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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DROPBOX, INC. and MICROSOFT CORPORATION,
Petitioner,

v.

DATANET, LLC,
Patent Owner.

IPR2024-00078 (Patent 8,473,478 B2)
IPR2024-00079 (Patent 9,218,348 B2)

Record of Oral Hearing
Held: February 13, 2025

Before JOSIAH C. COCKS, GEORGE R. HOSKINS, and
BACH V. HOANG, *Administrative Patent Judges.*

APPEARANCES:

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The above-entitled matter came on for hearing on Thursday, February 13, 2025, commencing at 10:00 a.m. EST, at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

1 P R O C E E D I N G S
2 - - - - -
3 10:00 a.m.
4 JUDGE COCKS: Please be seated.
5 All right, good morning, and welcome to the Board. We're here today
6 for a consolidated oral argument for two proceedings, IPR 2024-00078
7 involving U.S. Patent Number 8,473,478, and IPR 2024-00079 involving
8 U.S. Patent Number 9,218,348.
9 I am Judge Cocks. I am joined in the room by Judge Hoang, and
10 Judge Hoskins is joining us on the phone.
11 Let's begin with introductions of Counsel, Counsel for Petitioner,
12 please state your appearance.
13 MR. MORTON-PARK: Frank Morton-Park for Petitioners. And with
14 me at the table is Andy Mason.
15 JUDGE COCKS: Thank you, Mr. Morton-Park.
16 And will Counsel for Patent Owner do the same, please?
17 MR. JAFFESS: Good morning, Your Honor, Ari Jaffess from Liston
18 Abramson on behalf of Patent Owner, Datanet, LLC. And with me is my
19 partner, Michael Lewis.
20 JUDGE COCKS: Thank you, Mr. Jaffess.
21 Now, the trial hearing order is set forth that each side has 75 minutes
22 of argument time. Petitioner has subsequently made a LEAP request which
23 has been granted, so they will have an additional 15 minutes of argument
24 time, and they ask that each participant have a substantive role, which will
25 be the case.

1 So, Petitioner bears the burden of showing unpatentability and will
2 argue their case first and may reserve rebuttal time. Patent Owner will then
3 argue their opposition to Petitioner's case and may reserve surrebuttal time.
4 Petitioner will then argue their rebuttal. And we'll conclude with Patent
5 Owner arguing their surrebuttal.
6 A couple of preliminary matters, we have Petitioner's demonstratives
7 in front of us, but we do not have any demonstratives from the Patent
8 Owner. Is that the case?
9 MR. JAFFESS: That's correct, Your Honor.
10 JUDGE COCKS: Thank you.
11 All right, with all that said, unless the parties have any questions,
12 Petitioner, the podium is yours. You may begin when you are ready.
13 And before we begin, do you wish to reserve any rebuttal time?
14 MR. MORTON-PARK: Yes, I would like to reserve 30 minutes of
15 time for rebuttal.
16 JUDGE COCKS: That will give you a total of 60 minutes for your
17 opening presentation. You may begin when you're ready.
18 MR. MORTON-PARK: Thank you.
19 May it please the board, Frank Morton-Park for Petitioners Dropbox
20 and Microsoft. Today, we're discussing two IPRs featuring the same two
21 grounds against the claims of the '478 Patent and the '348 Patent.
22 All the challenged claims of both of these Patents are obvious in view
23 of the Ground 1 prior art combination of Kenley and Long.
24 Kenley, Exhibit 1014, is a file-based backup and archiving system that
25 uses a hierarchical storage architecture, plus three different tiers of storage
26 ranging from fast and small volume to slow and larger volume.

1 Kenley moves archive files through these different tiers of storage in
2 order to optimize their location within these different tiers to track the
3 locations of backup files as they're moved around in this hierarchical storage
4 architecture.
5 Kenley uses a database catalog that maintains backup locations and
6 other file attributes of all the backup files so that it can locate, access, and
7 migrate those archived files accordingly.
8 Long is also an archive system, that's Exhibit 1004. Long also
9 features hierarchical storage, but Long provides the additional benefit of a
10 general purpose technique that backs up data and responds to data
11 modifications.
12 In combination, Kenley-Long is a file-based backup system that backs
13 up files in response to a modification request to modify that file, and tracks
14 the location of that archived file as it's moved throughout three different
15 storage locations.
16 And then, this combination has a benefit of frequently changed files
17 not being lost between incremental backups.
18 If I could invite the Board to Slide 2, Demonstrative Slide 2, the
19 disputes for both IPRs focus on Claim 1 of each Patent, which are
20 representative. The Kenley-Long combination that I just briefly described
21 satisfies all the elements of Claim 1.
22 For the purposes of the dispute, the language in Elements 1.4 for the
23 '478 Patent and '348 Patent are slightly different. So, there are some claim
24 construction arguments specific to the '478 Patent.
25 Unless there are questions about the combination at this point, I'd like
26 to turn to the claim construction arguments.

1 JUDGE COCKS: Please do.
2 MR. MORTON-PARK: Thank you.
3 JUDGE HOSKINS: Mr. Morton-Park?
4 MR. MORTON-PARK: Yes?
5 JUDGE HOSKINS: This is Judge Hoskins; I just have one quick
6 question. I think this is clear from your briefs, but I just want to make sure,
7 in terms of tracking the location of these files as they get migrated from one
8 memory to another, I think you're saying that both Kenley and Long track
9 that location.
10 So, Kenley does it in its database is your contention. And then, Long
11 does it – it's in an audit header, I guess, in Long, perhaps other ways in
12 Long. But their commonality is that they're both tracking the location of the
13 archived files and moving them, they just kind of do it in slightly different
14 ways. Do I have that correct?
15 MR. MORTON-PARK: That's correct, yes.
16 JUDGE HOSKINS: Okay, thank you.
17 MR. MORTON-PARK: If I could invite the Board to Slide 27, this is
18 just a title slide.
19 Regardless of the construction of Element 1.4 of the '478 Patent,
20 Kenley-Long satisfies this claim Element 1.4, which is searching the first
21 temporary storage location for the archived filed responsive to the
22 occurrence of a first event.
23 But first, let's speak to the proper construction of Element 1.4.
24 JUDGE COCKS: Okay, Counsel, let me just make sure I understand.
25 So, you're saying that the construction of the searching— the 1.4 claim
26 element— that it does not matter in terms of the outcome in this case?

1 MR. MORTON-PARK: Ultimately, yes, that's correct.
2 I'll speak to the claim construction briefly. So, the – this Element 1.4,
3 searching the first temporary storage location for the archived file
4 encompasses examining the temporary storage location to determine if any
5 archived files are stored there.
6 We know that this is the meaning of this claim element because that's
7 what the Applicants told the Patent Office during prosecution.
8 If I can invite the Board to Slide 28, during prosecution of the '478
9 Patent, the Applicant cited three specific portions of the application as
10 providing exemplary support for the disputed element shown here for the
11 '478 Patent.
12 These three pieces of exemplary support convey to the public what
13 this claim element means. And as you can see highlighted, this is the
14 disputed element at issue here, searching the first temporary storage location
15 for the archived file.
16 If I can invite the Board to Slide 29, a proper construction of the
17 disputed Element 1.4 of the '478 Patent encompasses a general examination
18 of the first temporary storage location to determine whether any archived
19 files are stored there.
20 These passages shown here in Slide 29 are the particular disclosures
21 cited as exemplary support for the searching claim element that I just had on
22 the previous slide.
23 Just a moment – this first portion here on the left that I'm pointing to
24 with my laser pointer, here, the '478 Patent discloses regularly examining
25 input buffer for the presence of archived files. This is just a general
26 examination of the input buffer to see what archived files are stored there.

1 Here on the bottom left, the '478 Patent, again, discloses examining
2 input buffer to determine whether any archived files are stored therein. This
3 emphasizes that the '478 method is just looking to determine if any files are
4 stored in the input buffer, the temporary storage location. This is confirmed
5 here on the right in Figure 2A of the '478 Patent.
6 Here in Box 100, this was also cited as exemplary support for this
7 disputed element in here. Figure 2A says that – describes examining the
8 input buffer to see if any files reside there.
9 JUDGE COCKS: So, Counsel, you're saying that it's essentially a
10 binary choice? Files, yes or files, no? That's all? That's all that's going
11 on?
12 MR. MORTON-PARK: Yes, that's what this description describes,
13 right, is a yes/no determination of whether a file – an archived file is stored
14 in this location.
15 JUDGE HOSKINS: Mr. Morton-Park?
16 MR. MORTON-PARK: Yes?
17 JUDGE HOSKINS: One of the things I think we're going to hear
18 from your colleague across the aisle is that we should dismiss the
19 prosecution history here because it's not definitional and it doesn't disavow
20 claims.
21 Is that what you're really saying the prosecution history is doing is
22 that it's providing a definition for this term or is it just one example of the
23 way searching might be satisfied, based on the prosecution history?
24 MR. MORTON-PARK: We're arguing that these passages are going
25 to give examples of what searching encompasses. We're not arguing that

1 there's some strict definition given. There's no disavowal of the claim
2 scope.
3 Rather, the Applicants pointed to this and explained to the public and
4 to the Patent Office this is what searching means in the context of the '478
5 Patent.
6 JUDGE HOSKINS: Thank you.
7 MR. MORTON-PARK: I'd also like to point out, just to be clear,
8 there's nothing in this description of examining an input buffer that suggests
9 any specificity or particularity in a search. There is nothing about the search
10 specifically seeking out a particular file. It's just a general examination,
11 again.
12 In fact, there is no a priori knowledge described in the '478 Patent of
13 what files are stored in the input buffer prior to the step.
14 As you can see here, I'll use the laser pointer again, on Slide 29 on the
15 right in Figure 2A, Box 105, if files are present at 100, if 100 determines that
16 files are present in input buffer at 105, the '478 Patent says, update the
17 database to indicate the end of – the input buffer as the location of these
18 files.
19 Here on the left, again, these last two sentences, it's cut off, but starts,
20 if archived files are detected, smart data manager updates database and it
21 goes on to say, to indicate the location of the archived files, that is, to
22 indicate that the archived files are resident in input buffer.
23 So, given that the '478 Patent describes updating the database to
24 indicate where the files are located after this examination step, it does not
25 have that pre-knowledge of what archived files might be stored in that
26 temporary storage location.

1 So, it is not searching out a specific archived file. It doesn't know
2 what it's looking for. But it is examining that storage to identify what might
3 be there.
4 If I can invite the Board to Slide 34, just to touch on the '348 Patent
5 briefly, there weren't particularly expressed claim construction arguments
6 made, but Patent Owner argued that this Element 1.4 for the '348 Patent,
7 which is analogous to the '478, here, it's identifying presence of the
8 archived file.
9 Patent Owner argued that this element requires identifying a specific
10 or a particular file.
11 There's no explanation of how identifying presence of a file would
12 require identifying a specific file. The same description that related to the
13 searching element in the '478 Patent also supports this Element 1.4 in the
14 '348 Patent.
15 As shown here, Dr. Maier, in his declaration, Exhibit 1024 for the
16 '348 here in paragraph 30, walked through the support in the '348
17 specification that supports this identifying presence of the archived file.
18 Again, it's examining input buffer for the presence of archived files and
19 examining to determine whether any archived files are stored therein. And if
20 no archived files are present, smart data manager rests idle.
21 So, that is clearly the description supporting this claim element.
22 And nothing requires specificity or particularity in that identification.
23 Right? Just, again, the '348 Patent does not describe any a priori knowledge
24 of what files may be present in the input buffer before going to perform this
25 step.

1 If there are no questions, I'll turn to the combination with regard to
2 this claim element for both patents.
3 For both the '478 Patent and the '348 Patent, the Kenley-Long
4 combination teaches claim Element 1.4 and, thus, renders the claims
5 obvious, regardless of construction.
6 Let's see here, just a moment – if I can invite the Board to 38 of the
7 demonstratives, here, to move the archived file from the memory buffer or
8 the temporary storage location, Kenley-Long searches the temporary storage
9 location for the archived file so that it knows what it is moving and when the
10 move is completed.
11 Without doing so, Kenley-Long would not even know whether there
12 is anything to move.
13 This is how the petition explained the combination of Kenley-Long.
14 And Kenley-Long searches the memory buffer for the archived file in
15 response to a first event. And once identified, that searched for archived file
16 is moved to the hard disc.
17 JUDGE COCKS: So, which construction of the searching term are we
18 relying – are you relying on here –
19 MR. MORTON-PARK: This –
20 JUDGE COCKS: -- in Slide 38?
21 MR. MORTON-PARK: Yes, this is for the proper contextual
22 construction that looks at the element in the context of the Patents. And so,
23 that would be the examination of the first temporary storage location to
24 determine whether any files are stored there.
25 JUDGE COCKS: So, your proposed construction, then? That's what
26 we're focusing on at this point of the searching term?

1 MR. MORTON-PARK: Yes, this is – that's what I'm discussing here.
2 JUDGE COCKS: That's fine, just going forward, I want to have that
3 in my head. So, thank you.
4 MR. MORTON-PARK: Yes, absolutely.
5 If I could invite the Board to Slide 37, again, just to emphasize that
6 the Kenley-Long combination knows what it's moving. Kenley-Long
7 updates the database that's tracking the locations of those archived files as
8 they're migrated. And so, Kenley-Long needs to know what it just moved
9 so that it can update the database to indicate that it moved it from the
10 memory buffer to the hard disc.
11 Regarding the narrower – the unduly narrow construction that's
12 offered by Patent Owner, Kenley-Long also satisfies that construction, as I
13 mentioned. Kenley-Long maintains the database of the backup locations of
14 files in order to aid file recovery and migration.
15 And Kenley-Long's database tracks all the archived files stored in the
16 memory buffer. And so, under that narrow construction, you realize that
17 when Kenley-Long is moving files from the memory buffer to the hard disc
18 and searching to locate those files, Kenley-Long has the database and uses it
19 to reference and see what files – what archived files are stored in the
20 memory buffer.
21 And then, it's able to search through the memory buffer and identify,
22 okay, there's the file that the database says in the memory buffer, now, I can
23 move it.
24 And so, that goes to the idea of searching for a specific file within the
25 memory buffer.

1 And similarly, Kenley-Long identifies presence of the archived file,
2 again, for the same reasons that I just described. Kenley-Long is moving the
3 archived file from the memory buffer to the hard disc. And in order to do
4 so, it moves – or searches – or identifies presence of the archived file within
5 the memory buffer. Otherwise, it wouldn't be able to perform the move.
6 JUDGE HOANG: So, Counsel, are you suggesting that simply
7 knowing that something exists, identifying its existence teaches searching
8 for a specific file? You mentioned that Kenley-Long keeps this archived
9 file, so it needs to know what file has moved and that's how that teaches the
10 searching for a specific file feature, right?
11 MR. MORTON-PARK: Mm-hmm.
12 JUDGE HOANG: So, are you suggesting that just having a list of the
13 data that's in the – that's being moved – is searching?
14 MR. MORTON-PARK: No, I – the act of moving – like move – like
15 going to move the file, right, it's not just, oh, I have a list of the files that are
16 here, but rather, going to the file to move it. The act of moving involves
17 locating that searching step in the same way – in order to move the file,
18 know when the move is completed.
19 JUDGE HOANG: So, this is going down a list and moving files to
20 files, is that really a search for a specific file or is that just going down a list
21 and doing the next step?
22 Okay, if I have a list of things to do, move one, two, and three, and I
23 just hopefully go down that list? Are you contending that that is a search
24 with, you know, a search for a specific file because it moves that – does that
25 specific action?
26 MR. MORTON-PARK: Of evaluating the list of files to move?

1 JUDGE HOANG: Well, you said that it has a list of things to do,
2 right? It's going down this list of files and it's moving all the files. And so,
3 as it's going down the list, it's saying, move file one, file two, file three.
4 So, you're saying just by going down that list – are you saying, just by
5 going down that list saying move file one, move file two, move file three,
6 you're searching for file one, file two, file three, is that your position?
7 MR. MORTON-PARK: Not in isolation. I think it's that that step of
8 evaluating what is there and what needs to be moved, but also the actual, as
9 a part of moving the file, that involves, in itself, a searching for that file that
10 has, you know, saying, oh, there's file a, file b, file c. Well, that file has
11 these file attributes defining it as such. And in order to move it, the process
12 needs to go to it.
13 It knows – so, under this, you know, discussion here right where you
14 have the list of what's in the memory buffer, you now know, okay, I'm
15 looking for file a, but it's not – the file doesn't magically teleport to the next
16 location now that I know what I want to move, rather, the process still needs
17 to actually perform that move. And in that, it needs to search for that file.
18 JUDGE HOANG: Thank you.
19 MR. MORTON-PARK: Thank you.
20 JUDGE HOSKINS: Mr. Morton-Park, which reference are you
21 getting this notion of a list from?
22 MR. MORTON-PARK: That would be – well, I wouldn't call it a list
23 too plainly –
24 JUDGE HOSKINS: I think you did.
25 MR. MORTON-PARK: I think –
26 JUDGE HOANG: I think that was me.

1 MR. MORTON-PARK: That was –
2 JUDGE HOSKINS: Okay.
3 MR. MORTON-PARK: But it would be more who would be more
4 perfect to refer to it as the catalog database described in Kenley, which is
5 tracking the backup locations of files.
6 JUDGE HOSKINS: Okay, so in Kenley, where is it that tells us that
7 what gets backed up is determined by that catalog? Does it – I understand
8 the cause and effect here. You're describing the combination as, okay, it's
9 time to make a backup, these are the things we're going to backup, whether
10 it's a file or whatever the definitional contours of the things to be backed up
11 are, there's a catalog somewhere of the things that we're going to back up.
12 And so, then, we need to search for those things in order to back them
13 up. So, that cause and effect is catalog, and then, go search for it.
14 What's the best disclosure in Kenley for that notion?
15 MR. MORTON-PARK: Your Honor, I'd like to clarify that. Here, the
16 cause and effect is not there's a catalog and, therefore, a backup of a file.
17 But rather, in the Kenley-Long combination, that backup occurs in response
18 to the system trying to modify that file so the file is backed up.
19 A copy is created, put into the memory buffer quickly –
20 JUDGE HOSKINS: But we're talking about moving from the buffer
21 to the second archive, right? We have to search the buffer. We're not
22 talking about – the claim language, as I understand it, is searching the first
23 temporary storage location, not searching the data that we're backing up
24 from the initial step. Do I have that wrong?
25 MR. MORTON-PARK: I don't believe you have that wrong, but to be
26 clear, in Kenley-Long, in the combination, right, so, say a file is about to be

1 modified, there's a modification request which is taught by Long. And then,
2 in response to that modification request, Kenley-Long takes a copy of the
3 file that's on disc and about to be modified, quickly copies it into the buffer.
4 That's the backup that's creating the archive file.
5 And it updates the database to say, okay, I just created this backup
6 which is now in this memory buffer in the first temporary storage location.
7 And then, it's – so, that was just a temporary place to hold this backup
8 copy so that you can create it quickly. That's what Long teaches in Exhibit
9 1004, column 7. It explains why, you know, to do this quick copy of this
10 file, you put it in that temporary place.
11 And then, so you have the backup already in the memory buffer. And
12 then, you're migrating it to disc. Right? So, that's – and that's the step
13 that's related to this Element 1.4, just to be clear. I'm not sure, does that –
14 JUDGE HOSKINS: No, I agree with you on that. So, I'm trying to
15 understand, though, this – if we're applying Patent Owner's claim
16 construction to the step of – we have to search that first temporary backup
17 storage location for an archived file. That's the limitation we're talking
18 about.
19 And I'm trying to understand what your position is to when the
20 backup file is moved from that first backup storage location to the second –
21 actually, it's not the second, so it's – because the second is actually the last
22 memory in the claim.
23 So, when we move it from the first temporary storage location to the
24 intermediate storage location, the claim says we – part of that is searching
25 the first storage location.

1 So, I was just struggling with if we're applying Patent Owner's claim
2 construction how the combination satisfies that limitation?
3 MR. MORTON-PARK: Well, the combination, you know, as
4 described, has – it creates this backup copy, right, puts it into the first
5 storage – temporary storage location, updates the database to indicate that
6 that, I just, you know, created this archived file. I put it in the memory
7 buffer.
8 And that comes from this teaching of the technique in Long of doing
9 this quick backup copy.
10 And then, responsive to some other event, it then starts to migrate that
11 file through – or to the disc, right, which is a more secure location. It's not
12 the memory buffer anymore.
13 And so, that's – and that searching there, right, I think that's just the –
14 in moving that file from the first location to the intermediate – to the hard
15 disc in Kenley-Long, it needs to search in order to move it. I think that's –
16 JUDGE HOSKINS: Okay, thank you.
17 MR. MORTON-PARK: Yes.
18 And again, that's just on Slide 37, perhaps, lays out what I've been
19 discussing about this – what Kenley-Long does in this context of the
20 narrower construction.
21 If there are no more questions on this Element 1.4, I might move on.
22 So, the Elements 1.6, 1.9, and 1.10 of both Claim 1 for the '348 and
23 '478 Patents are in this dispute. These are the claim elements that relate to
24 updating a database after putting an archived file in a location.
25 If I could invite the Board to Slide 23, so again, Kenley-Long includes
26 a database that stores and maintains locations of backup copies regardless of

1 where they're stored. And this database is updated each time the backup is
2 placed in a storage location, as taught by Long.
3 And so, in the combination, right, we're using Kenley's database
4 catalog and the regular updating of an audit header which is analogous to a
5 database, and in combination every time a file is placed in a location, this
6 database is updated to indicate that the file is located there.
7 If I can invite the Board to Slide 25, Patent Owner argued that
8 Kenley's catalog does not store the location of any files – of any archived
9 files. But Kenley clearly discloses a backup location identifier as stored as a
10 file attribute in the backup catalog.
11 These passages of Kenley here in Slide 25 describe a backup file
12 location identifier that enables Kenley's system to properly backup and
13 restore files.
14 Here, at the top passage in Exhibit 1014, column 7, lines 51-62, this
15 identifier which is also referred to as the backup location identifier, includes
16 information such as the volume ID, the file starting offset, storage length,
17 and the file length. So, these are all different storage locations and a way of
18 indicating the precise storage position.
19 It also notes that the file identifier can refer to either secondary
20 storage or backing storage.
21 Again, here on the right in column 8 of Exhibit 1014, lines 10-13,
22 Kenley notes that the file characteristics, for example, you know, that is the
23 name and attributes which include the aforementioned baseline backup
24 location identifier. That's also clearly this identifier that's discussed at the
25 top of this Slide 25 is in this catalog.

1 And so, Kenley clearly discloses this backup catalog that indicates the
2 location of these files.
3 And again, in general, despite the express disclosure of Kenley with
4 regards to its catalogs, skilled artisans, in general, knew that catalogs store
5 file locations.
6 This Slide 26 includes an except from Microsoft Computer
7 Dictionary, Exhibit 1027, with its definition of catalog, which defines
8 catalog as usually containing the location of files.
9 And so, even if Kenley didn't include that express disclosure of a
10 backup location as a file attribute, skilled artisans would have known that for
11 Kenley's catalog to be useful for retrieval and restoration, that it would
12 include the locations of those backup files.
13 And overall, Kenley-Long, again, includes a database that stores the
14 backup locations of every archived file so that it's able to locate it no matter
15 where it's stored in hierarchical storage architecture.
16 If there are no more questions about the database elements?
17 JUDGE HOSKINS: Can you walk us through Long in that regard?
18 Like where -- how is it that Long is tracking the location of its archived data
19 as it moves through the various backup storage locations?
20 MR. MORTON-PARK: Well, Long includes the audit header,
21 describes this audit header that it uses to maintain the audit subsystem.
22 And Long discloses right when creating this backup copy, creating a marker,
23 and this marker has the marker information, so when it creates that marker
24 and puts it into the memory buffer, and this is in column 7 of Exhibit 1004,
25 that information goes into this audit header.

1 It's the last marker information, right, the last thing you put into the
2 memory buffer, that's there. And then, it shows, if I can refer to Slide 7,
3 Figure 5 of Long here on the right, notes that after moving the backup data
4 from the memory buffer to the hard disc, the system then updates the audit
5 header to reflect those changes. And that's also described in column 7.
6 And so, that is this updating of the audit header to indicate that this
7 location has changed for this backup copy. And then, it also describes,
8 again, I believe in column 9 of Exhibit 1004, when it makes that move from
9 that intermediate -- the hard disc to the archived media, the permanent
10 storage location, it, again, updates the audit header.
11 And so, this, you know, the combination primarily relies, again, on
12 less on the specifics of Long and what exactly -- what information it might
13 be updating in the audit header. It clearly is somehow recording information
14 about backup locations.
15 But more importantly, it is making these updates. There's this express
16 disclosure of updating the audit header at these certain moments.
17 And so, in combination with Kenley, where this is, again, not a bodily
18 incorporation of Long's audit header into the database of Kenley, but rather,
19 you know, that's the fact that skilled artisans would have understood that
20 that catalog, that database, needs to be updated every time they move a file.
21 And that's consistent with these teachings of updating the audit header
22 each time that a file -- or this backup copy in Long, in isolation, is moved or
23 put into a particular storage device.
24 JUDGE HOSKINS: Thank you for that. I appreciate that, and I
25 understand the position.

1 I just have one more question for you on that, the marker -- the format
2 of the marker in Long has this marker header and maker trailer identified in
3 Figure 3. Do they play a role in -- in your view, do they play a role in
4 helping to track the location of this archived data in Long? Is that what
5 they're doing or are they doing something else?
6 MR. MORTON-PARK: My understanding of the way, you know,
7 using that is that marker data, the header and the trailer, are basically
8 delineating that data in the memory buffer and -- or essentially metadata like
9 attributes, saying this is that backup copy. In a sense, that's what that
10 marker header seems to include.
11 But the audit header is what is tracking the locations of the backup
12 data.
13 JUDGE HOSKINS: Okay, thank you.
14 MR. MORTON-PARK: I believe I touched on this a little bit, but
15 there -- if I can invite the Board to Slide 9, there were a number of rationales
16 for combining Kenley and Long. So, here, I'm just discussing the
17 combination in general so I can address the disputes.
18 Here, Patent Owner argued that skilled artisans would not have
19 combined Kenley and Long, simply because Kenley describes a files-based
20 system while Long describes a sector-based system -- or sector-based
21 embodiment.
22 Patent Owner's arguments all assume the fundamental incompatibility
23 between file-based techniques and sector-based techniques. But as
24 evidenced, Patent Owner's expert simply described aspects of files and file-
25 based systems, aspects of sectors and sector-based systems.

1 And then, made the logical leap to say, oh, skilled artisans could never
2 apply one technique from this conceptual level to another.
3 Didn't really explain why skilled artisans couldn't do that, but rather, just
4 concluded. In fact, based in fact, there are differences, certainly, between
5 these two approaches, these two conceptual levels, but there's some
6 incompatibility.
7 But again, referring to Slide 9, the petition laid out a number of
8 rationales for why skilled artisans would have naturally combined Kenley
9 and Long. This wasn't a bodily incorporation of Long's teachings, but
10 rather, hints at Kenley, but rather, the use of the general purpose technique
11 taught in Long to improve upon Kenley, a file-based system.
12 And this Kenley-Long combination improves the completeness of file
13 backups by making -- and makes sure that no files that are frequently
14 changed are lost between backups.
15 Second, you know, Long's technique improves Kenley's similar
16 system. They both have similar architectures and are concerned about
17 preserving data.
18 Third, Long's technique is applicable to files. There's no real
19 evidence that suggests otherwise. And I can touch on that a bit more in a
20 moment, if there aren't further questions.
21 But again, also the backup storage architectures were complementary.
22 Right? Skilled artisans would not need to modify the architecture of
23 Kenley's storage system to accommodate the teachings in Long of creating
24 this backup copy and migrating it through different tiers of storage.
25 And then, fifth, Kenley's system catalog fits conveniently and easily
26 with Long's audit header teachings. So, that's another complementary point

1 that would play a role in motivating skilled artisans to make this
2 combination.
3 And so, again, Long's technique was applicable to files. Skilled
4 artisans would have recognized when reading Long that this technique of
5 using a modification request from an application, as described in Exhibit
6 1004, could easily be applied to initiate a backup process in a file-based
7 system.
8 And skilled artisans also knew that data is typically organized as files
9 and that helps the ease of access and maintaining of the data. Kenley also
10 describes that using a file organization or file attributes include the backup
11 location of files, enables the proper backup and restoration of files.
12 And so, skilled artisans would have naturally turned to using a file-
13 based approach for backup due to the benefits of file organization compared
14 to a sector-based embodiment.
15 I'd also like to turn to Slide 15. This is Schneider-US, Exhibit 1016.
16 This is an important piece of evidence that was discussed in the petition, a
17 prior art reference that expressly described using Long's technique -- this
18 modification driven technique -- but applying it to files.
19 And the Patent Owner Response did not dispute or even address
20 Schneider-US. It did bring up arguments in Surreply, but those were waived
21 by not raising them in the Patent Owner Response. And they are also not
22 supported by expert testimony and they're also wrong on the merits.
23 Just briefly, without -- since we didn't brief this, but the Surreply
24 discusses how Schneider-US mentioned drawbacks. But that is in the larger
25 context of tradeoffs between different types of methods for capturing files.

1 And there's nothing in Schneider-US that says, no, you should not apply
2 Long's technique to files, or you can't.
3 And if I can invite the Board to Slide 17, this just outlines the POR
4 arguments again. But the Patent Owner Response did not dispute the
5 benefits motivating the combination or Schneider-US, as I just described,
6 but instead asserted those challenges of mixing techniques, as I mentioned
7 before, from there made a teaching away argument and also argued that this
8 combination required re-engineering and changed the principle of operation.
9 But all those arguments, again, focused on bodily incorporation,
10 which I hope is clear, is not what the petition proposed in the combination of
11 Kenley and Long.
12 And there's no evidence that has been advanced since the preliminary
13 briefing. These were the same arguments made in the preliminary briefing
14 and the Board correctly rejected it.
15 There's no new arguments further demonstrating that, you know, any
16 of these points of there being these supposed challenges or teaching away or
17 re-engineering would be necessary. And so, the bodily incorporation
18 assumption -- or, presumption should be rejected for the same reasons.
19 I believe the -- if there's no further questions, that's all I have to say
20 on Ground 1.
21 And before I start with -- are there any questions about Ground 2, this
22 Cabrera-Schneider-Whiting?
23 Okay, well, I'll just briefly walk through some of the main points here
24 since I have a bit of time.
25 So, in the Patent Owner Response arguments against this Ground 2
26 combination of Cabrera-Schneider-Whiting, the Patent Owner Response did

1 not dispute the benefits of making this combination but rather made these
2 specific arguments against the combination and why it wouldn't have been
3 obvious.
4 Patent Owner argued that Cabrera, the Exhibit 1005, is fundamentally
5 periodic and, therefore, making the proposed combination would alter the
6 principle of operation, and therefore, this wouldn't be an obvious
7 combination.
8 Patent Owner Response also argued that the proposed combination
9 would not work in the system of Cabrera. Both of these arguments kind of
10 miss the point of the combination.
11 If I can invite the Board to Slide 43, regarding Patent Owner's
12 argument that Cabrera is fundamentally periodic, there's nothing in Cabrera
13 that suggests that its fundamental premise is periodic.
14 This excerpt from Exhibit 1005, column 10, describes multiple
15 triggering events that initiate backup. Right? One of them is the
16 accumulation of a given amount of data, another is the expiration of a given
17 time delay.
18 But there's also a description of any other triggering event as well as a
19 command to save data -- a command to initiate the backup.
20 So, Cabrera describes multiple alternatives as examples of how you
21 might initiate the backup process but make sure at the end, as highlighted
22 here, any triggering event could be used. And the combination, a triggering
23 event is an attempt to modify a file, as taught by Schneider.
24 And in this -- so, this argument that Cabrera is fundamentally periodic
25 and that making that modification would change the principle of operation,
26 that's simply incorrect.

1 If I can move on Slide 44, Patent Owner also argued that this
2 combination would fundamentally not work because the data in Cabrera is
3 allegedly backed up after the data is present in the local storage area. There
4 are no real issues here.
5 Patent Owner seems to be focusing on instances where a file is not yet
6 produced by the data producer as shown here on the right in Figure 2 of
7 Cabrera, Exhibit 1005. Right?
8 So, yes, Patent Owner assumes that files don't yet exist in the local
9 storage area, and therefore, can't be backed up. And of course, no backup
10 method can back up a nonexistent file or yet to exist file.
11 But the combination looks to files that are stored in the local storage
12 area already and are about to be modified by those data producers or edited
13 or otherwise changed. And in response to that attempt, that request to
14 modify that file in the local storage area, the combination makes a copy of
15 that file that's stored in the local storage area.
16 And so, it exists already, the file that's being copied. And there's no
17 real issue here with the combination working.
18 And that said, the combination not working, the evidence shows that
19 skilled artisans had a reasonable expectation of success implementing this
20 combination. Skilled artisans knew how to use file intercepts to intercept the
21 command to access a file or modify a file. And then, use that to trigger
22 another process, as described in the petition.
23 If I can invite the Board to Slide 46, Patent Owner's own expert
24 confirms that the easiest way to detect, read, and write commands from other
25 programs is to use an interrupt, this interrupt handler and explained it in
26 detail that this how you would do it. And you can, you know, use this

1 interrupt handler to initiate another process before you return to completely
2 write.
3 That's the same interrupt that's described in the prior art cited in the
4 petition. And so, the evidence seems to show that skilled artisans could
5 easily make this combination of Cabrera-Schneider-Whiting.
6 If I can invite the Board to Slide 47, for this Element 1.4, this turns on
7 whether the Board adopts the proper contextual construction of Element 1.4,
8 or rather decides to narrow the element and scope of the element.
9 We did not argue against that narrower construction for Element 1.4
10 for the Ground 2. But Patent Owner also made no arguments against this
11 combination with regard to the proper contextual construction.
12 So, again, in the mapping of Cabrera-Schneider-Whiting, this
13 combination as taught by Cabrera in response to this first event, need to
14 evaluate the temporary storage area to decide whether to append more data.
15 And in doing so, as the petition explained, Cabrera-Schneider-Whiting
16 searches for, identifies presence of those files that are stored in that
17 temporary staging area -- the temporary storage location.
18 There's also a dispute here about the database elements, Elements 1.6,
19 1.9, and 1.10, I'm referring now to Slide 49 -- or 48, excuse me. Whiting,
20 Exhibit 1006, was cited for Ground 2 as disclosing this global directory
21 database which is used to store the locations of backup files across different
22 storage devices.
23 And Whiting also explained, as shown in this lower excerpt, of why
24 these methods would be used with hierarchical storage management systems
25 such as that taught by Cabrera.

1 If I can invite the Board to Slide 49, Whiting was cited as providing
2 implementation details and support for what skilled artisans would have
3 done at the time. The skilled artisans knew that you need to track the
4 location of the files. You don't just lose them in your system.
5 And, you know, Whiting provides a pretty simple disclosure of this
6 global directory database of storage file IDs precisely explaining where the
7 backup file is located.
8 And if I can invite the Board to Slide 50, just one final point, there's a
9 dispute about Elements 1.5 and 1.8 with regard to this Ground 2
10 combination. Elements 1.5 and 1.8 of the claims are satisfied with the
11 teaching in Cabrera.
12 I'm not sure if it's cutting off, but we can go back to this specific
13 language if I can invite the Board to Slide 2. So, quickly, 1.5 describes
14 moving the archived file to a second storage location responsive to a second
15 event, and that's the permanent storage location. So, 1.5, the move of the
16 archived file to the second storage location is triggered by the second event.
17 And in Element 1.8, the archive file is moved from the first temporary
18 storage location to an intermediate storage location. And note that there's no
19 events in 1.8 detailing that move from temporary to the intermediate.
20 So, if I can invite you back to Slide 50, this paragraph here from
21 Cabrera, Exhibit 1005, column 7, lines 47-60, shows these two elements.
22 So, at the top, the highlighted portion points out that second predetermined
23 event occurs, and then the system transfers the data to remote storage. That
24 is the transfer of the archived file from the temporary storage location to the
25 permanent storage location. And that's 1.5.

1 Element 1.5 doesn't specify where that data is being transferred from
2 at the time of that second event. Rather, in response to a second event, the
3 archived file is moved.
4 Cabrera describes, as I'm trying to point with this laser pointer here
5 on the bottom of this excerpt, that as a part of that move to the remote
6 storage, the permanent storage location, the archived file is placed in an
7 intermediate subsystem, an intermediate storage location.
8 And so, Cabrera-Schneider-Whiting in combination moves the
9 archived file to an intermediate storage location on its way to remote storage
10 in response to that second event. And then, it doesn't seem to be, from my
11 understanding, any inconsistency with these Elements 1.5 and 1.8. In fact, it
12 seems to be an exact teaching of those two steps.
13 So, if there are no further questions, I'd like to reserve the rest of my
14 time.
15 JUDGE COCKS: One question. Is there any -- are any of your
16 arguments distinct to either cases, the 00078 and 00079, or is there
17 essentially a complete overlap?
18 MR. MORTON-PARK: Aside from the claim construction points,
19 which are also a bit similar, they are largely the same and overlap, yes.
20 JUDGE COCKS: Well, let me push back a little bit. You say a bit
21 similar. Is there a variation in the claim construction arguments? I know the
22 language is different, but is the position the same for both?
23 MR. MORTON-PARK: The position -- our position is the same for
24 both.
25 JUDGE COCKS: Understood, thank you.

1 All right, you have nine and a half minutes remaining on top of your
2 30 minutes that you reserved.
3 MR. MASON: Judge Cocks, under LEAP, can I just make two
4 clarifications real quick?
5 JUDGE COCKS: Yes.
6 MR. MASON: I don't even know that these are needed, it might just
7 be me overlooking.
8 But to clarify Judge Hoskins's questions, on claim construction, we
9 are not arguing disclaimer-based on the prosecution history statements. And
10 so, all the Patent Owner's cases are inapposite. We're arguing that they
11 gave examples of what the claim encompasses. Just wanted to clarify that.
12 And then, on the second question about the triggering movement from
13 the memory buffer, so with Long, it teaches that you have a triggering event,
14 the memory buffer is pulled or otherwise needed.
15 Kenley teaches using this database catalog to trap the files, to locate
16 the files for movement within the system or for retrieval.
17 And so, when you have this triggering event that's taught by Long
18 within this combination then, the system examines the catalog database,
19 determines, okay, I have archived files in my memory buffer, now I have to
20 search for those memory files in the archive buffer in order to locate that
21 data and move that data to the other storage location.
22 So, I just wanted to make sure I spoke to that. That's discussed at
23 pages 13 to 14 of Petitioner's Reply.
24 JUDGE HOANG: So, let me ask a question then about that. You
25 talked about that data. Are we talking about specific data or is it just

1 whatever resides in that first temporary storage location has to be moved to
2 the intermediate storage location?
3 MR. MASON: It's the specific data associated with a given archived
4 file. So, using that catalog database taught by Kenley, the -- it gives -- it
5 tells you, okay, this is an archived file. The archived file is located in the
6 memory buffer, I'm going to go – it needs to go find that particular file so
7 that it can, you know, that it knows that it's moving the entirety of the file
8 and it knows when the file is done. And so, it is moving a specific file.
9 JUDGE HOANG: Okay, so, what is your best disclosure in Kenley
10 for saying that we're going to archive a particular file or a specific file?
11 MR. MASON: And you're saying in Kenley?
12 JUDGE HOANG: Yes, I think that's what you were saying as where
13 you were getting that from. Maybe I misheard.
14 MR. MASON: Yes, so I think the -- in Kenley, and again, this is
15 under the narrow construction offered by Patent Owner, but Kenley --
16 JUDGE HOANG: Correct, agreed, yes, that's why I was asking the
17 question.
18 MR. MASON: Yes, yes, and so, Kenley, and this Slide 36, speaks to,
19 you know, maintaining data in the form of files having attributes and
20 selecting files to be migrated. So, this is Exhibit 1014, column 3, lines 1-8.
21 And then, if we turn to Slide 37, Dr. Maier explained that within the
22 combination, right, this is, again, not bodily incorporation, and the skilled
23 artisan is implementing this, because it's moving files, right, the Kenley-
24 Long system updates the database to indicate the location of an archived file.
25 And in doing so, it has to know what files it moved from the memory buffer

1 to the other buffer on disc in order to appropriately update the database.
2 Right?
3 In order to make sure that the move's completed properly, it has to go
4 look for and find that particular file. And that also needs to be done in order
5 to update the database properly.
6 JUDGE HOANG: Thank you.
7 MR. MASON: Thank you, Your Honors.
8 JUDGE COCKS: You'll have 35 minutes.
9 MR. MASON: Okay, that's perfect, thank you, Judge Cocks.
10 JUDGE COCKS: Patent Owner?
11 Whenever you're ready.
12 MR. JAFFESS: Yes.
13 JUDGE COCKS: Mr. Jaffess, is that your name?
14 MR. JAFFESS: Mr. Jaffess, yes, thank you, Your Honor.
15 JUDGE COCKS: And do you wish to reserve any surrebuttal time?
16 MR. JAFFESS: I would like to reserve 18 minutes, Your Honor, 18
17 minutes. I may go a little over.
18 JUDGE COCKS: Well, the surrebuttal time is simply so I have
19 something to end with. Use your time as you see fit. You have 48 minutes -
20 - I'm sorry, 42 minutes.
21 MR. JAFFESS: Do we have 75 minutes?
22 JUDGE COCKS: I'm sorry, 75, I apologize.
23 MR. JAFFESS: No problem.
24 JUDGE COCKS: Fifty-seven minutes, then.
25 MR. JAFFESS: Sorry, I use an odd amount of time for my surrebuttal.
26 JUDGE COCKS: You may begin when you're ready.

1 MR. JAFFESS: Thank you, Your Honor.
2 Please the Board, it's a pleasure to be here on behalf of Patent Owner,
3 Datanet.
4 Just by way of introduction, the patents we're talking about here come
5 from a real company developing a real product called AccuSafe. It's a
6 revolutionary product.
7 The provisional patent application underlined the two challenged
8 patents in this case, Exhibit 1028 provides a lot of material from that
9 development. I just want to set the stage here.
10 I'm going to start with the claim construction, searching for the
11 archived file, and we're putting up Petitioner's Microsoft's dictionary,
12 Exhibit 2023, on the definition of search.
13 But the argument here is that searching for the archived file requires
14 an actual search for the actual archived file, both parts of this.
15 Both of which they ignore in their overly broad construction.
16 So, the claim limitation here is searching the first temporary storage
17 location for the archived file. This is Limitation 1.4. It's slightly different in
18 the 79 case, the '348 Patent that's identifying the presence of the archived
19 file.
20 So, the searching part is different, that word, but the object of this
21 action in both sets of claims is the archived file which takes antecedent basis
22 from the prior limitations in all sets of the claims that are challenged here.
23 The antecedent basis is the file created in Limitation 1.3 from the
24 operating file on which an operation was detected, in Limitation 1.2,
25 temporally proximate to that operation being performed. It's a particular
26 file; it's not any files.

1 The arguments about the prosecution history, I don't know what case
2 law they're going under because they cited no case law when they cited to
3 this prosecution history. But we've cited a bunch of cases, summaries from
4 the Federal Circuit and a few District Court cases as well to show that
5 exemplary support is not limiting or definitional.
6 And especially in this case, when the particular limitation at issue for
7 the exemplary support was not at all at issue in the appeal brief underlying
8 the prosecution history. And it was not used to distinguish over any prior
9 art. It was just exemplary support.
10 There were other potential examples for support. The exemplary
11 support is certainly related to the limitation in question. It involves the
12 temporary buffer, just like we're talking about and it involves identifying the
13 presence. But it's not the language that was actually claimed, it was other
14 support.
15 And the exemplary support is missing --
16 JUDGE HOSKINS: Mr. Jaffess?
17 MR. JAFFESS: Yes, sir.
18 JUDGE HOSKINS: So could you turn to Petitioner's slide 29, do you
19 have that ability?
20 MR. JAFFESS: Yes, sir.
21 JUDGE HOSKINS: Just so I'm looking at the same, we're all
22 looking at the same thing. Do you have that in front of you? I can't tell.
23 MR. JAFFESS: Yes, Your Honor, I do.
24 JUDGE HOSKINS: Okay, thank you. So you said, during the
25 prosecution history, it was represented to the Office that these disclosures

1 that are here in orange correspond to the searching term, are you saying that
2 was wrong, are you disagreeing with that?
3 MR. JAFFESS: I'm saying it's not limiting that it relates to one
4 another, but that the words of the claim are what governs and not the spec
5 support that was exemplary at the time, and to take this exemplary support
6 and import it into these words that are different would be the classic case of
7 importing limitations from the spec into the claims.
8 JUDGE HOSKINS: So are you saying that -- as I understand
9 Petitioner's position, the searching can encompass what you've construed it
10 to be, which is requiring this comparison of patterns, like to identify a
11 particular file, that is one example of searching, but another example of
12 searching, Petitioner is telling us, from the prosecution history, is examining
13 the buffer for the presence of archived files, which is what you told the
14 Patent Office at the time. So, with respect to that second part, are you
15 saying it's no longer an example of searching in your view?
16 MR. JAFFESS: First of all, the language is different. This says any
17 archived files or files plural, rather than the archived file, and it's not
18 searching, it's examining, to see the presence of anything in the buffer.
19 Again, it's relevant because it's using this buffer, and it has this check, so it
20 is related to it, but it doesn't define searching, and it certainly doesn't define
21 searching for the archive file that was created in the antecedent basis, the
22 other limitations, 1.1 through 1.3.
23 JUDGE HOSKINS: So if we go to the exhibit -- please go ahead.
24 MR. JAFFESS: It was also a throwaway, I mean, this was not directly
25 at issue -- throwaway may be too strong of a word, so let me take that back,
26 but the point is, this was not at all at issue in the appeal brief, the arguments

1 in question, they had to do with the operating system and what was going on
2 there, it was not about this limitation at all, it was someone putting spec
3 support in that time, exemplary support for other limitations.
4 JUDGE HOANG: So every -- sorry, excuse me Counsel, every
5 example, at least this is Petitioner's position, cited in that appeal brief for
6 this specific limitation shows searching for any files, right, this broad
7 interpretation, so are you trying to say that there's -- is there any other
8 written description support showing searching for a specific file, or is the
9 only written description support you had in the appeal brief only directed to
10 seeing if there are any files existing at all?
11 MR. JAFFESS: In the appeal brief, there were three examples given
12 that are shown on this screen, there was other possibilities for support for
13 searching, there were two other uses of searching used in its normal course
14 within the specification, and then the original claim had this limitation as it's
15 written now, limitation 1.4 was in the original claim, which as well provides
16 specification support --
17 JUDGE HOANG: And do you have any citations in the record
18 evidence where searching is for a specific file?
19 MR. JAFFESS: Again, it's in limitation 1.4, I don't know the exact --
20 it was in the original claim set, so I don't know if it was in the same exact
21 position at that time, because the claim's obviously been amended over time.
22 JUDGE COCKS: So Counsel, can you remind me the context in the
23 appeal brief as to why, for instance, this Figure 2B, box 100, was offered for
24 the limitation in question?
25 MR. JAFFESS: At the time, it was then pending, it was claim 34, and
26 the arguments at issue in the appeal brief related to detecting an instruction

1 from an operating system, so the search limitation wasn't at issue in these
2 arguments with the Examiner at the time, it was just a list of all of the then
3 pending limitations and exemplary support for each of them.
4 JUDGE COCKS: Thank you.
5 JUDGE HOANG: Why would we take a construction that reads out
6 an example?
7 MR. JAFFESS: I think because the words are different, basically.
8 Why would you include --
9 JUDGE HOANG: But the words in the appeal brief, the limitation is
10 exactly the same, in the appeal brief they pointed to these examples we see
11 on screen here, so to the original question that Judge Hoskins asked, should
12 we just disregard what the appeal brief said?
13 MR. JAFFESS: No, but you should not disregard the actual language
14 of the claims and that it differs from this.
15 JUDGE HOANG: But the appeal brief is suggesting what that
16 language of the claims means by giving us an example.
17 MR. JAFFESS: It's pointing to relevant disclosure in the
18 specification, I don't think it's an example of what would actually meet the
19 limitation.
20 JUDGE HOANG: Thank you.
21 MR. JAFFESS: I don't think it meant as such. Again, it was not at
22 issue there, it was not distinguishing over the prior art, it was citations that
23 were included. It is the words of the claim, what matters, and again, this
24 search is specific to the 478 Patent, in the 348 Patent, the 79 case, it's
25 identification, but again, identifying the presence of, but again, it is the
26 archived file, which takes antecedent basis. It's the object of the search.

1 The patentee knew how to say any archived files, present archived files
2 plural, and specifically recited in limitation 1.4, searching the first temporary
3 storage location for the archived file.
4 Petitioner's expert, this is Exhibit 2022, pages 70 to 71, Dr. Maier,
5 when asked about searching in the sense of when we have a collection of
6 information, requires identifying an element of that collection. So their
7 expert understood this meant the actual archived file in both cases, and not
8 any file. This is in line -- actually, sorry, I misspoke. That is specific to
9 searching, so that goes to the 478 alone, but this is in line with Patent
10 Owner's definition, of course. They ignore their expert's opinion.
11 JUDGE COCKS: Counsel, what portions of Exhibit 2022 did you just
12 reference?
13 MR. JAFFESS: It's page 70, line 16, to page 71, line 14. This is
14 because all of the examples that were given in the petition were examining
15 the whole -- they were arguing about examining the whole buffer to see if
16 anything was there. Now, do Your Honors have any other questions about
17 claim construction?
18 Moving on to Ground 1, the Kenley-Long limitation -- sorry, the
19 Kenley-Long combination on limitation 1.4. So, Petitioners argue that a
20 POSITA, that's how I was taught the term, person having ordinary skill in
21 the art --
22 JUDGE COCKS: Counsel, we understand what a POSITA is.
23 MR. JAFFESS: Okay -- would have implemented Kenley-Long, so to
24 file copy to the memory buffer is done with such marking metadata in order
25 to mark, identify, copy archived file, as the specific archived file, this is in
26 their Reply, and they cite the original declaration of Dr. Maier. This was an

1 argument introduced in reply, and the underlying expert citations, which is
2 Exhibit 1003, paragraphs 67 to 68, they do not support this argument. As a
3 brief background of Long, I think I've basically gone through this, but
4 Figure 2B shows the audit buffer, shows the audit header, and then the
5 markers that follow, and then Figure 3 shows each of the markers, there's a
6 marker header, the data, and the marker trailer.
7 The only metadata that's referenced in paragraph 67 to 68 of Dr.
8 Maier's original declaration is the marker trailer, which supposedly contains
9 information required to determine the location of the marker header, this is
10 in paragraph 68 of his first declaration. They're reading between the lines
11 here, there's a lot of reading between the lines here, to be honest. There's
12 nothing in the Long markers to help determine one version of data from
13 another, let alone one file from another file, of course. There's even an
14 error, as we pointed out, in the cited disclosure of Long about the marker
15 trailer. The actual disclosure does not even contain information required to
16 determine the location of the marker header, therefore it does not even allow
17 for the stated purpose of accessing the audit buffer in the first order, as Long
18 alleges it does, and upon which functionality Petitioners rely.
19 The fields in the marker trailer, if we can go to table three of Long,
20 Exhibit 1004, this is in column six, these are the fields of the marker trailer,
21 the event type, the length of the optional text string, and the CRC, cyclical
22 redundancy check. None of these fields allows for accessing anything. In
23 deposition, Dr. Maier stated, quote, and this is Exhibit 2025, page 51, lines
24 18 to 19, he said it's possible that the description given there for that field is
25 not the best possible one. It's an error that Dr. Maier did not even recognize
26 until it was pointed out to him, he tried to correct Long on the spot in

1 deposition, arguing that for the stated purpose, a POSITA would understand
2 the marker trailer had to contain information reflective of the total length of
3 the marker.
4 But there is no such data in the long marker trailer, as disclosed. This
5 is in addition to the mistake from Long pointed out in the Patent Owner
6 Response, where Long conflated its audit header and marker header, this is
7 in our Patent Owner Response 20 to 21, and this was discussed at the
8 deposition of Dr. Maier, the first one, Exhibit 2022, pages 69 to 70, 6921 to
9 76, but the main point here is that nothing's wrong with Petitioner, Dr.
10 Maier's original declaration has anything to do with metadata or
11 distinguishing versions of data or files. This came in reply.
12 They then argue from here that a POSITA would implement the
13 combination of Kenley-Long so that the relevant marking metadata and the
14 current location would be stored in a database. There is no such relevant
15 marking. They argue that a POSITA would naturally augment the catalog
16 database of Kenley to store relevant information from the audit header
17 taught by Long. This is where the argument began, you take Long's audit
18 header information and put it into the database of Kenley, but the audit
19 header, as we've pointed out extensively in our briefing, the audit header of
20 Long does not store anything about the location of markers, other than the
21 first and the last, it doesn't store the intermediate markers. There were some
22 arguments about semaphores, they have not brought those up today. Again,
23 semaphores have nothing to do with searching for a particular archived file
24 in Long, or identifying the presence of any particular archive file in Long.
25 Then there's discussion of flushing the buffer in Long. This is
26 important. They talked about moving data from the Long memory buffer to

1 the audit portion on the disk, it doesn't just move data, it flushes it, all of it,
2 it doesn't even move part of it, ever. This is what happens. That's
3 important because it's not going through this data, and certainly not
4 searching through this data, it's flushing the entire memory buffer. That's
5 how it's set up, that's why it tracks the beginning and the end, and not
6 anything in between, and just pins it to the end of the memory buffer that's
7 on the disk, in the audit partition, and then it clears the metadata in the -- or
8 location data, I misspoke about metadata, but it clears the data that's in the
9 audit header that's on the memory buffer. That's what it does, it just resets
10 it. There's no searching here.
11 As Mr. Jawadi testified, Long stores the location of the first and last
12 markers, not those in between, it stores the data in a buffer contiguously, this
13 is undisputed. So Long -- this is disputed, this next part. Long would copy
14 the buffer from the beginning to the end as a block copy. They say
15 otherwise, but that's why it's set up as such, it flushes the whole thing, it
16 takes it and moves it over when copying the data to the audit partition. This
17 is why Long tracks the beginning and the end of its memory buffer to allow
18 it to copy the entire buffer in a block, without requiring any searching, or
19 even traversing through the memory buffer, let alone searching for anything
20 in particular. So now we move to Kenley, and it's --
21 JUDGE HOSKINS: Mr. Jaffess, before you go on, I have one
22 question about this. So you just walked us through all of your arguments
23 about how Long doesn't search, are all of those arguments premised on your
24 claim construction being adopted, or do they also apply if we take this
25 example that Petitioner just pointed us to as an example of searching?

1 MR. JAFFESS: I would submit that that would be ignoring the
2 definition of a search as it should be used, and that would ignore the object
3 of the search.
4 JUDGE HOSKINS: I understand the claim construction argument,
5 I'm asking you if we do apply Petitioner's claim construction, despite your
6 objections to it, do all of your arguments about Long still apply, or are they
7 just premised solely on your claim construction being applied?
8 MR. JAFFESS: I'm just thinking through each of them. If their
9 definition -- if the Board finds that their definition is proper, then I believe
10 our arguments would not apply, as far as Long is concerned, to limitation
11 1.4.
12 JUDGE HOSKINS: Thank you for that. Understood, thank you.
13 JUDGE COCKS: Counsel, I have one more question before you go
14 on. You used the word, I think the term data flush connecting with Long,
15 does that appear in Long itself, or is that your phase?
16 MR. JAFFESS: Flush appears in Long. It's in the audit header field,
17 and then it's also in column eight, line 22 of Long. That's what talks about
18 moving -- it's not moving data, that's what talks about flushing that out from
19 the memory buffer. If there are no further questions on Long, I can move on
20 to Kenley. They rely very heavily on selecting files to be migrated to argue
21 that the combination searches for archived files. You know, the citation is in
22 the Petition, the argument is absent, to be fair, but regardless, the selecting in
23 Kenley, move the file from the secondary to the backing storage. It has
24 nothing to do with the RAM in Kenley, which they say corresponds to the
25 memory buffer.

1 If we can go to their slide 25, Petitioner's slide. You can see on slide
2 25, this is Exhibit 1014, column three, lines 17 to 24, it selects data files to
3 be migrated to the backing store. This is from the secondary to the backing
4 store. Bear with me for just a moment. This is also in column three, lines
5 five to eight of Kenley, moves files from secondary to backing storage. It
6 has no bearing on the first temporary storage location, which is recited in
7 limitation 1.4. They map that to the RAM of Kenley, this has nothing to do
8 with the RAM of Kenley. You can see the mapping of the three tiers in their
9 slide five, RAM, magnetic disk, optical disk, and slide 13 of theirs, or
10 Petitioner's, excuse me, shows the three levels of storage, the two references
11 allegedly line up. They talk about the compatibility of these three tiers of
12 storage. Limitation 1.4 is about the first temporary storage location, so even
13 if you take everything they say about Kenley's catalog and even if it stores
14 locations as they say, it has nothing to do with limitation 1.4.
15 We disputed in the papers whether the catalog actually stores this
16 location data, but again, it's irrelevant to limitation 1.4 in the searching, and
17 you'll see, I'm going to argue now, it's irrelevant to limitation 1.6, the
18 database limitation, about the first temporary storage location. If there are
19 no questions further about limitation 1.4 in relation to Ground 1, I'll move
20 on to the database limitations, this is 1.6, 1.9, and 1.10.
21 Again, we argued extensively in our papers, Patent Owner Response
22 18 to 19, about the Kenley citations that they point to for the database
23 limitation, they don't actually show storage of location information. They
24 characterize Kenley as requiring the location of archived files for it to work,
25 but they're reading it in. They rely on a dictionary definition of catalog, or if
26 they're writing our use of a dictionary definition, as including location files.

1 All the disclosures of Kenley from the Petition show is that lists of files are
2 saved and maintained, it's not location information. Set X has files a, b, and
3 c, that's what's shown, it's argued in the papers. This is the first declaration
4 of Jawadi, Exhibit 2020, paragraph 173.
5 So again with Kenley, even if Petitioners are correct, though, about
6 the catalog, which they're not, the Kenley catalog is not in connection with
7 the primary storage of Kenley, the RAM. It contains information on data in
8 the secondary and backing stores. This is Exhibit 1014, column three, lines
9 17 to 28. So does not disclose or suggest limitation 1.6 as recited, updating
10 a database to indicate that the archived file is located in the temporary
11 storage location. They claim Kenley wouldn't work without doing this,
12 Kenley doesn't even do it.
13 Now, they also make an argument about Long, which is also new in
14 their Reply, that the combination in Ground 1 would take the last marker
15 information from Long in each update and include that in the Kenley
16 database. Their reworking their combination, honestly, I don't know where
17 this comes from, I don't know how to -- it's new, on reply. They tried to
18 avoid the deficiencies in the actual functioning of the references. They say
19 they're not relying on the specifics, they're just person of ordinary skill, but
20 they didn't make these arguments specifically in their Petition.
21 JUDGE HOANG: Counsel, can you give me that page number again
22 for the Reply, please?
23 MR. JAFFESS: That's their Reply at page 13.
24 JUDGE HOANG: Thank you.
25 MR. JAFFESS: Dr. Maier could not explain, their expert, how one
26 would understand this argument from his original declaration. When asked,

1 he pointed to vague language, stated that a POSITA would understand how
2 to make the combination. This is Exhibit 2025, pages 52 to 57. But beyond
3 this, new arguments, there's even more deficiencies in the combination. Dr.
4 Maier stated that a POSITA would use extra data beyond Long's in the
5 catalog of the Kenley-Long combination, this is Exhibit 2025, page 47, line
6 23, to 48, line 14. But when Dr. Maier was asked what additional data
7 would be used, he admitted, I don't go into detail here about exactly what
8 the additional elements would be that would added to Kenley's system
9 catalog database. This is Exhibit 2025, page 50, lines seven to 10.
10 So this was their burden, and they haven't met it. They say extra data
11 is needed, but they haven't supplied what that data is, it's unclear how this
12 would work, and they're using just broad brush to say well, take this piece
13 and that piece, and POSITA, but they're not actually specifying the
14 arguments, and certainly not in the Petition. They're coming in and
15 replying, doing it in here.
16 Kenley and Long, moving on from the database limitations, Kenley
17 and Long are incompatible, as we've argued. Long pertains to sectors, and
18 Kenley to files. They tried to argue about a broader disclosure in Long
19 beyond sectors, but it's absent. It's unclear from their argument today
20 whether they dropped some of these arguments, they talked about claim 31
21 and these different disclosures in Long, they're not really relying on here,
22 but we rebutted that, because all of them were linked to low-level hard disks
23 and sectors. Their expert, Dr. Maier, in his original deposition, this is
24 Exhibit 2022, page 48, lines eight to 13, talked about detecting file-based
25 operations because those file modifications ultimately get down to the level

1 where you're writing to disk, that's what Long's doing, it's hardware. It's at
2 the level where you're writing to disk.
3 The portions that they cited to, again, I'm not sure how much they're
4 relying on it, claim 31, the abstract, all of them recite the locations of the
5 storage device, which are sectors in Long, that's the point. And all of the
6 claims of Long recite this, locations of the storage device, these are sectors.
7 They also point a lot to Figure 5 as allegedly being broader than sectors, this
8 is -- here, this is the description of Figure 5, in the specification, is the
9 application change request, but the actual Figure 5, 46 in Figure 5, says
10 modification request to the hard disk. That's how it works, it's at the disk
11 level.
12 JUDGE HOSKINS: Mr. Jaffess?
13 MR. JAFFESS: Yes sir.
14 JUDGE HOSKINS: So I have a question about this distinction
15 between sector and file that you're drawing. So help me understand, please.
16 If I'm working on a computer, and I'm working in my Microsoft Word
17 document, which is a, I view it as a file, right, this is an exemplary file,
18 maybe it's a Microsoft Word document, and I click save, and so it goes to
19 the hard disk to save it. It gets saved on a sector, maybe even multiple
20 sectors, but it gets saved on the sector of the hard disk, is that right?
21 MR. JAFFESS: That is correct, Your Honor. Usually multiple
22 places.
23 JUDGE HOSKINS: Fair enough, so, and the operating system that
24 kind of sits in between the Microsoft Word application and the disk does
25 something to track that, so that it knows where the little bits and pieces of
26 the file are that are stored on the sectors of the hard disk, right?

1 MR. JAFFESS: Yes, Your Honor, it's the file controls generally in
2 the operating system, yes. There's other levels of it as well, but yes.
3 JUDGE HOSKINS: So just help me understand why the -- so given
4 that relationship, it seems to me that you're doing, whether we're backing up
5 files or we're backing up sectors, it seems to me they're pretty similar, it's
6 just kind of identifying which part of the hard disk that we want to back up,
7 is it going to be this part of the hard disk that stores this file? Or is it just
8 kind of this defined sector of the hard disk? So I'm having trouble
9 understanding why those two things are so different, such that back up
10 processes that are applied in one way wouldn't apply to the other way.
11 MR. JAFFESS: Well, when you're talking about an application, an
12 application doing an operation on a file and detecting that, it's different than
13 a disk modification at a lower level, right? On some level, you're saying on
14 some level, data is data, but this is specific here. The Long implementation,
15 or the Long disclosure is all about doing very low level, and it teaches away
16 from file-based operations as well, as we've argued, but it's all at the lower
17 level, and Kenley is at a file-based level. So if you want to -- taking these
18 systems and combining them wouldn't work, that's the argument,
19 essentially. They're trying to pick and choose what they claim is broad
20 concepts and taking them away, but combining these systems and how they
21 would work, and using the disclosures together would be incompatible.
22 JUDGE HOSKINS: Thank you.
23 JUDGE HOANG: Counsel, do you have any evidence you've made
24 of record showing that it would be, that this concept of seeing the difference
25 would be so -- sorry -- would be so difficult at the lowest level of the system

1 versus a higher level system, say the application layer or something like
2 that?
3 MR. JAFFESS: There's evidence and argument that the references
4 teach away from doing this at a file level, that's the best evidence, as well as
5 Jawadi's declaration about it. That teach away from it, right? Dr. Maier
6 admitted that the discussion of Figure 5 in Long relates to sectors, this is
7 Exhibit 2025, page 19, line 1 to page 21, line 7. He said there's broader
8 embodiments in Long, but when asked, he could not point to any. This is
9 Exhibit 2025, page 29, line 7 to page 34, line 21. They also, in their slides
10 they argue about some other concepts in Long, to counter the teaching away
11 of keeping operations at the lowest level, but the error detection and audit
12 information in Long, they're all stored together. This is Exhibit 2025, page
13 38, lines 4 to 19, Dr. Maier talking about Long storing both these types of
14 data together.
15 Long's title, we can go to Exhibit 1004, the title, it's Fault Tolerant
16 Computer with Archival Rollback Capabilities. These are intertwined with
17 one another. The fault tolerance and the error correction are core Long,
18 they're intermingled, and Long says to keep its operations at the lowest
19 level. Petitioners, in their Reply, introduced Exhibit 1025 to Matze, to argue
20 about mixing concepts from different levels, but Matze has a disclosure, this
21 is Exhibit 1025, column 5, lines 15 to 18, file by file, those types of systems,
22 the performance is proving extremely difficult to maintain, this discourages
23 use of file by file systems, like those in the claims of the challenged Datanet
24 patents. I'm just comparing those to image backups, that's what Matze is
25 doing.

1 They argued Schneider-US, it's not part of Ground 1's combination,
2 they argue it shows general teachings in Long as fundamental, we've
3 disputed that in our briefing. It talks about the Move Method as being
4 fundamental, not Long itself, it also talks about drawbacks in the Move
5 Method, fundamentally being slow. This is Exhibit 1016, column 6, it talks
6 about having a flaw, that the RAM cache is insufficient for data, like word
7 processing documents or graphic images overflow the cache. This is Exhibit
8 1016, column eight, it gives the example of a delay of saving from 10 to 30
9 seconds, which would be potentially unacceptable performance impact for a
10 user. This is column eight of Schneider-US, 1016.
11 So this evidence does not support the use of Long with Kenley, and
12 they say it's evidence of what a POSITA would know, there's no evidence
13 that Schneider or its co-inventors were persons of ordinary skill in the art,
14 their backgrounds are not in record. This is one reference that talks about
15 two different types of systems and discourages the use of the Move Method
16 in file systems, like they were trying to do in this combination.
17 JUDGE HOSKINS: Mr. Jaffess?
18 MR. JAFFESS: Yes Your Honor.
19 JUDGE HOSKINS: So, you know, they cite Kenley for that, so
20 Kenley apparently thought that a file-based backup system was a good idea,
21 and it has the hierarchical kind of nature, maybe not the three steps, because
22 you've got the RAM issue, really the first of the three memories, but it's
23 definitely moving archived files, specifically. So why isn't that something
24 that tells us file-based backup systems are useful at times?
25 MR. JAFFESS: File-based systems are certainly useful at times, but
26 the combination of Long's sector-based approach with Kenley, they're

1 trying to use Schneider-US. to say you can combine these, and Schneider-
2 US says you shouldn't. You shouldn't use the Move Method with file-based
3 systems, it's slow, it causes performance issues, it's unacceptable to users.
4 That's the point, the combination. But those aspects in Kenley, you're
5 correct, those are there.
6 JUDGE HOSKINS: Thank you.
7 MR. JAFFESS: Yes, Your Honor. They argued that there's, as far as
8 the searching limitation, just doing some clean-up in Ground 1 before we
9 move onto Ground 2. They argue there's no prior knowledge of the files as
10 far as the searching limitation. I mean, there's the antecedent basis in
11 creating the file in the first place, so there is. There is some conflict with
12 their argument, they're saying you need to search to know what's there, but
13 then you also need to search to move it. There's some conflict in what's
14 going on there, it's unclear. I'll note the backup location in Kenley is not the
15 backup file location, it's the backup baseline location, it's different. That's
16 all I have on Ground 1, unless there are any questions from Your Honors.
17 Moving on to Ground 2, as far as the searching limitation -- sorry, just
18 finding my place. So there's no dispute that the combination of Ground 2
19 fails to disclose or suggest searching under our proposed definition. Dr.
20 Maier confirmed this. So that handles the searching limitation, and it also
21 handles the identifying the presence limitation, again, because it's tied to the
22 specific archived file, in the 348 Patent, the 79 case. The other limitations in
23 dispute are the database limitations again, they're not arguing it today, but
24 they had tried to argue in their Reply about the master file table of Cabrera,
25 that that alone would render these limitations obvious, but their expert
26 admitted in deposition that he failed to support this, this is Exhibit 2025,

1 page 76, lines 1 to 20. I'm not sure if they're sticking with that today, but he
2 admitted that that was improper.
3 Cabrera does not store location information for files in its master file
4 table, and this was part of the basis of Petitioner's combining Whiting,
5 arguing that Whiting would enhance Cabrera's alleged ability to track data.
6 As argued in the Patent Owner Response, it wouldn't have been obvious to
7 combine Whiting with Schneider and Cabrera, as proposed, and the
8 combination is not properly supported by Petitioner, at least as far as the
9 database limitations. Fundamentally, Whiting is not a multi-location backup
10 system. This is Exhibit 2020, Jawadi's declaration, paragraph 235, and also
11 Whiting Exhibit 1006, in Figure 1 and column seven. Whiting has one
12 network file server, 100, with one backup storage unit, 101.
13 There's only a single paragraph of Whiting discusses that in one
14 embodiment there could be hierarchical storage management, in which files
15 that have not been accessed for a long time are migrated from disk to
16 secondary storage means, such as tape or optical disks, which is done to
17 save storage costs. This is column 6 to 7 of Whiting.
18 Whiting discloses nothing about how this HSM would work or how it would
19 affect the backup directory, and this was in Mr. Jawadi's declaration, Exhibit
20 2020, paragraph 236. They basically included Whiting into the Ground 2
21 with minimal discussion. They have large swaths of citations with minimal
22 discussion. As we've argued in the papers, it's insufficient to meet their
23 burden.
24 The other limitation in Ground 2 that's at issue is limitation 1.5.
25 Cabrera does not disclose what would trigger a move of its data from its
26 intermediate location to the remote storage. Petitioner ignored the

1 intermediate location of limitation 1.8 when mapping limitation 1.5. In
2 reply, and today, they're arguing for a broad read of limitation 1.5, that
3 Cabrera delivers data in turn from the intermediate system to the remote
4 system. Limitation 1.5 requires moving the archived file to a second or
5 permanent storage location responsive to a second event. Petitioner's
6 mapping shows at most moving data to the intermediate system, responsive
7 to the mapped events. There is no event shown, disclosed, or suggested, that
8 results in the archived file moving to the alleged second permanent storage
9 location. It's unclear how it would be done, when it would be done, it's just
10 not shown, it's not in response to an event.
11 And we also argue that the entire combination of Ground 2 would not
12 be obvious, because Cabrera is periodic in nature. They argue that this
13 periodic nature is an embodiment in the alternative, they quote Exhibit 1005
14 in column three, lines 45 to 50, but the quoted section of Cabrera makes
15 clear the alternative to waiting a period of time is to wait for an amount of
16 data to be stored in the staging area. In other words, the alternative is
17 periodic as well, you're waiting for time or you're waiting for data, it's
18 waiting, that's the point of Cabrera. Cabrera waits, and then it does back up.
19 This is its nature, and the proposed combination with Schneider is not
20 obvious. Finally, making this combination fundamentally alters the
21 principle of operation of Cabrera from this periodic nature to something
22 different. Backs up data after data is already written, not before a write
23 operation, but this shows the engrained periodic nature of Cabrera, waiting
24 to back up data that's already been written, different than what they're trying
25 to do here, and it doesn't work together.

1 JUDGE HOANG: Counsel, sorry to pull you back, there is one thing
2 that you mentioned, it's that limitation 1.5, 1.8 issue, the second storage
3 location and then the intermediate storage, the temporary storage location,
4 excuse me. Since you have Petitioner's demonstratives up there, on page 50
5 of their demonstratives, it looks like they're mapping the remote storage 62,
6 to limitation 1.5 for the permanent source location, and then they're mapping
7 this last part of that, the paragraph they reproduced, the intermediate system,
8 sub-system, as an intermediate storage location for limitation 1.8, but you
9 said they didn't map that.
10 MR. JAFFESS: In the Petition.
11 JUDGE HOANG: In the Petition.
12 MR. JAFFESS: They ignored it, yes.
13 JUDGE HOANG: I see. Thank you.
14 MR. JAFFESS: So again, there's nothing disclosed in Cabrera about
15 triggering a move to the permanent storage location, that's the point. I'll
16 note that the argument today about preexisting files that are about to be
17 modified, it's not clear from the Petition at all, but that's the argument
18 they're making today, in the modification of Cabrera that they're
19 advocating. They also talked about our expert and the interrupt handler, his
20 testimony as somehow showing it'd be obvious to a POSITA. Asking an
21 expert is different than a POSITA, asking someone years after the fact and
22 with all these papers in front of them, it's just very different. Literal
23 hindsight is 20/20, and that's the story. So I don't really see the argument,
24 but it's improper to say that that's the knowledge of a POSITA, the
25 knowledge of an expert now, POSITA back then, very different. Unless
26 Your Honors have any further questions, I'll reserve the rest of my time.

1 JUDGE COCKS: I don't think we do, thank you.
2 MR. JAFFESS: Thank you very much.
3 JUDGE COCKS: I think you will have 29 minutes for rebuttal. All
4 right, so Mr. Morton-Park, you have 35 minutes available for rebuttal.
5 MR. MORTON-PARK: Thank you. I'd first like to touch on the
6 claim construction arguments, I believe Judge Hoskins, you asked if Patent
7 Owner is attempting to disavow or claim that any of the prosecution history
8 is wrong, that Applicants didn't mean that, those pieces of exemplary
9 support do not actually explain what the element 1.4 means. The answer is
10 that, that is in fact what Patent Owner is trying to do today, they are trying to
11 change the meaning of element 1.4 in the context of the 478 Patent by
12 introducing extrinsic evidence that is not consistent with that disclosure in
13 the 478 Patent.
14 Patent Owner's counsel suggested that we cited no case law in support
15 of our construction, but we did in fact cite Phillips, if I could invite the
16 Board to slide 53, just this one quote here, and it makes it clear that a proper
17 construction, you know, needs to look to what an ordinary artisan would
18 understand after reading the entire patent. The context is important. And
19 Phillips warned against a heavy reliance on extrinsic evidence like
20 dictionary definitions, because those risk taking, the meaning of the term,
21 the proper meaning of the term, out of the context of the patent, and here
22 that's exactly what the dictionary definition as offered by the Patent Owner
23 do for this claim, they drift too far away to only narrowly construe elements
24 1.4 to be consistent with those dictionary definitions. Improperly import
25 additional limitations to the claims that aren't taught or suggested by the 478
26 Patent.

1 Furthermore, allowing Patent Owner to narrow the scope of the claims
2 now would just be improper under Phillips. That would be, you know,
3 Patent Owner cannot tell the public, this is what element 1.4 means, in
4 exchange for getting the patent, and then later say no, actually, we didn't
5 mean that. You know, if it was good enough to give them written
6 description support and to enable the disclosure, that's part of the bargain of
7 getting a patent, is describing your invention and how it works. And so here,
8 today, the public should understand that these claim elements mean what the
9 patent says they mean, and what the applicants told the public in order to
10 obtain that patent, so that those claim elements are met.
11 I'd also like to turn now to the combination of, let's see, a lot of the
12 arguments you've just heard all assume a bodily incorporation of Long into
13 Kenley, there was a lot of focus on what Long specifically discloses out of
14 the context of what the Petition cited in Long, and assumes that it must be
15 incorporated. In the teaching away arguments, if I can direct the Board to
16 slide 21, there's discussion by Patent Owner of this error detection in Long,
17 but, and the fact that Long is titled a fault tolerant computer, and there are
18 elements of fault tolerant strategy that Long discusses, such as error
19 detection and error containment, and those are clearly discussed in the
20 background of Long's specification, as distinct from auditing or this method
21 of capturing data before it's modified, creating a backup copy. There's
22 nothing in Long that teaches away from using a modification request from
23 an application to initiate a backup process in a file-based system. And that
24 teaching away argument only works if you're assuming that you're taking
25 the literal markers taught by Long and the audit header and all of these error
26 teachings as well and incorporating them, but rather, the Petition described a

1 different combination which is a file-based system like Kenley that migrates
2 archived files through its different tiers of storage, tracks the location of
3 those files as they're moved, initiating a backup with a modification request
4 and quickly storing the backup copy into a primary storage, a temporary
5 storage, such as RAM, a memory buffer.
6 Regarding some of the database elements that Patent Owner argued,
7 with regards to that location information, if I can invite the Board back to
8 slide 25, that this is limited to the secondary storage and the backing storage,
9 and that for Kenley, Kenley describes here using the backup identifier to
10 refer to either secondary storage or backing storage. So, I think if I
11 understand Patent Owner's argument, Kenley doesn't describe also using it
12 for the RAM, and therefore it's not obvious to update the location. And
13 that's just looking at Kenley and what Kenley's specific method is doing,
14 but in Kenley-Long, a combination of Kenley and Long, where skilled
15 artisans are realizing you can make a quick copy, backup copy of a file
16 before it's modified and put it into RAM, and then migrate it through the
17 different tiers of storage, as explained in the Petition, you would need to
18 track that location as well. You don't just let the archived file disappear for a
19 while and then suddenly start tracking it when it gets to another tier of
20 storage, you'd rather want to be able to access it, restore it, regardless of
21 where it's stored. And that's consistent with what Kenley teaches for this
22 backup location identifier.
23 There's also regarding the block copy that was discussed, and this
24 idea that in order to move in Long, to move the file, that it somehow doesn't
25 need to search for, it doesn't need to identify the presence of that data in the
26 memory buffer, because it just performs a block copy, which of course,

1 Patent Owner's expert explains would involve referencing the audit header
2 to get the location of that data in the memory buffer to then perform
3 that block copy. Dr. Maier explained that it's not clear that Long would do a
4 block copy, Long teaches every time it moves, it teaches writing a file from
5 one -- the data from one place to another, there's no block copying
6 described, every instance of moving data involves writing it from one place
7 to the next, and in the sector-based embodiment, sector by sector, and there's
8 no clear reason why for this one particular move, a block copy would be
9 done. That's again getting into the weeds of assuming that we're bodily
10 incorporating Long's teachings into Kenley, which again is not the case.
11 I'd like to also touch briefly on Ground 2, there's discussion about the
12 database elements and this assertion of a new argument about a master file
13 table in our Reply. The Petition pointed out that Cabrera discloses a master
14 file table, page 65 of the 478 Petition walked through that, there's a master
15 file table, which is typical of file-based systems, they have some way of
16 knowing where the files are located so they can access them. Dr. Maier
17 explained, as cited in that page of the Petition, what skilled artisans would
18 understand about master file tables, but then said okay, well that's nice, but
19 Whiting describes expressly using a global database to track backup location
20 files, and gives these details for the combined system of tracking the
21 locations of backup files as they're migrated about, so they can be accessed
22 regardless of where they're stored. So there's no --
23 JUDGE HOSKINS: Mr. Morton-Park?
24 MR. MORTON-PARK: Yes?
25 JUDGE HOSKINS: One of the things that Patent Owner's counsel
26 said was that your witness walked back some of -- or at least disagreed,

1 perhaps, with some of what you said in the Petition regarding the master file
2 table. What do you have to say about that?
3 MR. MORTON-PARK: My understanding, or what Dr. Maier, our
4 expert, said during deposition, was he was walking back the idea that our
5 argument is that the master file table alone is what we're proposing renders
6 these database elements obvious. That's not what the Petition explained,
7 that's not what the Reply explained, and in both instances it's been Whiting
8 teaches these, you know, renders these database elements obvious through
9 its teachings of a global database that tracks the backup locations of files.
10 And so Dr. Maier, I think, in the Reply, there's a statement that the master
11 file table alone gives you these file attributes, but it didn't stop there, it
12 didn't say and then we're done, that's Ground 2 for the database elements.
13 It went on to explain that Whiting gives these implementation details about,
14 that informs how skilled artisans at the time implementing this combination
15 naturally would track the locations of files.
16 JUDGE HOSKINS: So is it not your position, then, that the master
17 file table alone is sufficient, that you need Whiting, or are you still arguing
18 that the master file table Cabrera is sufficient?
19 MR. MORTON-PARK: We don't take a specific position as to
20 whether the master file table alone is sufficient, but the Petition and the
21 Reply present this combination that includes Whiting, relies on Whiting for
22 those implementation details, and that's the position that we take for Ground
23 2.
24 JUDGE HOSKINS: Okay, thank you.
25 MR. MORTON-PARK: Let's see, Patent Owner's counsel also
26 brought up Schneider-US, mentioned those waived arguments that they

1 presented in the Surreply for the first time about Schneider, apparently
2 Schneider-US supposedly teaching away from Long's teachings, or saying
3 not to use Long's teachings. Schneider-US does not say don't use Long's
4 teachings, Schneider-US describes some drawbacks, but you can go through
5 Schneider-US and see that it discusses trade-offs of any particular method,
6 and this is something for skilled artisans to decide how they might want to
7 implement one method for capturing a file before it's modified over another,
8 but in any case, Schneider-US makes it clear that the Move Method in Long
9 is considered a fundamental method part of it.
10 Just inviting you to slide 52 of the demonstratives, Schneider does
11 expressly refer to Long, here in the 519 Patent, describes it as the Move
12 Method, describes that this is one of the fundamental methods for capturing
13 data before it's overwritten, and then has a figure depicting this Move
14 Method being applied to files. So it's just very clear that here there's
15 nothing in Schneider saying no, Long's teachings couldn't be applied to
16 files, this technique couldn't be used to capture file data before it's
17 overwritten. So the notion that Schneider-US teaches away, rather than
18 confirms the applicability, is wrong. I believe that's all I have, unless there
19 are other questions that I can address?
20 JUDGE COCKS: I don't think we have any further questions, so
21 thank you.
22 MR. MORTON-PARK: Thank you. Oh, Mr. Mason might have a
23 few.
24 MR. MASON: Just one clarifying point, sorry to interrupt, but with
25 respect to Whiting and the explanation on page 65 of the Petition, Judge
26 Hoskins, to speak to your question, the Petition explained, and this is

1 supported by Dr. Maier, that the MFT, the master file table, in Cabrera
2 would have had this location information, he said, but nonetheless Cabrera
3 lacks some detail, so a skilled artisan would turn to Whiting for those
4 implementation details on how to track the locations of these files within the
5 system, and then the combined system would use those teachings from
6 Whiting within Cabrera. So contrary to Patent Owner's assertions that
7 somehow we had all these cites to Whiting but never explained how it was
8 used, page 65 of the Petition clearly explains that. And then I think what
9 happened at deposition is I think Dr. Maier said well, Cabrera doesn't
10 expressly teach some of these things, and then that was acknowledged in the
11 Petition ,which is why the Petition then turned to Whiting to fill in those
12 implementation details and leave no doubt that it would have been obvious
13 to track the location.
14 And then one other point as to Long teaching the flushing, I think
15 there's some questions about the flushing, and flushing, as Long describes it,
16 might work for sectors, but when applied in Kenley's file-based system,
17 simply flushing would not allow for tracking the file, so I think again, Patent
18 Owner's assuming some kind of bodily incorporation and that we're just
19 piecemeal taking all of Long's techniques into Kenley, but really, in the
20 combination, the system searches for and locates the file to ensure the file
21 remains intact during the move, and to ensure that the location of the file is
22 tracked by the system. And it needs to do that in order to be able to find the
23 file. So those are two final points I wanted to make. Thank you.
24 MR. JAFFESS: If we can have just two or three minutes, Your
25 Honor?
26 JUDGE COCKS: You've got 29 minutes available.

1 MR. JAFFESS: I do not anticipate using anywhere near that.
2 JUDGE COCKS: You may begin when you're ready.
3 MR. JAFFESS: Everybody's ready. One point on sector changes
4 versus file changes, sector alterations would not just be file changes at the
5 disk level, it could be any number of data changes or maintenance of sectors
6 on a disk, all sorts of other changes would occur that have nothing to do with
7 file operations. And these sorts of changes would be constant, and this
8 would further teach away from using what they say, bits of Long in Kenley.
9 On the prosecution history, the appeal brief that was submitted at the
10 time did not say this is what the searching limitation means, it did not. It
11 provided exemplary support. It includes the temporary buffer, it includes an
12 identification for any files, but it's not the wording of the claims, it's not
13 definition. The words have to govern, there has to be a search, and it has to
14 be for the archived file, not any files, again, which the Patentee knew how to
15 say, because it was in the spec. He said something different in the claims,
16 that has to matter.
17 Their argument about Kenley's three tiers, they argued about the three
18 tiers mapping together, and now they're trying to back away and say their
19 argument about the Kenley location information stored in this database,
20 again, we disagree that it is, but we're saying even if it is, it's only done for
21 the secondary tracking. Now they're trying to alter it and say well,
22 somehow in this combination, again, a person of ordinary skill would take
23 all of these steps, a lot of skill for this person, it seems. It does seem like
24 hindsight, I have to say. They said that Kenley couldn't work without
25 tracking the location information, but Kenley doesn't track the location
26 information in the RAM. This is their argument, and it's off, Kenley

1 actually works, or I assume -- Kenley disclosure doesn't do this. So either
2 Kenley is non-functional as it stands, or it works without tracking the
3 location information in the RAM. It's one or the other.
4 Petitioners argue that block copying is done with the location, that's
5 true, but it's done with location first and last marker that it used to copy out,
6 and they keep talking about it moving data from the memory buffer. It's
7 flushing, it's not moving, that's important in the context of this block copy.
8 Moving at all, it's not moving pieces of it, it's moving it. And counsel said
9 that, in the last bit of argument, that when applied in Kenley's file-based
10 system, somehow it would not allow for tracking of files if it was all flushed
11 -- again, in Kenley's system, it doesn't track files in RAM, so I'm not quite
12 sure what that means. He says that it makes sure that that file is moved
13 completely, I'm not really sure where we are as far as mixing Kenley and
14 Long or concepts of where, I think we're far afield from the actual
15 references, honestly.
16 What we said was the new argument in reply, on the master file table,
17 was their argument that this alone would render the database laminations
18 obvious. That was the point, they came in new with that.
19 The master file table does not show location, and Dr. Maier admitted this.
20 He said, and I quote, this is Exhibit 2025, page 76, lines 1 to 20, when I say
21 in my reply declaration that Cabrera discloses a master file table storing
22 location information for files, and then further down he says, I did not
23 demonstrate or support that point in my original declaration, and he then
24 further says, I did not offer evidence of that in my reply declaration. So it's
25 unsupported that the master file tables store this location information. And
26 again, this forms the basis of their combination. They say well, this master

1 file table stores location, which is unsupported and wrong, and they say well,
2 then use Whiting as just implementation into this. The premise is wrong, the
3 master file table is not storing location information, at least it hasn't been
4 demonstrated by them. And so it would be improper to make this
5 combination.
6 On the waiver argument for Schneider-US, I'd just like -- they include
7 a ton of reasons all over the place that we responded to, and they stressed
8 this in their -- and this was in the Petition, right you saw that they listed all
9 this -- this can be combined, this, that, the other reason, all of these, some of
10 which they're trying to back off of now, like the three layers mapping
11 together in Kenley-Long. We responded to them, and then they stressed
12 Schneider-US in their Reply, which we responded to in the Surreply. Unless
13 Your Honors have any further questions?
14 JUDGE COCKS: I do not think we do, thank you counsel.
15 MR. JAFFESS: Thank you very much.
16 JUDGE COCKS: I'd like to thank both sides for their presentations
17 today, they have been very useful and helpful, and particularly would like to
18 note that the Petitioner in availing themselves with the LEAP opportunity,
19 the Board is happy to see that and appreciate Mr. Morton-Park's
20 contribution in that capacity. All right, the cases are submitted, and we are
21 adjourned. Thank you very much.
22 (Whereupon, the above-entitled matter went off the record at 12:10
23 p.m.)

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