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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

K/S HIMPP,
Petitioner

v.

BRAGI GMBH,
Patent Owner.

IPR2023-01204 (Patent 10,117,014 B2)
IPR2023-01205 (Patent 10,397,688 B2)

Record of Oral Hearing
Held: January 24, 2025

Before LARRY J. HUME, STACEY G. WHITE, and GARTH D. BAER, *Administrative Patent Judges*.

APPEARANCES:

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The above-entitled matter came on for hearing Friday, January 24, 2025, commencing at 1:00 p.m. EST, via Video-conference.

1 P-R-O-C-E-E-D-I-N-G-S

2 (1:00 p.m.)

3 JUDGE HUME: Good afternoon. We are convened for oral
4 arguments in two cases, IPR 2023-01204, which pertains to patentability
5 challenges of Claims 1 through 13 in U.S. Patent Number 10,117,014 and
6 also IPR 2023-01205, which pertains to patentability challenges of Claims 1
7 through 14 in U.S. Patent Number 10,397,688. I'm Judge Hume and also
8 appearing are Judges White and Baer.

9 Let's get started with appearances for both parties who will be arguing
10 today including, as I understand it, a LEAP practitioner appearing for
11 Petitioner. If anyone else is attending remotely with you today but will not
12 be speaking, please identify them as well. For example, please state if your
13 client is attending. Following the hearing, please confer with the court
14 reporter to ensure there are no questions regarding the spelling of names or
15 terms. We'll start with appearances for Petitioner.

16 MR. ESRAM: Good afternoon, Your Honors. I'm Trishan Esram,
17 representing Petitioner HIMPP. With me is lead counsel, Haixia Lin. We
18 are both from Wilmer, Hale.

19 JUDGE HUME: Thank you. And you're the LEAP practitioner
20 today? Is that correct?

21 MR. ESRAM: That's correct, Your Honor.

22 JUDGE HUME: Okay. And no other appearances on your side?

23 MR. ESRAM: No, Your Honor.

24 JUDGE HUME: Thank you. Who is appearing for Patent Owner?

25 MR. JARRETT: Yes, Your Honor. It's Bradley Jarrett on behalf of
26 Patent Owner Bragi. With me is also lead counsel, Richard Kamprath and

1 potentially Mr. Scott Hejny will also be joining remotely, but I will be
2 arguing. Mr. Hejny and Mr. Kamprath, also my colleague Nicole Smith.
3 And we may also be joined by a representative, Mr. Connor Kennedy, for
4 Patent Owner Bragi.
5 JUDGE HUME: All right. Thank you very much. Some of this may
6 be old hat to you, but I'd like to welcome you and give you basic overview
7 of oral hearings at PTAB. I want to take this opportunity to address counsel
8 and their clients before we begin. As an inter partes review is a contested
9 proceeding, today's hearing provides you an opportunity for counsel to
10 orally advocate for your positions on the patentability of the challenged
11 claims as raised in the petition. We understand -- and in revised motions to
12 amend, which we'll be addressing.
13 We understand that in every case that comes before us, the parties,
14 both Petitioner and Patent Owner have a lot at stake. The judges before you
15 today take our role in deciding this dispute seriously. We have reviewed the
16 briefs in evidence and we are prepared today with questions. These
17 questions and their answers will help us to decide the issues in the case.
18 In the interest of fairness and due process, we must limit our
19 considerations to the arguments and evidence already presented in the
20 record. We have the briefs and evidence available to us on our computers.
21 So, if we look away from the camera during the hearing, we may be
22 consulting the documents in the record or taking notes. Please note that we
23 are paying close attention to your arguments and carefully considering the
24 case.
25 And if we interrupt you, we apologize in advance, but we do so to be
26 able to ask you questions that may be essential for resolution of the issues or

1 to keep the hearing on track with time. As for clarity of the record,
2 recording of any PTAB hearing is prohibited. The court reporter will
3 provide a transcript of the hearing that will become part of the record of the
4 proceeding at a later date.
5 To ensure that the transcript of this hearing is clear, we ask you to
6 identify yourselves before speaking, speak directly into the microphone and
7 to identify specific slide numbers, numbering of figures, and any other
8 pertinent identifying information when referring to demonstratives or other
9 evidence. Please mute yourself when not speaking.
10 If you encounter any technical difficulties, please let us know
11 immediately. As for burdens, to prepare for your oral arguments, we have
12 familiarized ourselves with the record and issues in this case. Our role as
13 judges on the panel is to assess your arguments and evidence and weight
14 those in accordance with the burdens established by our rules of procedure
15 and precedential authority.
16 We remind the parties that Petitioner has the ultimate burden of
17 establishing unpatentability by a preponderance of the evidence. As for the
18 amount of time for each side, for the hearing order, which are Paper 32 and
19 the 1204 proceeding and Paper 33 and the 1205 proceeding, each party has
20 120 minutes total time, two hours, to argue their cases. Given the similarity
21 of these two cases, you're certainly welcome to take all that time, but it may
22 not be necessary to take that amount of time. But you do have it available to
23 you and we'll look at maybe taking a break halfway through if necessary.
24 We received Patent Owner, or excuse me, Petitioner's request for
25 Trishan Esram to participate in the oral hearing under the Legal Experience
26 and Advancement Program or LEAP, so Petitioner will receive a total of 15

1 additional minutes of argument time, this is for both cases, so it's 15 total for
2 both cases during oral hearing, bringing their total argument time to 135
3 minutes.
4 We remind Petitioner that the LEAP practitioner must have a
5 meaningful and substantive opportunity to argue during the hearing today.
6 That said, there is no set time requirement for that argument, it may be
7 longer or shorter than 15 minutes. Petitioner will open the argument and
8 may reserve rebuttal time, which may not exceed more than half of
9 Petitioner's total argument time.
10 Patent owner will then respond to Petitioner's arguments, may reserve
11 sur rebuttal time, also not to exceed more than half the Patent Owner's total
12 argument time. The parties may allocate their time between these two cases
13 as you deem appropriate.
14 As for objections, please remember your arguments should be limited
15 only to those arguments previously presented in the briefs.
16 Please make it clear which challenges and claims you are addressing
17 at all times. We ask that the parties hold any objections regarding a parties'
18 arguments until it is their time to speak.
19 We also note that demonstratives if used, which they are going to be,
20 apparently, in this case, are not a mechanism for making new arguments.
21 Demonstratives are also not evidence, so will not be relied upon as
22 evidence. Rather, demonstratives are visual aids to a party's oral
23 presentation regarding arguments and evidence previously presented and
24 discussed in the paper.
25 The Board has considered Petitioner's objection to the Patent Owner's
26 demonstrative and may reserve ruling on the objection.

1 As for time, I will maintain a clock, and I hope other people will do it
2 also to keep me on track.
3 And I endeavor to give each party warning time as you near the end of
4 your allotted opening argument time and near the end of any reserved
5 rebuttal time, but it would be helpful for the parties to also track your own
6 time.
7 Petitioner, do you wish to reserve any rebuttal time?
8 MR. ESRAM: Yes, Your Honor, half an hour, please.
9 JUDGE HUME: 30 minutes. All right. Thank you. Very good, you
10 may begin your arguments when ready.
11 MR. ESRAM: May it please the Board. Once again, I'm Trishan
12 Esram representing Petitioner HIMPP. I'm now on Slide 1 of Petitioner's
13 demonstratives. The original claims of the '014 and '688 patents, were all
14 directed to adjusting power level of a wireless earpiece in response to
15 detecting or not detecting a magnetic field. The claimed techniques
16 purportedly have managed and extend battery life of the earpieces.
17 Patent Owner no longer disputes that managing battery life by
18 adjusting power levels based on absence or presence of magnetic field was
19 known. Patent Owner did not present any arguments as to why the original
20 claims of the two patents are patentable. Patent Owner did not file a
21 response in either IPR.
22 And Patent Owner waived all arguments directed to Petitioner's
23 challenges to the original claims of the two patents. On the other hand,
24 Petitioner has shown by preponderance of the evidence that original Claims
25 1 through 13 of the '014 patent and the original Claims of 1 through 14 of
26 the '688 patents are unpatentable.

1 Therefore, Petitioner respectfully requests that Your Honors cancel
2 these original claims. What remains are Patent Owner's revised motion to
3 amend in each proceeding. When we consider the current disputes related to
4 these revised motions to amend, none of Patent Owner's arguments is based
5 on any limitations related to altering power levels or detecting magnetic
6 fields.
7 Instead, Patent Owner's revised motions to amend introduce a new
8 limitation that requires that the wireless earpiece be configured to read user
9 biometrics. This is the only limitation that Patent Owner argues is not
10 present in the prior art cited in the petitions.
11 In his proposed substitute claims, Patent Owner did not have any other
12 limitations about which facts of user biometrics are read or what sensors are
13 used or otherwise how this feature is implemented. The added limitation
14 only requires configuring the wireless earpieces to read user biometrics.
15 The only limitation directed to how the user biometrics are used,
16 appears in a dependent claim, Claim 22, which requires utilizing the user
17 biometrics to alter the power mode. This confirms that all the other claims,
18 including the substitute independent claims do not limit how the user
19 biometrics are used, stored, displayed, or communicated.
20 But even with respect to the user biometrics limitation, the nature of
21 the dispute is limited. Patent Owner admits this limitation was known in the
22 art before the two patents and their parent '853 patent. Patent Owner also
23 admits that it was known to adjust power level of any earpiece based on
24 temperature measured by sensor of the earpiece.
25 Therefore, there is no dispute that it was known before the two
26 patents, how to configure a wireless earpiece to read user biometrics and that

1 such a configuration may be desirable, for example, for managing power
2 levels of the wireless earpiece.
3 Despite these admissions, Patent Owner attempts to argue that there
4 was no motivation to consider a wireless earpiece that has in terms of
5 existing power levels, to incorporate the known feature of being able to read
6 user biometrics.
7 As I will discuss, these arguments are going to fail. Patent Owner's
8 revised motions to amend fail for other reasons that I will discuss. Skipping
9 to Slide 4, the '014 patent is a combination of U.S. Patent 9843853, the '853
10 patent, which was filed on August 23, 2016, and claims the benefit of a
11 provisional application filed on August 29, 2015.
12 The '688 patent is a combination of the '014 patent. The '853, '014,
13 '688 patents all share the same specification. As Your Honors are aware, the
14 '853 patent was challenged in IPR2023-01150. Throughout our presentation
15 today, we will refer to statements made by Patent Owner and by its expert
16 declarant in that IPR proceeding.
17 These statements may include, for example, the meaning of certain
18 claim terms in the context of the '853 patent and the knowledge and the level
19 of the skill of a person of ordinary skill in the art as of its priority date.
20 Because the '014 and '688 patents are continuations of and share the
21 same specification as the '853 patent, those statements made by Patent
22 Owner and its declarant are relevant and applicable here as well.
23 Throughout our presentation, we will also be concurrently addressing IPR --
24 MS. LIN: I'm sorry. Let me just jump in really quickly. Regarding
25 the related matter, IPR2023-01150, the parent, I know the Board is aware,
26 but just did want to raise that decision did come out in that matter after a

1 briefing had completed for these proceedings, so there was no opportunity to
2 raise that final decision until now. But since it is the related matter, we
3 thought it prudent to just raise that the final decision had come out.
4 MR. ESRAM: Thank you, Haixia. So, again it's Trishan Esram now.
5 I was about to say, throughout the presentation today, we will be
6 concurrently addressing the two IPR's at issue today, but IPR 2023-1204,
7 which challenges the '014 patent and IPR 2023-1205, which challenges the
8 '688 patent.
9 Our cites today include citations mostly to papers in the 1204 IPR,
10 and our arguments may reflect the papers in the 1204 IPR as well. But
11 because our arguments in the 1204 IPR largely overlap those in the 1205
12 IPR, we just want to be clear that unless we state otherwise, our slides and
13 arguments apply to both IPR's today.
14 So, turning to the substance of the patents themselves, the patents
15 relate to wireless electronics but not exclusively to wireless earpieces that
16 manage and extend battery life, as highlighted here on this slide.
17 Moving to Slide 5, here on this slide, we see that the embodiments of
18 the patent never included wireless earpieces, but a variety of wireless
19 devices, including those that may be ingested or implanted into a user.
20 The patents contemplate the devices in the form of endoscopic pill,
21 pacemaker, contact lenses, oral implants, bone implants, and so on.
22 Furthermore, the patent recognizes a wide variety of information, data or
23 measurements could be made by these wireless devices. With this brief
24 overview, we'd like to get straight into the key disputes related to Patent
25 Owner's revised motions to amend.

1 Skipping to Slide 34. In its revised motions to amend, Patent Owner
2 proposed one substitute claim for each of the original claims of the '014 and
3 '688 patents. Turning to Slide 35, for the '014 patent here, we see the first
4 substitute independent Claim 14. We've highlighted the added user
5 biometrics limitation.
6 Patent Owner does not dispute that any non-highlighted portions,
7 including any other added limitation was known in the prior art. Turning to
8 Slide 36, we see the second substitute independent Claim 23 for the '014
9 patent. Once again, Patent Owner's only argument rests on similar
10 limitations related to reading user biometrics highlighted here on this slide.
11 Moving to Slide 37, as I mentioned during the opening, Patent
12 Owner's only argument as to why it's proposed substitute claims are
13 patentable, is that the user biometrics limitation is missing from the prior art
14 cited in the petitions. And if we scroll through Slide 38, Slide 39, and Slide
15 40 it's the same for '688 patent.
16 On to Slide 41. Petitioner opposed Patent Owner's revised motion to
17 amend. Petitioner introduced two prior art references, Rass and Aumer, that
18 each disclosed before the priority date of the '014 and '688 patents, a
19 wireless earpiece that is considered to read user biometrics.
20 Supported by Dr. Kiaei's testimony, Petitioner explained why a
21 POSITA would have been motivated to combine Rass and/or Aumer with
22 each of the primary references, Hain, Steinbrecher and Shaffer, cited in the
23 petitions with a reasonable expectation of success, thereby rendering all of
24 Patent Owner's proposed substitute claims obvious.
25 Next, I would like to look at Rass and Aumer and then the motivations
26 to combine. Moving to Slide 43, here on the slide is prior art reference,

1 Rass. There is no dispute that Rass is prior art. Rass was actually filed in
2 May 2005 and takes priority to a foreign application filed in May 2004,
3 more than a decade before the priority date of '014 and '688 patents.
4 As you can see here on the slide, Rass disclosed a hearing aid I fitted
5 with a temperature sensor, indicated here on the slide in red, to detect the
6 body heat of a hearing aid wearer, which we underlined in red as well.
7 On Slide 44, Rass explains that when worn, the hearing aid I or its
8 shell heats up and the temperature sensor (TS) registers this heat. And when
9 the temperature is above or below a threshold, the hearing aid is switched on
10 or off respectively. In fact, as we see on the lower left, Patent Owner admits
11 that Rass discloses as much.
12 And that excerpt on the lower right shows that Rass' disclosure is
13 similar to what the challenged patents disclose. Rass also discloses that the
14 switching on and off operations includes switching to and from standby
15 mode. And this mode extends a useful life or endurance of a hearing aid
16 battery during normal operation.
17 JUDGE HUME: Counsel, Judge Hume. Let me interrupt you for a
18 second. As I recall, Patent Owner makes an argument that this temperature
19 sensing that's happening in Rass is not a biometric measurement of the user,
20 per se, because it's measuring the temperature of the shell of the, at least in
21 one instance. Would you care to comment on that?
22 MR. ESRAM: Yes, Your Honor. First of all, I think it's clear from
23 Rass' disclosure that I just went over that the temperature that's being sensed
24 is of the wearer. It's being worn by a user, it gets heated up, it records the
25 temperature. There is no dispute that that temperature is because of the
26 wearer wearing the earpiece.

1 If Patent Owner's position is that that's not the temperature of a user
2 and therefore not the user biometrics, and if Patent Owner is trying to say
3 that Rass is not enabling, then similarly, the patents being challenged here,
4 the '014 and '688 will also not be enabling. Because there is nothing in
5 these two patents that show how you would measure the temperature of a
6 user directly without having to have a sensor the way Rass is disclosing, that
7 gets worn and gets heated up by the user wearing it to measure temperature.
8 JUDGE HUME: All right. Thank you. And benefit for Patent
9 Owner, if I've mischaracterized your argument, please address that during
10 your rebuttal time.
11 MS. LIN: This is Haixia for Petitioner. I just wanted to jump in and
12 add on to what my colleague Trishan said. It seems -- our understanding of
13 Patent Owner's argument is since Rass does say that the temperature sensor
14 detects the body heat of the wearer, the only reason to characterize the body
15 heat of a wearer as not being a user biometric is if somehow Rass's
16 implementation fails to achieve what it purports to, which is measure body
17 temperature.
18 But given that Patent Owner also argues that a person of ordinary skill
19 in the art at the time before this claimed invention, knew how to implement a
20 temperature sensor in a wireless earpiece to measure body temperature, we
21 think that Patent Owner basically has a contradiction in terms of what it says
22 about the person of ordinary skill in the art, the level of art, when it's arguing
23 for enablement, and then, what it says about Rass when it's arguing for non-
24 obviousness.
25 MR. ESRAM: Thank you, Haixia. So, we're on Slide 45 now. As I
26 mentioned earlier, Petitioner has provided expert testimony by Dr. Kiaei as

1 to why POSITA would have been motivated to combine Rass with each of
2 the primary art references, Hain, Steinbrecher, and Shaffer cited in the
3 petitions with a reasonable expectation of success. Moving to Slide 46, we
4 see the reasoning behind Dr. Kiaei's explanation here.
5 First, Dr. Kiaei explains that Rass is analogous to the challenged
6 patent. Second, the POSITA would have known how to include a sensor to
7 read user biometrics, as taught by Rass, in earpieces, as taught by Hain,
8 Steinbrecher, or Shaffer with a reasonable expectation of success.
9 And third, Rass itself exclusively discloses several benefits of
10 switching on and off the hearing aid based on the temperature detected by
11 temperature sensor fitted therein.
12 On Slide 47, we actually highlight these benefits that Rass disclose.
13 First, Rass explains that its invention significantly increases user friendliness
14 by providing automatic switching on and off without requiring a mechanical
15 switch.
16 And as I noted earlier, Rass's switching on and off operation allows
17 for standby mode, that extends a useful life or endurance of a hearing aid
18 battery. In its reply, Patent Owner argues that the motivations to combine
19 Rass with the primary references are insufficient.
20 Patent Owner's argument hinges on its assertion that Rass is not
21 analogous to not only the challenged patent, but also to the primary
22 references cited in the petitions. But as Petitioner explains in its opposition,
23 and as I will discuss in more detail in later slides, Rass is analogous art.
24 Next, I'd like to take a look at Aumer. Moving on to Slide 49, this
25 slide actually shows Aumer's cover page in Figures 2A and 2B. Like for
26 Rass, there is no dispute that Aumer is prior art. Aumer discloses in Figures

1 2A and 2B, a wireless monitoring earpiece, 20, which includes a sensor
2 module, 24, and indicated here in red on this slide.
3 On to Slide 50. Aumer discloses that the sensor module, 24, when
4 positioned within the ear of a subject that is the user of a earpiece, it's
5 considered to contact a selected area of the ear.
6 The sensor module 24 is considered to detect and/or measure
7 physiological information from the user. That's consistent with Patent
8 Owner's expert testimony, shown in the bottom right snippet that Aumer's
9 physiological information will be understood to be user biometrics in the
10 context of a challenged patent. Turning to --
11 JUDGE HUME: Judge Hume. But not necessarily temperature,
12 correct, in Aumer? That's a broad statement.
13 MR. ESRAM: Aumer is even broader. But Aumer discloses several
14 user biometrics and I believe the next slide will show you that, including
15 temperature. So, here on Slide 51, we do see that Aumer discloses several
16 types of user biometrics, namely, temperature, heartbeat, blood gas levels.
17 Those are very similar if not the same, as the user biometrics that are
18 disclosed in the challenged patents. Aumer explains that the ear is an ideal
19 location to measure these types of user biometrics. And you can see that in
20 the first sentence in Paragraph 64 of Aumer.
21 JUDGE HUME: Excuse me, Counsel, Judge Hume again. So,
22 Aumer, as I recall, and I could be mistaken, as I seem to remember, it
23 doesn't explicitly measure it, it's just saying you can do these things, which
24 may or may not be enough for prior art purposes.

1 But the actual sensor implemented in Aumer is of a different type and
2 temperature, as I recall, uses light, infrared light, to determine pulse rate and
3 oxygenation and that sort of thing, so.
4 MR. ESRAM: And again, we have --
5 JUDGE HUME: You're using Aumer in one revised ground or
6 challenge and Rass in another on the same claim, it seems. So, will you
7 discuss that just a little bit, too?
8 MR. ESRAM: And that's partly correct, Your Honor. If I point to
9 Rass, it's like 52, Aumer, first of all, on the previous slides that Aumer has a
10 sensor module, 24. It doesn't limit it to just a temperature sensor, but in
11 Aumer's disclosure on Slide 52, here, Aumer discloses several types of
12 sensors that could be used to measure the user biometrics.
13 But it discloses in the previous slide I showed you, on Slide 51, that
14 the sensors disclosed by Aumer include several sensors. It includes the
15 optical sensors, the one we are talking about, the infrared. But it also
16 discloses thermal sensors, so those actually are to measure temperature.
17 And it shows you that in Paragraph 70 on the left of Slide 52 here.
18 So, to your point, Aumer does disclose temperature sensor the same way
19 Rass discloses it or how the patents report that they disclose measuring
20 temperature.
21 JUDGE HUME: Okay. Thank you for that clarification. I appreciate
22 that.
23 MR. ESRAM: Moving to Slide 53, Your Honors. But for Rass,
24 Petitioner has provided expert testimony as to why a POSITA would have
25 been motivated to combine Aumer with each of the prior art references with

1 a reasonable expectation of success. Moving to Slide 54, Dr. Kaiei
2 explained that first, Aumer is analogous art to the challenged patent.
3 Second, a POSITA would have know how to include a sensor to read
4 user biometrics as taught by Aumer in earpieces, as taught by Hain,
5 Steinbrecher, or Shaffer. Third, around Aumer's findings, that is before the
6 challenged patents, there were increased consumer interests in monitoring
7 personal health and also advances in miniaturizing sensors.
8 And fourth, it was known to switch an earpiece on and off depending
9 on user biometrics, for example, as Rass disclosed more than a decade
10 before the priority date of the patents. Such a feature would provide the
11 added benefit of saving battery life of the earpiece as explicitly disclosed in
12 Rass and as Dr. Kiaei explained as well.
13 Patent Owner contests these motivations to combine. Patent Owner's
14 argument rests on its assertion that Aumer is not analogous art to not only
15 the challenged patents, but also primary references cited in the petitions.
16 But again, Petitioner explained in its opposition and I will discuss next in
17 more detail or in later slides, Aumer is analogous art.
18 Skipping now to Slide 56, we turn to Patent Owner's reply to
19 understand Patent Owner's disputes. Patent Owner admits that a POSITA
20 would have known how to implement a sensor for reading various user
21 biometrics.
22 Specifically, the techniques to read biometrics that would be
23 implemented in an earpiece, such as heartbeat or temperature, were known
24 in the art and within the skill level of a POSITA to implement as of the
25 priority date.

1 In particular, Patent Owner calls out temperature as one such
2 biometric that a POSITA would know. And the techniques for reading
3 temperature using an earpiece were within a POSITA's skill level to
4 implement before the priority date of the challenged patents.
5 JUDGE HUME: Counselor, Judge Hume. Playing devil's advocate a
6 little bit here, but that statement was made in the context of enablement.
7 And now, using your position that that statement would equally apply to the
8 prior art analysis under obviousness?
9 MR. ESRAM: That would be our position, Your Honor. And I think
10 that's maybe what counsel actually was alluding to, but Patent Owner seems
11 to be taking contradicting positions when it comes to enablement versus
12 patentability. But I'd say that that's one way that shouldn't be allowed. But
13 it is our position that Patent Owner is saying what he is saying here for
14 enablement should apply equally for patentability.
15 MS. LIN: Just, this is Haixia Lin again. Just to add on to that, the
16 level of skill of a person of ordinary skill in the arts, by the time of the
17 priority date of the challenged patents should be the same for enablement
18 purposes as for an obviousness analysis, you know, that level shouldn't
19 change regarding which issue we are contemplating. And so a statement
20 made here should equally apply to the obviousness analysis for the claims.
21 JUDGE HUME: Okay. Thank you.
22 MR. ESRAM: Thank you, Haixia. Back to me, Trishan Esram. And
23 as we see at the bottom of the slide here, there is a snippet where Patent
24 Owner also admits that powering up and down an earpiece based on
25 temperature was known, in particular, Patent Owner has described in Rass.

1 Well, despite these admissions, Patent Owner argues that the
2 substitute claims are patentable because they recite wireless earpieces
3 configured to read user biometrics. These with prior art references
4 expressed in Rass and Aumer that disclose wireless earpieces configured to
5 read user biometrics, Patent Owner instead argues that Rass, their reference
6 about hearing aids body heat temperature sensor in Aumer, a reference about
7 wearable biometric monitoring devices, are not analogous art and thus not
8 combinable with the primary references cited in the petitions. Patent
9 Owner's arguments fail, as I will discuss next.
10 Skipping to Slide 59, unlike Patent Owner's arguments, Rass is
11 analogous art. In its opposition supported by Dr. Kiaei's testimony,
12 Petitioner set out reasons why Rass is analogous art to the '014 and '688
13 patents under both the field of endeavor and reasonable pertinence tests.
14 Turning to Slide 60, based on the case law, the field of endeavor may
15 be broadly defined because it relies on the complete disclosure of four
16 embodiments in the patents' specification. Notably, the federal circuit has
17 affirmed findings of analogous art where the references share a general field
18 of endeavor.
19 Moving on to Slide 61, we see that the '014 patent broadly relates to
20 wireless electronics and battery systems and not exclusively to wireless
21 earpieces that manage and extend battery life. As such, its field of endeavor
22 is wireless electronics, including wireless earpieces.
23 Like the '014 patent, Rass discloses an earpiece, and thus has the same
24 field of endeavor. In its reply, Patent Owner says that the '014 patent's field
25 of endeavor is narrower than the wireless electronics devices and battery

1 systems, more specifically, wireless earpieces managing and extending
2 battery life.
3 Patent Owner also asserts that Rass, on the other hand, focuses on
4 turning the device on and off. But Patent Owner is mischaracterizing Rass.
5 In fact, like the '014 patent, Rass exclusively discloses extending the useful
6 life or endurance of a hearing aid battery. This is shown here on the slide by
7 the green highlight. Therefore, Rass is from the '014 patent's field of
8 endeavor whether interpreted broadly or narrowly.
9 Moving to Slide 62, the case law also says that a field of endeavor of a
10 patent is not limited to a specific point of novelty. But this also means that
11 the field of endeavor should at least include the alleged point of novelty.
12 And as we've mentioned several times earlier, the only point of
13 novelty that Patent Owner identified is the requirement that the wireless
14 earpieces are configured to read user biometrics. So, the field of endeavor
15 here should at least include wireless earpieces configured to read user
16 biometrics.
17 As shown on the bottom right here, Rass discloses that its hearing aid
18 I is fitted with a temperature sensor to detect the body heat of the hearing aid
19 wearer and we've seen that before. So, even if we were to focus on Patent
20 Owner's alleged point of novelty as a field of endeavor of the '014 patent,
21 Rass is from that field of endeavor as well.
22 And now on Slide 63, focusing on the second test that are reasonable
23 pertinent tests. The case law makes clear that the prior art reference is
24 reasonably pertinent only if a person of ordinary skill would reasonably have
25 consulted those references and applied their teachings in seeking a solution
26 to the problem that the inventor was attempting to solve. Moreso, if a

1 reference disclosure has the same purpose as the claimed invention, then the
2 reference relates to the same problem.
3 Turning to Slide 64, Patent Owner says that Rass is not reasonably
4 pertinent to the problem with which the inventor of the '014 patent is
5 involved, namely, managing and extending battery life of wireless
6 electronics through the variation of power modes and methods of charging.
7 And once again, Patent Owner says that Rass is concerned with
8 switching a hearing aid on and off. But as I mentioned a few slides back,
9 Rass exclusively discloses extending of a useful life or endurance of a
10 hearing aid battery.
11 As we can also read from the bottom excerpt, Rass explains that this
12 extension in battery life results from the switching on and off operations,
13 which include switching to and from a standby mode. That's just like the
14 variation of powers in Patent Owner's argument.
15 Turning to Slide 65, interestingly, despite relying solely on a wireless
16 earpiece to read user biometrics for patentability, Patent Owner disregards
17 this feature as being a problem faced by the inventors. But even if today,
18 Patent Owner was to argue that configuring a wireless earpiece to read user
19 biometrics were the problem faced by the inventors, Rass discloses a
20 temperature sensor fitted in the hearing aid for measuring user temperature.
21 Therefore, Rass is reasonably pertinent to problems faced by the
22 inventors. So, as we just covered, one, Rass is from the same field of
23 endeavor as the claimed invention and Rass is reasonably pertinent to the
24 problems faced by the inventors. The bottom line, therefore, is that Rass is
25 analogous art. Slide 66.

1 Aside from arguing that Rass is not analogous to the challenged
2 patents, Patent Owner provides other reasons why Rass is not combinable
3 with Hain, Steinbrecher, or Shaffer. As I will discuss next, Patent Owner's
4 reasons fail.
5 Turning to Slide 67, the table here is a summary of Patent Owner's
6 other reasons shown in the left column and in the right column are
7 Petitioner's responses in its sur reply. I will address each argument in the
8 next few slides.
9 Turning to Slide 68, Patent Owner argues that Rass is not from the
10 same field of endeavor as or analogous to the primary references Hain,
11 Steinbrecher, or Shaffer. But Patent Owner wrongly applies the analogous
12 art tests. The analogous test is to determine whether a reference is
13 analogous to the claimed invention, not to other references.
14 If we flip to Slide 69 for a minute, on Slide 69 we see that the case
15 law states that references qualify prior art for an obviousness determination
16 only when analogous with the claimed invention and that it is not required
17 that the references be analogous art to each other.
18 In going back to Slide 68, Patent Owner wrongly compares Rass to
19 the primary references, not to the claimed invention, as set forth in Patent
20 Owner's proposed substitute claims. As we already discussed, Rass is
21 analogous to the challenged claims and substitute claims.
22 Petitioner's expert, Dr. Kiaei has also explained how the primary
23 references, Hain, Steinbrecher, and Shaffer are analogous. Thus, Patent
24 Owner does not dispute that each of the primary references like Rass,
25 discloses a wireless earpiece.

1 Moving on to Slide 70, here we see Patent Owner's next argument that
2 Rass's temperature sensor allegedly measures temperature of a hearing aid or
3 its shell, not the user biometric. That's what Judge Hume question was
4 related to earlier.
5 Again, I think we discussed it already, but Patent Owner's position is
6 in direct contradiction with Rass's explicit disclosure that its temperature
7 sensor measures the body heat of a hearing aid wearer. And as we show
8 here again at the bottom left, Patent Owner admitted the techniques to read
9 biometrics that would be implemented in an earpiece, suggest temperature
10 were within the skill level of a POSITA to implement, as of the priority date.
11 Turning to Slide 71, Patent Owner argues that Rass's temperature
12 sensor is incompatible with Hain's telephone mode, the mode when a
13 telephone is held next to a user's ear during conversation.
14 Patent Owner's reasoning seems to be that a magnetic field emitted by
15 a telephone receiver in Hain, will allegedly create an interference signal that
16 will produce a wrong temperature reading. But Patent Owner provides no
17 support or further explanation for how or why a magnetic field would
18 interfere with a temperature sensor.
19 As shown on the slide here, Patent Owner cites expert declaration that
20 merely parrots their reply language verbatim. Moreover, Hain's telephone
21 mode is irrelevant because at no point during this proceeding did Petitioner
22 rely on Hain's telephone mode for its obviousness positions or otherwise.
23 If we turn back to Slide 20, we see telephone mode in the figure on
24 the right. The figures indicated indicate the teachings of Hain that Petitioner
25 did rely on. Notably, none of the grounds rely on or use the teachings

1 related to Hain's telephone mode. So, whether Hain's patent of telephone
2 mode is compatible with the temperature sensor, is irrelevant.
3 MS. LIN: All right. This is Haixia Lin jumping in again. I also just
4 wanted to point out back on Slide 71, that Trishan was showing you, this is
5 the entirety of Patent Owner's arguments in its papers. Please note that the
6 only citations are to the expert declaration that was submitted with it, which
7 is shown in its entirety on the right. There is no other citations or
8 explanations, so this is the entirety of their argument on this point.
9 MR. ESRAM: Thank you, Haixia. Back to me, Trishan Esram.
10 JUDGE HUME: This is Judge Hume, did you have an opportunity to
11 depose Dr. Young on this point?
12 MR. ESRAM: No, Your Honor. This was Patent Owner's reply and
13 no, we didn't have a --
14 JUDGE HUME: -- 2006, though --
15 MR. ESRAM: I'm sorry, Your Honor, could you please repeat your
16 question?
17 JUDGE HUME: Exhibit 2006 was filed in conjunction with Patent
18 Owner's reply?
19 MR. ESRAM: That's correct.
20 JUDGE HUME: And there were no further depositions taken?
21 MR. ESRAM: None after that point, correct.
22 JUDGE HUME: Okay. Thank you.
23 MR. ESRAM: So moving on to Slide 72, Patent Owner also argues
24 that the combination of Hain and Rass suffers from hindsight bias. But Rass
25 disclosed benefits, at least a decade, as I discuss earlier, before the priority

1 date of the challenged patents. The benefits were, if you recall, user
2 friendliness and extension of battery life.
3 But as we discussed at length earlier, Rass is analogous art, so there is
4 no hindsight bias for combining Hain and Rass here. We now turn to Slide
5 73 to explain why Aumer is analogous art unlike Patent Owner's
6 contentions.
7 But for Rass, in its oppositions supported by Dr. Kiaei's testimony,
8 Petitioner set out reasons why Aumer is analogous to the '014 and '688
9 patents under both analogous art tests. Moving on to Slide 74, as we
10 mentioned before, the '014 patent relates to wireless electronics and battery
11 system and not exclusively to wireless earpieces that manage and extend
12 battery life.
13 And again, that means that its field of endeavor is wireless electronics
14 including wireless earpieces. And like the '014 patent, Aumer discloses
15 wearable biometric monitoring devices, and in particular wireless earpieces,
16 which is shown here on the slide in Figures 2A and 2B of Aumer and thus,
17 has the same field of endeavor.
18 Aumer has the same field of endeavor as the challenged patents.
19 Therefore, Aumer is from the challenged patents broad field of endeavor.
20 On to Slide 75. In its reply, Patent Owner takes a narrower read of '014
21 patent and its proposed substitute claims.
22 Patent Owner asserts that managing and extending battery life of
23 wireless electronics, earpieces, is both a field of endeavor and a problem
24 faced by inventors. But in its narrow read of the '014 patent and its proposed
25 substitute claims, Patent Owner improperly sets side its only alleged point of
26 novelty, wireless earpieces configured to read user biometrics.

1 As we've discussed earlier, Aumer discloses a wireless earpiece is 20,
2 that includes a sensor module. That can be a temperature sensor that is
3 configured to measure physiological information. And that's consistent with
4 Patent Owner's own expert's testimony, shown in the box excerpt here. That
5 physiological information is understood to be user biometrics in the context
6 of the challenged patents.
7 Turning to Slide 76, Aumer is also reasonably within that problem
8 faced by the inventors. Aumer is directed to solving the problem of how to
9 connect a wearable biometric monitoring device such as a wireless earpiece.
10 If a POSITA was faced with a problem of how to configure a wireless
11 earpiece to read user biometrics, once again, the only feature that Patent
12 Owner relies for patentability, then a POSITA would have considered a
13 reference such as Aumer that is directed to improving signal quality in the
14 wearing of a biometric monitoring device such as a wireless earpiece.
15 Even if the inventors were involved in using biometric readings to
16 manage the battery life of the wireless earpiece, and to be clear, this feature
17 is not recited in the claims, a POSITA would still have reasonably
18 considered references directed to how to configure wireless earpieces
19 through biometrics, like Aumer, to ensure that the earpieces manage battery
20 life based on accurate biometric readings.
21 So, likewise, Aumer is one, from the same field of endeavor as the
22 claimed invention, and two, reasonably pertinent to a problem faced by the
23 inventors. Therefore, Aumer is analogous art.
24 Slide 77. Aside from noting that Aumer is not analogous to the
25 challenged patents, Patent Owner provides other reasons why Aumer is not

1 combinable with Hain, Steinbrecher or Shaffer. And once again, I will
2 explain why Patent Owner's reasons fail.
3 Turning to Slide 78, like we showed for Rass, this table here is a
4 summary of Patent Owner's other reasons shown in the left column, and in
5 the right column Petitioner's responses in sur reply. I will address each
6 argument in the next few slides.
7 Turning to Slide 79, we see here that Patent Owner argues that Aumer
8 is not from the same field of endeavor as the primary reference, Hain. Once
9 again, Patent Owner wrongly applies analogous art tests. Patent Owner
10 compares the primary references to one another rather than the claimed
11 invention as set forth in Patent Owner's substitute claims.
12 As we already discussed, Aumer is analogous to the claimed
13 invention. Petitioner's expert, Dr. Kiaei has also explained how the primary
14 references, Hain, Steinbrecher and Shaffer, are analogous art. And once
15 again, Patent Owner does not dispute that each of the primary references like
16 Rass is analogous art.
17 Moving on to Slide 81, in its reply, Patent Owner also discounts
18 motivations to combine that existed at the time of Aumer and narrowly
19 focuses on the problems described in Hain. But motivations to combine
20 should not be limited to the problems described in a specific reference.
21 We see here in the snippet at the bottom right, the Supreme Court in
22 *KSR* stated that familiar items may have obvious uses beyond their primary
23 purposes, and in many cases a person of ordinary skill will be able to fit the
24 teachings of multiple patents together like pieces of a puzzle.
25 Here, each of the primary references provided a wireless earpiece, and
26 Aumer disclosed have including in it, a sensor to measure user biometrics

1 like temperature. A POSITA would have combined Aumer with each of the
2 primary references, regardless of the primary purposes of these primary
3 references.
4 On to Slide 82. Patent Owner here argues that because Rass uses
5 temperature of a hearing aid or shell and not the temperature of a user, a
6 POSITA would not have been motivated by Rass's teaching to combine
7 Aumer with the primary references to turn on and off a wireless earpiece
8 based on user biometrics.
9 But once again, Patent Owner contradicts Rass's exclusive disclosure
10 that its temperature sensor is for body heat of the wearer and is thus
11 measuring the body temperature. And now on Slide 83, Patent Owner's
12 revised motions to amend fail because the user biometrics indication, which
13 is included directly or indirectly in all proposed substitute claims lacks
14 enablement.
15 Heading to Slide 84, in the *Amgen* case, the Supreme made it clear
16 that the specification must enable the full scope of the invention as defined
17 by its claims. The patent specification here fails to enable a POSITA to
18 make and use a wireless earpiece configured to read user biometrics.
19 The claims simply require that the wireless earpieces be configured to
20 read user biometrics. There are no further limitations restricting user
21 biometrics to specific types of user biometrics. Thus, the substitute claims
22 cover the entire class of all user biometrics.
23 Moving to Slide 85, during cross-examination, Patent Owner's expert,
24 Dr. Young, testified that a POSITA would understand the term "user
25 biometrics" in the context of the '853 patent to mean biological,
26 physiological or chemical characteristics of a user. This testimony applies

1 equally to the '014 and '688 patents, because they both share the same
2 specification.
3 Turning to Slide 86, Petitioner's expert, Dr. Kiaei, has provided
4 testimony that Dr. Young's broad definitions would include, for example, a
5 DNA sequencing, retinal scans, vein patterns, and facial features. Dr.
6 Kiaei's testimony is consistent with Dr. Young's testimony that a retinal scan
7 is also considered user biometrics in the context of the patent.
8 In our opposition, we went through the *Wands* factors based on Dr.
9 Kiaei's testimony to explain why making wireless earpieces configured to
10 read user biometrics such as DNA sequencing, retinal scans, vein patterns,
11 and facial features would require undue experimentation. Therefore, the
12 patent specifications fails to enable a POSITA to make and use wireless
13 earpieces configured to read an entire class of user biometrics. On to Slide -
14 -
15 JUDGE HUME: Judge Hume. Patent Owner argues that this claim is
16 directed to wireless earpieces and therefore things such as DNA sequencing
17 kind of fall outside the scope of biometrics, facial recognition, et cetera,
18 what are your comments if any on that?
19 MR. ESRAM: Yes, Your Honor. Actually, we showed earlier an
20 excerpt from the patent where the patent actually contemplated different
21 embodiments of the wireless ear -- the device that they are disclosing.
22 And actually, if we turn to Slide 89, Your Honor, I was trying to look
23 for it. On the right snippet there, we can see that the disclosure from the
24 '014 patent shows that the patent itself contemplated -- other embodiments
25 are included, endoscopic pill, pacemaker, and so on, that would actually

1 allow for measurements of a variety of user biometrics, including, I would
2 say DNA sequencing and so on.
3 JUDGE WHITE: Counselor, is that requiring us to look at this too
4 broadly, though, especially when it does say, you know, wireless earpiece?
5 So, does there need to be some sort of relationship to the ear and the
6 biometric?
7 MR. ESRAM: Sorry, Your Honor, give me a second. My earpiece
8 just fell. Your Honor, may I point you to Slide 88 to make my point. I don't
9 think it's requiring us to take a broad reading, I think the claim itself is very
10 broad. The claims, for example, doesn't require the earpiece to be worn
11 while reading the user biometrics.
12 So, that leaves it open for someone to be holding the earpiece and
13 taking a measurement or reading of a user biometric. I think if we move to
14 Slide 89, we'll have a snippet of Dr. Kiaei's declaration that kind of talks of
15 that example of how that would happen. You could think of someone
16 getting a fingerprint read or looking into an earpiece, having a retina scan
17 done.
18 So, because of the way the substitute claims are written, they're very
19 broad to start with. If Patent Owner wanted to limit the claim, they should
20 have done so, but they didn't.
21 MS. LIN: Okay. Just to build on what Trishan said, this is Haixia Lin
22 for Petitioner. The claims only require a portion of the wireless earpiece to
23 actually fit within the ear, and so there's a vast portion outside the ear that
24 has a lot of potential in terms of how it could be used, the type of sensors it
25 could be incorporating, you know. It could be used outside the ear.

1 And when you look at the portion of the specification that is excerpted
2 on Slide 89 at Column 3, starting at Line 15, not only does it talk about all
3 these different uses, but there's an entire discussion about the logging
4 capabilities for all the data and measurements that could be captured, the
5 ability to store, chart, and synchronize all this data.
6 There's just a wide variety of possibilities of the type of data that
7 could be recorded, that could be of interest to earpiece wearer. So, there
8 isn't really much limitation placed either in the claims or the specification on
9 what kind of user biometrics the wireless earpiece could be configured to
10 read.
11 JUDGE WHITE: I guess, as sort of a follow up on that, should there
12 be any limitation on the biometrics in the sense that they should be
13 biometrics that could work with the powering up and down of the earpiece?
14 Should we limit it in any sort of way for that? Because there is in this case,
15 a claim that does link the power to the biometrics.
16 MS. LIN: So -- go ahead Trishan.
17 MR. ESRAM: What Your Honor is asking or referring to, the Claim
18 22, and that's a dependent claim. And it does say utilize the user biometrics
19 to alter the power mode. That's a dependent thing. That leaves it open, I
20 think, that's even the opening that, it leaves it open for all the other claims to
21 not be altering the power mode.
22 And that leaves it open for why the broader claim that doesn't have to
23 alter the power mode. So, what is the use of the user biometrics in the other
24 claims? Could be anything other than altering the power mode.
25 MS. LIN: Well --
26 JUDGE HUME: Go ahead.

1 MS. LIN: Well, just to add on to that and speak to, because Trishan
2 spoke about the implications of that being a dependent claim on all the other
3 substitute proposed claims, for dependent Claim 22 itself, there is a concern
4 of introducing lack of clarity and definiteness issues if we start saying well,
5 some user biometrics will fall into the scope and some will fall out.
6 Where is the guidance regarding which types of user biometrics are
7 suitable for power management versus aren't suitable for power
8 management?
9 There is no guidance in the specification to that end. Just because it
10 provides some examples, it doesn't provide any sort of characteristics or
11 features or some kind of quality to look for that would guide a person of
12 ordinary skill in the art to understand the scope of user biometrics for
13 dependent Claim 22.
14 JUDGE HUME: So, this is Judge Hume. So, you're relying at least in
15 part, your arguments rely at least in part on the doctrine of claim
16 differentiation and to say that Claim 22 specifically calls out the biometrics
17 used for power control purposes that necessarily the independent claim on
18 which it depends is necessarily broader. And does that summarize your
19 position accurately?
20 MS. LIN: Yes, that's correct.
21 JUDGE HUME: Okay. Thank you.
22 MR. ESRAM: So then, back to me, Your Honor. I think we discuss a
23 lot of what we wanted to discuss already. If I point you to Slide 90, it's
24 Patent Owner's interpretation of a substitute claim were to be accepted, and I
25 think Haixia Lin touched on that, Patent Owner takes the same position that
26 the claims, the user biometrics should be limited to those that could be done

1 with an earpiece being worn and excludes biometrics such as DNA
2 sequencing, vein pattern recognitions, and so on, then it's unclear which
3 types of biometrics within the claims are suitable for an earpiece worn
4 within the ear.
5 The question we ask is how does a POSITA determine which is the
6 biometrics suitable for an earpiece worn within the ear versus one which is
7 not? Also, it is unclear which types of user biometrics fall within the claims
8 that are suitable for performing associated functions, which would include
9 controlling various power modes.
10 What is meant by associated functions beyond controlling various
11 power modes? How does a POSITA determine what user biometrics are
12 suitable for some undefined earpiece functionality? I see Haixia, maybe you
13 wanted to jump in, so I will let you do that.
14 MS. LIN: Yes. And I just wanted to build on what you said to
15 address Claim 22, the dependent claim specifically. We don't understand
16 Patent Owner to put forward any kind of arguments that the enablement of
17 Claim 22 is somehow differently situated than the rest of the proposed
18 substitute claims.
19 They have made no argument specific to that claim. They have made
20 no arguments that the scope of user biometrics would be different from
21 Claim 22 than for the rest of the claims. So, we understand them to say that
22 the scope of user biometrics should be the same wherever that term appears
23 in the proposed substitute claims.
24 MR. ESRAM: Thank you, Haixia. Back, and this is Trishan Esram
25 again. So, the last point I think I wanted to make is even Patent Owner and
26 Patent Owner's expert disagree regarding which user biometrics are covered

1 by the substitute claims. Namely, whether retinal scans fall within their
2 scope.
3 If we go back to Slide 87, we see that Patent Owner argues that retinal
4 scans are irrelevant. But on Slide 86, Patent Owner's expert testified that
5 scanning an individual's retinal eye, is a type of user biometrics in the
6 context of the patent.
7 So, the fact that Patent Owner's own expert disagrees with Patent
8 Owner regarding whether retinal scans are suitable, a suitable biometric in
9 the context of the patent, demonstrate what an arbitrary and uncertain claim
10 interpretation Patent Owner is trying to get at.
11 JUDGE HUME: This is Judge Hume. Is that a fair characterization
12 of Patent Owner's expert's testimony, we only have a snippet on Slide 86 and
13 it talks about, I think, just identifying types of biometrics. I don't see that he
14 said it would be relevant to the claimed invention?
15 MR. ESRAM: That's a fair observation, Judge Hume. Dr. Young's
16 answer here actually stems from previous answers. And if you were to look
17 at Page 15, Line 18 of Exhibit 1032, starting about there, you will see that all
18 the answers that follows Dr. Young, that line of questioning, is in the context
19 of the '853 patent. So, yes. When we are talking about retinal scanning, it
20 was in the context of that.
21 JUDGE HUME: Okay. Thank you.
22 MR. ESRAM: So, the bottom line is because Patent Owner's narrow
23 claim interpretation not only has support -- has no support, but would also
24 render the claims indefinite, it should be rejected. And because Patent
25 Owner never disputes that there are certain user biometrics, like, for
26 example, retinal scanning, that are not enabled by the patent specification, it

1 follows that the full scope of the substitute claims is not enabled and Patent
2 Owner's revised motions to amend should be denied. With that, we'll
3 reserve the remaining of our time for rebuttal. Thank you, Your Honors.
4 JUDGE HUME: All right. Thank you. And so by my count, you
5 have about 67 minutes left. Can we go off the record for a brief second,
6 court reporter?
7 (Whereupon, the above-entitled matter went off the record at 2:15
8 p.m. and went back on the record at 2:22 p.m.)
9 JUDGE HUME: Okay. We're into Patent Owner's rebuttal. First of
10 all, based on the demonstratives, it appears you're -- and correct me if I'm
11 wrong, you're waiving arguments against the original claims? Is that
12 correct?
13 MR. JARRETT: Yes, Your Honor. We're proceeding on the revised
14 motion to amend.
15 JUDGE HUME: For both IPR's, correct?
16 MR. JARRETT: Correct. Yes, Your Honor.
17 JUDGE HUME: Okay. Do you wish to reserve any rebuttal time or
18 sur rebuttal time?
19 MR. JARRETT: Your Honor, if I could, 30 minutes if needed.
20 JUDGE HUME: Okay. So, you have 30 minutes in your principal
21 argument and 30 minutes, yeah, that's -- no, I'm sorry, you get two hours.
22 So, you get an hour and a half.
23 MR. JARRETT: I promise I will try not to take all that time, Your
24 Honor.
25 JUDGE HUME: Okay. So, please proceed when ready.

1 MR. JARRETT: Good afternoon, Your Honors. Bradley Jarrett on
2 behalf of Patent Owner BRAGI. If I could direct you to Slide 2 of our
3 demonstrative slides. So, Your Honors, this slide provides an overview of
4 the points I'm going to address today on behalf of the Patent Owner.
5 We're going to show that Patent Owner has met its burden of
6 establishing requirements to amend the claims of the '014 and '688 patent.
7 Namely, the substitute claims are patentable over Petitioner's prior art
8 grounds.
9 As we'll show for several reasons, Petitioner's new grounds that were
10 raised in response to Patent Owner's revised motion to amend, lack of
11 motivation to combine Petitioner's Aumer references, the Aumer and Rass
12 reference with the original references cited in the petition. The motivations
13 to combine are simply just a product of hindsight bias, and we'll show that.
14 Patent Owner will also show that Petitioner's enablement and
15 indefiniteness arguments also fail. And Your Honors, for convenience and
16 out of respect for Your Honors' time this afternoon, references in the
17 demonstrative slides are generally to the '014 patent and the IPR number
18 2023-01204.
19 But as far as the demonstratives are concerned and the arguments for
20 the '014 patent, they will apply to the '688 patent and the other IPR, 01205,
21 unless otherwise stated. As I said, there's -- just out of convenience, they
22 share a common specification and the claims are directed to similar subject
23 matter, particularly the subject matter that's before the Board today.
24 So, Your Honors, without further ado, I will move on to give a brief
25 overview of the two patents at issue, starting here on Slide 4, we have the
26 '014 patent. It's generally directed to power control for battery powered

1 personal area network device, just in a method, essentially power control in
2 a wireless earpiece system.
3 And here on Slide 5, this is just an overview again of the abstract,
4 provide system and methods for managing the wireless earpieces.
5 Specifically, the claims are directed to managing and extending battery life
6 of the wireless earpieces through control during power modes also
7 employing a magnetic field.
8 Again, here is, on Slide 6, this is the first claim, the first independent
9 claim of the '014 patent. And there is a Figure 1 from the patent as well,
10 claiming the powering circuitry and altering the powering modes based on
11 detection of a magnetic field is not applied to one or more earpieces.
12 And so now, on Slide 7, we have the substitute claim and what we've
13 added as Petitioner has shown in his presentation. What has been added to
14 the substitute claim is this language here in blue, a portion of an earpiece fits
15 within an ear canal opening and the wireless earpiece is configured to read
16 user biometrics.
17 And that is, as Your Honors are aware from Trishan's presentation,
18 that is the crux of the dispute here in the presentation where you'll be
19 directed at when analyzing the references.
20 And also, there's the dependent claim, 22, which specifically required
21 the utilization of the biometric reading to then alter the power mode of the
22 earpiece, which is the dependent claim for the '014 patent. And Your
23 Honors, moving on to Slide 10, this is the '688 patent, again, it would have
24 been the same family, a continuation of the '014 patent.
25 And now we have on Slide 10 -- Slide 11, excuse me, again the
26 explanation of the abstract and the system for managing wireless earpieces

1 and specifically for powering and utilizing different power modes based on
2 detection of a magnetic field to preserve battery life.
3 And on to Slide 12, we have the initial Claim 1 of the '688 patent,
4 again, directed to powering circuitry and altering the power mode of the
5 circuitry based on detection in response to a magnetic field.
6 At Slide 13, this is again the substitute claim, the first claim, first
7 independent claim. Again, the addition here is as I noted for the '014 patent,
8 wherein a portion of the earpiece fits within the ear canal and the wireless
9 earpiece is configured to read user biometrics. And there's a similar
10 dependent claim requiring the user biometrics being utilized by the wireless
11 earpiece to alter the power mode.
12 Now, as far as Patent Owner's statutory and regulatory requirements
13 for substituting patent claims, moving on to Slide 16, these are the
14 requirements that we as the Patent Owner are required to meet in order for
15 the Board to grant our revised motion to amend. The motion to amend must
16 present a reasonable number of substitute claims.
17 The claims respond to a ground of unpatentability involved in the
18 trial. The substitute claims do not enlarge the scope of the claims or
19 introduce new subject matter. And the substitute claims are not shown by
20 preponderance of the evidence to be unpatentable.
21 It's my understanding, Your Honors, that the first three elements are
22 not in a material dispute at this point. We'll focus mainly on the fourth
23 element, which is the patentability of the actual subject matter of the claims.
24 But briefly going over our requirements, Your Honors, the proposed
25 number of substitute claims is reasonable.

1 We've proposed one for one, substitution of one claim for one claim,
2 which, in the Board's preliminary guidance, the Board recognized that this is
3 a reasonable number of substitute claims. And Petitioner, to my knowledge
4 has not refuted this.
5 As far as substitute claims responding to the ground of unpatentability
6 involved in the trial, we specifically, the substitute claims add a limitation
7 that is meant to address the original grounds asserted by the Petitioner in the
8 opening petition. And substitute claims do not enlarge the scope of the
9 claims or introduce a new matter.
10 As the Board's decision in *Electronics* (phonetic) states, a motion to
11 amend may not present substitute claims and enlarge the scope of the claims
12 of the challenged patent or introduce new subject matter. And the claims
13 here or the substitute claims, do not broaden the claims scope, they narrow
14 it.
15 It's increasing, and provides another limitation on the wireless
16 earpiece or the method of managing the wireless earpiece. So, it's a more
17 limited claim, it's not expanding the scope. And as far as introducing new
18 subject matter, these claims do not introduce new subject matter. And there
19 is support for all of these substitute claims within the specification that we've
20 cited in our papers.
21 And I'm referring here, Your Honors, to Slides 25, 26, 27, 28, and 29
22 that refer to or cite where in the '013 application, the application for the '014
23 and '688, where the support is for the biometrics or the additional element of
24 the substitute claims, which include user biometrics and reading user
25 biometrics.

1 And now, for the fourth requirement for the Board to grant our motion
2 to, revised motion to amend, the substitute claims must be patentable over
3 Petitioner's obviousness ground and we will explain that, why they are.
4 So looking at Slide 31 now, Your Honors. This is a breakdown of the
5 petition grounds and references and the new reference has been added just to
6 try to clarify and streamline this. Essentially, the references that were
7 initially inserted in the petition were the grounds in the original petition are
8 on the horizontal axis to the top of the chart in blue, in a blue box blocked.
9 And on the left side, you have the new references that Petitioner has
10 raised in response to our petition to amend. Those references are Rass and
11 Aumer and also a combination of Rass and Aumer together. So, this is just a
12 nice chart to try to streamline and show which references are matched up
13 with which grounds for the specific patents.
14 And also, on Slide 32, Your Honors, a little more streamlined yet.
15 Again, we've highlighted which grounds are what we would call the Rass
16 grounds, the Aumer grounds, and the Rass and Aumer grounds. For the
17 Rass grounds and Aumer grounds are similar in a sense that they both
18 address or include a combination, some combination of references, the Hain
19 reference, the Shaffer reference, and the Steinbrecher reference.
20 So, I'm going through overseeing Petitioner's grounds to streamline
21 things, we'll tend to address specific issues with those references, the
22 original petition references in combination with Rass and Aumer instead of
23 having to go individually for each single reference to try and address them
24 together as best we can.
25 First, Your Honors, going on to Slide 33, we have combinations with
26 Rass, we can look at these first. This is Petitioner's essentially first

1 combination that they've addressed in their opposition in to our revised
2 motion to amend. And Hain and Rass here on Slide 34, then going into
3 Slide 35, this is a demonstrative of the Hain reference.
4 The Hain reference is a hearing aid system with two hearing aids that
5 can be worn on the head, an automatic detection of a hearing aid situation
6 telephoning, and an automatic switching off of the hearing aids when they're
7 removed from the head.
8 According to the invention, hearing aids have sensor devices for
9 switching hearing aids on and off which are used to detect, with the relevant
10 hearing aid -- and with the relevant hearing aid is in a magnetic field that
11 exceeds the specific field strength.
12 So essentially, breaking that down, Hain is concerned with a hearing
13 aid system with an automatic detection of telephone mode and/or switching
14 off, based on the presence of a magnetic field of a certain strength. So, a
15 magnetic, automatic switching based on a magnetic field.
16 And now we have the Rass reference. Rass is concerned with a
17 method for switching on and off a hearing aid using various types of sensors.
18 Examples that are provided in the Rass reference are the temperature sensor,
19 pressure sensor, an acoustic sensor. And the abstract states, the abstract of
20 Rass states that the intention of Rass is to make switching a hearing aid on
21 and off more user friendly.
22 And the background of the invention recognizes the that there are
23 known ways of turning a hearing aid on and off, some that were error prone,
24 some that were too complicated. One that was error prone, for example, is a
25 battery compartment switch, a separate switch that would have to be
26 activated or inactivated, or the automatic switching off by a magnetic means.

1 Other methods that were known according to the background the invention
2 Rass, were infrared sensors, acoustic and sensor circuits.
3 And the summary of the invention, Rass also recognizes that these
4 known sensors are relatively expensive, sensitive to interference, or require
5 additional objects for switching off. So, Rass is seeking to provide a simpler
6 way of switching on and off the hearing aid and a more user-friendly
7 solution, and getting away from those either more complicated or error
8 prone solutions.
9 Going on to Slide 37, Your Honors. This is a summary of Petitioner's
10 reasons or justifications for combining Rass and Hain. And these
11 justifications, these three justifications shown on this slide, are also relevant
12 to Petitioner's motivation to combine for the other references, the Shaffer
13 reference, the Sorenson reference, and the Steinbrecher reference.
14 It's the same, they rely on the same three tenets here. Petitioner
15 claims that they -- that the references are in the same field of endeavor or the
16 patent is in the same field of endeavor as the references, the Rass reference
17 and so forth, that the combination of these references, Rass would be what
18 the Petitioner references the real predictable results.
19 In a sense that it's Petitioner's position that because a POSITA would
20 know how to put or implement some kind of biometric sensor within an
21 earpiece, that it would be obvious to do so, without giving any further
22 motivation for why this would occur.
23 And also, the perceived benefits, which as I mentioned for Rass, the
24 user friendliness, but none of these reasons either alone or together is
25 sufficient to support a motivation to combine Rass or the petition references.
26 I will explain here in the next few moments why that's the case.

1 So, starting off at Slide 38, we have Rass is not analogous art.
2 Moving on to Slide 39, Petitioner covered this in -- Mr. Esram covered this
3 in his presentation. The tests for the analogous art, we don't dispute it, it's
4 well-known within the federal circuit. The art is in the same field of
5 endeavor and the reference is reasonably pertinent to a particular problem
6 with which the inventor is involved. These are the two prongs to the
7 analogous art test.
8 And looking at Slide 40, we have Hain and Rass, or excuse me, the
9 '014 patent and Rass. The wireless earpiece of the '014 patent is intended to
10 manage and extend the battery life. That's the field of the invention for the
11 '014 patent. And Rass relates to just creating a better on and off switch, not
12 in the same field of endeavor in that case, and not directed at the same
13 problem. All right.
14 Going on to Slide 41, Hain and Rass, when you compare the two
15 references are not analogous either. Hain, as I mentioned, is concerned with
16 this magnetic, the use of a magnetic field or the use of some kind of
17 magnetic sensing to either turn to hearing mode, the hearing aid into a
18 telephone mode, adjusting the power that way, or turning it off based on the
19 detection or lack of a magnetic field.
20 And Rass specifically, as I mentioned, is limited to attempting to
21 come up with a more convenient solution that does not involve magnetic
22 field expressly. And in the background, you mentioned Rass criticizes
23 magnetic field, the use of an automatic switch on and off using a magnetic
24 field among other, more complicated or error prone ways of turning on or
25 off a hearing aid.
26 JUDGE HUME: Sorry, this is Judge Hume --

1 MR. JARRETT: Yes, Your Honor?
2 JUDGE HUME: Are you saying that the Rass reference disparages
3 the use of magnetic switching?
4 MR. JARRETT: Yes, Your Honor. Looking --
5 JUDGE HUME: I do not recall that argument in prior briefs.
6 MR. JARRETT: Your Honor, this is in response when, in our expert's
7 declaration, our expert explained that there would be a conflict between the
8 teachings of Hain, for example, or any of the other references using a
9 magnetic field and combining them with some kind of temperature sensor
10 other user, potential user biometric sensor.
11 Our expert says that in his declaration. I'm raising this point in
12 response to Petitioner's sur reply stating that there is no basis for that
13 opinion, besides the expert stating it himself, and that is just not the case.
14 JUDGE BAER: Counsel, this is Judge Baer. Are you raising this in
15 reference to the analogous art argument or in response to the reason to
16 combine? Are you saying it teaches away, therefore it's not analogous art, or
17 are you saying something else?
18 MR. JARRETT: Teaching, Your Honor, teaching away in a sense
19 that it would -- there would be no motivation to combine.
20 JUDGE BAER: We're not addressing the analogous art point
21 anymore; we are addressing whether there's a reason to combine. Do I have
22 that right?
23 MR. JARRETT: Correct. The analogous art has to be, I guess, the
24 threshold in creating the motivation to combine. This is more directed
25 expressly to the motivation to combine, Your Honor. Excuse me for not
26 clarifying.

1 JUDGE BAER: Thank you. That's all. Thank you.
2 JUDGE HUME: This is Judge Hume, your substitute claim, whatever
3 you substituted for Claim 1, I think 15 maybe or 14?
4 MR. JARRETT: Oh, for the '014 patent it would Claim 14, Your
5 Honor. And for the '688 patent, it would be the Claim 15.
6 JUDGE HUME: Right. So, you've fill in the limitation that's
7 measuring user biometrics and then it goes on to say that the powering is
8 controlled by magnetic switching. For what purpose is that bio
9 measurement being conducted?
10 You're saying in Rass that disparages the combination of temperature
11 and magnetic switching. I'm just curious how you square that with your
12 proposed substitute claim?
13 MR. JARRETT: As far as for the substitute claim, Your Honor, with
14 Rass disparaging that, as far as the inquiry as far as looking at the prior art
15 that's relevant as far as what the inventor is motivated --
16 JUDGE HUME: Did you make this disclosure in prior briefs? I'm
17 not -- it doesn't jump out at me.
18 MR. JARRETT: Your Honor, with the response, as I mentioned, in
19 the response to Petitioner's sur reply, it stated our expert's declaration who
20 they chose not to depose, that his explanation that Rass and any kind of
21 biometric signal, a temperature signal, a temperature sensor signal as
22 disclosed in Rass would be in conflict with the magnetic field disclosed in
23 Hain that were some of the other references that use a magnetic field for on
24 and off switching, or adjusting power modes.

1 And in response to that, Petitioner's sur reply stated that there was no
2 basis for that opinion other than our expert's opinion in and of itself, and so
3 this is a response to that point from Petitioner's sur reply.
4 JUDGE HUME: Okay. Thank you.
5 MR. JARRETT: So, Your Honor, to clarify, it was not -- that
6 argument was not expressly made in a reply brief, to answer your question
7 more directly, my apologies. And going on to Slide --
8 JUDGE HUME: Excuse me, Counselor, sorry to interrupt. But can
9 you point to exactly where this disparagement of Rass occurs, can you give
10 us a pinpoint citation to that?
11 MR. JARRETT: Yes. Looking at the background of invention, Your
12 Honors, let me get the exact, I have it up here on the screen. If you look at
13 Column 1, Line 40 through -- 41 through 44. It's discussed there is an
14 automatic hearing switch which is also known from the publication
15 FR270088783, this operates on magnetic basis.
16 If an object containing a magnet moves into the vicinity of the hearing
17 aid, the hearing aid is switched off accordingly. Your Honor, that's
18 disclosing, said another way, it's disclosing essentially a magnetic field, for
19 use as a magnetic field.
20 And then the summary of the invention, Your Honors, further down,
21 that Column 1, I believe it's 57 through perhaps 61. The said sensors, which
22 I understand to be referring to all the sensors that are discussed in the
23 background of the invention, or however, are relatively expensive, sensitive
24 to interference, or require additional objects for switching purposes. An
25 object of the present invention is therefore to improve or simplify the
26 automatic switching on and off of hearing aid.

1 And Your Honors, I read that in response to Petitioner's contention
2 that there is no support for Dr. Young's testimony that an interference signal
3 would create problems between -- there'd be an interference signal when
4 you're combining a temperature sensor disclosed in Rass would be magnetic
5 field as envisioned by Hain, used in the magnetic field envisioned by Hain
6 or Steinbrecher and also Shaffer.
7 JUDGE WHITE: Sir, could you give me the first cite again, I got the
8 second one, the one at 157. What was the first one?
9 MR. JARRETT: Yes, Your Honor. It would be one -- the lines are a
10 little, maybe a little off, it's kind of in between, but I believe it's 141 through
11 44, Your Honor. And it's discussing the automatic hearing aid switch based
12 on a magnetic field or magnets.
13 JUDGE WHITE: All right. Got it. Thank you.
14 JUDGE HUME: This is Judge Hume again. So we concentrate on
15 the word "disparagement" a little bit. Is it fair to say that this is disparaging
16 use of the magnetic or is it just expressing a general preference for other
17 types of switching mechanisms?
18 MR. JARRETT: I would characterize it, Your Honor as disparaging
19 or teaching away from it at a minimum. When it mentions, when Rass
20 mentioned these very types of switches here and there's other switches that
21 are mentioned, a battery compartment switch is the first one there in Line,
22 Column 1, Line 20 through 26 or so.
23 There's also remote control referenced there, a hearing aid sensor
24 circuit within the auditory canal. And then a Japanese publication
25 referencing an infrared sensor. So, these are all types of sensors that Rass is
26 recognizing as not in the art.

1 And I'm going to discuss that in the summary of the invention it
2 explains that these sensors are relatively expensive, sensitive to interference,
3 or requires additional objects for switching purposes. And the object of Rass
4 then, is to present an invention to improve or simply the automatic
5 switching.
6 So, I read it as teaching away from using those types of switches or
7 methods of switching. Rass is seeking to provide a simpler solution, which
8 is essentially just a sensor, a more simplified sensor delivering a signal. It
9 gives those examples, Your Honor, in, I believe it's 2, Column 2, Lines 5
10 through 12 or so, that second, the first full paragraph in Column 2, Your
11 Honors.
12 That's where it's discussing the types of sensors that Rass seeks to
13 employ in getting away from the magnetic sensor or the other more
14 complicated sensors like the infrared sensor that are given in the background
15 of the invention.
16 And Your Honors, at Slide 42, this is just highlighting Dr. Young's
17 opinion regarding the interference between a signal and what is in the
18 temperature sensor and other sensor electronics due to a magnetic field. And
19 going to Slide --
20 JUDGE HUME: Excuse me, what page, what page here?
21 MR. JARRETT: That was Slide 43, Your Honor. This is just a
22 screenshot essentially of the brief citing Dr. Young's opinion regarding the
23 interference signal that would be imposed on a temperature sensor due to the
24 magnetic field.
25 JUDGE HUME: Thank you.

1 MR. JARRETT: And then, Your Honor, going to Slide 44 or perhaps
2 45 where the text is highlighted. This is Petitioner's sur reply, that's just
3 attorney argument, Your Honor. Basically summarize, it said that Patent
4 Owner has provided no further support or further explanation for how or
5 why a magnetic field and a field with a temperature sensor other than citing
6 to an expert declaration that merely parrots the reply language verbatim.
7 Your Honors, I would disagree with the characterization there. This is
8 Dr. Young's opinion and we incorporated -- Patent Owner incorporated Dr.
9 Young's expert opinion into it's reply brief and not the other way around.
10 I'm almost done. I would like to point out, Your Honor that when, after
11 being served with this reply brief, Petitioner chose not to depose Dr. Young
12 any further regarding his opinion.
13 Petitioner also did not offer any expert opinion of its own to contradict
14 or rebut this opinion regarding the interference signal between a temperature
15 sensor disclosed in Rass or the magnetic field it disclosed in Hain or the
16 magnetic field it disclosed in Steinbrecher or also Shaffer.
17 In not offering an opinion by its own expert, Dr. Young's opinion
18 stands unrebutted. And it is also supported by Rass as we have gone through
19 the Rass reference to show the examples where Rass teaches away from
20 using a magnetic sensor in combination with the types of sensors that Rass
21 seeks to employ to simplify the on and off switch in the hearing aid.
22 And also, the last sentence, where Petitioner states that Hain's
23 telephone mode is irrelevant, that at no point during the proceeding did
24 Petitioner rely on Hain's telephone mode for its obviousness positions or
25 otherwise. Patent Owner would disagree with that, Your Honor. As far as
26 that's concerned, the magnetic field that is employed to regulate the

1 telephone mode or the on/off switch, there's no differentiation in Hain
2 between those two.
3 So, for all intents and purposes, the teaching in that regard is one in
4 the same. So, telephone mode is relevant because it is related to the
5 switching off or adjusting or altering a power mode based on a magnetic
6 field.
7 Also, Your Honors, to address this idea again, of the third element of
8 Petitioner's motivation to combine justification, the user friendliness. By
9 looking at Rass's teaching as we've just gone over, a POSITA would not be
10 motivated to then look to Hain and more complicated, admittedly more
11 complicated automatic switch for a hearing aid to combine it's teaching with
12 a more complex teaching.
13 In fact, Rass is trying to get away from Hain as opposed to combine
14 its teachings with Hain. So, I think, looking at the face of the Rass reference
15 gives a reason to undermine the motivation to combine just on the face of
16 the Rass reference itself.
17 And also, another point, Your Honors, Rass does not -- I know this
18 was addressed during Petitioner's presentation, Rass did not specifically call
19 for the measuring of a user's biometric information, it references temperature
20 of a user.
21 But looking at the actual reference itself, if you look at Column 2 of
22 Rass, all the way down to the end of the page there, at 63 through
23 approximately 67, this is where it's talking about as a temperature sensor
24 when one hearing aid shell heats up, the temperature registers this, the
25 temperature sensor registers this heat.

1 Now, there's no explanation that that temperature registry is coming
2 from the user itself or the user's biometric reading. But I think there's an
3 important distinction between just the idea of a simply temperature sensor
4 and one that is actually a biometric temperature sensor. I think there is a
5 difference between those two things, which, I don't believe Petitioner has
6 addressed.
7 Because exactly with the temperature sensor, this is generally reading
8 between two diodes and measuring voltage and differences in voltage. As
9 opposed to a biometric temperature sensor which actually reads skin
10 temperature for example, which is usually done using infrared technology or
11 reading of -- read readings taken from user's skin. So, those are two
12 different things.
13 And I don't think, it's also telling that Rass never once mentions
14 biometric readings or refers to biometrics, because I don't -- based on that, I
15 don't believe that Rass, the inventor of Rass was considering his own
16 invention to be biometrics. It was just the temperature sensor that's more
17 simplified.
18 JUDGE HUME: Counselor, Judge Hume. I'm reading Column 2,
19 starting at Line 63 under the detail description of the invention. You quoted
20 a portion of that. But it does say when worn, the hearing aid I or shell heats
21 up. Isn't that enough to suggest at least that it's measuring temperature of the
22 user or this temperature of the shell acts as some sort of surrogate for the
23 temperature of the user?
24 MR. JARRETT: I think, perhaps, the easiest way to distinguish this,
25 Your Honor, is looking at that teaching right there, where it said the hearing

1 aid shell heats up, I think there's a difference between a sensor directly
2 measuring the user's temperature and measuring the shell.
3 I look at that as the shell being an intermediary between the user and
4 the actual temperature sensor. Where a biometric sensor would be directly
5 measuring against the user's skin. That's the distinction I would draw.
6 JUDGE HUME: All right. It does say -- it does have alternative
7 language that when worn, the hearing aid I or its shell, heats up. I'm not
8 sure. And I would agree that Rass doesn't appear to use the phrase
9 biometric, nor has biometric in it. But this is not enough to suggest
10 measuring the user temperature in some form, whether it's intermediate or
11 not?
12 MR. JARRETT: Potentially, Your Honor, but it does not exclude -- it
13 could be a user's temperature but it's not actually, I guess, the difference
14 being sufficient, necessary versus sufficient. Looking at this, it could be any
15 kind of heat source.
16 It doesn't have to be explicitly for the user. Whereas, for example, an
17 example of a biometric sensor that would require measuring a user's
18 temperature that I could think of would be a temperature sensor that uses, for
19 example, one example would be infrared that basically bounces infrared
20 waves off of the user's skin and then takes the measurement and then
21 compares that to a stored measurement for example, to confirm that it's
22 within the range of like human body temperature.
23 That's, I think, a differentiation between just measuring, I guess, for
24 lack of a better term, an unsophisticated temperature sensor that's just
25 sensing any kind of heat source, which would be a voltage change or a
26 differentiation in voltage which could be created by any kind of heat.

1 For example, I could take a hearing -- if the hearing aid was equipped
2 to, take for example, the Rass example, the embodiment. Here I could take
3 it and put it under the space heater, next to the space heater under my desk
4 and it would still, in theory work. It's not a biometric reading at that point. I
5 think, could it be a user's body temperature, yes.
6 But is it specifically required to be a user's body temperature, no. And
7 I think the reason why Rass doesn't expressly call this a biometric reading, I
8 mean, that is the understanding, whether it's an aspirational goal that a user's
9 body temperature could change the temperature of the hearing aid and
10 register with some kind of on/off switch, is it possible? Yes. But is it a
11 requirement? No.
12 And I think that's the difference between a biometric temperature
13 reading versus just any temperature reading that could be based on any kind
14 of a user's body heat, rubbing your hands together with the earpiece within
15 your hands. I think that's a differentiating factor.
16 JUDGE WHITE: Well, does the language "when worn" change that,
17 though? Because you can't be rubbing your hands together, the
18 measurement is only when it's worn, and I'm taking that to be worn in the
19 ear. I don't know that Rass would support any other type of wearing. So,
20 wouldn't that change so when it's worn in the ear and check the temperature?
21 MR. JARRETT: Your Honor, I still think it presents that same
22 problem of there being an intermediary and not being -- the user's body heat
23 not being necessary, because they fill a disclosure, it's measuring the
24 temperature of the hearing aid heating up. It's not specific to a user's
25 biometric and there's no mention of a user's biometrics or in that sense.
26 JUDGE WHITE: Well, doesn't it specifically say body heat?

1 MR. JARRETT: It references body heat, yes. There are references in
2 Rass to body heat.
3 JUDGE WHITE: Right.
4 MR. JARRETT: But again --
5 JUDGE WHITE: No, go ahead.
6 MR. JARRETT: But based on the disclosure, Your Honor, there's
7 nothing to show that it's an actual measure of body heat. It's actually just
8 any kind of heat source. It doesn't specifically disclose some kind of
9 biometric measurement. Which again, is back to the '014 patent which
10 specifically discloses, refers to temperature and biometrics as opposed to just
11 body temperature. So, it could be body temperature but it could be any kind
12 of temperature.
13 JUDGE WHITE: Well, let me point you to the abstract, because that's
14 where I see a specific disclosure there. So, the hearing aid I is fitted with a
15 temperature sensor, PS, to detect the body heat of the hearing aid wearer.
16 Isn't that specific enough to say that we are detecting the heat of the person,
17 not some other heat source?
18 MR. JARRETT: I'm still reading that portion, Your Honor, I'm still
19 reading that portion of the abstract in light of the entire patent and
20 specification. I would still fall back to Column 2 in the description of how it
21 -- the only description it gives for how it registers the actual body heat or
22 registers the actual heat, which is just essentially the hearing aid device or
23 shell registering heat. It's not required to be from the body.
24 I guess, again, could body heat be sufficient, yes. But it is it
25 necessary, no. And I think that's the differentiation between a true biometric

1 measurement of a body temp. Biometric measuring of a user's body
2 temperature versus just any kind of temperature measurement.
3 JUDGE HUME: Counselor, Judge Hume. Further up in Column 2
4 around Line 7, it talks about, this is at the Rass reference, following signals,
5 a temperature signal relating to the body heat of a hearing aid wearer. I'm
6 back to -- it may not explicitly disclose a user biometric, but does that at
7 least suggest they're measuring the temperature of the user? Or would that
8 not be sufficient under our obviousness analysis too?
9 MR. JARRETT: Again, Your Honor, it could be measuring the body
10 heat, but it's not versus sufficient. Is it sufficient? Yes. Is it necessary? No.
11 I think the issue here is it, based on the claims it needs to be a biometric
12 measurement and it needs to be body heat. This is just suggesting it could
13 be without giving any explanation of how it would confirm that that's the
14 users biometric.
15 I guess, the difference -- maybe the better point would be, the
16 difference here is the meaning of biometric. Biometric being some kind of
17 biometric information, not just heat source. And describing, just saying that
18 body heat would be measured without explaining, you know, the biometric
19 aspects of it and what makes it biometric. Because I think there's a
20 difference between just measuring heat versus measuring a biometric that is
21 a user's body heat.
22 JUDGE WHITE: What would make it biometric? Maybe that's the
23 link I'm missing. Taking your temperature, when would that be biometric as
24 opposed to not?
25 MR. JARRETT: One example I can think of, Your Honor, is using
26 infrared. I know Rass mentions an infrared sensor for, it mentions the

1 infrared sensor from a Japanese publication, but essentially teaching away
2 from that, saying that it's coming up with a different, a more simplified or
3 simplistic way to switch on or off the hearing aid.
4 But one example I could think of that would be biometric, would be
5 infrared measurements based on a user's skin, detecting differences in user's
6 ears skin to determine the temperature. Potentially then, matching that with
7 a baseline that would be consistent with the user's body temperature
8 previously measured and stored, like a stored result or comparison.
9 Basically, it takes infrared readings of the user's ear, determines that
10 those are within the range of what would be acceptable for the human user
11 and then comparing it to some kind of stored metric. That's an example I
12 can think of, Your Honor.
13 JUDGE WHITE: Does that require us to construe biometric?
14 MR. JARRETT: I don't -- I don't think so, Your Honor. I would say
15 that a biometric sensor, just understanding a biometric would be understood
16 by someone skilled in the art, an electrical engineer, which is the person of
17 skill in the art, I think would understand that difference between just a
18 regular temperature, a reading of a regular temperature sensor that just uses,
19 like I said, changes in voltage versus some kind of user biometric. I think a
20 person skilled in the art would understand that difference and reading
21 biometric in context of temperature.
22 JUDGE HUME: Counselor, Judge Hume. The mystery is, my
23 understanding of the technology of the art not utilizing infrared technology
24 in the -- how does your expert characterize biometric information?
25 MR. JARRETT: When he was asked in his deposition, he
26 characterized it when he was given examples of just biometric information

1 within the context of the patent, I believe, I'd have to look back at his
2 deposition testimony, but my recollection is that he was, it was consistent
3 with the examples that were given in the '014 patent specification.
4 Now, during -- Petitioner presented him, I believe it's Slide 86, I did
5 want to clarify this. From Slide 86 of Petitioner's presentation from Dr.
6 Young's deposition, the question is, is a facial feature for facial recognition a
7 type of using biometrics? Dr. Young's response to this was just the general
8 concept of any kind of biometric, it wasn't specifically confined to the
9 teachings of the '014 patent or the references.
10 And just, as it's staged, I didn't offer an opinion in my report on this
11 specific, you know, facial recognition and he had not thought about it, which
12 suggests that he had limited his understanding of biometric to what was
13 disclosed in the '014, excuse me, '014 specification.
14 JUDGE WHITE: How would one know if you have a biometric
15 temperature reading versus a non-biometric temperature reading? Like if I
16 tell you that the body temperature is whatever, how would one of skill in the
17 art know which bucket to put that in, as to whether that counts as a
18 biometric? Is there a framework for that?
19 MR. JARRETT: Your Honor, I think it would depend on the input,
20 for what was given to the input of the temperature. If it was something that's
21 specifically read, like I said, infrared. And was specific to human and then
22 comparing to a human baseline or something like that versus just anything
23 that registers any temperature, whether it's body heat or just registers heat. I
24 think there is a difference. I think there's a distinction there.
25 JUDGE WHITE: But the distinction you're trying to make is within
26 the measuring of body heat as in there can be non-biometric body heat?

1 MR. JARRETT: I think the distinction, my understanding of the
2 distinction would be a difference between how the measurements were
3 collected, this sort of like, for example, the infrared example I gave would
4 be an example of biometric versus just measuring heat with changes in
5 voltage, for example.
6 I think it's the input as far as how, I guess, what is being measured,
7 what is actually being measured. Because it's not, we say it's the body heat,
8 but it would actually be a difference in voltage versus using infrared, for
9 example. That's just the one example I can think of, there may be others that
10 I'm not thinking of right at this moment.
11 Your Honors, going to Slide 48, I think regardless of whether the
12 Board decides that Rass discloses biometrics with its mention of body heat
13 or not, it's still, Petitioner cannot overcome the issues with the disparaging
14 teaching of Rass in conjunction with Hain and the magnetic field. There's a
15 contract then a conflict Rass teaches against, or teaches away from Hain
16 specifically.
17 And I think that's the important -- the most important point here, why
18 a POSITA would not combine them. A POSITA would not look with
19 developing Rass to make a more simple sensor and then work backward and
20 look to something from Hain, being taught in Hain, that expressly on the
21 face of Rass says, look, this is a complicated -- we're either trying to make it
22 a more simplified solution that isn't error prone, it's not sophisticated or
23 complicated, prone to interference. So, Rass on its face, is looking away
24 from the teachings of Hain, the teachings of Shaffer and Steinbrecher.
25 And now looking at Steinbrecher, again, the same arguments apply for
26 why the motivation upon, just on the work. Steinbrecher's concern with

1 contact, with loading of the accumulator battery in a hearing aid. Basically,
2 it's working at charging, charging the battery life.
3 And then, looking at Slide 52, this is where we look at Rass next to
4 Steinbrecher. And Steinbrecher, a POSITA looking at these two references
5 side by side, would not have any other reason but hindsight to combine
6 them. Steinbrecher's concern again, was contact with loading an
7 accumulator battery located in the charging shell. Rass is concerned with
8 just switching a hearing on and off.
9 And Steinbrecher at most, briefly mentions a way to shut off the
10 hearing aid device. I believe it's at Paragraphs 0018 and 19, and that's based
11 on a microswitch controller that shuts off when in contact with the charging
12 gauge.
13 So again, this is a battery compartment type switch that Rass is
14 teaching away from in the background of the invention. Identifying it is
15 something that's error prone that it's try to fix or address.
16 And again, looking at Shaffer, the other grounds that incorporate Rass
17 with Shaffer, Slide 54, Shaffer is concerned with implementing a case for
18 receiving inductive charge and then turning that around charging the earbuds
19 themselves.
20 So, again, this is inductive charging, charging more generally, battery
21 life. Rass is more high level concerned with, if you look at Slide 56, putting
22 them side-by-side, this is Rass. Again, the on/off switch is all Rass is
23 concerned about. And Shaffer is more concerned with battery life, storage
24 dock, with the electrical charger, charging of wireless earbuds, and
25 conductive charging.

1 JUDGE HUME: Counselor, excuse me. Rass is only concerned with
2 the on/off switch, is that what I heard you say?
3 MR. JARRETT: That's the primary concern of Rass, it's a very short,
4 patent short reference, that's the primary concern of Rass, is coming up with
5 a better on/off switch, disclosed in Slide 56 there, the field of its invention.
6 And Shaffer again, briefly mentions, I believe in the specification, mentions
7 shutting off the earpieces when detected within the aperture or removed
8 from the aperture.
9 Basically, failed to mention -- acknowledges the magnetic field that it
10 could be used. So, again, Shaffer's looking more in line with Hain and
11 Steinbrecher, with either using some kind of battery compartment switch or
12 magnetic switch that Rass is not concerned with and is concerned with
13 designing away from or teaching away from.
14 Slide 57, Your Honors, I'll move on to combination with Aumer and
15 the motivation to combine -- and the motivations to combine there. As far as
16 Slide 58, we have -- this is just Patent Owner -- oh, sorry, Petitioner's
17 justifications for the motivation to combine. Some are similar to the Rass
18 motivations, so, same field of endeavor, predictable results.
19 One difference, the benefits for with Aumer or this increased
20 consumer interest in personal health and the knowledge of POSITA. A
21 POSITA would know how to implement a sensor, biometric sensor within
22 an earpiece as the motivations to combine. Looking at 59, again, Aumer is
23 concerned with wearable biometric device configured to accept the
24 biometric simple quality of one or more sensors associated with the
25 monitoring device.

1 And if you look at the field of invention there on Slide 59, for Aumer,
2 the present invention relates generally to monitoring devices and methods,
3 more particularly, to monitoring devices and methods for measuring
4 physiological information. So, that is the objective of Aumer and that's what
5 Aumer is directed to.
6 And looking at Slide 60, when you put Aumer next to the '014 patent,
7 extending and managing battery life is what the '014 patent is concerned
8 with. Presenting, and as far as Aumer, the sole goal of measuring
9 physiological information is not the same.
10 And if you look at Hain and Aumer on 61, looking at them side-by-
11 side, more again, this is the motivation to combine. Looking at the
12 motivation to combine and comparing the two references and what they're
13 directed to. Again, as we've gone over with Hain in combination with Rass,
14 Hain's again, concerned with this idea of telephone mode, powering down or
15 powering off the hearing aids based on detecting or not detecting a magnetic
16 field, operating --
17 JUDGE HUME: Counselor, Judge Hume.
18 MR. JARRETT: Yes, Your Honor.
19 JUDGE HUME: The reference to Slide 60, you mentioned that
20 Aumer was directed to measuring physiological information and your '014
21 patent was measuring and extending battery life, and therefore, if I'm
22 summarizing correctly, they're not directed to the same field of endeavor or
23 the same problem.
24 But how would you distinguish measuring physiological information
25 from measuring biometric information, which your claim now proposes?

1 MR. JARRETT: In that sense, with what's proposed with the
2 substitute claim, Your Honor, I don't see that there's specifically a difference
3 between biometric and physiological information. Physiological
4 information would be considered within biometric or aspect of biometric
5 information.
6 JUDGE HUME: Well, let me ask you, and I don't believe you address
7 this with your revised claim adding the measuring biometric information
8 limitation, what problem does that solve? Because you get the magnetic
9 switching to turn the device on and off, what problem does the biometric
10 measurement solve?
11 MR. JARRETT: It's another way to manage power modes. That's
12 what this specification describes.
13 JUDGE HUME: So, you would use both biometric information and
14 magnetic switching to control the power? Is that what you're saying?
15 MR. JARRETT: I --
16 JUDGE HUME: Not necessarily claimed in that particular claim,
17 Claim 22 of the '688 won't do that.
18 MR. JARRETT: Correct. The dependent claim required, well, yes,
19 requires the use of biometric information for alternate power mode for the
20 hearing aid.
21 JUDGE HUME: Rass disparages -- Rass disparages that type of
22 approach, but yet, you're claiming it. Is that -- I'm a little confused here.
23 MR. JARRETT: That is correct. But the analysis of what -- of Rass
24 is not necessarily relevant to what the inventor of the '014 patent was
25 attempting to achieve. I think there's a difference between looking at prior
26 art combinations and what a POSITA would understand looking in hindsight

1 versus what the inventor was thinking or claiming. I think there is a
2 distinction there.
3 JUDGE HUME: Do they have to solve the same problems, I mean, in
4 the same way or be motivated by the same problem, it may solve the same
5 problem but motivation might come from some other aspect?
6 MR. JARRETT: I think there's a difference between a motivation of
7 what motivates an inventor versus a POSITA. I don't know, honestly, Your
8 Honor, off of the top of my head, I'm not familiar with an analysis for
9 motivation of an inventor's motives for claiming a particular limitation.
10 JUDGE HUME: I think what I was getting at is based off, well, you
11 can have different purposes for these references than what -- well, I'll let that
12 lie, we can pick that up later if necessary.
13 MR. JARRETT: Yes, Your Honor, looking at Slide 61, the potential
14 combination between Hain and Aumer. Again, Hain is concerned with
15 magnetic, the magnetic field that we've discussed previously with Rass, and
16 Aumer's not concerned with using a magnetic field, monitoring any kind of
17 magnetic field, it's concerned with biometrics. And there's no reason,
18 looking at the face of Aumer and Hain, why a POSITA would combine
19 those two, other than working backwards from the claims of the '014 and
20 '688 patent.
21 And the same for Shaffer on Slide 62. As we've gone over with Rass,
22 Shaffer is concerned with a mobile device case serving as an electric
23 charging source and storage dock for rechargeable wireless audio earbuds.
24 It's again, power modes charging power. Aumer is not concerned with
25 power within earpieces at all.

1 So, looking at these two references, the only reason to combine them
2 would be working backwards from the claims of the '014 and the '688 patent.
3 And the same for Steinbrecher on Slide 63. There's no overlap between the
4 teachings of Aumer and Steinbrecher and nothing that Petitioner has pointed
5 to that would bridge the gap between those two references.
6 And then looking at Slide 64, this idea of any, the consumer interest.
7 Consumer interest is in personal health advances is not relevant in this sense
8 in combining Petitioner's original references which all relate to power modes
9 charging, wireless charging.
10 There's no reason to just combine a reference that deals with biometric
11 readings just because of personal health advances. I think that's irrelevant to
12 what those references are directed to and it wouldn't be a motivating factor
13 to take the teachings of Aumer and combine them with the teachings of
14 Rass, or I'm sorry, the teachings of the original petition references.
15 JUDGE WHITE: Why wouldn't it be? Because one of skill in the art
16 trying to create a device, wouldn't they have the market for which this device
17 is intended as one of the things that would be on their mind when they're
18 trying to create something?
19 MR. JARRETT: Your Honor, I believe a POSITA would be
20 concerned, if you're looking at what the teachings of Aumer and the
21 teachings of Hain and all the references that deal with charging and power
22 mode consumption. I just don't understand how personal health would in
23 any way be related to teachings regarding power modes and charging
24 wireless earpieces and spark cases.
25 It just doesn't seem to fit between the two. Other than, the only reason
26 I could think of is if you look at the claims in the '014 patent and the '688

1 patent and need to find something to fill the gap between those references
2 and the claims.
3 JUDGE WHITE: I mean the old standbys for motivation are better,
4 faster, and cheaper. Those things aren't necessarily going to be what the
5 power or whatever would be about, but it would be something that one of
6 ordinary skill in the art would be thinking about when they're putting
7 together a device and they're creating something, why would this not fall
8 into that realm of something that one of skill in the art was thinking about
9 when they are going to create a device?
10 If the marketplace wants a certain type of hearing aid or other wireless
11 earpiece, then wouldn't you be looking to make something that would be
12 agreeable with the market?
13 MR. JARRETT: I think as far as better, cheaper, faster, I don't think
14 adding biometric capabilities necessarily, looking at the teachings of the
15 other references, would make the earpiece function faster or better
16 necessarily.
17 JUDGE WHITE: Why wouldn't that be better? Better is -- better is
18 subjective based on what sort of things that you consider to be important
19 factors out there, you know. It might be better if it's smaller or it might be
20 better if it's bigger. It might be better if it does, you know, whatever. Why
21 wouldn't this make it better and thus be something that a person of ordinary
22 skill in the art would be concerned about?
23 MR. JARRETT: I think better in the context, it's still, when you look
24 at the other references, you still have to look at those references and what the
25 purposes of those references is in the context of someone skilled in the art.

1 Someone skilled in the art would be an electrical engineer, would be
2 considered with those references looking at battery life, performance, those
3 kind of things, not personal health and benefit of a consumer to improve, to
4 make a better earpiece.
5 And the content for those references, a POSITA would be concerned
6 with making the performance of the earpiece better, which would require
7 most, with those references, it's specifically relating to battery life, charging
8 and the like, not personal health. I'll clarify. I think there's a differentiation
9 between the two from what a POSITA would be looking at or concerned
10 with.
11 Your Honor, I'm not sure if that sufficiently answered your question
12 or not?
13 JUDGE WHITE: Yes. Thank you, go ahead.
14 MR. JARRETT: And then looking at the Aumer and Rass
15 combinations on Slide 66, combining Rass and Aumer, just to summarize
16 that the same issues that individually came up for Rass and Aumer, we
17 discussed in the context of combining them with Petitioner's reference would
18 apply equally to both, a combination that included Rass and Aumer.
19 I'd like to briefly address Petitioner's arguments regarding the
20 enablement that were brought up in Petitioner's papers and then also during
21 Petitioner's presentation. Looking at Slide 68. It's our position that the
22 substitute claims are enabled. And looking at these, these two cases that are
23 cited here, these are the standards for determining, you know, whether
24 claims are enabled.
25 The specification must teach a POSITA how to make and use the full
26 scope of the claimed invention without undue experimentation and when a

1 patent specification has a broad disclosure, it may suffice to give an example
2 or a few examples.
3 The specification also discloses some general quality running through
4 the class that gives it a peculiar fitness for the particular purpose. And
5 looking at Slide 69, the federal circuit's *Wands* factors which are considered
6 when determining whether a disclosure would require undue
7 experimentation. And based on an analysis of the *Wands* factors, the
8 claimed, the '014 and '688, the substitute claims are sufficiently enabled by
9 the specification.
10 We can go through the *Wands* factors here on slide 70. The breadth
11 of the claims, for example, and the breadth of the claims, the nature of the
12 claims, looking to the claims themselves, the specification and the context,
13 reading biometrics is limited to the context of the wireless earpiece itself.
14 I recall that Petitioner did point to, I believe it was a portion of the
15 specification on Slide 89, I would differentiate that that portion of the
16 specification refers to an embodiment, the wireless earpieces may represent
17 wireless devices that may be ingested or implanted into a user.
18 That may represent wireless devices is different than the actual
19 earpiece itself, which is the claim. The claim is limited to the earpiece, not a
20 representation of a wireless device. And also, in the context of the earpiece,
21 I think when looking for motivation to combine, the federal circuit and the
22 Supreme Court instructed that a POSITA, looking through the perspective of
23 the person with skill in the art, a person of skill in the art essentially is not
24 robotic, they can use common sense, creativity and basic creativity and
25 whatnot.

1 In looking at the claims and looking at a wireless earpiece that fits
2 within the ear, a POSITA would understand that the -- that there's a limit
3 here as far as what biometrics would be considered. And based on
4 Petitioner's briefing and presentation, this idea that retina scans, vein
5 mapping, DNA sequencing, facial recognition, seem well out of bounds for
6 what would be within the scope of an earpiece.
7 For one, Petitioner has not given any examples that those technologies
8 were capable of being implemented or a POSITA would know to implement
9 those technologies at this time. The POSITA again, is a person who is an
10 electrical engineer.
11 When you talk about facial recognition and some of the retina
12 scanning and vein mapping, that gets into visual engineers, visual
13 engineering with camera devices that would be outside the scope of a
14 traditional electrical engineer.
15 And if not, there's no evidence and POSITA's, sorry, Petitioner has
16 provided nothing to show that a POSITA would have understood that those
17 types of technologies were readily used or capable of being put in an
18 earpiece or show any examples of what any person has ever put a facial
19 recognition sensor into an earpiece or that it's technologically possible given
20 the size of an earpiece that would fit within the ear.
21 Even with a phone, the camera apparatus that's required for facial
22 recognition requires stop projectors, apertures, infrared cameras typically to
23 create digital mapping of the face, which getting all of that into a potentially
24 small earpiece is not within the realm of what a POSITA would be
25 considering.

1 I think again, we have to consider the common sense of a POSITA
2 when reading the claims and understanding the claims and understanding
3 what biometrics would be. And reading the claims in the context of the
4 specification and the specification gave several examples, a heartbeat sensor,
5 biometric temperature sensor, those kinds of things.
6 JUDGE HUME: Counselor, Judge Hume. Your Slide 68, can you go
7 there, please. "When a patent specification has a broad disclosure, it may
8 suffice to give an example (or a few examples) if the specification also
9 discloses some general quality running through the class that gives it a
10 peculiar fitness for the particular purpose." What would you characterize the
11 general quality running through the class would be in the '014 patent?
12 MR. JARRETT: I would characterize it as a biometric sensor or
13 something, a biometric sensor that would fit within an earpiece to read a
14 user's biometrics. Which again, think in the context of an earpiece or what
15 was know to a person of ordinary skill in the art at the time of the priority
16 date and also a POSITA's common sense in working -- this is an electrical
17 engineer who is the POSITA, working with circuitry and thinking about
18 circuitry.
19 And a lot of these more exotic types of a biometric examples that
20 Petitioner's provided would be outside the scope of what a POSITA would
21 consider given the constraints of fitting or working with an earpiece system.
22 It can also just be the fact that using an earpiece, that fitting it within the ear
23 and whatnot, I mean, for example, a biometric marker could be blood typing
24 or blood sugar if someone's diabetic.
25 It seems well outside the scope and I don't think anyone would
26 suggest that they're, it would be reasonable to suggest that an earpiece would

1 draw one's blood and take blood measurements to determine, to switch on or
2 off, the things that are obviously accepted outside the scope, there would
3 have to be a line or some kind of boundary.
4 And that is the common sense of POSITA of what they would
5 understand in the context of the claim, which is the physical earpiece
6 system, not some kind of combination of an earpiece with a server, not of
7 that is claimed. It's an earpiece.
8 JUDGE WHITE: It's an earpiece, but we don't really have a size on it.
9 Because it's only got to have a portion that fits within the ear, there could be
10 some sort of portion hanging outside. And I don't know how large it would
11 be, something hanging outside to be, to give it, you know, additional
12 functionality.
13 I think where we're struggling here is that the specification didn't
14 really bound it as in what sort of things could be done with this
15 earpiece/wireless device. Because the spec does just say that a wireless
16 earpiece may represent a wireless device.
17 And where are we getting this bounding from, as far as what box to
18 put it in? Because if we can put biometrics in the box, then you might have
19 a hook here. But I don't know where we're getting that box from.
20 MR. JARRETT: I think, Your Honor, looking at the entirety of the
21 specification, I mean, the examples of the figures in the specification, if you
22 look at the figures of what it envisioned for the earpiece.
23 Obviously, it's not only limited, solely limited to that earpiece, but
24 that's an idea of what is envisioned for an earpiece. I think someone skilled
25 in the art who's working as an electrical engineer again, working on circuitry
26 and building these devices, they're thinking when they read, when you read

1 all the claims or the language of the claims, it's understood as one that's
2 skilled in the art would understand it.
3 And one skilled in the art would understand an inner ear wireless
4 earpiece to be, I would imagine, fairly in line with the figure -- what is it,
5 Figure 1 of the patent which shows an ear bud, something of that nature.
6 I mean, that's the -- I think that, looking at the examples from the
7 specification and these pictures, a lot of the figures, that's envisioned for
8 what a person of skill in the art would understand would be encompassed
9 within an earpiece.
10 I know referencing back to that where it talks about another portion of
11 the specification was on Petitioner's Slide 89 that refers to, may represent
12 wireless devices. I read this, as for example, the smart case may be
13 configured to work with an endoscopic pacemaker pill.
14 I think it's working more -- that's my reading of the smart case in
15 communication with other devices, not necessarily the earpiece. And when
16 you read the earpiece in the context of the claims, I think we're still referring
17 to an earpiece.
18 And my understanding of that, I think a POSITA would understand
19 the same, is looking at those figures that the patent gets, and someone would
20 read that, that claim language and think okay, this is the scope of what we
21 have to work with, an earpiece that's something similar to this, maybe not
22 exactly.
23 For example, many earpieces include a stem, a small stem, so it's still
24 fairly limited to what can be included or what that level of biometrics would
25 be. And I think, the important point is I think facial recognition and thinking
26 about facial recognition, DNA sequencing, those just seem well out of

1 bounds. I cannot think of any working examples of an earpiece that uses a
2 retina scan just for practical sense or common sense, how it's used within the
3 ear.
4 It just -- I don't think a POSITA would go to using a retina scan.
5 Again, would require a camera, extensive technology that would not fit in
6 some kind of compact device that fits in an ear.
7 I think perhaps, to better answer your question, Your Honor, I think
8 looking at the specification, the totality, the figures, the explanations and the
9 claim language itself, a POSITA would understand, have a concept of an
10 earpiece similar to what's shown in the figure. And that's the limiting factor,
11 is the physical earpiece itself for what biometrics would be considered and
12 the common sense of the POSITA.
13 JUDGE HUME: Counselor, Judge Hume. So, if we didn't limit the
14 scope of this biometric information or biometric sensor as you suggest, then
15 there would be undue experimentation required to implement things such as
16 retina scan and?
17 MR. JARRETT: I don't know that that would be the case also, Your
18 Honor. I don't think that Petitioner has shown any example that, hasn't given
19 an example or explanation on how undue experimentation would be required
20 for even DNA sequencing or facial recognition. There's really no analysis
21 on this.
22 The Petitioner throws out these examples to just basically make the
23 argument that the specification doesn't cover every possible example, which
24 again, we're not required to -- the patent -- the inventor is not required to do
25 that.

1 He's just required to show if it's a broad disclosure, just to show an
2 example, maybe one example or several examples that may have a common
3 thread, and the common thread here would be the earpiece, the limiting
4 factor.
5 But I don't know, sorry, Your Honor, to more directly answer your
6 question, my apologies. I don't think that -- I don't know that the claim can
7 be read outside of the context of the earpiece itself. So, outside of that, I
8 don't know that there'd be undue experimentation required even, one way or
9 the other. It's hard -- I guess, it's hard to conceptualize that.
10 JUDGE HUME: All right. Thank you.
11 MR. JARRETT: In some of the other *Wands* factors, the presence or
12 absence of working examples, the specification does provide some examples
13 or an example. The heartbeat sensor is one in the specification that's
14 provided, how the heartbeat sensor would communicate and work.
15 As far as Slide 71, some of the other *Wands* factors, skill of the art
16 again, looking at what POSITA is capable of versus, and I know this was
17 brought up during Petitioner's presentation, but there is a distinction between
18 looking at this from the enablement perspective and the motivation to
19 combine.
20 Just because the POSITA would understand how to implement some
21 kind of small sensor into an earpiece doesn't mean that there would be a
22 motivation to do so. And so that's where there is a distinction, where
23 Petitioner has just said that because this was known in the art, a POSITA
24 would have done it because it was known, it would be readily applicable that
25 a POSITA could do this, there has to be something more than just a
26 combination of known elements.

1 And so, that's why there's a difference between where, in this sense it
2 could be enabled because the POSITA has the knowledge to do something
3 versus the motivation to do it. I just wanted to clarify that point.
4 The last thing, Your Honors, the Petitioner has not necessarily
5 addressed this in their presentation, but it was addressed in the papers. The
6 substitute claims are not indefinite on Slide 72.
7 Looking at Slide 73, we have, you know, the standard here from the
8 MPEP. "A claim is indefinite when it contains words or phrases whose
9 meaning is unclear … Obviously, however the failure to provide explicit
10 antecedent basis for the terms does not always render a claim indefinite. If
11 the scope of a claim would be reasonably ascertainable by those skilled in
12 the art, then the claim is not indefinite."
13 And then looking at Slide 74, this is just a summary of the terms that
14 Petitioner claims are indefinite. And we have in the second row here, where
15 the claims are located in each of the patents. Petitioner's position and then
16 our response that was asserted in the reply. For these, Your Honors, we rest
17 on the papers for these unless Your Honors have any further questions
18 regarding any of these specific terms. I think our briefing in the replies is
19 clear enough.
20 JUDGE HUME: Well, Counselor, Judge Hume. I'm looking at Claim
21 22, I think that's the one we're talking about here, how the user biometrics is
22 utilized by the wireless earpiece to alter the power mode, you say that in the
23 immediately preceding sentence, it says, it talks about below power mode as
24 a power save mode.

1 That depends from proposed substitute Claim 14, which talks about
2 low power mode, high power mode, there's no ambiguity here, so what
3 mode is directly being addressed by 22?
4 MR. JARRETT: Sorry, Your Honor, let me pull up the claim. Your
5 Honor, looking at the claim and look to, at Slide 8 where the low power, I
6 believe the lower power mode is what Petitioner has -- takes issue with.
7 And that's referring back to, since this is a dependent claim, referring
8 back to the first substitute claim that is the underlying independent claim.
9 So, I don't think there's any ambiguity there. And the power save mode, I
10 think is a power save mode so there's no issue with "indefinite-ism" on that
11 point.
12 JUDGE WHITE: So, what do you think they're going for the power
13 mode at the end, utilized by the wireless earpiece to alter the power mode?
14 MR. JARRETT: The antecedent basis for reading this claim would be
15 the immediately preceding low power mode, is my reading of that.
16 JUDGE HUME: Would it not be the power saver mode or the high-
17 power mode which is in Claim 14?
18 MR. JARRETT: In the initial --
19 JUDGE HUME: You have three different power modes in play here
20 and you're altering "the power mode" so, it leaves an open question as to
21 which power mode. Or is it the power state of the device that's being
22 modified by putting it into one of those three modes or two modes?
23 MR. JARRETT: I think it would be the latter, basically just altering
24 the power mode. It's not specific to -- it's the power mode that it's currently
25 in.
26 JUDGE HUME: And this is arguably unclear draftsmanship here?

1 MR. JARRETT: Yes. Your Honor, if I could clarify. The method of
2 Claim 14, wherein the low power mode is a power save mode and the user
3 biometric is utilized by wireless earpiece to alter the power mode. Altering
4 the power mode, it refers back to the previous or the independent claim.
5 JUDGE HUME: Well, the independent claim doesn't have "the power
6 mode", it has a high-power mode and it has a low-power mode?
7 MR. JARRETT: Excuse me. I'm looking, again, looking here at
8 Claim 22, the method of Claim 14 wherein the low power mode is a power
9 mode, a power saver mode, and the user biometrics is utilized by the
10 wireless earpiece to alter the power mode. I believe that's referring back to
11 the low power mode. That's my reading of that. And regardless, either way,
12 if you look at the independent claim, you know, first the high-power mode
13 or lower-power mode, either one of them is the power mode, so if it's
14 altering either one of them, I think that would be sufficient.
15 JUDGE HUME: Okay.
16 MR. JARRETT: But I believe it's directly referring back to lower
17 power mode, but again, both high or low power mode would be a power
18 mode that would be altered. But, pending any questions, Your Honors, I
19 will yield whatever time remains for rebuttal.
20 JUDGE HUME: Okay. I have you with about 38 minutes. Okay.
21 Petitioner?
22 MR. ESRAM: Your Honor, is it okay if we take another short break
23 before we start again, please?
24 JUDGE HUME: I'm not adverse to that. So, let's shall we say, is five
25 minutes sufficient?
26 MR. ESRAM: Sounds good. Thank you.

1 JUDGE HUME: All right. So, we're off the record and reconvene in
2 five minutes.
3 (Whereupon, the above-entitled matter went off the record at 3:45
4 p.m. and went back on the record at 3:51 p.m.)
5 JUDGE HUME: Okay. Mr. Esram, I have you at 67 minutes
6 remaining in your time. Please proceed.
7 MS. LIN: Thank you, Your Honors. This is Haixia Lin. I'm going to
8 start and then turn it over to my colleague Trishan Esram. I would like to
9 start with the enablement's arguments which is close to where we ended
10 during Patent Owner's presentation. I just want to point out that the Patent
11 Owner had the pen here. This is a revised motion to amend. They chose the
12 scope of the claim amendment that they added.
13 And they chose to claim it as user biometrics and that it's simply a
14 wireless earpiece configured to read user biometrics. The onus is on them to
15 claim only as much as the specification enabled. I would point out that this
16 purely functional language, it's just the ability to read a user biometric.
17 The claim amendments don't even recite the inclusion of a sensor, let
18 alone specific types of sensors, specific types of biometrics or even some
19 characteristic or general quality of these. The only thing that Patent Owner
20 raises is well, it's in a wireless earpiece as a person of ordinary skill in the
21 arts. Only certain user biometrics are enabled for inclusion in a wireless
22 earpiece.
23 That's like if in the *Amgen* case, the patentee at that point had said,
24 well, we claimed an entire class of antibodies solely based on their
25 functionality, but a person of ordinary skill in the art, understands that you
26 only can make some of these antibodies and not the other ones.

1 So, the claim is actually limited to a subset of those antibodies and
2 because the claim is limited to only those things that are enabled, it is
3 enabled. That same argument should fail here. You claim the entire class of
4 user biometrics, you have to now enable that. You should only claim as
5 much as you are able to enable. Okay. So, setting aside the enablement
6 argument, I'm going to turn to the discussion regarding the prior reference,
7 Rass.
8 I just want to make the record really clear from Petitioner's
9 perspective in terms of which arguments that Patent Owner raised during its
10 presentation that are new, not contained in any of the papers to this point and
11 therefore should be stricken.
12 So, there are cites to specific portions of Rass that are allegedly
13 supporting this argument. Well, let me take a step back. So, the argument is
14 on Petitioner's Slide 71 of our demonstratives. This is the entirety of Patent
15 Owner's argument on this point. There is an alleged incompatibility between
16 Rass and Hain's telephone mode.
17 This is it, this is all that's in the Patent Owner reply, this is all that's in
18 the expert declaration, there are no cites to any other evidence whatsoever,
19 to Rass, to other documents, nothing. Now, any new cites to Rass were not,
20 do not show anywhere, so, the only reason that Petitioner became aware of
21 those cites is when we received their demonstratives earlier this week.
22 This thought that Rass is teaching away from or disparaging anything,
23 that's -- this is the first I've heard of it. It does not show up in any of the
24 papers. If you look for the words teaching away, disparaging, they do not
25 appear in any of Patent Owner's papers.

1 And I couldn't exactly follow this, but it sounds like maybe they're
2 attacking Rass's ability to combine with any of the references based on some
3 alleged teaching away or disparagement, that would also be new.
4 So, I just wanted to make sure that the record was clear that this is the
5 first time Petitioner's heard about this, you know. Patent Owner could have
6 and should have raised all these arguments in Patent Owner reply if it
7 wanted to and that would have given the Petitioner opportunity to respond in
8 the sur reply. All right. I will now turn it over, unless there is any questions,
9 I will turn it over to Trishan to talk about the merits of its position.
10 MR. ESRAM: Thanks, Haixia. So, this is Trishan Esram, Your
11 Honors. I would like to start pointing you to Patent Owner's own
12 demonstratives, starting at Slide 45, which is showing a snippet of
13 Petitioner's sur reply. And what's underlined here is what triggered this
14 whole teaching away argument, which is still something new, as Haixia Lin
15 just said.
16 But the argument here is what they're making is, Patent Owner says
17 there is some kind of a magnetic field that will interfere with the temperature
18 sensor. That's what they say. And yet, there was no support provided as to
19 why there is any kind of interference that will affect the temperature sensor.
20 And then, when you get to Slide 46 of Patent Owner's demonstratives,
21 we get into what Rass discloses. But even on the merits here, that's not
22 addressing the issue of an interference with temperature sensor.
23 The background of Rass talks about different types of sensors to turn
24 on and off a wireless earpiece or hearing aid. These sensors are not
25 temperature sensors, the word "temperature sensor" doesn't show up in the
26 background section.

1 So, whether there's an interference in Rass when it comes to that first
2 sentence in the summary section is to these other sensors that turn on and off
3 the wireless earpiece, not a temperature sensor.
4 So, even what Patent Owner is trying to prove that in Rass doesn't
5 support their argument that combining Hain with Rass with some kind of
6 interference so that the temperature sensor won't work. So, clearly Patent
7 Owner after seeing our sur reply, went and tried to find reasons why their
8 argument is correct and found the wrong reasons.
9 And to be clear again, and we talk about it during our opening, we are
10 not relying on Hain's telephone mode whatsoever. So, the whole argument
11 about the telephone receiver creating an interference signal is misplaced.
12 For these reasons, Your Honors, you should disregard everything that
13 Patent Owner said about Rass, about the teaching away, disparaging and so
14 on. And I also want to point out that we did file an objection yesterday to
15 this specific slide of what we're showing you here at Slide 46.
16 Petitioner and Patent Owner did meet to discuss this slide. There is no
17 cite to any papers to where they discuss these excerpts from Rass. Patent
18 Owner admitted that that is the case, there is no citations whatsoever in any
19 paper, whether it's ours or theirs. So, we hope that Your Honors consider
20 our objection and act on it.
21 And then, the last piece, if I may, has to do with the indefiniteness of
22 Claim 22, the power mode. We still are very confused by what Patent
23 Owner's counsel, Mr. Jarrett, said about the antecedent basis for the power
24 mode.
25 At first he said it's related to the low-power mode, then he said it
26 could be any other modes, and then I think he ended with the high-power

1 mode. Clearly, he, himself is very confused and that kind of supports the
2 fact that the term in Claim 22 is indefinite. And I think that's all I have,
3 Your Honors, unless you have any other questions. I think we will rest.
4 JUDGE WHITE: Actually, before you rest, I would like to hear your
5 thoughts on the argument that counsel for Patent Owner was making about
6 this notion that body heat isn't necessarily biometric?
7 MR. ESRAM: Yes, Your Honor. Thank you for -- that was one other
8 thing we wanted to discuss. So, I think even there, there is a lot of confusion
9 and a lot of what is really being taught by Rass. I think that Patent Owner
10 had mentioned diode, voltage, being some types of temperature sensors that
11 won't measure a user biometric, but then at some point, Patent Owner also
12 said that it depends on the source of the heat.
13 To give an example of, if it's worn, then it is the heat of a user, it's a
14 body temperature. For us, it's very clear. It's very clear in Rass that we're
15 talking about the user's temperature and these user biometrics. Let's talk
16 about using a diode or an infrared sensor doesn't change the point of Rass
17 measuring the user's temperature. And I think that's still very clear in Rass,
18 that it's talking about the user's temperature and that's a user biometrics.
19 And I see Haixia Lin jumping in, so please go ahead.
20 MS. LIN: Good. Yes, just to add on to that, I did hear Patent Owner's
21 counsel say that the sensor could be detecting body temperature in his
22 answers to your questions. That combined with the explicit recitation of
23 detecting body heat, it's Petitioner's position that Rass is clearly disclosing
24 reading a user biometric.
25 The distinction between why body heat isn't a user biometric, I will
26 confess, escapes me. I would just put forward that it sounds like if I took

1 just a run of the mill drug store thermometer and put it in my mouth, you
2 know, it's not using infrared, maybe it's measuring the temperature of the
3 shell or device itself rather than my temperature.
4 I question whether even a normal drug store thermometer is reading
5 user biometrics under whatever standard has now been applied to Rass
6 which just seems, frankly, wrong. Because I would think that a person of
7 ordinary skill in the art would understand if I bought the thermometer from
8 the store that it's measuring the user biometric. But if there aren't any other
9 questions, we're happy to rest.
10 JUDGE WHITE: That was it from me.
11 JUDGE HUME: Judge Baer?
12 JUDGE BAER: Nothing else.
13 MS. LIN: Thank you, Your Honors.
14 JUDGE HUME: All right. You're giving up 54 minutes, we
15 appreciate that.
16 MS. LIN: We can keep going.
17 JUDGE HUME: Okay. Patent Owner, I have you at 38 minutes.
18 Please proceed when ready. Patent Owner, I believe you're -- or Counsel, I
19 believe you're muted.
20 MR. JARRETT: Sorry. I promise to not take the full 38 minutes,
21 Your Honor. Just to briefly address some of the points raised there by
22 Petitioner. So, first the enablement issue. The specification gives clear
23 examples of user biometrics and how they are employed to read user -- or
24 how user biometrics are read.
25 Also, common sense dictates, at some point common sense dictates
26 what is or is not included within user biometrics within the context of an

1 earpiece. For example, I don't think there's, at some point we can't give an
2 example for every single potentially thing that could be characterized as a
3 biometric, psychic brain waves, genome mapping, blood typing, I don't think
4 those would be included within the context of what a POSITA would believe
5 would be biometrics readings for an earpiece.
6 So again, as we've stated, the specification gives examples, the law
7 doesn't require us to give an example for every member of the genus, just
8 something that's representative or a few examples or even one example.
9 And the specification does that.
10 Arguments regarding Dr. Young's declaration or this going back to
11 our slide, I believe it's 44, this is Petitioner's response and sur reply. PO
12 provides no further, no support or further explanation for how or why a
13 magnetic field would interfere with the temperature sensor other than citing
14 to an expert declaration that merely parrots the reply language verbatim.
15 Your Honors, Dr. Young's declaration is evidence that the Board can
16 consider and it is support for this position. Petitioner has never deposed Dr.
17 Young about this, even after receiving the reply brief and his declaration, it
18 never responded with its own expert declaration rebutting this point. This
19 point is unrebutted, it's unrebutted.
20 Regardless, in the reference to Rass and the background you mention
21 Rass was in response to saying that there was absolutely no support for Dr.
22 Young's position, which is not true because Dr. Young's position is
23 unrebutted. And also, Rass supports Dr. Young's position. In Rass,
24 specifically, in the background that we mentioned, in the summary that we
25 mentioned, we went over during my portion of the presentation.

1 JUDGE WHITE: Let me try and put a finer point on it. What I take
2 Petitioner to be saying is that it is one thing for you to say that the magnetic
3 field interferes. It's another thing for you to say that Rass is teaching away
4 from using a magnetic field. And they're saying that that is new and
5 therefore at this stage in the game, improper. Is that a demarcation line that
6 you can agree with?
7 You're not saying -- you don't want us to find anything on teaching
8 away, you want us to see whether we agree with this point as to whether
9 there's interference?
10 MR. JARRETT: I think Your Honors, it's supports that there is
11 interference and also teaches away. Looking at the summary of the
12 invention, I was just -- the portion I cited was the said sensors and
13 explaining that one of those is the magnetic sensor that's essentially what's
14 employed in Hain.
15 The said sensor in the other references, to clarify, all of them
16 reference some kind of magnetic sensor before turning the hearing aids off
17 or the earpieces off. Summary of the invention on Column 2, Lines, I think
18 it's 57, starting at -- or Column 1, sorry, Lines starting at 57. The said
19 sensors are however relatively expensive, sensitive to interference, or require
20 additional objects for switching purposes.
21 An object of the present invention is therefore to improve or simplify
22 the automatic switching on and off of the hearing aids. This is in response to
23 this argument that there is no support for this interference position that Dr.
24 Young, other than his own declaration, which were just pointing out that this
25 supports what Dr. Young says. In addition, it does expressly on its face,
26 teach away from --

1 JUDGE WHITE: I guess my question is more about whether that
2 argument is in front of us properly. Teaching -- are you saying -- is it your
3 position that teaching away is an argument that is properly in front of us at
4 this point in the proceeding?
5 MR. JARRETT: Yes. As an extension of what Dr. Young said, in
6 clarifying his position on interference, yes.
7 JUDGE WHITE: So, you're saying Dr. Young argued for teaching
8 away?
9 MR. JARRETT: Dr. Young argued the point about interference and
10 this is just in line with what Dr. Young had said. This is an extension or
11 provides support for his argument.
12 JUDGE WHITE: I'm saying is teaching away as a separate stand-
13 alone argument, it is your position that that's in the case right now? I can
14 accept that whether we agree with this point of interference is in the case
15 right now. But to me, it's a separate issue if you want to say that Rass
16 teaches away from a combination in which there would be a magnetic field,
17 a magnetic sensor.
18 MR. JARRETT: I think the reference in Rass to interference and a
19 reference to interference as expressed by Dr. Young, those are one in the
20 same. I think they're both part of the same argument regarding interference
21 and teaching away. Rass teaches away expressly on its face.
22 I think based on a reference interference, this is properly before the
23 Board. If you're asking, Your Honor, if there's a specific citation to this
24 specific line in our reply brief, there's not. I will agree with that point.
25 JUDGE WHITE: Well, I'm going to be very transparent here. I'm
26 having some difficulty seeing teaching away/disparagement as something

1 that is in front of us right now. This question of whether or not there's
2 interference, that's a separate issue to me. So, this is your moment to tell me
3 why teaching away as a separate, stand-alone argument is properly in front
4 of us. Because right now, I'm thinking it's not.
5 MR. JARRETT: I don't think it's a separate stand-alone argument. I
6 think it's in line with Dr. Young has said and supports that argument.
7 JUDGE WHITE: Okay. So, what you want us to decide is whether
8 this interference question is true and we can take that from your evidence
9 and your argument?
10 MR. JARRETT: Yes.
11 JUDGE WHITE: Okay.
12 JUDGE HUME: Counsel, just refresh me, what has changed over the
13 course of the proceedings to now bring teach away up at the 11th hour?
14 MR. JARRETT: I don't know that anything's changed, Your Honor
15 other than the fact that our expert --
16 JUDGE HUME: The reference still says what it said six months ago.
17 MR. JARRETT: Correct. Our expert gave an opinion and it was
18 questioned and this is support for our expert's opinion. It was brought up in
19 the sur reply.
20 JUDGE HUME: Okay. Thank you.
21 MR. JARRETT: And just to clarify, Your Honors, that I would like to
22 go to the Slide 74 where it talks about our -- actually, easier if I go to the
23 claim language, my apologies. On, if you look at Slide 14 where it's the
24 substitute claim, this is in the indefiniteness argument. I wasn't confused.
25 And I think it's, maybe I just need to explain it better. Claim 22, the
26 method of Claim 15 wherein the low-power mode is a power-saver mode

1 and the user biometrics is utilized by the wireless earpiece to alter the power
2 mode. The power mode is a reference to any power mode that is altered.
3 It could be a low power mode, it could be a power saver mode, it's just
4 altering a power mode, the power mode. Altering the power mode, the
5 power mode in general, referring to any power mode. That's as clear as I
6 can make that.
7 JUDGE HUME: And Judge Hume. So, it could be understood to
8 read to alter the current power mode --
9 MR. JARRETT: Correct.
10 JUDGE HUME: -- the current power mode?
11 MR. JARRETT: Correct. That was a better way to phrase it, yes.
12 That's my understanding in the intent. Pending your questions, Your
13 Honors, that's all I have.
14 JUDGE HUME: Judge Baer?
15 JUDGE BAER: No.
16 JUDGE WHITE: Nothing from me.
17 JUDGE HUME: I have no further questions. Does the court reporter
18 -- we can go off the record.
19 (Whereupon, the above-entitled matter went off the record at 4:14
20 p.m.)

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