that -- I'll read from his  
04:13 3 declaration: "Specific capacity is the amount of charge a  
04:13 4 particular material can accept per mass usually in  
04:13 5 milliamperes per gram."

04:13 6 And this aligns also with general usage of the  
04:13 7 adjective "specific," and I'm looking at Slide 35 now. The  
04:14 8 adjective "specific" in science is used to describe a  
04:14 9 quantity divided by mass. So you have things like specific  
04:14 10 energy, which is energy per mass, and specific power, power  
04:14 11 per mass, et cetera. So specific capacity is just capacity  
04:14 12 per mass.

04:14 13 Why is this all important? Well, if you look at  
04:14 14 the parties' constructions of Claim 5, both sides agree that  
04:14 15 the term that we're construing, this ratio term, describes a  
04:14 16 specific capacity, that you use specific capacity, because  
04:14 17 both parties' constructions incorporate the concept of using  
04:14 18 capacity per unit mass and then multiplying that by mass and  
04:14 19 then looking at the ratio.

04:14 20 The only dispute is whether the number that you  
04:14 21 plug in for capacity is the capacity at 4.2 VV or the  
04:15 22 capacity at the -- it's not even possible --

04:15 23 THE COURT: Right.

04:15 24 MR. ZAHEER: -- but the theoretical absolute  
04:15 25 maximum capacity.

04:15 1 THE COURT: The use of all of the material.

04:15 2 MR. ZAHEER: Yes. Exactly. And that dispute has  
04:15 3 been resolved correctly by Your Honor insofar as you have to  
04:15 4 not just looked at theoretical capacity separately from the  
04:15 5 voltage, but you look at the term all as one. You construe  
04:15 6 it as a whole. That's the law. And when you construe it is  
04:15 7 as a whole, since everybody agrees that capacity varies by  
04:15 8 voltage, then the number you plug in when you're determining  
04:15 9 this measurement is the capacity at that voltage.

04:15 10 Now, in the art, sometimes they call that  
04:15 11 "theoretical capacity." Sometimes they call it "theoretical  
04:15 12 specific capacity." Sometimes they call it "specific  
04:15 13 capacity." But in the patent, we have defined it. We've  
04:16 14 defined it at -- in this patent, when we say "theoretical  
04:16 15 capacity," we mean capacity at that voltage.

04:16 16 THE COURT: Right.

04:16 17 Anything further?

04:16 18 MR. BROWN: Your Honor, I'll admit that the last  
04:16 19 slide that plaintiff just put up said that the parties agree  
04:16 20 that Claims 1 and 5 cover specific capacity, but that's not  
04:16 21 what their construction says. Their construction doesn't  
04:16 22 say "specific capacity." It says "capacity." That was one  
04:16 23 of my primary arguments, that we have far too many  
04:16 24 capacities that could be read in there, and they  
04:16 25 specifically left out an actual definition of what it is.

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04:16 1 The reason that --

04:16 2 THE COURT: Doesn't the definition flow from the  
04:16 3 voltage?

04:16 4 MR. BROWN: No, not necessarily, Your Honor.  
04:16 5 There's been representations from plaintiff that it does.  
04:16 6 Our expert says that it doesn't always, and our expert says  
04:16 7 there's a difference here. Fundamentally, this is a -- it's  
04:16 8 potentially a fact issue down the road. So the question is  
04:17 9 that we want to have just -- we need to know I think what  
04:17 10 that capacity is. Is it a specific capacity in Claim 5? Is  
04:17 11 that now what plaintiff is saying they're rewriting their  
04:17 12 claim as, or is it theoretical capacity, which is what the  
04:17 13 claim originally said? And I think leaving it open to just  
04:17 14 capacity is far too broad and not at all what the claimed  
04:17 15 patent really seeks.

04:17 16 THE COURT: Okay. Thank you.

04:17 17 I think that you wanted to take up Claim 4 with  
04:17 18 respect to a typo.

04:17 19 MR. TURNER: Yes, Your Honor.

04:17 20 So this can be seen on page 31 of the tentative,  
04:18 21 Your Honor, and I've raised this with plaintiff's counsel  
04:18 22 just before the hearing. It's a typo in their proposed  
04:18 23 construction I believe, and they said they would consider  
04:18 24 this.

04:18 25 In the second of the two constructions in your

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04:18 1 tentative, it says: "Overcharge/overcharging protection  
04:18 2 release voltage" refers to "the voltage level at which a  
04:18 3 battery's protection mechanism disengages or resets." We  
04:18 4 believe that should be "the battery's protection mechanism,"  
04:18 5 meaning it's not some abstract battery out there. It's the  
04:18 6 same battery being discussed elsewhere in the independent  
04:18 7 and dependent claims. So that's the correction we would  
04:18 8 make if plaintiff's proposed construction is adopted.

04:18 9 THE COURT: Any comment on that?

04:18 10 MR. ZAHEER: They did indeed raise it before the  
04:18 11 hearing. I believe that we agree that it can be changed  
04:19 12 from "a" to "the," but I think since it was just raised,  
04:19 13 we'd like to take, you know, a little time just to make sure  
04:19 14 that we agree with that. So if it's all right with Your  
04:19 15 Honor, we can get back to the Court by tomorrow, for  
04:19 16 example, just to confirm.

04:19 17 THE COURT: File something by the end of the day  
04:19 18 tomorrow.

04:19 19 MR. ZAHEER: Will do. Thank you.

04:19 20 THE COURT: Okay. And if I think a response is  
04:19 21 necessary, I'll ask for one.

04:19 22 Then let's go to the last one.

04:19 23 MR. TURNER: The last will be discussed by Sarah  
04:19 24 Mikosz from our team, Your Honor. It has to do with Term 5.  
04:19 25 It's not a construction issue that we'll argue today but

04:19 1 whether or not that term is indefinite, or more  
04:19 2 appropriately, whether or not Your Honor has -- Your Honor  
04:19 3 hasn't construed the term and therefore hasn't resolved the  
04:19 4 indefiniteness issue. We think that the evidence is such  
04:19 5 that there remains an indefiniteness issue.

04:20 6 THE COURT: Okay.

04:20 7 MS. MIKOSZ: Your Honor, the claims at issue here  
04:20 8 deal with this term "maintains at least a given percent of  
04:20 9 capacity after 400 cycles." Apple's position here, Your  
04:20 10 Honor even after reading your tentative is that these terms  
04:20 11 are indefinite because the actual testing parameters that  
04:20 12 are used in these 400 cycles and then also what the capacity  
04:20 13 test would be are not reasonably certain to a person of  
04:20 14 ordinary skill in the art.

04:20 15 Specifically, some of the test conditions that  
04:20 16 actually have a substantial impact on the capacity include,  
04:21 17 for example, starting with the charging method that's used.  
04:21 18 As Your Honor noted in the tentative and then also from  
04:21 19 plaintiff's briefing, there are several different types of  
04:21 20 charging methods, whether that's, say, constant current,  
04:21 21 constant voltage, constant current/constant voltage  
04:21 22 post-charging. So that is one of the many test conditions  
04:21 23 that need to be specified in order to run these 400 cycles  
04:21 24 and determine what capacity remains.

04:21 25 Other example test conditions that you can see

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04:21 1 here on the slide include what the charge current and  
04:21 2 discharge current is going to be. And then also, for  
04:21 3 example, what's the rest time between each one of these  
04:21 4 cycles? And then finally as Your Honor did address in the  
04:21 5 tentative, the temperature that these cycles are performed  
04:21 6 at.

04:21 7 So Apple believes that while Your Honor's  
04:22 8 tentative does address at least that last example condition  
04:22 9 that you can see here, the temperature, which plaintiff has  
04:22 10 submitted is performed at room temperature. The other  
04:22 11 charging --

04:22 12 THE COURT: Isn't the question which room?

04:22 13 MS. MIKOSZ: I'm sorry. What was that, Your  
04:22 14 Honor?

04:22 15 THE COURT: Isn't the question which room?

04:22 16 MS. MIKOSZ: Whether it's a freezer or in --

04:22 17 THE COURT: Well, you know, if you're in a lab  
04:22 18 with a row of routers or computers, that room can get warm.  
04:22 19 It also can be chilled.

04:22 20 MS. MIKOSZ: Correct. Again, slight temperature  
04:22 21 variations do impact the capacity, so maybe having an actual  
04:22 22 specified temperature that it's going to be cycled at for  
04:22 23 these 400 cycles would also help. But specifically looking  
04:22 24 at the Pacific Coast case that Your Honor does cite and  
04:22 25 actually relies on in your tentative, Apple believes that

04:23 1 this case further shows why these terms are indefinite.

04:23 2 First, the actual patent at issue in the Pacific  
04:23 3 Coast Building case actually referenced a standard that the  
04:23 4 patentees argued could be used to figure out how to measure  
04:23 5 this claim's scored flexural strength of a scored board.  
04:23 6 However, that standard actually gave four different test  
04:23 7 conditions that could potentially be used to measure that  
04:23 8 flexural strength of a board.

04:23 9 So what the Federal Circuit found is that even  
04:23 10 though the specification in this Pacific Coast Building case  
04:23 11 referenced a standard, because that standard also gave  
04:23 12 multiple different test conditions that could be used to  
04:23 13 arrive at that claimed parameter, it was still indefinite.

04:24 14 And unlike Pacific Coast Building, here the patent  
04:24 15 is completely void, for example, of referencing a particular  
04:24 16 standard for a manufacturing specification that's supposed  
04:24 17 to be used here. And while the patent does make one passing  
04:24 18 reference, which as Your Honor noted in the tentative, that  
04:24 19 except for voltage all process parameters for charge and  
04:24 20 discharge are commonly used in the art, the issue here is  
04:24 21 there are multiple different standards and specific test  
04:24 22 parameters, for example, the charge and discharge rate, that  
04:24 23 were commonly used in the art that have a material impact on  
04:24 24 the actual capacity that's remaining.

04:24 25 So as you may recall from the technology tutorial,

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04:24 1 this is an excerpt from the Linden extrinsic evidence that  
04:25 2 both parties do rely on, and it discusses how capacity tests  
04:25 3 need to consider and specify a number of these different  
04:25 4 parameters.

04:25 5 And then, additionally, if we look at the Chinese  
04:25 6 general specification of a lithium ion battery for cellular  
04:25 7 phones that the plaintiffs have cited and relied on, you can  
04:25 8 actually see here on this slide that the test conditions  
04:25 9 that are specified in this standard both specify, for  
04:25 10 example, the charging method that's used. And it also, for  
04:25 11 example, as you can see here in red gives two different  
04:25 12 possible charging rates. One is whether it's going to be  
04:25 13 charged at the 0.2C, and then B is where it's charged at 1C.  
04:25 14 Then it also, again, Your Honor, specifies the actual  
04:25 15 temperatures.

04:26 16 Again, this is further down when you're  
04:26 17 actually -- the standard is discussing the charge retention  
04:26 18 capacity. It again says that after the battery completes  
04:26 19 the charging that I just mentioned, then it's going to be  
04:26 20 placed in this power source loop. And again, it specifies  
04:26 21 what the temperature is going to be in addition to what the  
04:26 22 discharge rate will be.

04:26 23 So, as I mentioned, Your Honor, these test  
04:26 24 parameters are not immaterial. They actually will impact  
04:26 25 the scope of the claim and whether, for example, a battery

04:26 1 that's charged at .5C might actually satisfy the claims at  
04:26 2 issue, whereas, another battery that's charged at 1C would  
04:26 3 not satisfy.

04:26 4 So, for example, if you look here on the slide --  
04:26 5 this is from again the Linden Handbook. Linden explicitly  
04:26 6 notes that, for example, after 500 cycles at the 1C rate,  
04:27 7 which is what you can see here as the purple line of the  
04:27 8 figure, the battery delivered approximately 1.01  
04:27 9 ampere-hours or 70 percent of the initial capacity.

04:27 10 Now, if you recall, the claims at issue all deal  
04:27 11 with either maintaining 75 percent capacity, 75.83 percent,  
04:27 12 and then some in the 80 percent capacity. So just looking  
04:27 13 at Linden here, the battery that cycled at the 1C rate would  
04:27 14 not meet the claims. However, if the battery is cycled at  
04:27 15 the .5C rate, you can see here that after 500 cycles, it's  
04:27 16 delivering approximately 1.16 ampere-hours or 80 percent of  
04:27 17 its initial capacity.

04:27 18 And if we look at that same example from Linden  
04:28 19 here -- and we're just focusing -- again, these are the two  
04:28 20 that are highlighted, and they're both at the same  
04:28 21 temperature, Your Honor, the 21 degrees Celsius, which is  
04:28 22 approximately room temperature. When we move the line over  
04:28 23 and look at, okay, approximately where would the capacities  
04:28 24 be of the batteries after the 400 cycles -- if we're looking  
04:28 25 at the battery that is the .5C rate, which is in that tan

04:28 1 color, it's going to be maintaining approximately 83 percent  
04:28 2 capacity at around that 400 cycle mark. But then when you  
04:28 3 look at, for example, the 1C rate, which is the purple line,  
04:28 4 that's only maintaining about 73 percent capacity.

04:28 5 So the issue here is, Your Honor, that these --  
04:29 6 this is one of the example test conditions that need to be  
04:29 7 specified because they have a material impact on whether or  
04:29 8 not a given battery cycled at the 1C, .5C, whatever -- all  
04:29 9 of these other charging rates would actually meet the  
04:29 10 claims.

04:29 11 So while plaintiffs point to different standards  
04:29 12 or they reference manufacturing specifications, there are a  
04:29 13 number of different standards in specifications that use  
04:29 14 different parameters. So there is not one -- a person of  
04:29 15 ordinary skill in the art would not be able to reasonably  
04:29 16 understand the scope of the invention because they do not  
04:29 17 know what test parameters apply. So we could have a  
04:29 18 situation where both parties, whether it be for invalidity  
04:29 19 or infringement, are able to just adjust what these test  
04:29 20 parameters are in order to have it satisfy the claim.

04:29 21 And that, Your Honor, is why Apple believes that  
04:30 22 these terms are indefinite, and we believe that the Federal  
04:30 23 Circuit precedent supports this because if, for example, the  
04:30 24 scope of the claims is depending on -- which it does here --  
04:30 25 the measurements of the capacity, those parameters have the

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04:30 1 material impact of determining whether or not the capacity  
04:30 2 is met of the claims.

04:30 3 THE COURT: Okay. Thank you.

04:30 4 MR. NG: Thank you, Your Honor. Again, Michael Ng  
04:30 5 for the record.

04:30 6 There are two foundational points I would like to  
04:30 7 start with. One is that the standard for indefiniteness is  
04:30 8 not whether every single conceivable testing parameter way  
04:30 9 of defining the meets and bounds of the claim specific  
04:30 10 testing condition is set out. It would be literally  
04:30 11 impossible for any claim to set all that out. You could go  
04:31 12 down an infinite laundry list of different conditions  
04:31 13 that --

04:31 14 THE COURT: Or you could just set one. This  
04:31 15 patent meets this level after X cycles with these test  
04:31 16 parameters. Why couldn't you just put one in the patent,  
04:31 17 one benchmark?

04:31 18 MR. NG: Well, Your Honor, they did. First of  
04:31 19 all, one of the things that's pointed to is the question of  
04:31 20 whether the -- what are the materials and the designs of the  
04:31 21 anode and cathode, for example? Those are set out. The  
04:31 22 experimental examples are set out. What the law requires  
04:31 23 with specificity is that the claims are enabled. That's a  
04:31 24 different question from indefiniteness obviously. And  
04:31 25 there's specificity in this patent that lays out the details

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04:32 1 that would allow a person of ordinary skill in the art to  
04:32 2 follow and mirror what the inventors claimed and be able to  
04:32 3 do it themselves. That's their half of the bargain, which  
04:32 4 is to reveal to the world what they invented and how to do  
04:32 5 it.

04:32 6 What the law requires for indefiniteness is that a  
04:32 7 person of ordinary skill in the art would have reasonable  
04:32 8 certainty about where the boundaries of the claims lie. For  
04:32 9 that reason, the second point that I wanted to make is that  
04:32 10 the law imposes a presumption of validity and imposes on the  
04:32 11 challenger claiming indefiniteness the burden of proof of  
04:32 12 showing with clear and convincing evidence -- and I'll note  
04:32 13 evidence and not argument -- that the claim is indefinite.

04:32 14 We saw a laundry list -- and there's a laundry  
04:32 15 list in the briefing and in the declarations -- of different  
04:32 16 testing parameters that could potentially impact the results  
04:32 17 of a test, a cycleability test. But except with the slight  
04:33 18 exception of temperature, there is no evidentiary support  
04:33 19 for whether those variables are material, whether you have  
04:33 20 to go to an extreme in order for them to be material,  
04:33 21 whether they take those claims out of -- whether applying  
04:33 22 different variables take them out of the scope of the  
04:33 23 claims.

04:33 24 I would note, for example, with respect to  
04:33 25 temperature even, which is one where they have provided some

04:33 1 support -- and I'm citing to the declaration of Dr. Horn in  
04:33 2 the responsive brief from Apple at paragraph 34 where  
04:33 3 they're talking about a citation that describes in the  
04:33 4 Linden reference what happens after 500 cycles, which is  
04:33 5 obviously more than what the patent claims. There, Linden  
04:33 6 says that if you use a higher temperature rather than  
04:33 7 retaining -- well, sorry, at the higher temperature, only  
04:34 8 87 percent of capacity is retained. That's still within the  
04:34 9 scope of the claim.

04:34 10 So there is no evidence even with respect to  
04:34 11 temperature and even at the extremes that they're talking  
04:34 12 about outside of room temperature, outside of standard  
04:34 13 testing conditions, that show that it would make a material  
04:34 14 difference with respect to these claims.

04:34 15 Of course there is some variability, but the law  
04:34 16 allows that. The BASF case says that, and the other cases  
04:34 17 that we cite say that. You do not need to make reference to  
04:34 18 a standard. The BASF case has no reference to a standard at  
04:34 19 all.

04:34 20 But I would like to distinguish the case that they  
04:34 21 do rely on, the Pacific Coast case. The Pacific Coast case  
04:34 22 involved gypsum board that was scored, that had cuts in it.  
04:34 23 And they cited to a flexibility standard that existed out  
04:34 24 there for unscored gypsum board. The scored "flexural  
04:35 25 strength" was a term that was completely made up in the

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04:35 1 patent, which is fine, which is allowable, but if you're  
04:35 2 going to make up a term, you have to say what you're talking  
04:35 3 about.

04:35 4 The test for regular flexural strength had four  
04:35 5 different kinds of measurement. They were measuring  
04:35 6 different things. The patent said it claimed one figure,  
04:35 7 one result for it. And what the Federal Circuit said was we  
04:35 8 don't know how to put those four different types of  
04:35 9 measurements together. It wasn't the testing conditions.  
04:35 10 It was a question fundamentally of what was being measured  
04:35 11 at all.

04:35 12 Here, I think the analog would be to say that we  
04:35 13 had a claim covering the dimensions of the battery that said  
04:35 14 the dimensions of the battery are eight centimeters. And  
04:35 15 even if we reference a standard that said, well, a battery  
04:36 16 has a length, and a battery has a width, and a battery in  
04:36 17 some circumstances has a circumference, those are three  
04:36 18 different kinds of measurement. We can measure linearly,  
04:36 19 but it doesn't provide any guidance as to how you reduce  
04:36 20 that down to one number.

04:36 21 So if our claim had one number for the dimensions  
04:36 22 and we referenced a standard that had length and width and  
04:36 23 circumference, we would have a problem like you had in  
04:36 24 Pacific Coast. We don't know what to measure. That's not a  
04:36 25 question about the testing conditions under which that

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04:36 1 measurement should happen.

04:36 2 So it's just a fundamentally different kind of  
04:36 3 ambiguity that's at issue in that case. It's what to  
04:36 4 measure, not the conditions under which a person of ordinary  
04:36 5 skill in the art would know that this is how you do it, for  
04:36 6 example, in room temperature.

04:36 7 THE COURT: What other parameters would the person  
04:37 8 of ordinary skill know besides temperature, that is,  
04:37 9 temperature should be room temperature? What other  
04:37 10 parameters would the POSITA know?

04:37 11 MR. NG: There are standards about the charging  
04:37 12 rate. That is one of them. We, again, have no evidence  
04:37 13 despite the fact that they've now raised that at oral  
04:37 14 argument, but there was no evidence in the record as to the  
04:37 15 differences that might make and whether that is material,  
04:37 16 but that does have an impact. Other things have an impact  
04:37 17 as well. There are a number of different unclaimed elements  
04:37 18 that could have an impact. Those are the ones that are  
04:37 19 commonly addressed in the art and ones that would tell a  
04:37 20 POSITA how to conduct standard testing.

04:37 21 THE COURT: But how would you know which parameter  
04:37 22 to choose? I'm looking at page 35, test conditions  
04:37 23 generally influence capacity. Now, there are three  
04:38 24 different parameters tested there with different results.  
04:38 25 How would the person of ordinary skill know which one to

04:38 1 choose because some will yield an acceptable result and some  
04:38 2 won't?

04:38 3 MR. NG: Well, there's no evidence, first of all,  
04:38 4 they would yield an unacceptable result. There is a red  
04:38 5 line here if I'm looking at the right slide that is sort of  
04:38 6 an approximation of what might be said. I'm not sure that  
04:38 7 that actually does say that it's outside of the range of  
04:38 8 what's claimed.

04:38 9 THE COURT: It looks like it's below 75 or right  
04:38 10 at it.

04:38 11 MR. NG: It could be right there, Your Honor. It  
04:38 12 could be close. There are standards -- again, we -- there  
04:38 13 are standards as to, you know, what rate of charging one can  
04:38 14 use. You can obviously overcharge. If you connect the  
04:38 15 power that came out of, you know, a nuclear reactor to a  
04:38 16 battery, it would obviously have an impact on cycleability.  
04:39 17 You could go to all sorts of extremes.

04:39 18 THE COURT: But within the value range of normal  
04:39 19 values for a parameter, how would the person know which  
04:39 20 value to choose?

04:39 21 MR. NG: Well, first of all, within those normal  
04:39 22 ranges -- if there are standards -- let's say that the  
04:39 23 normal ranges are within X and Y -- room temperature is not  
04:39 24 a laboratory-controlled condition as Your Honor pointed out.  
04:39 25 There are variations in things like that.

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04:39 1 THE COURT: Right. Most people would think, well,  
04:39 2 it's probably 68, 74, something like that.

04:39 3 MR. NG: Correct, Your Honor. So one would take  
04:39 4 the range that is set out in the art that says these are the  
04:39 5 standard ranges if there is a range, and one would test at  
04:39 6 them.

04:39 7 Your Honor, obviously when we get to trial and we  
04:39 8 get to the Daubert stage and the evidentiary stage, we are  
04:40 9 going to have a debate between the experts likely about  
04:40 10 infringement. And there is going to be a debate if we don't  
04:40 11 do our testing correctly that we did it improperly, that we  
04:40 12 loaded the dice, that we did something -- that we kept it at  
04:40 13 an artificially low rate of charge, for example.

04:40 14 I mean, if we came in here and we just had a  
04:40 15 trickle charge and we said, you know, in conditions that  
04:40 16 would take a phone battery, you know, two weeks to charge,  
04:40 17 you can achieve these cycleability results, we would have a  
04:40 18 massive problem at the evidentiary stage because their  
04:40 19 expert would tear our expert to shreds saying that is not an  
04:40 20 appropriate testing condition.

04:40 21 There are ranges within which the industry accepts  
04:40 22 the standard, and it is incumbent on us to establish this,  
04:40 23 that we have covered an appropriate range that establishes  
04:40 24 that there's infringement. And if they say that we're  
04:40 25 outside of that range, or that if we went to one side of the

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04:41 1 range or the other and we ignored something, then that's an  
04:41 2 evidentiary issue first for Your Honor to decide whether it  
04:41 3 goes to the jury, and ultimately for the jury to decide  
04:41 4 whether we have appropriately addressed those things, but  
04:41 5 that doesn't make it indefinite at this stage.

04:41 6 THE COURT: Are you saying that you've presented a  
04:41 7 situation of dueling experts as to what a POSITA would know  
04:41 8 such that that issue ought to go to the jury?

04:41 9 MR. NG: No, Your Honor, I'm not saying that. I'm  
04:41 10 saying that there are standards, and obviously within those  
04:41 11 standards, there are --

04:41 12 THE COURT: But who knows the standards?

04:41 13 MR. NG: Well, that issue of whether we have  
04:41 14 appropriately selected the standards is first a threshold  
04:41 15 issue for Your Honor to decide whether it goes to the jury  
04:41 16 at the Daubert stage, and then ultimately an issue for the  
04:41 17 jury to decide on the factual stage if we have met that  
04:41 18 threshold standard.

04:42 19 THE COURT: Okay. Thank you.

04:42 20 Do you want to close?

04:42 21 MS. MIKOSZ: Yes, thank you.

04:42 22 So Your Honor, I'd like to briefly address just a  
04:42 23 couple of points that plaintiff's counsel made. The first  
04:42 24 is that plaintiff alleges that Apple has not put forward any  
04:42 25 evidence that factors other than temperature affect the

04:42 1 outcome. Apple has presented evidence, including from the  
04:42 2 declaration of Dr. Horn, that these parameters, including  
04:42 3 temperature but also charge/discharge rate -- how long  
04:42 4 you're actually going to break between each one of these  
04:43 5 cycles -- all do affect the outcome of the capacity  
04:43 6 measurement.

04:43 7 Specifically, while this one is estimated based  
04:43 8 off of the 400 cycles, if you go back to the 500 cycles from  
04:43 9 Linden -- and Linden expressly states that only 70 percent  
04:43 10 of the initial capacity is remaining after 500 at the 1C  
04:43 11 rate -- and compare that with the 80 percent capacity that's  
04:43 12 remaining at the 0.5C rate -- again, these are both cycled  
04:43 13 at the same temperature. So this is just one example of  
04:43 14 evidence that shows that these are material to the outcome.

04:43 15 And while plaintiff does allege that there are  
04:43 16 standards, plaintiff's own expert, Dr. Yao, in his  
04:43 17 responsive declaration walks through a few of these  
04:43 18 standards or data sheets, and those standards and data  
04:44 19 sheets actually use different charging rates across them.  
04:44 20 For example, as we saw with the Chinese specification, the  
04:44 21 charging rates can be .2C, or it could also be charged at  
04:44 22 1C. And then, for example, on the Panasonic data sheet, the  
04:44 23 data sheet also specifies that the charging rate can be .5C,  
04:44 24 and then the discharge rate is approximately 1C.

04:44 25 So what we're left with is a person of ordinary

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04:44 1 skill in the art would not know where to go to look to  
04:44 2 figure out what these test conditions and parameters should  
04:44 3 be to arrive at this capacity calculation, and these  
04:44 4 parameters are material to determining whether or not a  
04:44 5 given battery meets the limitations of the claims at issue  
04:44 6 here.

04:44 7 THE COURT: But wouldn't a person skilled in the  
04:44 8 art for any given parameter have an understanding of what  
04:45 9 the typical value is? I assume that there's a typical value  
04:45 10 that's used to recharge telephones, iPhones, whatever.

04:45 11 MS. MIKOSZ: I do not believe that that is the  
04:45 12 case, Your Honor, including if you look at, for example,  
04:45 13 plaintiff's expert's declaration that talks about multiple  
04:45 14 different data sheets, specifications, and standards for  
04:45 15 lithium batteries that use different rates. So how would a  
04:45 16 person of ordinary skill in the art know which rate they  
04:45 17 should be applying for this test? They could pick and  
04:45 18 choose one that would allow it to meet the limitation.

04:45 19 THE COURT: Suppose I did? Suppose that I  
04:45 20 understand that for a broad cross-section of recharging  
04:45 21 telephones is X value, and, therefore, I'm going to use X  
04:45 22 value. I would know that. Is that implausible, or are the  
04:46 23 charging rates so variable that no one could come up with  
04:46 24 that?

04:46 25 MS. MIKOSZ: Your Honor, with the evidence put

04:46 1 forth that both parties have at least presented, including  
04:46 2 extrinsic evidence --

04:46 3 THE COURT: No, no. What I'm asking is, is it  
04:46 4 plausible that a person skilled in the art, for example,  
04:46 5 charging telephones, could know that the vast majority of  
04:46 6 telephones are recharged at rate X?

04:46 7 MS. MIKOSZ: Your Honor, the patent is completely  
04:46 8 devoid of that, and the --

04:46 9 THE COURT: Okay, it may be, but if a person of  
04:46 10 ordinary skill with respect to each of the parameters knew  
04:46 11 what the typical value in the real world is, the rate for  
04:46 12 recharging, the rate things discharge, whatever other factor  
04:46 13 you want to plug in there -- suppose a person of ordinary  
04:46 14 skill would know the typical value for each of the  
04:47 15 variables. Would it still be indefinite?

04:47 16 MS. MIKOSZ: If there were particular values for  
04:47 17 these parameters, no.

04:47 18 THE COURT: No, no, no. The premise is that the  
04:47 19 person of ordinary skill knows the typical value for each  
04:47 20 variable. If that were the case, would it be still be  
04:47 21 indefinite?

04:47 22 MS. MIKOSZ: If there was a typical value to be  
04:47 23 applied and a person of ordinary skill of the art would know  
04:47 24 what that is, then no. But that is not the situation here.  
04:47 25 Here, we're talking about secondary lithium ion batteries.

04:47 1 As you can see from just this one example of the Chinese  
04:47 2 specification that plaintiff relies on, there are multiple  
04:47 3 values, for example, of just the charge rate, and those  
04:47 4 values materially impact whether or not if it's cycled at  
04:47 5 this charge rate it would actually meet the claims.

04:47 6 THE COURT: But does the fact that there are  
04:47 7 multiple values tell you anything about whether there is a  
04:48 8 typical value or what it is?

04:48 9 MS. MIKOSZ: I think the fact that, for example,  
04:48 10 the specification says that either one of these charge rates  
04:48 11 can be used, no, there's not just a typical value.

04:48 12 THE COURT: Okay.

04:48 13 MS. MIKOSZ: For example, including the data  
04:48 14 sheets and other references that both parties' experts rely  
04:48 15 on, there is not just one typical charge or discharge rate  
04:48 16 value. And while alone the fact that there might be some of  
04:48 17 these parameters -- the parameters actually have a material  
04:48 18 impact, which is why the claims are indefinite because a  
04:48 19 person of ordinary skill in the art wouldn't know where to  
04:48 20 go to start.

04:48 21 THE COURT: Okay. Thank you.

04:48 22 Briefly, Mr. Ng.

04:48 23 MR. NG: Very briefly, Your Honor. Two things.  
04:48 24 The standards that were referenced all had values that were  
04:48 25 under what, 1C? Obviously, the issue here is not going too

04:48 1 fast as we saw with Linden. If it goes too fast, it goes  
04:49 2 down more quickly. But those standards talk about .2, .5,  
04:49 3 and 1. Those were the ones we just had on the screen that  
04:49 4 Apple's counsel was pointing to. Those are well below what  
04:49 5 they're claiming is a problematic level. That's because it  
04:49 6 doesn't matter. If we look at lower charging rates, that's  
04:49 7 going to have a higher cycleability, so I don't think that's  
04:49 8 the real dispute here. The dispute is how high can you go?  
04:49 9 And none of the standards that they said go as high as what  
04:49 10 they're saying is problematic here.

04:49 11 The other thing is, yes, there are standards that  
04:49 12 are out there. I mean, you can talk with certainty about  
04:49 13 what actually happens in the real world. Their client, just  
04:49 14 like every other phone company out there, advertises the  
04:49 15 cycleability of their phones. One of the things they tell  
04:49 16 consumers is this is going to last 400 or 800 cycles. They  
04:49 17 know what that means, and they're going to get themselves in  
04:49 18 a lot of hot water if they don't. They have a way of saying  
04:49 19 we're not false advertising. This is, you know, knowable,  
04:50 20 and we --

04:50 21 THE COURT: Yes, the FTC comes knocking on your  
04:50 22 door and says where is your evidence to back this up?

04:50 23 MR. NG: I'm sorry, Your Honor?

04:50 24 THE COURT: The FTC comes knocking on your door  
04:50 25 and says where is your data to back up this claim?

04:50 1 MR. NG: You're absolutely correct, Your Honor, or  
04:50 2 a class action lawyer, which I think is maybe even the more  
04:50 3 frightening of the two, but you're absolutely right. These  
04:50 4 are hotly disputed. Everything that phone companies say to  
04:50 5 the world in their advertising gets hotly disputed by the  
04:50 6 FTC and class actions, everything, and they say this in  
04:50 7 their advertising. They know there's a way to speak about  
04:50 8 this in shorthand without saying also here is the laundry  
04:50 9 list of every laboratory condition that we use when testing  
04:50 10 this. There's a common parlance that's used. There's an  
04:50 11 even more specific parlance that's used in the industry, and  
04:50 12 that provides parameters around which this testing can be  
04:50 13 conducted.

04:50 14 THE COURT: Okay. Thank you. I think that brings  
04:50 15 to conclusion the argument today.

04:50 16 Is there anything else anyone would like to bring  
04:51 17 up?

04:51 18 MR. TURNER: Just some citations for the record,  
04:51 19 Your Honor, to make the reference back a little bit easier  
04:51 20 if you're looking at the transcript when Ms. Mikosz was  
04:51 21 referring to the evidence in the record.

04:51 22 From the experts, Docket 68-1, paragraphs 55 and  
04:51 23 paragraph 27, and Docket 73-1, paragraphs 31 through 36,  
04:51 24 were the locations she was referring to. And Linden is  
04:51 25 Exhibit 69-10.

04:51 1 THE COURT: Okay.

04:51 2 MR. TURNER: There was a reference to enablement  
04:51 3 being an issue for another day, Your Honor. We agree with  
04:51 4 that. The argument was regarding indefiniteness.

04:51 5 THE COURT: Right. Okay.

04:51 6 MR. ZAHEER: Nothing further from the plaintiff.

04:51 7 THE COURT: Okay. My apologies for getting a late  
04:51 8 start, and my apologies as well for the fact that you were  
04:51 9 excluded from that argument. It was a trade secret case  
04:51 10 between Masimo and of all people Apple, so everyone was  
04:52 11 excluded. So not only were you late, but you were stuck in  
04:52 12 the hallway, so my apologies for that. Thank you.

04:52 13 (Whereupon, the proceedings were concluded.)

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CERTIFICATE

I hereby certify that pursuant to Section 753,  
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Date: September 9, 2023

/s/ Sharon A. Seffens 9/9/23

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