

IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF TEXAS
 MARSHALL DIVISION

NETWORK SYSTEM TECHNOLOGIES,) (
 PLAINTIFF,) (CIVIL ACTION NO.
) (2:22-CV-482-RWS
 VS.) (TEXARKANA, TEXAS
) (
 TEXAS INSTRUMENTS INCORPORATED,) (NOVEMBER 8, 2023
 ET AL.,) (10:00 A.M.
 DEFENDANTS.) (

CLAIM CONSTRUCTION AND DISCOVERY HEARING
BEFORE THE HONORABLE ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

FOR THE PLAINTIFF: Mr. Daniel S. Stringfield
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COURT REPORTER: Ms. Shelly Holmes, CSR, TCRR
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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

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09:58:03 1 COURT SECURITY OFFICER: All rise.

09:58:03 2 THE COURT: Please be seated.

10:01:31 3 Good morning, everyone.

10:01:32 4 Mrs. Schroeder, if you would call the case for us.

10:01:35 5 COURTROOM DEPUTY: Civil Action No. 2:22-CV-482,

10:01:40 6 Network System Technologies LLC versus Texas Instruments

10:01:44 7 Incorporated.

10:01:45 8 THE COURT: Announcements for the record?

10:01:46 9 MR. DAVIS: Good morning, Your Honor. Bo Davis on

10:01:47 10 behalf of the Plaintiff. With me today is Mr. Dan

10:01:51 11 Stringfield --

10:01:51 12 MR. STRINGFIELD: Good morning, Your Honor.

10:01:52 13 THE COURT: Hello.

10:01:52 14 MR. DAVIS: -- doing the arguing, Mr. Eric

10:01:52 15 Chmelar.

10:01:57 16 MR. CHMELAR: Hi, Your Honor.

10:01:57 17 THE COURT: Hi.

10:01:58 18 MR. DAVIS: And from NST, Warren Hurwitz.

10:02:02 19 THE COURT: All right.

10:02:02 20 MR. HURWITZ: Good morning, Your Honor.

10:02:04 21 THE COURT: Good morning.

10:02:04 22 MR. DAVIS: And we're ready to proceed, Your

10:02:04 23 Honor.

10:02:04 24 THE COURT: All right. Thank you.

10:02:06 25 Good morning.

10:02:06 1 MS. FAIR: Good morning, Your Honor. Andrea Fair
10:02:06 2 on behalf of Texas Instruments. With me today, Mr. Bob
10:02:06 3 Haslam.

10:02:11 4 THE COURT: Good morning.

10:02:11 5 MR. HASLAM: Good morning, Your Honor.

10:02:12 6 THE COURT: Hello.

10:02:12 7 MS. FAIR: Mr. Ranga Sudarshan.

10:02:12 8 THE COURT: Mr. Sudarshan.

10:02:15 9 MS. FAIR: Ms. Emily Mondry.

10:02:15 10 THE COURT: Hello.

10:02:17 11 MS. FAIR: And from Texas Instruments,
10:02:19 12 Mr. Kristoffer Leftwich.

10:02:23 13 THE COURT: Very well. Good morning. Good
10:02:24 14 morning to everybody and welcome. Thanks to all of you for
10:02:27 15 being here.

10:02:28 16 We're here for the claim construction hearing in
10:02:31 17 this matter, and we also have a discovery issue to take up
10:02:42 18 at the conclusion of the Markman.

10:02:45 19 I think the parties have agreed that an hour and a
10:02:47 20 half per side on the Markman is an ample amount of time to
10:02:53 21 cover everything that's necessary. Of course, I will rely
10:02:58 22 upon each side to keep track of their time and allocate it
10:03:08 23 accordingly.

10:03:09 24 Let me also note for the record that earlier this
10:03:13 25 morning, we distributed to counsel preliminary

10:03:19 1 constructions of the disputed terms. Those are intended to
10:03:26 2 sort of let you know where I am after the initial review of
10:03:31 3 the pleadings and the claim construction briefing. They're
10:03:35 4 designed to allow you to focus your time and your
10:03:41 5 arguments, I guess, where you think the Court most missed
10:03:46 6 the mark. And they're certainly not designed to foreclose
10:03:52 7 any arguments that anyone wishes to make.

10:03:54 8 I reserve the right to and do reconsider those
10:03:59 9 preliminary constructions based on the arguments that are
10:04:03 10 offered at the -- at the hearing. So I hope that you will
10:04:07 11 take them in that light.

10:04:08 12 Let me also say for the record that I've reviewed
10:04:11 13 the technology tutorials that were provided by both sides.
10:04:16 14 Obviously, either side is welcome, if you want to, to start
10:04:21 15 off with any initial remarks you may have about the patents
10:04:25 16 or the technology.

10:04:26 17 And then, finally, let me just say I think it
10:04:29 18 makes sense to -- unless the parties think otherwise --
10:04:33 19 just follow the order set forth in the preliminary
10:04:38 20 constructions we provided to you earlier today and follow
10:04:42 21 those on a term-by-term basis, hearing from both sides on
10:04:48 22 each term.

10:04:50 23 Obviously, if you -- you know, if a construction
10:04:55 24 has been selected, at least in terms of preliminary
10:04:58 25 construction, that is the side you advocated for, you might

10:05:05 1 use your time more effectively focusing on other terms
10:05:09 2 where you weren't as convincing.

10:05:11 3 So with those preliminary remarks, whoever wishes
10:05:15 4 to proceed on the first term, may do so.

10:05:18 5 MR. STRINGFIELD: Good morning, Your Honor. Dan
10:05:21 6 Stringfield on behalf of Network System Technologies.

10:05:24 7 THE COURT: Good morning.

10:05:24 8 MR. STRINGFIELD: May I proceed?

10:05:25 9 THE COURT: You may.

10:05:26 10 MR. STRINGFIELD: Your Honor, Network System
10:05:28 11 Technologies agrees with the Court's preliminary
10:05:29 12 construction for "integrated circuit," which is the first
10:05:32 13 term up for construction. So I have no argument on that
10:05:35 14 term at this time. If I may reserve a couple of minutes
10:05:38 15 for rebuttal?

10:05:38 16 THE COURT: Of course.

10:05:38 17 MR. STRINGFIELD: Thank you, Your Honor.

10:05:46 18 THE COURT: Mr. Sudarshan.

10:05:48 19 MR. SUDARSHAN: Good morning, Your Honor.

10:05:49 20 THE COURT: Good morning.

10:05:51 21 MR. SUDARSHAN: We've reviewed the Court's
10:05:55 22 preliminary constructions, and in view of the time
10:05:59 23 limitations, I'll just jump right in.

10:06:01 24 Let me see if I can get our slides going.

10:06:09 25 Okay. Your Honor, our position is that integrated

10:06:13 1 circuit does not require further construction. Our
10:06:18 2 preliminary view of the Court's preliminary construction is
10:06:21 3 that that construction in spirit is tracking the argument
10:06:28 4 that NST proposed that this term, first of all, needs a
10:06:33 5 construction; and, second of all, that the jury should be
10:06:36 6 instructed that integrated circuit within these patents
10:06:41 7 requires circuitry within a chip, essentially. That's how
10:06:45 8 we're interpreting the honor within a continuous substrate
10:06:51 9 language that's in the Court's preliminary construction.

10:06:53 10 And here is why I think -- this is -- this is our
10:06:57 11 argument as to why the construction is not needed and also
10:07:01 12 why the "on a chip" or "within a continuous substrate"
10:07:07 13 language is not required.

10:07:08 14 In a nutshell, the intrinsic evidence suggests
10:07:12 15 that there's no special meaning to integrated circuit.
10:07:16 16 This is a very old term that one of ordinary skill in the
10:07:20 17 art was familiar with. We don't think the jury would have
10:07:22 18 any confusion in terms of what an integrated circuit is.

10:07:25 19 But to put a fine point on it, the intrinsic
10:07:29 20 record does not support importing an "on a chip" or "within
10:07:35 21 a substrate" requirement. And what I have here on our
10:07:41 22 Slide 5 is our view of what's going on here. This is from
10:07:46 23 Dr. Chmelar's -- excuse me, Dr. Chmelar's report.

10:07:49 24 What NST was seeking to do through its
10:07:53 25 construction -- and we see this as largely reflected in the

10:07:56 1 Court's preliminary -- is they're trying to exclude
10:07:59 2 circuitry that is not on the chip.

10:08:04 3 So the claim just says integrated circuit, and
10:08:07 4 they're saying that means that all the circuitry has to be
10:08:09 5 on that chip. And -- and that's an importation of a
10:08:15 6 requirement that's not in the claim.

10:08:17 7 And let me point you to our strongest intrinsic
10:08:22 8 support for why the Court should not accept this argument
10:08:26 9 in the letter or in the spirit.

10:08:28 10 Judge, here on Slide 6, I have some of the claims
10:08:33 11 of the patents, and I would submit that if you look at
10:08:36 12 these claims, they should show you that when the inventors
10:08:40 13 wanted to point out that their invention was on the same
10:08:44 14 chip and the integrated circuit was on the same chip, they
10:08:47 15 did that explicitly.

10:08:49 16 So Claim 1 of the '818 patent has an integrated
10:08:53 17 circuit, and then it goes on to say: Well, there's
10:08:55 18 something more about our integrated circuit. In this
10:08:57 19 claim, the modules have to be disposed on the same chip.

10:09:01 20 Similarly in the '449 patent, again, they claimed
10:09:05 21 an integrated circuit wherein the modules, network, and
10:09:10 22 resource manager are disposed on a chip. And then they
10:09:13 23 have a dependent claim saying that the processing modules
10:09:16 24 and the network are disposed on said chip.

10:09:19 25 So what we have here, Your Honor, is we have six

10:09:23 1 patents. Many of these claims claim an integrated circuit.
10:09:27 2 Some of those claims, like you can see on -- on this slide,
10:09:32 3 make it explicit that the modules have to be on the same
10:09:35 4 chip. But those are only some of those claims. The Court
10:09:40 5 should not import that requirement into all the claims.

10:09:42 6 There's another piece of intrinsic support for our
10:09:49 7 argument, Your Honor. On Slide 7, we think this is quite
10:09:53 8 significant. If you look at the '800 patent, and this
10:09:57 9 similar language is in the '052 patent, the inventors told
10:10:01 10 us that their embodiments relate to systems on chip. I
10:10:06 11 think we all agree on that. But they clarified that the
10:10:10 12 systems on chip can either be on the same chip or on
10:10:13 13 different chips.

10:10:14 14 And what NST's proposal does is say, you -- you --
10:10:20 15 you're limiting us to that one -- that one type of
10:10:23 16 embodiment were on the same chip, and it would exclude the
10:10:27 17 other embodiments. And the Court's well aware of the --
10:10:30 18 the abundance of case law that absent a very high bar, some
10:10:35 19 type of disclaimer or some type of very clear statement
10:10:38 20 where the inventor said even though there's integrated
10:10:41 21 circuits where all the modules are on different chips, I
10:10:45 22 don't mean to address those in my claims.

10:10:48 23 NST's not able to point you to any such disclaimer
10:10:51 24 or any such clear statement that says the embodiments at
10:10:55 25 issue for the jury in this case are only the on the same

10:10:58 1 chip-type embodiments.

10:11:01 2 And for those reasons and also in view of the
10:11:03 3 time, I'll rest on my argument. And we think the best way
10:11:06 4 forward is to just give this term the plain and ordinary
10:11:09 5 meaning.

10:11:09 6 THE COURT: All right. Thank you.

10:11:11 7 Mr. Stringfield?

10:11:11 8 MR. STRINGFIELD: Thank you, Your Honor.

10:11:19 9 Just very briefly, again, Network System
10:11:24 10 Technologies agrees with the Court's preliminary
10:11:25 11 construction. And I just want to call the Court's
10:11:28 12 attention to Slide -- oh, the number is not shown. One
10:11:34 13 second -- Slide 7 of NST's presentation.

10:11:43 14 Here on Slide 7, we show that there is ample
10:11:46 15 support in the specification and disclosure in the
10:11:51 16 specification of "on chip." These patents relate to
10:11:56 17 networks on chip.

10:11:57 18 Texas Instruments is very candid in its intent to
10:12:00 19 read these patents to cover off-chip structures, and we do
10:12:04 20 not believe that's appropriate. We believe that these
10:12:07 21 patents are limited to "on chip."

10:12:09 22 Counsel indicated that TI's strongest argument was
10:12:12 23 based on a claim differentiation argument, wherein a couple
10:12:16 24 of the patents that they highlighted in their presentation
10:12:18 25 specified a single chip.

10:12:20 1 Your Honor, we don't believe that the absence of
10:12:24 2 specificity in the other claims that TI did not focus on,
10:12:28 3 whether they have on-chip or off-chip structures, overrides
10:12:33 4 the overwhelming disclosure and clarity in the
10:12:37 5 specification that these patents are limited to an on-chip
10:12:40 6 structure.

10:12:41 7 So one -- one more point. Just to be clear, at
10:12:46 8 the time of these inventions, integrated circuits were
10:12:50 9 comprised almost exclusively on a single chip. Today, we
10:12:54 10 have structures where there are chips comprised of multiple
10:13:00 11 subchips called chiplets.

10:13:02 12 And, Your Honor, it's our belief that a structure
10:13:04 13 that's on a chip that includes chiplets or subchips would
10:13:08 14 still be within the spirit of both the Court's construction
10:13:12 15 and within the scope of the disclosure in the asserted
10:13:15 16 patents.

10:13:15 17 So with that, Your Honor, with -- unless the Court
10:13:18 18 has any questions.

10:13:19 19 THE COURT: I don't.

10:13:20 20 Let me -- Mr. Sudarshan, any response?

10:13:25 21 I guess the question I've -- for you,
10:13:27 22 Mr. Sudarshan, is, is a chip a continuous substrate?

10:13:33 23 MR. SUDARSHAN: I think that's unduly limiting,
10:13:37 24 Your Honor. I don't think that's -- I believe the Court
10:13:41 25 may have derived that from one of the dictionary

10:13:44 1 definitions that was provided by NST's expert, but that
10:13:48 2 does not -- that definition is not found in all the
10:13:51 3 dictionary definitions.

10:13:52 4 And, again, I think the Court and -- the guidance
10:13:57 5 from the Federal Circuit is that we should look at the
10:14:04 6 intrinsic record first. The dictionary definitions can be
10:14:06 7 helpful, but the Federal Circuit case law says even if you
10:14:10 8 have dictionaries pointing in one direction -- but the
10:14:13 9 intrinsic record, here the claims and the specifications
10:14:15 10 say that integrated circuit can be both on a chip or not on
10:14:18 11 a chip -- then I think the intrinsic record should trump.
10:14:22 12 And that's why the plain and ordinary would be the safer
10:14:26 13 definition here.

10:14:27 14 THE COURT: All right. Thank you.

10:14:28 15 Next term?

10:14:29 16 MR. STRINGFIELD: Thank you, Your Honor.

10:14:38 17 The next term for construction is "dropping
10:14:40 18 means." From the Court's preliminary construction, it
10:14:43 19 appears that the Court is inclined to hold that dropping
10:14:45 20 means is subject to 35 U.S.C. 112(6).

10:14:54 21 As NST explained in its brief and as I'll briefly
10:14:58 22 mention here, we respectfully disagree with that
10:15:01 23 conclusion. NST believes that the term is not subject to
10:15:04 24 35 U.S.C. 112(6), and the construction of the term, if not
10:15:10 25 subject to 35 U.S.C. 112(6), should be "a circuit

10:15:14 1 configured to drop messages," which is reflected on Slide
10:15:20 2 12.

10:15:20 3 So, Your Honor, I will skip ahead to Slide 14.

10:15:24 4 The Federal Circuit has held -- and we cited both
10:15:28 5 of these cases in our brief, Power Integrations v.
10:15:31 6 Fairchild and MIT versus Abacus Software -- that the
10:15:37 7 Federal Circuit has held on several occasions that the term
10:15:39 8 "circuit" connotes structure, and that the term "circuit"
10:15:42 9 is not a means-plus-function limitation when the patent
10:15:45 10 provides a recitation of the respective circuit's operation
10:15:50 11 in sufficient detail to suggest structure to persons of
10:15:54 12 ordinary skill in the art.

10:15:54 13 Your Honor, it's our position that dropping means
10:15:58 14 does so. Your Honor, integrated circuits are hardware.
10:16:02 15 They are complex machinery in actuality on a microscopic
10:16:08 16 scale. You know, when I first was getting familiar with
10:16:10 17 this technology, I often conflated the concepts of circuit
10:16:14 18 design with software. And it was when I, you know, got it
10:16:17 19 in my head that these are hardware structures, that it
10:16:21 20 really resonated for me that these are hardware structures.
10:16:25 21 These are -- these are machinery.

10:16:26 22 Circuits -- these integrated circuits in these
10:16:29 23 SoCs are microscopic, you know, assemblies of circuit
10:16:35 24 elements, such as gates and flip flops and multiplexers and
10:16:42 25 so forth. And how these chips work is electrons

10:16:43 1 representing data move through the chip, and their
10:16:45 2 direction through the chip is guided by these microscopic
10:16:49 3 elements.

10:16:49 4 So you think of it like a channel of water and
10:16:51 5 water flowing through it. These are -- these are physical
10:16:55 6 structures.

10:16:56 7 So, you know, in that context with chips being
10:16:58 8 something physical, a person of ordinary skill in the art,
10:17:01 9 when they set out to design a dropping means, they see
10:17:05 10 that, and they understand. I know what a dropping means
10:17:07 11 is. I know how to make that. I know what a dropping means
10:17:09 12 does. A dropping means drops data from the channel, from
10:17:15 13 the channel of water. The data that's dropped is literally
10:17:18 14 bits of electricity that are sent to ground. It is
10:17:22 15 physically -- this is a physical dropping of data.

10:17:26 16 So when a person of ordinary skill in the art sees
10:17:27 17 dropping means, they say, ah, I get it. This is a part of
10:17:31 18 the circuit. I need to design it to drop data, and it will
10:17:34 19 be subject to the policies and the rules that are -- that
10:17:37 20 are hard-built into that integrated circuit structure.

10:17:40 21 So in light of the Federal Circuit's disclosure
10:17:42 22 and that elaboration on what chips are, we believe that
10:17:47 23 it's sufficiently structural.

10:17:49 24 Turning to the Court's finding on the structure,
10:17:53 25 if the -- if the Court is inclined to, you know, stick with

1 its preliminary holding that it is subject to 112(6), we
2 think that the primary dispute for NST is the structure.

3 So the first part of the Court's structure
4 construction, it refers to portion of the circuit. Then it
5 says configured to implement. So -- and then it says
6 configured to implement the scheme disclosed in the '818
7 patent at three specification -- specification passages.

8 So, Your Honor, our -- our -- we agree with the
9 spirit of the construction where it's talking about a
10 circuit that's configured. Indeed, that's NST's -- the
11 first part of NST's proposed construction, which is a
12 circuit configured to drop the data. Our concern with the
13 second part of the Court's construction is it refers to the
14 specification passages that -- that refer to additional
15 functional language.

16 And so the Federal Circuit has held in Micro
17 Chem -- so I'm on Slide 18 of our presentation. So what
18 Micro Chem teaches us is that Paragraph 6 of Section 112
19 does not permit limitation of a means-plus-function claim
20 by adopting a function different from that explicitly
21 recited in the claim. The District Court erred in that
22 case by incorporating unrecited functional limitations into
23 the claim.

24 So as you see on the left side of Slide 18, our --
25 our qualm with Qualcomm's construction was they attempted

10:19:30 1 to do just that. They tried to read in a specific example
10:19:33 2 of a policy given in the specification as, you know, this
10:19:37 3 is a scenario that may include these types of policies.
10:19:40 4 And we said that's not appropriate. You can't import
10:19:43 5 additional functional limitations.

10:19:45 6 And so our concern with a construction that refers
10:19:48 7 to the specification is it's going to necessarily bring in
10:19:52 8 additional functional limitations, and we think
10:19:55 9 impermissibly.

10:19:56 10 Now, the specification language does have --

10:19:58 11 THE COURT: I'm sorry, could I ask you to slow
10:20:00 12 down just a little bit?

10:20:01 13 MR. STRINGFIELD: Thank you, Your Honor. I will.

10:20:02 14 THE COURT: Thank you.

10:20:03 15 MR. STRINGFIELD: So the specification passages
10:20:05 16 that the Court has pointed to do include, you know,
10:20:10 17 language of, you know, it's possible, it's including, it
10:20:14 18 can be. And so those aren't necessarily troubling because
10:20:20 19 those can be read as, you know, illustration of how the
10:20:24 20 chip that is configured to implement that scheme may
10:20:28 21 operate or could operate or is possible to operate.

10:20:32 22 But for other parts of the specification passages
10:20:35 23 that don't have that permissive, you know, language of
10:20:39 24 illustration that -- and may be read as a hard requirement,
10:20:44 25 our concern would be that if those specification passages

10:20:46 1 are read as functional limitations and then those are
10:20:51 2 incorporated by the Court's reference in its construction
10:20:54 3 to those specification passages, that that would be
10:20:57 4 improper importation of additional limitation -- additional
10:21:00 5 functional limitation that's not expressly recited in the
10:21:04 6 claim.

10:21:04 7 The function that's recited in the claim is
10:21:07 8 dropping. And so NST's original construction, which is a
10:21:12 9 circuit configured to drop data, we think remains the
10:21:16 10 appropriate construction.

10:21:18 11 Thank you, Your Honor.

10:21:18 12 THE COURT: Thank you.

10:21:21 13 MR. HASLAM: I think the problem with the argument
10:21:37 14 you just heard is it starts at the wrong place. The claim
10:21:46 15 language -- if we look at the claim language, contains the
10:21:50 16 term "dropping means for dropping data exchanged by
10:21:54 17 first" -- "said first and second modules."

10:21:58 18 Williamson is very clear. When the term -- when
10:22:02 19 the claim uses the term "means," there is a rebuttable
10:22:07 20 presumption that means-plus-function treatment applies.

10:22:11 21 Williamson also said -- and we have -- Apex versus
10:22:16 22 Raritan said it first, Williamson reinforced this, the test
10:22:21 23 for whether the presumption is rebutted is whether a person
10:22:25 24 of ordinary skill in the art looking at the claim language
10:22:30 25 would understand that the claim language indicates to a

10:22:36 1 person of ordinary skill in the art sufficient structure to
10:22:39 2 perform the functions.

10:22:40 3 Now, you heard during the argument -- you just
10:22:45 4 heard about circuit. Well, that a person of ordinary skill
10:22:48 5 in the art when they look at this knows what a circuit is,
10:22:52 6 and they know how it would operate, and, therefore, a
10:22:55 7 circuit is the relevant analysis here.

10:22:57 8 There is no testimony from a person of ordinary
10:23:02 9 skill in the art in this case that looking at that claim,
10:23:07 10 anywhere within that claim, that a person of ordinary skill
10:23:10 11 in the art would understand what structures perform the
10:23:14 12 dropping of data for the means for dropping.

10:23:18 13 And, in fact, there is testimony from our expert,
10:23:21 14 Dr. Thornton, that there is no well-understood set of
10:23:26 15 structures or structure for dropping data as -- as called
10:23:30 16 out in the claim for dropping means.

10:23:34 17 So the means for dropping should be interpreted as
10:23:38 18 a means-plus-function, which the Court's construction does,
10:23:41 19 and that is correct.

10:23:44 20 When we then go to what the structures are, as I
10:23:48 21 understand the Court's analysis, it effectively says and it
10:23:55 22 points to various places, which we pointed to in our brief,
10:23:58 23 that it's a buffer circuit, a buffer structure which drops
10:24:03 24 data when it overflows.

10:24:06 25 And when the Court -- when you look at the various

10:24:08 1 pieces of the Court's construction about how the circuit
10:24:14 2 implements the dropping, it incorporates, in our view --
10:24:18 3 and that's our understanding of it -- it incorporates that
10:24:20 4 it drops data when a buffer overflows, which is clearly
10:24:24 5 what the patent is talking about.

10:24:25 6 It's talking about when a -- when a -- when the
10:24:31 7 network interface on the master side sends a packet to the
10:24:36 8 slave side, when it gets there, the slave side buffer may
10:24:41 9 be full. And in that case, that packet -- a packet will
10:24:45 10 have to be dropped. It'll either be one that just got
10:24:50 11 there -- that's the wine policy, because wine ages, and you
10:24:55 12 want the older packet -- or it will drop the new one, which
10:24:59 13 is the milk policy -- it will drop the older one for the
10:25:04 14 milk policy, because milk you want fresh.

10:25:07 15 But I believe that that is our understanding of
10:25:09 16 the Court's construction, and it is -- it is perfectly
10:25:13 17 proper based on how one should interpret a
10:25:18 18 means-plus-function claim.

10:25:18 19 I don't think I need to go, but I'll just say in
10:25:21 20 passing, and our brief, I think, adequately addresses this,
10:25:29 21 their argument about circuit and that circuit -- that the
10:25:32 22 Court should say it's just a circuit for dropping is --
10:25:35 23 that analysis -- that entire analysis starts at the wrong
10:25:39 24 place, and that is it starts with the fact that the claim
10:25:41 25 says it's an integrated circuit comprising various

10:25:43 1 elements, and, therefore, every element that is part of the
10:25:46 2 comprising of an integrated circuit must itself be a
10:25:50 3 circuit. That has been rejected in the Egenera case.

10:25:53 4 If one actually looks at the Williamson case,
10:25:55 5 which found that a distributed learning module was subject
10:26:00 6 to 112(6), that was part of a comprising claim that was
10:26:04 7 part of a server.

10:26:06 8 The Court is clear, you do not go anywhere else in
10:26:10 9 the claim to determine whether it's means-plus-function.
10:26:12 10 You look at what the claim language says. Dropping means
10:26:16 11 for dropping data, it's 112(6), and the Court's analysis,
10:26:19 12 we believe, is correct.

10:26:21 13 THE COURT: Thank you.

10:26:22 14 MR. STRINGFIELD: Very briefly, Your Honor, in
10:26:27 15 rebuttal.

10:26:27 16 Texas Instruments test -- or asserted that there's
10:26:30 17 no testimony in this case from a person of ordinary skill
10:26:33 18 in the art about their understanding that a dropping means
10:26:36 19 is a circuit. So I just want to direct the Court and put
10:26:39 20 into the record -- if we go to Paragraph 105 of
10:26:44 21 Dr. Chmelar's declaration.

10:26:46 22 Dr. Chmelar is a person of ordinary skill in the
10:26:48 23 art, and in his declaration, about midway through the
10:26:52 24 paragraph, he testifies: Therefore, a dropping mean --
10:26:56 25 dropping means comprised in an integrated circuit must be a

10:26:59 1 circuit element of the integrated circuit. Additionally,
10:27:02 2 the dropping means must be a circuit because the interface
10:27:06 3 means is a circuit, paren, because it is also comprised in
10:27:10 4 the integrated circuit, close paren. And the interface
10:27:14 5 means comprises the dropping means.

10:27:17 6 So, Your Honor, with that clarification, we're
10:27:19 7 ready to move on to the next term.

10:27:21 8 THE COURT: All right.

10:27:26 9 MR. STRINGFIELD: Your Honor, for the next term
10:27:29 10 under construction, which is "network," NST agrees with the
10:27:33 11 Court's preliminary construction, and we'll just reserve
10:27:35 12 some time for rebuttal.

10:27:36 13 THE COURT: Thank you.

10:27:41 14 MS. MONDRY: Good morning, Your Honor.

10:28:12 15 THE COURT: Good morning.

10:28:13 16 MS. MONDRY: Turning next to the term, "network,"
10:28:17 17 TI's proposed construction is that the term should be
10:28:20 18 understood according to its plain and ordinary meaning.
10:28:22 19 And I do understand that the Court's preliminary
10:28:24 20 construction has identified a construction that pretty
10:28:28 21 closely tracks if not I think the exact same language as
10:28:32 22 NST's proposed construction, which is a multi-hop
10:28:36 23 interconnection between modules separated by one or more
10:28:40 24 network nodes.

10:28:40 25 Respectfully, TI disagrees with this construction

10:28:44 1 for a couple of different reasons, but primarily being that
10:28:48 2 it contradicts the teachings of the asserted patents which
10:28:50 3 do not require the limitation of a multi-hop or a
10:28:56 4 connection separated by one or more network nodes. And
10:29:01 5 it's improper to take those limitations and try to import
10:29:03 6 them into the construction of the term.

10:29:05 7 So turning first to just what NST's burden here
10:29:12 8 is, it's important to remember that to disavow claim scope,
10:29:16 9 the specification must contain expressions of manifest
10:29:19 10 exclusion or restriction representing a clear disavowal of
10:29:23 11 claim scope.

10:29:24 12 But that isn't what NST has done here. They have
10:29:26 13 pointed to one primary part of the specification in the
10:29:32 14 asserted patents, one single sentence, which they say
10:29:34 15 should be taken to set aside a plain and ordinary meaning,
10:29:38 16 but it does not rise to the level of manifest exclusion or
10:29:41 17 restriction. It is simply a single sentence taken from the
10:29:45 18 specification to try to contradict that plain and ordinary
10:29:50 19 meaning.

10:29:50 20 And there are other things to look at in the
10:29:53 21 asserted patents that explicitly disagree with this
10:29:56 22 restriction.

10:29:56 23 For example, if you take a look at the '052
10:29:58 24 patent, which I have up here on Slide 25, it expressly says
10:30:03 25 that the network on chip may include wires, bus,

10:30:09 1 time-division multiplexing, switches, and/or routers within
10:30:14 2 a network.

10:30:14 3 The important thing to note here is that it does
10:30:15 4 not require a multi-hop. It includes technology, such as
10:30:17 5 wires which are point-to-point connections. So while a
10:30:20 6 network can include a multi-hop, it is improper to require
10:30:23 7 it to include a multi-hop.

10:30:26 8 And this is something that we similarly see in
10:30:29 9 other places in the patent where the inventors show that
10:30:32 10 they understand the difference and specify when they mean a
10:30:37 11 multi-hop and when they don't.

10:30:38 12 You can see this again, for example, in the '818
10:30:40 13 patent where you can see the difference between two
10:30:43 14 particular embodiments as shown in Figure 1 and Figure 2
10:30:46 15 here.

10:30:46 16 THE COURT: Well, let me -- let me ask you. Is it
10:30:49 17 your position that network should be construed the same for
10:30:55 18 all four patents?

10:30:57 19 MS. MONDRY: It is, Your Honor.

10:30:57 20 THE COURT: Okay.

10:30:58 21 MS. MONDRY: You can see, for example, in some of
10:31:00 22 the patents where it makes it clear that a network should
10:31:03 23 be a multi-hop in a particular embodiment. You can see in
10:31:06 24 Figure 2 here where RN here in the middle refers to router
10:31:11 25 network. That's in comparison to a first embodiment which

10:31:14 1 is described in Figure 1 of the '818 patent, which is
10:31:17 2 simply a network. And that tracks the language of the
10:31:19 3 claims, which specify a network, parens, N, RN. The idea
10:31:28 4 is that network is intended to be a broad term understood
10:31:28 5 by its plain and ordinary meaning to be either direct or
10:31:31 6 indirect connections, not requiring a multi-hop.

10:31:36 7 And here you can see the corresponding language of
10:31:38 8 another patent, the '2893, specifically Claim 1, where it
10:31:42 9 specifies the plurality of network stations comprising a
10:31:45 10 plurality of data routers.

10:31:48 11 So, again, when the inventors intended that a
10:31:50 12 multi-hop be considered, they specified that. The term
10:31:54 13 "network" more broadly, as it's used in the patents, was
10:31:57 14 not intended to provide that restriction.

10:32:00 15 And you can see that, as well, with definitions
10:32:03 16 that NST's own expert points to in -- in his testimony.
10:32:09 17 For example, you can see the top definition here which says
10:32:13 18 that a network is any set of devices or subsystems
10:32:16 19 connected by links joining, directly or indirectly, a set
10:32:19 20 of terminal nodes.

10:32:21 21 The point here being that there are other
10:32:23 22 contemporary definitions that NST's own expert points to
10:32:28 23 that explain the connection be -- can be direct or
10:32:30 24 indirect. Again, it is -- it is not TI's proposition that
10:32:33 25 a network cannot be understood as a multi-hop connection,

10:32:36 1 simply that it should not only be understood as a multi-hop
10:32:41 2 connection.

10:32:41 3 So, again, turning back to the burden here, the
10:32:43 4 important thing to remember is that there is a heavy
10:32:47 5 presumption that the language in the claim carries its
10:32:49 6 ordinary and customary meaning.

10:32:51 7 The impropriety here is trying to take what NST
10:32:56 8 points to as a single sentence, which I'll get to in just a
10:32:56 9 second, and use that as the means to say that we should set
10:32:59 10 that plain and ordinary meaning aside. Although the
10:33:01 11 specification often describes very specific embodiments of
10:33:04 12 the invention, Courts have repeatedly warned against
10:33:07 13 combining the claims to those embodiments. And, again, the
10:33:11 14 mere fact that a patent discloses certain embodiments does
10:33:14 15 not in and of itself mean the claims at issue are limited
10:33:17 16 to the disclosed embodiments.

10:33:17 17 So the one sentence that NST does point to is this
10:33:20 18 which appears in the asserted patents. Introducing
10:33:23 19 networks on chips --

10:33:23 20 THE COURT: Could I ask you to slow down a little
10:33:25 21 bit?

10:33:26 22 MS. MONDRY: Of course.

10:33:27 23 Introducing networks as on-chip interconnects
10:33:30 24 radically changes the communication when compared to direct
10:33:33 25 interconnects, such as buses or switches. This is because

10:33:36 1 of the multi-hop nature of a network, where communication
10:33:39 2 modules are not directly connected, but separated by one or
10:33:43 3 more network nodes.

10:33:43 4 The point here is that -- again, TI is not
10:33:48 5 disagreeing that NOCs can include multi-hop, just that they
10:33:54 6 don't necessarily require multi-hop. Again, if we look
10:33:56 7 back at the example in the '052 patent, it explains that
10:33:59 8 those technologies certainly are and can be included in
10:34:03 9 network on chip or NoC, but they're not the only types of
10:34:07 10 networks that can be included in NoC. They may also
10:34:09 11 include wires, bus, time-division multiplexing, switches
10:34:15 12 and/or routers. They also explicitly --

10:34:15 13 THE COURT: Could I ask you to slow down? I'm
10:34:17 14 sorry.

10:34:18 15 MS. MONDRY: Yes, I apologize.

10:34:20 16 THE COURT: I'm having trouble following you.
10:34:22 17 You're just speaking too quickly.

10:34:25 18 MS. MONDRY: I will -- I will try to speak slower.

10:34:28 19 The point -- the main point here is that
10:34:30 20 while net -- while a network may include a multi-hop, it
10:34:33 21 does not require a multi-hop. The sentence that NST points
10:34:36 22 to for this -- for this proposition does not exclude other
10:34:43 23 types of networks. It simply says that at the time of this
10:34:46 24 invention, routers or other multi-hop connections were
10:34:50 25 something that could be and maybe should be included in a

10:34:54 1 network but not to the exclusion of other known
10:34:57 2 technologies, which the patents explicitly reference and --
10:35:02 3 and incorporate in many different ways.

10:35:04 4 And with that, I think I'll reserve the rest of
10:35:07 5 our time for any rebuttal.

10:35:09 6 THE COURT: All right. Thank you.

10:35:19 7 Mr. Stringfield, what's the Plaintiff's position
10:35:21 8 about network? Should it be construed the same way for all
10:35:26 9 four patents?

10:35:27 10 MR. STRINGFIELD: Yes, Your Honor, for all six
10:35:29 11 patents-in-suit, the term --

10:35:30 12 THE COURT: I'm sorry, all six. Well, it's
10:35:33 13 actually -- is it six?

10:35:34 14 MR. STRINGFIELD: Your Honor, let me correct
10:35:36 15 myself. Five of the six patents --

10:35:37 16 THE COURT: Five.

10:35:38 17 MR. STRINGFIELD: -- use the phrase "network."

10:35:38 18 THE COURT: Got it.

10:35:40 19 MR. STRINGFIELD: The sixth patent uses
10:35:42 20 "interconnect means." And it's our position that those
10:35:45 21 should be construed synonymously. We have ample argument
10:35:49 22 about that, but the Court's preliminary constructions
10:35:51 23 appears to agree with NST that the spirit of network and
10:35:55 24 the Court's construction should cut across all six of the
10:35:58 25 patents.

10:35:59 1 Your Honor, just a couple of very brief points in
10:36:09 2 rebuttal on network.

10:36:10 3 Slide 22 of NST's presentation, there is ample
10:36:13 4 disclosure in the specification about how the network on
10:36:17 5 chip that is the subject of all six of the patents is an
10:36:21 6 indirect connection. It's a multi-hop connection. And
10:36:24 7 we've highlighted a couple of exemplary passages from the
10:36:28 8 '818 patent, but there are similar disclosures in all six
10:36:31 9 of the patents that talk about the multi-hop nature of the
10:36:35 10 network and how it's an indirect connection.

10:36:37 11 Your Honor, on Slide 23, we've reproduced Figure 1
10:36:43 12 of the '2893, which is a visual representation of the
10:36:47 13 multi-hop concept. As data would move from interface 105
10:36:52 14 on the upper left side of the slide -- or of the upper left
10:36:56 15 side of the figure, it would have to take a hop through
10:36:59 16 router 110, then it may take a hop to router 130, and
10:37:05 17 may -- it may take a hop to router 140, then it may take a
10:37:09 18 hop to router 120, and then reach interface 106, or it
10:37:13 19 could do other paths. But the point is, is that there
10:37:15 20 are multiple hops that are involved in -- in a network --
10:37:19 21 in network on chip that's disclosed in the asserted
10:37:21 22 patents.

10:37:21 23 Your Honor, briefly, Slide 24, the patents talk
10:37:28 24 about disadvantages of prior interconnect technologies such
10:37:33 25 as a shared bus. It wasn't clear from TI's argument

10:37:36 1 whether their qualm with the Court's construction is the
10:37:41 2 multi-hop part only, and if they would be okay with a
10:37:45 3 construction that was just network, or if they want to
10:37:48 4 include shared buses. It's unclear.

10:37:52 5 But just to be clear from NST's side, a shared bus
10:37:56 6 is -- is disparaged in the asserted patents. They talk
10:38:00 7 about -- on the left side of Slide 24, which is an excerpt
10:38:03 8 from the '818 patent, it talks about how buses were no
10:38:08 9 longer practical. As chips became increasingly complex
10:38:13 10 with denser circuitry, the buses had formed too high a bus
10:38:19 11 load. Buses form a communication bottleneck. And then at
10:38:24 12 the bottom of that excerpt it says that networks, network
10:38:29 13 on chips form an effective way to overcome these
10:38:32 14 disadvantages of buses.

10:38:34 15 So skipping ahead to Slide 27, which has the same
10:38:41 16 passage from the '818 patent on the left side, on the right
10:38:43 17 side, we have some Federal Circuit case law that says when
10:38:47 18 a specification disparages the prior art, it is improper to
10:38:52 19 read the claims as covering that disparaged prior art.

10:38:56 20 So that was in the Openwave versus Apple case,
10:39:00 21 808 F.3d 509, and in the SciMed v. ACS case, 242 F.3d
10:39:08 22 137 -- 1337. It says: The discussion in the written
10:39:10 23 description supports the District Court's conclusion that
10:39:13 24 the claims should not be read so broadly as to encompass
10:39:17 25 the distinguished prior art structure.

10:39:21 1 With that, unless there's any questions, Your
10:39:23 2 Honor.

10:39:23 3 THE COURT: No, thanks.

10:39:29 4 Ms. Mondry?

10:39:36 5 MS. MONDRY: Just a couple of points.

10:39:39 6 THE COURT: Ms. Fair, would you put your phone up,
10:39:42 7 please?

10:39:43 8 MS. FAIR: I was keeping time. I apologize.

10:39:48 9 THE COURT: Oh, okay. Mrs. Schroeder will keep
10:39:49 10 time.

10:39:50 11 MS. FAIR: Okay.

10:39:50 12 MS. MONDRY: Just a couple of quick points on what
10:39:53 13 NST just presented, the first of which is that NST pointed
10:39:57 14 to a couple of excerpts from the '2893 patent claiming that
10:40:03 15 they show that a network must be multi-hop. But I think
10:40:07 16 that this is exactly the point that when the patentees --
10:40:10 17 or the inventors intended to show a multi-hop, they knew
10:40:13 18 how to, and they did.

10:40:14 19 This, again, is the language of the '2893 patent,
10:40:19 20 Claim 1, which corresponds to the figure that NST just
10:40:22 21 showed you, which explicitly has in the claims plurality of
10:40:25 22 network stations comprising a plurality of data routers.
10:40:30 23 When the patentees wanted to have this kind of restriction,
10:40:34 24 they knew how to do that. But the term "network," as it is
10:40:38 25 generally used throughout the claims, is not tracking the

10:40:41 1 same language.

10:40:42 2 So, again, it shouldn't be read in the exact same
10:40:45 3 way. And you can see this again, as I pointed to earlier,
10:40:50 4 with other patents that show distinctions between a router
10:40:53 5 network, such as Figure 2 from the '818 patent, which
10:40:56 6 corresponds to a certain embodiment, and Figure 1, which
10:40:59 7 says more generally a network.

10:41:01 8 So, again, the point here is that the very high
10:41:05 9 burden that NST has to meet here is an expression of
10:41:09 10 manifest exclusion or restriction. And the only intrinsic
10:41:12 11 evidence that NST points to is that a network can include a
10:41:15 12 multi-hop and focuses on the inclusion of these multi-hops
10:41:19 13 because they were newer at the time of the invention.

10:41:21 14 But it's not to the exclusion of other types of
10:41:24 15 networks. And, again, we see this very clearly in the
10:41:27 16 patents where it expressly says -- such as the '052 patent,
10:41:30 17 Slide 25 here -- network on chip may include wires, bus,
10:41:35 18 time-division multiplexing, switches, and/or routers, which
10:41:38 19 includes direct -- direct -- direct point-to-point
10:41:40 20 connections.

10:41:41 21 So, again, the main point here is that we are not
10:41:45 22 denying that multi-point -- or multi-hop connections are
10:41:50 23 included in the concept of a network, but not -- but just
10:41:53 24 that it's not to the exclusion of other types of networks
10:41:56 25 that are explicitly included in that definition as the

10:41:59 1 inventors themselves described in the patent.

10:42:05 2 THE COURT: Could I ask a question, Ms. Mondry?
10:42:11 3 Why should the Court consider the use of the term "network"
10:42:14 4 in the '052 patent for the construction of network for
10:42:17 5 these five patents when the term that needs construction
10:42:21 6 for the '052 patent is "interconnect means" rather than
10:42:25 7 "network"?

10:42:26 8 MS. MONDRY: Good question, Your Honor.

10:42:27 9 The same language -- and I can find the exact
10:42:30 10 point-to-point place that it appears -- is in the other
10:42:34 11 patents, as well, that are included in the couple that you
10:42:37 12 just listed. And we can find that exact point for you, if
10:42:41 13 helpful.

10:42:41 14 THE COURT: All right. Thank you.

10:42:49 15 MR. STRINGFIELD: Your Honor, nothing further on
10:42:50 16 "network" for NST.

10:42:51 17 The next term for construction is "interconnect
10:42:54 18 means." Again, we agree with the Court's preliminary
10:42:57 19 construction, and we'll reserve our time for rebuttal.

10:42:59 20 However, I'll note that the Court -- or the
10:43:01 21 question that the Court just asked is -- is sort of key to
10:43:04 22 our position that interface means and network should be
10:43:07 23 construed synonymously insofar as it's the same intrinsic
10:43:15 24 disclosure in the '052 patent as TI has highlighted in its
10:43:19 25 discussion of network. It, you know, confirms that

10:43:21 1 interconnect means should be construed the same.

10:43:24 2 So I'll reserve the rest of our time for rebuttal.

10:43:29 3 THE COURT: Thank you.

10:43:30 4 Okay. Do you have anything else you want to add

10:43:32 5 at this point?

10:43:33 6 MS. MONDRY: For network, Your Honor?

10:43:34 7 THE COURT: Yes.

10:43:36 8 MS. MONDRY: No.

10:43:37 9 THE COURT: Okay. Next term.

10:43:38 10 MR. STRINGFIELD: I'm sorry, Your Honor, that was

10:43:40 11 my discussion of "interconnect means."

10:43:42 12 THE COURT: Oh, okay. Interconnect --

10:43:44 13 MR. STRINGFIELD: I'm happy to repeat myself, but

10:43:47 14 I don't think that's a good use of time.

10:43:47 15 Thank you, Your Honor.

10:43:47 16 THE COURT: All right. Interconnect means; is

10:43:53 17 that yours, too?

10:43:53 18 MS. MONDRY: Essentially.

10:43:53 19 As NST has pointed out, the same construction has

10:43:55 20 been provided for both terms, and the same language has

10:43:58 21 been pointed to by NST and TI for both terms.

10:44:01 22 THE COURT: Fair.

10:44:04 23 MS. MONDRY: It should be the same arguments.

10:44:06 24 They rise and fall together.

10:44:07 25 THE COURT: Okay. Next?

10:44:08 1 MR. STRINGFIELD: Thank you, Your Honor. The next
10:44:31 2 term for construction is "interface means."

10:44:34 3 Your Honor, NST's argument for interface means is
10:44:38 4 largely the same as our argument for dropping means. Both
10:44:43 5 of the terms are in the '818 patent. It's, again, NST's
10:44:46 6 position that interface means should not be construed under
10:44:53 7 112(6). We believe that interface means is sufficiently
10:44:57 8 structural for the same reasons that we advocated for
10:44:58 9 dropping means.

10:44:58 10 And if the Court agrees that Paragraph 112 -- or,
10:45:02 11 excuse me, Paragraph 6 of Section 112 does not apply, then
10:45:05 12 NST's construction, which is interface circuit that
10:45:09 13 connects a module to a network, should be the construction
10:45:12 14 adopted.

10:45:13 15 TI has proposed no fallback construction for
10:45:16 16 either dropping means or interface means in the event that
10:45:20 17 the Court concludes that 112(6) does not apply to either of
10:45:24 18 those terms.

10:45:25 19 However, if the Court is inclined to construe
10:45:31 20 interface means as subject to 112(6), our issue with the
10:45:36 21 Court's construction would be similar to our issue with the
10:45:40 22 construction of dropping means, which as explained earlier,
10:45:42 23 the first portion of the Court's construction for the
10:45:46 24 structure, which is a portion of the circuit configured to
10:45:49 25 implement -- again, we believe that is a structural

10:45:55 1 description, but it would be the same issue of improperly
10:45:58 2 importing additional functional limitations into the claims
10:46:04 3 unduly as -- as the Federal Circuit has taught in the -- in
10:46:07 4 the case that we cited previously.

10:46:08 5 And so, Your Honor, another point that I think is
10:46:18 6 worth making, it was a point that also could be made for
10:46:21 7 dropping means, and I apologize for not including it during
10:46:24 8 that discussion, but it's the same argument, and it's this.

10:46:28 9 So if we go to Slide 47 of NST's presentation.

10:46:32 10 So in the '818 patent, it defines interface means,
10:46:41 11 ANIP, PNIP. So ANIP is active network interface. PNIP is
10:46:49 12 passive network interface. If you look at the passage on
10:46:53 13 the left and compare that to the passage on the right, the
10:46:57 14 specification defines interface means synonymously with
10:46:59 15 network interface. It uses the same acronym for them, and
10:47:02 16 it uses the same discussion of them in context.

10:47:05 17 And if you -- if you look at these passages, it's
10:47:07 18 the same for dropping means and dropping manager. So on
10:47:13 19 the left of the '818 patent -- and this is at Column 5,
10:47:16 20 Lines 37 through 44 -- it talks about how the interface
10:47:20 21 means ANIP, PNIP comprises a first dropping means DM for
10:47:29 22 dropping data.

10:47:29 23 Then on the right at Column 7, Lines 46 through 51
10:47:35 24 of the '818, it talks about how the dropping manager DM is
10:47:41 25 responsible for dropping data. And that is inside the

10:47:44 1 network interface.

10:47:45 2 So the Federal Circuit teaches us in, for example,
10:47:47 3 Edwards Lifesciences v. Cook, 582 F.3d 1322, that the
10:47:54 4 interchangeable use of two terms is akin to a definition
10:47:57 5 equating the two.

10:47:58 6 So in the specification, the -- the patent has
10:48:02 7 defined interface means as a network interface, and it's
10:48:06 8 defined a dropping means as a dropping manager.

10:48:10 9 So if we go to the next slide, Slide 48.

10:48:14 10 So TI in its construction of dropping means for
10:48:19 11 the structure for Claims 3 and 5 -- so the bottom left side
10:48:24 12 of Slide 48 -- TI's proposed structure is structure for
10:48:28 13 Claim 1 with additional structure disclosed in the '818
10:48:34 14 patent at Column 9, Lines 2 through 10.

10:48:37 15 So on the right side of our slide, we have
10:48:40 16 highlighted that passage. It's the same passage that was
10:48:42 17 on the prior slide.

10:48:44 18 TI's structure for its 112(6) definition of Claims
10:48:49 19 3 and 5 includes as its only structural elements in this
10:48:55 20 passage a dropping manager DM and passive network interface
10:49:03 21 port PNIP and the active network interface port ANIP. We
10:49:07 22 read this as a concession by TI that these elements are
10:49:11 23 indeed structural.

10:49:12 24 And because the specification has defined the
10:49:14 25 dropping manager the same as dropping means and it's

10:49:21 1 defined network interface the same as the interface means,
10:49:23 2 we believe that concession extends to the means claims,
10:49:27 3 and, therefore, TI has conceded that those claim elements
10:49:30 4 are sufficiently structural.

10:49:32 5 And, indeed, at least for network interface,
10:49:35 6 network interface is used in many other places in the
10:49:38 7 claims that are asserted against TI. And TI has not
10:49:42 8 asserted that network interface is subject to 112(6).

10:49:47 9 So we read that as further support that TI does
10:49:50 10 not believe that a network interface is not structural and
10:49:54 11 requires 112(6) construction.

10:49:56 12 And nothing further on that term, Your Honor.

10:50:00 13 THE COURT: All right.

10:50:19 14 MR. HASLAM: I think it was long ago that the
10:50:21 15 Federal Circuit said the name of the game is the claim. We
10:50:24 16 read the claims in light of the specification, but it's the
10:50:28 17 claim.

10:50:29 18 And if we look at the claim -- and I'm going to
10:50:31 19 focus on interface means, and I'll get to the dropping
10:50:34 20 means in a minute -- the interface means is written in
10:50:43 21 means-plus-function language. It invokes
10:50:49 22 means-plus-function.

10:50:50 23 Same argument I made before. The test for whether
10:50:53 24 or not you rebut the presumption that it's subject to
10:50:56 25 112(6) is whether or not the term "interface means" or

10:51:03 1 "means for interfacing," with the relevant functions that
10:51:06 2 are described in the claim, is their structure or a set of
10:51:12 3 defined structures for performing those functions that is
10:51:16 4 known to a person of ordinary skill in the art.

10:51:18 5 And, again, the only testimony on that comes from
10:51:21 6 TI, and it's the dropping manager, dropping means,
10:51:26 7 interface means, with the functions described in the '818
10:51:33 8 patent, Claim 1, does not describe to a person of ordinary
10:51:38 9 skill in the art a reasonably defined set of structures for
10:51:41 10 performing those functions.

10:51:42 11 And I assume that my esteemed colleague will get
10:51:48 12 up and argue and point to something in their expert's
10:51:51 13 declaration, but I just want to point out, both with
10:51:54 14 respect to dropping means and interface means, the
10:51:56 15 testimony of their expert is not that a person of ordinary
10:52:01 16 skill in the art would understand, looking at the claim
10:52:06 17 language interface means for managing the interface, that
10:52:08 18 that connotes or brings to mind a sufficiently definite set
10:52:13 19 of structures for performing those functions.

10:52:15 20 His entire analysis, both on dropping means and
10:52:18 21 interface means, proceeds from this paradigm. Because the
10:52:23 22 claim is to an integrated circuit and the integrated
10:52:28 23 circuit comprises an interface means and it comprises a
10:52:33 24 dropping means, ergo they must be circuits, and that's
10:52:37 25 his -- how he proceeds to come up with the definition of,

10:52:42 1 quote, circuit for doing all these things.

10:52:44 2 He does not say that when you look at an interface
10:52:47 3 means for managing the interface between a module and the
10:52:50 4 network, wherein said interface means comprises a first
10:52:55 5 dropping means for dropping data and wherein the dropping
10:52:58 6 of data and, therefore, the transaction completion can be
10:53:01 7 controlled by the interface means, he does not opine that
10:53:05 8 looking at that claim language I know what structures come
10:53:13 9 to mind to perform those functions. And that should be the
10:53:18 10 end the inquiry.

10:53:19 11 Now, on the use of -- on the argument about the
10:53:21 12 interchangeable use of network interface and interface
10:53:25 13 means, I'd point to the WSOU case that was cited in our
10:53:31 14 reply brief where the Federal Circuit said that a patent
10:53:34 15 that used means and unit, I believe it was, interchangeably
10:53:39 16 supports the contrary observation, which is they -- neither
10:53:42 17 one connotes structure.

10:53:43 18 So I think you can find cases that will say on
10:53:46 19 both sides, but the most recent pronouncement from the
10:53:50 20 Federal Circuit is -- would take the argument that you
10:53:52 21 heard from my colleague and say that the fact that it uses
10:53:56 22 means and network interface and interface means means that
10:54:01 23 there are no structure for either of them, not that one
10:54:05 24 connotes structure for the claim. And, therefore, I think
10:54:07 25 the Court has both with dropping means and interface means

10:54:12 1 in the '818 patent -- I think its constructions are the
10:54:15 2 right constructions, and we accept them.

10:54:23 3 MR. STRINGFIELD: Your Honor, nothing further on
10:54:25 4 interface means. We're ready to proceed to the next term.

10:54:28 5 THE COURT: Okay.

10:54:28 6 MR. STRINGFIELD: Your Honor, the next term for
10:54:37 7 construction is "optimal amount of data to be buffered"
10:54:40 8 from the '800 patent. The Court's preliminary construction
10:54:43 9 is that this is indefinite, and we respectfully disagree.

10:54:45 10 So, Your Honor, I'll go ahead to Slide 53 of NST's
10:54:54 11 presentation. So I think the -- the thrust of the
10:55:00 12 assertion that optimal amount of data is indefinite is that
10:55:04 13 it's not a -- an absolute target. It's not an absolute
10:55:11 14 value, and -- and we think it is. We think that from the
10:55:14 15 specification disclosure, it is clear to a person of
10:55:16 16 ordinary skill in the art that there is an optimal amount
10:55:19 17 of data and there is, when we get to that term, an optimal
10:55:24 18 time for sending that data. And the specification
10:55:26 19 illustrates what that means. It's sufficient detail for a
10:55:30 20 person of ordinary skill in the art.

10:55:31 21 So on Slide 53, we summarize the various places in
10:55:37 22 the specification of the '800 where they talk about the
10:55:40 23 goal of the optimization, which is, you know, optimizing
10:55:44 24 the interconnect utilization. When you design these
10:55:49 25 interconnects, just like you design a highway, you can't

10:55:54 1 design, you know, a 50-lane highway unless you have the
10:55:56 2 traffic to support it. You have to design a highway that
10:56:00 3 is sufficiently wide for what you anticipate the traffic
10:56:02 4 will be, and then you try to optimize the utilization of
10:56:05 5 that highway the best you can.

10:56:07 6 And so, too, is the same for network on chips.
10:56:10 7 You can't design a super wide highway that could
10:56:15 8 accommodate as much traffic as you want. You have to
10:56:18 9 design traffic that would fit within those parameters and
10:56:22 10 then do your best to optimize it.

10:56:23 11 So that's what the specification of the '800
10:56:26 12 patent teaches on Slide 53. That's the overarching goal.

10:56:29 13 And so going to -- I'm sorry, still on Slide 53.

10:56:40 14 So for the optimal amount of data, the
10:56:44 15 specification teaches how you determine what that optimal
10:56:47 16 amount of data is.

10:56:48 17 So starting on the right side of the slide, the
10:56:51 18 top part, at Column 6, Lines 47 through 53, is the passage
10:56:57 19 that we've excerpted. The optimal amount of data is
10:57:03 20 determined based on the current communication or connection
10:57:06 21 properties. So communication or connection properties are
10:57:10 22 constraints that are put on the optimization decision by
10:57:15 23 the patent. And so these are what are used to determine
10:57:19 24 what are the optimal amount of data to be sent.

10:57:24 25 And so in the bottom right side of Slide 53, we

10:57:27 1 have the excerpt from the '800 patent at Column 5, Lines 27
10:57:32 2 through 35. It explains what those connection properties
10:57:36 3 are. They're ordering flow control, throughput, latency,
10:57:42 4 lossiness, transmission termination, transaction
10:57:45 5 completion, data correctness, priority, or data delivery.

10:57:51 6 So those are examples of what the connection
10:57:53 7 properties are. Again, it says connection properties may
10:57:57 8 include, so not an exclusive list.

10:58:00 9 But an example of how the optimal amount of data
10:58:02 10 might be determined is if, for example, there is a
10:58:06 11 guarantee of latency -- a maximum latency guarantee. So
10:58:12 12 latency is delay.

10:58:13 13 So if there are chip traffic that has to be sent
10:58:18 14 fast, there would be a guarantee on that traffic that
10:58:20 15 there's a maximum latency.

10:58:22 16 So let's say there's a latency guarantee of 5
10:58:26 17 milliseconds. So that's the time frame within which the
10:58:29 18 chip is operating. So the optimal amount of data under
10:58:33 19 that constraint of a latency guarantee of less than
10:58:37 20 5 milliseconds may be I buffer as much data as I can within
10:58:42 21 that 5 milliseconds, and then I send that. That's the
10:58:45 22 optimal amount of data. That's the most data that I can
10:58:48 23 buffer within the time constraint put on by the latency
10:58:51 24 guarantee.

10:58:51 25 And so a person of ordinary skill in the art would

10:58:54 1 understand that when you're looking at optimal, you're
10:58:57 2 trying to maximize efficiency, you're trying to maximize
10:59:01 3 utilization. Just like any other area where you would
10:59:04 4 focus on efficiency and utilization, you try to do the best
10:59:08 5 you can under the constraints that are provided.

10:59:10 6 And so it's our belief that the optimal amount of
10:59:12 7 data is concrete. It's not subjective. The cases that TI
10:59:15 8 points to say that it's -- it's indefinite if the -- the
10:59:21 9 term is based on human subjective decisions. This is not a
10:59:25 10 human decision. This is a machine decision.

10:59:28 11 Remember, integrated circuits are complex
10:59:31 12 machinery that are not executing software instructions.
10:59:35 13 They're -- they're hard-baked with how they -- they deal
10:59:38 14 with the data. They're not making decisions based on
10:59:41 15 human -- human decisions.

10:59:43 16 So when the chip, as it's designed, has these
10:59:47 17 parameters -- for example, this type of traffic has a
10:59:50 18 maximum latency guarantee -- the machine knows what it's
10:59:54 19 got to do. The machine will execute in conformance with
10:59:58 20 that policy with that instruction to optimize the amount of
11:00:01 21 data. The machine will buffer as much as it can while
11:00:05 22 still meeting that latency guarantee. That's the optimal
11:00:07 23 amount of data.

11:00:08 24 On Slide 54, we have a recent decision from the
11:00:13 25 Western District of Texas, Bitmicro versus Kioxia America,

11:00:20 1 Inc. That's Case No. 6:22-CV-00331, Docket 54, on February
11:00:27 2 16th, 2023. And what we cited here is on Page 30 of that
11:00:32 3 decision.

11:00:34 4 So in that decision, the Court interpreted the
11:00:38 5 construction of optimized memory operations, and there the
11:00:41 6 Court found that that term is not indefinite and should be
11:00:44 7 accorded its plain and ordinary meaning because, as the
11:00:47 8 Court found, the specification discloses optimizations.
11:00:51 9 It's not a human decision. It's optimizations that are not
11:00:55 10 subjective. They are objective. They are -- they're
11:00:58 11 concrete, and they can be determined.

11:01:00 12 So optimal amount of data is not indefinite.

11:01:05 13 Unless the Court has any questions.

11:01:10 14 THE COURT: I don't.

11:01:11 15 MR. STRINGFIELD: Okay. Thank you, Your Honor.

11:01:17 16 THE COURT: Mr. Sudarshan, I do think this issue
11:01:19 17 is close, so I want you to present your argument on it.

11:01:22 18 MR. SUDARSHAN: Thank you, Your Honor.

11:01:23 19 The first point I would make is that there is no
11:01:26 20 support in the case law for the standard that my colleague
11:01:31 21 here argued for. My colleague argued that in a term like
11:01:36 22 this, for it to be indefinite, there has to be some human
11:01:39 23 subjectivity to it. That's not what the case law suggests,
11:01:43 24 and I would respectfully submit that's not the right
11:01:45 25 standard.

11:01:45 1 The standard is whether under the Nautilus
11:01:49 2 decision, do the claims have reasonable certainty such
11:01:53 3 that, for example, TI could look at the claims and make an
11:01:57 4 assessment of whether there is infringement, whether one of
11:02:00 5 ordinary skill in the art could make an assessment. Here
11:02:02 6 the problem is you've got a subjective term like "optimal,"
11:02:08 7 and the question is how do you determine what's the optimal
11:02:12 8 amount of data?

11:02:14 9 And what I'd like to explain here is the closest
11:02:18 10 the patent gets is to a laundry list of 10 different
11:02:23 11 criteria, but it doesn't tell you how you balance those
11:02:27 12 criteria or how you even assess those criteria to
11:02:31 13 understand optimal.

11:02:33 14 And I'll get to this, Your Honor, but we do think
11:02:36 15 there's some very close and helpful case law to our
11:02:39 16 position that should give the Court comfort that
11:02:42 17 indefiniteness is the right decision here.

11:02:44 18 So start here by the intrinsic support. We noted
11:02:51 19 this in our brief, Your Honor. Basically, the patent says
11:02:54 20 that an optimal amount of data is a sufficiently large
11:02:58 21 amount. That really illustrates the problem. What is a
11:03:02 22 sufficiently large amount?

11:03:04 23 So if you think about any -- anything that you're
11:03:08 24 trying to measure, and let's say there's a claim saying,
11:03:12 25 well, we claim an optimal amount of that something, there

11:03:16 1 needs to be a disclosure to one of ordinary skill in the
11:03:19 2 art, how do you measure that? And here the patent just
11:03:23 3 tells us, well, it's good enough. As long as it's good
11:03:27 4 enough, sufficiently large amount, that's good enough. But
11:03:32 5 there's no -- there's no clear explanation of what optimal
11:03:34 6 means.

11:03:34 7 The other thing that I really want to highlight,
11:03:37 8 Your Honor, that is not highlighted as much in the brief
11:03:38 9 but that our expert talked about is my -- my colleague here
11:03:44 10 talked about the connection properties or the communication
11:03:47 11 properties. Those properties, if you look at the
11:03:52 12 specification, and we've got here on our Slide 51, those
11:03:55 13 properties are considered, according to the specification,
11:03:59 14 to determine the -- what's called optimal burst length.
11:04:04 15 But that's a different -- that's a different thing than
11:04:07 16 optimal amount of data.

11:04:09 17 They don't explain how it is that a determination
11:04:14 18 of optimal burst length, depending on communication
11:04:17 19 properties, tells you what the optimal amount of data is.

11:04:22 20 So let's take a step back. Even if you take their
11:04:25 21 argument, Judge, that they're saying, look, we've got these
11:04:28 22 communication properties, there's a laundry list,
11:04:31 23 there's -- he talked about latency, my point here is even
11:04:34 24 if you take that, the specification tells you, you use
11:04:38 25 those properties to determine an optimal burst length, not

11:04:42 1 the optimal amount of data, which is what's claimed.

11:04:44 2 And why is that important? The claims tell us
11:04:50 3 that those are different concepts.

11:04:52 4 So Claim 14 is talking about determination of
11:04:58 5 burst lengths, whereas Claim 1 is directed to the optimal
11:05:03 6 amount of data to be buffered. And as our expert said,
11:05:07 7 it's not clear, there's no indication what the relationship
11:05:10 8 is between optimal burst length and optimal amount of data.
11:05:16 9 So that's -- that's my Argument A, Judge.

11:05:18 10 Let me recap. They point to the connection
11:05:21 11 properties, and they say that's good enough to tell you
11:05:23 12 what optimal is. And to that, we say those connection
11:05:28 13 properties only get you to an optimal burst length. That's
11:05:32 14 not what's claimed. So the Court should take comfort in
11:05:35 15 that in arriving at indefiniteness.

11:05:37 16 The second point I want to make, let's -- let's
11:05:39 17 put aside that burst length issue. Let's -- let's take
11:05:43 18 them at face value that you've got these connection
11:05:46 19 properties. Our expert explained -- Dr. Thornton explained
11:05:51 20 this is -- what the specification provides is that these 10
11:05:55 21 properties, and it's essentially a number of subjective
11:06:00 22 criteria.

11:06:01 23 Mr. Stringfield gave you the example about a
11:06:04 24 latency and a certain number of milliseconds. The problem
11:06:07 25 is -- and this is where the Court can really focus on this

11:06:11 1 point -- their expert, Dr. Chmelar, never told us how do
11:06:16 2 you take those 10 different properties and arrive at what
11:06:21 3 is optimal? There's no -- there's no analysis of that.
11:06:24 4 You would have thought that if they -- if they had an
11:06:27 5 opinion of that, Dr. Chmelar would say, look, one of
11:06:30 6 ordinary skill in the art would see the 10 properties and
11:06:33 7 would know how to figure out what's optimal.

11:06:35 8 Our expert said the contrary, and that's -- the
11:06:37 9 Court -- the Court should conclude that this is unrebutted
11:06:42 10 expert opinion, which is -- which the Federal Circuit has
11:06:44 11 said is important in an indefiniteness argument.

11:06:47 12 Dr. Thornton explains that the patent provides
11:06:50 13 this list and gives no indication as to what aspect or
11:06:54 14 combination of these properties may facilitate the
11:06:57 15 determination of an optimal amount of data.

11:07:00 16 And he gave an example, and I'll go back to this
11:07:05 17 list. Let's take ordering. Let's say hypothetically that
11:07:10 18 the optimization scheme is the first message that's in the
11:07:14 19 queue is the first that's out. That's called first
11:07:17 20 in/first out. That's like saying the first person in this
11:07:21 21 room today is the first person who gets to argue.

11:07:25 22 Another -- another ordering scheme could be the
11:07:27 23 last person in this room is the first one who gets to
11:07:30 24 argue. That's called an ordering scheme.

11:07:33 25 But, Judge, how does that tell you what the

11:07:35 1 optimal amount of data is? That's -- that's what our --
11:07:40 2 our expert, Dr. Thornton, observed is just pointing to
11:07:44 3 ordering doesn't tell you what an optimal amount of data
11:07:46 4 is.

11:07:46 5 So the -- you asked me to point to why you should
11:07:50 6 get comfortable on indefiniteness. One very clear point of
11:07:55 7 comfort for you, Judge, is that there's unrebutted expert
11:07:58 8 testimony that one of skill in the art would not know how
11:08:00 9 to balance these 10 properties and know what optimal means.

11:08:05 10 The other -- the other, I would say, significant
11:08:12 11 point of comfort for the Court here to get to
11:08:14 12 indefiniteness is the case law. There's a -- there's a
11:08:19 13 Federal Circuit decision that we pointed to in the brief,
11:08:22 14 the Intellectual Ventures decision, that's remarkably on
11:08:25 15 point. In that case, the claim term was allocating means,
11:08:31 16 et cetera, to optimize end user application IP QoS
11:08:36 17 requirements. That's -- that's spot on to this case
11:08:41 18 because QoS is quality of service. Quality of service is
11:08:46 19 connection properties.

11:08:48 20 That's admitted in NST's opening brief at Page 3
11:08:51 21 at the bottom segment I have here. They told you, Your
11:08:54 22 Honor, that the quality of service parameters are
11:08:58 23 connection properties. And here you have the Federal
11:09:02 24 Circuit looking at a patent with connection properties/QoS
11:09:08 25 and a claim to optimize those requirements.

11:09:10 1 And the Federal Circuit said that that claim was
11:09:13 2 indefinite because it was entirely subjective what optimal
11:09:18 3 meant in terms of those QoS requirements, and, again,
11:09:23 4 un rebutted expert testimony that one of skill in the art
11:09:26 5 would not know how to balance those 10 requirements to get
11:09:30 6 to optimal.

11:09:34 7 The other -- final comment I'd have on the case
11:09:37 8 law, Your Honor, and really final -- final comment overall.
11:09:41 9 The Bitmicro decision that Mr. Stringfield pointed to you
11:09:45 10 is not on point. The Bitmicro decision was based on a
11:09:49 11 claim differentiation argument that's not present here.

11:09:52 12 In Bitmicro, the Defendants had argued that -- and
11:09:58 13 there the claim term was "optimized operations." And the
11:10:03 14 Defendants were arguing that the specification said that
11:10:07 15 certain parameters must be different for that optimality to
11:10:12 16 exist, but because of a claim differentiation argument,
11:10:15 17 they said there's no difference in parameters. The Court
11:10:19 18 rejected that claim differentiation argument and said the
11:10:22 19 specification discloses multiple techniques for
11:10:26 20 optimization.

11:10:27 21 That's not what's present here. There's no
11:10:29 22 multiple techniques for optimization presented.

11:10:32 23 The final case I would point to -- you to, Your
11:10:36 24 Honor, to give you comfort on indefiniteness is the
11:10:40 25 In re TR Labs decision that was cited in our brief at Page

11:10:46 1 24. That's a very close case to the situation we have
11:10:49 2 here.

11:10:49 3 The claim term was "increases and optimizes demand
11:10:59 4 served." And if you read that decision, the specification
11:11:02 5 had 12 constraints that were a laundry list, but none of
11:11:04 6 them explained how individually or taken together you'd get
11:11:07 7 to optimal. So In re TR Labs from the District of New
11:11:12 8 Jersey has the same laundry list problem.

11:11:15 9 And for those reasons, Your Honor, we think
11:11:17 10 optimal is indefinite.

11:11:18 11 THE COURT: Thank you.

11:11:23 12 Mr. Stringfield?

11:11:24 13 MR. STRINGFIELD: Thank you, Your Honor. A few
11:11:29 14 brief points in rebuttal.

11:11:31 15 So, Your Honor, I think one thing that's important
11:11:36 16 to keep in mind is that the understanding of the teachings
11:11:38 17 of a patent is from the perspective of a person of ordinary
11:11:43 18 skill in the art, of course.

11:11:44 19 And so starting with the discussion of optimal
11:11:48 20 burst length, optimal burst length is the same thing as
11:11:53 21 optimal amount of data. And we know that -- I do have our
11:11:57 22 expert, Dr. Chmelar, here, by the way, who would happily
11:12:01 23 entertain any questions the Court may have on this point,
11:12:05 24 but we don't need to go there.

11:12:07 25 If we go to the '800 patent, Column 4, and we go

11:12:15 1 Lines 51 through 53, it talks about the larger a packet is,
11:12:25 2 the smaller amount of packet headers, and, therefore, the
11:12:30 3 overhead.

11:12:31 4 So in this portion of the specification where they
11:12:33 5 talk about optimization, one optimization is to send fewer
11:12:40 6 packets. So instead of sending a lot of small packets,
11:12:43 7 each having a header -- and a header isn't the useful data.
11:12:46 8 The header is the routing data. Instead of sending many
11:12:51 9 small packets, you send one bigger packet with one header.
11:12:54 10 And so you've saved all that header data, and you don't
11:12:59 11 have to transmit all that.

11:13:00 12 And so this focus on the length of a packet.
11:13:04 13 Packets are defined in terms of length. So when we talk
11:13:08 14 about the amount of data in a packet, we talk about that in
11:13:11 15 terms of length. And here's an illustration of that in the
11:13:17 16 '800 specification.

11:13:18 17 This same illustration is also mentioned in
11:13:20 18 Column 7 at Lines 19 through 23. Again, it talks about
11:13:32 19 sending fewer longer packets, fewer packets having more
11:13:35 20 data. The longer the packet, the more data.

11:13:38 21 So burst length is the same as amount of data. So
11:13:43 22 an optimal burst length is synonymous with an optimal
11:13:48 23 amount of data.

11:13:48 24 So pointing to that purported distinction in the
11:13:51 25 specification as an area of confusion is -- is not a reason

11:13:54 1 that this term is indefinite. And, indeed, I don't believe
11:13:57 2 their expert testified he doesn't understand what either an
11:14:00 3 optimal burst length or an optimal amount of data is. I
11:14:04 4 think he merely points out that it's different words.

11:14:07 5 And the other primary point my colleague made is
11:14:14 6 with respect to the 10 communication properties and how
11:14:17 7 they have to be balanced and how all 10 of those may have
11:14:20 8 to be weighed or which 10 are more important.

11:14:23 9 Your Honor, that is a design decision that would
11:14:27 10 be made as part of designing the chip. The specification
11:14:30 11 gives examples of parameters that would be put on what is
11:14:34 12 the optimal amount of data. It would be up to the intent
11:14:39 13 of the chip and the designer of the chip to decide which of
11:14:44 14 those criteria are, first, applicable; and, second, which
11:14:52 15 are most important; and, third, how they interact with each
11:14:56 16 other, whether a latency guarantee would -- would take
11:14:59 17 precedence or a priority guarantee. That's up to the
11:15:02 18 design of the chip.

11:15:02 19 And the specification does not and should not
11:15:04 20 teach all the different permutations of how those could be
11:15:09 21 combined. That's a design decision that a person of
11:15:11 22 ordinary skill in the art would be more than capable of
11:15:13 23 understanding.

11:15:13 24 So based on those -- at least those two arguments,
11:15:16 25 it's not indefinite. You know, this is how a person of

11:15:18 1 ordinary skill in the art understands it. And even a
11:15:23 2 layperson would understand what is optimal. What's the
11:15:25 3 best? What's the most amount of data that I can transmit
11:15:28 4 in the parameters that are put on me? That is the optimal
11:15:30 5 amount of data. It is concrete. It is determinable. It
11:15:34 6 is design-specific, and, therefore, the patent doesn't
11:15:39 7 provide concrete examples of different amounts of optimal
11:15:42 8 data. Rather, it teaches that it should be optimized for
11:15:46 9 the network, the structure of the network that is being
11:15:49 10 designed. And for the criteria and parameters that are put
11:15:50 11 on it, a person of ordinary skill in the art would say,
11:15:52 12 okay, I know what the optimal amount of data is.

11:15:56 13 Unless the Court has any questions?

11:15:57 14 THE COURT: I don't.

11:15:58 15 MR. STRINGFIELD: Thank you, Your Honor.

11:16:04 16 MR. SUDARSHAN: Your Honor, there was -- there was
11:16:10 17 one comment made that I'd like to respond to.

11:16:13 18 Mr. Stringfield said it's up to the designer of
11:16:18 19 the chip to balance those 10 factors and figure out what's
11:16:20 20 optimal.

11:16:21 21 That's not right. It's for the patent. It's for
11:16:25 22 the inventors to describe to one of ordinary skill in the
11:16:29 23 art what they mean by optimal. If you leave it up to the
11:16:32 24 designer of the chip, it's entirely subjective.

11:16:35 25 That's all I have, Your Honor.

11:16:41 1 THE COURT: All right. Okay. Next term?

11:16:45 2 MR. STRINGFIELD: Thank you, Your Honor. Just one
11:17:01 3 brief point on the remark my colleague just made.

11:17:04 4 It's -- the optimal amount is not subjective.

11:17:09 5 That was not the point that I made. The point that I made
11:17:11 6 is the weighing of the characteristics that would be used
11:17:14 7 by the machine to determine what the optimal amount of data
11:17:17 8 is would be up to the designer. So the optimal amount of
11:17:22 9 data is not subjective. That's a concrete thing. It's the
11:17:25 10 most data that can be sent under the constraints.

11:17:29 11 The designer deciding do I want latency to be more
11:17:32 12 important than priority, those kinds of decisions that are
11:17:35 13 the external constraints would be baked into the chip. And
11:17:40 14 then once the chip is baked, the machine knows what the
11:17:43 15 optimal amount of data is.

11:17:44 16 And TI, their chips are baked. They know whether
11:17:48 17 or not their chips are doing the optimal amount of data.
11:17:50 18 That would be based on the constraints that would be
11:17:53 19 designed within the chips, and that would be determinable
11:17:55 20 and concrete.

11:17:56 21 All right. Your Honor, now on to the "optimal
11:18:01 22 moment." Similar argument. So briefly Slide 48 -- excuse
11:18:11 23 me, 58. Again, the point of this is optimization,
11:18:14 24 optimization of the network. So in the context of the
11:18:17 25 optimal moment for sending, the specification also teaches

11:18:21 1 that.

11:18:22 2 So if we look at the right side of Slide 58, the
11:18:25 3 top portion from the '800 patent, Column 7, Lines 4 through
11:18:30 4 14, it says: The transmission moment -- which is
11:18:33 5 understood to be the optimal moment in the context of the
11:18:36 6 patent -- in this example could be a guaranteed throughput
11:18:39 7 connection, and the data should wait for a slot.

11:18:42 8 And then in the specification, Claim 12 of the
11:18:48 9 '800 patent -- or, excuse me, in Claim 12 of the '800
11:18:50 10 patent, which is in the bottom right-hand quadrant, the
11:18:54 11 claim defines how to determine the optimal amount --
11:18:57 12 optimal moment for sending the data. And, again, it's
11:19:01 13 according to the communication properties, the 10 things
11:19:06 14 that we've been talking about.

11:19:07 15 So an example here that illustrates what the
11:19:10 16 optimal moment to send would be if you have a guaranteed
11:19:15 17 throughput guarantee. So that's what's illustrated in the
11:19:18 18 top right portion. So guaranteed throughput is a guarantee
11:19:24 19 of how much data for a unit of time. So let's say it's a
11:19:28 20 guaranteed throughput of 5 megabits per second, that's a
11:19:30 21 guarantee that is designed and baked into the chip so the
11:19:33 22 machine knows for this traffic it has to have a throughput
11:19:36 23 of 5 megabits per second or whatever the time period is.

11:19:40 24 So the chip would know that the optimal moment to
11:19:44 25 send is when there's a slot available for it to send that

11:19:50 1 5-megabit package or the data that would make up that
11:19:54 2 5-megabit package. It's the optimal moment for sending. I
11:19:57 3 know that I have to meet this constraint, this external
11:20:02 4 concrete and identifiable constraint. And from that
11:20:03 5 constraint, the machine knows, it's not making decisions,
11:20:06 6 it's not calling balls and strikes, the machine knows that
11:20:11 7 for a guaranteed throughput guarantee, if I have this much
11:20:14 8 data and I have this guarantee, I wait for the slot that is
11:20:17 9 available to accommodate that much data, and then I send
11:20:19 10 it. And that's the optimal moment for sending.

11:20:25 11 So, again, not subjective. Machine decisions made
11:20:27 12 according to how it's baked.

11:20:33 13 MR. SUDARSHAN: Your Honor, the biggest problem
11:20:53 14 that NST has on this term, "optimal moment," is that the
11:20:57 15 specification never even mentions that phrase. It only
11:21:01 16 shows up in the claim. And this is kind of one of those
11:21:06 17 scenarios that I think we've all seen where the inventors
11:21:09 18 or whoever wrote the specification disclosure, they
11:21:15 19 disclosed one thing, and then it looks like the patent
11:21:20 20 attorney to write the claims showed up and -- and did
11:21:22 21 something else.

11:21:23 22 So the closest you'll get in the specification to
11:21:25 23 optimal moment is this phrase "transmission moment."
11:21:30 24 That's all.

11:21:31 25 So there's -- they really cannot point the Court

11:21:35 1 to anything in the specification that defines the optimal
11:21:40 2 moment because the optimal moment isn't even mentioned.
11:21:43 3 That is a -- I've never seen that scenario before, and I
11:21:45 4 think the Court can take notice of that and find comfort
11:21:48 5 in -- in a finding of indefiniteness when the specification
11:21:51 6 doesn't even mention the term.

11:21:52 7 The technical point that our expert made here is
11:21:57 8 quite similar, which is that the connection properties, if
11:22:01 9 that's what they're going to point to as saving this from
11:22:06 10 indefiniteness, again, it's just a laundry list. We don't
11:22:09 11 know how you take all these concepts of latency, lossiness,
11:22:13 12 et cetera. How do you balance those methodologies which
11:22:16 13 are subjective, and how do you get to what the optimal
11:22:20 14 moment is?

11:22:21 15 Dr. Thornton looked at that, and his conclusion is
11:22:25 16 that there's a countless number of concepts encompassed in
11:22:29 17 that 10-item laundry list, and there's no disclosure to one
11:22:33 18 of skill in the art as to how you -- how you get to an
11:22:37 19 optimal moment.

11:22:37 20 Dr. Chmelar saw this report. He never put in any
11:22:42 21 submission explaining how you could look at those 10
11:22:47 22 factors and arrive at the optimal moment. And we would --
11:22:51 23 we would submit that the Court should take note of that,
11:22:56 24 and in particular the one-sided nature of the expert
11:23:02 25 testimony we think does help us get to the standard

11:23:05 1 required to invalidate the claim here as indefinite.

11:23:10 2 THE COURT: Let me ask you, isn't your
11:23:11 3 indefiniteness argument really a lack of written
11:23:12 4 description argument or a lack of -- or an enablement
11:23:16 5 argument?

11:23:16 6 MR. SUDARSHAN: It is -- it is related, but I
11:23:20 7 think it is distinct, Your Honor. This is really about the
11:23:24 8 scope of the claims, and the -- if you're going to claim
11:23:29 9 something like optimal, the Supreme Court's Nautilus
11:23:32 10 decision says that you have to have reasonable certainty on
11:23:34 11 what that means.

11:23:35 12 So I think there's some relatedness here in terms
11:23:38 13 of did they disclose enough to tell one of ordinary skill
11:23:42 14 in the art what optimal means is? But to answer the
11:23:46 15 Court's question directly, it is not an enablement
11:23:50 16 argument. Enablement is a question of fact the Federal
11:23:55 17 Circuit has found for the jury, and this is a question of
11:23:58 18 law that we think the Court should decide here as a matter
11:24:00 19 of claim construction.

11:24:01 20 THE COURT: Well, I guess my -- I guess what I'm
11:24:03 21 struggling with is whether it is a claim construction issue
11:24:06 22 or something else.

11:24:08 23 MR. SUDARSHAN: The cases that we cited you to,
11:24:14 24 the In re TR Labs, the Intellectual Ventures, even the
11:24:20 25 Bitmicro case that we disagree on, all of those were

11:24:25 1 decisions --

11:24:25 2 THE COURT: On claim construction.

11:24:26 3 MR. SUDARSHAN: -- on claim construction regarding
11:24:31 4 optimal.

11:24:31 5 THE COURT: Okay. Fair enough.

11:24:33 6 MR. SUDARSHAN: That's all I have, Your Honor.

11:24:33 7 THE COURT: Thank you.

11:24:35 8 Mr. Stringfield?

11:24:36 9 MR. STRINGFIELD: Thank you, Your Honor.

11:24:37 10 One brief rebuttal point on optimal moment.

11:24:42 11 TI had indicated that there's no expert testimony
11:24:47 12 on whether transmission moment means the same as optimal
11:24:51 13 moment.

11:24:52 14 And I'll just direct the Court to Paragraph 221 of
11:24:57 15 Dr. Chmelar's declaration. And in the portion of that
11:25:01 16 paragraph at the top of Page 78 -- again, in Paragraph
11:25:06 17 221 -- Dr. Chmelar testifies: While the exact term
11:25:10 18 "optimal moment" is not used in the specification, the
11:25:12 19 specification does disclose the meaning of an optimal
11:25:15 20 moment in terms of a transmission moment.

11:25:17 21 So we do have testimony from a person of ordinary
11:25:20 22 skill in the art that he understands that transmission
11:25:23 23 moment refers to optimal moment in the context of the
11:25:26 24 disclosure of the '800 patent.

11:25:28 25 So, Your Honor, the next term for construction --

11:25:34 1 THE COURT: Let's -- I tell you what, we've been
11:25:36 2 going for about an hour and a half, Mr. Stringfield. We've
11:25:40 3 got two more terms, I think. Let's take a short recess
11:25:47 4 before we take those up and the discovery matter.

11:25:48 5 MR. STRINGFIELD: Very good, Your Honor.

11:25:48 6 COURT SECURITY OFFICER: All rise.

11:37:49 7 (Recess.)

11:37:50 8 COURT SECURITY OFFICER: All rise.

11:37:51 9 THE COURT: Please be seated.

11:41:14 10 All right. Next term.

11:41:20 11 MR. STRINGFIELD: Thank you, Your Honor.

11:41:21 12 The next term for construction is "communication
11:41:24 13 manager."

11:41:31 14 Your Honor, just briefly, it's our position --
11:41:35 15 oops, I'm going the wrong way.

11:41:37 16 Again, NST's overarching position on the
11:41:43 17 means-plus-function limitations that we've discussed today
11:41:46 18 is they should not be construed according to Paragraph 6 of
11:41:52 19 Section 112 for the reasons that I mentioned earlier in the
11:41:52 20 context of dropping means insofar as a person of ordinary
11:41:56 21 skill in the art would understand that the circuitry
11:41:58 22 machinery is intrinsically structural, and they would seek
11:42:03 23 communication manager, and they would know what that is and
11:42:05 24 how to implement it.

11:42:06 25 So without repeating all of that, I'll just say

11:42:09 1 that we incorporate our earlier discussion of that.

11:42:15 2 So -- and then also, again, our qualm with the
11:42:19 3 Court's proposed construction, if the Court goes forward
11:42:22 4 with a 112(6) construction, is with the structure for the
11:42:26 5 same reasons that we discussed earlier and the concern that
11:42:30 6 a construction that refers to specification passages that,
11:42:36 7 you know, describe functional description could be read as
11:42:40 8 improperly importing additional functional limitations into
11:42:44 9 the claim contrary to the case law that we discussed
11:42:47 10 earlier.

11:42:47 11 And so with that, unless the Court has any
11:42:58 12 questions?

11:42:58 13 THE COURT: I don't.

11:42:59 14 MR. STRINGFIELD: Thank you, Your Honor.

11:43:00 15 MR. SUDARSHAN: Your Honor, on communication
11:43:20 16 manager, we've seen the Court's preliminary construction,
11:43:23 17 and, of course, we agree that the 112(6) should apply. I
11:43:28 18 won't spend too much time on that. I'll spend most of my
11:43:32 19 time on the actual structure that was identified by the
11:43:34 20 Court.

11:43:34 21 In terms of the application of 112(6), the
11:43:39 22 strongest arguments we have, we believe, are, for example,
11:43:42 23 the interchangeable use of communication manager. And
11:43:47 24 communication managing means in the specification is
11:43:50 25 helpful, again, under the WSOU case that Mr. Haslam

11:43:55 1 referenced previously.

11:43:56 2 On Slide 63, we also had noted in the briefing
11:43:59 3 that the prosecution history of the patent and the
11:44:03 4 intrinsic evidence also suggests that communication
11:44:07 5 manager and communication managing means were used
11:44:10 6 interchangeably.

11:44:14 7 And we have also pointed in the brief to the
11:44:18 8 Blackboard case from the Federal Circuit where the term --
11:44:22 9 it was an access control manager. And in that case, the
11:44:25 10 Court found that it was a 112(6) indefiniteness issue,
11:44:29 11 mainly because manager there modified by access control was
11:44:32 12 not structural.

11:44:34 13 Similarly here, manager modified by communication
11:44:38 14 does not impart any structure. The strongest support I
11:44:46 15 would submit here is the unrebutted nature of the testimony
11:44:50 16 from the experts on this issue. This is -- this is similar
11:44:52 17 pattern to other terms the Court's looked at today. Our
11:44:56 18 expert, Dr. Thornton, said that a person of skill in the
11:45:00 19 art would not have understood communication manager as a
11:45:03 20 term of art. It's not inherently structural.

11:45:08 21 And Dr. Chmelar did not come in with any evidence
11:45:13 22 that people of skill in the art know inherently what a
11:45:18 23 communication manager is either as a structure or a class
11:45:20 24 of structures.

11:45:25 25 Let me go right to our indefiniteness argument.

11:45:27 1 The basis of this argument is that if you -- if you accept
11:45:30 2 the 112(6) premise and then you turn to the specification
11:45:34 3 and you look and see what is actually disclosed -- on
11:45:38 4 Slide 72, we've highlighted the CM that's in Figure 3 of
11:45:44 5 the patent. That's about all that we're told about the
11:45:47 6 structure of the communication manager. We are told about
11:45:49 7 what the communication manager does functionally in terms
11:45:53 8 of requesting messages, interacting with the resource
11:45:58 9 manager, requesting connections with certain properties.
11:46:01 10 I've put some of that functional language on Claims -- on
11:46:05 11 Slide 71 here.

11:46:07 12 Some of this language, I believe, is in the
11:46:09 13 Court's preliminary construction -- in particular, the top
11:46:13 14 excerpt. '449 patent, 10:19 to 24. And so that's a good
11:46:18 15 place to focus.

11:46:22 16 If you just read that, Your Honor, it says: The
11:46:25 17 communication manager CM request a connection with a set of
11:46:28 18 properties between two modules from the resource manager
11:46:31 19 RM, after receiving the request REQ from the active network
11:46:36 20 interface -- interface ports, et cetera.

11:46:39 21 So that just tells you that the communication
11:46:41 22 manager is getting -- is requesting a connection. It's
11:46:44 23 what it does. It doesn't tell you what it structurally is
11:46:48 24 made of.

11:46:51 25 And we've argued in the brief, and I'd resubmit it

11:46:55 1 here, that's exactly the situation where the Federal
11:46:57 2 Circuit has said if you just put in a structure that's a
11:47:00 3 black box and you don't disclose how it's structurally
11:47:04 4 composed, that is the -- that is a right way to find --
11:47:06 5 that's the right occasion to find indefiniteness.

11:47:09 6 So that's our position on indefiniteness, Your
11:47:13 7 Honor.

11:47:13 8 If the Court is inclined to -- towards its
11:47:17 9 preliminary construction, our response would just be that
11:47:19 10 that portion of the specification only emphasizes that its
11:47:25 11 function -- it's functionally defined and it's a black box.
11:47:28 12 And there is no other -- there is no other disclosure in
11:47:33 13 the specification that tells you what the structure of the
11:47:35 14 communication manager is.

11:47:40 15 That's all I had, Your Honor.

11:47:42 16 THE COURT: Okay. Mr. Stringfield?

11:47:43 17 MR. STRINGFIELD: Your Honor, the final term for
11:47:54 18 construction is "resource manager."

11:47:57 19 We agree with the Court's preliminary construction
11:48:08 20 to give this term its plain and ordinary meaning.

11:48:12 21 One point that maybe was worth making earlier and
11:48:16 22 I'll make now is that TI has been inconsistent in its
11:48:20 23 treatment of the word "manager." We just talked about
11:48:24 24 communication manager, and TI has pointed to case law that
11:48:27 25 says that a manager is indefinite and so forth.

11:48:31 1 And, you know, we don't think that the inquiry
11:48:34 2 begins and ends with the word "manager," nor does TI
11:48:38 3 apparently insofar as they did not advocate resource
11:48:42 4 manager is subject to 112(6) or indefinite. So the word
11:48:46 5 "manager" is not the touchstone here.

11:48:48 6 You know, as I mentioned earlier in the context of
11:48:51 7 the other means-plus-function claims, you know, this all
11:48:53 8 has to be taken in the context of the understanding of a
11:48:57 9 person of ordinary skill in the art in chip design, in
11:49:02 10 semiconductor design, and they understand that these are
11:49:04 11 complex machines that are baked to perform functions.

11:49:08 12 The network on chip is a purpose-built machine.
11:49:11 13 It's not a -- it's not a -- it's not a microprocessor that
11:49:15 14 executes software instructions. It's a purpose-built
11:49:18 15 machine whose job is to move data from one side of the chip
11:49:23 16 to the other as it's designed, as the parameters it's been
11:49:28 17 given dictate.

11:49:29 18 So a person of ordinary skill in the art operating
11:49:31 19 in that world of a -- of a purpose-built machine, of a
11:49:36 20 network on a chip, would understand what a communication
11:49:39 21 manager does and how to make it based on what is disclosed
11:49:42 22 in the claim about how the communication manager interacts
11:49:44 23 with the resource manager. Likewise, how a person of
11:49:47 24 ordinary skill in the art would understand under the
11:49:50 25 Court's plain and ordinary meaning construction for

11:49:52 1 resource manager, what its role is.

11:49:54 2 So we submit that like resource manager, which has
11:50:00 3 been given its plain and ordinary meaning, we think it
11:50:01 4 would be appropriate if the Court were inclined to give
11:50:05 5 communication manager a plain and ordinary meaning
11:50:06 6 construction.

11:50:09 7 Nothing further, Your Honor.

11:50:10 8 THE COURT: Thank you.

11:50:12 9 MR. HASLAM: Let me just address that last point
11:50:21 10 that was made.

11:50:22 11 We approached the construction of these claims
11:50:27 12 from the correct point of view according to Federal Circuit
11:50:30 13 law.

11:50:30 14 With respect to communication manager, we asked
11:50:32 15 our expert: Does communication manager to a person of
11:50:38 16 ordinary skill in the art in this particular art in this
11:50:40 17 claim connote a definite set of structures?

11:50:43 18 The answer was: No, it doesn't.

11:50:45 19 We asked the same question with respect to
11:50:47 20 resource manager, and he said: There are -- there are
11:50:49 21 resource managers known in the art. And that's why we
11:50:51 22 didn't argue that resource manager is a means-plus-function
11:50:54 23 claim.

11:50:54 24 Having trouble with the screen here. The best
11:51:25 25 minds haven't been able to conquer it, so I'll go on

11:51:30 1 anyway.

11:51:30 2 The argument here is simply that this is a
11:51:34 3 disclaimer in the prosecution history of arbiters. And let
11:51:43 4 me just -- I've put up on the screen, and it's up there
11:51:45 5 now, is Figure 2 from the Emerson patent, which is U.S.
11:51:50 6 patent -- it's a publication 2004/0103230. And this is the
11:52:01 7 reference that the examiner combined with another reference
11:52:04 8 to reject the claims that were then pending.

11:52:06 9 And I've put up Figure 2, which is -- contains
11:52:14 10 four ports, a multiplexer, an arbiter, a FIFO, and an SRAM.
11:52:22 11 And basically what this circuit is designed to do is to
11:52:25 12 allow one of four processing modules, which would connect
11:52:31 13 through the four ports, to be able to access the memory
11:52:35 14 SRAM.

11:52:39 15 There's a multiplexer which would choose one of
11:52:42 16 the four processing modules through the four ports to
11:52:46 17 access the SRAM. And the arbiter is the one that selects
11:52:50 18 which particular processing module is able to access the
11:52:57 19 SRAM by configuring the multiplexer to accept Port 1, Port
11:53:03 20 2, Port 3, or as it says on here, Port X.

11:53:07 21 And arbiter 132 in Figure 2 was the subject of the
11:53:15 22 examiner's rejection. And I've put on Slide 77 a
11:53:23 23 portion -- in the top portion of the -- of the response
11:53:29 24 given by the patent attorney to the rejection by the
11:53:33 25 examiner. And the highlighting on this slide is not ours.

11:53:42 1 This is the highlighting that the prosecuting attorney
11:53:46 2 highlighted, which we believe wanted to emphasize the
11:53:50 3 portion of the prior art that that exam -- that that patent
11:53:55 4 attorney was going to focus his or her arguments on.

11:54:00 5 And what -- what the patent attorney said is
11:54:03 6 arbiter 132 arbitrates which port has use of multiplexer
11:54:10 7 122 and of the memory space at a given time.

11:54:15 8 The arbitration protocol may be any protocol
11:54:18 9 suitable for the system, including rotation of the priority
11:54:23 10 among the ports or assigning specific ports a priority over
11:54:26 11 others or a combination of both.

11:54:30 12 And that's where the highlighting added by the
11:54:32 13 prosecuting attorney ends. He goes on to talk a little bit
11:54:37 14 more about the arbitration schemes.

11:54:38 15 After highlighting the portion of Emerson that
11:54:45 16 I've just gone through, the argument that was presented is
11:54:48 17 the arbiter 112 of Emerson does not disclose or suggest the
11:54:55 18 features of Claim 1 which include the resource manager
11:55:00 19 determining, et cetera.

11:55:04 20 That, Your Honor, I think is -- is as clear a
11:55:08 21 disclaimer as one will ever see in a prosecution history.
11:55:16 22 Here is an arbiter 132 in the system, and here is what it
11:55:21 23 does. That doesn't disclose or suggest what my resource
11:55:27 24 manager is in the claims.

11:55:29 25 And I'm going to come back to -- at the same time

11:55:31 1 that they -- the patent attorney made this argument, they
11:55:34 2 amended the claim to add the limitation that the resource
11:55:40 3 manager determines whether a target connection with a
11:55:43 4 desired connection properties is available. So on the face
11:55:48 5 of this, this is, I believe, a clear disclaimer.

11:55:51 6 Now, there's an argument that was made by NST,
11:56:00 7 well, in the notice of allowance, the examiner said nothing
11:56:03 8 about the reliance on this disclaimer or anything about the
11:56:06 9 arguments that were made.

11:56:07 10 I want to emphasize that after the prosecution
11:56:12 11 argument presented that I just showed you, the next event
11:56:17 12 was the notice of allowance. So there was no further back
11:56:21 13 and forth between the examiner and the prosecuting attorney
11:56:24 14 between what we believe is that description of the arbiter
11:56:27 15 132 and saying it does not suggest or disclose the resource
11:56:33 16 manager in the notice of allowance.

11:56:35 17 Now, NST has made the argument because there's
11:56:38 18 nothing in the notice of allowance about that, it doesn't
11:56:40 19 count. Flatly wrong. In Laitram versus Morehouse -- it's
11:56:48 20 on Slide 79: The fact that an examiner placed no reliance
11:56:53 21 on an applicant's statement distinguishing prior art does
11:56:59 22 not mean that the statement is inconsequential for purposes
11:57:04 23 of claim construction, close quote.

11:57:05 24 And that's because the Federal Circuit has several
11:57:08 25 times said: The prosecution history is something that can

11:57:12 1 be read and relied on by people of skill in the art when
11:57:17 2 they go to look at what the patent claims cover. And you
11:57:20 3 are bound by what you say to the examiner.

11:57:25 4 And Laitram is not the only case. That's a 1998
11:57:28 5 case. In 2015, in Fenner Inventions Limited versus Cellico
11:57:36 6 Partnership on Slide 80, the Federal Circuit said this:
11:57:40 7 However, the interested public has the right to rely on the
11:57:44 8 inventor's statements made during prosecution, without
11:57:50 9 attempting to decipher whether the examiner relied on them,
11:57:56 10 or how much weight they were given.

11:57:59 11 In Microsoft Corp. versus Multi-Tech, a 2004 case,
11:58:05 12 also on Slide 80, Federal Circuit said: We have stated on
11:58:09 13 numerous occasions that a patentee's statements during
11:58:14 14 prosecution, whether relied on by the examiner or not, are
11:58:18 15 relevant to claim interpretation.

11:58:21 16 I think in light of the case law and in light of
11:58:30 17 the blanket statement that the arbiter of Emerson does not
11:58:34 18 disclose or suggest the features of Claim 1 is a clear
11:58:39 19 disclaimer under the relevant case law.

11:58:43 20 Now, the examiner relied on arbiter 132. In the
11:58:53 21 comments and the argument accompanying the patent
11:58:56 22 attorney's response, he referenced arbiter 112. And I
11:59:02 23 don't -- and I believe that it is clear from the context
11:59:04 24 that that's a typographical error, but if the Court is
11:59:10 25 troubled at all by the fact that the comments refer to

11:59:12 1 arbiter 112 and the highlighting added by the patent
11:59:18 2 prosecuting attorney refers to arbiter 132, that shouldn't
11:59:22 3 trouble us.

11:59:25 4 In the patent, there are five figures. Figure 1
11:59:33 5 is a block diagram of a multi-bus system employing a
11:59:39 6 communication module according to an embodiment of the
11:59:42 7 present invention.

11:59:44 8 Figure -- and in Figure 1 is an arbiter 112. And
11:59:49 9 that arbiter is described at Column 2, Line -- in Paragraph
12:00:00 10 18, the bus system 100 are data bus systems that transfer
12:00:06 11 data between master devices, plural, and slave devices 106
12:00:12 12 under control of arbiter 112. So there's a reference to an
12:00:17 13 arbiter 112 in Figure 1.

12:00:19 14 Figure 2 is where arbiter 132 appears, and here's
12:00:25 15 what the patent says about Figure 2: Figure 2 is a block
12:00:32 16 diagram of a communications module in accordance with the
12:00:39 17 present invention for use in the multi-bus system
12:00:42 18 illustrated in Figure 1.

12:00:44 19 So Figure -- so arbiter 132 is an example of the
12:00:47 20 arbiter 112 in Figure 1.

12:00:50 21 So whether you treat it as a typo and that the
12:00:54 22 patent attorney, I'm sure, intended to respond to what the
12:00:59 23 examiner said, I wouldn't ascribe to them an attempt to
12:01:04 24 blow one by the examiner by arguing 112 after emphasizing
12:01:10 25 132, but it doesn't matter. The arbiters of Emerson do not

12:01:15 1 disclose or suggest the features of the claims that we're
12:01:21 2 talking about of a resource manager.

12:01:24 3 And if you think globally about what the arbiter
12:01:28 4 does, the arbiter simply picks one among many of its
12:01:36 5 inputs.

12:01:36 6 The resource manager, in contrast, looks for a
12:01:40 7 target connection with connection properties. That is not
12:01:46 8 something the arbiter in Emerson does, and it's not what
12:01:49 9 the resource manager of the patent does. They're
12:01:52 10 fundamentally different. And I believe and TI believes
12:01:56 11 that under the case law, the prosecution history of the
12:02:03 12 '449 patent does contain a clear disclaimer of an arbiter
12:02:08 13 and an arbiter that imposes the priority scheme -- some
12:02:13 14 priority scheme that allows it to pick one from among many
12:02:17 15 of its inputs.

12:02:19 16 If the Court has any questions?

12:02:21 17 THE COURT: Thank you, Mr. Haslam.

12:02:24 18 MR. STRINGFIELD: Your Honor, for there to be a
12:02:36 19 prosecution disclaimer, it has to be a clear and
12:02:38 20 unmistakable disclaimer. It's got to be an exacting
12:02:42 21 disclaimer, and there is no such disclaimer here.

12:02:45 22 So I'm on Slide 69 of NST's presentation.

12:02:50 23 So on the left side are excerpts from the
12:02:55 24 applicant's response to the Office Action that my colleague
12:02:58 25 was just discussing. So in the top left portion is a

12:03:03 1 sentence that the prosecuting attorney had -- you know, it
12:03:08 2 was the lead-in to quoting a passage from the Emerson
12:03:13 3 reference. Notably, there is no discussion of the Emerson
12:03:19 4 reference in that passage.

12:03:24 5 The next section that we have on the screen below
12:03:26 6 that is the extent of the discussion of the arbiter of
12:03:30 7 Emerson. So a couple points about this discussion.

12:03:33 8 So, first of all, my colleague was pointing to and
12:03:37 9 had highlighted the first sentence, and that refers to
12:03:41 10 Claim 1 of the claim that was under prosecution.

12:03:45 11 Just to be clear, Claim 1 that was the subject of
12:03:49 12 prosecution that issued as Claim 1 of the '449 patent --
12:03:56 13 Claim 1 of the '449 patent is not asserted in this case.

12:04:02 14 If you look four lines down in that passage, it
12:04:06 15 refers to Claim 7. Claim 7 under prosecution is what
12:04:09 16 issued as Claim 10 of the issued '449 patent. That's the
12:04:13 17 patent that we're talking about. So that's the discussion
12:04:15 18 that we're focusing on. So that's one point.

12:04:18 19 And so the -- the applicant nowhere in this
12:04:23 20 discussion -- he talks about, you know, how -- you know,
12:04:26 21 the -- you know, Claim 7 does these things. You know, it
12:04:32 22 checks with a second module. It receives a request for a
12:04:36 23 connection with a second module, forwards it to a
12:04:39 24 communication manager. You know, it describes the steps
12:04:41 25 that it's going to do, which as you see on the right side

12:04:45 1 of Slide 69 are the amendments that the applicant made to
12:04:49 2 Claim 7. Again, Claim 7 is what is now Claim 10 asserted
12:04:54 3 in this case. And the applicant adds descriptive steps of
12:04:59 4 what the claim requires.

12:05:01 5 Nowhere in the discussion of Emerson does the
12:05:04 6 applicant say, you know, my resource manager is an arbiter,
12:05:08 7 my resource manager is not an arbiter, we have an arbiter,
12:05:11 8 we don't have an arbiter. All -- all the applicant does is
12:05:15 9 they distinguish Emerson based on steps that aren't
12:05:18 10 disclosed in the Emerson reference or the Adams reference,
12:05:22 11 which was also asserted in prosecution, and the applicant
12:05:24 12 amended claims to include the steps.

12:05:29 13 NST does not, you know, contend that the steps
12:05:29 14 that were amended into the claims are not part of the
12:05:32 15 claims. That's -- that's part of the claims, and those
12:05:35 16 limitations must be met. But there is no discussion of an
12:05:38 17 arbiter. There is no clear and unmistakable disclaimer,
12:05:42 18 and so there is no prosecution history estoppel.

12:05:46 19 THE COURT: Okay.

12:05:47 20 MR. STRINGFIELD: Thank you, Your Honor.

12:05:48 21 THE COURT: Thank you.

12:05:52 22 Mr. Haslam?

12:05:54 23 MR. HASLAM: Well, I'll leave this slide on here.

12:05:58 24 If we look on the left-hand side, the bottom box
12:06:04 25 that begins: The arbiter 112 of Emerson does not disclose

12:06:08 1 or suggest the features of Claim 1, which include the
12:06:13 2 resource manager, and the features of Claim 7, which
12:06:17 3 include the first module issuing a request, et cetera, I'm
12:06:20 4 not sure what the argument was. That clearly says that the
12:06:23 5 arbiter of Emerson is not the resource manager of Claim 1
12:06:29 6 or the resource manager of Claim 7.

12:06:32 7 They can add various steps, and they put those
12:06:34 8 steps on the right-hand side, but those steps are performed
12:06:38 9 by a resource manager. The resource manager determining
12:06:42 10 whether a target connection with a desired connection
12:06:45 11 properties is available, the resource manager responding
12:06:49 12 with the availability of the target connection to the
12:06:52 13 communication manager.

12:06:54 14 What they said is the arbiter of Emerson does not
12:07:02 15 disclose or suggest the resource manager determining
12:07:04 16 whether a connection with the connection properties is
12:07:07 17 available. And with respect to Claim 7, it says the
12:07:11 18 resource manager is not -- it also isn't the resource
12:07:16 19 manager determining whether a target connection with the
12:07:18 20 desired connection properties is available, which is the
12:07:22 21 step that counsel just pointed to in what is now Claim 10.

12:07:26 22 I don't know how much clearer, when you look at
12:07:32 23 the case law, the disclaimer can be when somebody says:
12:07:39 24 I'm going to describe what the prior art is and I'm now
12:07:43 25 telling you that doesn't disclose or suggest the aspect of

12:07:46 1 my invention which is the resource manager determining the
12:07:52 2 connection based on connection properties or in the method
12:07:56 3 claim. It doesn't matter.

12:07:59 4 Whatever the method does, whatever the apparatus
12:08:03 5 does, it isn't an arbiter. And people of ordinary skill in
12:08:09 6 the art reading the prosecution history are going to -- I
12:08:12 7 don't see how you can say that I do not come away with the
12:08:16 8 objective understanding that the inventor was very clear,
12:08:21 9 whatever my resource manager is, it is not an arbiter.

12:08:26 10 Thank you.

12:08:27 11 THE COURT: Thanks.

12:08:27 12 MR. STRINGFIELD: Your Honor, nothing further for
12:08:30 13 Network System Technologies other than -- than to thank the
12:08:32 14 Court and its staff on behalf of NST for its time and
12:08:35 15 attention in these important matters.

12:08:36 16 THE COURT: Sure. Thanks.

12:08:38 17 MR. STRINGFIELD: Thank you, Your Honor.

12:08:38 18 THE COURT: So -- yes, ma'am?

12:08:40 19 MS. MONDRY: We had one quick response in response
12:08:44 20 to a question you had earlier.

12:08:46 21 So responding to your point about the '052 patent
12:08:48 22 and the term "network" and why relying to that, I did
12:08:52 23 promise to provide --

12:08:53 24 THE COURT: Yes, thank you.

12:08:54 25 MS. MONDRY: -- where it can be found in other

12:08:57 1 patents that you did reference.

12:08:59 2 THE COURT: Okay.

12:08:59 3 MS. MONDRY: And I just wanted to point the Court
12:09:01 4 to -- for example, in the '449 patent, Column 8, Line 46,
12:09:05 5 the same language appears, the network on chip may include
12:09:09 6 wires, bus, time-division multiplexing, switch and/or
12:09:14 7 routers within a network.

12:09:15 8 THE COURT: Got it.

12:09:18 9 MS. MONDRY: Thank you.

12:09:18 10 THE COURT: Okay. Good. Thanks.

12:09:19 11 Well, thanks to all of you. I know there were a
12:09:22 12 number of agreed constructions that the parties have
12:09:29 13 resolved, and I appreciate your effort in that regard.

12:09:31 14 And those, of course, are set forth on Pages 6 and
12:09:40 15 7 and 8 of the preliminary constructions that we provided
12:09:46 16 earlier this morning.

12:09:47 17 I also know that there were three terms,
12:09:52 18 "multicast," "narrow cast," and "data communication
12:09:57 19 introducing a delay" that were apparently withdrawn, or
12:10:02 20 they were agreed, and we were somewhat confused about that.

12:10:05 21 Have the parties agreed on a construction on those
12:10:07 22 three terms?

12:10:08 23 MR. SUDARSHAN: No, Your Honor.

12:10:09 24 THE COURT: Can you tell us what the -- what the
12:10:14 25 status of that is?

12:10:15 1 MR. SUDARSHAN: Yes, Your Honor. We -- the
12:10:19 2 pre-Mark -- pre-Markman briefing exchanges, there was an
12:10:25 3 agreement between the parties that those would not get
12:10:28 4 briefed. And I think there was just a misunderstanding
12:10:30 5 perhaps, and so they -- NST included those terms in its
12:10:33 6 opening brief. We pointed them back to the parties'
12:10:36 7 exchanges, and then we reached an agreement that those
12:10:40 8 would not need to be addressed by the Court.

12:10:42 9 THE COURT: So there is not a dispute; is that
12:10:44 10 what you are telling me?

12:10:45 11 MR. SUDARSHAN: There's not a dispute right now
12:10:47 12 over those terms, that's right.

12:10:48 13 THE COURT: Well, is there going to be a dispute?

12:10:50 14 MR. SUDARSHAN: We don't think it's material at
12:10:53 15 this point. That's -- that's right. We -- just so I'm --
12:10:56 16 I don't want to be wiggly about this, Your Honor.

12:10:59 17 THE COURT: Well, you just said there's not a
12:11:01 18 dispute right now, so...

12:11:02 19 MR. SUDARSHAN: Yeah, we don't think there's a
12:11:04 20 material dispute, and we didn't -- certainly didn't think
12:11:06 21 it rose to the level of being briefed.

12:11:07 22 THE COURT: Fair enough.

12:11:08 23 Mr. Stringfield?

12:11:10 24 MR. STRINGFIELD: Your Honor, we agree with that.

12:11:11 25 THE COURT: Okay. Okay. Good.

12:11:12 1 All right. On the -- on the discovery motion, so,
12:11:19 2 you know, I know that you all have had discussions about
12:11:23 3 this. I know this is an issue that's -- y'all apparently
12:11:29 4 have not been able to resolve. So I think I should just
12:11:34 5 hear from -- from TI on it, and then we'll hear from the
12:11:37 6 Plaintiff.

12:11:38 7 MR. SUDARSHAN: Your Honor, may I hand up some
12:12:07 8 materials?

12:12:08 9 THE COURT: Yes.

12:12:08 10 MR. SUDARSHAN: I think we may be having a similar
12:12:30 11 issue to what we had before. Let me toggle the display and
12:12:34 12 see if I can get our slides up.

12:12:36 13 Your Honor, thank you for hearing argument on
12:12:54 14 this.

12:12:54 15 I want to say at the outset, I know the Court has
12:12:57 16 entertained a lot of briefing on this particular dispute,
12:13:00 17 and it is something that's very important to our client.
12:13:03 18 It goes to a pretty fundamental issue.

12:13:07 19 One of the -- one of the key issues we're trying
12:13:09 20 to get to the bottom of is who has licenses to these
12:13:14 21 patents?

12:13:16 22 We have only come to find out, after we filed the
12:13:19 23 motion, that there are a number of entities out there who
12:13:24 24 have licenses to the patents-in-suit. And it turns out
12:13:29 25 that many of those entities are TI customers.

12:13:32 1 So if TI is making sales to customers that NST is
12:13:36 2 accusing of infringement but those customers have a
12:13:40 3 license, we can't owe damages on that. It's a pretty
12:13:45 4 fundamental important point.

12:13:47 5 And so what I'd like to do here, Your Honor, is
12:13:51 6 explain to you where we are, what's -- why we're still here
12:13:55 7 with a dispute. And I do think it's important how we got
12:13:59 8 here, because before we filed this motion, there was a lot
12:14:03 9 that NST did not tell us about the documents they had, and
12:14:07 10 a lot of representations that they made to us about them
12:14:11 11 having given us all relevant documents, and it has been a
12:14:16 12 concerning track record, and I think that -- that history
12:14:18 13 is important for the Court to determine what to do now
12:14:21 14 going forward.

12:14:21 15 Let me sum it up in terms of what's outstanding.
12:14:27 16 There's really four issues that are outstanding. One is
12:14:31 17 there are documents related to the acquisition of the
12:14:34 18 patents from Phillips. NST purchased these patents from
12:14:40 19 Phillips, and there's documents like notes and summaries
12:14:43 20 that are -- that we do believe are out there that we don't
12:14:45 21 have and that there have been very, very belated and
12:14:52 22 unsubstantiated claims of privilege or work product over,
12:14:55 23 and we are asking for those.

12:14:56 24 Number two, there's a number of licenses out
12:15:00 25 there, and we -- we are trying to get at these every way we

12:15:04 1 can, but we feel that we're -- we've been stymied in this
12:15:08 2 process. And that's why we need the Court's help on Issue
12:15:14 3 2, as well.

12:15:15 4 THE COURT: Well, I mean, haven't -- so what's the
12:15:17 5 status on the efforts TI is making to secure these
12:15:21 6 agreements?

12:15:21 7 MR. SUDARSHAN: We have -- thank you for the
12:15:24 8 Court's assistance in signing the Hague request.

12:15:27 9 We have submitted that request to the foreign
12:15:30 10 authority in the Netherlands. That is a difficult process,
12:15:34 11 Your Honor, that we are -- you know, it's kind of we launch
12:15:37 12 it, and we hope for the best. And --

12:15:40 13 THE COURT: Do you have any idea what the
12:15:42 14 normal -- Mr. Davis?

12:15:44 15 MR. DAVIS: Your Honor, I apologize to interrupt.
12:15:46 16 But I believe we're getting into information that's covered
12:15:48 17 under the protective order in this case. We know there are
12:15:51 18 counsel for other parties not involved in this case but in
12:15:54 19 related cases in other courts. We'd like to ask they be
12:16:00 20 excused from this proceeding.

12:16:02 21 THE COURT: What type of information would be
12:16:04 22 covered by the protective order?

12:16:05 23 MR. DAVIS: Information related, Your Honor, to a
12:16:08 24 number of license agreements, as an example.

12:16:11 25 THE COURT: Okay.

12:16:11 1 MR. SUDARSHAN: We would object to that, Your
12:16:14 2 Honor. We -- I have one slide that has language from
12:16:18 3 the patent purchase agreement that I would not -- I will
12:16:21 4 not --

12:16:21 5 THE COURT: Why don't you just hand it up to me,
12:16:24 6 Mr. Sudarshan.

12:16:26 7 I'm going to overrule your objection.

12:16:30 8 I mean, if testimony -- I mean, not testimony, but
12:16:32 9 if argument needs to be made by either side and you think
12:16:35 10 there's something that's implicated other than what you've
12:16:38 11 just told me, Mr. Davis, I'm happy to entertain, you know,
12:16:45 12 any additional concerns you've got, but at this point, I
12:16:49 13 don't see anything here that's problematic.

12:16:52 14 MR. DAVIS: Thank you, Your Honor.

12:16:54 15 MR. SUDARSHAN: Your Honor, we've sent out the
12:16:56 16 Hague request. That is with the central authority in the
12:17:01 17 Netherlands. That's a really difficult process. We really
12:17:04 18 don't have any control over how Phillips will respond to
12:17:07 19 that request. And we've been told by NST's counsel that
12:17:12 20 they may be objecting on the basis of confidentiality to
12:17:14 21 give us the information we're looking for.

12:17:16 22 So the one pressure point we have here is this
12:17:20 23 motion to try to get at this important information. And
12:17:23 24 that's what -- I'm going to try to explain what we think
12:17:25 25 the Court still has the authority to help us --

12:17:27 1 THE COURT: So NST has told you they may object on
12:17:29 2 the basis of confidentiality when they originally told you
12:17:35 3 to go get them from Phillips?

12:17:37 4 MR. SUDARSHAN: I -- I will let Mr. --

12:17:38 5 THE COURT: I mean, I'll let him speak to it, as
12:17:41 6 well, but...

12:17:41 7 MR. SUDARSHAN: Yes. I'll tell you what we've
12:17:43 8 been told.

12:17:43 9 So there -- there was an email that NST sent to
12:17:46 10 Phillips requesting that the documents be given to us in
12:17:50 11 this case. In the meet and confer that we had following
12:17:53 12 the Court's order --

12:17:54 13 THE COURT: Could I ask when that email was sent?
12:17:58 14 How long ago was that email sent?

12:18:00 15 MR. SUDARSHAN: That was sent over a month ago.

12:18:03 16 THE COURT: And when were these documents first
12:18:05 17 requested?

12:18:06 18 MR. SUDARSHAN: They were -- they were -- we
12:18:11 19 requested them back in the June 2nd letter.

12:18:13 20 THE COURT: Okay. So in June, you requested them,
12:18:16 21 and they did not ask Phillips for them until September?

12:18:20 22 MR. SUDARSHAN: Yes. It was -- it was really with
12:18:25 23 the -- I believe it was with the sur-reply briefing in
12:18:29 24 September. I'll have to go back and double-check that, but
12:18:32 25 that's my recollection, Your Honor.

12:18:33 1 THE COURT: All right.

12:18:34 2 MR. SUDARSHAN: So I'm going to get into this a
12:18:38 3 little bit later on the Hague issue and Phillips. But we
12:18:40 4 feel like we've been given the runaround because there's
12:18:44 5 interrogatories out there asking for the license
12:18:46 6 information, and they're saying: Well, we don't have
12:18:47 7 custody of the licenses, so we can't tell you about them.

12:18:50 8 But there was -- we do believe they have notes
12:18:55 9 about some of these agreements, and we do believe they have
12:18:58 10 access. So that's Issue No. 2.

12:18:59 11 Issue No. 3 is somewhat of an unusual one, and
12:19:06 12 I'll try to keep this high level.

12:19:08 13 NST purchased the patents and financed the
12:19:12 14 litigation in a single transaction. And we think that when
12:19:16 15 you couple acquisition financing to buy the patents and
12:19:21 16 litigation financing, that raises a number of questions
12:19:27 17 about value, standing, that are -- that are relevant.

12:19:33 18 There's case law in the Eastern District we're
12:19:35 19 aware of where the Court is generally reluctant to allow
12:19:39 20 discovery into litigation finance, but this is a different
12:19:42 21 circumstance --

12:19:43 22 THE COURT: There's a lot of authority from a lot
12:19:46 23 of places saying that.

12:19:47 24 MR. SUDARSHAN: Yes, Your Honor.

12:19:48 25 THE COURT: And some to the contrary.

12:19:49 1 MR. SUDARSHAN: Yes, Your Honor. So I'd like to
12:19:52 2 explain that issue, why we think it's different, and why we
12:19:54 3 think the Court -- we're looking for the Court's help on
12:19:55 4 getting to the bottom of that issue.

12:19:57 5 The fourth issue is emails, and that percolates a
12:20:01 6 number of these. But just take the example of Phillips.
12:20:05 7 They have an email requesting the licenses from Phillips,
12:20:09 8 and then we were told there was a phone call where Phillips
12:20:16 9 said: We agree with you that you don't have the power to
12:20:18 10 request these documents from us. Well, what else was said
12:20:21 11 between the parties? It seems a bit -- a little bit too
12:20:25 12 convenient.

12:20:26 13 We've also come to find out that there's been a
12:20:28 14 number of information exchanges between Phillips and NST in
12:20:34 15 the transaction process. And we think that opens up the
12:20:37 16 relevance of emails. So that's the last issue I'll cover.

12:20:42 17 So just to summarize the four points, these -- and
12:20:45 18 I'll cover this for each of these buckets. One, we don't
12:20:48 19 think there's any relevance objection that can be made.
12:20:51 20 All of these documents are unquestionably relevant.

12:20:55 21 Burden. They have not advanced any real burden
12:20:57 22 arguments, and I'll get to this on emails. They're not
12:21:01 23 telling us that there's thousands of emails or they'd be
12:21:04 24 hard to pull.

12:21:06 25 Privilege is a really important point here. We

12:21:08 1 have been very surprised and disturbed that we haven't
12:21:11 2 gotten a privilege log even to this date.

12:21:14 3 THE COURT: I thought there was an agreement not
12:21:16 4 to -- not to provide privilege logs. Am I wrong about
12:21:19 5 that?

12:21:20 6 MR. SUDARSHAN: There was an agreement not to
12:21:21 7 provide privilege logs for post-lawsuit information, but
12:21:26 8 here, we're talking about pre-lawsuit information. So in
12:21:31 9 this context where we're seeking documents, I'll just bring
12:21:34 10 up the notes as an example.

12:21:37 11 When they were having the diligence process to buy
12:21:40 12 the patents, we understand that the attorneys took notes on
12:21:44 13 some of these licenses perhaps. And so those -- those we
12:21:47 14 would at least need to know what the basis is of holding
12:21:51 15 those notes back.

12:21:53 16 So I'm going to get into those four documents,
12:21:56 17 Judge -- four categories, Judge. But I do want to just
12:22:00 18 frame this.

12:22:01 19 It's the -- the burden is on NST at this point to
12:22:03 20 resist discovery because we've established that the
12:22:06 21 documents are within the scope of -- scope of discovery.
12:22:09 22 And here is the quick little history which colors why we're
12:22:15 23 being pretty insistent.

12:22:17 24 On May 23rd was their initial document discovery
12:22:21 25 deadline. They only produced 12 documents. Judge, in most

12:22:24 1 cases I've been involved with on the defendant's side, if
12:22:26 2 there's a patent purchase agreement, that pops out right
12:22:29 3 there in that first deadline. And so we were surprised
12:22:32 4 that they hadn't produced the patent purchase agreement.

12:22:36 5 And we raised a number of deficiencies in our June
12:22:38 6 2 letter. There was a long meet and confer process, two
12:22:44 7 and a half months, where we tried to reason with them, and
12:22:48 8 we said there's a patent purchase agreement, the draft
12:22:51 9 agreements. There's got to be more to the transaction that
12:22:53 10 you're holding back. And we were told none of that was
12:22:56 11 relevant or that it didn't exist.

12:22:58 12 It was only after we moved to compel on August
12:23:00 13 15th -- and I've drawn this little arrow here -- that they
12:23:04 14 finally produced the patent purchase agreement. And then
12:23:06 15 they said: Oh, your motion is moot now.

12:23:09 16 At that time, we then moved to file a reply brief
12:23:13 17 because we said there's no way our motion is moot. There's
12:23:16 18 all this other stuff we moved on in the motion, draft
12:23:19 19 agreements, communications with Phillips, assignment
12:23:23 20 agreements. So after we filed the reply, then they
12:23:28 21 trickled out 50 assignment agreements. And they said:
12:23:31 22 Okay, now it's moot. There's no other relevant
12:23:34 23 non-privileged information at this point.

12:23:37 24 And the Court rightly saw that the motion was not
12:23:42 25 moot at that point. There were entire categories of

12:23:45 1 documents that were very clearly articulated in our motion
12:23:49 2 that were outstanding, and the Court granted the motion on
12:23:53 3 October 6th.

12:23:55 4 So it's after that motion that we have this
12:23:57 5 production of 850 documents, including claim charts that
12:24:01 6 they had never produced, all kinds of information from a
12:24:04 7 data room from -- that they had in the transaction with
12:24:08 8 Phillips, term sheets, et cetera.

12:24:10 9 So it's really remarkable to us that from June 2,
12:24:15 10 it took them until October, after multiple -- after a Court
12:24:20 11 order and multiple briefs to provide this information. And
12:24:23 12 I'm going to get to this when I talk about emails. We
12:24:26 13 don't feel like they have dealt with us in candor and good
12:24:30 14 faith on some of this.

12:24:31 15 So let me -- let me go forward now to the -- if
12:24:37 16 somebody knows how to erase my line. Oh, here we go. Got
12:24:41 17 it.

12:24:41 18 So let me -- let me walk through my four
12:24:44 19 categories, Judge.

12:24:46 20 Patent acquisition documents. Some of this -- I'm
12:24:51 21 only articulating what I know. Part of the problem here is
12:24:55 22 we don't know what we don't know. But we know now that
12:24:58 23 there's at least some type of summary or notes about NST's
12:25:03 24 acquisition of the patents relating to their due diligence.
12:25:06 25 They haven't spelled this out in a privilege log. They're

12:25:09 1 saying we never sought it. We certainly sought it right at
12:25:13 2 Page 1 of our motion. And they have not substantiated work
12:25:16 3 product immunity or privilege or any other basis to hold
12:25:20 4 these back.

12:25:20 5 The case I really want to highlight here is this
12:25:23 6 Robinson case from -- it's from the Texarkana Court in 2003
12:25:28 7 where the Court found waiver and held what NST is doing
12:25:32 8 here, you can't get away with. You can't -- you can't not
12:25:35 9 disclose that documents exist. And then only after there's
12:25:39 10 briefing and only after a motion, come out with a privilege
12:25:42 11 log and say, okay, it's privileged. They owed us that
12:25:46 12 privilege long ago. They owed us information about the
12:25:50 13 existence of these documents long ago. We're only learning
12:25:53 14 about these notes in the meet and confer that they had in
12:25:56 15 Dallas that Mr. Haslam and Mr. Stringfield had a couple
12:25:58 16 weeks ago.

12:25:59 17 So it's way too late to be making these
12:26:03 18 assertions. They haven't substantiated, even if they --
12:26:08 19 even if they come to you now. For example, on the notes,
12:26:10 20 the Robinson decision says there's two types of work
12:26:13 21 product. There's ordinary work product, and then there's
12:26:16 22 opinion work product. We think that these notes where they
12:26:19 23 were taking notes on the Phillips licenses, that would be
12:26:23 24 considered ordinary work product. It's about facts. And
12:26:27 25 whether or not a TI customer is licensed, that's a fact.

12:26:31 1 So the level of protection afforded to those kind of notes
12:26:37 2 would be very low.

12:26:38 3 But, Judge, I'm going to be upfront with you. I'm
12:26:42 4 shooting in the dark here. I'm guessing because they
12:26:44 5 haven't -- they haven't told us the nature of those notes.
12:26:47 6 They haven't given us the particulars that are required
12:26:49 7 under the case law how each document satisfies all the
12:26:52 8 elements of the privilege.

12:26:54 9 It's remarkable to me that they didn't mention
12:26:57 10 privilege in opposition to our motion to compel. That
12:27:01 11 alone is grounds for waiver.

12:27:03 12 THE COURT: And that was the -- first raised in
12:27:08 13 September, this privilege issue?

12:27:10 14 MR. SUDARSHAN: Yes, Your Honor, in the sur-reply.

12:27:13 15 THE COURT: In the sur-reply?

12:27:14 16 MR. SUDARSHAN: Yes, sir, it was first raised in a
12:27:18 17 sur-reply.

12:27:18 18 So Category 1, we think, is easy. We're seeking
12:27:21 19 the documents, and they haven't substantiated privilege.
12:27:21 20 The Court should order NST to produce whatever it has in
12:27:26 21 this category.

12:27:27 22 Category 2 is licenses and agreements. This one,
12:27:30 23 I acknowledge, Your Honor, is a little bit trickier. The
12:27:33 24 issue here is they're saying they can't get the licenses
12:27:36 25 from Phillips. We have our doubts about that. I'm not

12:27:41 1 going to project Slide 9, but, Judge, can I ask you to look
12:27:45 2 at your hard copy of Slide 9?

12:27:47 3 THE COURT: Yes. Okay.

12:27:54 4 MR. SUDARSHAN: That language -- I'm not going to
12:27:56 5 read it into the record -- we think shows they have access
12:28:01 6 to these documents in the context we're talking about here.
12:28:04 7 We think the Court could and should compel NST to go get
12:28:10 8 these documents from Phillips.

12:28:12 9 They've had phone calls. They've had emails with
12:28:15 10 Phillips. Phillips is not an unknown entity to them. So
12:28:21 11 we think they should go get it.

12:28:21 12 But failing that, let me -- let me show -- let me
12:28:24 13 show what you the problem is. I put back up on the screen
12:28:30 14 our -- Slide 10. This is our interrogatory served months
12:28:33 15 ago: Describe in detail each offer, discussion,
12:28:37 16 negotiation, or agreement to license, et cetera.

12:28:40 17 So they should have described these existing
12:28:43 18 licenses that are out there. And what they just told us --
12:28:47 19 a few weeks ago after the Court's order, they gave us a
12:28:50 20 supplemental interrogatory response, and they said: NST
12:28:53 21 does not have any of the agreements listed in Exhibit C.
12:28:57 22 Therefore, they're not telling us anything about them.

12:28:59 23 Well, what about the notes? What about the
12:29:01 24 provision that's on the hard copy I showed you? We think
12:29:04 25 at a minimum, they ought to have gone to Phillips and said:

12:29:09 1 Hey, we've got -- we've got discovery being served on us.
12:29:12 2 TI wants to know if its customers are licensed. Even if
12:29:15 3 you're not going to give us the licenses, show them to us
12:29:18 4 on a WebEx or a Zoom or something so we can answer this
12:29:22 5 interrogatory.

12:29:22 6 So at a minimum, the Court should compel them to
12:29:25 7 answer this rog and give us all the information we're
12:29:28 8 asking for.

12:29:30 9 And if -- you know, we put this in our last
12:29:34 10 submission, Your Honor, the five-pager. If they don't do
12:29:38 11 that, there's a very simple solution. They should not be
12:29:41 12 allowed to get damages from TI for TI's sales to any of the
12:29:46 13 customers that are in those license schedules. And that's
12:29:50 14 not at all a harsh penalty, and it's the only reasonable
12:29:53 15 one I can think of if we don't get cooperation on this
12:29:56 16 issue.

12:29:57 17 THE COURT: When -- when was it first represented
12:29:59 18 that NST did not have access or control over these
12:30:06 19 documents?

12:30:06 20 MR. SUDARSHAN: Your Honor, we did not know about
12:30:10 21 the existence of these documents until they produced the
12:30:14 22 PPA --

12:30:15 23 THE COURT: Okay.

12:30:15 24 MR. SUDARSHAN: -- on August 29th.

12:30:17 25 THE COURT: All right. And soon thereafter, they

12:30:21 1 represented to you that they did not have access or control
12:30:23 2 over them?

12:30:24 3 MR. SUDARSHAN: Yes, Your Honor.

12:30:24 4 THE COURT: Okay.

12:30:25 5 MR. SUDARSHAN: On acquisition financing, the --
12:30:35 6 clearly we've sought this information. There's no question
12:30:37 7 about that. The tricky question, we acknowledge, is the
12:30:41 8 privilege immunity question because of the case law on
12:30:43 9 litigation finance.

12:30:45 10 Couple of things, the Federal Circuit in the In re
12:30:50 11 Nimitz decision did confirm that it is within this Court's
12:30:54 12 discretion to order that kind of production if you think
12:30:58 13 it's appropriate. The case -- there's no case law from the
12:31:00 14 Federal Circuit saying you don't have that ability.

12:31:03 15 THE COURT: Help me with the relevance here.

12:31:06 16 MR. SUDARSHAN: Sure. Sure. So the ordinary
12:31:09 17 course is patent Plaintiff owns some patents. They go to a
12:31:12 18 litigation financier and say we want to go sue TI, we want
12:31:17 19 to sue Samsung, we want to sue Qualcomm. They're going to
12:31:21 20 hire big law firms. We need money. Let's share the
12:31:22 21 proceeds. Let's come up with some agreement where you loan
12:31:26 22 us money, and then we'll go out and engage in litigation.
12:31:29 23 That's not the situation we have here, or at least that's
12:31:32 24 not what we think.

12:31:33 25 The situation is there is some financier out there

12:31:37 1 who's not only underwriting the litigation, they also have
12:31:41 2 written a check to finance the purchase of the patents from
12:31:44 3 Phillips. And that's a distinction that's important, Your
12:31:49 4 Honor, because purchase brings into play valuation on
12:31:53 5 damages, how much were paid for the patents, any
12:31:56 6 discussions they may have had over the value.

12:32:00 7 It also brings into play standing in a unique way
12:32:05 8 because I think if it's just an ordinary litigation
12:32:08 9 finance, you may not have as much of an issue on standing.
12:32:11 10 It's a loan. But here, you've got this entity that's
12:32:14 11 writing a check for you to buy the patent and go out and
12:32:18 12 litigate the patents. At a minimum, it's discoverable. We
12:32:22 13 ought to be able to see and verify for ourselves that that
12:32:26 14 super funder has not retained rights in the patent that
12:32:30 15 jeopardize the standing.

12:32:31 16 On this issue, Your Honor, we did put this in our
12:32:34 17 submission. The Court could require in camera submission
12:32:38 18 of these documents to verify for itself. And that was done
12:32:44 19 in the Mondis case. That was done in several of these
12:32:48 20 cases where the Court examined documents in camera.

12:32:51 21 But on this acquisition issue, that's what makes
12:32:52 22 it different from the cases that have been considered
12:32:54 23 before because when you have NST negotiating with the
12:32:57 24 funder -- I'm calling it a super funder because it's funded
12:33:02 25 not just acquisition but also litigation -- there's an

12:33:07 1 adversity there over the price that they -- they were going
12:33:09 2 to -- they were going to want to pay Phillips for the
12:33:10 3 patents, and that's a distinction that's important, we'd
12:33:13 4 submit.

12:33:14 5 And so I'm just going to keep going here, given
12:33:17 6 the limited time, but happy to come back with any
12:33:20 7 questions.

12:33:20 8 THE COURT: Okay.

12:33:20 9 MR. SUDARSHAN: On emails, we did not know to
12:33:20 10 explicitly ask for emails in our motion or the meet and
12:33:31 11 confer. I'm not going to tell you that our motion
12:33:33 12 explicitly asked for emails because it didn't. That said,
12:33:36 13 our motion broadly sought the very same documents that we
12:33:39 14 think are the subject of emails.

12:33:43 15 And given the extraordinary history, I'll go back
12:33:46 16 to our timeline slide here -- given the extraordinary
12:33:49 17 history of how we've had to pull on strings to get more and
12:33:52 18 more information, the Court would be well within its
12:33:56 19 discretion to order that they produce emails on these
12:34:00 20 topics, for example, emails that they had with Phillips.

12:34:02 21 In the meet and confer process after your order,
12:34:06 22 Judge, we asked them: Are you telling us it's burdensome
12:34:09 23 for your two principals to pull their emails with Phillips
12:34:13 24 and produce them? And we didn't hear anything about that
12:34:15 25 being burdensome. All we heard was that it's not in the --

12:34:18 1 it's not -- we didn't agree to email production, and they
12:34:21 2 said the infrastructure to get email production going is
12:34:25 3 burdensome, whether it's five emails or 20 emails or a
12:34:29 4 hundred emails.

12:34:30 5 Well, we don't think it would be burdensome for
12:34:34 6 those two individuals or the principals of NST to just pull
12:34:37 7 down their emails with Phillips and other related
12:34:41 8 correspondence and produce those to us in this these --
12:34:44 9 in this case. And I think under the circumstances, a
12:34:45 10 limited exception to the discovery order is well warranted
12:34:50 11 here.

12:34:50 12 The final thing I'll say, Judge, not ascribing any
12:34:58 13 kind of personal jibes to this, but almost all this
12:35:02 14 information came out after our motion to compel. And we
12:35:05 15 have asked for fees, and it's not just a run-of-the-mill
12:35:08 16 discovery dispute. Just look at the categories I have on
12:35:13 17 this slide here.

12:35:14 18 850 documents produced after the motion to compel,
12:35:17 19 after telling us these documents were wholly irrelevant.
12:35:22 20 They've repeatedly told the Court that our motion is moot
12:35:24 21 when it's not. There was the whole issue about assignment
12:35:28 22 agreements being on the public website when they weren't.
12:35:31 23 I've mentioned the issue about there -- the phone call they
12:35:35 24 had with Phillips that concerns us. It's very bizarre that
12:35:40 25 Phillips didn't write back. If this was really arm's

12:35:42 1 length, we would have expected them to produce a response
12:35:45 2 from Phillips.

12:35:47 3 They haven't requested -- they haven't given us a
12:35:50 4 privilege log, and they continue to say that we're seeking
12:35:53 5 things that we never sought.

12:35:55 6 So all of that, we think, supports the relief
12:35:58 7 we're asking for and supports fees.

12:36:00 8 THE COURT: Thanks.

12:36:05 9 MR. DAVIS: Good morning, Your Honor. Bo Davis on
12:36:09 10 behalf of NST.

12:36:10 11 I would start, Your Honor, by highlighting the
12:36:22 12 fact that we do believe that many of the documents that
12:36:28 13 Texas Instruments is now seeking were not part of its
12:36:31 14 original motion.

12:36:32 15 Our understanding of the original motion was that
12:36:35 16 they -- and I think as reflected in the original motion, is
12:36:38 17 that they were seeking the patent purchase agreement, which
12:36:42 18 we have produced.

12:36:44 19 What has happened is that since the motion and
12:36:47 20 since the Court's order as to -- to, I guess, overruling
12:36:53 21 NST's relevance objection to a number of documents, and I
12:36:59 22 think that's where counsel's bullet point on Slide 15, the
12:37:06 23 850 documents produced after TI -- TI's motion was granted,
12:37:10 24 the majority of those documents, we believe, are irrelevant
12:37:16 25 documents dealing with document -- documents exchanged

12:37:19 1 between NST and Phillips in the negotiations in the patent
12:37:25 2 acquisition process that relate to, for example, claim
12:37:27 3 charts for a number of patents that are not in this case.

12:37:30 4 There's lots of patents that were acquired in this
12:37:34 5 transaction, and there were lots of documents exchanged
12:37:36 6 related to patents that are not involved in this case. So
12:37:39 7 I'd like to put the 850 documents in context and let the
12:37:43 8 Court know that when the Court overruled the relevance
12:37:47 9 objection, which was based primarily on documents related
12:37:50 10 to a number of unasserted patents, that's where a lot of
12:37:53 11 documents came in. We produced those.

12:37:57 12 Our understanding of what is remaining that has
12:38:02 13 not been produced is emails and attorney work product.
12:38:11 14 NST, I believe, reasonably stood on its -- on its
12:38:16 15 understanding and the memorialization of the fact that
12:38:21 16 they're -- emails are not being produced in this case. So
12:38:23 17 we didn't produce emails.

12:38:24 18 THE COURT: Right. And they've asked you for
12:38:26 19 emails since then. So why have you not produced them?

12:38:29 20 MR. DAVIS: They asked us for emails. There was
12:38:31 21 an in-person meet and confer just a few weeks ago. We
12:38:33 22 said, we're happy to discuss producing emails.

12:38:37 23 THE COURT: Right. And have they -- have you done
12:38:39 24 that?

12:38:39 25 MR. DAVIS: We have not produced any emails

12:38:41 1 because emails -- that process is going to require that the
12:38:46 2 parties meet and confer, that we agree on the custodians,
12:38:49 3 that we agree on search terms.

12:38:50 4 THE COURT: Right. So what efforts have you made
12:38:52 5 to run that down?

12:38:54 6 MR. DAVIS: We've offered to begin those
12:38:55 7 negotiations, and they have not taken us up on it. We have
12:38:58 8 completely --

12:38:59 9 THE COURT: Well, this afternoon will be a great
12:39:02 10 time to do that.

12:39:02 11 MR. DAVIS: Well, I agree. So we are willing to
12:39:07 12 produce emails. We're willing to engage in that --

12:39:10 13 THE COURT: I can't see how it's terribly
12:39:13 14 burdensome. I don't think you're making that argument.
12:39:14 15 But I can't imagine if there are a couple of custodians,
12:39:17 16 that producing email, regardless of whether it was
12:39:21 17 originally requested or not, is going to be a terribly
12:39:25 18 burdensome thing.

12:39:26 19 MR. DAVIS: I understand that, Your Honor. And I
12:39:28 20 don't believe we're making the argument that it's overly
12:39:31 21 burdensome.

12:39:31 22 It's just that -- but it is a process. It
12:39:35 23 requires imaging hard drives, it requires setting up the
12:39:40 24 database. I mean, it's just -- it's not something -- we
12:39:42 25 don't have the email sitting in a folder on our desk that

12:39:45 1 we can just hand to them. So we're not saying it's overly
12:39:47 2 burdensome. We're just saying it will take time, and we --
12:39:51 3 as with any email production, it requires some time, some
12:39:54 4 effort, and negotiation as to the parameters of what's
12:39:57 5 being produced, in addition to time to review the emails
12:40:00 6 prior to producing them, which we haven't done.

12:40:02 7 So there's -- so emails, I don't know that
12:40:06 8 that's a -- there's really an issue remaining there.

12:40:10 9 The other outstanding documents that I believe
12:40:14 10 they're seeking are Mr. Stringfield's attorney work product
12:40:19 11 notes that he took during meetings with Phillips during the
12:40:26 12 acquisition process. It's work product.

12:40:28 13 Now, they've asked for a privilege log for the --
12:40:32 14 specifically for the first time that I'm hearing today.
12:40:35 15 We're happy to discuss that. We're happy to evaluate that,
12:40:41 16 but according to the orders controlling in this court,
12:40:44 17 there is no requirement that we provide a privilege log or
12:40:48 18 a work product log for documents that existed after the
12:40:56 19 anticipation of litigation, which includes these notes that
12:41:01 20 Mr. Stringfield took.

12:41:02 21 So we haven't been required to provide a log prior
12:41:07 22 to this. I feel like we're being criticized for not having
12:41:11 23 provided a log prior to this when the parties have an
12:41:14 24 agreement that no logs would be provided.

12:41:16 25 THE COURT: So I was -- I asked Mr. Sudarshan

12:41:17 1 that, and he told me something I wasn't aware of, that the
12:41:20 2 parties had agreed not to produce post-litigation or
12:41:24 3 initiation of litigation documents on the -- had agreed not
12:41:32 4 to require a log for anything created after the litigation
12:41:35 5 began.

12:41:36 6 But was there -- are you taking a different
12:41:39 7 position that there was an agreement not to produce a
12:41:41 8 privilege log for anything?

12:41:43 9 MR. DAVIS: Well, what I'm trying to articulate to
12:41:47 10 Your Honor, and this is -- this is actually in the Court's
12:41:49 11 discovery order. I mean, the parties agreed to this, we
12:41:51 12 crafted this language, it's been signed by the Court. This
12:41:54 13 is on Page 7 in Paragraph 12, that unless good cause is
12:42:01 14 shown, the parties shall not be required to log any
12:42:04 15 privileged documents created on or after the earlier of
12:42:08 16 anticipation of litigation.

12:42:10 17 Anticipation of litigation for this case began at
12:42:14 18 the acquisition. So that's our basis. We believe it's a
12:42:17 19 good-faith basis. I know counsel feels that they're being
12:42:22 20 strung along and jerked around, but we're abiding by the
12:42:27 21 letter of the rules. The agreements that the parties have
12:42:28 22 reached, there's no -- there's no bad faith, there's no
12:42:32 23 intent here to hide the ball.

12:42:33 24 I was present at the meet and confer with
12:42:39 25 Mr. Haslam in Dallas, and there was a fulsome, candid, and

12:42:44 1 open discussion. And many of the things we're hearing
12:42:46 2 today were not presented during that meet and confer. The
12:42:50 3 tenor of what's being presented today was not present
12:42:54 4 during the meet and confer. And from our perspective, we
12:42:57 5 understood that we had reached agreement on virtually
12:43:00 6 everything. We presented them with our basis for not
12:43:03 7 providing emails. They didn't have much to say in
12:43:06 8 response to that, other than, well, let's continue to talk
12:43:08 9 about it.

12:43:09 10 We presented them with our basis for withholding
12:43:12 11 Mr. Stringfield's attorney notes, work product notes. We
12:43:19 12 presented them with the case law, primarily the Mondis
12:43:24 13 case, which we still have not received any response to or
12:43:27 14 any articulation as to why that case doesn't apply.

12:43:27 15 And I'll take issue with my colleague's
12:43:32 16 characterization of that case as not -- as dealing with
12:43:34 17 something other than the situation here, which is
12:43:38 18 acquisition funding. The Mondis case dealt with
12:43:42 19 acquisition funding. They seem to be articulating or
12:43:45 20 advocating for a position that, well, we might agree that
12:43:48 21 litigation funding is off limits if it's just litigation
12:43:52 22 funding. But if it's litigation funding plus acquisition
12:43:55 23 funding, then, you know, there -- these cases don't apply.

12:43:59 24 THE COURT: Well, maybe that's a really good
12:44:00 25 reason to keep those two things separate going forward.

12:44:03 1 MR. DAVIS: Perhaps, Your Honor. I wasn't
12:44:07 2 involved with that, but I do -- perhaps it is.

12:44:10 3 However, the Mondis case has dealt with that
12:44:13 4 situation and held that there -- that it's not -- they're
12:44:18 5 not relevant. And I didn't hear any articulation as to
12:44:22 6 what they would learn from the acquisition funding
12:44:26 7 agreements that is relevant to this case other than the
12:44:34 8 funder might have some rights in this case to control
12:44:36 9 settlement or something like that. There's been
12:44:38 10 representation that that's not correct.

12:44:41 11 Now, if -- if they'd like to ask an interrogatory
12:44:46 12 or take a deposition in which representatives from NST give
12:44:51 13 their opinions on that, then -- then they're more than
12:44:55 14 welcome to. But that doesn't justify producing the
12:45:02 15 acquisition or the litigation funding materials.

12:45:04 16 THE COURT: What if the acquisition funding
12:45:08 17 materials were produced with the -- with the, you know,
12:45:12 18 litigation funding, to the extent it's not relevant,
12:45:17 19 litigation funding sections redacted?

12:45:19 20 MR. DAVIS: With the litigation funding sections
12:45:23 21 redacted?

12:45:24 22 THE COURT: Correct.

12:45:24 23 MR. DAVIS: Your Honor --

12:45:25 24 THE COURT: Would there be any objection to that?

12:45:29 25 MR. DAVIS: I believe there might be. I --

12:45:31 1 THE COURT: What would be the objection?

12:45:33 2 MR. DAVIS: That it continues to not be relevant,
12:45:35 3 that there's nothing in there that's going to be -- the
12:45:38 4 acquisition funding -- I'm sorry, the acquisition portions
12:45:45 5 of the agreement continue to -- are -- are just not
12:45:47 6 relevant.

12:45:47 7 MR. STRINGFIELD: Your Honor, may I speak to that
12:45:49 8 briefly?

12:45:49 9 THE COURT: Yes.

12:45:50 10 MR. STRINGFIELD: I've seen the acquisition --

12:45:51 11 THE COURT: Can I ask you to go to the podium?

12:45:53 12 MR. STRINGFIELD: Only because Mr. Davis might not
12:45:57 13 be as familiar with the documentation.

12:45:59 14 So there was one transaction, there was one set of
12:46:02 15 documentation that included acquisition and litigation
12:46:05 16 funding. There aren't separate terms for the acquisition
12:46:09 17 part of the funding or the litigation part of the funding.

12:46:11 18 There was one master commitment of capital. The
12:46:15 19 litigation funder committed one amount of capital. Part of
12:46:20 20 it is allocated to the acquisition of the patents. Part of
12:46:24 21 it is allocated to attorneys' fees. Part of it is
12:46:27 22 allocated to expert witness and out-of-pocket costs. It's
12:46:31 23 one allocation of capital.

12:46:33 24 There aren't separate terms that can be carved and
12:46:35 25 sliced. It is one litigation funding agreement that

12:46:39 1 includes an acquisition component.

12:46:41 2 And to follow up on a point that my colleague,
12:46:44 3 Mr. Davis, made about the Mondis case, the Mondis case held
12:46:49 4 that there is no distinction between litigation funding and
12:46:52 5 acquisition funding. The Mondis case specifically dealt
12:46:55 6 with acquisition funding.

12:46:56 7 And we've pointed this out to TI and told TI,
12:46:59 8 look, the case law in this district is clear that this type
12:47:02 9 of funding is under the Fifth Circuit's standard where the
12:47:05 10 primary motivating purpose of the funding and of the
12:47:09 11 documents and of the attorney-prepared product is for the
12:47:12 12 purpose of possible future litigation.

12:47:16 13 The primary motivating purpose for the acquisition
12:47:19 14 funding, the same as the primary motivating purpose for the
12:47:23 15 litigation funding, which were all part of the same
12:47:27 16 transaction. I think it maybe even speaks for itself when
12:47:29 17 it's all one -- one document that provides acquisition
12:47:32 18 funding and litigation funding. The primary motivating
12:47:35 19 purpose is for litigation. Mondis dealt with acquisition
12:47:38 20 funding specifically and held that that is work product and
12:47:43 21 is treated no differently than litigation funding. And the
12:47:44 22 other cases that we cited in our five-page position paper
12:47:47 23 deal specifically with litigation funding.

12:47:48 24 There should be no different treatment. These --
12:47:50 25 these types of transaction are increasingly more common,

12:47:53 1 these litigation funding transactions that include
12:47:55 2 acquisition of portfolios. We have seen no court take a
12:47:59 3 position that if a litigation funding agreement includes an
12:48:04 4 acquisition piece, that all bets are off, and it's treated
12:48:06 5 differently. And it should not be.

12:48:08 6 Particularly -- oh, sorry, Your Honor.

12:48:09 7 THE COURT: Well, I mean, I'm not sure that I
12:48:11 8 agree that it should not be. I just think it's a -- this
12:48:16 9 is -- you know, there are courts that are looking at this,
12:48:19 10 as everyone knows.

12:48:20 11 MR. STRINGFIELD: Yeah.

12:48:21 12 THE COURT: So I don't know what the answer is.
12:48:24 13 But I do think combining them is probably not the best idea
12:48:28 14 because I can certainly -- I think there is a very
12:48:32 15 compelling argument to be made that, you know, information
12:48:36 16 related to patent acquisition is directly relevant to a lot
12:48:40 17 of issues that are going to be raised in the case. Issues
12:48:44 18 related to litigation funding, less so. And when you
12:48:48 19 combine those things in a single transaction or document, I
12:48:52 20 think you run the risk of that becoming discoverable.

12:48:56 21 MR. STRINGFIELD: It could be, Your Honor. And I
12:48:57 22 think the answer perhaps is that there are less burdensome
12:49:00 23 means of getting to the discoverable information that they
12:49:04 24 seek. If they want information on standing, we can provide
12:49:07 25 that in an interrogatory response. If they want -- if

12:49:09 1 there's --

12:49:10 2 THE COURT: That's actually what I was getting
12:49:11 3 ready to propose. And I'll have Mr. Sudarshan speak to
12:49:15 4 that.

12:49:15 5 But I assume you all, and I think Mr. Davis
12:49:18 6 suggested this as a possible resolution, is a series -- one
12:49:29 7 or more interrogatories that go to the -- the question that
12:49:35 8 the Defendants really are at. And then to the extent, you
12:49:40 9 know, the Plaintiff can provide fulsome responses to that
12:49:44 10 and give them the information they need, we may not have to
12:49:47 11 go to the next step, which is, you know, looking at these
12:49:51 12 documents in camera.

12:49:53 13 MR. STRINGFIELD: Your Honor, we agree that that's
12:49:54 14 a sensible approach, rather than burdening the Court or the
12:49:57 15 parties with trying to carve up an agreement that has been
12:50:01 16 held work product protected in many other courts. We think
12:50:05 17 that that's a better way to get the discovery that they
12:50:07 18 believe they're entitled to.

12:50:09 19 THE COURT: Okay. Thanks.

12:50:09 20 Mr. Davis, I didn't -- I don't know if
12:50:13 21 Mr. Stringfield covered everything else you were going to
12:50:16 22 address. I think I do want you to come back around to the
12:50:20 23 licenses. I'm not sure that really -- you covered
12:50:22 24 everything about the licenses.

12:50:24 25 MR. DAVIS: Correct, Your Honor. I've not

12:50:26 1 addressed the licenses yet.

12:50:28 2 THE COURT: Okay.

12:50:28 3 MR. DAVIS: Thank you.

12:50:29 4 The bottom line is we don't have the licenses. We
12:50:34 5 don't have control of the licenses.

12:50:35 6 THE COURT: Have you seen the licenses?

12:50:37 7 MR. DAVIS: I personally have not.

12:50:39 8 THE COURT: No, I'm not talking about you
12:50:40 9 personally.

12:50:41 10 MR. DAVIS: Correct.

12:50:41 11 THE COURT: I'm talking about has the -- has the
12:50:44 12 Plaintiff or anyone acting on the Plaintiff's behalf seen
12:50:48 13 the licenses?

12:50:49 14 MR. DAVIS: I don't know the answer to that
12:50:50 15 question. I know that according to the terms of the
12:50:52 16 agreement, they were made available for inspection during
12:50:55 17 the process.

12:50:56 18 Mr. Stringfield may have additional information.
12:50:58 19 He was involved in that process. He may be able to answer
12:51:02 20 whether he has seen them.

12:51:04 21 What I do know is that the agreements are not --
12:51:07 22 we don't have them now. They're no longer available --
12:51:10 23 available to us. We have asked Phillips to make them
12:51:15 24 available and avoid the subpoena process, and they've
12:51:18 25 declined to do that, which is, they believe, their right to

12:51:21 1 do.

12:51:21 2 We can't force them to produce the licenses. We
12:51:25 3 can't force them to make them available. So I believe
12:51:27 4 that's where the licenses stand, and I just -- we've done
12:51:31 5 everything we can, and there's been some inferences that
12:51:35 6 the communications between NST and Phillips have been
12:51:39 7 nefarious or some concerted effort to avoid having those
12:51:42 8 licenses produced. That's not the case at all.

12:51:45 9 And, you know, I don't know that there's any
12:51:49 10 evidence to support that at all. Phillips simply is
12:51:52 11 resting on its right not to produce something that it's not
12:51:56 12 compelled to produce by a court of law or an order -- order
12:51:59 13 requiring it to do so.

12:52:01 14 So I think that's where that stands.

12:52:04 15 THE COURT: Okay.

12:52:04 16 MR. DAVIS: Thank you, Your Honor.

12:52:05 17 THE COURT: Thank you. Mr. Stringfield, do you
12:52:08 18 have something else you wanted to say?

12:52:10 19 MR. STRINGFIELD: Your Honor, I -- only to answer
12:52:12 20 your question about whether NST has seen the agreements,
12:52:15 21 and -- and if the Court's interested in that, I can answer
12:52:17 22 that question, or I can move on.

12:52:20 23 THE COURT: Yes, please.

12:52:21 24 MR. STRINGFIELD: So, Your Honor, there are
12:52:24 25 approximately 148 identified agreements listed in the

12:52:27 1 Exhibit C to the patent purchase agreement. During the due
12:52:30 2 diligence process, Phillips provided different categories
12:52:34 3 of access to about one-third, one-third, one-third of that
12:52:39 4 148 agreements.

12:52:40 5 So there was the first one-third where Phillips
12:52:45 6 allowed outside counsel only for NST to review those
12:52:49 7 agreements through a secure portal. So it was a -- it was
12:52:52 8 a computer setup that didn't allow printing or downloading.
12:52:57 9 It tracked your eyes. If you looked away from the
12:53:01 10 computer, it locked. You know, it was very restricted.
12:53:03 11 But about a third of those outside counsel for NST was
12:53:07 12 allowed to review.

12:53:07 13 THE COURT: Okay.

12:53:08 14 MR. STRINGFIELD: The next --

12:53:08 15 THE COURT: So that's the first third.

12:53:11 16 MR. STRINGFIELD: That's the first third.

12:53:12 17 The second third is Phillips provided a summary --
12:53:16 18 a similar type of table to Appendix C, but it provided
12:53:19 19 additional detail about some of the licenses. And so that
12:53:22 20 was the second category.

12:53:24 21 That summary was also only made available through
12:53:26 22 the secure portal. NST was not allowed to retain a copy of
12:53:30 23 it. NST was never provided a copy of it. And, again, it
12:53:33 24 was only outside counsel for NST. No non-outside counsel
12:53:37 25 were ever allowed access.

12:53:39 1 The third part of the 148 identified agreements,
12:53:44 2 Phillips would not provide a summary, nor would they let
12:53:49 3 outside counsel for NST even see them. Phillips hired an
12:53:53 4 expert who was prepared to speak about them, talk about
12:53:57 5 them in general terms, but NST was never allowed to lay
12:54:00 6 eyes on them. It was never provided any summary of them.

12:54:03 7 And so as -- as Mr. Davis had alluded to earlier,
12:54:08 8 I was representing NST in connection with the acquisition.
12:54:11 9 I was serving as outside counsel. As my role as outside
12:54:16 10 counsel preparing notes in anticipation of future --

12:54:19 11 THE COURT: And is that what TI -- we're talking
12:54:21 12 about the notes that TI is seeking here?

12:54:24 13 MR. STRINGFIELD: That's right.

12:54:24 14 THE COURT: Okay.

12:54:24 15 MR. STRINGFIELD: And so, the -- you know, in our
12:54:26 16 in-person meet and confer in Dallas, they asked: Do the
12:54:30 17 principals of NST -- do the non-outside lawyers, do they
12:54:33 18 have notes of conversation with Phillips? And we said:
12:54:36 19 Well, I don't know. We'll check. We investigated. There
12:54:39 20 are no such notes. So that's --

12:54:41 21 THE COURT: The only notes are your notes?

12:54:43 22 MR. STRINGFIELD: Attorney notes made in
12:54:46 23 anticipation of litigation.

12:54:47 24 And counsel was drawing a distinction between -- I
12:54:50 25 forget the phraseology -- fact notes and opinion notes.

12:54:53 1 And he categorized that notes about the contents of the
12:54:56 2 purchase agreements would be fact notes and somehow more
12:55:00 3 discoverable than opinion notes.

12:55:04 4 It's our position that notes -- an attorney's
12:55:09 5 notes regarding interpretation of a contract -- you know,
12:55:12 6 these are 148 contracts. Contract interpretation is a
12:55:15 7 matter of law. So as an attorney is reading an agreement
12:55:21 8 and digesting it and choosing what information that he or
12:55:25 9 she wishes to record and his or her attorney impressions of
12:55:30 10 the information in a contract, that's inextricably work
12:55:34 11 product. There are no bare facts that can be extracted
12:55:38 12 from those notes.

12:55:39 13 What the -- you know, it's analogous to the law
12:55:40 14 school example of, you know, an attorney's choice of what
12:55:44 15 questions to ask and the order in which he asks a fact
12:55:46 16 witness, that's work product protected.

12:55:49 17 So, too, are an attorney's decisions on what to
12:55:52 18 write down from agreements. And his or her legal
12:55:57 19 interpretation -- interpretation of a contract which is
12:56:00 20 interpreted as a matter of law, his or her impressions
12:56:03 21 using his or her legal training, that's all work product,
12:56:08 22 Your Honor. There is no non-work product that can be
12:56:10 23 gleaned from an attorney's notes about interpreting
12:56:13 24 contracts, the limited subset thereof that NST was provided
12:56:16 25 access to.

12:56:17 1 So we see no path forward for them to get
12:56:22 2 discovery to outside counsel's notes on that subject.

12:56:22 3 THE COURT: Okay. And you're referring to outside
12:56:24 4 counsel. I'm assuming there's no inside counsel?

12:56:26 5 MR. STRINGFIELD: No, there is -- one of the
12:56:28 6 principals of NST is a lawyer. So there is inside counsel.

12:56:31 7 THE COURT: Acting as a -- I mean, are those the
12:56:33 8 subject of the motion to compel?

12:56:36 9 MR. STRINGFIELD: So --

12:56:37 10 THE COURT: There were no notes?

12:56:39 11 MR. STRINGFIELD: There were no -- so we are not
12:56:40 12 withholding any notes from any principal at NST on an
12:56:44 13 attorney work product basis. Even though one of the
12:56:48 14 principals is an attorney, we're not withholding notes on
12:56:51 15 that basis. Those notes don't exist.

12:56:53 16 The notes we're holding on an attorney work
12:56:55 17 product basis are only the outside counsel's notes. And so
12:56:58 18 those are work product for the reasons that I just
12:56:59 19 articulated.

12:56:59 20 THE COURT: Okay. That's helpful.

12:57:00 21 MR. STRINGFIELD: Thank you, Your Honor.

12:57:01 22 THE COURT: Thank you.

12:57:03 23 Mr. Sudarshan?

12:57:04 24 MR. SUDARSHAN: Picking up on that last point,
12:57:13 25 Your Honor, the notes and work product, my colleague made a

12:57:20 1 remark that this was the first time we'd asked for a
12:57:24 2 privilege log today. We did make that request in an
12:57:27 3 October 12 email after the Court's order. So we have -- we
12:57:32 4 have -- we have made the request for a privilege log in
12:57:35 5 writing, and we've insisted on that several times.

12:57:38 6 I am troubled by this position, though, on work
12:57:43 7 product that essentially counsel in the process of
12:57:48 8 acquiring these patents from Phillips that they knew they
12:57:51 9 were going to litigate, ostensibly against TI, that counsel
12:57:57 10 was privy to licenses where Phillips gave rights under
12:58:03 11 these patents to entities, including TI customers, and we
12:58:09 12 just can't know about it because they structured it in a
12:58:13 13 way that we can't know about it, there's something deeply
12:58:16 14 troubling about that.

12:58:18 15 The Robinson case that we've cited to from the --

12:58:21 16 THE COURT: I'm sorry, what do you mean by
12:58:24 17 structured in a certain way?

12:58:25 18 MR. SUDARSHAN: The structure --

12:58:26 19 THE COURT: I mean, the attorney notes are
12:58:28 20 attorney notes, Mr. Sudarshan.

12:58:29 21 MR. SUDARSHAN: No, I didn't mean -- I didn't mean
12:58:31 22 the notes. I meant the access provision.

12:58:34 23 THE COURT: Oh, okay.

12:58:35 24 MR. SUDARSHAN: The way it was -- the way it was
12:58:37 25 set up where NST didn't get these agreements, there were

12:58:41 1 summaries provided in a data room or however else it was,
12:58:46 2 but it seems to have been structured in a way that they
12:58:48 3 knew that a Defendant would be curious to know if some of
12:58:53 4 their customers were licensed, but the transaction was set
12:58:56 5 up in such a way that they'd be able to say what they're
12:59:00 6 saying today, which we can't tell you.

12:59:02 7 Where I was going with the Robinson decision is
12:59:05 8 there is an exception to work product -- the work product
12:59:08 9 doctrine. A Court may order production of ordinary work
12:59:11 10 product if the party seeking production can show that it
12:59:14 11 has a substantial need for the material in the preparation
12:59:18 12 of its case and that it cannot obtain the substantial
12:59:22 13 equivalent of the material by other means without undue
12:59:23 14 hardship.

12:59:26 15 The work product, it is not an absolute privilege
12:59:29 16 like attorney-client privilege. It is a lesser privilege
12:59:32 17 where we have established a need. And I would disagree
12:59:36 18 strongly with the notion that -- that this is opinion work
12:59:39 19 product. When you go through licenses and you're saying,
12:59:42 20 are you licensed or not, I just disagree. I don't think
12:59:46 21 that's a complex contractual analysis. Either the contract
12:59:48 22 has a license or not.

12:59:52 23 Again, the Court could look at this in camera if
12:59:54 24 there's a doubt, but we think this is ordinary work
12:59:57 25 product. We have a substantial need we've articulated.

01:00:01 1 We --

01:00:01 2 THE COURT: So let's -- let's -- what would be
01:00:04 3 your next most desirable request? Because that's -- that
01:00:13 4 opens a -- I'm not sure you're going to convince me that's
01:00:16 5 the right road to go down.

01:00:18 6 MR. SUDARSHAN: So --

01:00:19 7 THE COURT: Would a -- would an interrogatory be
01:00:23 8 the right way to proceed? Would that be your next
01:00:29 9 preferred choice?

01:00:29 10 MR. SUDARSHAN: Our next preferred choice is an
01:00:33 11 order from the Court compelling NST to answer that
01:00:37 12 Interrogatory No. 4, and clarifying that they can't say
01:00:40 13 that they can't answer it just because they don't have
01:00:44 14 physical access to those agreements.

01:00:46 15 The provision I showed you, Your Honor, is pretty
01:00:49 16 clear that they could dial up Phillips and access that
01:00:52 17 online. Maybe they don't get it turned over to them, but
01:00:55 18 we think there's an access provision that the Court could
01:00:58 19 order them to invoke to then view those agreements and at
01:01:02 20 least tell us which of those entities are licensed. So
01:01:05 21 that's our next best ask.

01:01:07 22 THE COURT: Okay. All right.

01:01:11 23 MR. SUDARSHAN: I wanted to talk about emails.

01:01:15 24 To be clear, Your Honor, we are not asking for
01:01:21 25 whole scale opening up of email production in this case.

01:01:24 1 And I wasn't clear from counsel's statement whether
01:01:29 2 there -- Your Honor, when you said go negotiate that this
01:01:32 3 afternoon, we don't think that TI has done anything that
01:01:34 4 opens up an exception to the discovery order where they get
01:01:37 5 to go tit-for-tat and say, okay, if they're going to
01:01:41 6 ask for emails from us, we're going to go serve email --

01:01:42 7 THE COURT: Oh, no, that's certainly not what I
01:01:44 8 was suggesting.

01:01:45 9 MR. SUDARSHAN: Okay. Thank you, Your Honor. I
01:01:46 10 just wanted that clarification, because we have asked for
01:01:49 11 them to articulate any burden. And so we think -- you
01:01:53 12 know, we'd be happy to talk about search terms to get the
01:01:56 13 emails we're looking for there.

01:01:57 14 Standing issue on the acquisition/litigation
01:02:05 15 funding agreement, you know, the Court asked whether there
01:02:10 16 could be some interrogatories served on this. I must say,
01:02:14 17 Judge, I -- maybe it's just a once bitten/twice shy issue,
01:02:22 18 because in the lead-up to this whole thing on the patent
01:02:26 19 purchase agreement, they had offered to answer questions we
01:02:28 20 had about the patent purchase agreement. They said it's
01:02:31 21 not relevant.

01:02:32 22 So, you know, from my client, I have a duty to
01:02:34 23 zealously advocate and get to the bottom of legitimate
01:02:39 24 issues on what we think may be standing, may be valuation,
01:02:42 25 and so I don't think it's fair for me to then just submit

01:02:44 1 myself to the same process where we didn't get the
01:02:46 2 information before.

01:02:48 3 The Court has put its finger on the issue. They
01:02:51 4 chose to structure the transaction by mixing the litigation
01:02:56 5 funding and the acquisition aspects.

01:02:59 6 The Court would be well within its authority to
01:03:02 7 order them to produce a redacted version of that agreement
01:03:06 8 that has the purely litigation finance provisions redacted.

01:03:11 9 On that point in Mondis, there were -- first of
01:03:15 10 all, there was in camera review before the Court ruled.
01:03:19 11 But there's a distinction. Mondis wasn't exactly on point
01:03:22 12 in terms of acquisition. The Court -- what the Court ruled
01:03:25 13 did not need to be produced were basically slide shows or
01:03:32 14 presentations -- I'll quote from the opinion: Enpro
01:03:36 15 provided a number of investment brokers and potential
01:03:39 16 investors with slide presentations and other documents that
01:03:42 17 contain disclosures of Enpro's licensing and litigation
01:03:46 18 strategies and also estimates of licensing and litigation
01:03:52 19 revenues.

01:03:52 20 So that was kind of a pitch. That was a pitch to
01:03:54 21 investors. We're asking for something different. There's
01:03:56 22 a super funder out there that they have an agreement with,
01:04:00 23 an actual agreement. It's not a slide deck, per se. It's
01:04:05 24 an actual agreement. We're entitled to know what rights
01:04:08 25 were given away in exchange for that funder writing a check

01:04:13 1 to finance both the litigation and the purchase of the
01:04:15 2 patents from Phillips. And so I do think an interrogatory
01:04:21 3 would not be satisfactory on that front. We think they
01:04:23 4 should produce that document.

01:04:29 5 That's all I have, Judge.

01:04:31 6 THE COURT: Okay. Mr. Davis or Mr. Stringfield?

01:04:34 7 MR. DAVIS: Unless the Court has any questions, I
01:04:38 8 don't have anything further.

01:04:38 9 THE COURT: I don't. I don't.

01:04:39 10 These are thorny issues. I had thought -- you
01:04:43 11 know, I'd thought maybe the parties would have made some
01:04:46 12 progress on the meet and confer, but I think I understand
01:04:52 13 the issues here. And, you know, I think that we'll write
01:05:02 14 an order as best we can write it and resolve these issues.
01:05:06 15 And I will fully expect both sides to work with each other
01:05:06 16 professionally and in good faith to resolve any issues that
01:05:11 17 arise after we put an order out.

01:05:13 18 So we're not going to continue to litigate this
01:05:17 19 issue to death. I'm going to rule on this issue, and
01:05:23 20 then -- on these issues, and I will hope to do that sooner
01:05:28 21 rather than later. And then once we've done that, I really
01:05:31 22 do expect you all to work in good faith to get the
01:05:37 23 discovery that is sought, okay?

01:05:39 24 Anything else on that or any other matter we need
01:05:45 25 to discuss before we adjourn?

01:05:48 1 MR. DAVIS: Nothing from the Plaintiff, Your

01:05:50 2 Honor.

01:05:50 3 THE COURT: Okay.

01:05:50 4 MR. HASLAM: Nothing from Defendant.

01:05:53 5 THE COURT: All right. Thanks to everybody. Safe
01:05:56 6 travels to you.

01:05:56 7 COURT SECURITY OFFICER: All rise.

01:05:57 8 (Hearing concluded 1:05 p.m.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/S/ Shelly Holmes
SHELLY HOLMES, CSR, TCRR
CERTIFIED SHORTHAND REPORTER
State of Texas No.: 7804
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