

1 IN THE UNITED STATES DISTRICT COURT IN AND FOR THE DISTRICT OF DELAWARE APPLE INC., -----Plaintiff, } vs. } Case No. 22-CV-1377-MN- JLH 22-CV-1378-MN- JLH MASIMO CORP, et al., -----Defendant. } TRANSCRIPT OF MARKMAN HEARING MARKMAN HEARING had before the Honorable Jennifer L. Hall, U.S.M.J., in Courtroom 6D on the 14th of September, 2023. APPEARANCES POTTER ANDERSON & CORROON LLP BY: DAVID MOORE, ESQ. -and- DESMARAIS LLP BY: JOHN DESMARAIS, ESQ. COSMIN MAIER, ESQ. KERRI-ANN LIMBEEK, ESQ. DAVID SHAW, ESQ. JORDAN MALZ, ESQ. TIM CHO, ESQ. AMY WANN, ESQ. JEFF SEDDON, ESQ. JAMIE KRINGSTEIN, ESQ. BEN LEUHR, ESQ.	3 THE COURT: We are here today to hear some claim construction disputes. This is <i>Apple and Masimo</i>. It's Civil Action Number 22-1377 and -78. Let's start with appearances for the record. MR. MOORE: Good morning, Your Honor. David Moore from Potter Anderson on behalf of Apple. As you can see, the gang is all here today. Seated at counsel table with me are John Desmarais and Kerri-Ann Limbeek. And additional attorneys you'll hear from in the claim construction phase are Cosmin Maier, Jordan Malz, David Shaw, Amy Wann, and Tim Cho. THE COURT: Great. Good morning to everybody. MS. HANEY: Good morning, Your Honor. Megan Haney from Phillips, McLaughlin, and Hall on behalf of Defendants. I'm joined today by Steve Jensen, Douglas Wentzel, Ben Katzenellenbogen, Daniel Hughes, Brian Horne, Brian Claassen, and Jared Bunker. THE COURT: Good morning to everybody. So I think this might be only the second or third hearing we've had in the new
2 -and- WILMERHALE BY: JENNIFER MILICI, ESQ. Counsel for Plaintiff PHILLIPS MCLAUGHLIN & HALL P.A. BY: MEGAN HANEY, ESQ. -and- KNOBBE MARTENS BY: DOUGLAS WENTZEL, ESQ. JARED BUNKER, ESQ. DANIEL HUGHES, ESQ. BEN KATZENELLENBOGEN, ESQ. BRIAN CLAASSEN, ESQ. BRIAN HORNE, ESQ. STEVE JENSEN, ESQ. Counsel for Defendant	4 courtroom. We're still getting some of the logistics worked out. I know it seems like everybody is really far away, but we had it set up this way so that the jury would be able to see the evidence being presented on the screen, and we were limited in terms of the width of the courtroom, so -- but if you have any suggestions for how you think we might make it more conducive to presentation, let us know. Looks like -- we've got some more chairs in the back. Looks like next time we can bring more chairs out as well. Hopefully, all the technology is working, so today will be a good test for that. I believe we've allotted three hours to each side to hear all of the disputes. Did we have a discussion between the parties about who wanted to go first or how we were going to proceed? MS. LIMBEEK: Good morning, Your Honor. Kerri-Ann Limbeek on behalf of Apple. We did have a discussion about the order. We will defer to Your Honor if there's any particular order you'd prefer. Otherwise, the parties agreed we'd go through the order in the

5 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	7 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
6 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	8 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

9 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	11 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
10 1 advise deferring to the figures and warned 2 against detailed verbal descriptions. As 3 Federal Circuit explained in <i>Egyptian Goddess</i>, 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 <i>Crocs</i> 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	12 1 they are doing their infringement analysis. 2 <i>Egyptian Goddess</i>. 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 <i>Crocs</i> 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 <i>Egyptian Goddess</i> 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

13 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	15 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
14 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	16 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.

17 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 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, 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 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.	19 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 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 15 way that is claimed in the electronic device 10:23AM 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
18 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	20 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

21 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	23 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 <i>Egyptian</i> -- the 14 guidance from the Federal Circuit in <i>Egyptian</i> 10:28AM 15 <i>Goddess</i> and <i>Sport Dimension</i>, 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
22 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	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

25 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 its 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	27 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
26 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	28 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

29 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	31 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.
30 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	32 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 <i>Egyptian Goddess</i>, comes after <i>Crocs</i>, 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

33 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	35 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 <i>02</i> 18 <i>Micro</i> 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
34 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	36 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

37 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	39 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 <i>OddzOn</i>, which is a 11 case from '97, so that was pre <i>Egyptian</i> 12 <i>Goddess</i>, 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 <i>Egyptian Goddess</i>. 17 But it's this <i>Ethicon</i> 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 <i>Ethicon</i> 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 <i>Ethicon</i> 24 decision because it really walks through 10:51AM 25 exactly what you're supposed to do in this
38 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 <i>Gorham</i> 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 <i>Gorham</i>, 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	40 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 <i>Egyptian Goddess</i>, it was talking 10:52AM 10 about what you separate and that you separate 11 purely functional from ornamental. The Court 12 in <i>Egyptian Goddess</i> 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 <i>Ethicon</i> case makes it clear. It 23 goes through two prior cases, the <i>Richardson</i> 24 case and <i>OddzOn</i> case. And <i>Richardson</i> involved 25 what I thought was a hammer but in reading over

41 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 <i>Ethicon</i> 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 <i>Ethicon</i> talked about <i>OddzOn</i>, which is the	43 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
42 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 <i>Egyptian Goddess</i>, 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	44 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 <i>Ethicon</i>. 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

45 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 <i>Richardson and OddzOn</i> and <i>Ethicon</i> 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	47 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 <i>XMTT</i> case,
46 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	48 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 <i>XMTT</i> 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

49 1 claim language itself as part of <i>XMTT</i> because 2 that's a critical distinction. 3 The reliance on <i>XMTT</i> is particularly 4 curious because <i>XMTT</i>, 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	51 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
50 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 <i>Ethicon</i>, 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	52 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

53 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	55 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?
54 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	56 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

57 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	59 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,
58 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,	60 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

61 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	63 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
62 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	64 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 <i>02 Micro</i> 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, <i>Nike</i> 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

65 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	67 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 <i>Ethicon</i>, 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
66 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	68 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. 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 <i>Ethicon</i>, which is 14 <i>Ethicon</i> went through and described those 11:27AM 15 constructions in both <i>OddzOn</i> and <i>Richardson</i>. 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? 25 MR. KATZENELLENBOGEN: Under our

69 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 <i>Ethicon</i> described the <i>Richardson</i> 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.	71 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
70 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 <i>OddzOn</i>, 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	72 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 <i>Ethicon</i> 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.

73 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	75 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
74 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	76 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.

77 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	79 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 <i>Egyptian</i> 14 <i>Goddess</i> 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 <i>Egyptian Goddess</i> said is 24 procedurally improper. What the Federal 11:41AM 25 Circuit said is improper is an
78 1 this portion of <i>Ethicon</i> 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	80 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

81 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 <i>Egyptian Goddess</i>? 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 <i>Egyptian Goddess</i>, 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	83 1 those cases say that. 2 What they actually say, for example, the 3 <i>Golden Eye</i> 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
82 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	84 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

85 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 <i>OddzOn</i> case that counsel referred 11 to and claimed it was post <i>Egyptian Goddess</i> is 12 from 1997. It's pre <i>Egyptian Goddess</i>. 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 <i>Shur</i> 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	87 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
86 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,	88 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

89 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.	91 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
90 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.	92 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

93 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	95 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 <i>Striker</i>, 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
94 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	96 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

97 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,	99 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
98 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	100 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. DESMARAI: 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

101 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	103 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
102 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	104 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

105 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.	107 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
106 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	108 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

109 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	111 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
110 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	112 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.

113 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	115 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
114 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	116 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

117 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	119 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
118 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	120 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,

121 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 <i>Phillips</i>, 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.	123 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 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
122 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	124 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

125 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	127 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
126 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	128 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

129 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	131 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
130 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	132 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

133 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 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? 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 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 25 were talking about ECGs for watches for	135 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 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 SpO2, pulse rate, 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 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 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 25 measuring blood is correct. Measuring
134 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 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 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? 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 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. 25 THE COURT: Okay.	136 1 pulsating blood through spectroscopy, that's 2 correct. 3 THE COURT: That is the dispute? 4 MR. CLAASSEN: That is. 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 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 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 25 of the second display? It doesn't have one.

137 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,	139 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 on 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.
138 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.	140 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.

141 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	143 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
142 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	144 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

145 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	147 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
146 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.	148 1 <i>GPNE versus Apple</i>, 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

149 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,	151 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
150 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	152 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

153 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	155 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.
154 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	156 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.

157 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	159 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
158 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,	160 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

161 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	163 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
162 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	164 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

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.

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Deanna L. Warner, CSR, #1687



22 Speedbudget Enterprises, LLC
23
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