

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABBOTT LABORATORIES and ABBOTT DIABETES CARE INC.,
Petitioner,

v.

ALTIVERA LLC,
Patent Owner.

IPR2024-00425
Patent 7,969,307 B2

Record of Oral Hearing
Held: April 23, 2025

Before JAMESON LEE, BART A. GERSTENBLITH, and
BACH V. HOANG, *Administrative Patent Judges*.

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The above-entitled matter came on for hearing on Wednesday, April 23, 2025, commencing at 10:00 a.m. EST, at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE HOANG: Good morning. We are convened for oral arguments in IPR2024-00425, which pertains to patentability challenges of claims in U.S. Patent 7,969,307 B2. I am Judge Hoang, and I'm joined by Judge Gerstenblith and Judge Lee in the hearing room.

So let's get started with appearances for both parties, for those of you who will be arguing today. If anyone else is attending in person or remotely with you today but will not be speaking, please identify them as well. For example, please state if your client is attending.

Following the hearing, please confer with the court reporter to ensure that there are no questions regarding the spellings of names or terms.

So let's start with appearances for Petitioner.

MS. OSMAN: Good morning, Your Honors. My name is Inge Osman from Latham & Watkins, here on behalf of Petitioner, Abbott Laboratories and Abbott Diabetes Care. With me today I have my colleagues Steve Peters and Mike Morin in the hearing room, and remotely, I have Jim Kristas from Abbott.

JUDGE HOANG: Thank you.

MS. OSMAN: Thank you.

JUDGE HOANG: Patent Owner?

MR. PEKAREK KROHN: David Pekarek Krohn, Perkins Coie, for Patent Owner, Altivera LLC. With me is Rodger Carreyn and Christopher Hanewicz, also Perkins Coie, as well as Dr. John Peeters, the inventor of the '307 patent. It is possible some people are joining remotely, but I'm not positive.

1 JUDGE HOANG: Thank you.

2 A couple of notes before we begin. First, the court reporter will
3 provide a transcript of the hearing that will become part of the record in the
4 proceeding at a later date. To ensure that the transcript of the hearing is
5 clear, we ask you to speak directly in the microphone when talking and,
6 since there are a lot of slides, to identify specific slide numbers, numbering
7 the figures and any other pertinent identifying information when referring to
8 demonstratives.

9 Per the hearing order, each party has 60 minutes total time to argue
10 their cases. Petitioner will open the argument and may reserve rebuttal time.
11 Patent Owner will then respond to Petitioner's argument and may reserve
12 surrebuttal time. Petitioner then presents its rebuttal, followed by Patent
13 Owner's surrebuttal.

14 Third, please remember that your arguments should be limited to
15 those arguments previously presented in your briefs. Please make it clear
16 which challenges and claims you're addressing at all times. We ask that the
17 parties hold any objections regarding the parties' arguments until it is your
18 time at the podium to note any objections.

19 The Court will maintain a clock, and I'll try to give each party a
20 five-minute warning during the opening argument and a warning near the
21 end of any reserved rebuttal time. Our hearing room has a timer that I'll set
22 up for each party with the requested time allotment, but please also keep
23 track of your own time as a backup.

24 And fifth, I anticipate that we will take two short five-minute
25 breaks, one after Petitioner concludes its opening argument, and the second
26 after Patent Owner concludes its opening argument.

1 Okay. Petitioner, would you like to reserve any rebuttal time?

2 MS. OSMAN: Yes, Your Honor. I would like to reserve 15
3 minutes for rebuttal.

4 JUDGE HOANG: Fifteen minutes?

5 MS. OSMAN: Yes.

6 JUDGE HOANG: Okay.

7 JUDGE LEE: It's Judge Lee. To the parties, please verify you will
8 not be talking about any confidential information, because we have the
9 public access line.

10 MS. OSMAN: Yes, Your Honor. I can verify that on that matter.

11 MR. PEKAREK KROHN: Confirmed for Patent Owner.

12 JUDGE LEE: Thank you.

13 JUDGE HOANG: Very good. You may begin your arguments
14 when you're ready.

15 MS. OSMAN: Thank you, Your Honor. I have four copies of
16 Patent Owner's -- Petitioner's demonstratives if that would be helpful.

17 JUDGE HOANG: I don't -- I don't need them.

18 Do you? Okay.

19 JUDGE LEE: Counsel, if you can, can you bring the microphone
20 closer to you? Yeah. Thank you.

21 MS. OSMAN: Is that better?

22 JUDGE LEE: Yes.

23 MS. OSMAN: Thank you, Your Honor.

24 Good morning, Your Honors. My name is Inge Osman on behalf
25 of Petitioners Abbott Labs and Abbott Diabetes Care. Your Honors, this is a
26 straightforward case. The claims are not complicated, and the prior art

1 teaches or renders obvious every limitation that appears in the claims.

2 Patent Owner's arguments to the contrary amount to an effort to
3 deny what's written in black and white in the papers. So Patent Owner is
4 asking -- effectively asking the Board to ignore what's in the patent and in
5 the prior art to get around this obviousness finding.

6 But if you start with the patent itself, Patent Owner tries to get
7 around obviousness by rewriting the claims. It's proposing an unduly
8 narrow construction that is undisputedly inconsistent with the plain and
9 ordinary meaning of the term. And then, turning to the prior art, Patent
10 Owner makes arguments based on what it wishes the prior art said instead of
11 based on what the prior art actually says.

12 So, for example, Patent Owner asserts that Beck, one of the prior
13 art references, is limited to a network's wired system. But if you go look at
14 the disclosure in Beck, it expressly teaches the use of wireless connections
15 like RF and IR radio frequency and infrared. Patent Owner wants the Board
16 to just put on blinders and ignore that clear disclosure.

17 Similarly, Patent Owner asserts that the prior art does not teach
18 that its client computing device -- and again, I'm talking about Beck here --
19 is mobile. But if you look at the reference, it expressly says that its client
20 computing device can be a PalmPilot or an internet-enabled cell phone. As
21 of the priority date of the alleged invention, in January of 2004, those of
22 ordinary skill in the art understood that a cell phone and a PalmPilot were
23 mobile.

24 One more example -- Patent Owner says that Beck is limited to a
25 hospital setting. But Beck doesn't use the word hospital anywhere, and in
26 fact, it talks about glucose monitors and patients monitoring their own

1 biological and physiological conditions. This is not prior art that's limited to
2 a hospital.

3 Patent Owner is inviting the Board to adopt its
4 mischaracterizations of the record to get around the prior art. But the
5 documents as written show that these claims would have been obvious.
6 Now, this is a theme that permeates the entire case, and we'll see it come up
7 over and over today. But I'd like to address three main issues.

8 I'm hoping to start with claim construction. As I already alluded
9 to, Patent Owner is proposing a construction of a term that is -- that both
10 parties agree is inconsistent with plain and ordinary meaning. And there's
11 nothing in the specification, no lexicography or disavowal, that would
12 justify, that would merit, the departure from plain and ordinary meaning the
13 Patent Owner is asking for here. But what's important is even if Patent
14 Owner were right about its construction -- and it is not -- they would still --
15 the claim still would have been obvious because the Beck ground teaches the
16 challenged claims even under Patent Owner's incorrect construction.

17 Now, second, I'd like to start with the grounds and address the
18 Beck ground first. Now, this is Ground 3 in the petition, but I'll address it
19 first because the Board addressed it first in its institution decision and also
20 because it's really a straightforward application of prior art to the claim
21 language. There is no dispute that Beck and the references in that ground
22 are prior art. And under this ground, I'd like to show that a person of
23 ordinary skill would have been motivated to combine Beck, Heller, and
24 Lovejoy, and also that Beck teaches what I will refer to as the authentication
25 limitation, which I'll talk about shortly.

26 And then, third, I'd like to move to the Bandy ground and talk

1 about the Bandy ground. Now, the Board doesn't have to reach the Bandy
2 ground if it agrees with us on Beck. But this ground provides an entirely
3 independent reason that the challenged claims are invalid. And so, under
4 this ground, I'll show that Bandy is in fact prior art and that Dr. Bandy
5 contributed to the parts of the Bandy reference that the petition relied on to
6 show -- to invalidate the claims. And then I -- I'll also show that Bandy
7 teaches that authentication limitation as well.

8 So, with that, if you'll please turn to Slide 9, we can start talking
9 about claim construction. So this is -- the stated term appears on the top of
10 Slide 9. It is wherein the remote server authenticates said unique sensor ID
11 associated with said unique wireless device ID. Now, the Patent Owner
12 proposes that this term should be understood to require that the remote
13 server authenticates, first, the unique server -- excuse me, the unique sensor
14 ID, and second, the associated unique wireless device ID. But Patent Owner
15 agrees that this is inconsistent with the claim meaning.

16 So, on the right of the slide, you see the undisputed plain meaning.
17 This is a quote from the Patent Owner response. We did not propose this.
18 This is Patent Owner's concession on what the plain meaning of the term is.
19 Patent Owner is asking the Board to ignore the plain language and rewrite
20 the claims despite the plain meaning. But there is no support for this term in
21 the spec. In fact, this term does not even appear in the spec. There is no
22 discussion of authenticating a unique sensor ID or an association between a
23 unique sensor ID and a unique wireless device ID. That just does not appear
24 in the specification.

25 There is also no lexicography or disavowal. There's not even an
26 allegation of lexicography or disavowal that would merit the type of

1 departure from plain and ordinary meaning the Patent Owner is looking for
2 here.

3 JUDGE LEE: Counsel, it's Judge Lee. Assuming that we agree
4 with you that there does not need to be separate authentication of the unique
5 wireless device ID, what is nonetheless required by -- to meet the association
6 limitation? It has to mean something, right?

7 MS. OSMAN: And it does. That's a great question, Your Honor.

8 So if you can turn to slide -- if you could turn to Slide 17, please.

9 This is -- this is the second claim construction argument, and it's
10 sort of -- it -- it's connected to the first one, but this is focused on that
11 associated-with limitation. So the term that we're focused on here is unique
12 sensor ID associated with said unique wireless device ID. And there's been
13 sort of a dispute between the parties about what does that associated-with
14 term mean?

15 So our expert, Petitioner's expert, Dr. Sarrafzadeh, explained. He
16 said associated with, in this context, means there is a relation or connection.
17 It doesn't mean anything more than that. It has its ordinary meaning and
18 nothing more.

19 Patent Owner, in response, says, no, it's not that. But it doesn't
20 propose an alternative. Instead, it seems to be suggesting that that
21 associated-with step -- step -- it seems to be suggesting that associated with
22 requires a separate associating step. But that can't be right because there is
23 nothing in the specification that teaches associating a unique sensor ID with
24 a unique wireless device ID. That -- this language just doesn't appear in the
25 specification.

26 In fact, if you turn to slide 18, it's really helpful to look at the

1 language of the claim and sort of walk through the language to understand
2 what work that associated-with language is doing. So, if we can walk
3 through, briefly, Claim 1 together, Claim 1 recites a addressable diagnostic
4 sensor unit comprising -- and there are two different -- I should have
5 explained at the beginning, but there are two different IDs in this claim. But
6 what's interesting about Claim 1 is it refers to these two different IDs in five
7 different ways. It never refers to the same ID using the same language. It
8 just doesn't do that. So this claim has been annotated to include highlighting
9 to show which ID is being referred to when it refers to the same ID in
10 different language.

11 So, walking through the claim, it -- Claim 1 recites, an RF
12 addressable diagnostic sensor unit that comprises -- and then, focusing on
13 the ID language, a unique identification ID number. The first wherein
14 clause in that claim goes on to explain that, wherein, the RF addressable
15 sensor communicates with a remote wireless device, said wireless device
16 having multiple wireless communication means, share location means, and a
17 unique ID.

18 So, reading this claim, we know that this new ID is different from
19 the unique identification ID number because of the article, a. So we know
20 these are two different IDs that the claim is talking about.

21 If we jump down to the next wherein clause, it says, wherein the
22 wireless device communicates with the RF addressable sensor interface to
23 obtain the ID and the sensor data. So this is a new way of describing ID, but
24 we know from the context of the claim and the language surrounding that
25 word, the ID, that is the unique identification ID number that's being
26 discussed because the wireless device communicates with a sensor to obtain

1 it. It can't be the wireless device ID that's highlighted in blue because the
2 wireless device already has a wireless device ID. So this must be that first
3 unique identification ID number.

4 And then, if you move down to the final wherein clause, it recites,
5 wherein the remote server authenticates said unique sensor ID -- again, ID
6 referred to in an entirely different way -- associated with said unique
7 wireless device ID. The unique sensor ID, we know, must be that unique
8 identification ID number because it's associated with said unique wireless
9 device ID. It's associated with the unique wireless device ID; it is not the
10 unique wireless device ID.

11 So that associated-with language is serving to further explain what
12 this unique sensor ID is. Without it, it would be very hard to understand
13 what -- what ID the claim was referring to. So it's providing a further
14 description of the unique sensor ID, and the claim is also explaining,
15 according to the claim, unique sensor ID is associated with the unique
16 wireless device ID because the wireless device communicates with the RS --
17 RF addressable sensor interface to get the idea from the sensor interface.

18 So that's the association. There is, in fact, no other association
19 disclosed anywhere in the specification, no -- I should be clear. No other
20 association between the unique sensor ID and the unique wireless device ID
21 disclosed anywhere else in the specification. This association in the claim is
22 the only one that exists.

23 And if you turn to slide 19, in the institution decision, the Board
24 recognizes the word described -- it explained that the associated with said
25 unique wireless device ID language serves to further describe unique sensor
26 ID. And that's exactly right. That is the work this associated-with language

1 is doing. It's helping to explain which ID we're referring to in the claim.

2 Patent Owner, in its surreply, argues that no, that can't be right.

3 And they're -- they don't exactly explain what associated with requires
4 because they can't, because there's no support for it. But they say that's like
5 saying, every time you call someone on your cell phone, you're associated
6 with the caller. But that's precisely correct. Every time you call someone on
7 your cell phone, you're connected to, you're related to, that person in some
8 way.

9 The claim doesn't require anything more. This is another example
10 of the Patent Owner trying to write an additional limitation into the claim
11 that has no support anywhere in the record to try to get around obviousness.

12 If you'd turn, please, to slide 20.

13 So I made this point, but I just want to make it very clear the
14 specification -- we know that the specification doesn't rely -- require, excuse
15 me -- anything more than a connection or some sort of connection or relation
16 because it doesn't talk about this. There's no disclosure of a wireless device
17 ID, of associating IDs, of authenticating a wireless device ID. This just
18 doesn't appear in the specification.

19 The only description of a type of association between IDs that
20 exists is what is claimed in the specification. It's the process in the
21 specification.

22 JUDGE LEE: Well, Counsel, just looking at the -- slide 19 you
23 had, in the patent surreply -- pardon me -- I'm kind of agreeing with what
24 they're saying. And it seems like, according to Petitioner, the word,
25 associated, really has no meaning. It has no real requirement. You can take
26 it out of the claim, and everything would still be the same. So what is your

1 response to that?

2 MS. OSMAN: So, Your Honor, I don't think that's true. If you
3 turn back to slide 18, if you took the associated with -- so, if you took that
4 clause out of the claim -- and I'm talking about the bottom wherein clause --

5 JUDGE LEE: Can -- can you speak a little louder and use the
6 microphone?

7 MS. OSMAN: Oh. Sorry. My apologies. I'll move closer to the
8 microphone. Is that better?

9 JUDGE LEE: Yeah.

10 MS. OSMAN: Okay. If you look at the final clause in that
11 wherein clause -- so it's the final wherein clause in Claim 1. If you took that
12 associated-with language out of the claim, then that unique sensor ID would
13 be very hard to interpret because, the way this claim is written, it's
14 inconsistent in the way that it refers to each of these IDs.

15 That associated-with language is doing real work here. It's
16 explaining what this unique sensor ID that it's referring to in a brand-new
17 way with no support anywhere else in the specification is. Without that, it's
18 very hard to figure out which ID they're referring to and in what -- in -- in
19 that context.

20 So it's not true that the associated-with language is superfluous or
21 doesn't have a meaning. It certainly does. It's describing that unique sensor
22 ID.

23 JUDGE LEE: So what is the difference if the word, associated
24 with, is not there? Why wouldn't the claim still mean the same thing?

25 MS. OSMAN: Well, if the word, associated with, wasn't there, so
26 if you said -- let's imagine the claim said instead, wherein the remote server

1 authenticates said unique sensor ID -- and then you would skip associated
2 with said unique wireless device ID -- and communicates with -- to -- and so
3 on. It would be hard to figure out, what is that unique sensor ID? Is it the --
4 is it the wireless device ID that's -- that's highlighted in blue, or is it the
5 unique identification ID number? That unique sensor ID doesn't exist, that
6 language doesn't exist, anywhere else in the claim.

7 JUDGE LEE: Thank you.

8 MS. OSMAN: But, Your Honor, even if you -- even if you agree
9 with Patent Owner and you think associated with has to be more than what's
10 written in the claim, recited in the claim, that is still disclosed in the prior
11 art.

12 So, with that, if -- you know, unless there are more questions about
13 claim construction, I'd love to show you how that associated-with is
14 disclosed in the prior art, in the Beck ground.

15 Okay. If you could please turn to slide 88.

16 The Beck ground -- this is, again -- this is Ground 3 in the petition.
17 But the Beck ground teaches this authentication limitation, which includes
18 that associated-with language under either the plain meaning or Patent
19 Owner's construction. And so Patent Owner's construction, as you recall,
20 requires authentication of both the unique sensor ID and the associated
21 unique wireless device ID. Beck teaches both.

22 So, if you look at Beck, starting with paragraph 65 on the right, it
23 teaches that the server computing device 110 in step 306 attempts to
24 authenticate the user, the client computing device, and the medical device.
25 And then, if you skip down to the next highlighted portion of that excerpt, it
26 says, for example, authentication may be based further upon or alternatively

1 upon the network address of the client computing device, which is the
2 wireless device ID, the serial number of the medical device, which is the
3 unique sensor ID, and then stored authentication keys, et cetera.

4 So it -- it expressly teaches that authentication is based on both of
5 these devices -- excuse me, both of these IDs, not just one of them.

6 And then, if you turn to -- excuse me, not turn, but if you look at
7 paragraph 51 in Beck, Beck also expressly teaches that these different IDs
8 are associated with each other. So, in slide -- in paragraph 51, Beck teaches
9 that the patient data 208 can also include patient identification information
10 and authentication information. That authentication information, as I just
11 talked about, includes the client's computing device address, the medical
12 device serial number, the client computing device network address, which is
13 the unique sensor ID and the unique wireless device ID.

14 So Beck teaches that these different authentication IDs are stored
15 together on the client computing system, meaning that they must be
16 associated.

17 And if you turn to the very next slide -- this is slide 89 -- this is an
18 excerpt from paragraph 76 in Beck. Beck not only teaches that these
19 different authentications methods, the different IDs, are associated and
20 stored together, it expressly says -- it uses the word, associated. It says these
21 different IDs are associated with each other.

22 So, if you read paragraph 76, it says server containing device 110
23 in an exemplary embodiment stores measurement data received from the
24 client computing device with the patient data such that the measurement data
25 is associated with the user client computing device and/or medical device
26 authenticated in step 306.

1 In the paragraphs we just looked at, we understand that the client
2 computing device is -- is authenticating using the wireless device ID
3 number, and the medical device is authenticating -- authenticated using the
4 medical device serial number, which is the unique sensor ID.

5 So Beck expressly teaches authenticating both of those IDs and
6 associating those two IDs with each other. So, even if associated with
7 requires something more that's -- than what's recited in the claim, it's clearly
8 disclosed by the prior art.

9 And I also want to make the point that if we're looking at the plain
10 meaning of the term, you know, because Beck teaches the -- this limitation
11 under Patent Owner's unduly narrow construction, it necessarily also teaches
12 this authentication limitation under the proper plain meaning construction.

13 If you'd turn to slide 90, please.

14 Now, Patent Owner raises an argument that I just want to address
15 very briefly. Patent Owner argues that we didn't make this authentication
16 argument in the petition. That's incorrect. In fact, we cited to -- we not only
17 expressly cite that Beck teaches authenticating and associating the unique
18 sensor ID with the unique wireless device ID -- that's in petition at page
19 65 -- but we also cited to Beck paragraph 76 that we just looked at that
20 expressly says that these different IDs are associated with each other.

21 Now, to the extent that Patent Owner is complaining that we're
22 not -- that we didn't emphasize enough that Beck authenticates both of those
23 IDs -- you know, in fact, we did. If you look at the petition at page 62, we
24 expressly said that. But in addition, under the Federal Circuit's decision --
25 Axonics decision -- we were permitted to respond to a claim construction
26 that is raised in the Patent Owner reply -- in the Patent Owner response.

1 We're permitted to respond to that in the Petitioner reply. This is nothing
2 more than proper responsive arguments to arguments that were raised in the
3 POR.

4 So, if there are no more questions on the Beck authentication
5 limitation, I'd like to move on and talk about motivation to combine briefly.

6 Okay. Let's turn to slide 61, please. Oh, my apologies. Let's turn
7 to slide 58.

8 The petition outlines in great detail why a person of ordinary skill
9 by a skilled artisan would have been motivated to combine Beck with Heller.
10 And the institution decision outlined and identified a lot of the reasons why a
11 person of ordinary skill would have made this combination.

12 Now, Patent Owner doesn't necessarily directly respond to any of
13 the motivations that we've identified but raises a number of arguments that I
14 think it -- it's important to go through briefly.

15 If you'll please turn to slide 62.

16 Now, the first argument that Patent Owner raises is it says Beck is
17 limited to a hospital setting, i.e. non-ambulatory devices. So Patent Owner
18 says a person of ordinary skill wouldn't combine Beck's disclosure with
19 Heller's because Beck is only used in hospitals. The problem with this
20 argument is it is just not true.

21 Beck doesn't use -- as I mentioned, doesn't use the word, hospital.
22 And in fact, Beck identifies patients as users of the system. It also talks
23 about glucose monitoring and patients monitoring their own biological and
24 physiological conditions. This is not a reference that is limited to a hospital
25 setting.

26 In fact, during Patent Owner's expert deposition, we asked him

1 about this. We said, hey -- and this is slide 63. We -- we -- we raised this
2 exact argument. We said, are Beck's medical devices limited to a hospital
3 setting? And he said no. He said that's what the spec teaches, but there's no
4 disclosure of that in the specification, in Beck's specification. Patent Owner
5 is asking the Board, again, to ignore Beck's disclosure and read the reference
6 as they wish it were written.

7 If you'll please turn to slide 65.

8 Another argument Patent Owner raises is that Heller, according to
9 Patent Owner, teaches away from that because, according to Patent Owner,
10 Beck is limited to large or bulky or inflexible devices. Now, as a
11 preliminary matter, that's not true. Beck is not limited to large devices.
12 There's nothing in Beck that would limit it in that way.

13 But in addition, there is -- Heller, if anything, motivates the
14 combination. It says devices that are large or bulky or ineffective can be
15 really annoying for patients when they need something like continuous
16 glucose monitoring, and so it's better to make these devices smaller. If
17 anything, a person of ordinary skill in the art reading Heller and Beck would
18 have adopted the teachings of Heller and modified Beck. If anything, it
19 motivates the combination. It does not teach away.

20 If you'll turn --

21 JUDGE HOANG: Counsel, do the claims require a, let's say,
22 mobile or unbulky device?

23 MS. OSMAN: No, Your Honor, they don't. There's nothing in the
24 claims that would require a mobile or unbulky device.

25 JUDGE HOANG: And to your combination of Beck and Heller, is
26 your combination necessarily creating this mobile device or is the

1 combination more incorporating certain features from Heller into Beck? Or
2 is it some -- one of each?

3 MS. OSMAN: Your Honor, our combination -- I just want to be
4 very clear about this. You're not combining two -- taking two systems and
5 mashing them together into, like, a franken-system or franken-device. We
6 are taking the teachings of Heller and incorporating them with the teachings
7 of Beck.

8 And so I think this is a really important point because Patent
9 Owner raises a lot of arguments about physical combinability. The Federal
10 Circuit has explained that physical combinability is not the test. In fact, the
11 Federal Circuit has said this is basically irrelevant to the question of
12 obviousness because the question of obviousness is, would a person of
13 ordinary skill in the art with the knowledge of a person of ordinary skill in
14 the art know how to combine these references in this way or combine the
15 teachings in this way? And that is precisely what the petition establishes.

16 We're combining the teachings. So -- and we've identified the
17 specific teachings in Heller that a person of ordinary skill would have
18 combined, and we've explained -- we've provided the reasons that a person
19 would have combined them in that way.

20 JUDGE HOANG: Thank you.

21 MS. OSMAN: If you'd please turn to slide 66.

22 So the next argument that Patent Owner raises on motivation to
23 combine is -- is sort of a hybrid argument. It's framed as motivation to
24 combine, but I want to explain it a little bit more.

25 Patent Owner in its POR says that a person of ordinary skill would
26 not have combined Beck and Heller because Beck discloses a system

1 concerned with communication between medical devices, whereas Heller
2 has sensor technology. The problem with this argument is it assumes and it
3 creates a false dichotomy between Beck's medical device and the claimed
4 sensor unit.

5 In fact, the petition establishes that Beck's medical devices are the
6 claimed diagnostic sensor units. And if you look at the claim -- so, again,
7 we're looking back at Claim 1 of the '307 patent, and it's on slide 66 on the
8 left -- it recites an RF addressable diagnostic sensor unit comprising. This is
9 a broad claim. It defines the diagnostic sensor unit as comprising at least
10 one sensor element, at least one referenced sensor element, a sensor
11 interface, at least one antenna, a substrate, and so on.

12 This is a broad claim. It's not limited in size. Patent Owner is
13 suggesting that Beck's medical devices are too large to be considered
14 diagnostic sensor units, but there's just nothing in the claims or in Beck or
15 anywhere to support that argument. Beck's medical device is a sensor unit,
16 and a person of ordinary skill in the art -- as Dr. Sarrafzadeh -- this is
17 Petitioner's expert -- explained, a skilled artisan would have understood that
18 Beck's medical devices must have used sensor elements in order to monitor
19 and analyze the biological and physiological, you know, analytes and
20 information that Beck talks about analyzing. The only way to do that is with
21 sensors.

22 And so if you'll please turn to the very next slide, slide 67.

23 So Patent Owner makes an additional argument. This one is -- is
24 sort of related, though, so I wanted to make sure to talk about them together.
25 Patent Owner is arguing about -- we talked about physical combinability
26 already, but Patent Owner argues that Beck's glucose monitor uses test

1 strips, and because it uses test strips, you wouldn't have combined it with
2 Heller, which uses a sensor control unit and an on-skin sensor control unit.

3 Now, we've talked about why that physical combinability
4 argument is problematic. But Patent Owner also makes a related argument,
5 and it says that because glucose is -- Beck's glucose meter uses test strips, it
6 doesn't have sensors. So it says the sensor -- the test strips are the sensor,
7 and the glucose meter doesn't have sensors.

8 That argument fails for three different reasons, the first of which is
9 it just doesn't make sense. Beck's medical device, the glucose monitor,
10 necessarily includes the test strips. The test strips are part of the medical
11 device. The medical device can't operate without them. It is dependent on
12 those -- the test strips. And this is a box-drawing exercise where Patent
13 Owner has tried to draw a box around the part of the prior art that it likes and
14 exclude the part that it doesn't like to try to get the Board to find the claims
15 not obvious. That argument just doesn't work.

16 It also fails for a second reason. Beck's disclosure is not limited to
17 a glucose monitor. Beck says there are lots of different types of medical
18 devices that you could use. And on the very previous slide -- oh, this is --
19 sorry -- slide 66. Apologies for going back and forth. But on slide 66, Beck
20 lists a whole number of things that you can monitor using its medical
21 devices. It's not just glucose. It says bodily fluids, bodily functions, bodily
22 signals, bodily stimuli. This would include devices like an EEG, an EKG --
23 a variety of devices. It's not limited to just a glucose monitor.

24 And then, finally, if we're talking about the combination of Beck
25 and Heller, a person of ordinary skill, a skilled artisan, would have known
26 how to use Heller's teachings and combine them with Beck, as we -- as we

1 described. And that might mean that they're not using glucose strips. But a
2 person of ordinary skill in the art would have had the ordinary information
3 and the background knowledge of a skilled artisan in the field and would
4 have been able to do that. And there isn't a dispute about that.

5 So, unless there are questions about the Beck and Lovejoy
6 combination, I want to go ahead and turn instead to Patent Owner's
7 arguments about unique identification number. So, unless there are any
8 questions, I should have said, about motivation to combine, we perhaps can
9 turn to slide 79.

10 JUDGE LEE: This is Judge Lee. I do have a question about the
11 recitation of a -- in Claim 1 of a unique ID code, unique identification ID
12 number. The way Petitioner is approaching this in your paper, are you
13 regarding that as a unique identification ID number of the sensor element, or
14 not necessarily so, as long as you find a unique ID number of anything that
15 meets it?

16 MS. OSMAN: Your Honor, I think that is an excellent question.
17 The way that this claim is written, the unique identification ID number could
18 be an identification of this diagnostic sensor unit. It could also be -- it -- it's
19 written broadly, though, so it could also uniquely identify the sensor
20 element. Either one qualifies as a unique identification ID number.

21 So, the way the papers are written, we said --

22 JUDGE LEE: Oh, yeah, I know. But I just wanted to know, the
23 way you present it in your petition, which way have you gone? Have you
24 said, well, it can be anything, and I'm using this -- I'm using that? So have
25 you identified a unique ID number of the sensor element in the art, or are
26 you just saying, look, it may not be the unique ID number of the sensor

1 element, but it doesn't matter because it's a unique identification ID number
2 anyway?

3 MS. OSMAN: So our -- our position is that we identify the
4 medical device serial number of Beck, and that is a unique identification ID
5 number of the sensor unit because the medical device is the claimed sensor
6 unit. And the unique identification ID number, we asked -- I -- I actually
7 think this is a position Patent Owner took in its briefings, as well, that the
8 unique identification ID number identifies the sensor unit.

9 We think it's a broad term. It could identify either, but it certainly
10 encompasses identifying the diagnostic sensor unit. And that's exactly what
11 Beck teaches. It teaches a medical device serial number, and that medical
12 device is the claimed diagnostic sensor unit.

13 JUDGE LEE: Okay. Then the follow-up question is, later on in
14 Claim 1, there is a unique wireless device ID, which is different from the --
15 the first instance of a unique identification ID number, right? So you haven't
16 used the same ID to meet both, right?

17 MS. OSMAN: No, Your Honor. We have two different -- two
18 different IDs. So you're -- you're absolutely correct. There are two different
19 IDs. The first one, the unique identification ID number -- and I'll stick with
20 Beck just because that's the ground we're talking about. In Beck, the unique
21 identification ID number identifies the diagnostic sensor unit. In Beck, that
22 is the serial number of the medical device. So it identifies the sensor unit --

23 JUDGE LEE: Right. How about the second one? Tell me about
24 the second one and how it distinguishes from the first --

25 MS. OSMAN: The second one --

26 JUDGE LEE: -- in the prior art.

1 MS. OSMAN: Absolutely. So the second one is a wireless device
2 ID. In Beck, the wireless device is an internet-enabled cell phone. That
3 internet cell phone, Beck teaches, has a network -- a network address. And
4 our -- our expert, Dr. Sarrafzadeh, also said it has a MAC address and an
5 IMEI address. That is the second thing These are two distinct IDs, and they
6 identify different things.

7 JUDGE LEE: Well, okay. I understand the answer. How about
8 the recitation of said unique sensor ID? Then there's no antecedent basis for
9 that.

10 MS. OSMAN: So, when we -- can we go back to the -- thank you.
11 So we're -- we're looking at -- we're looking at slide 80, just so we have
12 the -- the claim language up. So that's right. There's no antecedent basis for
13 said unique sensor ID. That's why that associated-with language is so
14 important. It's providing the work that is necessary because there is no
15 antecedent basis.

16 Because there's no antecedent basis to figure out what that unique
17 sensor ID is, you need that associated with said unique wireless ID language.
18 That language makes clear that the said unique sensor ID is the same ID that
19 was recited first as a unique identification ID number.

20 Because it can't be the wireless device ID -- it's associated with the
21 wireless device ID -- it must be distinct from --

22 JUDGE LEE: So what is the reasoning for regarding said unique
23 sensor ID as the recitation, a unique identification ID number? I mean,
24 you've linked the two.

25 MS. OSMAN: Yes, Your Honor.

26 JUDGE LEE: So what -- what is the underlying basis that allows

1 you to do that?

2 MS. OSMAN: The underlying basis is the language in the claim.
3 The language in the claim recites two different IDs. It recites a unique
4 identification ID number and then a -- sorry. Let me go back to the claim
5 language on -- give me one second. Let me go back to the right slide.

6 Slide 18, please. Thank you.

7 So this is back to slide 18. The reason we know we can link them
8 is because there were two -- there are two articles -- two IDs that have been
9 identified by the article, a. The first one is highlighted in yellow. It says a
10 unique identification ID number. The second one is identified as just a
11 unique ID. So we know those are two different unique IDs.

12 And then, if you continue walking through the claim, you can tell
13 which ID is being referred to by the language surrounding the claim. So, in
14 the second -- this is the second wherein clause. It says the wireless device
15 obtains the ID and sensor data. To obtain the ID, there -- again, it's the ID,
16 but there's no -- you know, it's not using the same language. So, to figure
17 out which ID is being obtained --

18 JUDGE LEE: So you're saying because that's the only other one,
19 so it has to be that one.

20 MS. OSMAN: That -- that's exactly right. So, the way the claim is
21 written, it doesn't use the same language to talk about these different
22 sensor -- these different IDs.

23 JUDGE LEE: Okay. That's a little tenuous, but if we say that,
24 then it's got to be a sensor ID, right? Because the preamble says sensor unit
25 comprising -- that comprises a unique identification ID number. And you
26 say, because that's the only one left, so that has to be the thing that's

1 identified by said unique sensor ID.

2 MS. OSMAN: And -- and it is a sensor --

3 (Simultaneous speaking.)

4 JUDGE LEE: But if you do that, then the first instance has to be a
5 sensor ID, doesn't it? It -- it cannot just be a -- a generic device ID, then.

6 MS. OSMAN: And I -- and I need to be clear. I wasn't -- I wasn't
7 trying to insinuate that it could be a generic device ID. It could be either the
8 diagnostic sensor unit ID or a sensor element ID. And the way both parties
9 have argued this, they've said that the unique identification ID number has to
10 be an ID of the sensor unit. And so, in fact, the sensor unit is a medical
11 device that includes a medical device serial number.

12 JUDGE LEE: I see. So you regard the overall medical device as a
13 sensor unit.

14 MS. OSMAN: It is a sensor unit. Correct. And so you're
15 absolutely right. That ID has to identify a sensor unit, and that's what Beck
16 does.

17 JUDGE LEE: What about the argument that it's not just a sensor
18 unit; it's also got a display, it's got a strip reader, it's got all the other things
19 to it, so you can't regard that overall medical device as a sensor unit? What's
20 the response?

21 MS. OSMAN: Your Honor, that argument just doesn't have any
22 basis in the record. If you look at this claim, it's a broad comprising claim.
23 There's nothing in the specification or prosecution history anywhere that
24 would limit the size of a sensor unit to any particular size. There's no basis
25 to say, oh, well, you know, if you're beyond a certain size, then you're not a
26 sensor unit anymore.

1 Also, you're right that Beck says you could have -- you could have
2 various types of input/output devices. Beck also says the input/output
3 device on its medical device could just be an LED. That could be a very
4 small device. There's just simply no basis for -- for the assumption or the
5 statement that Beck is limited to these large, bulky devices. That's just not
6 true. That could be a tiny device like the one in Heller that's attached to the
7 skin. It is the medical device that analyzes biological or physiological
8 conditions of a patient. It's a sensor unit.

9 JUDGE LEE: So it's a sensor unit. It doesn't matter. It's got a
10 display. It's got other -- a strip reader. It's got other things.

11 MS. OSMAN: Well -- well, to be clear, Beck doesn't limit it to,
12 you know, something that has a really large display or a strip reader. Beck
13 says the medical device could have all these things, and there's a whole list
14 of things that Beck includes and says any of these could be included. But it
15 doesn't say the medical device must include X, Y, and Z. That's just not
16 present.

17 JUDGE LEE: Thank you. But it -- it almost feels like we're doing
18 a lot of heavy lifting to make sense of this claim because there are a lot of
19 areas that it doesn't seem exactly right. Aren't -- aren't we doing a little too
20 much, rather than just say, look, this claim is just confusing; we don't know
21 what it means?

22 MS. OSMAN: Your Honor, I don't think so. I -- I agree this claim
23 could be written better, but this claim is not one where, you know, we can't
24 figure out what it means and we can't render an obviousness determination
25 because it's intractable and we can't figure it out.

26 When you look at the language surrounding words like unique

1 sensor ID, it makes it clear which ID is being talked about. This is not a
2 claim that we just can't understand. This is certainly one where we can
3 match it to the prior art and find that the prior art teaches every limitation in
4 this claim and that it would have been obvious based on the disclosures in
5 the prior art.

6 So we talked a little bit about unique identification ID number, but
7 unless there are objections, I just want to go through that one more time very
8 briefly.

9 If you'll please turn to slide 80.

10 So this is -- Judge Lee, we were just speaking about the unique
11 identification ID number. One of the arguments that Patent Owner raises in
12 its surreply is the serial number doesn't identify -- isn't a unique identifier for
13 a sensor, which is, I think, the one we were just discussing.

14 The problem with this argument is it identifies a sensor unit.
15 Beck's medical device is a sensor unit -- I mean identifies a sensor unit. And
16 also, if you look at the specification, what the specification says about the
17 unique identifier is that it identifies uniquely the type of sensor used. That's
18 precisely what Beck's serial -- medical device serial number does. It
19 identifies the type of sensor used. It identifies not only the type of medical
20 device but also the types of sensors used in that medical device. This meets
21 the claim limitations, and it meets the description in the specification of the
22 claim limitations.

23 And just to be clear, it also -- I'm sorry, Judge. Do you have a
24 question?

25 JUDGE HOANG: Counsel -- yes. Does the claim require that the
26 unique identify -- the unique identification ID number actually identify a

1 type of sensor?

2 MS. OSMAN: The claim doesn't require that, no. It's not in the
3 claim. It's -- if you look at the specification for the description of what work
4 that ID does, that's where you get it. But it's not in the claim.

5 But I -- I just want to make one brief additional point on here. It
6 also uniquely identifies the medical device, because there's some dispute in
7 the papers about whether the serial number uniquely identifies the sensor
8 unit. It's a serial number. It uniquely identifies the sensor unit in Beck.

9 With that, I want to touch on Bandy very briefly and -- unless there
10 are any other questions on Beck.

11 JUDGE HOANG: I -- I actually want to turn to the motivation
12 between Beck and Lovejoy for a minute. Sorry to call you back.

13 MS. OSMAN: Sure.

14 JUDGE HOANG: But Patent Owner raises the argument that the
15 modification or the combination of Beck and Lovejoy results in whatever
16 geolocation means being put in the sensor unit rather than the client
17 computer or the wireless communication means. What's your response to
18 that argument?

19 MS. OSMAN: Your Honor, there's absolutely no reason why a
20 person of ordinary skill in the art would have put the geolocation in the
21 sensor instead of -- instead of in the cell phone or in the client computing
22 device. That -- that's not what a person of ordinary skill in the art would
23 have done.

24 A person of ordinary skill in the art would have had reason to put
25 the geolocation means in the cell phone because that was the standard
26 technology in cell phones as of the time of the alleged inventions. In 2004,

1 as, you know, we submitted, the FCC report was out trying to move the
2 whole industry towards having handset-based geolocation.

3 So it was an obvious choice to add geolocation to the cell phone
4 later. And also, because Beck talks about having, you know, line-of-sight
5 connection to the -- the sensor that's being read by using infrared, for
6 instance, or even RF, that -- that would have suggested that the cell phone
7 and the sensor are in close contact with each other.

8 JUDGE HOANG: Patent Owner raises the point that the FCC
9 report are goals, not that necessarily every single cell phone had geolocation
10 means in that. Would just the mere goal, you know, of adding geolocation
11 in cell phones -- would that be adequate motivation?

12 MS. OSMAN: I just want to be clear about how we're using the
13 FCC report. We're not combining with the FCC report. This isn't a
14 combination. The FCC report is used to show the knowledge in the industry
15 at the time, which is -- and we're also, to be clear, not arguing inherency.
16 We're not arguing that every single cell phone in 2004 included geolocation
17 means.

18 What the FCC report clearly shows is that those of ordinary skill in
19 the art, those skilled in the art at the time, knew that you could add handset-
20 based geolocation, GPS or non-GPS-based, to a cell phone and that they
21 were actually doing it at the time.

22 And -- and to your question, also, about Lovejoy and whether you
23 would add geolocation to the sensor or to the cell phone, you know, there --
24 either -- they -- potentially, you could have done either thing. But it's -- it's
25 not required for obviousness for it to be the best option. But it was an
26 option, and it would have been obvious to do it, to add it in the cell phone.

1 JUDGE HOANG: Thank you. You have about three minutes
2 remaining.

3 MS. OSMAN: Okay. And so, with my three minutes, I just want
4 to very briefly talk about Bandy.

5 JUDGE LEE: I have one question --

6 MS. OSMAN: Yes.

7 JUDGE LEE: -- about Bandy. In case you don't have time to get
8 to it, I want to ask it now. How is the binary tree protocol of Mr. Bandy
9 relied on in your petition to meet any limitation of a challenged claim?

10 MS. OSMAN: So, if you'll turn to slide 26, I can show you exactly
11 the portions that were relied on and how. The portions -- the binary tree
12 protocol -- and I want to be clear Dr. Bandy didn't just contribute the binary
13 tree protocol. He also contributed to the logic to interrogate and read RFID
14 ties from RF addressable sensors.

15 So these are portions of Bandy that were cited and relied on in the
16 petition to anticipate this limitation in 1K, which is, wherein the wireless
17 device communicates with the RF addressable sensor interface to obtain the
18 ID and sensor data. This binary tree traversal protocol and the interrogation
19 protocols generally disclosed in Bandy are a way to communicate with the
20 RF addressable sensor.

21 There -- are they the only way? No, but they are the way that was
22 determined and that was used in the Bandy reference. And that's exactly
23 what the Petitioner relied on. In fact, if you look at -- so this is on the right
24 of the screen -- column 16 in Bandy, we specifically relied on this particular
25 embodiment in Bandy. And in this embodiment, it's expressly noted that the
26 protocol use is a binary tree traversal protocol.

1 This is the embodiment that we pointed to in the petition, and it
2 expressly teaches that it uses that particular binary tree traversal protocol.
3 And there isn't any dispute in the record that Dr. Bandy contributed this
4 particular protocol --

5 JUDGE LEE: Yeah, that's why I asked, because I think that's the
6 only corroboration you have. With regard to everything else Mr. Bandy says
7 he invented, there's no corroboration. But here, at least the other inventor
8 does not dispute that this particular protocol was the work product of Mr.
9 Bandy. So I want to ask, well, how did you rely on this specific protocol to
10 meet a limitation? Because if you haven't, then it doesn't matter.

11 MS. OSMAN: No, I completely understand. I want to push back a
12 little bit. It's not the only thing we relied on. Dr. Bandy contributed to all of
13 the interrogation in the Bandy reference. The Bandy reference --

14 JUDGE LEE: I understand. But you know, it's well established
15 that we need -- you need independent corroboration for anything an inventor
16 says he conceived. Well, I'm not able to find any corroboration for anything.
17 So the only corroboration there is, is where both inventors said the same
18 thing. Then they corroborate each other. Thus far -- and if you want to, you
19 can tell me what corroborations are there for the other assertions of Mr.
20 Bandy?

21 MS. OSMAN: So absolutely. And I want to be clear. Both
22 inventors agree that, yes, Dr. Bandy contributed that binary tree traversal
23 protocol, but they also both agree that Dr. Bandy contributed to interrogation
24 generally -- more generally, not just that particular protocol. So Dr. Bandy
25 contributed to the interrogation --

26 JUDGE LEE: Can you point out where that is?

1 MS. OSMAN: Yeah. Absolutely.

2 JUDGE LEE: The only thing I -- other thing I remember is
3 probably the singularization that Mr. Bandy says he did. But I'm not sure
4 how that was relied on to meet any limitation of the challenged claim. You
5 can show that to me, too.

6 MS. OSMAN: Sure. So let's start with -- start on slide -- this is
7 31. Yep. So this is Dr. Bandy's testimony at his deposition --

8 JUDGE LEE: Which slide is this?

9 MS. OSMAN: Excuse me. Slide 31.

10 JUDGE LEE: Okay.

11 MS. OSMAN: So, Slide 31, we asked Dr. Bandy about his
12 contributions, and we specifically pointed to Claim 65 in Bandy. Claim 65
13 in Bandy talks about transmitting signals to the one or more RF addressable
14 sensor where the signals initialize the one or more RF addressable sensors.
15 And that's how RF addressable sensors work. First, you have to initialize
16 them. Then the next step is you interrogate the one or more RF addressable
17 sensors to isolate an individual RF addressable sensor.

18 These are the two steps we talked about with Dr. Bandy. He
19 said -- so we asked him, did you -- is this like what you contributed to
20 Bandy? And he said yes. And if you turn to the very next slide -- this is
21 Slide 31 -- we also asked Dr. Peeters the same question. And he said the
22 word 'isolation' could be Bill's contribution, and he said the rest is an area I
23 had detailed knowledge about.

24 And then we said, well, is that really the only portion that Dr.
25 Bandy contributed to? And he said, you know what, I don't recall exactly;
26 that was 22 years ago -- which I completely understand. Obviously, that was

1 a long time ago.

2 And I just want to make the point and be very clear that it is true
3 that we have the burden of persuasion. Petitioner has the burden of
4 persuasion. That doesn't move. That doesn't shift throughout the
5 proceeding. But Patent Owner has the burden of production to show that
6 Bandy is not the prior art. And here, they have not produced enough
7 evidence --

8 JUDGE LEE: You didn't cite any case law for that. I was going to
9 ask you about that.

10 MS. OSMAN: Oh, you're right. We may not have cited the case
11 law in the record. Dynamic Drinkware, the Federal Circuit case says that.
12 But you're right. Apologies, Your Honor. We didn't cite that as well.

13 JUDGE LEE: Well, isn't their affirmative production already met
14 by pointing out that their inventor is on the Bandy patent?

15 MS. OSMAN: I -- you know, I don't think so, Your Honor. The
16 reason I don't think that meets the burden of production is they're not the
17 only inventor. So Bandy is invented by another because it's invented by Dr.
18 Peeters and Dr. Bandy. It's not the same inventor. And they produced two
19 declarations, one from Dr. Peeters and one from Dr. Bandy. But when we
20 talked to Dr. Bandy about his declaration in his deposition, he made it very
21 clear that that declaration is not reliable.

22 I'm sorry. I see I'm over time.

23 JUDGE LEE: What do you think they would have to do to meet
24 the burden of production if they are subject to that burden?

25 MS. OSMAN: So, Your Honor, I think they would have to
26 produce reliable declarations. They would have to produce

1 contemporaneous evidence showing that Dr. Peeters conceived of the
2 invention at the time independently.

3 And I want to be clear. Conception isn't just, I had the idea of
4 doing it. It requires more than, you know, I have an idea of a flying car, and
5 so I conceived of it. It's the definite and permanent idea of the invention.
6 And there isn't -- there just isn't sufficient evidence of that.

7 JUDGE LEE: Exactly. I agree with you. There's a lot is required
8 to show conception of anything. But for that very reason, it seems like
9 whoever has the burden has an uphill to climb here. And I don't know where
10 you get the idea they have to have the burden of production on that, but even
11 if they do, it seems like by just saying, look, Bandy -- the Bandy reference
12 has my name on it, so it's not the work of another -- that seems to me to the
13 burden of production, and then it's back to you, who has the burden of proof,
14 to say, you know, although your name is on it, Bandy is actually the guy
15 who invented -- owned material that we're relying on for the petition.

16 MS. OSMAN: Your Honor, we can come back to you -- I can
17 come back to you on rebuttal with a case cite, happily. But I would also say,
18 you know, the fact that the inventors are different on the Bandy reference
19 should go our way. That suggests that it's not the same inventor. That is
20 under 102 -- that is prior art by another. It's their burden to come forth with
21 evidence showing that no, in fact, everything that's been relied on in the
22 petition is something that Dr. Peeters independently invented because,
23 otherwise, inventorship would be incorrect, right? Otherwise, that Bandy
24 patent should just have Dr. Peeters on it; it shouldn't have Dr. Bandy on it as
25 well.

26 Just very briefly, I want to talk about the Dr. Bandy declaration

1 and kind of explain -- oh, unless you have a question, Dr. Hoang -- Judge
2 Hoang.

3 JUDGE HOANG: Well, Counsel, we see that you're into your
4 rebuttal time. We asked you a lot of questions, so if you need a little more
5 time in your rebuttal, we can give you five minutes back and give Patent
6 Owner an equal five minutes, or we can just take this from your rebuttal
7 time.

8 MS. OSMAN: I would love an extra five minutes. Thank you.

9 JUDGE HOANG: Okay.

10 MS. OSMAN: Thank you, Your Honor.

11 JUDGE HOANG: Okay.

12 MS. OSMAN: Okay. Thank you. So, very briefly, on Dr.
13 Bandy's declaration -- so, as I mentioned, to comply with their burden of
14 production, Patent Owner came up with two declarations, one from Dr.
15 Peeters and one from Dr. Bandy.

16 Dr. Bandy -- if you look at Slide 39, we asked him about his
17 declaration, in which he said that his contributions to the Bandy reference --
18 referred to as the '803 patent, but it's the Bandy reference -- did not relate to
19 the sensor features recited in various claims in the '307 patent. But when we
20 asked him about the '307 patent in his deposition, he said, I've never read it;
21 I don't know anything about it. So his testimony about whether or not he
22 contributed to the claims in the '307 patent is not reliable. He hasn't read the
23 patent.

24 And if you'll turn, please, to Slide 40.

25 In his declaration, Dr. Bandy talked in great detail about a meeting
26 that he had with John Peeters, Dr. Peeters, and said during this meeting, Dr.

1 Peeters -- according to Dr. Bandy's declaration -- allegedly came up with the
2 idea of incorporating a reader into cell phones and modifying these cell
3 phones to use RFID sensors.

4 When we asked Dr. Bandy at his deposition about this meeting, he
5 said, I don't remember, effectively. And so I just want to read this
6 testimony. It's very important. We asked him, do you remember that
7 meeting? And he said, vaguely; I knew John pretty well. Who reminded
8 you about when you met John Peeters? Well, I was reading -- it wasn't
9 reading his declaration. I'm trying to remember how he came up with his
10 system. I think John and I talked about it because John had called me and
11 said this case is happening and reminded me of the patent and asked me if I
12 would basically testify on his behalf in terms of the details of how he
13 generated the patent. I think he must have reminded me when he had that
14 meeting and how it all happened, which is good. I think that's how it came
15 about.

16 So I want to be very clear. This description in the Bandy
17 declaration isn't Dr. Bandy's memory. This is Dr. Peeters relaying to him
18 what he remembers happening. So we don't have two declarations from the
19 inventors in the Bandy patent. We have a declaration from John Peeters, Dr.
20 Peeters.

21 And Dr. Peeters, you know, with all due respect -- I'm sure he's an
22 excellent scientist. But, you know, he has a strong interest in this. He is the
23 inventor on the '307 patent. This Bandy declaration is not reliable.

24 And then one more point. The Patent Owner also submitted a
25 number of exhibits to try to support/corroborate their contention that Dr.
26 Peeters independently invented that -- everything that we relied on in the

1 Bandy reference.

2 If you turn to Slide 37, these are excerpts from some of these
3 exhibits. One of them is an email from Dr. Peeters where he said -- and this
4 is directed to Dr. Bandy and Dr. Arneson, who are founders of Matrics2. He
5 said, I thought a great deal yesterday about matching your RFID technology
6 with our cell phone platform technology. This is not an invention. Bandy
7 was not independently invented by Dr. Peeters. It was in coordination with
8 Dr. Bandy.

9 And then, on the right of the slide, you see an outline from Dr.
10 Peeters that he put together where he identified what is lacking. And he
11 specifically said things that are lacking -- well, before I get to that, I want to
12 point out that technologies that were already existing, he noted, included
13 geolocation and a unique ID. Those were technologies provided by a cell
14 phone.

15 So what is lacking? On-phone sensing abilities. Gentag would do
16 that. Gentag is Dr. Peeters' company. But he also said remote censor
17 analysis capabilities, which would be done in coordination with Matrics2,
18 Dr. Bandy's company, and also low-cost power-up and read capabilities for
19 an RFID chip, also done with Dr. Bandy -- Matrics2, his company.

20 And then, finally, what is currently lacking Bill and Michael to
21 complete? Bill and Michael are Dr. Bandy and Michael of the -- of the
22 Matrics2 company, and that included sensing ability, continuous variable
23 measurements, an A/D converter -- analog-to-digital converter --
24 programmable memory, and so on.

25 I just want to be very clear. They worked together. This was not
26 independently -- Bandy was not independently invented by Dr. Peeters, and

1 certainly, Dr. Bandy contributed to the RFID reader and the tap technology.

2 Before I sit down -- I can see I'm losing time -- I want to make one
3 final point. A number of Patent Owner's slides today include arguments and
4 citations to the record that are not anywhere in the papers, so I just wanted to
5 flag these are not cited in the record. And you know, I'll address them on
6 rebuttal. But -- unless there are any other questions, I'll sit down.

7 JUDGE LEE: Maybe when you sit down, you can answer this on
8 your next time up. I'm looking at your reply where you indicate that what
9 you relied on to show how certain limitations are met -- you were citing
10 petition page 29, where the parentheses quoting Bandy, column 13, 1 to
11 13 -- lines 1 to 13. And I'm going to your petition, page 29. I don't see any
12 wording followed by a citation to Brandy, column 13, lines 1 to 13. So --

13 MS. OSMAN: I'll look that up, Your Honor.

14 JUDGE LEE: Oh, actually, I found it now. That's okay.

15 MS. OSMAN: Okay. Okay.

16 JUDGE LEE: That was my only question. Thank you.

17 MS. OSMAN: Thank you very much.

18 JUDGE HOANG: Okay. So it looks like you're ten minutes over
19 time, but I'm going to add ten minutes to Patent Owner's full time. So,
20 instead of 60 minutes, Patent Owner has 70, and you'll still have your 15
21 minute rebuttal time.

22 MS. OSMAN: Thank you, Your Honor.

23 JUDGE HOANG: Okay. And also, we are going to take a quick
24 five-minute break, and we will be back in about five minutes.

25 (Whereupon, the above-entitled matter went off the record at 11:00
26 a.m. and resumed at 11:05 a.m.)

1 JUDGE HOANG: Welcome back.

2 MR. PEKAREK KROHN: Thank you.

3 JUDGE HOANG: Patent Owner, do you wish to reserve any
4 rebuttal time?

5 MR. PEKAREK KROHN: Yes. I'd like to reserve 20 minutes of
6 rebuttal time.

7 JUDGE HOANG: Twenty minutes of rebuttal time, so that means
8 your argument time is 50 minutes. Please begin when you're ready.

9 MR. PEKAREK KROHN: Thank you, Your Honors. I agree with
10 Petitioner's counsel. I think this is a straightforward case. And I'd like to
11 start where Petitioner started, which is with the Beck/Heller reference.

12 And we heard a lot from the other side, but what we didn't hear, I
13 think, is fatalist combination. They never showed any sensor unit with a
14 unique identification ID number, as required by the claims of the '307 patent.

15 So, turning to Slide 37, as you can see, Claim 1 of the '307 patent
16 requires a radio frequency (RF) addressable diagnostic sensor unit
17 comprising a unique identification ID number. That means that the sensor
18 unit has to have a number that is different from all other diagnostic sensor
19 units. Neither Beck nor Heller has

20 JUDGE HOANG: Counsel, sorry to interrupt. Just before we
21 continue, so you are reading that this unique identification number is unique
22 to the sensor unit rather than to the sensor element recited in the claim?

23 MR. PEKAREK KROHN: I think that's right. Now, in many
24 sensor units, there may only be one sensor. And so, when it refers later to
25 the sensor ID, it doesn't say sensor element ID. It just says sensor ID. I
26 think it's pretty clear that's referring to the sensor unit.

1 JUDGE HOANG: Thank you.

2 MR. PEKAREK KROHN: And neither Beck nor Heller has a
3 sensor unit with a unique identification ID number. Both Beck and Heller
4 have disposable sensor units that are read from separate medical devices,
5 and the only purported unique ID from either reference is the serial number
6 for Beck's glucose meter. So Petitioner cannot meet its burden to show a
7 combination that has a sensor unit with a unique ID.

8 JUDGE GERSTENBLITH: Well, Counsel, what's wrong with the
9 glucose unit?

10 MR. PEKAREK KROHN: So the glucose meter, as disclosed in
11 Beck in paragraph 34, this is the only glucose meter disclosed in Beck.

12 And importantly, while Petitioner talked about combining general
13 medical devices, general sensor units supposedly with Heller, the
14 combination is specifically with the glucose meter. They take the
15 temperature sensor, for example, from Heller and combine it with the
16 glucose meter. They take the substrate and combine it with the glucose
17 meter. So, while there is other references to other medical devices, such as
18 EKG machines, and that sort of thing in Beck, it is the glucose meters -- the
19 only thing that they appear to combine when they're talking about Beck and
20 Heller.

21 And as you can see, the glucose meter disclosed in Beck is not a
22 continuous glucose monitoring system as in Heller. The glucose meter in
23 Beck is a glucose meter that uses test strips. So, while Heller is an in vivo
24 testing system where it's measuring glucose subcutaneously, what the
25 glucose meter in Beck is about is an in vitro measurement where you put
26 your blood on a test strip, and then you insert that test strip into the glucose

1 meter and

2 JUDGE HOANG: Counsel?

3 MR. PEKAREK KROHN: Yeah?

4 JUDGE HOANG: Could you show me where the petition makes it
5 very clear that it's limiting itself to this combination to Beck's glucose meter
6 rather than using elements of the glucose meter?

7 MR. PEKAREK KROHN: So, I think I have, at least, in the reply.

8 So this is their summary of their supposed combination. And they
9 say they would apply Heller's teachings to Beck, including a temperature
10 sensor to improve sensor accuracy, but the temperature sensor in Heller is
11 only for analyte monitoring. It's not for blood coagulation or anything else.
12 It's specific to analyte monitoring.

13 Similarly, they say substrate is a way -- a known way to implement
14 sensors for glucose. It says and other measurements. But Heller says
15 nothing about other measurements. It only talks about analyte
16 measurements such as glucose.

17 And then, they talk about the adhesive patch. But again, an
18 adhesive patch in Heller is specifically for measuring analytes, not for
19 cardiac function or anything like that.

20 JUDGE LEE: Counsel?

21 MR. PEKAREK KROHN: Yeah.

22 JUDGE LEE: This is Judge Lee. If you regard the unique
23 identification ID number as the unique identification ID number of the
24 sensor unit, then what's wrong with what the Petitioner did, which is to
25 regard the medical device as having the unique identification number.

26 MR. PEKAREK KROHN: Right, but -

1 JUDGE LEE: ID and the cell phone as having the unique
2 wireless device ID?

3 MR. PEKAREK KROHN: So, Judge Lee, you had some questions
4 about does, if I understood correctly, does a sensor unit stop being a sensor
5 unit when you add things to it, and I don't think that's the issue here.

6 The issue is the medical device that they're pointing to, the glucose
7 meter, is a it's what's not in that glucose meter, and what's not in that
8 glucose meter are sensors. Petitioner said, oh, it has sensors. But it's
9 undisputed that the sensors for the glucose meter disclosed in Beck are the
10 test strips, the sensor units.

11 Dr. Warren said that it's the test strips that are glucose sensors.
12 They're the ones that chemically measure the enzyme and turn that into an
13 electric signal. And then what Dr. Sarrafzadeh said is he didn't under he
14 didn't address that question. He couldn't say where the sensors were in the
15 glucose meter disclosed in Beck. So it's undisputed that the test strips are
16 the sensor units in a in the glucose meter of Beck.

17 And so, if you take the serial number for the separate reading
18 device, that is not a unique identification ID number for the sensor unit.
19 And in fact, in their petition, Petitioner recognized that the sensors in Beck
20 would include one sensor element, such as electrochemical electrodes in the
21 case of a glucose meter. And those electrochemical electrodes, those are on
22 the test strip, not in the reading device.

23 JUDGE HOANG: Counsel, if you could, please identify the slide
24 numbers, that would be

25 MR. PEKAREK KROHN: I apologize.

26 JUDGE HOANG: Thank you. But (CROSSTALK)

1 MR. PEKAREK KROHN: For the record, when we were looking
2 at paragraph 34, that was Slide 31. The discussion about the undisputed
3 opinion, that's Slide 32. And then finally, the reference from Petitioner's
4 petition about electrochemical electrodes is Slide 33.

5 JUDGE HOANG: And so, Petitioner asserts that what you've done
6 is just a box drawing exercise, and you've drawn the box a little bit too
7 narrowly. Why can't we -- or why can't the Petitioner assert that the meter --
8 the diagnostic sensor unit is the test strips and the glucose meter and
9 whatever else they need?

10 MR. PEKAREK KROHN: Well, so I think there's a few issues
11 there. One and we get at Slide 32 the undisputed testimony is that the
12 sensor unit is the separate test strip. Second, they are separate components.

13 And if you look at Claim 1, it's not just that the that it has to have
14 so turning to Slide 63, which is Claim 1 it's not simply that the device has
15 to have a unique that the sensor unit has to have a unique identification ID
16 number. It has it for a purpose, right? And that purpose is to communicate
17 software related to that unique identification ID number.

18 And so, if the if you're saying that sort of the combination of the
19 test strip and the reader is somehow past the sensor unit, then it doesn't make
20 sense to download the software when you're putting in the test strip, but
21 they've pointed to nothing like that. So I think that because these are
22 separate components, literally separate, you need to be able to download
23 software related to the ID of the sensor unit, not to the glucose meter.

24 JUDGE HOANG: And do these arguments regarding the sensor
25 versus the sensor unit and what they are, do they still work if we're not
26 reading -- or Petitioner is not reading the diagnostic sensor unit as the

1 glucose meter and instead is reading Beck's more general description of the
2 medical device as the diagnostic sensor unit?

3 MR. PEKAREK KROHN: Well, so, I think they still - I think that
4 gets back to a little bit of the motivation to combine because if they're just
5 reading general medical devices, which Beck, you know, describes a number
6 of them we've talked about EKG machines in the petition because they
7 mention that in our papers because they mention that in the petition, I
8 believe. But you can't just combine Heller.

9 There's no motivation to combine Heller, which is a very specific
10 analyte monitoring system -- in vivo analyte monitoring system. You can't
11 combine that with an EKG machine. You can't combine that with all these
12 things and just sort of say, oh, I'm going to use a temperature sensor because
13 I feel like using a temperature sensor. Their arguments are specific
14 teachings from Heller that really only apply to the glucose meter. They
15 haven't said that it applies to anything else.

16 JUDGE HOANG: So is it your position that Heller is limited to a
17 particular type of sensor, or is it your position that Petitioner's combination
18 is limited to that particular type of sensor?

19 MR. PEKAREK KROHN: I think that Heller's teachings are very
20 narrow to analyte monitoring in vivo, using a subcutaneous skin patch.

21 JUDGE HOANG: Thank you.

22 JUDGE LEE: This is Judge Lee. So I'm not sure I get the answer.
23 Are you saying, for a typical glucose meter, Petitioner cannot regard that
24 entire meter as the sensor unit; they have to regard the test strip as the sensor
25 unit?

26 MR. PEKAREK KROHN: I think that's right, Judge Lee. For a

1 glucose meter that uses test strips, the only glucose meter disclosed in Beck,
2 the undisputed testimony is that the test strips are the sensor units. And
3 there's no indication of any other sensor in the actual device. And so, there's
4 no ability to meet the limitations of Claim 1's diagnostic sensor unit.

5 JUDGE LEE: But wouldn't it be for the glucose meter with the
6 test strip in it? That would still (CROSSTALK) --

7 MR. PEKAREK KROHN: Again, the glucose meter, at some
8 point, has the test strip in it, but they are separate components. And again,
9 the claim isn't just about having a sensor unit that just happens to have a
10 unique identification ID number. The claim is about getting software based
11 on that unique identification ID number. And they haven't pointed to
12 anything in their petition where it's sort of the test strip plus the meter as
13 being the sensor unit. They just say that, oh, it's just the medical device
14 generally. I don't think they've pointed to anything like that, Judge Lee.

15 I'd like to go back to Slide 38. And I just want to point out that
16 this is from their petition, and this is their entire argument on unique ID
17 number from the petition. And it relates only to medical devices. It does not
18 talk about sensor units at all.

19 So, turning to slide 40, I think this shows Petitioner's problematic
20 logic. They start with Beck, where the test strips, which are the sensors,
21 don't have a unique ID, and add Heller, which does not disclose any unique
22 ID, but somehow, Petitioner asserts that the result has a sensor unit with a
23 unique ID. It just doesn't make sense.

24 And to be clear, I know we've talked a little bit about this, but this
25 issue isn't limited to test strips. Heller discloses the on-skin sensor unit,
26 which is what the Petitioner relies on, as well as a receiver/display unit. And

1 Dr. Sarrafzadeh could not or would not say whether this, his combination,
2 included the receiver/display unit.

3 So the point is that in both Beck and Heller, there's a sensor unit
4 and a separate receiver communicating with that sensor unit. In Beck, the
5 receiver is the glucose meter communicating with the test strip sensor unit.
6 And in Heller, it's the receiver/display unit communicating with the on-skin
7 sensor unit.

8 JUDGE HOANG: I just -- I want to -- stay on this slide for just a
9 second.

10 MR. PEKAREK KROHN: For sure.

11 JUDGE HOANG: So the claim requires a unique identification
12 number, and that is for the diagnostic sensor unit. Here, it looks like what
13 you're asserting is Beck's test strips have no unique IDs, or are you saying
14 that the test strips are the sensor unit, or are the test strips the sensor?

15 MR. PEKAREK KROHN: The test strips are the sensor unit. I
16 think some of the testimony from Dr. Warren might've used the term sensor
17 as opposed to sensor unit, but I believe that the test strips have the sensor on
18 them. So, to the point, they are the only things that could be a sensor unit, I
19 guess, is the point. They have pointed to no sensor in the actual device. The
20 only sensor is on the test strip. And so, the test strips would be the sensor
21 units, as in because they're the only things that have a sensor, if that makes
22 sense.

23 JUDGE HOANG: I see what you're saying. I guess that gets back
24 to Petitioner's box drawing argument that you can't say that the glucose
25 monitoring device and those test strips, that is what teaches or reads on the
26 diagnostic sensor unit.

1 MR. PEKAREK KROHN: Again, I don't think they've pointed to
2 anything like that in the petition. They just sort of generally talk about
3 medical devices. They haven't described the particular where the sensor is
4 in the glucose meter.

5 JUDGE HOANG: Okay.

6 JUDGE LEE: So, yeah. This is important. This is Judge Lee. So,
7 to the extent -- I'm not saying, you know, if it has any merit, but to the
8 extent that it would be good for Petitioner to regard the glucose meter
9 together with the test strip together as sensor unit, and you're saying that was
10 never laid out in the petition?

11 MR. PEKAREK KROHN: I don't think that was ever there. And
12 to the extent you're going to do that, I think it causes problems with their
13 purported combination, right?

14 So one thing that was not clear, and this gets a little bit to the
15 motivation to combine, it's not clear what exactly -- what teaching they're
16 taking from Heller. Are they teaching taking just the teaching of using a
17 temperature sensor? And if so, are they putting a temperature sensor on the
18 test strip, or are they putting it on the reader? They don't really say. Same
19 thing with the substrate, they don't say whether that's going on the test strip
20 or in the sensor, or are they taking the entire subcutaneous patch? And if
21 they're taking the entire subcutaneous patch, then they don't talk about how
22 that would work with the separate device of the separate glucose meter
23 reader in Beck.

24 And to the extent that's what they're doing, you no longer have this
25 combination, right? If they're taking the entire patch, then you have this
26 device that has a sensor and a reference sensor and a serial number and

1 everything like that because that would be a separate device. And again,
2 Heller doesn't teach that its separate reading device has a serial number and
3 unique ID.

4 JUDGE LEE: I see . Oh, it's Judge Lee again. So your position is
5 they cannot regard the serial number for the glucose meter as the unique ID
6 for the sensor unit because the glucose meter has no sensor in it.

7 MR. PEKAREK KROHN: That's exactly right, Judge Lee.

8 So I want to talk about a couple of the new theories that Petitioner
9 presented on reply. The first one is that the unique ID of the sensor unit
10 need not be unique at all. And if there's any doubt to what Petitioner meant
11 in its reply, Dr. Sarrafzadeh testified that two devices, each with a serial
12 number 123, would still have unique IDs. And this is Slide 41, for the
13 record. But this is inconsistent with the plain the claim language and
14 inconsistent with the plain meaning of the word unique. There's nothing
15 unique about two identical numbers.

16 JUDGE LEE: What about -- are there -- is there enough evidence
17 in the record for the Board to find that absent the test strip, there's no sensor
18 in the glucose meter? Because if I didn't know anything about all this
19 technology, someone could think, oh, the test strip is just a channel that
20 takes blood from one end and puts it into the other end. There's some sensor
21 in the glucose meter to sense and process.

22 MR. PEKAREK KROHN: Right. So, going back to Slide 32, and
23 I might have been looking at a different version of this slide before, but this
24 is basically what we were looking at before. The evidence is Dr. Warren's
25 undisputed testimony. Dr. Warren said it is the test strips that are the
26 glucose sensors. They it's the test strips that contain enzymes that

1 chemically react with glucose to create carriers in the form of an electric
2 current. That's what a sensor is. That's what Dr. Warren said. That's

3 JUDGE LEE: You're what slide number?

4 MR. PEKAREK KROHN: This is Slide 32. And Dr. Sarrafzadeh
5 didn't think about this in his opinion. He said he couldn't figure out exactly
6 where the sensor was in a glucose meter that uses that use test strips or
7 glucose meter generally.

8 And again, this aligns with what Petitioner said in Slide 33, what
9 Petitioner said they understood a sensor element to be -- it's the
10 electrochemical electrodes in the case of the glucose meter.

11 And just as a demonstrative, just so we're all understanding what
12 we're talking about, test strips are more than just absorbent pieces of paper,
13 and just in case people aren't familiar with it, there's just a picture of a box
14 that shows

15 JUDGE LEE: What is the input from the test strip to the glucose
16 meter? Is it something electrical or

17 MR. PEKAREK KROHN: It's electrical, yes. There are
18 electrodes on the end of a test strip that then connect with the glucose meter.
19 And I think that's basically what the definition of a sensor would be. It's
20 something that is it's like a transducer, takes a chemical reaction and turns
21 that into a different form of energy, such as an electrical current, that can be
22 read by a separate device to then

23 JUDGE LEE: So you would say that's not sensing; that's
24 communicating something that's already sensed.

25 MR. PEKAREK KROHN: It's reading. It's communicating.
26 Sensing is the electrode is the chemical reaction converted into some sort

1 of electrical signal.

2 JUDGE GERSTENBLITH: Counsel, do you does the glucose
3 meter have electrochemical electrodes?

4 MR. PEKAREK KROHN: The glucose meter itself, I don't
5 believe it does. And Dr. Warren sure didn't think (CROSSTALK)

6 JUDGE GERSTENBLITH: For example, the slide you were just
7 on previous to this one here

8 MR. PEKAREK KROHN: Slide 33, yes.

9 JUDGE GERSTENBLITH: from the petition, page 42, when it
10 says, such as electrochemical electrodes in the case of a glucose meter, what
11 are those electrochemical electrodes? Are you saying that that means it's on
12 the test strip as opposed to in the meter itself or

13 MR. PEKAREK KROHN: Exactly. There are, for sure, there are
14 electrical connections in the reader, but the electrochemical electrodes, the
15 ones that are converting chemical interaction into electricity, either
16 amperage or resistance or something like that that can be read by the reader,
17 that's all on the test strip.

18 JUDGE GERSTENBLITH: And does that even matter if we
19 consider the medical device to be the meter plus the test strips? Like, why
20 does that matter that it's -- that they're separate once you put it in?

21 MR. PEKAREK KROHN: So, again, I don't think that I'm
22 guessing she'll say something different when she steps up here, but I don't
23 think that Petitioner's pointed to specifically, I know Dr. Sarrafzadeh said
24 anything about, you know, the medical device being the device plus the test
25 strips.

26 And again, they can't just take the device plus the test strips as

1 exists in Beck because it doesn't have substrate; it doesn't have a temperature
2 sensor, as they acknowledge. And so, you have to combine it with the
3 teachings of Heller. And so, in Heller, they are entirely separate devices.
4 There is no connection between the two. There is a meter display unit, and
5 there is a skin patch.

6 So if there were an analogy and I don't think they've made this,
7 but if you were going to try to make the analogy, it would be the reader
8 display unit that would be kind of like the glucose meter that reads the test
9 strip. It would be the on-skin sensor unit that's kind of like the test strip.
10 But again, if you do that, there's no serial number disclosed in Heller for that
11 reader display unit. And in Beck, the only serial number would be for that
12 reader, not for anything you're pulling from Heller.

13 JUDGE GERSTENBLITH: And if the unique ID is the meter
14 itself, that doesn't help anybody because you need it to be attached to the
15 sensor specific -- you need it to be specific to the sensor part.

16 MR. PEKAREK KROHN: It doesn't help Petitioner. That's for
17 sure, right? The claim requires a diagnostic sensor unit, which means it has
18 a whole bunch of things, including a sensor, a reference sensor, those sorts
19 of things, and it has to have a unique identification ID number, which means
20 it needs to be unique across those sensor units.

21 And that, turning again to Slide 41, that's the argument that they
22 try to make in reply. They try to say that it doesn't actually need to be
23 unique to sensor units. It just you can have two of the exact same serial
24 number, and those would still be unique, and that doesn't make sense.

25 The other argument they make, on Slide 42, is that the serial
26 number identifies the type of medical device, and I want to address so this

1 late argument is that the assertion that a serial number for a medical device,
2 such as an EKG machine or a glucose meter, identifies every component of
3 the device, including the replaceable sensor units.

4 But as discussed in our surreply, that's like saying that a vehicle
5 information number, or VIN, identifies a particular tire or brake components
6 of a car, and I mean the actual brake components, the actual tires, not a type
7 of tire. But of course, those components, like the test strips of a glucose
8 meter or the leads or electrodes of an EKG machine, are often swapped out
9 without changing the serial number or VIN of the overall device.

10 JUDGE HOANG: I thought Petitioner's argument was that the ID
11 just identifies the medical device, so and because Petitioner is mapping the
12 diagnostic sensor unit to the medical device, then that ID does -- is unique
13 for the medical device. So, in your VIN number example, it's just that the
14 VIN number is identifying the car, not the tires.

15 MR. PEKAREK KROHN: Right, but I think that is sort of but I
16 think they say that it also identifies every component of that meter, which I
17 think they would say, if the sensor units are these test strips, which I think
18 it's undisputed they are, or the sensor units are the skin patch, it would have
19 to identify all of those, and you can't do that. But if there's a recall on a
20 certain batch of brake pads, telling you my VIN number isn't going to know
21 whether or not I need to take my car in.

22 JUDGE HOANG: Thanks.

23 MR. PEKAREK KROHN: And Dr. Sarrafzadeh was asked about
24 this in his deposition, and he could not answer whether you would how
25 you would determine which sensor unit components were used based on the
26 serial number of the overall medical device. For test strips and this is

1 Slide 43 for determining which test strips were used in the glucose meter,
2 he said he didn't know if anyone would be interested in doing that, even
3 though Petitioner specifically argued the ability to do that in its reply. In
4 fact, he said it was not something he would mind, though.

5 And similarly, on Slide 44, Dr. Sarrafzadeh could not answer how
6 to determine which leads or electrodes were used in an EKG machine based
7 on the EKG machine's serial number.

8 So, in summary, as shown on Slide 45, Beck, which is what
9 Petitioner relies, does not disclose a unique ID for a sensor unit, but only, at
10 most, a unique ID for a separate medical device. And Petitioner's additional
11 argument should be rejected both because they are untimely and because
12 they are just wrong. The ID must be unique to each sensor unit, as recited
13 by the claim, and there is no way of determining the particular separate
14 sensor units used with a medical device based on the serial number of the
15 medical device.

16 I do want to talk going to Slide 28, we've been talking about
17 assuming that someone would be motivated to make this combination, and
18 but beyond the fact the combination doesn't meet all the limitations, which
19 again is fatal to Petitioner's argument, I do want to talk a little bit about the
20 motivation to combine.

21 Judge Hoang, I think you asked about sort of how they were
22 combining Heller, the teachings of Heller with the teachings of Beck, and it's
23 still not clear to me. I understand they're not doing a Franken-device, I
24 think, as Counsel said, but they still need to explain exactly how you would
25 take these teachings and apply them. Dr. Sarrafzadeh couldn't really explain
26 what it was. I don't think I heard anything today explaining what it was,

1 again, whether you are taking the entire skin patch, whether you're taking
2 just the temperature sensor, how the substrate fits in, all that kind of stuff.

3 Looking at Slide 29, Beck's in vitro glucose meter is incompatible
4 with Heller's in vivo sensor unit, and Petitioner hasn't explained how the
5 combination would work or identify which components would be included.

6 So, going to Slide 34 as one example, Dr. Sarrafzadeh had no idea
7 what would be and would not be included in this purported combination of
8 Beck and Heller because he had no real understanding of how or why this
9 combination would be made. Notably, as we've discussed, Heller discloses
10 both an on-skin sensor unit and a separate receiver/display unit, but Dr.
11 Sarrafzadeh could not say whether his purported combination would include
12 the receiver/display unit.

13 So I want to look at one of Petitioner's slides, Slide 66, Petitioner's
14 Slide 66, if there's a way to switch the ELMO. So I'll wait for that to come
15 up.

16 Do I have to do anything else?

17 HEARING STAFF: Since it didn't do it that way, if you can, un-
18 connect your HDMI

19 MR. PEKAREK KROHN: Oh, okay.

20 UNIDENTIFIED SPEAKER: and have it come up that way.

21 MR. PEKAREK KROHN: Okay. There we go. I can see it on
22 mine now, at least.

23 HEARING STAFF: Just give it some time.

24 MR. PEKAREK KROHN: Sure. There we go. So, again, this is
25 Petitioner's slide 66. Petitioner put this slide up here highlighting a number
26 of items from the claim to assert that Beck's medical device was a sensor

1 unit. But Petitioner admits that Beck doesn't disclose a reference sensor
2 element or a substrate, so it must show that a POSITA would be motivated
3 to add those components based on the teachings of Heller.

4 Looking on the right side of this slide, Heller's temperature probe
5 is only for in vivo testing of analytes. It didn't teach using it for any other
6 purpose. And so, the highlighting of blood pressure, blood gases, blood
7 coagulation, et cetera, that's irrelevant to anything taught in Heller. The only
8 device in paragraph 34 that relates at all to anything in Heller is the glucose
9 meter. And as we've talked about before, unlike the Heller system, the
10 glucose meter in Beck uses test strips, not a skin patch.

11 So we looked at slide 35 before, but I want to look at it again. This
12 is Petitioner's summary in their reply of the changes that they would make to
13 Beck, based on the teachings of Heller. But given that Dr. Sarrafzadeh
14 could not say what the sensor was in Beck's glucose meter or what
15 components would be included in the resulting combination, Petitioner
16 cannot meet its burden of showing there would be a motivation to combine
17 these aspects of Heller with the sensor of Beck's glucose meter. Since Dr.
18 Sarrafzadeh cannot identify the sensor, Petitioner can't show how it's going
19 to mount a sensor to a substrate. Since Dr. Sarrafzadeh can't identify a
20 sensor, Petitioner can't show how it would be affixed to a person.

21 Notably, Petitioner said in its petition that the substrate would
22 provide structure for connecting to an analyte monitor, but neither Beck nor
23 Heller described this. For Beck, there's no indication that a substrate helps
24 loading the test strip into the reader, and Heller doesn't describe connecting
25 the sensor to a monitor at all. So, just to be clear, Heller is about a wireless
26 connection between the patch and the receiver displaying it. So it's not

1 something that you can just sort of swap out with the medical the glucose
2 meter in Beck.

3 Petitioner doesn't say whether the asserting combination that does
4 in vivo or in vitro testing. In other words, they don't say whether the
5 resulting combination includes the entire subcutaneous patch from Heller or
6 the test strips from Beck, and either way, they can't meet their burden. If
7 they are taking entire patch from Heller, they can't show a unique ID. If
8 they are not taking the entire patch from Heller, they can't show a motivation
9 to combine the in vivo components of Heller with Beck's test strips. And
10 even if they could, there is still no unique ID for the test strip sensor unit.

11 Unless there are other questions on the Beck/Heller combination,
12 I'll go on to talk about the '803 patent and why it's not by another.

13 So, turning to slide 10, the '803 patent is not by another because
14 everything properly relied on by Petitioner was contributed by Dr. Peeters,
15 the inventor of the '307 patent. It's very simple. Dr. Bandy contributed only
16 the binary tree traversal protocol to the '803 patent. That's the only thing in
17 the record that is that he's described as contributing, and that protocol is
18 not properly relied on in the petition. The binary tree traversal protocol is
19 not discussed or claimed in the '307 patent. In fact, it is incapable of
20 meeting any of the limitations of Claim 1 of the '307 patent.

21 And right now, we're on slide 11, which is a summary. The
22 Petitioner's Counsel said that he, that Dr. Bandy contributed interrogation
23 broadly, but that just isn't the case.

24 JUDGE LEE: Counsel?

25 MR. PEKAREK KROHN: Yeah?

26 JUDGE LEE: Let me get into this. They when I asked

1 Petitioner's Counsel what word exactly did they rely on which is Mr.
2 Bandy's contribution to the to take down a challenged claim, they said,
3 well, the it's the binary tree protocol, right? And did you just say that they
4 did not rely on that?

5 MR. PEKAREK KROHN: No, no, no. So thank you, Judge Lee.
6 They didn't properly rely on it because there's nothing in that binary tree
7 traversal protocol that can meet any of the limitations of the claims of the
8 '307 patent.

9 JUDGE LEE: Yeah, I understand, but isn't that a different
10 question? If there's nothing there, then you will win on the merits. To say it
11 doesn't matter who invented it, even if it's by another, it doesn't meet it
12 because so what? The binary tree protocol doesn't meet anything in my
13 claim, so the challenge is no good for that reason, not that he's not a
14 coinventor of the binary tree, and therefore, it is the reference of another?

15 MR. PEKAREK KROHN: Judge Lee, that's an interesting way to
16 look at. I think that that is accurate. If they are relying solely on the binary
17 tree traversal protocol, they can't meet the limitations because the binary tree
18 traversal protocol does one thing and one thing only. It isolates a tag from a
19 sea of tags.

20 I can go to slide 13. So Dr. Bandy explained his contribution to
21 the '803 patent, and he described his binary tree traversal protocol, which
22 referred to here, I think, as a tree-walking protocol. And the purpose of this
23 was to singulate or isolate I think that they're synonymous out of a
24 thousand tags, a particular tag that you're looking for.

25 So, if you're in a room and you're doing temperature sensing, right?
26 You have temperature sensors all over the place, and you know the IDs of all

1 of those tags. You need to read all of them, right? So you go in order, and
2 you can say, okay, I want to read the one that's in that corner. I know that
3 ID. I'm going to have to isolate that tag, so when I'm asking for data, which
4 is a separate process, but when I'm asking for data, that's the one that's going
5 to tell me because I want to know the temperature there, not the temperature
6 in the other corner. And that's what the binary tree traversal protocol does; it
7 isolates.

8 JUDGE LEE: But I remember there's testimonial evidence saying,
9 yeah, he invented the singulation.

10 MR. PEKAREK KROHN: Exactly.

11 JUDGE LEE: That's the same thing, right? The binary tree and
12 the isolation of the singulation of one tag among a sea of tags.

13 MR. PEKAREK KROHN: Exactly. One tag among a sea of tags.
14 One in a thousand, it's a little bit like finding a needle in a haystack. Or
15 perhaps, counting all the pieces of hay but identifying them individually.
16 And the key is to do that, you need to know the RFID ID ahead of time.
17 You need to know which tag you're going to interact with by its ID. That's
18 how you do this isolation. That's what this binary tree traversal protocol
19 does.

20 In slide 14, Dr. Bandy was specifically asked about whether the RF
21 power and communications interface was something in his company's
22 products, and what Dr. Bandy said is they did not have a communication
23 protocol and work communicating status. All they were doing was getting
24 back responses to help isolate the tag, which he said was a very different
25 logic operation.

26 And I think that it's a little confusing sometimes because

1 interrogation is talked about in a number of ways. And so, while this is
2 sometimes referred to as interrogation protocol, binary tree traversal
3 protocol is about purely isolation. Once you isolate the tag, the actual
4 reading of the tag is sort of standard RFID communication that Dr. Bandy
5 I'm sorry Dr. Peeters was aware of going back to at least 1997.

6 JUDGE LEE: So you don't dispute that Mr. Bandy invented or had
7 significant contributions to the binary tree protocol in the singulation and
8 isolating one tag among a sea of tags?

9 MR. PEKAREK KROHN: I think that's right. You know,
10 whether he invented it, whether he improved it (CROSSTALK)

11 MR. PEKAREK KROHN: It came from Bandy's side of the
12 house, right? It was not something that Dr. Peeters came up with. But
13 again, that doesn't meet any of the limitations of the claim because

14 JUDGE LEE: I understand that. Maybe you're right, maybe you're
15 not. But isn't that a separate question, that does it meet it or not, and not
16 whether it's a reference of another?

17 MR. PEKAREK KROHN: So it's important for the *Duncan*
18 *Parking* analysis, right? Because they need to show what they relied on
19 turning to Slide 17 they can't just sort of say, oh, look, it says binary tree
20 traversal protocol, so we're relying on it. It's in that set of we have a cite to
21 it; we win, right? They need to show that that's used to meet some limitation
22 of the claims, and it can't because it the reading of data, in particular this
23 limitation, Limitation 1(k), is wherein the wireless device communicates
24 with the RF addressable sensor to obtain the ID and sensor data. So

25 JUDGE LEE: Oh, you mean used successfully to meet the claims;
26 is that what you mean? What if they used it, but it's, you know, it's no good?

1 MR. PEKAREK KROHN: It's no well, and they're citing other
2 things, right? So it's possible that the rest of that, the cited language, may
3 meet the claim, may not. But even if it meets the claim, that's because Dr.
4 Peeters came up with it, not because Dr. Bandy came up with it. What Dr.
5 Bandy contributed so you sort of like if I understand the Duncan Parking
6 analysis, you sort of take out what Dr. Bandy contributed, and what you're
7 left with is that what they're relying on. I think it is. And so, there's nothing
8 from Dr. Bandy's contribution that obtains the ID and the sensor data from
9 the wireless device.

10 JUDGE LEE: Then why is it even cited -- relied on by Petitioner?

11 MR. PEKAREK KROHN: I think, honestly, I think it was a little
12 happenstance. I want to be clear about, sort of, the procedural history here.

13 So, in their petition, they cite some general things about reading
14 data, communicating with the tag. In our POR, we explain why Dr. Bandy's
15 contribution was very narrow, not related to any of this. Neither the petition
16 nor the POR talks about the binary tree traversal protocol.

17 Then in his deposition, Dr. Bandy discussed the binary tree
18 traversal protocol and said, oh, that was my contribution. And he explained
19 in depth what it was. He explained that it's for isolation and singulation. It's
20 not for communication. That's a separate thing that was standard, and Dr.
21 Peeters could have gone to any sort of RFID company or even done it
22 himself because he was familiar with those protocols.

23 Then, after that deposition, they filed their reply. In that reply,
24 they start saying, oh, well, we said binary tree traversal protocol because
25 look, here, we cited it. And so, they cite it in 1641 to 51, where it is
26 mentioned, but they don't mention it in their petition because they don't

1 really care about it at that time. It's only when they have a name for it that
2 they're like, oh, look, we found a cite.

3 But again, based on everything in the record, all of Dr. Bandy's
4 testimony, all of Dr. Peeter's testimony, that binary tree traversal protocol
5 doesn't obtain the ID and sensor data from the tag. In fact, it does the
6 opposite, right? You need the ID. To the extent that the sensor ID is the
7 unique identification ID number of the sensor unit is an RFID ID, which is
8 one possible unique ID, you need that ID before you can do the binary tree
9 traversal protocols.

10 JUDGE LEE: So is it like this then: you say, although it's cited by
11 the petition, but it's such a tenuous link to the limitation it's trying to take
12 down, that it doesn't amount to anything (CROSSTALK)

13 MR. PEKAREK KROHN: I think it's not the way that we're
14 saying is it's not properly relied on. So, looking at Slide 19, here's the
15 section that they're relying on. And as you can see, the binary tree traversal
16 protocol is not necessary. For Petitioner's assertion, this section discloses
17 limitation 1(k). This

18 JUDGE LEE: Would you say the slide numbers so we can

19 MR. PEKAREK KROHN: Yeah, Slide 19. This language says
20 that the sensor communicates data to the reader, and the details of that
21 communication are dependent on the protocol. It then discusses one
22 potential protocol, the binary tree traversal protocol. But as we've discussed
23 that protocol is incapable of reading either the unique sensor ID or the sensor
24 data because that protocol ends once you've isolated the tag, and you then do
25 the communication using a separate sort of standard process.

26 JUDGE LEE: And there's nothing in the claim about isolation,

1 singulation?

2 MR. PEKAREK KROHN: There's nothing in Claim 1 about of
3 the '307 patent about isolation or singulation. In fact, as we've discussed,
4 the opposite is sort of true. You're obtaining the ID from the tag. It's more
5 about physical proximity.

6 So, as an analogy, it's when you go to pay with your credit card
7 and you do tap to pay, right? The credit card reader doesn't know what
8 credit card to expect, right? It doesn't know the ID that it's going to
9 communicate with. It's the tap that does it. The '307 patent is similar. It has
10 a diagnostic sensor unit you then take your separate wireless device, and
11 using that, you communicate to get the ID and the sensor data from that
12 device. There's no pre-known unique ID discussed in '307 patent or any of
13 the claims.

14 JUDGE LEE: Or any other claim. You mentioned Claim 1. It's
15 not in Claim 1, and it's not in any other challenged claim they

16 MR. PEKAREK KROHN: I don't I know that there's no
17 isolation discussed in the '307 because the '307 and the '803, they're very
18 different in that way. The '803 is about, sort of, lots of environmental tags
19 and communicating with them all to sort of figure things out, whereas the
20 '307 patent is about diagnostic sensor unit and one wireless device.

21 JUDGE HOANG: Counsel, you have a little less than three
22 minutes.

23 MR. PEKAREK KROHN: Oh, thank you. Let me go very
24 quickly to the claim construction issue. And I want to put up slide I want
25 to talk about one thing on the claim construction that was not raised by
26 Petitioner, and that is the prosecution history.

1 So, going to slide 48, this is from the prosecution history of the
2 '307 patent. It's describing Claim 65, which was granted as Claim 1. The
3 applicant distinguished the prior art by saying the claim requires
4 communicating with a unique sensor ID and unique wireless ID to a remote
5 server. So, while Petitioner said there's no argument about disclaimer, this
6 was disclaimed. This is the prosecution history.

7 JUDGE HOANG: Counsel, I think Petitioner pointed out that the
8 distinction here is this is what's being communicated to the server, versus the
9 claims reciting or what the purported construction or what the claim recites
10 is authenticating.

11 MR. PEKAREK KROHN: Yes, Judge Hoang. I think that's right,
12 but the only limitation that could be being referred to here is the
13 authentication limitation. There's no other limitation in Claim 1 where
14 there's any description of communicating anything to the server. So, to the
15 extent that you're communicating anything to the server, it would be for the
16 purposes of authentication.

17 JUDGE HOANG: Why wouldn't you communicate to the server a
18 network address, so you know where you're sending your data versus using
19 it, necessarily using it for authentication?

20 MR. PEKAREK KROHN: Because there's no claim limitation
21 about sending the wireless ID other than authentication, other than the
22 language we're talking about, right? So, if this isn't referring to the
23 authentication limitation, it's unclear what limitation it would be referring to.

24 JUDGE HOANG: I see.

25 MR. PEKAREK KROHN: I do want to

26 JUDGE GERSTENBLITH: Counsel, just to be clear, you're

1 saying on Slide 48, that this is some type of disclaimer; is that the argument
2 that Patent Owner is making?

3 MR. PEKAREK KROHN: I think that's right. Yeah, yes, Judge.

4 JUDGE GERSTENBLITH: And this rises to the clear and
5 unmistakable disclaimer of claim scope?

6 MR. PEKAREK KROHN: I think so. I mean, the language is
7 pretty clear. Most notably, the present invention in Claim 65 actively recites
8 limitation when the remote device communicates the unique sensor ID and
9 wireless ID to a remote server. That's about as clear as I think it gets to me.

10 JUDGE GERSTENBLITH: Thank you.

11 JUDGE HOANG: And just to note, you're into your rebuttal time.

12 MR. PEKAREK KROHN: Thank you. I do want to go to the
13 claim, so this is Slide 63. So Petitioner put up a slide where they were
14 saying it was sort of confusing about which ID was being referred to, and
15 therefore, the that's why it had this associated with language. I don't think
16 that's right.

17 So it says a diagnostic sensor unit comprising at least one sensor
18 element and a unique identification ID number. So you have a diagnostic
19 sensor unit that has a unique identification ID number. So, when you get to
20 wherein the remote server authenticates said unique sensor ID, I think a
21 POSITA would completely understand that unique sensor ID is the ID for
22 the diagnostic sensor unit. It may also be for the sensor element. There may
23 be only one sensor element in this, in the sensor unit, but there's no way of
24 reading said unique sensor ID and thinking, oh, wait, is that the wireless ID,
25 or is that the sensor unit ID? I think it's pretty clear, and a POSITA would
26 understand which ID was referred to.

1 And I think Judge Lee asked some of these questions. If they're
2 right, I think crossing out associated with said unique wireless device ID
3 doesn't change -- wouldn't change the meaning under their broad
4 construction. It simply says because you know which sensor ID it is,
5 associated with doesn't add anything to the claim under their broad
6 construction.

7 And finally, they say that, oh, just communicating -- just making
8 that phone call, even if you don't answer the phone, that does the association.
9 But there's already a description of communication between the sensor and
10 the wireless device. And so, adding that it's associated with doesn't add
11 anything. You already have this communication and needs

12 JUDGE HOANG: Counsel, are there sorry. Are there any
13 descriptions in is there any description of what this association between
14 the sensor ID and the wireless device ID; are there any descriptions of that in
15 the spec?

16 MR. PEKAREK KROHN: I don't know that there are. It's in the
17 claim, and I think that's what important here. They're not making any sort of
18 112 argument, which, obviously, they can't make here, so I don't think that it
19 matters, with the exception

20 JUDGE HOANG: Well, I'm just trying to figure out what the
21 scope of and what's necessary to meet "associated with" is.

22 MR. PEKAREK KROHN: So, in one of their slides, and it's not
23 one that Counsel put up I don't think, but it does talk about associating. It
24 cites some things, not this particular association, but what associated means.
25 And all of those examples are sort of mappings.

26 So there's associating a measurement like glucose level with a

1 disease or condition like diabetes or associating a smell with moldy cheese,
2 right? These are sort of or associating RFID with software, right? These
3 are mappings. These are you tell me one thing, I'm going to give you some
4 connection. It's not, oh, I called you once. I know we communicated, and
5 therefore there's communication there's an association. I think that the
6 way that the term associated with, based on what they point to, is narrower
7 than just sort of any sort of connection.

8 JUDGE LEE: It's Judge Lee. Counsel, what is the disclosed
9 embodiment in the challenged patent for the association?

10 MR. PEKAREK KROHN: What is the disclosed embodiment? I
11 don't think that either side has discussed that, and I think that would be, to
12 the extent there was like a 112 argument or something like that, I don't think
13 that's properly

14 JUDGE LEE: So the challenged patent does not disclose
15 authenticating the wireless device ID?

16 MR. PEKAREK KROHN: Well, so, it claims it, and we have
17 testimony from Dr. Warren about what a POSITA would understand by that
18 limitation and how that would work in the system of the '307 patent.

19 JUDGE LEE: What about, hypothetically, if we disagree with you
20 and hold the claims do not require authentication of the wireless device ID,
21 does Patent Owner still prevail?

22 MR. PEKAREK KROHN: Yes, Your Honor, because, again,
23 association needs to mean something. And if it's read as broadly as they are
24 saying, then you can just cross that out, and it would bring nothing to the
25 claim. They haven't really pointed to any actual association, whatever that
26 means, even under their own description of the scope.

1 JUDGE LEE: But it's true for you, too. You didn't tell us what it
2 could mean if it doesn't mean authenticating the wireless ID. So you put all
3 your eggs in one basket and if we disagree with you there, then you should
4 lose?

5 MR. PEKAREK KROHN: No, I don't think that's right because
6 it's not our burden, right? So we've said what we think authentication means
7 or what we think associated with means and that it's about authenticating; it's
8 about sending both items to the server. To the extent we're wrong, they have
9 the burden to show that that limitation, under some construction, is met.
10 And we just don't think they've met their burden.

11 But again, I want to be before I step back, I want to be clear. All
12 of this claim construction does not matter if you agree with us on two points.
13 One is that the Beck/Heller combination does not disclose a unique
14 identification ID number for a sensor unit and that the '803 patent is not by
15 another.

16 And with that, unless there are other questions

17 JUDGE GERSTENBLITH: Counsel, let me ask you one last
18 question.

19 MR. PEKAREK KROHN: For sure.

20 JUDGE GERSTENBLITH: Could you go back to Slide 48 on this
21 communicating aspect, from that sentence in the prosecution history? So it
22 says remote device communicates the unique sensor ID and unique wireless
23 ID to a remote server.

24 MR. PEKAREK KROHN: Yep.

25 JUDGE GERSTENBLITH: Specifically, the unique wireless ID
26 part of that sentence, where in Claim 1 is that recited?

1 MR. PEKAREK KROHN: The unique wireless ID?

2 JUDGE GERSTENBLITH: Correct, being communicated to the
3 remote server.

4 MR. PEKAREK KROHN: So I think that's sort of the point. The
5 only specific description would be in that authentication limitation. If
6 they're not saying that if they're saying that that language is for some other
7 limitation, there's no other limitation that I can see where that unique
8 wireless ID would be transmitted. So, to me, that means that Patent Owner
9 was talking about the authentication limitation, which in Claim 65 at the
10 time is, I believe, is the same as it is here, that would be the limitation that
11 they're talking about there.

12 JUDGE GERSTENBLITH: But that's not identified in the
13 prosecution history. They don't say I'm talking about that limitation.

14 MR. PEKAREK KROHN: They don't say

15 JUDGE GERSTENBLITH: And that language is not recited in the
16 claim.

17 MR. PEKAREK KROHN: That is right. They don't say it, but the
18 other point about this (CROSSTALK)

19 JUDGE GERSTENBLITH: So, if hypothetically we wanted to say
20 there was some type of disclaimer of claim scope, it's that we're supposed to
21 read Claim 1 to have a communication of a unique wireless ID somewhere;
22 we don't know where.

23 MR. PEKAREK KROHN: I think that it's the authentication
24 limitation because that's the only limitation that makes sense, but I think
25 that's right. And they have actually not made any argument that that's
26 incorrect, right? All they've said is it wouldn't require authentication, but

1 they don't really make an argument that there is some disclaimer requiring
2 both to be sent.

3 And I do want to point out that Dr. Sarrafzadeh specifically
4 recognized that both must be transmitted and relied on this same section of
5 the prosecution history for a separate and now moot claim construction
6 argument. This is Slide 49. So this is from Dr. Sarrafzadeh's report where
7 he said, most notably, the present invention he recites the exact same
8 section that we were talking about, and then he said the applicant confirmed
9 that the remote server uses the received unique sensor/wireless ID to send
10 the necessary software.

11 And with that, unless there are any other questions, I'll step back.

12 JUDGE HOANG: Okay. We are at minute 59, so there'll be 11
13 minutes of rebuttal time for Patent Owner.

14 With that, we'll take a quick five minutes, and then we'll be back
15 for Petitioner's rebuttal at the 15-minute mark.

16 (Whereupon, the above-entitled matter went off the record at 12:06
17 p.m. and resumed at 12:12 p.m.)

18 JUDGE HOANG: Please be seated.

19 Counsel, if you could, close that door, please, unless you're waiting
20 on somebody else.

21 MR. PEKAREK KROHN: Sure.

22 JUDGE HOANG: Oh, thank you so much.

23 Okay. Welcome back, everybody.

24 Petitioner, your rebuttal.

25 MS. OSMAN: Thank you, Your Honor.

26 Would you mind switching back to that HDMI, so that we could

1 put on our slides?

2 HEARING STAFF: I'm sorry?

3 MS. OSMAN: I'm sorry. Would you mind switching back to the
4 HDMI port so that we can have our slides?

5 HEARING STAFF: Is it connected?

6 MR. PEKAREK KROHN: It is.

7 MS. OSMAN: It is connected. I think it's on the ELMO right
8 now.

9 JUDGE HOANG: And just a reminder, you have 15 minutes of
10 time.

11 MS. OSMAN: Thank you, Your Honor.

12 Sorry about the delay. It works. Thank you.

13 Okay. Thank you, Your Honors. I'd like to start by addressing the
14 prosecution history argument that we heard just a few minutes ago. If you'll
15 please, turn to Petitioner's Slide 13.

16 So I think it's really important to look at what the prosecution
17 history actually says because this does not rise to the level of a clear and
18 unmistakable disclaimer or disavowal. The language that we're looking at
19 says, wherein, the remote device communicates the unique sensor ID and the
20 unique wireless device ID to a remote server. And this is the description that
21 the applicant used of the invention, but there's no basis for it in the claim.
22 There's no language about communicating either of these two IDs to the
23 claim, and it's sort of, you know, a throwaway sentence.

24 If you keep reading the prosecution history, the way the applicant
25 actually distinguished the claims from the prior art had nothing to do with
26 communicating either the unique sensor ID or the unique wireless device ID

1 to the remote server. Instead, what the applicant said was, the cited portions
2 of Evanyk, the prior art reference, does not teach the claim limitations
3 wherein the remote server loads software onto the wireless device relative to
4 a particular sensor ID that was relayed to the server from the wireless device
5 as claimed by the present invention.

6 So this isn't disclaimer. When we talk when the applicant is
7 describing the actual claimed invention in the context of distinguishing the
8 prior art, does it specifically, and it does it in the context of the actual claim
9 limitations. Patent Owner is effectively asking the Board to import a brand-
10 new limitation that has no basis in the claim, into the claims. This is, you
11 know, this is consistent with the theme that we've been talking about. Patent
12 Owner doesn't like the way the claims are written, doesn't like what the prior
13 art is saying, and is asking the Board to rewrite them, rewrite the claims, add
14 a limitation. It's not disclaimer. It doesn't rise to the level of the disavowal.

15 If you'll please turn to I'd like to look at the petition, pages 48
16 through 49, and I'm going to share them on the screen just so that we're all
17 looking at them together because we also heard a lot about the glucose
18 sensor strips. The glucose monitor has strips, and those strips allegedly are
19 sensors, and therefore, the petition allegedly didn't argue that these sensors,
20 that the that Beck's device, Beck's medical device was a sensor element or
21 included sensor elements.

22 In fact, if you look at what the petition actually said, the petition
23 said, a person of ordinary skill would have understood that the
24 biological/physiological sensors disclosed by Beck would include at least
25 one sensor element. And then, as an example, the electrochemical
26 electrodes in the case of the glucose monitor meter; excuse me. Patent

1 Owner's attorney just stood up here and said they agree those
2 electrochemical electrodes exist on the test strips. The petition made very
3 clear, to the extent there's a box drawing exercise, the glucose monitor
4 includes the test strips. These are part of Beck's medical device.

5 But even if that isn't enough and our position is that it is the
6 very next page says, to the extent that Beck alone does not disclose this
7 limitation, Beck in view of Heller renders it obvious. So combination of
8 Beck with Heller, and Heller's specific analyte monitors that include a
9 sensor, sensor control unit, and a substrate for measuring an analyte like
10 blood glucose.

11 JUDGE HOANG: Petitioner, are you exclusively relying on the
12 glucose meter, or are you relying on other general teachings regarding
13 Beck's medical device for your combination?

14 MS. OSMAN: Your Honor, we're not exclusively relying on the
15 glucose meter, and the petition makes clear throughout that we are relying
16 on more than just the glucose meter. It's an example. Beck is not limited to
17 the glucose meter, and neither is the petition.

18 So I'd also like to turn back to Petitioner's slide 18. I want to
19 address the associating step one more time.

20 So there are no examples, and Petitioner's Patent Owner's
21 Counsel stood up and talked a little bit about associating. There are no
22 examples of associating a wireless device ID and a unique sensor ID in the
23 specification, in the prosecution history, anywhere. Patent Owner is
24 requiring more from the prior art than what's in the patent.

25 And we proposed a construction of this associating. We said
26 associating means there's a connection. There's some sort of relationship.

1 There's nothing more disclosed anywhere. Patent Owner effectively says,
2 no, that's not enough, but they won't specify. They won't explain what
3 would be enough. And the reason they won't do that is because they don't
4 have any support for anything other than the plain meaning of associate,
5 which is some relation, connection.

6 So it can't be the case that what we've proposed, the association we
7 have proposed, based on the intrinsic record, isn't enough, but what is
8 enough is a secret, and nobody knows what it is. We've not only proposed
9 the relation and connection that is disclosed in the claim; we've also shown
10 that Beck also teaches an entirely independent form of association, which is
11 the wireless device ID and the unique sensor ID are both stored and saved
12 together and associated with each other in the - in Beck. And that's at
13 paragraph 76 of Beck.

14 Now, another thing Patent Owner's counsel argued was that we
15 must be limited; Petitioner must be limited to the glucose monitor in Beck
16 because we argue that a person of ordinary skill would have combined Beck
17 with Heller's temperature reference sensor. And according to Patent Owner,
18 the temperature reference sensor only relates to analytes.

19 Now, I want to be very clear. This is an argument that was
20 nowhere in the papers. This is a brand-new argument we're hearing for the
21 first time today, at oral argument. But even so, but even despite the fact that
22 it's a new argument, there are other kinds of analytes that could be
23 monitored. Glucose is not the only one. There are many other things that
24 are monitored in the blood.

25 So, even if Patent Owner were right about this, we're still not
26 limited to the glucose monitor. Beck still encompasses many more devices

1 than just a glucose monitor. So, for you could monitor cholesterol. You
2 could monitor iron. There are many, many things. Anyone who has ever
3 had a blood test knows that glucose is not the only thing you can monitor.

4 Turning to Petitioner's Slide 58 very briefly, Patent Owner also
5 Patent Owner's Counsel also stood up and argued about motivations to
6 combine and made arguments to dispute the motivations to combine that we
7 identified in the petition, and again, these are arguments we've never heard
8 before. These are arguments that were made for the first time at the oral
9 argument.

10 But the petition was very specific and explained in great detail why
11 a person of ordinary skill in the art would have used Heller's substrate, for
12 instance, to attach the sensors to a person. It would maintain the physical
13 integrity of the sensors, make sure they don't get damaged. Likewise, why
14 you would use inductive coupling, eliminate electrical contacts, reduces
15 noise, allows for water-resistant water resistance excuse me. Likewise, a
16 reference sensor would make sure that the information you're getting is
17 accurate, which allows for better medical determinations. All of these
18 combinations were explained in detail in the petition, as the Board
19 recognized at the institution phase.

20 Patent Owner also argued about the unique ID and argued that the
21 unique ID - that Beck's unique ID allegedly is not unique or doesn't need to
22 be unique, but this argument is entirely irrelevant. Beck's medical device
23 serial number is unique. It uniquely identifies the medical device. It doesn't
24 just identify the type of medical device or the type of medical sensor: it
25 identifies the specific device.

26 And to the extent that they're trying to argue -- that Patent Owner

1 is trying to argue that you have to uniquely identify every component in a
2 sensor unit, there's just no support for that, either in the specification or in
3 the intrinsic record anywhere. It's unsupported.

4 JUDGE HOANG: Counsel, what do you make of Patent Owner's
5 pointing out that your expert noted that there could be two different medical
6 devices with the same serial number?

7 MS. OSMAN: Your Honor, I think this was the I think this was
8 the Patent Owner was leading the expert down a path at the deposition, and
9 this was, you know, this is what the expert said. But I want to be clear; we
10 are not taking the position that our that's Beck's medical device serial
11 number is non-unique. Of course, it's unique, that it uniquely identifies the
12 medical device. And the medical device in the in Beck is the sensor unit.
13 So we do have a unique identification ID number as claimed.

14 JUDGE LEE: Counsel, I'm not sure what to think about this. I
15 want to hear your view on if it is the case that the petition does cite to the
16 binary tree protocol and that's not debatable, but I think it's opposing
17 counsel's position that it doesn't matter because the binary tree protocol
18 really does not add to any other disclosure of Bandy, the reference, in terms
19 of taking down any limitation. You happen to cite to it, but it's really not
20 needed in light of all the other things you've cited which are not Mr. Bandy's
21 contribution.

22 MS. OSMAN: Thank you, Your Honor. So I would my
23 response is that that's not true, and it's not true for two reasons. First, it's not
24 the case that Dr. Bandy's only contribution was the binary tree traversal
25 protocol. He also contributed more generally to interrogation of the RFID
26 sensors. But in addition, Patent Owner's characterization of the binary tree

1 protocol is not correct.

2 If you go to the actually, this is Patent Owner's Slide 13 was if
3 you wouldn't mind, Steve, putting that up there.

4 So, Patent Owner's Slide 13, this was a quote that Patent Owner
5 relied on, but this quote from the record equates singulation with
6 interrogation. So singulation is the process of it's part of the same process.
7 So singulation is the process of identifying the specific tag that you are
8 interrogating. Even the information that Patent Owner is relying on is
9 equating singulation with interrogation. Singulation is part of receiving the
10 RFID ID from that sensor, from the RFID, and that is has to be part of
11 communicating with the sensor.

12 So it's all Patent Owner is trying to draw a line and say, oh, the
13 binary tree traversal protocol has nothing to do with communication. In fact,
14 that's incorrect. It is a significant part of the communicating with the RFID
15 sensor. If it weren't, there would be no reason to include it in Bandy. There
16 would be no reason to use it.

17 This is sorry it took a moment, but this is Patent Owner's Slide
18 13. And here, you see Dr. Bandy explaining that the other the question
19 was the other technology you mentioned was the interrogation protocol.
20 And he said, yes, exactly. That's the process whereby the reader is able to
21 singulate, out of a thousand tags, okay, which tag it wants to talk to, wants to
22 interrogate.

23 So this singulation process, he's equating singulation with
24 interrogation. It's part of the interrogation process. It's part of
25 communicating with that RFID sensor to send

26 JUDGE LEE: Are you saying without singulation, you cannot

1 communicate?

2 MS. OSMAN: You can't communicate with the RFID sensor.
3 You need to singulate the tag to be able to communicate.

4 Dr. Bandy

5 JUDGE HOANG: Counsel?

6 MS. OSMAN: Oh, sorry. Go ahead.

7 JUDGE HOANG: Isn't that an improvement to already known
8 methods of communicating with an RFID? So the -- let's say the
9 singulation; it's an improvement to already known methods of
10 communicating with RFID sensors. I don't think there's any argument that,
11 you know, the actual communication was brand new and never done before.

12 MS. OSMAN: No, there's no argument that communicating was
13 brand new or never done before.

14 JUDGE HOANG: And I suppose, my follow-up with that or my
15 point with that is, in this claim and in where you cite, as far as the Bandy
16 reference goes, the claim -- I don't see where the claim is reflective of this
17 improvement. And in the reference itself, it seems like those citations also
18 encompass these already-known RFID communication mechanisms. So
19 why is it that the binary tree traversal or this improved singulation method
20 is necessary, right, to actually meet these claims?

21 MS. OSMAN: So the binary tree traversal protocol and the
22 interrogation protocol disclosed in Bandy were all contributed by Dr. Bandy.
23 That's what the record evidence is that Dr. Bandy contributed to this
24 information. I mean, you're correct that Dr. Bandy didn't invent the genus of
25 communication. He didn't invent how do you communicate with these RF
26 addressable sensors, but he did address he did invent or contribute to a

1 species of it.

2 And Duncan, the Federal Circuit, in Duncan Parking, addressed a
3 very similar scenario where it said the inventors don't have to have invented
4 the genus that's claimed. They can still it can still be anticipated; the
5 limitation can still be anticipated if you've invented a species of it. That's
6 exactly what we're talking about here.

7 Here, they've invented a species. Here, Dr. Bandy invented or
8 contributed to the invention of a species of communicating with the RF
9 addressable sensor. He did that by using a specific well, a more general
10 interrogation, but a specific interrogation protocol called the binary tree
11 traversal protocol, though it's not true that it has to be specifically claimed in
12 the '307 patent for it to be relevant.

13 Yep, thank you, Steve.

14 Steve pulled up this is slide 28, and this is the portion of Duncan
15 Parking where the Federal Circuit addressed a very similar scenario saying
16 that it's sufficient if the declarants are inventors of the species disclosed in
17 the patent. They don't have to have invented the generic genus that's
18 claimed in the patent they just anticipated.

19 JUDGE HOANG: So you have about one minute left.

20 MS. OSMAN: Okay. Sorry. One moment.

21 Okay. I'll guess just ask answer one question, Judge Lee, you
22 had for me before I sat down on opening. You'd asked me where this, where
23 my point about switching the burden, where the burden of how come the
24 burden of production shifts to patent owner, and I just wanted to provide that
25 cite. This is the Dynamic Drinkware, Federal Circuit opinion; it's 800 F.3d
26 1375 at 1380. And it wasn't cited in the papers, but it was cited in the

1 institution decision. And it talks about how the burden of production shifts
2 to the patent owner to argue or produce evidence that Bandy or whatever
3 reference is not prior art.

4 JUDGE LEE: On this issue or some other issue?

5 MS. OSMAN: It's a similar issue, on an issue of whether or not a
6 reference is prior art. I think, there, the issue was inventorship or when the
7 particular reference was conceived, but the but it's the same it would be
8 the same

9 JUDGE LEE: What is the name of the case?

10 MS. OSMAN: *Dynamic Drinkware*.

11 JUDGE LEE: So, I'm aware of that. I don't think that -- okay.
12 It's fine.

13 MS. OSMAN: Okay. Thank you, Your Honors. If there's no
14 more questions, thank you.

15 JUDGE HOANG: Thank you.

16 And Patent Owner, when you're ready, you have 11 minutes.

17 MR. PEKAREK KROHN: Thank you, Your Honors. I want to
18 start with a couple things that Petitioner's counsel said that I think are just
19 incorrect.

20 One is, she said that you can communicate that you cannot
21 communicate without singulation, and that's not accurate. She said why else
22 would the '803 patent discuss that. The point is, the '803 patent is very
23 different from the '307 patent. The '803 patent is about communicating with
24 tags you know the IDs of, and that's why you need to singulate out the tag
25 that you want to talk to.

26 She put up, or at least talked about, our slide 13, and she said she

1 pointed to 'interrogate' and said that Dr. Bandy's testimony was that
2 singulation was interrogation, but that's not what he says. He says that's the
3 process whereby the reader is able to singulate out of, say, a thousand tags,
4 which tag it wants to talk to, wants to interrogate. So the singulation
5 happens, and then the interrogation happens; then the reading happens.

6 Again, interrogate is used a little bit loosely to mean multiple
7 things, but what he's saying here is the interrogation is the reading and that
8 the reading part of it is not anything that Dr. Bandy contributed to. That was
9 standard RFID reading technology that went way back.

10 I also want to talk about they put up this part of the petition.
11 This is slide 33, and they pointed to petition 48 through 49. I want to be
12 clear that the they said that somehow the test strips were part of the
13 medical device, but then again, they don't explain how, especially once you
14 combine Heller, how the test strips are part of the medical device. And to be
15 clear, the test strips have no unique ID. They've not pointed to any unique
16 ID for the test strips. And again, the point of having a unique ID on the
17 sensor unit is to be able to download software related to that particular
18 sensor unit for use in the device. That's the point of the '307.

19 JUDGE LEE: Counsel, thus far, we're talking about the reference
20 as though it's a glucose meter reference, but doesn't it have other
21 embodiments and medical devices which contain in them a sensor, unlike a
22 glucose meter?

23 MR. PEKAREK KROHN: So, Judge Lee, thanks for that
24 question. Petitioner's Counsel said they were relying on other things other
25 than glucose meters. They said it could be analyte meters generally. Beck
26 doesn't describe any other analyte meters in detail. They haven't pointed to

1 any sensors or any of the other components that are in the Claim 1 of the
2 '307 patent, in any of the other medical devices in Beck. So I don't know
3 what from Beck Petitioner is relying on other than the glucose meter. It
4 seems like they're sort of waving their hands, saying, look, there are lots of
5 medical devices; Beck works with all of them, but they need to point to one
6 that they're going to combine that they're going to modify using the
7 teachings of Heller to get some

8 JUDGE LEE: They only pointed to the glucose meter, and you're
9 saying you don't know where in Beck there's another medical device that
10 itself contains a sensor?

11 MR. PEKAREK KROHN: They have not pointed to any other
12 device that I am aware of in Beck that explicitly states that it has a sensor,
13 especially for analyte monitoring. The only other device that I believe was
14 even in the petition, or maybe in the reply, is the EKG machine. And we've
15 talked about that where, in the EKG machine, it's -- the sensors are the
16 electrodes that get attached to your body, and those, like the test strips, are
17 disposable, so they don't have their unique ID. The unique ID would be for
18 the EKG machine.

19 JUDGE LEE: So what's your representation? You're saying they
20 didn't point it out, but why won't you tell us? Is it there, or does it not have
21 it?

22 MR. PEKAREK KROHN: I have seen Beck is very talks
23 about generic medical devices. Beck is talking about something very
24 different, in our mind, than the '307 patent. Beck is talking about, sort of,
25 monitoring medical devices. And this is what, you know, they pointed to a
26 lot of things that our expert talked about, about being bulky devices and

1 hospital setting and all that kind of stuff. And that's not necessary for
2 determination of this petition, but I think it does tell you the kind of
3 disclosure that Beck is. Beck is about something very different than the '307
4 patent.

5 But when you get down to brass tacks, what they're pointing to,
6 what they're trying because they know that Beck doesn't have, for
7 example, a reference sensor or a substrate, they then have to find that
8 somewhere else. They find it in Heller, but they can't combine Heller with
9 just sort of a generic device, so they use it with the glucose monitor. And
10 that's, I think, all they've done, notwithstanding Counsel's statements today.

11 JUDGE LEE: So, in the EKG embodiment, the sensor is the
12 electrode, which is not a part of the medical device. It's like the test strip.
13 It's disposable.

14 MR. PEKAREK KROHN: Right. It's disposable. I don't know if
15 you I've had EKGs done. They attach it to your body. They've got, you
16 know, sticky stuff. You wouldn't want that being used multiple times, so
17 they attach it and

18 JUDGE LEE: It's not a part of the instrument that's reused each
19 time.

20 MR. PEKAREK KROHN: Well, in the same way it's not reused.
21 That's for sure. And in the same way as the test strips can get swapped out
22 you use different test strips there's no unique ID of that electrode. They
23 haven't pointed to one.

24 And so, the serial number of the EKG machine, for example,
25 doesn't tell you about the doesn't give you a unique identification ID for
26 the sensor unit, the thing that has the sensor, and that's what the claim, the

1 claim limit requires.

2 JUDGE LEE: Yeah. So, even for the EKG device, the sensors is
3 the pad, not anywhere else?

4 MR. PEKAREK KROHN: That's right. They haven't pointed to
5 anything, and I'm not aware of anything else that the EKG machine would
6 be a sensor.

7 JUDGE LEE: Thank you.

8 MR. PEKAREK KROHN: And I think that Dr. Warren, I believe
9 in his declaration, he noted that the electrodes or the leads would be the
10 sensors.

11 They said some things about claim construction again, about the
12 prosecution history. We think the prosecution history is clear. We think that
13 their reading association much too broadly.

14 But I want to, as my last point unless there's other questions I
15 just want to be clear. The claim construction is not, I don't think, the driving
16 force in this case. In this case, the issue is that Bandy is not by another.
17 Everything properly relied on is the work of Dr. John Peeters. And Beck
18 and Heller, the combination, there wouldn't be motivation to combine. And
19 even if you did combine, there's no sensor unit with a unique identification
20 ID number as required by the claim.

21 And unless there are any other questions, I'm happy to save us 3
22 minutes and 20 seconds.

23 JUDGE HOANG: I don't have any.

24 JUDGE LEE: No, thanks.

25 MR. PEKAREK KROHN: Thank you.

26 JUDGE HOANG: Thank you all for appearing today and for

- 1 answering our questions. I know we had a lot, so very much appreciated.
- 2 We'll take this case under advisement and issue our decision in due course.
- 3 Have a good afternoon.
- 4 (Whereupon, the above-entitled matter went off the record at 12:37
- 5 p.m.)

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Patent 7,969,307 B2

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