1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE
3
APPLE INC.,)
4)
----------Plaintiff,)
5)Case No.
vs.)22-CV-1377-MN-
6)JLH
)22-CV-1378-MN-
7)JLH
MASIMO CORP, et al.,)
8)
----------Defendant.)
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10 TRANSCRIPT OF MARKMAN HEARING
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12 MARKMAN HEARING had before the Honorable
13 Jennifer L. Hall, U.S.M.J., in Courtroom 6D on
14 the 14th of September, 2023.
15
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1 THE COURT: We are here today to hear
2 some claim construction disputes. This is
3 *Apple and Masimo*. It's Civil Action Number
4 22-1377 and -78. Let's start with appearances
10:01AM 5 for the record.
6 MR. MOORE: Good morning, Your Honor.
7 David Moore from Potter Anderson on behalf of
8 Apple. As you can see, the gang is all here
9 today. Seated at counsel table with me are
10:01AM 10 John Desmarais and Kerri-Ann Limbeek. And
11 additional attorneys you'll hear from in the
12 claim construction phase are Cosmin Maier,
13 Jordan Malz, David Shaw, Amy Wann, and Tim Cho.
14 THE COURT: Great. Good morning to
10:02AM 15 everybody.
16 MS. HANEY: Good morning, Your Honor.
17 Megan Haney from Phillips, McLaughlin, and Hall
18 on behalf of Defendants. I'm joined today by
19 Steve Jensen, Douglas Wentzel, Ben
10:02AM 20 Katzenellenbogen, Daniel Hughes, Brian Horne,
21 Brian Claassen, and Jared Bunker.
22 THE COURT: Good morning to
23 everybody.
24 So I think this might be only the second
10:02AM 25 or third hearing we've a had in the new

1 courtroom. We're still getting some of the
2 logistics worked out. I know it seems like
3 everybody is really far away, but we had it set
4 up this way so that the jury would be able to
10:02AM 5 see the evidence being presented on the screen,
6 and we were limited in terms of the width of
7 the courtroom, so -- but if you have any
8 suggestions for how you think we might make it
9 more conducive to presentation, let us know.
10:03AM 10 Looks like -- we've got some more chairs
11 in the back. Looks like next time we can bring
12 more chairs out as well. Hopefully, all the
13 technology is working, so today will be a good
14 test for that.
10:03AM 15 I believe we've allotted three hours to
16 each side to hear all of the disputes. Did we
17 have a discussion between the parties about who
18 wanted to go first or how we were going to
19 proceed?
10:03AM 20 MS. LIMBEEK: Good morning, Your
21 Honor. Kerri-Ann Limbeek on behalf of Apple.
22 We did have a discussion about the order. We
23 will defer to Your Honor if there's any
24 particular order you'd prefer. Otherwise, the
10:03AM 25 parties agreed we'd go through the order in the

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1 briefing, which is starting with the design
2 patents then the Apple utility patents and then
3 Masimo's counterclaim patents if that's okay
4 with you.
10:03AM 5 THE COURT: That's fine.
6 MS. LIMBEEK: And we discussed the
7 order of terms, and we had a dispute on how to
8 organize the arguments for the design patents.
9 Apple, the way we see it is we should address
10:04AM 10 all of the design patents at once because the
11 issues are overlapping across the 25 different
12 terms that Masimo is proposing. That's how we
13 plan to address them.
14 THE COURT: What was Masimo's
10:04AM 15 proposal?
16 MR. KATZENELLENBOGEN: Good morning,
17 Your Honor. Ben Katzenellenbogen for Masimo.
18 Masimo's suggestion was that we start
19 with the overarching issue for the design
10:04AM 20 patents, which is whether to provide verbal
21 descriptions of the claims, as that issue sort
22 of covers just about everything and that we,
23 perhaps, also take up the issue of the
24 indefiniteness of one of the terms for two of
10:04AM 25 the patents. And we could then go, as we would

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1 do for the utility patents, go term by term.
2 It may be that we don't need to go exactly term
3 by term. We could do, for example, the watch
4 patents and then the charger patents, but
10:05AM 5 since, effectively, there was nothing in the
6 briefing where Apple was taking an issue with
7 the accuracy of any of Masimo's individual
8 constructions as to does this accurately
9 describe the figures, that seemed like less of
10:05AM 10 the important issue. And I think even Apple's
11 slides today characterize whether to construe
12 the claims as the threshold and most important
13 issue.
14 THE COURT: Thank you very much. You
10:05AM 15 can have a seat.
16 For the design patents, I think what
17 we'll do is we'll have Apple go first and you
18 can say whatever you want to say about them,
19 and then we'll hear from the other side. That
10:05AM 20 said, if there are particular questions I have,
21 we can have a little back-and-forth too.
22 Just to let you all know -- I think you
23 probably do know -- I don't look at the
24 PowerPoint slides ahead of the hearing. I
10:06AM 25 probably won't look at them after, so I will

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1 take notes on what I need to take notes on, but
2 as you can the record gets to be excessive.
3 Just stacking up the patents, I think, is a
4 number of inches, so we try to minimize it.
10:06AM 5 MS. LIMBEEK: Good morning again,
6 Your Honor. May it please the Court.
7 Kerri-Ann Limbeek on behalf of Apple, and I'll
8 be presenting the arguments on Apple's design
9 patents.
10:06AM 10 And there are four asserted design
11 patents in this case. As you can see on slide
12 two, three of those design patents claim the
13 ornamental design for an electronic device as
14 shown and described in the figures, and you can
10:06AM 15 see what's claimed in each in the blue there on
16 the slide.
17 THE COURT: Is there a dispute
18 between the parties about what's claimed?
19 MS. LIMBEEK: There is a dispute,
10:07AM 20 which is the second dispute on the design
21 patents relates to indefiniteness for two of
22 the patents, so there is a dispute on what's
23 claimed with respect to two of the patents.
24 Your Honor, we have slides, hard copies
10:07AM 25 of slides, and along with those slides, we

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1 received a redline last night of the joint
2 claim construction chart where Masimo has
3 rephrased seven of their terms, so we're also
4 handing up the redline that we received last
10:07AM 5 night after the slides were submitted.
6 The fourth design patent that is at issue
7 here is directed to an ornamental design for a
8 charger, as described. There are really two
9 disputes here between the parties on the design
10:08AM 10 patents. For all four of the patents, Apple
11 generally proposes adopting the standard design
12 patent formula that defers to the figures.
13 Masimo, on the other hand, is seeking lengthy
14 verbal descriptions of each individual element.
10:08AM 15 It's broken down the figures into a verbal
16 description on element-by-element basis.
17 And it says there are two reasons for
18 doing that. One, because every single element
19 in the ornamental design patents is supposedly
10:08AM 20 functional. They are not. And second because
21 Apple allegedly construed these patents in
22 responding to Masimo's validity challenges in
23 the IPRs and in its contentions. Apple did no
24 such thing there, either.
10:08AM 25 The second issue with respect to the

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1 design patents just relates to the '842 patent
2 and the '936 patent, which Masimo alleges are
3 indefinite because it's supposedly unclear
4 whether the shape of the arches is claimed in
10:09AM 5 those patents, but as I'll explain, the figures
6 with unobstructed views of the arches makes
7 entirely clear the shape of the arch is
8 claimed, and there is no inconsistency that
9 would lead to indefiniteness.
10:09AM 10 So starting with the first issue, as
11 we've shown here on slide five, each of Apple's
12 proposed constructions follows the same
13 formula, and it's the standard formula that
14 Courts adopt in design cases. The ornamental
10:09AM 15 design for an electronic device as shown in the
16 figures, and these are for the three electronic
17 device patents. Masimo's proposed
18 constructions break the figure down term by
19 term by term, element by element by element,
10:09AM 20 and they propose these lengthy, verbal
21 descriptions of every single development. And
22 that's the same thing for the charger patent,
23 the D'131.
24 So in the context of construing design
10:09AM 25 patents, the Federal Circuit has repeatedly

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1 advise deferring to the figures and warned
2 against detailed verbal descriptions. As
3 Federal Circuit explained in *Egyptian Goddess*,
4 "As the Supreme Court recognized, a design is
10:10AM 5 better represented by an illustration than it
6 could be by any description, and that's why the
7 preferable course ordinarily will be for a
8 District Court not to attempt to construe a
9 design patent by providing detailed verbal
10:10AM 10 description of the claimed design."
11 And the Federal Circuit has made that
12 clear repeatedly, and here in the *Crocs* case,
13 it quotes the MPEP which also says, "As a rule,
14 the illustration in the drawing views is its
10:10AM 15 own best description."
16 To start with some context on why the
17 Federal Circuit has this rule, it's based on
18 the proper infringement analysis in a design
19 case which is different than the infringement
10:11AM 20 analysis for a utility case. In the context of
21 design patents, as Your Honor knows, the
22 infringement analysis is the ordinary observer
23 test. It compares the overall visual
24 impression of the claimed designs in the
10:11AM 25 figures to the accused products in view of the

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1 prior art.
2 So the Federal Circuit has said when
3 you're applying that ordinary observer test for
4 infringement for design patents, differences
10:11AM 5 must be evaluated in the context of the claimed
6 design as a whole and not in the context of
7 separate elements in isolation. In fact, it's
8 gone on to say that an element-by-element
9 comparison is procedural error in the design
10:11AM 10 context.
11 And so that is totally unlike the
12 analysis you would do in a utility patent case,
13 where you have an element-by-element checklist
14 and you go through and you look at the accused
10:11AM 15 product and you see whether each element is
16 present in the accused product. That's not how
17 you do the infringement analysis in the design
18 case. That's actually improper because you're
19 supposed to be focused -- the fact finder is
10:12AM 20 supposed to be focused on the overall visual
21 impression of the designs, and that's why the
22 Federal Circuit has rejected the
23 element-by-element approach to claim
24 construction, because it risks undue emphasis
10:12AM 25 on particular elements for the fact finder as

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1 they are doing their infringement analysis.
2 *Egyptian Goddess*. The Federal Circuit
3 explained that risk. The risk is that a finder
4 of fact will focus on each individual described
10:12AM 5 feature rather than on the design as a whole.
6 Federal Circuit in *Crocs* went on to explain
7 depiction of the claimed design in words can
8 easily distract from the proper infringement
9 analysis of the ornamental patterns and
10:13AM 10 drawings.
11 And that's exactly what the constructions
12 that Masimo has proposed do. They illustrate
13 this exact concern. Masimo is creating a
14 20-plus element checklist that it wants the
10:13AM 15 jury to focus on and compare to the accused
16 products instead of doing the proper
17 infringement analysis, which looks at the
18 figures and compares the overall visual
19 impression from the figures to the accused
10:13AM 20 product.
21 And so based on this guidance from the
22 Federal Circuit, Courts since *Egyptian Goddess*
23 have followed a standard formula in design
24 patent cases, which is the ornamental design of
10:13AM 25 the article of manufacture as shown in the

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1 figure. Here are two examples of District
2 Courts adopting that standard language based on
3 collecting cases and finding that this is in
4 accordance with most recent claim constructions
10:14AM 5 in the design patent context, and it's based on
6 District Courts heeding the Federal Circuit's
7 warning against the dangers of undue emphasis
8 on particular features.
9 So here on slide 11, this is an example
10:14AM 10 that shows exactly the concern that the Federal
11 Circuit is worried about. For this simple
12 design element which is shown in red on the
13 left side of slide 11, Masimo has proposed and
14 briefed that the Court should adopt two
10:14AM 15 paragraphs of complex language describing that
16 design, five footnotes, and mathematical
17 calculations of proportions because they want
18 the jury to improperly focus on this laundry
19 list of imprecise descriptions instead of
10:14AM 20 looking at the figures and seeing how that
21 impacts the overall visual impression.
22 So last night in -- after these slides
23 were submitted, after the briefing was complete
24 in this case, Masimo sent us a joint claim
10:15AM 25 construction chart with a redline where they've

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1 rewritten a bunch of their proposed
2 constructions, and this is one of them. It's
3 on page eight of the joint chart, if I could
4 get the ELMO up, please.
10:15AM 5 They've now apparently admitted that the
6 construction that they briefed -- they've
7 deleted the entire thing, both paragraphs. It
8 actually goes eight -- pages eight to page nine
9 because the construction was so long. They've
10:16AM 10 now deleted all of that and come up with a
11 totally rewritten construction. All of that
12 shows is their original construction and their
13 new construction are completely untethered to
14 the record or to any legal analysis in this
10:16AM 15 case.
16 And there are many other examples. This
17 is one example that they haven't rewritten that
18 are still multi paragraphs to try to describe a
19 simple design element.
10:16AM 20 Here is one more. On slide 12, we're
21 looking at Masimo's term A-11. You can see on
22 the left side it's these tiny red lines in the
23 drawings, and they want to construe this with
24 two sentences of explanation because they want
10:17AM 25 to get the jury focused on element-by-element

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1 instead of looking at the overall visual
2 impression. For this one, they don't even
3 provide any justification for this
4 construction. They don't say Apple's ever used
10:17AM 5 this language. They don't say this is a
6 functional element. They have no justification
7 for multiple lines of text to explain this tiny
8 visual element.
9 So in general, Masimo has two arguments
10:17AM 10 for why they say this Court should depart from
11 what the Federal Circuit has said the rule
12 should be. First, they say every single
13 element of these ornamental designs is
14 functional, but Masimo misreads the law. None
10:17AM 15 of the elements are dictated by function, and
16 so none of the elements require construction.
17 And second, they argue that Apple somehow
18 construed these claims because Apple responded
19 to IPRs and Apple put in validity contentions
10:18AM 20 responding to Masimo's invalidity arguments,
21 which necessarily used words to explain to the
22 PTAB and explain to the Court Apple's
23 positions. But Apple did not provide
24 constructions in either of those contexts, and
10:18AM 25 finding that any time a patentee uses words to

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1 argue to the PTAB or argue to the Court, that's
2 a construction and now the Court needs to adopt
3 the defendant's construction, that would
4 eviscerate the guidance from the Federal
10:18AM 5 Circuit in design cases that the Court should
6 not be using verbal constructions on an
7 element-by-element basis.
8 Starting with the first issue, on
9 functionality, the reason for this
10:19AM 10 functionality, in brief, is that the scope of a
11 design patent is limited to the ornamental
12 aspects of the design, so the Federal Circuit
13 has explained that at the claim construction
14 phase, claim contradiction may include the
10:19AM 15 distinction between features of the claimed
16 design that are ornamental and those that are
17 purely functional. And Courts use the term
18 "purely functional" to also mean dictate by
19 functions. They use those terms
10:19AM 20 interchangeably.
21 That's the requirement, not just that
22 something has a function because, as the
23 Federal Circuit recognized, all design patents
24 claim articles of manufacture that have
10:19AM 25 utilitarian purposes, that have functions.

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1 That's not enough to require claim
2 construction. That's not enough to invalidate
3 those patents. What is required is an element
4 to be dictated by function.
10:20AM 5 THE COURT: So your view is in none
6 of the asserted design patents, none of the
7 claimed designs have any elements that are
8 dictated by function? Not one?
9 MS. LIMBEEK: Correct, Your Honor,
10:20AM 10 and I can go through each one, but each one has
11 sort of the same issues.
12 So first of all, Masimo doesn't even
13 argue that they are dictated by function. All
14 that Masimo shows is that they have functions,
10:20AM 15 but that's not enough. And for every single
16 element, the Federal Circuit looks at many
17 factors to figure out whether or not something
18 is purely functional, but the most important is
19 the availability of alternative designs, which
10:20AM 20 the Federal Circuit has said is an important,
21 if not dispositive, factor. And that's because
22 if you can design something many different ways
23 and have the same or similar functionality,
24 then the design that is chosen in the patent is
10:21AM 25 not dictated by function.

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1 So for the electronic device patents,
2 Masimo argues that there are five elements that
3 are functional, and they're listed here, and
4 I'll go through them briefly because they have
10:21AM 5 the same issues with every single one. So let
6 me start with the protrusion element because
7 Masimo makes a lot of this in its briefing and
8 in its expert declaration.
9 The first -- Masimo is alleging that the
10:21AM 10 protrusion on the back of the electronic device
11 for the '279 patent has the following
12 functions: It snugly mates and precisely
13 assigns with the Apple Watch charger design; it
14 improves user comfort; and it improves sensor
15 sensitivity.
16 The first issue is that Masimo is
17 identifying functions of a commercial
18 embodiment. It's limiting the scope of this
19 claim to aligning with the Apple Watch charger.
10:22AM 20 But the Federal Circuit has said when you're
21 doing this analysis, you cannot limit this to a
22 commercial embodiment. It's actually
23 overturned District Courts for doing that.
24 What you should be looking at is the
10:22AM 25 article of manufacture that's actually in the

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1 patent. The article of manufacture here is an
2 electronic device. There's no requirement that
3 this mate snugly with an Apple Watch charger
4 specifically. In any event, Masimo is also
10:22AM 5 wrong that this design element is dictated by
6 these functions, even in the context of the
7 commercial embodiment.
8 So Masimo, for all the different
9 elements, focuses on Apple's utility patents
10:22AM 10 relating to the watch. But it selectively
11 excerpts portions about a single embodiment,
12 whereas if you look at the Apple utility
13 patents, they actually show the opposite. They
14 show that you don't have to design a watch the
10:23AM 15 way that is claimed in the electronic device
16 patents. You can design it infinite different
17 ways and have the exact same function.
18 For example, in the '783 patent, this is
19 one of the Apple utility patents that Masimo is
10:23AM 20 relying on, that patent says the interfacing
21 surfaces of the dock and the device may be
22 substantially flat. There's no protrusion
23 required. And in fact, it goes through other
24 ways that you can align the device to the
10:23AM 25 charger, for example, using magnetic field

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1 sources.
2 The '157 patent. That's another Apple
3 youth patent that Masimo is relying on. And
4 yes, it says certain embodiments may have a
10:23AM 5 dome shape, but the carrier may also have
6 different shapes, including it could be flat.
7 It could have no protrusion at all. So the
8 apple patents that Masimo is relying on to say
9 that this element, this protrusion, is dictated
10:24AM 10 by function say the exact opposite. They say
11 there are many different ways you can design
12 this and have the exact same function.
13 In fact, even in the commercial product,
14 our expert analyzed documents showing that the
10:24AM 15 Apple Watch charger -- and I have one right
16 here -- it can align to devices that are flat.
17 You don't need a protrusion for this to work,
18 to align, and to charge efficiently. So even
19 the commercial embodiment, it's not dictated by
10:24AM 20 function.
21 And here, it's similar for some of the
22 other elements. For example, Masimo says the
23 claimed arches are functional because they
24 represent ECG electrodes on the back of Apple
10:25AM 25 Watch Series 4. First, again, this is

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1 improperly limiting the design of an electronic
2 device to Apple Watch Series 4. That is
3 improper under Federal Circuit law.
4 And second, again, the Apple utility
10:25AM 5 patents that Masimo is pointing to to say these
6 are dictated by function, they have to be
7 shaped this way for functional reasons, the
8 patent says the opposite. It's got a figure
9 with another embodiment that says these same
10:25AM 10 electrodes, they can be shaped in circles
11 instead of arches. And in fact, it goes on to
12 say although in some embodiments you have two
13 electrodes, sometimes you can have a single
14 electrode. Sometimes you can have more than
10:25AM 15 two electrodes, and it's still going to perform
16 the same function. And the expert also
17 analyzed prior art and similar products that
18 showed the same or similar functionality with
19 entirely different designs that shows these are
10:26AM 20 not dictated by function.
21 It's just another example. This is the
22 four-sided shape we looked at earlier. Again,
23 Masimo is improperly limiting this to photo
24 diodes of the optical sensor inside Apple Watch
10:26AM 25 Series 4, limiting to the commercial

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1 embodiment, which is improper.
2 In any event, the Apple utility patents
3 that Masimo is relying on say you don't have to
4 design it this way. You can design it other
10:26AM 5 ways. Here's just one example of another way
6 to design the photo diodes. And the prior art
7 and other commercial products also show you can
8 design it infinite different ways, and that's
9 because the design that's shown in the design
10:26AM 10 patents is an ornamental design. It is not
11 dictated by function.
12 So I'll just -- these are just a few
13 examples, but all of the other elements that
14 Masimo identifies have the exact same problems.
10:27AM 15 They're improperly limited to the commercial
16 embodiments, and they are actually disproven by
17 alternative designs that show you can
18 accomplish the same function using different
19 designs, and that's the same with the charger
10:27AM 20 patent, where Masimo identifies these two
21 functional elements and says that those are
22 functional. But if you look at the prior art,
23 if you look at other commercial products, you
24 can design the charger in myriad different ways
10:27AM 25 and still have the exact same function. So the

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1 designs that are claimed in the patent are not
2 dictated by function.
3 And so there is no element in these
4 asserted patents that is dictated by function,
10:27AM 5 and so there's no construction, no verbal
6 detailed construction, necessary to distinguish
7 between functional and ornamental elements.
8 But even if Masimo were correct, even if there
9 were an element that were -- that was dictated
10:28AM 10 by function, the correct result is not to adopt
11 Masimo's verbal descriptions that are multiple
12 paragraphs. Courts actually, including Courts
13 in Delaware, have based on the *Egyptian* -- the
14 guidance from the Federal Circuit in *Egyptian*
10:28AM 15 *Goddess* and *Sport Dimension*, they said rather
16 than adopting these overly detailed verbal
17 constructions, we'll just identify which
18 elements are dictated by function and purely
19 functional and otherwise instruct the jurors to
10:28AM 20 defer to the figures.
21 And so even if there were an element that
22 were dictated by function, which there is not,
23 the proper result would be just to identify
24 what that element is in the construction rather
10:29AM 25 than adopting Masimo's detailed verbal

24

1 descriptions.
2 And so unless Your Honor has any
3 questions about the functionality issue, I'll
4 move on to the second reason that Masimo is
10:29AM 5 saying Your Honor should construe these verbal
6 descriptions. Masimo is arguing that Apple has
7 construed these claims elsewhere. It says that
8 Apple did so in its motion to expedite in
9 responding to IPRs and in its validity
10:29AM 10 contentions. Apple did no such thing. In the
11 motion to expedite, Apple's expert explained
12 that any written description is not intended to
13 claim or specify the scope of the claimed
14 design nor to suggest any particular claim
10:29AM 15 construction or that claim construction itself
16 is appropriate or necessary. He had to use
17 verbal descriptions to -- in a declaration in
18 order to help the Court. That does not mean
19 those are constructions that would be useful to
10:30AM 20 a jury that is supposed to be focused on the
21 overall visual impression.
22 And the same thing in the IPRs and in the
23 validity contentions. In the IPR, Apple
24 responded to Masimo's petition for IPR by
25 explaining how Masimo's proposed constructions

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1 were incorrect. It did not provide its own
2 constructions. And in Apple's validity
3 contentions, again, Apple needed to provide
4 notice to Masimo of it position which it needed
10:30AM 5 to do in words, but Apple said its verbal
6 descriptions are not proposed constructions.
7 It has never construed these claims.
8 In any event, the language that Masimo is
9 relying on from Apple -- and you'll see this in
10:30AM 10 the slides, although they'll never put it up
11 side by side -- is completely different from
12 what Masimo is actually proposing that Your
13 Honor should construe the claims as.
14 For example with the A-9 term, Masimo
10:31AM 15 says in its briefing, "To distinguish prior art
16 Apple argued to the Patent Office the claimed
17 design includes eight four-sided shapes aligned
18 to form an inner broken circular shape smaller
19 in diameter than the outer broken circular
10:31AM 20 shape." From that, this is this construction
21 they get. Two paragraphs with complex language
22 like trapezoidal gaps that is not going to help
23 the jury and calculations of the proportion
24 between different radii, which is not what
10:31AM 25 Apple told the Patent Office at all. It's

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1 completely untethered to what Apple explained
2 to the Patent Office. And in fact, Masimo
3 seemed to admit this now because until the
4 redline they sent us last night, they deleted
10:31AM 5 most of this. Even they're admitting their
6 descriptions are basically arbitrary and
7 untethered to anything that's actually in the
8 record.
9 And Masimo's argued that these IPR
10:32AM 10 statements are -- should be considered because
11 they're part of the prosecution history, but
12 first, Masimo admits there's no disclaimer.
13 There's no clear and unambiguous disavowal
14 anywhere in any of the IPRs that should be used
10:32AM 15 in the construction. And absent a disclaimer,
16 the prosecution history doesn't require claim
17 construction unless it provides explanation,
18 elaboration, or qualification that better
19 captures the scope of the actual invention than
10:32AM 20 the claim language.
21 Here, we're dealing with figures that
22 show exactly what's claimed. There's nothing
23 in these IPRs that better captures the scope of
24 the actual invention, so neither of Masimo's
10:32AM 25 reasons justify its arbitrary verbal

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1 constructions that break these inventions down
2 and go on an element-by-element basis. So the
3 Court should instead adopt Apple's proposals,
4 which use the standard formula for design
10:33AM 5 patents.
6 So unless Your Honor has any questions on
7 that issue, I'll just briefly address the
8 second issue, which relates to indefiniteness.
9 The issue here, and I'll be quick, is
10:33AM 10 that, for context, all design patents claim a
11 three-dimensional article of manufacture using
12 two-dimensional figures, and a designer of
13 ordinary skill in the art needs to look at all
14 of the two-dimensional figures to figure out
10:33AM 15 what the scope of the claimed design is. Here,
16 Masimo is arguing that although in some of the
17 figures, it's crystal clear that what is
18 claimed is the shape of these arches, meaning
19 as this three-dimensional shape -- as the arch
10:34AM 20 goes towards the center, it's raised and it
21 basically follows the protrusion on the
22 electronic device.
23 It's crystal clear in the figures where
24 that is an unobstructed view because it's
10:34AM 25 claimed in solid lines, but Masimo looks at

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1 these side views where it's obstructed because
2 in the '842 and '936 patents, the convex
3 protrusion is unclaimed. So you have broken
4 lines showing that the convex protrusion is
10:34AM 5 unclaimed, and those are covering up what would
6 be the solid lines of the shape of the arches.
7 A designer of ordinary skill would look at all
8 of the images and look at the unobstructed
9 views and know exactly that the shape of these
10:35AM 10 arches is claimed.
11 In fact, the way that Apple has drawn
12 these figures is completely in line with what
13 the MPEP says to do. The MPEP describes a
14 situation like this, where there's broken lines
15 that cross over the full line showing the
16 claimed design, that's the broken lines of the
17 protrusion, it's still understood that the
18 surface which lines beneath is part of the
19 claimed design. That's the situation we have
10:35AM 20 here with the shape of the arches.
21 And the MPEP tells you what to do in that
22 situation. It says, "For a broken line that
23 must necessarily cross or intrude upon the
24 representation of the claimed design, such an
10:35AM 25 illustration should be included as a separate

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1 figure in addition to the other figures which
2 fully disclose the subject matter of the
3 design." That's what Apple did here, included
4 these unobstructed views in Figures 2 and 4
10:36AM 5 that show that the shape of the arches, the
6 three-dimensional shape that follows the convex
7 protrusion, is claimed.
8 So unless Your Honor has any questions, I
9 will --
10:36AM 10 THE COURT: No, thank you.
11 MR. KATZENELLENBOGEN: Good morning,
12 Your Honor. This is Benjamin Katzenellenbogen.
13 I will also be bringing up slide decks. Would
14 you like one for you and one for your clerk?
10:37AM 15 THE COURT: That would be great.
16 Thank you.
17 MR. KATZENELLENBOGEN: Did you need
18 another copy? Are you all set?
19 Your Honor, I'll be making a few
10:37AM 20 references, both to the slide deck that Apple
21 just went through as well as to our own. My
22 preference is to go through the hard copy so
23 we're not both staring at a screen. We do have
24 the ability to project it if you would prefer,
10:38AM 25 but I think going through it in hard copy would

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1 be more helpful.
2 And actually, I'd like to start on
3 Apple's slide deck exactly where Apple left
4 off, which is on their design slide deck slide
10:38AM 5 37. And Apple said that there were two reasons
6 why Masimo was arguing that the claims needed
7 verbal descriptions in this case. In fact,
8 there are three, and Apple skipped over what is
9 probably the most important of those reasons,
10:38AM 10 which is that the jury cannot be expected to
11 look at the face of these patents and
12 immediately know what is claimed.
13 Typically, design patents are addressing
14 ornamental features. At one extreme, a design
10:39AM 15 patent can simply be a design, a drawing, a
16 pattern that is applied to the surface of an
17 article of manufacture. And the idea is that
18 the utility patents cover the functional
19 aspects of what the thing does, and a design
10:39AM 20 patent can cover its ornamental aspects. And
21 we'll get to the case law in a moment because I
22 think that's really where our primary dispute
23 is, is about that case law.
24 But that the first reason why the Court
10:39AM 25 is going to need to construe these claims is

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1 because simply looking at the face of these
2 claims is not going to tell the jury that's a
3 hammer; oh, that's a fork; oh, that's a pencil,
4 which are the types of articles that are
10:40AM 5 typically in a lot of the design patent cases.
6 A football with fins. These are things that a
7 jury can look at a picture in a design patent
8 and go, "I know exactly what that's covering.
9 That's covering a football with fins" and
10:40AM 10 perhaps some of the details about what's
11 described is an electronic device.
12 But I noticed Your Honor sort of
13 squinting at the screen a couple of times. It
14 is not at all clear from the face of the
10:40AM 15 patents what is being claimed here. And at
16 this point, I'd like to switch back to Masimo's
17 slide deck, and so starting with slide four,
18 there's a summary of the four arguments that
19 I'm going to be going through today.
10:40AM 20 And the first is that Apple never
21 disputes the accuracy of Masimo's
22 constructions. And that makes this different,
23 probably, than any of the cases that are
24 addressed in the briefing, which is that
10:41AM 25 Apple's argument is you don't need to do this.

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1 We didn't go so far as to when we were
2 providing descriptions that doesn't -- we said
3 those aren't claim constructions, and we'll get
4 into some arguments about functionality. But
10:41AM 5 they never said that's wrong; that's not what
6 the claims describe.
7 Two, which is that the jury cannot be
8 expected to understand the scope of these
9 claims simply from looking at the patents.
10:41AM 10 Three is that they must be construed to
11 distinguish ornamental from functional
12 features, and as we'll go through there is
13 Federal Circuit case law that comes after
14 *Egyptian Goddess*, comes after *Crocs*, that makes
10:41AM 15 it clear that is a must. It's mandatory to
16 distinguish the functional from ornamental
17 features.
18 And finally, that Masimo's arguments are
19 based on Apple's own characterizations of the
10:42AM 20 patent, and one of the most fundamental aspects
21 of patent law is that the scope of the claims
22 has to be the same throughout the case, that
23 the patentee doesn't get to make the claims
24 really narrow when distinguishing the prior art
10:42AM 25 and broad when encompassing the accused

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1 product. When Apple says, "Well, we've
2 provided verbal descriptions" and their expert
3 provided bullet point elements when they were
4 arguing either to the Patent Office in the
10:42AM 5 prosecution history or what they've told us
6 they are going to argue in response to our
7 invalidity arguments where they say no, that's
8 not what the patent covers, you're ignoring
9 this element or this aspect of this element,
10:42AM 10 what they're doing, whether they call it claim
11 construction or not, they are verbally
12 describing the scope of the claims. And the
13 claims need to have that same scope when we go
14 to analyze infringement.
10:43AM 15 Let me grab some water.
16 So if we move on in our slide deck
17 perhaps to slide seven, these are images from
18 the three watch patents, and the figures in the
19 patents are not of sufficient quality to be
10:43AM 20 able to tell what's claimed. And one of the
21 first things that it says on the face of all
22 these patents is what's in solid lines is
23 claimed and what's in dotted lines is not
24 claimed. If you look at the figures from the
10:43AM 25 patent -- I know they're in the record as

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1 well -- if you look at the face of the patents,
2 it's impossible to tell what's claimed and
3 what's not. So these designs are not easy to
4 visually understand, as Apple asserts. And the
10:44AM 5 figures are simply too vague and of too low a
6 quality.
7 And I've blown up in slide seven -- if
8 you turn to slide eight, we've blown up the
9 center of those figures in all three patents.
10:44AM 10 And Apple claims that on the left, that's in
11 solid lines and the other two are in dotted
12 lines. And these are the low resolution
13 figures from the patents. There's simply no
14 way the jury is going to be able to understand
10:44AM 15 that without some explanation.
16 And the third reason is that Apple's own
17 experts, all the experts in this case,
18 recognize that the figures in the patents are
19 of too low of quality to simply say, "A-ha. I
10:44AM 20 know what's claimed." Apple's own experts,
21 they first went to the prosecution history, and
22 in the prosecution history there's high
23 resolution images. The technical term for them
24 is score drawings, and their experts take those
10:45AM 25 drawings, but those drawings aren't enough to

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1 make the point that Apple's experts need to be
2 able to make. So they below them up. They
3 colorize them. They make annotations, and then
4 they explain, using verbal descriptions, what
10:45AM 5 they assert that part of the claim conveys and
6 covers. And whether Apple calls that a
7 construction or simply a verbal description,
8 the answer is that the jury should have that
9 description and the Court should construe those
10:45AM 10 claims to resolve that issue so that we know
11 what the scope of these claims are going to be
12 both for validity and for infringement.
13 If the Court doesn't do that, we're going
14 to end up in a situation where at trial, in
10:46AM 15 front of the jury, the experts are going to be
16 arguing about the scope of the claims, and
17 that's something the Federal Circuit in *02*
18 *Micro* made very clear, which is where there's a
19 genuine dispute about claim scope, the Court,
10:46AM 20 as part of claim construction, does need to
21 resolve that. Since it's going to need to be
22 resolved, it makes sense to do that now as part
23 of claim construction where we have full
24 briefing and time to address this as opposed to
10:46AM 25 in the middle of trial as part of the jury

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1 instructions.
2 So those are simply the two options
3 because Apple has already told us that it is
4 going to make arguments based on the verbal
10:46AM 5 descriptions of these claims and of the
6 elements. We weren't the first ones that came
7 up with this bullet point list of the elements.
8 That was Apple in its motion to expedite trial
9 where its infringement expert said these are
10:47AM 10 the elements of the claim and then moved on to
11 analyzing how that applied, supposedly, to
12 Masimo's product.
13 Also, as we'll see a little bit later,
14 Apple made this argument that we would never --
10:47AM 15 Masimo would never show you how the statement
16 of Apple compared to Masimo's proposed
17 construction. In fact, that's what most of the
18 design portion of this slide deck is when we
19 get to it, is we have literally color-coded
10:47AM 20 Apple's statements, either in the prosecution
21 history or in its validity contentions or in
22 its infringement contentions -- sorry, not in
23 infringement contentions. Its expert
24 declarations. We've taken in red the exact
10:47AM 25 terms that Apple is using. We've done in blue

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1 where Apple makes an argument distinguishing
2 prior art, and then in green, we've shown where
3 Apple makes an argument based on the
4 proportions, where Apple has said the key to
10:48AM 5 the design or an important element or how we
6 distinguish the prior art is based on the
7 proportions of height to width or length or
8 thickness, and those are done in green.
9 And we carry that same color scheme, the
10:48AM 10 blue, the red, and the green, through to our
11 constructions, and we'll show the Court exactly
12 where we are borrowing exactly what Apple had
13 said. In some cases, there is black language
14 as well, which is where we've added it to try
10:48AM 15 to make it line up and make sense, and that's
16 exactly what we've done. And time permitting,
17 I will certainly get to that. And those
18 constructions start at about slide 13, so
19 that's the first issue.
10:48AM 20 The second issue is that the Court must
21 distinguish the functional from the ornamental
22 elements. And this is on -- this starts at
23 slide ten, which is that design patents --
24 sorry. I apologize. It's actually slide 11.
10:49AM 25 On slide 11, design patents can cover

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1 only functional elements. And we've got a
2 number of citations on the slide, but there's
3 no question that the scope of the design patent
4 must be limited to the ornamental aspects of
10:49AM 5 the design. And that's a distinction which the
6 case law makes which is that if you're just
7 talking about putting a fancy design on the
8 side of something, then it's easy because then
9 that's entirely ornamental. And that, for
10:49AM 10 example, was in the Supreme Court *Gorham* case,
11 which is where all these standards ultimately
12 come from. That was flatware, forks, spoons,
13 and it was talking about the designs on the
14 handles. So that was a classic design case,
10:50AM 15 which was you're literally -- you're not
16 suggesting that the designs on the handle have
17 any functional purpose. It's simply
18 ornamental.
19 But as people have filed design patents
10:50AM 20 on aspects of more functional articles, for
21 example, in *Gorham*, if the design patent
22 attempted to cover the shape of the tines, then
23 the Court would have needed to distinguish
24 between the functional aspects -- well, you've
10:50AM 25 got to have tines in order to perform the

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1 function of a fork -- from perhaps the
2 ornamental features, which might be the exact
3 shape of the tines or maybe their angles or
4 whatever it might have been.
10:50AM 5 And that's what the case law addresses,
6 which is when we're talking about functional
7 and ornamental, it's making a distinction
8 between those two. And if Your Honor goes to
9 slide 12, this is the case law we walked
10:50AM 10 through. And it starts with *OddzOn*, which is a
11 case from '97, so that was pre *Egyptian*
12 *Goddess*, which is where this concept of where a
13 design contains both functional and
14 nonfunctional elements, the scope of the claim
10:51AM 15 must be construed. That was carried through
16 this *Egyptian Goddess*.
17 But it's this *Ethicon* case, which I
18 believe is 2015, which I think is possibly the
19 most important case to resolving this dispute,
10:51AM 20 and particularly at pages 1333 to 1334 of the
21 *Ethicon* decision. If there's one small bit of
22 homework I could suggest to the Court, it would
23 be focusing on those pages of the *Ethicon*
24 decision because it really walks through
10:51AM 25 exactly what you're supposed to do in this

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1 situation.
2 If the Court looks at the quote we pulled
3 out right here, "Because each of these
4 components has a functional aspect, the
10:52AM 5 underlying elements must be excluded from the
6 scope of the design claims at this general
7 conceptual level." What that language makes
8 clear is when the Court talks about purely
9 functional in *Egyptian Goddess*, it was talking
10:52AM 10 about what you separate and that you separate
11 purely functional from ornamental. The Court
12 in *Egyptian Goddess* was not suggesting that you
13 only have to construe claims if you determine
14 that the element itself on the whole is purely
10:52AM 15 functional. And that wouldn't make sense
16 because if the element as a whole is purely
17 functional, then there's nothing to separate.
18 You don't need to separate the ornamental
19 features from the functional features if the
10:52AM 20 threshold determination is it's purely
21 functional.
22 And that *Ethicon* case makes it clear. It
23 goes through two prior cases, the *Richardson*
24 case and *OddzOn* case. And *Richardson* involved
25 what I thought was a hammer but in reading over

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1 it, it's a demolition tool. And it was a
2 design patent, and it had a hammer part for
3 hammering things, and it had a crowbar part
4 that could be used for pulling nails and could
10:53AM 5 be as a step for climbing up things.
6 And what the Court, the Federal Circuit
7 in *Ethicon* walks through and explains that all
8 of those individual elements of course had
9 functions, but they also had ornamental
10:53AM 10 aspects, and that's what the Court was really
11 worried about, was saying the District Court,
12 you said each of these individual parts has a
13 functional aspect and, therefore, you said the
14 claim has no scope, and that's not right. The
10:53AM 15 claim has a narrow scope. You don't get to
16 cover all things with a hammer shape and a
17 crowbar shape. You don't get to cover the idea
18 because that would turn the design patent into,
19 perhaps, a utility patent. What you get to
10:54AM 20 cover is the ornamental features, the exact
21 shape, the exact curvature of these things.
22 When you're dealing with design patents,
23 the scope of the design is narrow, but the
24 Court went through the process. And the Court
10:54AM 25 in *Ethicon* talked about *OddzOn*, which is the

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1 case with the football with the fins. And the
2 Court said of course the football and fins are
3 both functional, so you don't get to cover all
4 footballs with fins. You get to cover a
10:54AM 5 football with a fin that has the same
6 proportions you described, that evokes same
7 overall visual impression.
8 And I think if the Court agrees with us
9 on that fundamental issue, which is that an
10:54AM 10 individual element doesn't have to be purely
11 functional, that language comes right out of
12 *Egyptian Goddess*, but it was describing once
13 you separate it out, that's what you end up
14 with, is the purely functional stuff and the
15 ornamental stuff, and the design patent covers
16 the ornamental.
17 THE COURT: I think I heard opposing
18 counsel's argument today to be that if you
19 could perform a particular function with a
10:55AM 20 different design, that that meant that the
21 claimed design didn't have any functional
22 aspects. Did you understand that to be --
23 MR. KATZENELLENBOGEN: I'm not sure.
24 I think they backed off of that argument a
10:55AM 25 little bit. I think in their briefing, they

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1 suggested or perhaps overtly stated in some of
2 the early briefing that this alternative option
3 was dispositive. I think they have backed on
4 this, and I don't want to speak for them. I
10:56AM 5 think they have recognized that the case law --
6 the case law doesn't support that.
7 It is one factor that the Courts can
8 consider, but it's not merely are there other
9 ways of doing it. It's are there other ways of
10:56AM 10 doing it that are just as good; right? Because
11 of course, if you can use a different shape;
12 right? Sure, you could make a wheel and make
13 it square, but it sure wouldn't work as well;
14 right? And an octagon might be a little bit
10:56AM 15 better, but ultimately, in order for a wheel to
16 work, it's really got to be circular.
17 And that -- in what Apple went through
18 today and in their briefing, they go through a
19 lot of technical details saying, look, there
10:56AM 20 are other ways that other companies have done
21 some of these thing, but their expert doesn't
22 establish that they actually work as well. He
23 didn't go through and say, okay, if we change
24 the shape of the electrodes, does that work
10:57AM 25 just as well for getting the ECG signals? If

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1 we change the shape or the orientation of the
2 windows where the light is emitted to the wrist
3 and sent coming back out of the wrist, does
4 that work as well?
10:57AM 5 THE COURT: I get what you're saying
6 and why you're saying. Is that "work as well"
7 test something that finds support?
8 MR. KATZENELLENBOGEN: Yes, it's the
9 same or similar performance. I may not have
10:57AM 10 the exact right language there. Essentially,
11 if you can -- the case law is a little vague
12 there on what "similar" means, but, yes, that
13 is supported by the case law, and I can
14 certainly find a citation for Your Honor, if
10:57AM 15 not while I'm standing here, probably shortly
16 after I sit down. I believe that is even in
17 *Ethicon*.
18 So let me see where we are. And then
19 finally -- sorry. Pause for a moment.
10:58AM 20 THE COURT: That's fine. Go ahead.
21 MR. KATZENELLENBOGEN: And if Your
22 Honor turns back to ten, our slide ten, there
23 really isn't any dispute that each of these
24 elements includes functional aspects, and I
10:58AM 25 don't think we heard Apple anywhere in their

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1 brief say no, no, no, no, those elements have
2 no functional aspects. And we didn't hear them
3 say that today, and if there were any doubt,
4 slide ten has some quotes from both one of the
10:58AM 5 named inventors talking about -- and this was
6 in a declaration submitted in this case where
7 he says, and I think this got it right, which
8 was, the design of all those elements we saw on
9 the screen earlier, that wasn't dictated by
10:58AM 10 exact requirements for the dimensions or
11 spacing.
12 And that actually plays into the case law
13 really well, which is that is exactly what
14 *Richardson* and *OddzOn* and *Ethicon* teaches us,
10:59AM 15 which is if you have something like this
16 complicated biosensing sensor that's sensing
17 physiological measurements and it's got a bunch
18 of components. It's got parts that are
19 designed to be electrical contact with the
10:59AM 20 skin. It's got parts that emit light. It's
21 got parts that detect the light. It's got
22 spaces for having a charger. Of course, that's
23 going to be a mix of functional components and
24 the design components, and the design patent is
10:59AM 25 supposed to cover just those specific

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1 ornamental features, so the exact shapes, the
2 exact proportions, the exact spacing, so that
3 Apple doesn't get to cover anything that has
4 eight shapes in it or eight shapes in a circle
10:59AM 5 or the eight four-sided shapes, much less six
6 shapes or four shapes; that Apple's design
7 patent is, okay, what were the ornamental
8 aspects of those? Perhaps it's exactly how
9 thick they are, exactly how far apart they are
11:00AM 10 spaced.
11 And we'll go through a few of those, but
12 that's what Apple did in its prosecution
13 history and in its response to our invalidity
14 contentions, which is they went through our
11:00AM 15 prior art, which of course has curved ECG
16 bands, which of course has emitters and
17 circularly arrayed detectors, and Apple said
18 that doesn't have the same proportions as our
19 design. Those arches are too thick. They
11:00AM 20 don't have the nice streamlined appearance.
21 They don't create this "ripple in a pond"
22 effect. And Apple is welcome to make these
23 arguments, but those have to carry through the
24 case. If Apple says our patent is valid over
11:00AM 25 the prior art because it doesn't have those

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1 things or doesn't do those things, okay, but
2 then it can't claim those when it comes to the
3 accused products.
4 And so whether Apple -- and Apple pointed
11:01AM 5 in its slides to this disclaimer language. And
6 there's no question Apple included disclaimer
7 language says when we characterize the scope of
8 our patents, we don't mean that as a claim
9 construction. Whether they characterize it as
11:01AM 10 claim construction or not, the issue is did
11 they rely on verbal descriptions of the scope
12 of their patent and did they distinguish the
13 prior art based on saying, wait a minute, that
14 feature of the prior art, that's not what we're
11:01AM 15 claiming. And once they do that that needs to
16 be carried through.
17 Apple talked about this idea of whether
18 there was an express disclaimer. They argued
19 that. Both of their cases that they rely on
11:01AM 20 are utility patent cases, and they're not
21 design patent cases. And that's important
22 because -- and I'm glad they fixed this in
23 their slide. It was slide -- yes, it was their
24 slide 31. And it was particularly that second
11:02AM 25 quote that they have there from the *XMTT* case,

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1 which is a utility patent case, and in their
2 briefing, if Your Honor were to look at the
3 joint briefing at slide -- joint brief at 31,
4 I'll read it. If you want to pull it out, you
11:02AM 5 can.
6 I'll read it. What Apple said was "Those
7 statements comprise neither disclaimers nor
8 explanations that 'better captures the scope of
9 the actual invention' than the figures of the
11:02AM 10 patents themselves." And the Court, perhaps
11 like as I did when I first read that, I thought
12 Apple was suggesting that *XMTT* was a design
13 patent case and was distinguishing figures in a
14 patent. And I was all set to get up here and
11:03AM 15 point to Your Honor that was a utility patent
16 case where there was already a verbal
17 description of the claim and the Court was
18 simply distinguishing, saying, as this Court
19 has likely encountered in other utility patent
11:03AM 20 situations, where the words you're proposing
21 now are not any better than the words you used
22 then.
23 That's a completely different situation
24 than a design patent case. I was glad to see
11:03AM 25 in their slide now they did include in the

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1 claim language itself as part of *XMTT* because
2 that's a critical distinction.
3 The reliance on *XMTT* is particularly
4 curious because *XMTT*, although it was, I
11:03AM 5 believe, technically a Delaware case was a
6 situation where the claims were construed in --
7 right -- the claim that was being addressed was
8 actually already construed and then there was
9 an IPR, there was a Federal Circuit case. It
11:04AM 10 came back, and I believe it was Judge Kenneally
11 from Chicago who wrote the case as part of an
12 MDL, multidistrict litigation proceeding, and
13 the issue was the Court concludes -- sorry.
14 The Court merely declined to "engage in a
11:04AM 15 supplemental round of claim construction" where
16 "the judge to whom this case was previously
17 assigned issued a decision on the parties'
18 original request for claim construction which
19 concerned five terms." That's at star one.
11:04AM 20 When they make these arguments, Apple is
21 relying on district court cases, and in this
22 situation, a utility case where the Court had
23 already construed the claims and simply said,
24 parties, you got as much construction as you're
11:05AM 25 going to get out of me. And that's the best

1 case that they have to assert that there needs
2 to be this express disclaimer.
3 Whereas if one looks at design patent
4 cases, and the one we cited was the University
11:05AM 5 of Massachusetts case, 36 F.4th 1374-1379,
6 Federal Circuit case from 2022. "Even where
7 prosecution history statements do not rise to
8 the level of unmistakable disavow, they do
9 inform claim construction." That's the Federal
11:05AM 10 Circuit being very practical, which is even if
11 you don't use the magic words "I disclaim" or
12 "I hereby limit my claim to X," if you say
13 you're patentable over prior art because of X,
14 you're going to be limited to that.
11:05AM 15 So that's the big -- okay. Thank you.
16 The same or similar functional
17 capabilities language does some from *Ethicon*,
18 796 F.3d at 1331.
19 With that, I'd like to move on to a few
11:06AM 20 of the terms and to show that, in fact, we are
21 doing exactly what Apple said we would never
22 do, which is compare the language. So we start
23 on slide 14.
24 So this is term A-12, and this is the
11:06AM 25 overall visual impression. The fact that Apple

1 objects to even this is curious because Apple's
2 arguments are the design patent should cover
3 the overall visual impression, and they repeat
4 that mantra. But even when we tried to put the
11:07AM 5 overall visual impression into words, Apple
6 objected to that. Let's see how we got there.
7 On slide 15, this was Apple's statement
8 to the Patent Office. "The small thickness
9 relative to the diameter" and this is of that
11:07AM 10 protrusion. Again, just to orient Your Honor,
11 it's the part in dark lines. Here, we tried to
12 go to the high resolution score drawings so
13 it's a little more clear what's being claimed.
14 Again, even there, it can be a little
11:07AM 15 confusing.
16 "The small thickness relative to the
17 diameter" so that's in green, so that's a
18 proportion issue, "contributes to the overall
19 appearance of the claimed design as an elegant
11:07AM 20 and streamlined concentric circle appearance
21 rather than a bulky assembly of shapes." Apple
22 is saying ours is an elegant, streamlined
23 concentric circles. Prior art, bulky assembly
24 of shapes.
11:08AM 25 Next slide, 16, this is in this case in

1 response to the invalidity contentions. "The
2 streamlined, elegant, concentric circle
3 impression like that of the" and they make the
4 same statement regarding all of the patents.
11:08AM 5 Then let's look at slide 17. This is
6 Masimo's construction. Simply "The overall
7 appearance of the claimed design is an elegant
8 and streamlined concentric circle appearance
9 rather than a bulky assembly of shapes." We
11:08AM 10 have added the words "is" and a comma.
11 Everything else is Apple's own words. And yet
12 Apple still objects to even this construction.
13 I think this is one of the best examples,
14 and I'll go through a few examples from the
11:08AM 15 deck. I don't want to use up the Court's time
16 by going through every single one, but that's
17 what we've done, is lined these up.
18 THE COURT: Can you walk me through,
19 while we're all here -- I find your
11:08AM 20 constructions in this binder?
21 MR. KATZENELLENBOGEN: I apologize.
22 When you say "this binder" I'm not sure.
23 THE COURT: This is volume 1 of 2.
24 MR. KATZENELLENBOGEN: Yes. That
11:09AM 25 would be our constructions, although with the

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1 caveat that as part of our ongoing attempt to
2 discuss these issues with Apple and also after
3 we completed the briefing, one, Apple filed its
4 brief in the charger patent IPR, and so we
11:09AM 5 didn't have the ability to brief that issue.
6 There's one change that we made based on an
7 argument that they made there.
8 And then also after the briefing was
9 done, we got Apple's final response to our
11:09AM 10 final invalidity contentions, and what that
11 allowed us to do is to go back to our claim
12 constructions and as part of the ongoing role
13 to say is there any claim constructions we
14 don't need, is there anything we can simplify,
11:09AM 15 and that -- particularly I believe it was term
16 A-9 where we had the big long construction and,
17 again, Apple never suggested that any of that
18 was inaccurate. It was all accurate, and I can
19 walk through and say exactly how we came up
11:10AM 20 with all of it. Ultimately, we determined it's
21 long. It's going to be hard for the jury. We
22 think we can capture that in one sentence.
23 That's what's presented both in our slide deck
24 and in the document that Apple handed up
11:10AM 25 earlier, particularly A-9 and a couple of

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1 terms, where we shortened them based on
2 particularly looking at Apple's response to the
3 final invalidity contentions and saying okay.
4 This is not a distinction we're going to need.
11:10AM 5 There are details in here that, ultimately,
6 aren't going to matter in this case.
7 THE COURT: So walk me through. We
8 just talked about A-12 overall visual
9 impression and your proposal for A-12 was?
11:10AM 10 MR. KATZENELLENBOGEN: That's on
11 slide 17.
12 THE COURT: "The overall appearance
13 is an elegant and streamlined concentric circle
14 appearance rather than a bulky assembly of
11:10AM 15 shapes."
16 MR. KATZENELLENBOGEN: Exactly. And
17 on the preceding slides --
18 THE COURT: You're not saying
19 anything here is functional, though, for A-12?
11:10AM 20 MR. KATZENELLENBOGEN: No, we're not
21 raising that argument. For the functionality,
22 there's two ways functionality comes up.
23 Functionality comes up in the claim
24 construction where you're dealing with an
11:11AM 25 individual element, which we'll get to. For an

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1 individual element, if it's got functionality
2 and it's got ornamentation, then you separate
3 that out as part of claim construction to say
4 this is ornamental, this is functional so that
11:11AM 5 the jury knows, okay, if the ornamental part
6 that focuses on -- you don't completely get rid
7 of the -- you don't say, oh, it completely
8 ignored the functional aspect, but you need to
9 separate those out so the jury knows what to
11:11AM 10 focus on.
11 THE COURT: Right. But that's not
12 with respect to A-12?
13 MR. KATZENELLENBOGEN: Correct.
14 THE COURT: Okay.
11:11AM 15 MR. KATZENELLENBOGEN: So then the
16 next example I'd like to go to is A-7, and that
17 is our slide 38.
18 And the way the parties largely briefed
19 these issues, in case it wasn't obvious in the
11:12AM 20 way the deck is oriented, is the same way Apple
21 presented the arguments in its validity and
22 infringement analyses from its expert. These
23 charts, which I think Apple handed up --
24 these --
11:12AM 25 Did they hand those up?

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1 Did you.
2 MS. LIMBEEK: Yes.
3 THE COURT: Starting to get buried.
4 MR. KATZENELLENBOGEN: They're not
11:12AM 5 bound. They're just stapled. I can bring up
6 two extra copies if Your Honor would like.
7 These have the language in them. Here
8 we're talking about the chart for Apple's
9 patents, so that's why we created this as a
11:12AM 10 redline because it has both the constructions
11 that we've changed in response to Apple's
12 contentions as well as particularly with regard
13 to the utility patents to make it really line
14 up with the parties' briefing. There are a
11:13AM 15 couple of terms that the parties agreed. I
16 think there was one term the parties didn't
17 brief. There are a couple of terms, when we
18 get to that, the parties said we don't need to
19 discuss those in oral argument. We can submit
11:13AM 20 on briefing to try to streamline the process.
21 This would be the latest and greatest.
22 THE COURT: Okay.
23 MR. KATZENELLENBOGEN: And so with
24 regard to slide 38, "convex dome," what Apple
11:13AM 25 did is when Apple was describing these, they

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1 went outside in. So they started with the
2 outside of the circle on the physiological
3 sensor module, started from the outside and
4 then they went in and also started from the
11:13AM 5 flat back rear of the watch and went up.
6 This is the convex dome, which is the top
7 part of the protrusion. And the parties agreed
8 on slide 39 -- there's a patent drafting
9 convention. If you see those two sets of three
11:14AM 10 lines over the top that goes over everything
11 there, those are called oblique shading lines,
12 and that is used, and the parties agree, that
13 means a transparent translucent and highly
14 polished or reflective surface. The parties
11:14AM 15 agree on that part, so that's in purple.
16 That's our third convention, when we
17 agree on something. Unfortunately, there's not
18 as much purple as we would like.
19 On slide 40, that's our construction,
11:14AM 20 which is that the convex dome has a
21 transparent, translucent, and highly polished
22 or reflective surface."
23 THE COURT: I'm sorry. When you
24 said maybe it wasn't obvious what all the
11:14AM 25 agreements were. I think that was an

1 understatement. It took us a while to figure
2 out what was going on here. Where can I tell
3 in anything that I have before today that the
4 parties agreed on "transparent, translucent,
11:14AM 5 and highly polished surface"?
6 MR. KATZENELLENBOGEN: That would be
7 the joint claim construction brief. I believe
8 that starts out with two charts; is that
9 correct?
11:15AM 10 THE COURT: Let the record reflect
11 that I'm trying to locate this.
12 MR. KATZENELLENBOGEN: I apologize.
13 I know that --
14 THE COURT: Where? In the brief?
11:15AM 15 MR. KATZENELLENBOGEN: Yeah. So it's
16 in the beginning of the joint briefing. It's
17 also in our slide deck if that would help.
18 THE COURT: It wouldn't. I want to
19 stick with the brief. Where is it in the
11:15AM 20 brief? Oh, I see. Okay. Asserted Apple
21 design patents agreed-upon constructions. Got
22 it.
23 MR. KATZENELLENBOGEN: Yes. So these
24 are -- these, at least, are things that the
11:15AM 25 parties could agree on. These are,

1 essentially, patent drafting conventions that
2 we would not expect the jury to know, for
3 example, that what are called oblique shading
4 lines have this technical meaning that's
11:16AM 5 transparent, translucent, and highly polished
6 and reflective surface.
7 THE COURT: Got it.
8 MR. KATZENELLENBOGEN: So Apple
9 agreed that that's what those oblique shading
11:16AM 10 lines -- and I just have the picture from our
11 slide deck on the overhead, but it's in the
12 briefing, so we're good there.
13 And so -- actually, can we leave that on.
14 It might be helpful as we're following along.
11:16AM 15 Then on page 39 of our slide deck, that
16 shows our construction, which is simply the
17 oblique -- sorry. That's the agreement and
18 then our construction is on the next page, 40.
19 Which is simply that Masimo's construction is
11:17AM 20 "the convex dome has a transparent,
21 translucent, and highly polished reflective
22 surface," and Apple objected to even that.
23 That's showing exactly where our
24 constructions come from.
11:17AM 25 The next one I'd like to go to is A-10,

1 and that's on slide 56. And so here we have
2 the center of the -- the center of this module.
3 And I don't know. Is it easier for Your
4 Honor to go through it together on the
11:17AM 5 overhead?
6 THE COURT: Yes. I have it, also,
7 here on my desk.
8 MR. KATZENELLENBOGEN: Great.
9 So what this is, it's a central circle
11:17AM 10 with a number of concentric circles. It's
11 about 20 if we go through and count them up.
12 This is another figure from the patent, and
13 this is important because it shows perspective.
14 What Your Honor can see on the side here is
11:18AM 15 that the lines, as they get close to here, they
16 get cut off. And so what that means is that
17 this -- all these concentric lines, they have
18 to be below the surface of that outer circle;
19 right? Imagine if you have a bunch of lines.
11:18AM 20 If they're all on the same surface if you
21 looked at it from an angle, they might squish
22 together, they might look like an oval, but
23 they wouldn't get cut off.
24 THE COURT: I think I understand.
11:18AM 25 There's a reason I went to law school instead

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1 of dental school. It's because I don't have
2 perspective you need to pass that part of the
3 test.
4 MR. KATZENELLENBOGEN: If it were all
11:18AM 5 at the same level, what it would simply look
6 like is something -- they would all just be
7 oriented that way. They wouldn't be cut off.
8 The idea that the jury is going to be
9 able to look this and go, a-ha, I see, those
11:19AM 10 are recessed. Just between the two of us how
11 long we had to go through just to go through
12 that.
13 And then we see okay, this is how Apple
14 described this element. Apple said the design
11:19AM 15 includes a central round shape -- and I'm
16 skipping a little bit to highlight the key
17 words -- positioned within the inner circle
18 shape. But all Apple is describing is if it's
19 one red circle, if it's one circle. But
11:19AM 20 there's a lot more than that, and this is how
21 Apple described it in this case.
22 Again, they just referred to a central
23 circular shape or, in response to the
24 invalidity contentions in the second part, a
11:19AM 25 central round shape positioned within the inner

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1 broken circular arrangement. Here, we have a
2 situation; right? And particularly in the
3 lower one, which is Apple says we didn't
4 construe anything, we didn't construe anything.
11:20AM 5 What did Apple say? The D'279 patent protected
6 design includes at least the following design
7 elements.
8 And it's got a list, and one of those
9 elements, according to Apple, is a central
11:20AM 10 round shape spaced apart from and positioned
11 within the inner broken circular arrangement.
12 Whether Apple characterizes that as a
13 construction is beside the point. Apple has
14 said in order to distinguish our prior art,
11:20AM 15 Apple is going to argue that the protected
16 design includes at least the following
17 elements. We think it's appropriate for the
18 Court to say, okay, if that's the position that
19 Apple is going to take, then we'll make that
11:20AM 20 part of the claim construction, and that's got
21 to be the same for invalidity and it's got to
22 be the same for infringement.
23 The problem is Apple's descriptions omit
24 all those concentric circles. Apple acts as if
11:21AM 25 it's one circle. That's where we get to

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1 Masimo's construction, and the first part is
2 "20 concentric circles in the center of the
3 outermost circle and surrounded by four-sided
4 shapes." That's out of Apple's own language.
11:21AM 5 That's why it's mostly red.
6 The second part is the central circles
7 are recessed below the surface having the
8 four-sided shapes. And admittedly, that's in
9 black because Apple didn't say that, but that's
10 the respond to Apple's characterization that
11 it's just a circular feature. It is much, much
12 more than that.
13 And then we also have a proportion
14 element, which is the radius of the largest
11:21AM 15 central concentric circle, the radius of the
16 big circle, is about 17 percent of the overall
17 radius. That is about 17 percent of the big
18 one.
19 And that one probably should have been in
11:21AM 20 green. I will go through and you will see
21 where in a number of times, Apple makes
22 arguments attempting to distinguish prior art
23 where they compare the proportions of the
24 elements, and so Apple will say that piece of
11:22AM 25 prior art, that's not like our claimed design

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1 because it doesn't have -- this part is too
2 bulky or this part is too thick or this part
3 occupies too much of the space.
4 What we simply did was we described what
11:22AM 5 the shapes were and then we said, okay, look,
6 ultimately, we know that Apple is going to make
7 the following argument: They're going to say
8 the prior art is different because it doesn't
9 have the same proportions. Okay. Well, we
11:22AM 10 don't want to give the jury a protractor and
11 slide rule and say figure out what the
12 proportions of the claimed design are and then
13 have the expert say this is the proportion that
14 I calculated from the prior art or this is the
11:22AM 15 proportion I calculated for the accused
16 product.
17 We thought that as part of claim
18 construction under *02 Micro* it made sense,
19 since Apple is relying on the proportions,
11:23AM 20 let's do that part of the work for the jury.
21 And, again, there's no dispute that these are
22 accurate. Apple raises some cases like, I
23 think, *Nike* and one of the other district court
24 cases where the Court said I'm not going to
11:23AM 25 adopt specific proportions because you didn't

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1 tell me where these came in and you don't have
2 a supporting declaration. It's like the
3 attorneys just calculated it on the way to
4 court, and the Court said I'm not going to
11:23AM 5 incorporate that.
6 But we did exactly what it was the Court
7 said was missing in those cases, which is we
8 had our expert, Phil Drummond, went through,
9 did all of these measurements, and explained I
11:23AM 10 calculated these and these are the ratios and
11 Apple doesn't dispute that those are accurate.
12 Any questions about that? I realize this
13 is a ton of information.
14 THE COURT: So the examples you've
11:23AM 15 gone through have more to do with how we're
16 going to describe portions of the claimed
17 designs or the claims that are ornamental.
18 Hearing opposing counsel's argument, I thought
19 this was going to be a dispute between
11:24AM 20 functional and ornamental. Do you have -- do
21 you want to walk through something that has to
22 do with a place where you say something is
23 functional?
24 MR. KATZENELLENBOGEN: Sure, and I
11:24AM 25 don't think -- Apple doesn't dispute that these

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1 elements are -- I can go through, but they have
2 functional elements; right? That circle, the
3 20 concentric circles we just looked at, that's
4 called a Fresnel lens, and it's a specific type
11:24AM 5 of light diffuser, and their expert doesn't
6 dispute that, of course, that performs
7 functions; right? What he says is, well, you
8 could use a different Fresnel lens that instead
9 of having 20 gradations had a different number
11:24AM 10 of gradations or instead of having one Fresnel
11 lens you could have two.
12 Similarly, with the four-sided shapes,
13 the expert says you could have those shapes in
14 a different orientation. They could be in a
11:25AM 15 different size. Similarly with regard to the
16 arches.
17 There's no dispute, and Apple can correct
18 me if I'm wrong, that these all perform
19 functions. Ultimately, if these things weren't
11:25AM 20 necessary, Apple would just make the back of
21 the watch a clear piece of sapphire.
22 THE COURT: I guess what I'm trying
23 to understand is, how this is going to play out
24 in front of the jury? Are you going to say you
11:25AM 25 don't look at the picture, you have to take

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1 into account that some of these things are
2 functional and therefore can't be part of the
3 design --
4 MR. KATZENELLENBOGEN: Exactly.
11:25AM 5 THE COURT: -- that's claimed?
6 You're going to say that; right?
7 MR. KATZENELLENBOGEN: Well, I
8 imagine the judge will issue those as claim
9 construction instructions and as part of the
11:25AM 10 jury instructions.
11 THE COURT: Do I have that in front
12 of me? That's what I thought we were doing
13 here.
14 MR. KATZENELLENBOGEN: This is our
11:26AM 15 proposal. There are two ways of doing this.
16 In terms of identifying the claim construction,
17 what we've proposed is how the Court identifies
18 for the jury what the ornamental features are.
19 And that's separating out, and that's, for
11:26AM 20 example, what the Federal Circuit suggested in
21 *Ethicon*, which was going through and saying,
22 okay, let's limit the claims to the ornamental
23 features.
24 THE COURT: Got it. Your view is I
11:26AM 25 don't have to -- the way that you have done

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1 this is you're saying to me, Judge, you don't
2 have to tell the jury which parts are
3 functional. You just tell the jury which parts
4 are ornamental.
11:26AM 5 MR. KATZENELLENBOGEN: Yes. Yes.
6 And so Apple's first argument was, wait a
7 minute. I don't want you to even do that. But
8 they said if you are going to do that, they
9 want you to identify the functional parts
11:27AM 10 rather than the ornamental parts. We think
11 it's more appropriate to have the ornamental
12 parts identified, and that's where from --
13 again, I mentioned this at *Ethicon*, which is
14 *Ethicon* went through and described those
11:27AM 15 constructions in both *Oddzon* and *Richardson*.
16 It might be helpful -- I can read from a
17 portion of that.
18 THE COURT: So you are or you aren't
19 going to say to the jury in your closing
11:27AM 20 argument and with your expert you can't
21 consider the fact that there are all these
22 concentric circles as art of the claimed design
23 because those are functional? You are going to
24 argue that or you're not going to argue that?
11:27AM 25 MR. KATZENELLENBOGEN: Under our

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1 claim construction, the Court would say I
2 construe the claims as follows and would go
3 through and say it's these images, it has this
4 overarching shape, and would go through the
11:28AM 5 descriptors of the various elements. And then
6 we would do just like we do in a utility patent
7 case where the claims have been construed. We
8 would then walk through with the jury and say
9 this is the claim construction that the judge
11:28AM 10 has given you, and this is the overall image,
11 and in light of both the overall image, the
12 overall impression created by the image, and
13 these constructions, let's compare that to the
14 prior art, and let's compare that to the
11:28AM 15 accused product.
16 And for an example of that, this is how
17 *Ethicon* described the *Richardson* claim
18 construction. So this was describing that
19 construction -- and I can pause for a moment.
11:28AM 20 THE COURT: No, that's fine.
21 MR. KATZENELLENBOGEN: These elements
22 which compose the entirety of the multifunction
23 tool had utility that had been known and used
24 in the art for more than a century and were
11:29AM 25 thus outside the scope of the design claim.

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1 I'm going to omit the internal citations. This
2 does not mean, however, that the design claim
3 had no scope. Rather, the claim was limited to
4 the ornamental aspects of these functional
11:29AM 5 elements, in particular, the scope of the claim
6 encompassed, among other ornamental aspects,
7 the shape of the hammer head, the diamond
8 shaped flare of the crowbar in the top of the
9 jaw, the rounded neck, the undecorated handle,
11:29AM 10 and the orientation of the crowbar relative to
11 the head of the tool, which was not driven by
12 functional considerations, unlike the
13 orientation of the hammer head and crowbar at
14 opposite ends of the handle.
11:29AM 15 This is just a tool, and the Federal
16 Circuit went through and explained, okay, this
17 is the appropriate scope of what the design
18 patent was able to cover.
19 And then it went through for *OddzOn*,
11:30AM 20 which was the football with the tail. It said,
21 "Although the existence of a functional purpose
22 or the football shape, tail, and fin elements
23 of the underlying article did not alone
24 invalidate the design patent, as the claimed
11:30AM 25 design also included some purely ornamental

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1 features, such functional aspects at least
2 necessitated cabining the scope of the design
3 claim in order to prevent the claim from
4 encompassing the general design concept of a
11:30AM 5 football with a tail and fins."
6 And then there's an internal quote.
7 "These functional characteristics do not
8 invalidate the design patent but merely limit
9 the scope of the protected subject matter.
11:30AM 10 Thus, we affirm the construction of the
11 District Court which removed the generalized
12 football shape, tail, and fins from the scope
13 of the claim, limiting the design claim to its
14 purely ornamental features: A slender straight
11:31AM 15 tail shaft and three fins symmetrically
16 arraigned around the tail shaft, each gently
17 curving up and outward to create a larger
18 surface area at the end furthest from the ball
19 and flaring outwardly along the entire length
11:31AM 20 of the tail shaft with the fins seemingly
21 protruding from the inside of a football."
22 So there's the Federal Circuit -- and
23 this is in 2015, so after all the Federal
24 Circuit cases that Apple has cited --
11:31AM 25 explaining this is how you go about this. And

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1 these are for simple items: A toy football
2 with a fin and a hand tool. That was how much
3 construction explanation the Federal Circuit
4 thought was appropriate for construing the
11:31AM 5 claims.
6 And then comparing this to -- and in
7 those cases there was, as near as I can tell,
8 no argument that the cover of the patent itself
9 didn't reveal all of this. We have a much,
11:31AM 10 much more complicated case here, and of course
11 in those cases --
12 THE COURT: We love our patents.
13 That's for sure.
14 MR. KATZENELLENBOGEN: We also love
11:32AM 15 our patents. And I think the utility patents
16 may be a little more straightforward and
17 typical, but that's the key issue with regard
18 to the design patents, is that appropriate
19 structure. And Apple relies on a bunch of
11:32AM 20 district court cases, but, ultimately, the
21 Federal Circuit in *Ethicon* set the standard,
22 and that's the appropriate framework for the
23 Court to walk through.
24 I have a couple of specific terms from
11:32AM 25 the charger patent.

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1 THE COURT: I'm sure your team is
2 keeping you mindful of your time.
3 MR. KATZENELLENBOGEN: Yes.
4 THE COURT: Okay.
11:32AM 5 MR. KATZENELLENBOGEN: So let me just
6 take chart two here. Let's go to A-20, which
7 is on slide 65.
8 So this is the overall shape of the
9 charger. This is what Apple said. "The
11:33AM 10 claimed design includes an overall cylindrical
11 shape that resembles a compact puck" and that
12 "the claimed design includes non-orthogonal
13 transitions" -- so not at a right angle --
14 "e.g., curved or beveled edges between the
11:33AM 15 major faces and the sidewall."
16 Here is something we got after the
17 briefing was done. This is an example of what
18 Apple was doing in its briefing to the Patent
19 Office, which is on the left side, they're
11:33AM 20 saying, look, this is the patent. On the right
21 side, they're saying this is the prior art and
22 saying this is why the prior art doesn't cause
23 patentability problems. And they're saying the
24 design patent has curved edges, curve, curve,
11:33AM 25 curve, curved. And they say look, but the

1 prior art has what they call chamfered edges.
2 And this isn't my image. This is Apple's own
3 image, Apple's own words. "Chamfered edges
4 differ substantially from the claimed design."
11:34AM 5 And then they say, "Murray's appearance is
6 starkly different than the claimed design."
7 When Apple is saying we didn't construe
8 this claim, Apple is saying they want to be
9 able to argue to the Patent Office our claim is
11:34AM 10 patentable because chamfered edges are
11 completely distinct, but don't you dare tell
12 the jury that our patent doesn't cover
13 chamfered edges. That's not fair, and that
14 would violate the fundamental idea that the
11:34AM 15 claim has got to have the same scope all the
16 way through. There's no way the jury would
17 know that chamfered edges -- that Apple had --
18 there's no way the jury would know that Apple
19 had agreed chamfered edges are starkly
11:34AM 20 different.
21 Apple also made similar arguments in this
22 case. Overall cylindrical shape, curved edges,
23 a featureless bottom surface, and proportions
24 with substantially the same ratio of diameter
11:35AM 25 to height. And that's where Apple is saying

1 it's got to have the same proportions.
2 This is a revised construction because we
3 added what's highlighted because we didn't have
4 the chamfered argument in the briefing. It's
5 "A cylindrical shape with substantially
6 rounded, not chamfered, outer edges between the
7 sidewall and the top and bottom surfaces of the
8 cylinder." Again, entirely supported by
9 Apple's own statements.
11:35AM 10 If we go to A-24, which is slide 85,
11 "flat bottom surface." Again, Apple described
12 to the Patent Office that the bottom is flat.
13 It lacks features. It's generally featureless,
14 i.e., claimed surfaces are shown as continuous
11:35AM 15 and uninterrupted by features. And again, this
16 is Apple's on -- on slide 87, Apple's own
17 figures. When that tell the Patent Office,
18 look, stacked concentric disks of different
19 diameters create an overall stepped appearance
11:36AM 20 starkly different than the claimed design.
21 They're saying ours is a nice rounded bottom
22 surface that's flat. You can't have these
23 disks of different diameters underneath or on
24 the bottom.
11:36AM 25 Okay. And again, they argue that it's a

1 flat, featureless bottom surface.
2 Again, our construction is, on 89, "a
3 flat bottom surface with a diameter that is
4 substantially the same as the diameter of the
11:36AM 5 sidewall." The red "flat bottom surface" is
6 because those are terms used by Apple. And
7 "diameter that is substantially the same as the
8 diameter of the sidewall," that's in blue
9 because that's the argument that Apple made to
11:36AM 10 distinguish the Murray prior art, which is that
11 you can't have a second bottom that's of a
12 narrower diameter.
13 And finally, if we go to A-23, and that's
14 a debate about whether this recessed center
11:37AM 15 portion -- this is on the charger -- whether
16 that has to be recessed or it has to be convex,
17 meaning it has to have a curvature to it.
18 And Apple's argument, again, shade lines.
19 This is another patent convention, that shade
11:37AM 20 lines show contour, not surface orientation.
21 So this is on the front of the patent, so
22 there's no dispute about this. And Apple
23 argues that because there are shade lines and
24 it's the top of the patent, that must mean that
11:37AM 25 the whole part in here is convex like a bowl.

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1 Now, we know that's wrong because Apple
2 has shade lines on essentially every figure in
3 that patent, particularly the bottom, Figure 4.
4 If having these contour line here meant that
11:37AM 5 everything in the middle was bowl shaped, then
6 the bottom of the charger wouldn't be flat. It
7 would be convex like a bowl. And yet we just
8 know from the arguments we just went through
9 that Apple says that's not true.
11:38AM 10 We know that what this means is that it
11 doesn't have to be concave. It just has to be
12 recessed, and so that's our construction on 83,
13 which is that the flat ring features a circular
14 recessed center portion and then the claimed
11:38AM 15 design is not limited to a concave recess.
16 So I probably used up a little more time
17 in going through some of these things than I
18 anticipated.
19 A couple of quick notes. On Apple's
11:38AM 20 slide eight, when they're talking about the
21 element-by-element comparison, you'll notice
22 even in that quote they refer to the fact
23 finder.
24 I can do it this way.
11:38AM 25 There's a fact finder. That's because

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1 this portion of *Ethicon* is at 1334 and is
2 addressing infringement, not claim
3 construction.
4 And so I'm going to stop there. If there
11:39AM 5 are additional questions, I'm happy to answer
6 them, but I know we want to get on to the
7 utility patent stuff.
8 THE COURT: Thank you very much.
9 MS. LIMBEEK: Kerri-Ann Limbeek on
11:39AM 10 behalf of Apple. Can I briefly respond to a
11 few points?
12 What this comes down to is what's
13 appropriate for claim construction versus what
14 will be shown to the jury and the analysis that
11:39AM 15 the jury is going to have to do at trial. As
16 you saw --
17 THE COURT: Is that something
18 different than what the jury is going to be
19 instructed to do at trial? I thought that's
11:39AM 20 what -- I think you heard me say this. I
21 thought that's what we were doing here, is
22 figuring out how the jury is going to be
23 instructed.
24 MS. LIMBEEK: Right. And what the
11:40AM 25 jury is supposed to be doing at trial when it

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1 does its infringement analysis is it's supposed
2 to be comparing the overall visual impression
3 of the claimed design, which is in the figures,
4 to the accused product and the overall visual
11:40AM 5 impression of the accused product in view of
6 the closest prior art. So that process, the
7 Federal Circuit has held, that happens at trial
8 in front of the fact finder, and it is not
9 appropriate. And they have not said it in any
11:40AM 10 cases showing that it's appropriate to do that
11 analysis here at claim construction.
12 And I wanted --
13 THE COURT: Doesn't the *Egyptian*
14 *Goddess* case say something about that, though?
11:40AM 15 Let me find that.
16 MS. LIMBEEK: It says that verbal
17 constructions are disfavored and as a rule, you
18 should not have verbal descriptions that go
19 through on an element-by-element basis because
11:41AM 20 the fact finder is going to do that analysis
21 using the figures and not go through -- what
22 counsel got up here and said is they're going
23 to do what *Egyptian Goddess* said is
24 procedurally improper. What the Federal
11:41AM 25 Circuit said is improper is an

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1 element-by-element checklist instead of looking
2 at the overall visual design. They've gotten
3 up here and said the reason we want you to
4 construe these claims is so we have an
11:41AM 5 element-by-element checklist for the jury
6 instead of what the jury is supposed to be
7 doing, which is looking at the overall
8 impression from the figures.
9 THE COURT: There's a dispute,
11:41AM 10 certainly, about whether or not there's going
11 to be -- each element has to be met as they put
12 it now.
13 MS. LIMBEEK: When we're explaining
14 this to the jury, just like in the context of
11:41AM 15 the PTAB, you have to have written descriptions
16 and written testimony to explain to the PTAB
17 how to do that analysis. That analysis, as you
18 saw, it uses figures, and it explains to the
19 jury. And the experts are going to get up and
11:42AM 20 explain the figures. Of course that's going to
21 happen, and compare the figures in the patent
22 to the figures in the prior art and the figures
23 in the accused product.
24 But what the Federal Circuit warned
11:42AM 25 against is doing that at the claim construction

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1 phase because that's going to confuse the jury
2 into, instead of looking at the figures,
3 looking at the elements and saying is this word
4 met in the accused product, and that is not the
11:42AM 5 right analysis in a design patent case.
6 THE COURT: What do you make of the
7 Federal Circuit's language in *Egyptian Goddess*?
8 After it says it may be unwise to attempt a
9 full description, it says, "A Court may find it
11:42AM 10 helpful to point out either for a jury or in
11 the case of a bench trial by way of describing
12 the Court's own analysis various features of
13 the claimed design as they relate to the
14 accused design and the prior art." I suppose
11:43AM 15 they meant to point out in the jury
16 instructions.
17 MS. LIMBEEK: I suppose so. There
18 have been no cases raised where anyone has
19 actually pointed out features of the prior art
11:43AM 20 at the claim construction phase in the wake of
21 *Egyptian Goddess*, and the Federal Circuit has
22 done that since then. What the Federal Circuit
23 has done is defer to the figures and has
24 actually overturned situations where they
11:43AM 25 have -- where Courts have provided these verbal

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1 descriptions or read out elements because they
2 are allegedly functional because instead you
3 should be deferring to the figures.
4 I want to just touch on one thing that
11:43AM 5 seemed to be an area of confusion, which is the
6 import of the alternative designs. So the
7 Federal Circuit said this is the most important
8 factor and it, in fact, can be dispositive of
9 whether or not an element is functional. It's
11:43AM 10 not that if there are alternative designs then
11 this element has no function, but that's not
12 the inquiry. The inquiry is whether the
13 element is dictated by function, and whether
14 there are alternative designs actually does
11:44AM 15 show whether or not it's dictated by function.
16 So in the example that counsel gave of a
17 wheel, he says, well, you could have a wheel
18 that's four-sided, and that would be a design.
19 No, if it's four-sided, that's not going to
11:44AM 20 perform the same or similar function as a wheel
21 that's circular, and that's exactly what comes
22 out until the case law. So Masimo's claims
23 that there are some cases out there where they
24 found an element functional despite the fact
11:44AM 25 that there were alternative designs, none of

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1 those cases say that.
2 What they actually say, for example, the
3 *Golden Eye* case, it says -- it found that where
4 there are alternative designs that directly and
11:45AM 5 adversely impact the functionality. So if you
6 use a different design, now you're not going to
7 have the same function. You're going to have a
8 negative effect. That's when the design is
9 actually functional: When you use a different
11:45AM 10 design, you get a different utilitarian effect.
11 And they haven't argued that for a single
12 one of these elements. We have shown over and
13 over again in the Apple utility patents they
14 use, in the commercial embodiments, in the
11:45AM 15 prior art, that for each of these elements,
16 there are a number of different ways that you
17 can design the product to perform the function,
18 and it works substantially the same way. It's
19 the same or substantially similar function with
11:45AM 20 any of these myriad different designs.
21 And Apple's expert submitted a
22 hundred-page declaration going into that
23 analysis and explaining exactly that, that
24 there are lots of different ways to do the
11:46AM 25 ornamental design. They don't need to be

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1 arches. They can circles. We saw that in
2 Apple's own utility patents. They don't need
3 to be eight four-sided shapes. It could be two
4 half circles.
11:46AM 5 For each of these elements, the design,
6 it's not dictated by function. You could have
7 many other designs. And the Federal Circuit
8 has said that can be dispositive because it
9 goes to the heart of the inquiry, which is not
11:46AM 10 whether these elements have functions or
11 whether the article has function. That's
12 always the case with these articles of
13 manufacture. What matters is whether they are
14 dictated by function, and Masimo hasn't
11:46AM 15 established that for a single element. They
16 didn't put anything on their slides because
17 they can't show that.
18 And on these alternative designs, as Your
19 Honor pointed out, Masimo hasn't even attempted
11:46AM 20 with each of these elements to say here's the
21 part of this that's functional; here's the part
22 that's ornamental. They haven't done what the
23 case law says you can do in claim construction
24 if you're finding an element that is dictated
11:47AM 25 by function. It doesn't distinguish between

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1 the allegedly dictated by function elements and
2 ornamental elements anywhere in its claim
3 construction. In fact, it has a number of
4 elements that it's saying it's construing where
11:47AM 5 they don't even say any part of that element is
6 dictated by function but they're still
7 providing multiple sentences of verbal
8 description without any basis.
9 And more recent case law. I want to
11:47AM 10 point out the *OddzOn* case that counsel referred
11 to and claimed it was post *Egyptian Goddess* is
12 from 1997. It's pre *Egyptian Goddess*. And
13 recent case law, including from this district,
14 has said in the main, the case law counsels
11:47AM 15 against eliminating whole aspects of the
16 claimed designs at the claim construction
17 stage, and instead, it simply identifies the
18 particular elements that are dictated by
19 function. In that case, which was the *Shur*
11:48AM 20 case in 2020, the Court's claim construction
21 will simply note that the square shape of the
22 claimed design is dictated by function, but
23 otherwise they defer to the figures, which is
24 the proper analysis.
11:48AM 25 What Masimo is trying to do here is

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1 they're waving their hands and saying there are
2 functions to some of these elements and now you
3 need to adopt 20 different constructions of
4 different terms, some of which they haven't
11:48AM 5 said are functional, much less dictated by
6 function. And they haven't pointed out for one
7 of the elements something that is dictated by
8 function and then distinguished between the
9 famous dictated by function and what they say
11:48AM 10 is ornamental. Apple has shown for each of the
11 things they're pointing to, the arches, the
12 eight four-sided figures, the central circle,
13 there are different ways of designing with an
14 entirely different shape to get the same
11:49AM 15 functionality.
16 THE COURT: Thank you very much. At
17 this point, I think we're going to take a
18 break. If you all want to check with your time
19 with my courtroom deputy, she's at the front
11:49AM 20 here. She's keeping the clock. So we'll take
21 a 15-minute recess.
22 (A recess was taken, after which the
23 following proceedings were had:)
24 THE COURT: All right. Let me get
12:15PM 25 reorganized here. We're back for the next set,

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1 and I guess this is going to be Apple's utility
2 patents.
3 MR. MAIER: Correct, Your Honor. May
4 I proceed?
12:16PM 5 THE COURT: If there's going to be
6 more than one person talking, let the court
7 reporter know who's speaking for the record.
8 MR. MAIER: My name is Cosmin Maier,
9 and I along with my colleagues Amy Wann and Tim
12:16PM 10 Cho, who will be presenting their first Markman
11 hearing, we'll argue the Apple utility patents.
12 And I think the first term that Masimo
13 seeks to construe on slide three is "embedded
14 in." For each of these terms, Your Honor, I
12:16PM 15 think we'll start with a picture to give the
16 context and get to the disputes.
17 So if we go to slide six, what's shown in
18 Figure 4A and what the claims require is you've
19 got leads comprising pads, and those are
12:16PM 20 embedded in different portions of the
21 enclosure. And what we see in Figure 4A is you
22 have a lead, 442, which we've shown in green,
23 and you can see it's embedded into the bezel,
24 which is shown in blue. And that's what we're
12:17PM 25 talking about, leads embedded in a bezel or

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1 other portion of the device.
2 You can see here that the lead is not
3 only embedded in but part of it is exposed to
4 the user so that the user can make contact with
12:17PM 5 it. So we submit that any claim meaning, which
6 is what we suggest, would have to reflect
7 what's shown in Figure 4A, which is it has to
8 at least partially be set in material. It
9 doesn't have to be completely surrounded by it.
12:17PM 10 If we turn to slide five, I'll get to the
11 disputes. So Masimo's construction has two
12 requirements. First, Masimo seeks to construe
13 it as "surrounded by material," but in doing
14 so, they have to admit that they are excluding
12:17PM 15 the embodiment shown in Figure 4A that we just
16 went over, and we know that the Federal Circuit
17 has held that a construction that excludes a
18 preferred embodiment is "rarely if ever
19 correct."
12:18PM 20 And I'll explain why they're incorrect
21 here if we turn to slide seven. So what we
22 see, again, on slide seven is Figure 4A, which
23 Masimo's construction has to exclude, and on
24 the right is the claim language. And you see
12:18PM 25 that there's a requirement that the second pad

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1 that is embedded in -- that's the claim term --
2 has to detect an electrical signal via contact
3 with the user's skin. It can't be that this
4 embedded pad must be surrounded by material;
12:18PM 5 otherwise, you couldn't make contact with the
6 user's skin and you would be reading out that
7 option from the claim language. That's why we
8 submit the "surrounded by material" portion of
9 Masimo's construction is incorrect.
12:18PM 10 If you go to slide nine, the other part
11 of Masimo's construction is "set firmly into,"
12 and the reason we don't think this is necessary
13 is, one, it just introduces ambiguity. How
14 firmly must something be set into? How firm
12:19PM 15 must it be? We're going to be arguing about
16 that. And again, the "firmly" language comes
17 nowhere from the patents. It's nowhere in the
18 intrinsic record.
19 For those reasons, we think "embedded in"
12:19PM 20 requires no construction, but if Your Honor is
21 inclined to construe it, we submit that it's
22 just "at least partially set in material."
23 THE COURT: "Partially set in
24 material"?
12:19PM 25 MR. MAIER: That's right Your Honor.

1 THE COURT: I did have one question.
2 They said what they're worried about or at
3 least what I took from the brief they're
4 worried about is you're going to argue that
12:19PM 5 something mounted on is embedded.
6 MR. MAIER: I don't think so. If
7 it's purely sitting on top of something, that's
8 not what we're arguing. It has to be partially
9 set into, but they're trying to say it's
12:19PM 10 surrounded by material, which can't be right if
11 you're looking at the claim language in Figure
12 4.
13 THE COURT: Partially would solve
14 that issue, potentially?
12:20PM 15 MR. MAIER: I wouldn't use the word
16 "surrounded." "Partially set into material"
17 because that comports with Figure 4A, that's
18 what we suggest. "Surrounded" would read out
19 that part of the claim.
12:20PM 20 THE COURT: All right. Thanks very
21 much.
22 MR. MAIER: Thank you.
23 MR. CLAASSEN: Good morning, Your
24 Honor Brian Claassen.
12:20PM 25 THE COURT: Good afternoon.

1 MR. CLAASSEN: Good afternoon. Thank
2 you for your patience. I'd like to make a
3 couple of quick points.
4 The first is the question you asked about
12:20PM 5 the "mounted on." That comes from the
6 prosecution history. I think the construction
7 fairly needs to exclude "mounted on," and
8 that's what we've attempted to do.
9 As to the Figures 4A and 4B, those are
12:20PM 10 both disclaimed embodiments. The Figure 4A
11 embodiment is described as embedded along.
12 That's different than embedded in. The claim
13 phrase is "embedded in," means in.
14 The second figure on the right, Figure
12:21PM 15 4B, that shows the lead against the back of the
16 bezel. That's an example of how the lead can,
17 in fact, work when it's behind the material.
18 So "surrounded fully by the material" still is
19 operable with respect to this claim.
12:21PM 20 THE COURT: All right. Any
21 particular issue you have with the offer on the
22 table, which is "partially set into material"?
23 MR. CLAASSEN: "Partially." Needs to
24 be "surrounded by."
12:21PM 25 THE COURT: Surrounded by. You still

1 disagree. The only thing I have to decide is
2 whether or not partially is embedded or
3 surrounded by is embedded.
4 MR. CLAASSEN: Correct.
12:21PM 5 THE COURT: Okay. Thank you.
6 MS. WANN: Good afternoon, Your
7 Honor.
8 THE COURT: Good afternoon.
9 MS. WANN: The next term is "at least
12:21PM 10 the thickness of the second portion is
11 constructed from material having a second
12 conductivity." Masimo argues that this term is
13 indefinite. Apple submits that this term is
14 not indefinite and should be given its plain
12:22PM 15 and ordinary meaning.
16 The claim here is straightforward. Claim
17 4 requires an enclosure that comprises a second
18 portion, and that second portion has a
19 thickness that is constructed from material
12:22PM 20 having a second conductivity. This term is not
21 ambiguous. As Your Honor can see from the
22 claim language, which we have reproduced on
23 this slide, it is the thickness of the second
24 portion that is constructed from material
12:22PM 25 having a second conductivity, and that is

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1 actually consistent with how the specification
2 describes the thickness of the enclosure.
3 For example, Your Honor can see here in
4 the specification that you can place several
12:22PM 5 electrical leads at distances larger than the
6 thickness of the enclosure. That allows
7 electronic signals to be transmitted through
8 the steel or aluminum enclosure to a
9 silver-based lead underneath the enclosure. So
12:23PM 10 the specification actually describes that the
11 thickness of the enclosure is made from a
12 material with a second conductivity, such as
13 steel or aluminum.
14 Now, Masimo argues that "thickness of the
12:23PM 15 second portion" is nonsensical because
16 "thickness" is a dimension, and a dimension
17 cannot be constructed from material, but the
18 claim makes clear that it is the thickness of
19 the second portion that is constructed from the
12:23PM 20 material having a second conductivity, and
21 Apple's expert explained that "thickness"
22 simply refers to a dimension of the second
23 enclosure, which in turn, is constructed of a
24 material having a second conductivity.
12:23PM 25 The thickness of the thing is still

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1 referring to the thing itself, just like saying
2 the width of a table still refers to a table.
3 So if I say, for example, that the width of the
4 table is made from wood, I am saying that the
12:24PM 5 table, that part of the table, is made of wood.
6 And finally, "at least the thickness"
7 means that at least the second portion's
8 thickness must be made of this material with a
9 second conductivity. Of course, more than the
12:24PM 10 thickness can be conductive, but the claim
11 requires that at least the thickness must be
12 conductive.
13 For these reasons, this term is not
14 indefinite and should be given its plain and
12:24PM 15 ordinary meaning.
16 THE COURT: Thank you very much.
17 MR. CLAASSEN: Good afternoon again.
18 Brian Claassen.
19 Quick point on the "at least the
12:24PM 20 thickness of." In the briefing, you'll notice
21 Apple's examples point to the thickness of some
22 other component or an attribute of a different
23 component of the device. That means "the
24 thickness of" has no particular meaning, and
12:25PM 25 Apple's examples don't identify anything within

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1 the second component itself as having any other
2 material or thickness.
3 Thank you.
4 MR. CHO: Good afternoon, Your Honor.
12:25PM 5 Tim Cho on behalf of Apple. The next term for
6 construction is "ceramic."
7 The term "ceramic" appears in the context
8 of Claim 1 of the '783 patent, where it recites
9 the term "ceramic cover." The '783 patent does
12:25PM 10 not define the term "ceramic" nor does it
11 disclaim the scope. Under *Striker*, the term
12 "ceramic" should be given its plain and
13 ordinary meaning.
14 And that plain and ordinary meaning of
12:26PM 15 ceramic's was well known in the art. For
16 example, as early as 1993, it was known that
17 ceramic is any manmade, inorganic, nonmetallic,
18 solid material. And the '783 patent uses the
19 term "ceramic" consistent with that
12:26PM 20 understanding, as shown by the examples in the
21 specification.
22 Masimo also purports to provide an
23 ordinary meaning construction for this term,
24 but it's substantially narrower. Specifically,
12:26PM 25 Masimo argues that the term "ceramic" means

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1 made essentially from a nonmetallic inorganic
2 mineral, such as clay, and hardened by heat.
3 And Masimo argues that the latter part of the
4 construction, that it's a mineral such as clay
12:26PM 5 and hardened by heat, that's an essential
6 aspect of ceramic, according to Masimo.
7 But that's that argument is actually
8 belied by what it told the Patent Office in an
9 IPR proceeding. In the IPR proceeding
12:26PM 10 challenging the '783 patent, Masimo argued that
11 a POSITA would have understood "ceramic" in
12 this context to mean a solid, nonmetallic,
13 inorganic material such as glass or sapphire.
14 Nor did Masimo say that the mineral such as
12:27PM 15 clay then hardened by heat is an essential
16 aspect of ceramic. In the same proceeding,
17 Masimo also submitted an IPR expert declaration
18 where the expert testified that the ordinary
19 meaning of "ceramic" is a solid, nonmetallic,
12:27PM 20 inorganic material. Again, the expert did not
21 say the ceramic had to be a mineral such as
22 clay and hardened by heat. So we say that
23 Masimo's construction is inconsistent with the
24 IPR position.
12:27PM 25 The opposing counsel said in the design

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1 part of the case that the claim term has to
2 carry the same meaning throughout the lifetime
3 of the claim, and the same should apply here.
4 There's one additional reason why
12:27PM 5 Masimo's construction is improper, and that is
6 because it contravenes the claim construction
7 principles Masimo's construction attempts to
8 read in a process limitation such as hardened
9 by heat into a product term, ceramic. But we
12:28PM 10 submit that's improper because the Federal
11 Circuit explained that in order to read a
12 process imitation into a product claim, the
13 patentee has to have made it clear that the
14 process steps are a central aspect of the
12:28PM 15 invention.
16 Here, the patentee is Apple, not Masimo,
17 and Apple never said in the context of the '783
18 patent that the hardened by heat is an
19 essential aspect of ceramic, so we submit that
12:28PM 20 the term ceramic's should be given its plain
21 and ordinary meaning, and if Your Honor is
22 inclined to articulate what the meaning is, we
23 would be okay with the articulation that's
24 provided by Masimo's expert in the IPR
12:28PM 25 proceeding, which is a solid, nonmetallic,

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1 inorganic material.
2 THE COURT: Can I ask you a question?
3 MR. CHO: Yes, Your Honor.
4 THE COURT: I don't want to delve
12:29PM 5 deep into the philosophical exercise of what's
6 claim construction versus what's an
7 infringement or noninfringement position, but
8 this particular term to me seems to be one that
9 really emphasizes the point. Say I go with you
12:29PM 10 and we say to the jury plain and ordinary
11 meaning. Are they going to be free to tell the
12 jury that a particular thing is not a ceramic
13 because it's not hardened by heat, and are you
14 going to say, Your Honor, we already decided
12:29PM 15 this at the Markman hearing.
16 MR. CHO: That's correct, Your Honor.
17 THE COURT: That's a fair answer.
18 MR. CHO: That part is not -- that is
19 not a requirement of what a ceramic is. I
12:29PM 20 don't believe Masimo will be free to tell the
21 jury that ceramic has to be hardened by heat.
22 THE COURT: Isn't this one of those
23 things where we can have experts from each side
24 take the stand and say this is a ceramic or
12:29PM 25 this thing isn't a ceramic for whatever reason

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1 they want to say? Doesn't this one really
2 cross the line where ceramic is a ceramic?
3 Because if you parse it down too much, you're
4 never going to have anything go to the jury.
12:30PM 5 You can keep construing stuff until you're
6 going to have to grant summary judgment to one
7 side or the other. Should we draw a line in
8 this one with call it a ceramic, call it a day,
9 and let the jury decide?
12:30PM 10 MR. CHO: We absolutely agree, Your
11 Honor.
12 THE COURT: All right. Thanks.
13 MR. CHO: Thank you.
14 MR. CLAASSEN: Your Honor, your
12:30PM 15 request put the finger exactly on the point of
16 the issue --
17 THE COURT: Thank you.
18 MR. CLAASSEN: -- which is what is
19 and is not a ceramic. I think it's fair to say
12:30PM 20 that a person of ordinary skill in the art or
21 patent examiners, for example, even the PTAB
22 judges might understand what a ceramic is. A
23 juror is not going to understand it.
24 What we want to avoid is the sort of
12:30PM 25 dispute about whether, for example, a plastic

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1 is a ceramic, and a plastic would be a
2 nonmetal, inorganic material that's not
3 ceramic. So we were proposing to alleviate
4 that issue, but if you'd rather have us argue
12:30PM 5 it in front of the jury, we're perfectly happy
6 to do that. We don't want to be precluded from
7 arguing that a ceramic is something that's
8 hardened by heat.
9 THE COURT: Okay. So Apple, we're
12:31PM 10 okay with putting it to the jury?
11 MR. DESMARAIS: We're okay, Your
12 Honor.
13 THE COURT: All right. We got one
14 solved.
12:31PM 15 MR. CHO: So the next word for
16 construction is "biosensor module."
17 So Apple's construction of "biosensor
18 module" is grounded in the claim language and
19 the specification, but the claim term at issue
12:31PM 20 is "biosensor module," and we captured that
21 using the term module in our construction shown
22 in blue.
23 The specification also explained that the
24 module may include one or more light sources,
12:32PM 25 one or more photodetectors, and one or more

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1 electrodes or conductive elements, and those
2 are comprising one or more components, so we
3 captured that in our claim construction shown
4 in green.
12:32PM 5 The spec also explains that those
6 components can detect and measure a
7 physiological condition or property, so we,
8 again, capture those in our construction shown
9 in yellow.
12:32PM 10 So our construction is grounded in the
11 claim language and the specification.
12 Originally, Masimo had proposed a construction
13 that limits the biosensor module to the
14 components that sense physiological signals,
12:32PM 15 and we pointed out many different issues
16 associated with that. And once we identified
17 those issues -- and this is slide 22 -- in the
18 sur-reply, Masimo backed off a little bit and
19 argued that Masimo would not oppose construing
12:32PM 20 the limitation to mean a structure containing
21 one or more components that sense physiological
22 components.
23 Slide 23, please.
24 But we submit that -- that's where things
12:33PM 25 were in the at the end of sur-reply. Yesterday

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1 evening, Masimo served on us a revised joint
2 claim construction chart where Masimo noted
3 that they're going to further revise their
4 revised construction to say that it's a
12:33PM 5 structure containing one or more components
6 that sense physiological signals. We can
7 address that revised construction at this
8 hearing.
9 We submit essentially what's happening
12:33PM 10 here is Masimo is taking the description of the
11 biosensor module that's shown on the bottom of
12 the slide where it says that the components can
13 detect and measure a physiological condition or
14 property, and they're swapping out the
12:33PM 15 highlighted sentence, "detect and measure the
16 physiological condition or property" with the
17 phrase "sense physiological signals.
18 The problem with the re-revised
19 construction from Masimo is that it's not clear
12:34PM 20 whether that construction actually captures the
21 embodiment that's disclosed in the
22 specification. To the extent that the
23 "detected measure" statement is coextensive
24 with the "sense physiological signals" that
12:34PM 25 Masimo is proposing, we don't see a need to

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1 swap out the statement in the specification.
2 To the extent they're not coextensive, we
3 submit that Masimo's construction does not
4 fully capture the embodiment in the
12:34PM 5 specification, so we submit that -- we ask the
6 Court to adopt Apple's construction the
7 specifically grounded in the claim language of
8 the specification.
9 THE COURT: Do you know what the
12:34PM 10 dispute is about here? So this is one of these
11 examples that comes up during every Markman
12 hearing, which is that I've got words from both
13 sides and I don't know what they mean or how
14 they affect the case. So we've got "module"
12:34PM 15 versus "a structure containing one or more
16 components." We've got "detects and/or
17 measures" versus "senses." We've got
18 "physiological condition or property" versus
19 "physiological components." It seems like
12:35PM 20 everybody is geared up to play word games with
21 the jury, and that's the game we're playing,
22 and that's fine, but what am I deciding?
23 MR. CHO: I don't think there's much
24 dispute over the first two parts of the
12:35PM 25 construction, which is the modular versus

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1 structure. Those two, I believe, are generally
2 not in opposition with one another. I don't
3 think the parties are actively disputing that
4 portion. The same goes with the "one or more
12:35PM 5 components." I think much of the dispute is
6 directed to the third part of the construction,
7 which is from Apple's construction, it should
8 be "detects and/or measures a physiological
9 condition or property" versus Masimo's
12:35PM 10 construction, which is "sense physiological
11 signals."
12 THE COURT: Whose is broader?
13 MR. CHO: So we believe our
14 construction is slightly broader, and that is
12:35PM 15 consistent with the specification. If Your
16 Honor were to look at -- and if you could pull
17 up the '783 patent, Column 16, lines 42 through
18 56 --
19 Bear with us, Your Honor.
12:36PM 20 THE COURT: What column?
21 MR. CHO: Column 16, lines 42 through
22 56. This part of the '783 patent provides some
23 examples of what it considers to be a
24 physiological condition, and some of those
12:36PM 25 examples are things like heart rate, blood

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1 pressure, oxygen saturation, the ECG
2 measurements, galvanic skin resistance, and so
3 forth. Also, there are many other
4 physiological conditions that are described in
12:37PM 5 this part of the '783 patent.
6 We submit that the physiological
7 signal we believe is part of, can include --
8 excuse me. The physiological condition can
9 include physiological signals, but it can be
12:37PM 10 slightly broader than that. It can include
11 information that can be derived from the
12 physiological signal itself.
13 THE COURT: I see. I see. So your
14 point is, a sensor, what does a sensor measure?
12:37PM 15 A sensor in this case is measuring photons hit
16 it, but that's not actually what the claim is
17 claiming. It's actually -- when it's used in
18 the patent, you're saying it talks about the
19 sensor actually measuring the things that are
12:37PM 20 calculated from the signals that it's
21 receiving.
22 MR. CHO: So I think I agree with
23 Your Honor. I almost agree with it except for
24 the part that I don't think the physiological
12:38PM 25 condition excludes the particular signal.

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1 THE COURT: It's both, and the reason
2 you say that is the sensors don't actually
3 measure --
4 MR. CHO: So for example, the EKG
12:38PM 5 characteristics is one things. Exposure to UV
6 radiation, body temperature, those things
7 determined after you process the information
8 that you gathered from the raw signals, so we
9 believe that the physiological condition as we
12:38PM 10 include it in our construction is slightly
11 broader than the physiological signal that
12 Masimo --
13 THE COURT: That is helpful, and
14 we'll see where they disagree.
12:38PM 15 MR. CHO: Thank you, Your Honor.
16 MR. CLAASSEN: Now, I'll try to turn
17 right to your question. Here's an example of
18 one of the claims reciting the biosensor
19 module, and you're right that the calculation
12:39PM 20 is important here. This claim doesn't recite
21 anything having to do with the calculations,
22 physical arrangement of components. There's
23 not an actual calculation here made by the
24 biosensor module. What we've done in our
12:39PM 25 construction is attempt to explain the word

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1 "bio," which both parties seemed to agree to,
2 "sensor," and "module." "Module" is a
3 collection of components. There was a typo in
4 our briefing with respect to the last word in
12:39PM 5 the construction. Let me make sure I make that
6 clear for you.
7 And that's here on signals.
8 THE COURT: Give me a second. Okay.
9 MR. CLAASSEN: So it's that "sense
12:39PM 10 physiological signals." We inadvertently put
11 "components." That's nothing about the
12 component being sensed.
13 THE COURT: I have it. Okay.
14 MR. CLAASSEN: Any further questions,
12:40PM 15 Your Honor?
16 I submit that our construction is
17 actually broader and the "and/or measures" is
18 actually narrower.
19 THE COURT: Okay. Thanks. So we
12:40PM 20 dispute whose is broader?
21 MR. CLAASSEN: Yes.
22 MR. MAIER: Cosmin Maier on behalf of
23 Apple again.
24 The next term is "transparent," and I
12:40PM 25 think this is another one where you can only

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1 say so many words about something, and people
2 should understand what something -- whether
3 something is transparent or not. And I'll,
4 again, start with a picture to show you what
12:40PM 5 we're talking about so you can see it's pretty
6 clear here.
7 Go to slide 25.
8 What we're talking about is the back of a
9 watch, and that's shown in the figure. And
12:40PM 10 we're talking about the transparent rear cover,
11 so what the figure is actually showing is that
12 there are LED lights. Those are the ones shown
13 in yellow there. And those LEDs can transmit
14 light. It can be at different wavelengths. It
12:41PM 15 can be green and infrared. It can be green and
16 blue, a number of different wavelengths. And
17 those LEDs can have a transparent cover put
18 over them, so that there's not just holes in
19 the watch, there's a transparent cover on your
12:41PM 20 wrist. And the key is that the light from
21 those underlying LEDs can in some way reach
22 your wrist so the watch can take measurements.
23 That's the context we're talking about here.
24 So if we go to slide 26, we submit that
12:41PM 25 the plain meaning is pretty simple here, and it

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1 comes from the spec at Column 2, lines 53 to 57
2 of the '491 patent. All the transparent cover
3 has to do is it has to be operative to pass
4 light emitted from the light sources. That's
12:42PM 5 the point of it. The light sources, whether
6 they be red or green, as long as they get out
7 of the watch and hit your wrist, that's
8 transparent for purposes of these claims.
9 So let me turn to Masimo's construction
12:42PM 10 at slide 27. This may no longer be a dispute
11 based on what Masimo confirmed last night.
12 Masimo originally was saying that "transparent"
13 requires transmission of all light, every
14 wavelength of light. We pointed out that the
12:42PM 15 spec says transparent could be all wavelengths,
16 any wavelength, even one. I think they've now
17 dropped "all" requirement. Looks like did in
18 the sur-reply. I think they definitely did it
19 last night.
12:42PM 20 Turning to slide 28, that leaves one
21 dispute here, and that's whether a transparent
22 material has to transmit light without
23 diffusion or perhaps without appreciable
24 diffusion, which is their new new construction.
12:43PM 25 But we submit that transparent materials can

1 exhibit transfusion, and an example of a
2 transparent cover in the patent is sapphire,
3 and we submitted evidence that sapphire
4 exhibits diffusion, and there's no rebuttal
12:43PM 5 evidence on that point. Sapphire, which is one
6 of the transparent materials that the patent
7 uses, exhibits diffusion. We had our expert
8 explain that even air, which I don't think
9 anyone would think is not transparent. That
12:43PM 10 also exhibits diffusion. Transparent material
11 can't have no diffusion.
12 So if we turn to the next slide, slide
13 29, Masimo presented this new qualifier,
14 "without appreciable diffusion." We no longer
12:43PM 15 require all light. We no longer require
16 without diffusion. Masimo switched to
17 appreciable diffusion, and we think Your Honor
18 shouldn't go with that for three reasons.
19 One, this was first raised in the
12:44PM 20 sur-reply. There's been no evidence what that
21 even means.
22 Second, this comes from nowhere in the
23 patents. There's no "appreciable diffusion"
24 description in the patent.
12:44PM 25 And then most importantly, I think it

1 just makes it more ambiguous. We're going to
2 have arguments about okay, well, what amount of
3 diffusion is appreciable enough? Whereas if we
4 stick with the claim term "transparent" and
12:44PM 5 talk about how you've got this clear cover that
6 can pass light from the LEDs, people can figure
7 out whether that's transparent or not.
8 I want to make two more points.
9 One, in its sur-reply briefing in the
12:44PM 10 joint claim construction brief at 60, Masimo
11 implied it was Apple that advocated for the "no
12 appreciable diffusion" limitation. That's
13 blatantly false. If you go to the briefing at
14 page 68, Apple was pointing out their own
12:44PM 15 dictionary did allow for diffusion, so no
16 diffusion was incorrect. We weren't saying
17 that's what's required. We were just pointing
18 out how their dictionary was inconsistent with
19 their requirement at the time.
12:45PM 20 And one last slide here, slide 30.
21 Now, Masimo's told Your Honor that
22 they're not trying to get a particular
23 construction, they're also searching for the
24 plain meaning here. But in the IPR Masimo,
12:45PM 25 said, consistent with what we believe the plain

1 meaning is, that defining a transparent window
2 "simply means to allow passage of light."
3 That's what we're talking about here. If the
4 light from the LEDs gets through, that's
12:45PM 5 transparent. Masimo didn't say in the IPR here
6 that it had to be without any diffusion or
7 without appreciable diffusion. It just said
8 allowing passage of light in the context of
9 these watches.
12:45PM 10 In conclusion, if light from the light
11 sources can pass through the cover, it's
12 transparent in the context of these patents.
13 Thank you.
14 THE COURT: Thank you.
12:46PM 15 MR. CLAASSEN: I think there may be a
16 little bit of confusion between "transparent"
17 and "translucent." I'd like to go to the
18 specification and point out the difference that
19 Apple identified in its own specification, and
12:46PM 20 this portion was not shown on the slide we just
21 took a look at. And this is in scale. The
22 surface may be, and this is a scale,
23 transparent, essentially all light to pass;
24 semitransparent, a little less; translucent,
25 even less; or opaque, none.

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1 These examples were set forth in the
2 specification, and Apple chose transparent.
3 You can't go back -- and Apple is now
4 attempting to go back and rewrite the claim to
12:46PM 5 claim translucent, which would be passage of
6 the relevant light.
7 THE COURT: Thank you.
8 MR. CLAASSEN: Any questions?
9 THE COURT: No.
12:47PM 10 MR. MAIER: Just one point, Your
11 Honor. They're implying that "translucent" is
12 completely separate from transparent.
13 "Translucent" is just a subset of transparent.
14 Things can have various transparencies. I
12:47PM 15 think these windows are tinted. They're still
16 transparent even though not all the light is
17 passing through them. I don't think it's
18 correct to say these are mutually exclusive.
19 "Translucent" still falls within transparent,
12:47PM 20 just can see through it a little bit less, like
21 my sunglasses. That's still transparent.
22 THE COURT: Thank you.
23 Formed from a transparent material. Is
24 this the same dispute?
12:47PM 25 MR. MAIER: So that one has been

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1 dropped, and I think we requested plain
2 meaning, and we briefed it. Masimo did not
3 submit an answering brief, so you only have our
4 position on it, so we would suggest you go with
12:48PM 5 ours.
6 THE COURT: Okay. Got it.
7 MR. MAIER: And actually, good news.
8 The next term that was up is "maintain," and
9 last night I think the parties agreed that we
12:48PM 10 would just submit that on the briefing.
11 THE COURT: I thought you were going
12 to say something different.
13 MR. MAIER: Sorry.
14 THE COURT: Got a little excited
12:48PM 15 there.
16 MR. MAIER: So the next term that
17 we're actually going to talk about is
18 "near-field communication system" beginning at
19 slide 35.
12:48PM 20 So our construction is pretty simple, and
21 we think it captures the features of the system
22 in the patent. Masimo's construction is
23 actually a subset of a particular protocol
24 published in 2013 by the International
12:48PM 25 Standards Organization. And we'll show that

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1 it's blatantly litigation driven, and it
2 squarely contradicts what they said in the IPR.
3 Let me start with Apple's construction on
4 slide 36. So beginning with our construction,
12:48PM 5 you can see that in green, the device can
6 communicate wirelessly with, for example, those
7 Bluetooth headsets that people have. That's
8 where the green part of our construction comes
9 from. It's "communicate wirelessly with any of
12:49PM 10 the number of electronic devices, including
11 headset devices and so forth." That's where
12 the "wireless" comes from.
13 And the specification next explains that
14 the device has problem proximate to or near the
12:49PM 15 thing that it's communicating with. That's
16 where the "over close distances" part of our
17 construction comes from. What our construction
18 is trying to do is capture both of those
19 features.
12:49PM 20 If we go to slide 37, Masimo's long
21 construction is completely inconsistent with
22 what they said in the IPR. Masimo's goal in
23 the litigation appears to be to eliminate
24 Bluetooth. They don't want Bluetooth to be
12:50PM 25 part of this. But you can see in the IPR here

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1 on slide 37 -- and this is Apple's Exhibit 10
2 at 58 -- Masimo acknowledged that the examiner
3 during prosecution interpreted the term
4 "broadly" and equated it to Bluetooth.
12:50PM 5 Masimo then did not say whoa, the
6 examiner was wrong there. Bluetooth isn't
7 covered by this limitation. Instead, what they
8 said is, hey, PTAB, you should find this
9 limitation satisfied by Bluetooth. That's at
12:50PM 10 the very bottom. They said, "Under the
11 examiner's construction" -- which again, they
12 didn't disavow or say was wrong -- "Bluetooth
13 satisfies the 'near-field communication'
14 limitation." They're asking the PTAB to use
12:50PM 15 Bluetooth to invalidate this yet at the same
16 time trying to exclude Bluetooth here, so
17 that's really what's going on.
18 THE COURT: I did get your point
19 about that. It did make me smile when I read
12:51PM 20 it when you say they can't ask the Patent
21 Office. They are. They can, can't they? It's
22 a judicial estoppel type of thing?
23 MR. MAIER: They can't be doing two
24 different things at once.
12:51PM 25 THE COURT: Why not? Don't we do

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1 that all the time?
2 MR. MAIER: Hopefully, Your Honor
3 won't let them.
4 Slide 38. Just a little bit of case law
12:51PM 5 on these types of terms. "Near-field
6 communication," that's also a name for the
7 standard, but we know from the Fed Circuit that
8 if the claim uses lower case letters, which
9 ours does, it's telling, and it suggests that
12:51PM 10 the term is actually not limited to a standard
11 even if the standard has the same or similar
12 name. So that's what we pointed out in our
13 briefing.
14 In terms of the next slide, slide 39, in
12:51PM 15 the sur-reply Masimo found a case, a district
16 court case, that actually did limit a lower
17 case claim term to a standard. But let's look
18 at what actually happened in that case. In
19 that case, during prosecution the examiner said
12:52PM 20 that the claim originally included an acronym,
21 a capital acronym for a standard, ISAPI. And
22 the examiner said that the acronym had to be
23 spelled out because you can't just have
24 acronyms in the claim. The applicant crossed
12:52PM 25 out the statement capital acronym referring to

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1 the standard and spelled it out. In that case,
2 it was clear the claims were referring to a
3 standard because they were just spelling out
4 the acronym they had used before. We have no
12:52PM 5 similar situation here.
6 And then I just want to point out one
7 more thing on slide 40. Even their
8 construction doesn't even capture the protocol.
9 It's even narrower than the protocol. Their
12:52PM 10 construction is "range up to 2 centimeters."
11 Even this protocol says you go up to 10. Data
12 rate of 424. Even the protocol gives a
13 different bit rate. Their constructions can't
14 be correct. Again, we submit that you should
12:53PM 15 adopt ours. Don't let them argue different
16 things at PTAB and District Court, and that's
17 why we're here.
18 THE COURT: Thank you very much.
19 MR. CLAASSEN: Couple of points, Your
12:53PM 20 Honor. I'll start with that last point, the
21 criticism on the standard.
22 Masimo would accept replacing the
23 specifics of the construction with the NSC
24 standard, if that would make Your Honor's task
12:53PM 25 and the jury's task more understandable. If

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1 the jury is going to have trouble with the
2 specific frequency, the distance, and the rate,
3 the data rate, for example, what Masimo is
4 after here is accurately capturing what the
12:53PM 5 specification set forth, and that is this
6 near-field communication standard, which is an
7 example of one or more wireless interfaces.
8 You'll see what Apple's construction does
9 is take this "one or more wireless interfaces"
12:54PM 10 and substitutes it for "near-field
11 communication" here. What Apple is trying to
12 do is essentially claim, or through claim
13 construction, rewrite its claim so that it
14 covers the genus rather than the species.
12:54PM 15 As to the IPR statement, if you look at
16 our petition, we explained the examiner's
17 construction, which was as broad as reasonable
18 and then we continued on. So you have the
19 petition in the record, and the petition shows
12:54PM 20 that we actually, in fact, argued additional
21 prior art showing the standard.
22 THE COURT: Thanks very much.
23 MR. CHO: Your Honor, the next term
24 is "carrier member." Unless Your Honor has any
12:55PM 25 questions on this term, in the interest of

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1 time, we'll rest on the papers, please.
2 THE COURT: I did have a question on
3 this one. This is the '054 patent. So I'm
4 trying to decode my notes. I'm looking at
12:55PM 5 Claim 1. It says "carrier member," and then
6 later in the claim, it says that the first
7 electrode has to be positioned on the carrier
8 member. You don't like that they've said in
9 here on which electrodes are positioned, but
12:55PM 10 the claim otherwise requires that, so what's
11 the difference?
12 MR. CHO: So the issue in this -- the
13 issue with that, though, is that under the
14 prevailing Federal Circuit case law, the claim
12:56PM 15 construction that renders other parts of the
16 claim superfluous is disfavored. In this
17 particular case, that's exactly what's
18 happening.
19 THE COURT: I totally get that. You
12:56PM 20 can always find canons that supports one side
21 and opposite canons that support the other
22 side. What's the actual dispute here that I'm
23 screwing up if I say that it has to be --
24 structure on which electrodes are positioned?
12:56PM 25 How does that affect something in the case,

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1 considering that the claim already requires the
2 electrodes be positioned on the carrier member?
3 MR. CHO: It won't, Your Honor. The
4 dispute won't hinge on this particular
12:56PM 5 construction, actually. We thought under the
6 correct claim construction principle, their
7 construction just violates a couple of claim
8 construction principles. That's why we wanted
9 to have a correct construction, because under
12:56PM 10 *Phillips*, we are required to come to a correct
11 construction. That's why we wanted to argue
12 this case.
13 If Your Honor is okay with construing the
14 claim term in accordance with Masimo, we can.
12:57PM 15 THE COURT: Can I say under Federal
16 Circuit law that I only need to construe claims
17 to the extent that they're material to a
18 dispute in the case and there isn't one here?
19 MR. CHO: I agree with Your Honor,
12:57PM 20 so, yeah, if Your Honor is leaning toward
21 Masimo's construction, we can agree to it as
22 well.
23 THE COURT: If it doesn't matter,
24 it's less work for all of us. Let me hear from
12:57PM 25 Masimo.

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1 Anything I said strike you one way or the
2 other?
3 MR. CLAASSEN: We rest on the papers.
4 THE COURT: That's fine.
12:57PM 5 MR. CHO: So the next term for
6 construction is "deposited on." Apple asked
7 the Court to apply the plain and ordinary
8 meaning for this term. It's an easily
9 understood term that the jurors can understand.
12:58PM 10 On the other, hand Masimo is asking for a
11 construction that says "applied directly to."
12 The phrase "deposited on" -- and this is
13 slide 46. The phrase "deposited on" appears in
14 Claim 4 and 17 of the '054 patent, and it
12:58PM 15 appears in the context of "a conductive coating
16 being deposited on the carrier member." The
17 primary dispute between the parties, Your
18 Honor, is whether "deposited on" requires the
19 conductive coating to be directly deposited on
12:58PM 20 the carrier member or whether "deposited on"
21 can include the conductive coating indirectly
22 on the carrier member.
23 THE COURT: So there's a coating.
24 It's going to be deposited. It has to do with
12:58PM 25 indirect or direct. I wasn't clear from the

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1 brief if somebody was going to be saying I
2 deposited this paper on this. That's not what
3 you're saying. There's a coating that's
4 deposited.
12:58PM 5 MR. CHO: That's correct, Your Honor.
6 THE COURT: Let me hear from the
7 other side, or did you have more you wanted to
8 say?
9 MR. CHO: It's a simple argument,
12:59PM 10 Your Honor. The '452 patent uses the term
11 "deposited on" in the plain and ordinary sense.
12 That includes indirect deposition. There are
13 numerous examples in the specification. We
14 identify them in the brief. Unless Your Honor
12:59PM 15 has any further questions, we can rest on the
16 brief.
17 THE COURT: That's fine. Thank you.
18 MR. CLAASSEN: Your Honor, you,
19 again, are right on the dispute. It is
12:59PM 20 "deposited on" versus "separated by." So for
21 example, the specification distinguishes
22 between something that's deposited on -- it's
23 actually "formed on" and deposited is one
24 example of "formed on." It distinguishes
12:59PM 25 between "formed" or "deposited on" with

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1 "separated by."
2 For example, if a coating is deposited on
3 an insulator, it would be separated by an
4 insulator, according to the specification,
01:00PM 5 rather than deposited on. So that's the
6 distinction between direct and indirect.
7 THE COURT: All right. I understand
8 the dispute. Thank you.
9 So we're going to talk about what an app
01:00PM 10 is.
11 MR. MAIER: Yes. Cosmin Maier for
12 Apple, and we have reached the end of the road.
13 The term "side" is going to be rested on the
14 papers.
01:00PM 15 THE COURT: You agreed to rest on the
16 papers but not agreed on the constructions.
17 MR. MAIER: Exactly.
18 THE COURT: I'll decide if you rest
19 on the papers for that. Let's hear about
01:00PM 20 "application."
21 MR. MAIER: So again, "application,"
22 again, a word people use every day, and our
23 view is that it should be given its plain
24 meaning. And there's a dictionary definition,
01:00PM 25 actually Masimo Exhibit 38, that describes it

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1 as simply a program that makes calls to the
2 operating system. Our expert thought that was
3 a fine construction. Instead, what you have on
4 Masimo's side is this 29-word construction
01:01PM 5 here.
6 And if we turn to the next slide, on
7 slide 50, this is what I think is the most
8 telling point in this term. Masimo's
9 patents --
01:01PM 10 Sorry. Turn to -- yes.
11 Masimo's patents in this case on the left
12 side, they also use the word "application," and
13 Masimo, when their patents use the word
14 "application," they propose plain meaning. So
01:01PM 15 it seems that what Masimo uses this term in
16 their patents, everyone can understand what an
17 application means, yet when Apple uses the
18 exact same term, suddenly experts and jurors
19 need 29 words to describe it.
01:01PM 20 THE COURT: What is the dispute here?
21 Because I couldn't figure it out. It almost
22 seemed like they were saying that you're going
23 to say -- so they're making a distinction
24 between an application, that there's some
01:01PM 25 program that's getting run that's something

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1 different than something that has anything to
2 do with the operating system, but they almost
3 made it seem like you were going to try to say
4 that, like, a signal about how strong the
01:02PM 5 wireless is is an application or there's some
6 icon that going to show on the screen somewhere
7 that you're going to say is an app that
8 everybody knows isn't an app.
9 MR. MAIER: I don't think so, but I
01:02PM 10 think I can show you exactly what's happening
11 on the next slide, which is partially blacked
12 out on the screen because it's part of their
13 confidential information. You have it in your
14 deck. Here's what's actually happening here.
01:02PM 15 THE COURT: Give me a second. What
16 page?
17 MR. MAIER: This is slide 51.
18 THE COURT: Okay.
19 MR. MAIER: So what they're trying to
01:02PM 20 do is craft this negative construction to
21 exclude certain software in its products, and I
22 don't actually even think it gets them there
23 because of how vague their construction is.
24 But the things they're actually trying to
01:03PM 25 exclude, like what you see on the very right

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1 that I won't mention, they themselves outside
2 of this case refer to these things as
3 applications, yet now they're trying to give us
4 29 words to take that back in this case.
01:03PM 5 THE COURT: So you're saying --
6 you're accusing these things in the black box
7 on the right side -- I'm looking at the --
8 you're saying those are all applications?
9 MR. MAIER: Some of them are. Some
01:03PM 10 of them are. I don't have our infringement
11 contentions. But some of them are, certainly
12 the ones of the left. But again, we're not the
13 only ones who called them applications. Masimo
14 did too.
01:03PM 15 THE COURT: Well, there's at least
16 one on here that I can look at that most people
17 wouldn't normally understand to be an
18 application.
19 MR. MAIER: That's fair. Not all of
01:03PM 20 them are, but the one that they're trying to
21 exclude in the briefing Your Honor can see.
22 THE COURT: Okay.
23 MR. MAIER: I just think it's an
24 unprincipled approach. If Masimo thinks the
01:04PM 25 word is clear in their patents, if Masimo uses

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1 the word in their own materials, including the
2 user guide, all of a sudden we have to have 29
3 words with three negative constructions in it.
4 THE COURT: That's the "goose and
01:04PM 5 gander" canon of claim construction?
6 MR. MAIER: Let me mention one last
7 thing here, slide 52. Their construction
8 actually excludes one of the applications in
9 the patent. The patent talks about the
01:04PM 10 settings application, and the settings
11 application doesn't do anything other than
12 provide access to settings, and they're trying
13 to exclude that. When we pointed that out,
14 they had an expert come in and tried to
01:04PM 15 sidestep this issue, and he said, no, the
16 settings application, that fits within our
17 construction because it does a bunch of other
18 things. But what did he point to? He didn't
19 point to anything from the patent about the
01:05PM 20 settings application. He's talking about an
21 iPhone, and the iPhone isn't incorporated by
22 reference into this patent in any way.
23 Again, we think plain meaning is
24 sufficient here, and if there are particular
01:05PM 25 things that we point to that they say those

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1 aren't apps, those are just whatever, your cell
2 phone strength signal, you can't click on,
3 can't do anything, then great. That's maybe a
4 good argument for them, but we don't need 29
01:05PM 5 words for this.
6 THE COURT: Okay. Thanks.
7 MR. MAIER: Thank you.
8 MR. CLAASSEN: Okay, Your Honor. So
9 the dispute here is indeed about global device
01:05PM 10 settings, which the patent itself, this nice
11 little tiny box at the bottom of Figure 3
12 distinguishes from this long list of
13 applications.
14 So what we're talking about, in terms of
01:06PM 15 settings, are what I think most jurors would
16 understand are settings. For example, whether
17 your phone is set to vibrate mode, just as an
18 example. Or whether you're using the volume
19 up. Settings that would apply to the use of
01:06PM 20 the device as a whole versus the use of a
21 particular application or function of a
22 particular application.
23 THE COURT: All right. Thanks very
24 much.
01:06PM 25 MR. MAIER: I don't think we have

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1 anything further, but Your Honor mentioned --
2 THE COURT: Do you not want to argue
3 "side" because nobody cares or because you
4 think it's clear from the briefs? Because it
01:06PM 5 wasn't clear to me what the issue was here.
6 MR. MAIER: I was going to have my
7 colleague Amy address it. I don't know.
8 There's a claim, and it requires a front, a
9 back, and a side. What are we really
01:06PM 10 construing?
11 THE COURT: Is there a dispute that
12 you know about that this has anything to do
13 with?
14 MR. MAIER: Not that I know. I think
01:06PM 15 what they're saying is, in their watch, the
16 side is a little bit curved, so they're going
17 to say that's not a side because it's curved.
18 It's got to be up and down. But then we
19 pointed out in the specification two pictures
01:07PM 20 where it called the curved thing a side. I
21 don't know what the dispute is.
22 THE COURT: Is there a dispute over
23 "side"?
24 MR. CLAASSEN: To the extent both
01:07PM 25 parties identify and try to put them side by

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1 side, what's both shown in yellow as the side,
2 no.
3 THE COURT: Yes?
4 MR. MAIER: I think it's -- this is
01:07PM 5 one example. Yeah, I don't see what the
6 dispute is. I'm still failing to see it.
7 THE COURT: There's no dispute what's
8 in yellow is a side? That's what he wants you
9 to say.
01:07PM 10 MR. MAIER: That's a side, yeah.
11 THE COURT: We're good?
12 MR. CLAASSEN: Yes.
13 THE COURT: Perfect.
14 All right. We're switching to Masimo's
01:08PM 15 patents.
16 MR. CLAASSEN: We are.
17 THE COURT: Why don't we take ten and
18 let everybody get reorganized here, including
19 me. Thanks.
20 (A recess was taken, after which the
21 following proceedings were had:)
22 THE COURT: We can proceed when
23 you're ready.
24 MR. CLAASSEN: Thank you, Your Honor.
01:20PM 25 I think we reached the point of the hearing

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1 you've been looking for all day, which where
2 the parties have agreed to an actual set of
3 constructions.
4 THE COURT: Fantastic. These I knew
01:20PM 5 about; right?
6 MR. CLAASSEN: Yes, you did. It's a
7 little bit of a half measure. We were able to
8 agree at some point on something.
9 THE COURT: Fantastic.
01:20PM 10 MR. CLAASSEN: Aware of the limited
11 remaining time left and I want to be cognizant
12 of any particular questions the Court may have
13 on these terms, so I thought I'd start by
14 asking if you have particular things you'd like
01:20PM 15 us to address.
16 THE COURT: I think I had a couple
17 questions, but I have left a piece of my
18 technology in my chambers office.
19 MR. CLAASSEN: While he does that,
01:21PM 20 maybe I'll start with the first term.
21 THE COURT: Go ahead.
22 We're not quite set up. We just got
23 moved in. Not everything is connected yet.
24 We're making do.
01:21PM 25 MR. CLAASSEN: The first term where

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1 the parties have a dispute is on the "blood
2 parameter."
3 THE COURT: I do remember my question
4 about this one. Let me ask you. I may not be
5 able to articulate it as well as I had in my
6 notes, but everybody agrees this has to do with
7 blood, so it seemed to me that the dispute was
8 over whether or not the parameter you're
9 measuring is something that you're measuring
01:21PM 10 from your spectroscopy of blood, which may or
11 may not relate to something that has to do with
12 the blood or whether or not it has to do with
13 some quality of the blood itself. Does that
14 make sense?
01:21PM 15 MR. CLAASSEN: It does. I think
16 you're close but not quite all the way there
17 yet. Let me go to this Venn diagram that might
18 help. I'm not sure if it will or not.
19 There's a distinction in the
01:22PM 20 specification between three different
21 categories of parameters. The first is the
22 general physiological parameters. Those are
23 very, very general. It's includes things like
24 weight and temperature. Earlier in the day, we
01:22PM 25 were talking about ECGs for watches for

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1 electronically measuring heart rate. The
2 specification talks about blood parameters.
3 Those are all physiological parameters, but
4 they're more specific. Those include the
01:22PM 5 parameters that are measured through
6 spectroscopy, pulse rate, measured through
7 spectroscopy at the wrist or the finger and
8 PPG, which is the photoplethysmograph.
9 THE COURT: So they're telling you
01:22PM 10 something about physiology but they're not
11 necessarily telling you something about the
12 blood, but they're measured because they're
13 measuring a signal you're getting from the
14 blood; right?
01:22PM 15 MR. CLAASSEN: They are telling you
16 something about the blood. They're not telling
17 you something about the specific competition of
18 the constituents of the blood. That's an
19 important distinction here. There's a third
01:23PM 20 category, the blood constituents. Those are
21 the purple highlighted examples in the Venn
22 diagram. For example, pulse rate and PPG are
23 parameters of the blood but they're not
24 constituents of the blood.
01:23PM 25 THE COURT: Okay.

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1 MR. CLAASSEN: The specification
2 helps explain this a little bit more, and I
3 tried to link up the specification with the
4 figures to help Your Honor understand a little
01:23PM 5 bit.
6 Pulse oximetry refers to this SpO2
7 measurement. The parties are in agreement
8 that's a blood parameter. Pulse rate shown
9 here. The measurement for Sp02, pulse rate,
01:23PM 10 and PPG photopleth are done through a photo
11 spectrometer in this particular technology.
12 They're all parameters, and that's what the
13 specification is teaching. There's no
14 limitation -- or there's nowhere in the
01:24PM 15 specification or in the prosecution history
16 where Masimo limited the term "blood parameter"
17 to constituents in particular.
18 THE COURT: So what was the problem
19 with me saying that "blood parameter" can be
01:24PM 20 broad enough to be anything that's measured by
21 performing spectroscopy on the --
22 MR. CLAASSEN: That would be correct.
23 It's the composition of the blood where you
24 went a little too far. Measuring it through
01:24PM 25 measuring blood is correct. Measuring

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1 pulsating blood through spectroscopy, that's
2 correct.
3 THE COURT: That is the dispute?
4 MR. CLAASSEN: That is.
01:24PM 5 THE COURT: Okay. Thank you.
6 MR. SHAW: David Shaw for Apple, Your
7 Honor.
8 In the interest of time, we were going to
9 submit this term on the papers, but I do want
01:25PM 10 to address your question since you asked it.
11 If we can start with slide 15, the
12 question really boils down to is pulse rate a
13 blood parameter. If you see on slide 15, we
14 have independent Claim 27 and dependent Claims
01:25PM 15 42 and 43. What independent Claim 27 has is it
16 has a display capable of displaying a first
17 blood parameter and second blood parameter.
18 That's this display over here.
19 If you go to the dependent claims, they
20 have the display of Claim 27 comprises this
21 first display for displaying two blood
22 parameters and then they have a second display
23 over here for displaying pulse rate. If pulse
24 rate is a blood parameter, what's the purpose
01:25PM 25 of the second display? It doesn't have one.

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1 It would be rendered superfluous.
2 If you want to hear a little more, Your
3 Honor, about how we came to our construction of
4 "blood parameter," I would turn to slide six.
01:25PM 5 What we have here on slide six, the
6 specification never defines "blood parameter"
7 but it does give some instructive examples;
8 right? Claim 39 says percent oxygen saturation
9 and percent carbon monoxide saturation are
01:26PM 10 blood parameters, and the specification here on
11 the right starting at Column 5, line 61, it
12 says references made to many blood parameters,
13 for example, and then it points to
14 carboxyhemoglobin, methemoglobin, and total
01:26PM 15 hemoglobin as exemplary blood parameters and
16 then goes on to refer to them as constituents,
17 and it says they're reported as concentrations.
18 So the patent uses "blood parameter" and
19 "blood constituent" interchangeably. Our
01:26PM 20 expert, with 30-plus years of experience in
21 biomedical engineering and physiology, he
22 looked at the disclosure. If we turn to slide
23 7, you can see he said, "I know what that
24 means. That's a term that we use in the art
01:26PM 25 that person of ordinary skill would recognize,

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1 and what we say is a hematological parameter.
2 We don't say blood parameter, but I'm sure you
3 know hematological just means related to the
4 blood."
01:27PM 5 So he says, "A hematological parameter,
6 we all know in the art, refers to a blood
7 constituent that can be quantified to provide
8 information about the state, i.e., the makeup
9 or viability of the blood." That's what a
01:27PM 10 person of ordinary skill would recognize the
11 "blood parameter" to mean.
12 If we flip to our slide ten, I'm sure you
13 recall our expert explained pulse rate doesn't
14 tell you anything.
01:27PM 15 THE COURT: I get all of it. This is
16 one where I've got to pick one, and it does
17 seem to me that the dispute here is does blood
18 parameter include something that is measured
19 from the spectroscopy of blood, which I think
01:27PM 20 everybody agrees, the context of this
21 technology, the pulse and PPG, that's all
22 measured with the spectroscopy process; right.
23 MR. SHAW: That's right.
24 THE COURT: So it's either anything
01:28PM 25 measured from that or it's something narrower.

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1 MR. SHAW: And I think --
2 THE COURT: I don't know that the
3 specification is particularly helpful in this
4 dispute.
01:28PM 5 MR. SHAW: No, I don't either, and I
6 think you put your finger or the issue. And I
7 think that's the purpose of the discussion of
8 physiological parameters on one hand and blood
9 parameters on the other hand. So I think
01:28PM 10 potentially physiological parameters are
11 measured using spectroscopy, but all things
12 measured using spectroscopy are not blood
13 parameters.
14 THE COURT: That's the dispute. I'll
01:28PM 15 take it under advisement.
16 MR. SHAW: Thank you, Your Honor.
17 MR. CLAASSEN: Your Honor, before I
18 move to the next term, have you had a chance to
19 get your notes?
01:28PM 20 THE COURT: I did. I have them.
21 That was my question.
22 MR. CLAASSEN: So we knocked that
23 out.
24 The next term is "generally capable of
01:28PM 25 displaying." Apple didn't brief that issue.

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1 So their initial position has been indefinite.
2 It wasn't briefed.
3 One note, Apple went through that
4 indefiniteness argument on this term for its
01:29PM 5 final invalidity contentions as well. That
6 issue is now done with respect to the entire
7 case from Masimo's perspective.
8 I got a note that I went a little too
9 fast. I skipped "measured value."
01:29PM 10 THE COURT: So this is about whether
11 or not there needs to be a number on the
12 screen?
13 MR. CLAASSEN: Correct, and our
14 position is there does not. And the
01:29PM 15 specification gives examples. I'll get
16 straight to the point. The specification gives
17 examples where there are not numbers shown
18 directly on the screen. There are bar graphs
19 and trends. They may correlate somehow to a
01:29PM 20 number, as Apple pointed out, but they are not
21 the actual number itself. That's our position.
22 THE COURT: Okay.
23 MR. SHAW: We can start with our
24 slide 23. I can make this one very brief, Your
01:30PM 25 Honor. Sorry. Slide 18. Apologies.

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1 So Apple's construction, "actual numeric
2 value of a measurement," is the plain and
3 ordinary meaning of "measured value." Under
4 Masimo's construction, a measured value need
01:30PM 5 not be measured nor a value. It can be any
6 representation. That would render both terms
7 superfluous and can't be correct.
8 THE COURT: Let me ask you this.
9 Supposing I agree with you -- and I'm not
01:30PM 10 saying I do -- about numeric value. You say
11 actual numeric value of a measurement. You're
12 saying "measured value" is broad enough to
13 cover pulse rate and SpO2 and things like that;
14 right? But those aren't what is actually
01:30PM 15 getting measured. What's actually getting
16 measured by the sensor is photons hitting the
17 detector. "Measured value" means something
18 that is calculated; right? When you say
19 actually what is getting measured, that is not
01:31PM 20 actually what is getting measured.
21 MR. SHAW: I think that's fair to a
22 degree, Your Honor, but there are portions in
23 the specification that differentiate between
24 measured values and derived values, such as a
01:31PM 25 fractional oxygen saturation, SpA02. It calls

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1 that a derived value, so there's a line there.
2 I think the bigger dispute is whether a value
3 has to be a number.
4 THE COURT: All right. Thanks.
01:31PM 5 MR. CLAASSEN: Moving on then to the
6 next term, which is "mobile measurement," and
7 the dispute here is really over whether the
8 preamble is limiting. I'm going to go quickly.
9 Apple relies on the measurement shown in
01:31PM 10 the preamble, if you look at the first term,
11 and "SpO2 measurement system" is recited. The
12 measured to values is referring back to that
13 measurement. It's recited in the claims. The
14 preamble is not limiting.
01:32PM 15 THE COURT: If I agree with them that
16 the preamble is limiting, could I still agree
17 with you that the "mobile" part refers to a
18 mobile device as opposed to somebody moving?
19 MR. CLAASSEN: Absolutely. It refers
01:32PM 20 to portability as opposed to movement. It's
21 not a person moving. It's movement at the
22 measurement site in particular, but yes, you
23 could agree with both parties in that sense.
24 THE COURT: Okay. Thank you.
01:32PM 25 MR. SHAW: So first of all, with

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1 slide 33, please, so Masimo argues that the
2 SpO2 measurement values refers back to an SpO2
3 measurement system. It's unclear to me how a
4 value can derive antecedent basis from a
01:33PM 5 system. I don't think that's correct. I think
6 the only earlier reference to a measurement or
7 a measurement value is the mobile measurement
8 of oxygen saturation in the preamble. We think
9 that either "mobile measurement of oxygen
01:33PM 10 saturation" in the preamble provides antecedent
11 basis or else the SpO2 measurement value is
12 indefinite for lack of antecedent basis.
13 To address your question about whether or
14 not it can refer to measurement using a mobile
01:33PM 15 device, I would direct you to slide 35 of our
16 presentation. The specification actually
17 teaches away from implementing physiological
18 measurement technology on mobile computing
19 devices because, at the time, the mobile
01:33PM 20 processors weren't powerful enough to perform
21 those kinds of measurements, so I don't see how
22 it can refer to a measurement using a mobile
23 device.
24 If you want to talk about more broadly
01:34PM 25 whether it refers to measurement using a mobile

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1 system, we can turn to slide 37. There's an
2 entire claim set that deals with that. It's
3 Claims 1 through 12, and they're not asserted,
4 and they reference a mobile pulse oximetry
01:34PM 5 system for informing a user of mobile
6 measurement of oxygen saturation.
7 When Masimo wanted to claim a mobile
8 system, it did it, and if "mobile measurement
9 of oxygen saturation" refers to a mobile
01:34PM 10 system, then it's redundant of the "mobile
11 pulse oximetry" language, and one of them is
12 rendered superfluous.
13 THE COURT: Thank you.
14 MR. CLAASSEN: Just quickly in
01:34PM 15 response to the "mobile" issue, the issue is
16 what the meaning of "mobile" means in the
17 patent preamble.
18 THE COURT: I understand.
19 MR. HUGHES: Daniel Hughes on behalf
20 of Masimo, and I'll be addressing "one or more
21 signals." That's the next term.
22 The dispute here, Your Honor, is that the
23 term "one or more signals," Masimo's position
24 is that no construction is needed because this
01:35PM 25 is understandable by a jury, and Apple's

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1 construction, Apple is trying to interpret what
2 seems to be raw detected signals.
3 Both parties seem to agree that "signals"
4 is understandable because both the original
01:35PM 5 claim phrase and Apple's construction uses it.
6 What's really happening here is that Apple is
7 adding two adjective, detected and raw, and
8 trying to import them into the limitation.
9 In terms of "detected," detected is
01:35PM 10 already understood by the context of the claim
11 because the signals are coming out of the
12 sensor. Really, our dispute here is on "raw."
13 And in "raw" Apple is trying to import
14 limitations from the specification but the
01:35PM 15 intrinsic evidence of the specification here
16 never limits the signals to raw. In fact, when
17 it describes the raw signals, it uses words
18 like "in some embodiments" or "the signals can
19 be raw." Additionally, many parts of the
01:36PM 20 specification, these are cited in our brief,
21 talk about the signals as not raw and just use
22 the word signals.
23 Now, Apple argues those signals are still
24 in fact raw because the signals are sent from
01:36PM 25 the sensor to the processor for processing, but

1 Apple ignores the uncontroverted evidence from
2 our expert that a POSA would understand that
3 it's common for a sensor to have a
4 preprocessing element and send that signal
01:36PM 5 over.
6 THE COURT: Are we talking about
7 preprocessing here? One gets the sense when
8 one reads the briefs -- and I understand you
9 all are in the weeds about what the accused
01:36PM 10 products are in the infringement contentions --
11 but one gets the sense maybe someone is going
12 to argue down the line that there isn't a
13 separate processor, that something goes right
14 from the sensor to the mobile device, and
01:36PM 15 that's what we're really talking about. Is
16 preprocessing the issue here or is it something
17 else?
18 MR. HUGHES: Your Honor, I think the
19 issue is in terms of infringement. This is an
20 issue of infringement, and Apple is arguing the
21 sensor in their watch that sends the signal
22 from the sensor to the processor isn't raw, and
23 our position is it is raw. And what that
24 means, Apple never explained what "raw" means
01:37PM 25 in any of this.

1 Our position is there's no need to get
2 that far because they're doing a classic faux
3 pas of claim construction. They're trying to
4 import a limitation when the specification
01:37PM 5 doesn't support it. It it's not the plain and
6 ordinary meaning of the term, and nothing
7 clearly says the signals are limited in the
8 spec, and that's what they need to show in
9 order to import it in.
01:37PM 10 THE COURT: All right. Thank you
11 very much.
12 Is my prediction at all correct, or is
13 something different going on here?
14 MR. SHAW: I think you're on the
01:37PM 15 right track, Your Honor, if we could jump
16 straight to slide 43.
17 So first, with respect to the "raw"
18 limitation, it's not a matter, as Masimo tries
19 to pooh-pooh it, that they call it raw a couple
01:38PM 20 times in the spec. They repeatedly and
21 consistently refer to the data output by the
22 optical sensor and received by the processing
23 board as raw data, raw signals, raw detected
24 signals.
01:38PM 25 If you look at the Federal Circuit case

1 *GPNE versus Apple*, 830 F.3d 1635, you had
2 almost the exact same situation. There, The
3 specification repeatedly referred to the term
4 "node" as meaning a pager, but the claims use
01:38PM 5 the term "node." Lower court construed "node"
6 to mean a pager, and the patentee said that
7 can't be right because the claim term is node,
8 it's not pager, and just like Masimo says here,
9 the patentee says we have other patents that
01:38PM 10 claim a paging system, so "node" can't mean the
11 same thing.
12 What the Federal Circuit said there is
13 when the specification repeatedly and
14 consistently characterizes a claim term in a
01:38PM 15 particular way, it's proper to construe the
16 claim term in accordance with that
17 characterization. That's all we're asking you
18 to do here. They repeatedly and consistently
19 characterized the data output by the sensor 110
01:39PM 20 and received by the processing module 130 as
21 raw data.
22 On the preprocessing point, Your Honor,
23 actually I believe it was in the sur-reply
24 declaration. Their own expert, Dr. Mattisetti,
01:39PM 25 talked about what preprocessing is, and he says

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1 it's things like noise filtering.
2 If you look at the specification, Your
3 Honor, particularly one example is the note
4 starting Column 4, line 65, it says, "The
01:39PM 5 sensor data is transmitted from sensor 110
6 along the first cable 120 to the processing
7 module 130, which can apply noise filtering and
8 signal processing techniques." That type of
9 noise filtering preprocessing, the
01:39PM 10 specification itself says that's done on the
11 processing module not the optical sensor.
12 THE COURT: All right. Thank you.
13 MR. HUGHES: Two brief points, Your
14 Honor. One, I just want to be clear here. I
01:40PM 15 think what Apple's position is that the "one or
16 more signals" should be raw detected, and I
17 think we can see how far apart that is.
18 On the second point, in terms of
19 preprocessing, the fact that the processing
01:40PM 20 board can do some sort of filtering and
21 processing doesn't also mean the sensor can't
22 also do some processing.
23 With that, Your Honor, in the interest of
24 time, I think we would submit on the briefing
01:40PM 25 on the remaining terms of the '507 patent,

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1 which are the "processing board in data
2 communication with the optical sensor and
3 mobile computing device," "via processing
4 board," and "via application," we would submit
01:40PM 5 on the briefing unless Your Honor has
6 questions.
7 THE COURT: No questions on those.
8 MR. MALZ: Good afternoon, Your
9 Honor. My name is Jordan Malz on behalf of
01:41PM 10 Apple. We also submit on the papers on the
11 '507 terms.
12 THE COURT: Great.
13 MR. CLAASSEN: I think that advances
14 us now to "cavity." And the parties had
01:41PM 15 tentatively agreed to submit on the briefing on
16 "cavity" unless Your Honor has particular
17 questions.
18 THE COURT: I did have a question. I
19 have a note to myself. Give me a second.
01:41PM 20 So I was going to ask Apple, my
21 recollection of this dispute was that Masimo
22 was pointing to figures in the patent which the
23 patent refers to as a cavity. You agree that
24 those are cavities?
01:42PM 25 MR. MALZ: Are you referring to

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1 Figure 30B?
2 THE COURT: I'm referring to the red
3 parts that are colored.
4 MR. MALZ: Yes, we agree that is
01:42PM 5 bounding a cavity.
6 THE COURT: I guess my question was,
7 how do you determine whether something is a
8 hollowed out space within a solid body looking
9 at that picture?
01:42PM 10 MR. MALZ: The reason that's a
11 hollowed out space within a solid body is the
12 U-shaped structure that's surrounding that
13 cavity, that's bounding that cavity, is solid.
14 THE COURT: All right. Thank you.
01:42PM 15 MR. CLAASSEN: If Your Honor has no
16 further questions on "cavity," we'll move on.
17 The next term is "light block," and
18 Masimo's position on the light block is that
19 it's readily understandable to the jury.
01:43PM 20 There's an example, but the word "light block"
21 itself, the phrase "light block" itself is
22 readily understandable. And there's an example
23 of the shoebox 3200 that blocks light. So we
24 believe that there's no construction necessary
01:43PM 25 and that in particular the addition of "the

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1 detector assembly" is a significant departure
2 from "surrounding the at least one detector."
3 You're moving from a detector to a detector
4 assembly. The implication there is more than
01:43PM 5 the detector must be surrounded by a light
6 block.
7 THE COURT: Okay.
8 MR. CLAASSEN: Do you have any
9 questions, Your Honor?
01:43PM 10 THE COURT: No questions. Is this
11 something we can work out based on what I just
12 heard? That is my question. Let me ask Apple
13 first.
14 Do we have to have "assembly" in there?
01:44PM 15 MR. MALZ: I believe so, and I'd like
16 to explain exactly how we get there. So the
17 way we get there is Your Honor can see in the
18 first paragraph, the claim requires at least
19 one detector. And then the claims then go on
01:44PM 20 to require a light block surrounding the at
21 least one detector. So the at least one
22 detector has an antecedent basis, but it uses
23 the definite article "the." That is referring
24 to what the light is surrounding. It's
01:44PM 25 referring is referring back to the at least one

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1 detector from the first paragraph. What the
2 claim is telling us is that regardless of the
3 numbers that detectors that comprise at least
4 one detector -- and we're totally agnostic as
01:44PM 5 to that number -- the claimed light block is
6 referring back to that same assembly of
7 detectors.
8 And the reason why we use the -- that's
9 showing it's surrounding by the at least one
01:45PM 10 detector, the light block is accommodating the
11 assembly detectors and blocks stray light from
12 reaching the detectors, and that's the whole
13 point of having the light block, is to prevent
14 light from the emitter from reaching any of the
01:45PM 15 detectors without passing through tissue, and I
16 wanted to explain why we have the formulation.
17 THE COURT: So there can't be
18 detectors that aren't surrounded by the light
19 block and infringe?
01:45PM 20 MR. MALZ: Whatever the -- I would
21 say so. Whatever the "at least one detectors"
22 are for the device, those need to be surrounded
23 by the light block. Frankly, if Your Honor
24 prefers "surrounds" to "accommodates," that
01:45PM 25 works as well. The reason why we use the word

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1 "accommodates the detector assembly" is that's
2 coming directly from the specification. The
3 specification's only disclosure of a structure
4 surrounding any detector is shoebox 3200, and
01:46PM 5 the specification says that shoebox 3200
6 accommodates the detector assembly, and even
7 walks through detector assembly 2400 inserts
8 into the shoe, and you see the figure 2400 goes
9 into the shoe 3200, and then the shoe goes into
01:46PM 10 the rest of the device.
11 And that's the last slide I had on this,
12 was the '911 patent refers to "detector
13 assembly" over 40 times. It never discloses or
14 refers to a structure that accommodates
01:46PM 15 anything less than the entire detector
16 assembly, and when Masimo was quoting from the
17 specification, it actually deleted the word
18 "assembly" from its quotation. The quotation
19 is "the detector assembly is housed in an
01:46PM 20 enclosure so as to reduce light piping."
21 Masimo deleted "assembly" and said "the
22 detector is housed in an enclosure."
23 THE COURT: Reading the briefs, and
24 it's possible I didn't read it close enough, I
01:47PM 25 was getting the impression this was really

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1 about whether or not the light block could
2 encompass things that weren't detectors. Now
3 I'm hearing the dispute is really about whether
4 or not the all of the detectors in the accused
01:47PM 5 product are covered by the light block. Is
6 that what the dispute is?
7 MR. MALZ: That's right because if
8 some of the detectors were not within the light
9 block, that would run into the exact problem
01:47PM 10 the '911 patent was allegedly designed to
11 address, which is how do you address the light
12 piping? How you do prevent light that's
13 emitted from the emitter from reaching the
14 detector without first passing through tissue?
01:47PM 15 THE COURT: Got it. Okay. Thank
16 you.
17 MR. CLAASSEN: Your Honor, just to
18 make sure that we're clear on at least this one
19 point, counsel referred to the detector
01:47PM 20 assembly and made some passing reference to the
21 claims. There is no detector assembly in the
22 claims. It's "at least one detector." So if
23 the light block includes the at least one
24 detector or at least one detector, the claims
01:48PM 25 infringe.

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1 THE COURT: The comprising -- now I'm
2 thinking out loud because I hadn't understood
3 this before. The comprising is at the top. So
4 you would say there can be at least one
01:48PM 5 detector and that detector is in the light
6 block, but there could be other detectors that
7 aren't in the blight block.
8 MR. CLAASSEN: Or alternatively could
9 be in a different light block, yes.
01:48PM 10 THE COURT: Okay. All right.
11 MR. CLAASSEN: Moving on, we have
12 another term that's related to that light
13 block, and that's the top. And I think really
14 here the issue is whether we're referring to
01:48PM 15 the uppermost structure. It's an orientation
16 issue.
17 THE COURT: What does that mean,
18 uppermost?
19 MR. CLAASSEN: That's what Masimo's
01:49PM 20 point is. What does "uppermost" mean?
21 Uppermost relative to what?
22 THE COURT: To a shoebox? If you
23 envision a shoebox and that's the top?
24 MR. CLAASSEN: If you turn it upside
01:49PM 25 down, it's no longer the uppermost structure.

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1 That's what we're concerned with. Our answer
2 is no, we're talking about small devices. If
3 you turn your wrist upside down, for example,
4 the top of the shoebox would remain the top of
01:49PM 5 the shoebox regardless of the orientation. The
6 top of my head, if I did a handstand, would
7 still be the top of my head.
8 THE COURT: Okay. We're going to
9 take a closer look at the prosecution history.
01:49PM 10 I think my notes indicate there was something
11 that had to do with "top" in the prosecution
12 history.
13 MR. CLAASSEN: I don't have a note on
14 that, Your Honor.
01:49PM 15 THE COURT: Maybe not. Anyway, we'll
16 give you a chance and hear from them.
17 MR. MALZ: Your Honor, Jordan Malz
18 for Apple.
19 The parties dispute what the plain and
01:50PM 20 ordinary meaning of "top" is. And the issue is
21 does "top" mean the uppermost structure that
22 covers, or does it mean the area that has the
23 opening for the light to pass through, which is
24 Masimo's position in its opposition brief?
01:50PM 25 The claims make clear that "top" has an

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1 uppermost positional meaning and distinguishes
2 "top" from base and sides. So the claims
3 recite "a top of the shoebox structure includes
4 only one opening." The claims are telling us
01:50PM 5 that the opening can't be anywhere. The
6 opening has to be at the top.
7 And then the claims go on to distinguish
8 a base, sidewalls, and the top forming an
9 enclosure. The specification confirms that top
01:51PM 10 has an uppermost positional meaning. It uses
11 the phrases top, bottom, side all over the
12 place. It shows top views from above. It
13 distinguishes between the base and the bottom
14 versus the top, and it even refers to
01:51PM 15 components being placed on top of one another.
16 The file history confirms that "top" is
17 the uppermost structure that covers. During
18 prosecution, the examiner found that a prior
19 art reference disclosed a shoebox structure
01:51PM 20 further comprising a window on a top portion of
21 the shoebox structure, and the examiner labeled
22 the uppermost structure that covers the shoebox
23 as the top. So these are the examiner's own
24 labels. The examiner labeled the uppermost
01:51PM 25 structure as the top, labeled the sidewalls,

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1 labeled the base. And the examiner found that
2 the differentiating aspect was a top of the
3 shoebox structure having only one opening, and
4 the patentee subsequently made the amendment so
01:52PM 5 the claim said top of the shoebox structure is
6 where the opening was.
7 Dictionary definitions confirm Apple's
8 construction. There are many dictionaries that
9 say the uppermost part, the part that covers
01:52PM 10 the uppermost part. The issue we're having
11 with Masimo's proposal, three main ones,
12 Masimo's proposal that "top" means any area
13 that has the opening for light to pass through
14 reads "top" out of the claims. The claims
01:52PM 15 require the opening at a particular location,
16 the top, and if the opening can be anywhere,
17 then "top" has no meaning and is a nullity.
18 I would also add that Masimo's overbroad
19 construction is unsupported. The plain
01:53PM 20 meaning, the plain and ordinary meaning of
21 "top" is not any area that has the opening for
22 light to pass through. And notably, Masimo
23 cites no intrinsic or dictionary support for
24 its construction.
01:53PM 25 And then the last point I would make is

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1 that Masimo's proposal that "top" means any
2 area that has an opening for light to pass
3 through yields absurdities. Masimo can't tell
4 us the opening -- can't tell us the top of the
01:53PM 5 this shoebox, and plugging Masimo's
6 construction into the claim language yields
7 absurd results that the area that has the area
8 of the light block through which light is
9 configured to pass for light to pass through
01:53PM 10 includes only, one, the area of the light block
11 through which light is configured to pass
12 through which light is configured to pass.
13 That's where you incorporate their claim
14 construction into the claim language.
01:53PM 15 THE COURT: Thank you.
16 MR. CLAASSEN: Now I understand my
17 confusion on the prosecution history. Here was
18 the slide that Apple pointed to with respect to
19 the prosecution history.
01:54PM 20 The issue here is this sheds no light on
21 "uppermost." What we're -- what was
22 distinguished here was the distinguishing
23 aspect or differentiating aspect of the top of
24 the shoebox having only one opening is not
01:54PM 25 claimed, so it's the opening. "Top" is labeled

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1 here, but as an example of why it's not the
2 uppermost structure, you turn it upside down,
3 it's still the top.
4 The last term, I believe, for the day is
01:54PM 5 "opening," and, again, this is about the
6 passage of light, and you heard a little bit
7 about the passage of light earlier today, and
8 this opening is to allow the passage of light.
9 The dispute is really whether the opening may
01:55PM 10 have a material in it such as a window, and the
11 specification gives an example of a detector
12 window that provides an optical path from the
13 tissue to the center. The opening is not just
14 empty space. It something that allows for
01:55PM 15 light to pass.
16 THE COURT: Thank you.
17 MR. MALZ: So, Your Honor, the
18 parties, again, dispute the plain meaning of
19 "opening." Does "opening" mean empty space or
01:55PM 20 the area of the light block through which light
21 is configured to pass? And the secondary issue
22 is, does "opening" include closed windows that
23 are filled with material?
24 The claims made clear that light cannot
01:55PM 25 pass through merely anything. It must pass

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1 through an opening. Again, dictionary
2 definitions are clear on what "opening" means.
3 It means empty space or other synonymous terms,
4 open place, hole, gap, vacant space. And
01:56PM 5 Masimo's proposal that "opening" means any area
6 of the light block through which light is
7 configured to pass reads "opening" out of the
8 claims. The claims are clear that the light
9 must pass through on opening, and Masimo is
01:56PM 10 essentially treating opening as a nullity.
11 Masimo's overbroad construction is
12 unsupported. The plain and ordinary meaning of
13 "opening" is not anything through which light
14 is configured to pass. "Light top," this is
01:56PM 15 another example where Masimo cites no intrinsic
16 or dictionary support for its construction.
17 Masimo is attacking Apple's support for its own
18 construction, but Masimo never proffers support
19 for its own construction. Masimo also
01:57PM 20 improperly attempts to use extrinsic evidence
21 to alter the intrinsic evidence, and even that
22 extrinsic evidence does not support Masimo's
23 position.
24 And my last two slides on the issue of
01:57PM 25 "opening," Masimo fails to demonstrate and

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1 cannot demonstrate that a closed window filled
2 with material is an opening. A window is not
3 necessarily an opening because a window can be
4 open or closed, and the intrinsic evidence
01:57PM 5 itself is very instructive on this point
6 because some claims recite "opening" and other
7 claims recite "window."
8 And finally, in response to a prior art
9 rejection, the patentee amended the language of
01:57PM 10 numerous claims from "window" to "opening." So
11 the patentees themselves did not believe that
12 all windows were necessarily an opening. So we
13 believe that we've set forth the correct and
14 well-supported construction and Masimo has not.
01:58PM 15 THE COURT: Thank you.
16 MR. CLAASSEN: Your Honor, this is
17 the last term. I just want to briefly respond
18 on the window point. Open window, closed
19 window, that talks about the passage of air,
01:58PM 20 for example. A closed window is still an
21 opening with respect to light passing. That's
22 literally what a window is.
23 Furthermore, there was discussion of an
24 amendment made in the prosecution history.
01:58PM 25 That wasn't to do anything other than fix the

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1 antecedent basis for "opening," so that doesn't
2 shed much meaning or light on the meaning of
3 the word "opening," no pun intended.
4 THE COURT: Thank you very much.
01:58PM 5 MR. CLAASSEN: Thank you.
6 THE COURT: All right does that
7 conclude our claim construction disputes for
8 today?
9 MR. CLAASSEN: It does from Masimo's
01:59PM 10 perspective, Your Honor.
11 MR. MALZ: Same for Apple.
12 THE COURT: All right. Great. So
13 let's do this. This is just the paperwork on
14 my desk that has to do with claim construction
01:59PM 15 chart construction. I've got the discovery
16 disputes, which are a whole other stack in my
17 office, so let's take a ten-minute break, and
18 then we'll come back, and I'll just remind
19 everyone that we'll be on the trial time for
01:59PM 20 those. So if you wanted to work any of them
21 out, now would be a great time since we're all
22 here. See you in a few.
23
24
25

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1 C E R T I F I C A T E

2 STATE OF DELAWARE)
) ss:
3 COUNTY OF NEW CASTLE)

4 I, Deanna L. Warner, a Certified
5 Shorthand Reporter, do hereby certify that as
6 such Certified Shorthand Reporter, I was
7 present at and reported in Stenotype shorthand
8 the above and foregoing proceedings in Case
9 Number 22-CV-1377-MN-JLH, *APPLE INC. Vs. MASIMO*
10 *CORP, et al.*, heard on September 14, 2023.
11 I further certify that a transcript of
12 my shorthand notes was typed and that the
13 foregoing transcript, consisting of 165
14 typewritten pages, is a true copy of said
15 MARKMAN HEARING.
16 SIGNED, OFFICIALLY SEALED, and FILED
17 with the Clerk of the District Court, NEW
18 CASTLE County, Delaware, this 25th day of
19 September, 2023.
20
21 _____
Deanna L. Warner, CSR, #1687

22 Speedbudget Enterprises, LLC
23
24
25

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