

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CEVA SANTÉ ANIMALE S.A.,
EGG-CHICK AUTOMATED TECHNOLOGIES S.A.S., and
CEVA ANIMAL HEALTH, LLC.,
Petitioners,

v.

TARGAN, INC.,
Patent Owner.

IPR2024-00595
Patent 10,806,124 B2

Record of Oral Hearing
Held: May 6, 2025

Before KARL D. EASTHOM, MICHELLE N. WORMMEESTER and
BRIAN P. MURPHY, *Administrative Patent Judges*.

IPR2024-00595
Patent 10,806,124 B2

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P R O C E E D I N G S

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THE CLERK: All rise.

JUDGE EASTHOM: Please be seated. Good morning, everyone.

I'm Judge Easthom, and to my right is Judge Wormmeester, and Judge
Murphy's to my left here. This is for IPR2024-00595, Ceva Sante Animale,
S.A. v. Targan, Inc.

And Petitioner here is challenging the patentability of Claims 1 to
18 in Patent Owner's U.S. Patent number 10,806,124. May I have
appearances for Patent Owner please?

MR. ROBSON: Good morning, Your Honor. This is Matthew
Robson for Patent Owner Targan and Quinn Emanuel, and with me is my
partner, Raymond Nimrod.

MR. NIMROD: Good morning.

JUDGE EASTHOM: Good morning, gentlemen. Mr. Robson,
will you be presenting today, or both of you?

MR. ROBSON: Yes, I'll be presenting today.

JUDGE EASTHOM: Okay. And then Petitioner, please introduce
yourself.

MR. OLLIS: Good morning, Your Honors. My name is Andrew
Ollis with Oblon, McClelland, Maier, and Neustadt on behalf of Petitioners.
I'll be presenting today. And with me today is Christina Lai, also from our
office.

JUDGE EASTHOM: Welcome. Okay, well, for our hearing
order, Petitioner will go first, and you may reserve rebuttal time. Patent
Owner may also reserve rebuttal time. I'll be keeping track of the clock

1 here. We'll try to give you a warning when you get the two minute mark.
2 We have slides from both Counsel here, so you don't need to show anything.
3 If you want to, you're obviously welcome to do that.

4 Please just give us a slide number during your presentation, so we
5 have a good, accurate gauge of where we are in the record, particularly for
6 the court reporter.

7 I'll remind you also that demonstrative slides are not evidence, and
8 the parties are not permitted to introduce new arguments or evidence in their
9 presentation. Okay. And then, Mr. Ollis, how much time would you like to
10 reserve for rebuttal?

11 MR. OLLIS: Fifteen minutes would be good.

12 JUDGE EASTHOM: Okay. And then you can tell us, Patent
13 Owner, when you're ready --

14 MR. ROBSON: I will --

15 JUDGE EASTHOM: -- how much rebuttal time you would like.

16 MR. ROBSON: Fifteen minutes.

17 JUDGE EASTHOM: Fifteen? Okay. Great, well, why don't we
18 get started? Whenever you're ready.

19 MR. OLLIS: Okay. Thank you, Your Honor. Good morning
20 again, Your Honors, may it please the Board. On behalf of Petitioners, I'll
21 be presenting today again, it's Andrew Ollis from Oblon. And I'll be
22 referring to a number of the demonstrative slides in a little bit on screen to
23 the patent at issue here.

24 As I think the Board is aware, there are eight grounds that are the
25 subject of this IPR today. We intend -- I intend to focus mainly on Claim 1.
26 So that will mainly be on Grounds 1 through 4. I think the briefing in this

1 IPR is consistent with that. Most of the issues really are focused on Claim 1.

2 I might touch briefly on Claim 3. But otherwise, unless there's
3 specific questions on other claims, I largely intend to rely on the papers that
4 are submitted.

5 On the screen, this is Slide 3 from the demonstratives. This is
6 replication of Claim 1 from the '124, patent. And this claim is a relatively
7 simple claim. It's a system for determining the sex of a chick comprising
8 four elements.

9 We have a moving platform to support an unrestrained chick. At
10 least one stimuli to cause the chick to open its wings. An image capture
11 device to capture at least one image of the chick. And a computer processor
12 having a database of images, which is ultimately compared to the images
13 that are captured to determine the sex.

14 And that's it. We just have these elements, Your Honor. We
15 believe they're present in the prior art and this patent was allowed in error.

16 Now, looking at the patent, generally, and also some of the main
17 prior art references, these are all relatively early efforts to replace --

18 JUDGE EASTHOM: Slide 4?

19 MR. OLLIS: This is for the record, Slide 4.

20 JUDGE EASTHOM: Right.

21 MR. OLLIS: Thank you. From our Petitioner's demonstratives. I
22 appreciate the reminder. I may need that one or two more times.

23 JUDGE EASTHOM: Yes, no problem.

24 MR. OLLIS: And we can see we have the Patent Owner's system
25 on the left, Yavnai, above on the right, and Gershman, the plate -- moving
26 plate on the lower right. All of these are early efforts to replace what had for

1 long been manual chick sexing stations in hatcheries.

2 And, of course, those were fairly people-intensive and sometimes
3 would have errors. And so there was naturally an interest in replacing those
4 systems. And everyone here is thinking about doing the same thing at this
5 point in time. But these are all fairly early on.

6 Turning then to the patent-in-suit. There's an example. This is on
7 screen. We have Figure 6, in part from the patent, which is Exhibit 1001.
8 And we see there's a conveyor bringing chicks to a sloped platform.

9 The conveyor has a gate, and it may have a sensor on the gate.
10 The gate would swing down. The chicks go down. They're startled,
11 potentially by the angle of the platform. They open their wings. Their
12 picture is taken. There may be other stimuli here, and they move on.

13 Now notice where there's fair amount of mechanical motion here.
14 And we see in Figure 8 of Exhibit 1001, which is a side view of this same
15 thing, that in addition to the gate swinging down, the platform in the middle
16 that's angled -- has to pivot down, if it's a male. The males are generally not
17 as desirable for most purposes. And they'll get dropped off to another
18 platform and rotate back up.

19 JUDGE MURPHY: And Mr. Ollis, is that downwardly angled
20 conveyor, is that one of the stimuli?

21 MR. OLLIS: Yes, it's going to be one of the --

22 JUDGE MURPHY: And how does that work with the chicks?

23 MR. OLLIS: Essentially, well, the way I understand it works is
24 that the chicks are startled. They feel the sensation of falling, and they sort
25 of naturally will open up their wings. So it's similar to, in that sense, to the
26 Gershman dropping the plate, or Pierre, which seeks to put the chick in a

1 falling position.

2 So in that sense, there's some similarities. But that the chick can
3 be startled by simply being on the angled platform, and then raise its wings,
4 as I understand it, to balance itself.

5 JUDGE MURPHY: And what happens to the support of the chick
6 during that particular operation you just described?

7 MR. OLLIS: It depends a little bit on the definition of support.
8 But the chick is on the platform. It's trying to brace itself. If the platform is
9 too steep, obviously it could fall over. And eventually, when it's being
10 dumped, it will lose support completely and deposited to the next level of
11 platform once it's being routed, if it's a male, where it needs to go.

12 But I think the idea, depending on the angle, is that it's supposed to
13 stay on the platform in the Patent Owner's example here.

14 JUDGE MURPHY: And do you agree with Patent Owner's
15 position that the claim language, or the claim construction of the first
16 limitation, a moving platform to support an unrestrained chick requires both
17 moving the chick and supporting the chick simultaneously?

18 MR. OLLIS: At some point in the system, yes. We understand
19 that that's -- so it's a moving platform to support an unrestrained chick. But
20 we understand that the system at some point -- it doesn't have to be at the
21 time of the image capture -- but at some point, would be supporting the
22 chick.

23 JUDGE MURPHY: Well, we'll talk about that. But that's, in my
24 view, that's a question of antecedent basis.

25 MR. OLLIS: Yes. And we'll -- I was definitely planning to talk to
26 that shortly --

1 JUDGE MURPHY: Okay.

2 MR. OLLIS: -- if I may?

3 JUDGE MURPHY: Absolutely.

4 MR. OLLIS: Yes. And I agree that's an -- an antecedent basis
5 question is an important one that we certainly plan to address. There are a
6 couple of declarants as I believe the Board is aware on the automation side.

7 And we would just briefly submit that the Petitioner's declarant
8 Mr. LeCroy is really the more credible of the two. He has quite a bit of
9 experience in the hatchery business in terms of how to handle chicks,
10 whether they'll get injured, and those types of things that are raised in the
11 record.

12 Chick transport, along those lines, generally, and again, just for
13 context, comes up later in the presentation. It was generally well known.
14 The patent admits this. I'm on Slide 7 here, of the Petitioner's
15 demonstratives.

16 But the patent in Exhibit 1001, at column 5, states that chicks have
17 been previously separated by other conveyors, and dividers, and such
18 equipment, and logistics are not discussed. So that's generally well known.
19 The patent seems to acknowledge that. Mr. LeCroy reaffirms that.

20 As also noted by Mr. LeCroy, looking at Slide 6 from the
21 Petitioner's exhibits, chicks are pretty durable. They can be bounced around
22 when they're in the process of having the eggshells separated from the chick.

23 They're in what's called a cyclone and maybe a foot or more above
24 the ground, and eventually they've dropped down. And they're pretty
25 durable little creatures. It doesn't harm them. So with that little bit of
26 background, I'd like to turn to claim interpretation, and particularly two

1 points.

2 JUDGE MURPHY: Mr. Ollis, just on your Slide 6 for a moment.

3 MR. OLLIS: Sure.

4 JUDGE MURPHY: That's cyclone. Is that what drops the chicks
5 onto the conveyor?

6 MR. OLLIS: I believe it eventually drops the chicks onto a
7 conveyor, typically, yes.

8 JUDGE MURPHY: Okay.

9 MR. OLLIS: Yes. It's not -- obviously, it may be the first
10 conveyor, and it can go subsequently to other conveyors.

11 JUDGE MURPHY: Understood.

12 MR. OLLIS: Yes.

13 JUDGE MURPHY: Understood.

14 MR. OLLIS: Okay. So for claim interpretation, I'd like to talk
15 about two phrases in particular. The second one, we'll talk about the
16 antecedent basis question that Your Honor, Judge Murphy, raised.

17 But first briefly on the unrestrained chick. In this, I think the
18 record indicates that both sides, at some level, have been wrestling with this
19 phrase. And in part, as we noted in the petition itself, and it was clear in the
20 prosecution history, this word unrestrained is introduced during prosecution
21 in order to overcome prior art, but it's not in the specification.

22 And so this, you know, we can't argue indefiniteness and lack of
23 written support, but we do believe those are issues here with respect to this
24 phrase. And it complicates, frankly, claim interpretation.

25 Because we've introduced a new word. We're trying to come up
26 with these fine distinctions about what it means. But the word isn't in the

1 specification in the first place. And so, we're sort of guessing as to how it
2 relates back.

3 When we look at the prosecution history, and in the petition, they
4 overcame Yavnai, which had the supporting poles, in part because they were
5 trying to argue that that somehow restrained the wings.

6 And so, the reason we said it may be understood because, frankly,
7 still not 100 percent clear in the petition, was that it may be understood
8 based on that, since we're in the Phillips world and trying to interpret the
9 claims based on the specification.

10 JUDGE MURPHY: Well, that's one of our sort of important
11 questions for both counsel. Which is, what are we to make of that
12 prosecution history? There was this first limitation in the body of the claim.
13 It was amended from a moving platform to support a chick to a moving
14 platform to support an unrestrained chick. And they distinguished over
15 Tao's retainer unit --

16 MR. OLLIS: Right.

17 JUDGE MURPHY: -- (INDISCERNIBLE) support poles. How
18 are we supposed to view that in your view? Is that a clear disavowal of the
19 claim scope? Yavnai was distinguished.

20 MR. OLLIS: Yavnai was distinguished. I think it's -- there was an
21 attempt to disavow. I mean, I think that -- think of that more in typically an
22 infringement context for disavowal. But certainly it was distinguished over
23 Yavnai. I think Tao is pretty easy.

24 Tao is just literally holding the chicken in place. So everybody's
25 definitions of Tao are restrained and unrestrained are consistent with Tao.
26 Yavnai is where it gets trickier. In -- under Phillips, in general, prosecution

1 history can inform and has to be considered in a claim interpretation.

2 But it's not always clear. And we think this is an example of that.
3 So it's a little bit tricky. We frankly think the Examiner made a couple of
4 mistakes here. Number one, they shouldn't have allowed unrestrained in
5 there. And number two, we think there was a mistake in actually applying
6 the word unrestrained to Yavnai. So that's partially Petitioner's position.

7 JUDGE MURPHY: Well, explain that to me. Why you think the
8 Examiner made an error applying unrestrained chick to Yavnai in particular?

9 MR. OLLIS: Well, I guess this gets into Yavnai itself. But Yavnai
10 has two sections of the moving platform. There's one on the left, where the
11 chicks are jumping up and down. There's a lot of freedom. They can flap
12 their wings and they're quite free.

13 And then the focus seemed to be on the right side, at least briefly
14 in the discussion, where the poles are finally supporting the wings, or
15 maybe. And we think the Examiner made a mistake by not considering the
16 left side of Yavnai, first of all.

17 And secondly, in applying unrestrained. There's enough freedom
18 of movement. And as the Board pointed out in the initial determination,
19 Yavnai is supporting the wings. That's a different concept than restraint.
20 And we think there was an error there.

21 JUDGE MURPHY: Well, but the parallel poles in the Yavnai
22 configuration, why are they any different than the side rails of Figure 6?

23 MR. OLLIS: That's a point, Your Honor, that we 100 percent
24 agree with. And this is part of why we're struggling in the sense that we
25 believe -- and that's part of the reason we don't believe there's written
26 support for this idea.

1 Because the platform itself already has the chicks restrained by
2 sidewalls, if that's the approach of what restrained means. And so, there
3 isn't, I mean, they're not unrestrained on the platform. And that's part of the
4 reason we're struggling. Because we cannot make that distinction, Your
5 Honor. To us, they're very similar, if not identical, conceptually.

6 JUDGE MURPHY: So Petitioner's view would be in terms of
7 grappling with the construction of an unrestrained chick that Yavnai's
8 support poles are a lateral restraint? Just as Figure 6's side rails are a lateral
9 restraint?

10 MR. OLLIS: I think only at the very end they may limit at some
11 level, you know, some motion on the chicks, and particularly the wings. It's
12 not clear how much they restrain laterally.

13 JUDGE MURPHY: Well, at the end, you mean, at the point of
14 image caption?

15 MR. OLLIS: Yes, at the point of image capture. Yes. And we
16 think it is similar to the sidewalls. That's, and again, there's no support for
17 that. But the focus during prosecution, we believe, was on the wings. And
18 even under some of these other interpretations here, the focus was on the
19 wings.

20 And that's why, during prosecution, and that was the reason for the
21 original proposal that it may be interpreted that way, we're trying to square
22 this circle and make all these things work together.

23 Ultimately, though Your Honor, we think that for unrestrained,
24 really the best interpretation is the one that ultimately was kind of hinted at
25 with the initial determination and noting this thing, which between the poles
26 supporting the chick in Yavnai, and restraining as claimed.

1 That doesn't talk about restraining them. And that, as Mr. LeCroy
2 pointed out, you know, as in Tao, restraint really just means it's held in
3 place, and they can't run away. That's the cleaner interpretation at the end of
4 the day. Now the Patent Owner is also --

5 JUDGE EASTHOM: What about -- sorry.

6 MR. OLLIS: Yes?

7 JUDGE EASTHOM: I'm still on the same point. If -- I was
8 looking at their arguments on Exhibit 1002, page, I think it's 196. This is the
9 prosecution history.

10 MR. OLLIS: Yes?

11 JUDGE EASTHOM: And they say, first of all, we have -- the
12 rejection is over the combined teachings of Tao and Yavnai. And they
13 amend it. And they say Amended Claim 1 is directed to the system having a
14 moving platform to support an unrestrained chick. And their argument is, a
15 person in this -- skilled in this art, would be discouraged from pursuing a
16 system that allows a chick to move unrestrained through the system on the
17 basis of the teachings of Tao and Yavnai.

18 So I'm wondering if we just read that for what it says, they're really
19 just saying it can't be unrestrained all the time, but it could be restrained part
20 of the time. Is that their meaning?

21 MR. OLLIS: I had a little trouble with that statement. And I
22 know, Your honor, that they repeated that statement in some of their
23 arguments. Frankly, to me, that statement was one, and this comes up
24 routinely, certainly as Examiners see it, where there's a mismatch between
25 the argument that's being presented and the actual claim scope.

26 And so for that reason, since the claims don't require that they're

1 unrestrained throughout the system, they're just adding this in as part of their
2 argument. It was an interesting observation, but frankly, not persuasive, or
3 relevant, or something I felt should be considered or given weight, just
4 because there was a distinctive mismatch there between the actual
5 limitations of the claim.

6 JUDGE EASTHOM: But I thought, with respect to Yavnai, now,
7 that's part of your argument. It's only a restrained part of the -- when you
8 read, it's only restrained part of the time, right? When it's on the end?

9 MR. OLLIS: Well, yes, our argument is that the claim, this
10 limitation, a moving platform to support an unrestrained chick, you just have
11 to find that in the system somewhere. And as long as you find a point in
12 time where it's there, you've satisfied it.

13 And so at the minimum, it is certainly on the left side of the
14 Yavnai's present, before the poles have risen up. And even on the right side,
15 there's so much freedom of movement. And Yavnai talks about supporting
16 the chick, we still think that it doesn't ultimately rise to level of restraining
17 them.

18 JUDGE EASTHOM: Okay.

19 MR. OLLIS: I think the Patent Owner's positions, I just would
20 note that we weren't quite sure what they were for a number -- for a while, in
21 reading the papers on this issue. They criticized in their Patent Owner
22 response -- I'm on Slide 11 of the demonstratives. The Petitioner's positions,
23 in part, were saying, and they said that, well, no part of the chick is restricted
24 from its natural movement, laterally, forward, or backward, up, or down, or
25 rotationally.

26 And we found that very confusing, if that was the definition of

1 unrestrained or restrained, because clearly the sidewalls restrain the chick.
2 And if we're looking vertically, obviously, the platform itself supports the
3 chick, so that that was confusing.

4 And then they had a sentence that they eventually came back to in
5 their surreply, which says, the chick is free to move as it naturally can while
6 on the moving platform, which is an interesting statement. I'm not entirely
7 sure what it means. But it's not in the specification anywhere.

8 And then along the way, they also had a dictionary definition at
9 one point, which they didn't come back to. Of course, dictionaries, you
10 know, add further levels of uncertainty, frankly. And it talked about --

11 JUDGE MURPHY: Yes, talk to me about that. Because, right,
12 we're trying to define this claim term, that term unrestrained that doesn't
13 appear in the patent specification. It is discussed during prosecution.

14 MR. OLLIS: Yes.

15 JUDGE MURPHY: And there is a definition in the record, right?
16 So to the extent we want to consider it, what should we consider that for, if
17 anything?

18 MR. OLLIS: Your Honor, I would really, respectfully not
19 consider it very much at all. I mean, one of the Phillips' standard, which
20 we're interpreting, if we start with the intrinsic evidence, if there's still
21 uncertainty -- and here we have the additional problem that they've added --
22 this is added matter. But we just think that it's too far removed. The
23 dictionaries are too far removed from the specification, and there's multiple
24 definitions that you could choose from. You don't even know which one to
25 pick, that it doesn't provide much guidance, frankly, in terms of what's going
26 on. It raises interesting questions, but it just is too much uncertainty. And

1 indeed, the whole purpose of Phillips was overcoming Texas Digital, which
2 was about dictionary definitions.

3 JUDGE MURPHY: Right.

4 MR. OLLIS: Yes. All right, so going now to this kind of the
5 second point, the point that Judge Murphy was asking about the image
6 capture, I think, and the antecedent basis question. So I'd like to -- we have
7 Claim 1 on the screen.

8 Again, this is Slide 12 from the demonstratives for the Petitioner.
9 And we again, start with the preamble, which says we have a system for
10 determining the sex of a chick. And standard patent claim drafting practice
11 is the first time you introduce something, and you introduce an element of a
12 claim, you put 'a' in front of it, and if you're going to refer back to it, you can
13 refer back to it as 'the' or 'set'.

14 And so, that's what we see here. We have a chick in the preamble,
15 and then in the stimuli limitation, the capture device, et cetera, we have the
16 chick. And so, that's the natural starting point. Now, in between, we have
17 the moving platform, which itself has a limitation.

18 It's not just any moving platform, but we're qualifying the moving
19 platform. And we're saying that this moving platform needs to support an
20 unrestrained chick. This is chick prime, if you will. And that's fine. They
21 can do that.

22 They can say that the platform has to be qualified to support a
23 chick prime. But that doesn't change the fact that we introduced the chick in
24 the first place in the preamble. Now, the Patent Owners --

25 JUDGE MURPHY: Mr. Ollis, let me stop you there.

26 MR. OLLIS: Yes.

1 JUDGE MURPHY: Okay. So the first limitation we're addressing
2 a moving platform to support an unrestrained chick, right? The original
3 claim simply said to support a chick --

4 MR. OLLIS: Right.

5 JUDGE MURPHY: -- right?

6 MR. OLLIS: Yes.

7 JUDGE MURPHY: Why doesn't this -- why doesn't that claim
8 structure where you reintroduce a chick in the body of the claim, why isn't
9 that within the Shoes by Firebug case that Patent Owner's counsel cited to
10 the surreply --

11 MR. OLLIS: Sure.

12 JUDGE MURPHY: -- were a similar type of thing?

13 MR. OLLIS: Well, I think that for a couple of reasons, Your
14 Honor. And it's an interesting case. And obviously, we didn't have an
15 opportunity to respond to that, or brief to that.

16 JUDGE MURPHY: I'm just -- yes.

17 MR. OLLIS: But, and I think Firebug is interesting for a couple of
18 reasons. First, it's got two different independent claims, and with very slight
19 changes in the facts, you get completely different results in terms of whether
20 the footwear I think it was, in that case, is considered having antecedent
21 basis.

22 But the dispute there is focused on whether the preamble is an
23 intended use. And so, that's really the focus of the fight. And when we're
24 starting at it from that perspective, then there's this consequence that flows
25 or doesn't flow in terms of the antecedent basis.

26 We're not arguing here, I don't think, Your Honor, about whether

1 there's an intended use question. And that's -- so we really think that they're
2 addressing a different issue than we're addressing here, which is just a
3 straight antecedent basis question.

4 JUDGE MURPHY: Well, I mean, look, isn't the question whether
5 the preamble is limiting, and whether, conversely, whether the body of the
6 claim recites a complete structural system?

7 MR. OLLIS: Well, we actually -- we don't think that you need to
8 go that far. But even if we look at that analysis, and we would ask the
9 question, is the preamble limiting? Is it intended use? If we look at the end
10 of the computer processor limitation, we see starting with the preamble, first,
11 though, it's a system for determining the sex of a chick.

12 And later, at the end, we have where the image is processed and
13 compared to the database to determine the sex. So we're referring back to
14 what was introduced in the preamble. And so, even if we're going to do a
15 preamble, is it -- it's being relied on later, and so referred back to it. So we
16 believe, even in that case, it's, it's already being referred to, and is indeed
17 limiting even under the preamble.

18 JUDGE MURPHY: But why? Why shouldn't we find that it's
19 referring back to an unrestrained chick, which is the first limitation in the
20 claim?

21 MR. OLLIS: Because of both the reasons that I just mentioned,
22 Your Honor. Well, then I've got an additional one. But the starting premise
23 is, the first time something's introduced for, you know, is that's the
24 antecedent basis.

25 JUDGE MURPHY: But why isn't the preamble here just a
26 statement of intended purpose? And not the --

1 MR. OLLIS: Because if it's an intended purpose, it wouldn't be
2 referred back to later in the claim, Your Honor. And here we have it in the
3 computer processor that the determination of the sex of the chick is again
4 referred back to.

5 So they're drawing on in the computer processor that full
6 introduction even later in the claim. And so we think that actually
7 supports -- even the intended use approach supports Petitioner's view that a
8 chick is introduced in the preamble.

9 And if I might just note one further point, if we look at the other
10 independent claims, particularly Claim 9 -- this is Slide 14 of the
11 demonstratives. We have the system of sorting the chicks again. But now
12 we have a very different phrase on the image capture device.

13 And so the image capture device, they're expressly adding some
14 additional detail, positioning approximate to the moving platform, the chick
15 as it passes on the moving platform. So they knew how to tie the capture
16 device in to put some more limitations on exactly when the image is being
17 taken.

18 But they didn't do that in Claim 1. And so we believe that further
19 reinforces the interpretation and the understanding that Claim 1 in particular,
20 as well as Claim 6, is very broad on the image capture device.

21 JUDGE MURPHY: But isn't the point of the invention to capture
22 an image of an unrestrained chick, at least in the sense of the chick that's
23 freely opening or has opened its wings?

24 MR. OLLIS: I mean, they certainly want to ultimately capture,
25 you know --

26 JUDGE MURPHY: Well, isn't that how you determine the sex of

1 the chick? My understanding from reading the evidence is that you've taken
2 a high-quality image of the wings, particularly the wing tips, to differentiate
3 a male chick from a female chick. Is that your -- is that correct?

4 MR. OLLIS: That's correct, Your Honor.

5 JUDGE MURPHY: Correct understanding?

6 MR. OLLIS: That's correct. But I would submit, Your Honor that
7 the -- ultimately, you know, an applicant is free to draft their claims broadly.
8 And sometimes the, you know, if you set out just elements.

9 They chose to set out Claim 1 very broadly. They just listed these
10 four elements. They didn't explicitly knit them together. They just said you
11 have to have a moving platform that's good to support unrestrained chick,
12 the stimuli, and the image capture device to take a picture of the chick, and
13 that's it.

14 And we don't think it's appropriate to, on their broadest claims, for
15 example, just because they drafted them very broadly, to try to read in
16 additional specifics from the claim that they could have added. And in fact,
17 demonstrated that they had the ability to add. So that's Petitioner's position,
18 Your Honor.

19 Okay. And turning now to validity itself with Gershman. I think
20 for a lot of the facts in general are not that much in dispute on these devices,
21 or maybe some exception a little bit with Gershman.

22 But Gershman has the statement, when we're talking about the
23 moving platform to support an unrestrained chick, chickens are placed on a
24 moving plate. That's right on point, with this statement. And we really
25 think that's just about as far as the Board needs to go.

26 That was part of what we're focusing on in the petition. And it's

1 photographed during the fall. There's no question that it's unrestrained. I
2 mean, unrestrained is not an issue with Gershman. Turning to, I guess,
3 Slide -- the number is too small on here. I think it's 18.

4 Gershman -- the Patent Owner argued, though, pointing to a
5 different sentence, especially on page 5 of Gershman. That the chickens can
6 be placed on a plate and it's pushed down eight centimeters, essentially from
7 a height, onto shock absorbers.

8 And then they took the position through Dr. Keener that the chick
9 is never supported on a moving plate. Even though we have the first
10 sentence and we're cushioning it clearly at the end here.

11 JUDGE MURPHY: Well, take us through please, in Gershman,
12 where or how Gershman discloses or teaches contemporaneous movement
13 and support of the chick. All right?

14 MR. OLLIS: Sure.

15 JUDGE MURPHY: Because it's a fundamental issue, Patent
16 Owner says it doesn't happen.

17 MR. OLLIS: Right. But I think Gershman speaks for itself. I
18 think there's a couple of different -- Gershman has a couple of different ideas
19 and statements of what he's doing. And we believe the references is good
20 for what it teaches to inspire --

21 JUDGE MURPHY: Well, take us through those, please.

22 MR. OLLIS: So the first one is exactly as on page 3. Go back up
23 here. The statement says --

24 JUDGE MURPHY: Which? Counsel, which slide are you on?

25 MR. OLLIS: Sorry, I'm on slide -- hold one second, 17.

26 JUDGE MURPHY: Thank you.

1 MR. OLLIS: And it says that the chickens are placed on a moving
2 plate. And we believe that should be taken literally. That the plate may be
3 moving already when the chicken's placed on it. That's one option.

4 There is the possibility, from a later statement, that it's you put it
5 on a plate, and push down. And that maybe, maybe it's not moving at the
6 beginning. But what happens next? So that's the first point, and we believe
7 that that first option, there may be more than one option that they're talking
8 about here.

9 JUDGE MURPHY: And that's the argument in your petition?

10 MR. OLLIS: That's the argument of petition. And then --

11 JUDGE MURPHY: That's the only argument in your petition?

12 MR. OLLIS: That's the focus of the petition.

13 JUDGE MURPHY: Okay.

14 MR. OLLIS: But then they came back, Your Honor, and they took
15 what we thought was an extreme position, that there's never any movement
16 and so it's never supported. And at that point, we thought that, you know,
17 the barn door is open, or the chicken coop was open.

18 And we were free to come in and point out that, in fact, not only
19 does the first position in petition support our position, but in fact, the
20 cushioning, the springs, and these other points in time are also supporting
21 the moving chick.

22 Now, in between, we have a little initial acceleration, a little more
23 than gravity. But it's just an initial acceleration. And Gershman talks about
24 the fact that the chick has got -- I can't remember the words, the
25 prepubescent -- anyway, it only takes 20, 30, 40 milliseconds to get the
26 reflexes going that you need.

1 So you only need a very short initial acceleration to cause the chick
2 to feel it's falling. And maybe it separates a little bit, and then you're done.
3 You don't need to accelerate anymore.

4 JUDGE MURPHY: Well, let me focus your attention to play
5 devil's advocate, right?

6 MR. OLLIS: Yes?

7 JUDGE MURPHY: The Patent Owner points to your expert's
8 deposition testimony on this point.

9 MR. OLLIS: Right.

10 JUDGE MURPHY: Where he -- if I could summarize. Mr.
11 LeCroy essentially says Gershman does not -- he agrees Gershman does not
12 disclose an acceleration that's less than gravitational acceleration.

13 MR. OLLIS: Correct. But he also points out that that's the initial
14 acceleration.

15 JUDGE MURPHY: And so explain that for me, please.

16 MR. OLLIS: Well, the point is it's just a very brief initial
17 acceleration to cause the chick to feel that free fall and feel that it's free
18 falling. That's all. And after that you're not -- the assumption is there's no
19 point in accelerating the chick anymore.

20 JUDGE MURPHY: You mean after the image capture?

21 MR. OLLIS: What?

22 JUDGE MURPHY: After the image is captured?

23 MR. OLLIS: Well, you really just need to get the chick open --
24 yes, after the chick's opened its wings, regardless of -- once the chick's open
25 its wings, you're fine. You've done -- you've accomplished what you
26 needed. So it's not necessarily -- I mean, the chick will keep its wings open

1 probably after that for a bit because it's going to flutter. So, yes.

2 So that's, again, that's our position. It's just a brief acceleration.

3 It's going to cushion it on the fall. And that's how that works.

4 JUDGE MURPHY: You say it's going to cushion on the fall.

5 Their point is that's not in Gershman.

6 MR. OLLIS: Well, Your Honor, I think there are multiple
7 embodiments. I think it's critical to look at the entirety of what Gershman
8 teaches. And there are multiple embodiments and suggestions of how this
9 could work. Even if we take their -- even if we take the shock absorbers out,
10 let's suppose for the sake of argument, they also talk about that we could
11 implement this system with a moving plate having springs. And if you've
12 got a moving plate that's connected or associated with these springs, that's
13 clearly going to decelerate, and may even push the platform all the way up.

14 But at minimum, it's going to cushion the plate, and there's going
15 to be some movement, and the chick is going fall on that moving platform.

16 JUDGE MURPHY: So if I can summarize. You're saying the
17 disclosure of an initial acceleration that's just slightly more than gravity, a
18 combination with shock absorbers and cushions, tells a person of skill in the
19 art, there's going to be some type of deceleration --

20 MR. OLLIS: Yes. Support has to be --

21 JUDGE MURPHY: -- for the chick?

22 MR. OLLIS: Yes. And that's natural. And, you know, it's not
23 going to be, as Dr. Keener wrote, it's just not going to be there's a stop and
24 you're done. That's not realistic. And I think Mr. LeCroy pointed that out.
25 And was, you know, attacking the credibility of those demonstratives for
26 that reason. It wasn't a fair characterization of the system.

1 I think we've covered that slide or two. We've covered the initial
2 acceleration. We pointed out, Your Honor, I think that we disagreed in the
3 record with the way Dr. Gershman characterized the chick.

4 So just briefly on the image capture, Gershman also is analyzing
5 the wings. It's looking at compactness and the roughness of the wings as
6 part of its process. And it creates these values related to those features. And
7 it creates these polygons.

8 And our view is that it could reasonably also be looking at the full
9 database, the images themselves, as taught by Pierre as an alternative or
10 additional method. All these things are early, maybe you want to check or
11 something.

12 Which takes us to Pierre. Pierre is another one of these early
13 references that recognize that if you put a chick in a falling position and it
14 causes it to open its wings, we can take a picture and determine the sex.

15 And Pierre is also it's not just the sex. They could be determining
16 the health or other features of the claim (sic). And it also has an
17 introductory sentence generally teaching what it, you know, what it's doing.

18 Which says it's going to compare the captured images, two
19 reference images, plural. And that's referred to in the petition. That's an
20 important teaching in Pierre. And we believe that, although it doesn't say
21 there's a database, per se, it's understood reasonably, or would be obvious,
22 that you could, you know, keep these images in an organized structure, these
23 reference images.

24 And there's no question that it's looking at the plumage in Pierre
25 that's consistent with Gershman. They're all really kind of coming out just
26 generally the same type of analysis.

1 There's also the point that Pierre --and a lot of these things exist in
2 two states, right? There's the male and there's the female, and it's natural
3 that you might have the images of both the male and female stored.

4 The Patent Owner, and I think Dr. Karam, focus a lot on some later
5 sentences in Keener that talk about comparison to a reference image. And
6 that's fine. There's some examples there. But it doesn't take away, just as
7 the first sentence of Gershman doesn't get taken away, the fact that it's
8 pushing down on a moving plate.

9 It doesn't take away the overarching teaching here that you're
10 comparing reference images to -- excuse me, the captured images to
11 reference images. And there's almost no discussion, in fact, there's no
12 discussion of that sentence at all in the Patent Owner response.

13 They've just focused entirely only on the later sentences. They
14 don't even address really that first sentence. And finally, in the Patent
15 Owner, in the surreply, they go back, and they addressed head on that
16 sentence.

17 And they say, well, it could be it's in a different system or
18 something. And they refer back to Dr. Karam, who also doesn't even
19 actually fully quote that sentence. There seems to be, maybe, like a half
20 sentence that seems to reference or acknowledge that Pierre teaches images,
21 and kind of has a conclusory sentence saying something to the effect that
22 somehow that could be in a different system, which really doesn't tell me
23 very much. And so, from a Patent Owner's perspective, they really didn't
24 address that sentence.

25 And the combination, the basic idea is here, there's nothing new.
26 So it wasn't an important part of the prosecution that there's any indication

1 there's any special database here, or that this wasn't generally known.

2 Turning to just briefly, Claim 3. There's a little bit of discussion
3 about that on two points. One, and this is not raised in the petition, but it
4 was noted later on. I actually don't think the Board needs to address --

5 JUDGE MURPHY: Counsel, which slide are you on?

6 MR. OLLIS: Oh, I'm sorry, I'm on claim -- Slide 15. This is
7 actually a claim construction point first. But it talks about the stimuli may
8 be one of four options. And we think that's pretty clearly an optional claim.
9 Maybe it's invalid. It's not further limiting. But we think that speaks for
10 itself.

11 And even if it's not, the claim, just to Claim 1 just recites the
12 stimuli to cause the chick to open its wings. It doesn't tie it to a particular
13 point in time. It doesn't have to be the particular point in time that it was
14 going to have its image taken.

15 There's a stream of air towards the end of Gershman. Everybody
16 seems to agree that when you blow air, a stream of air, on chicks, they get
17 startled, and they open their wings. So we believe that's satisfied by
18 Gershman.

19 Yavnai, as we've mentioned, I think is important to look at from
20 both sides, the left and the right side. Because on both sides we have the
21 chick on the moving platform. I don't think there's any dispute about that.
22 There's an argument, again, on the right side about whether it's restrained --

23 JUDGE MURPHY: Which slide, counsel?

24 MR. OLLIS: Oh, sorry. We are -- I think that's Slide 20 -- I
25 apologize, from Petitioner's demonstratives, 28. And we can see on the left
26 side the chicks jumping up and down, very freely, unrestrained, as we've

1 submitted in the papers, as the poles are slowly rising up to it.

2 But at the beginning, there's a lot of freedom of movement. And as
3 we've indicated in the record, those poles are not going to keep that chick on
4 the platform. I think Mr. LeCroy pointed out in passing that every conveyor
5 in a hatchery is going to have sidewalls. I mean, that's just inherent. That's
6 what, how they're built.

7 And this is a side view. The Patent Owner's trying to just show the
8 parts that are of interest here. The fact that there's no sidewalls shown
9 doesn't mean that they're not actually there.

10 So again, we believe that, and Petitioners have explained in the
11 petition, that especially on this left side, the chick is supporting an -- excuse
12 me, the platform is moving and supporting an unrestrained chick, which is
13 jumping up and down.

14 Then again, we come back to the end on the right side. So this is
15 Slide 29 from the demonstratives. Where there's no dispute I don't think that
16 the poles are supporting the wings while the camera photographs the wing
17 tips of the chick.

18 And that's -- doesn't seem to be a disputed point. In the initial
19 determination it was pointed out that Yavnai uses the word support rather
20 than restrain. And the chick has still a lot of freedom at this stage.

21 Turning to slide -- demonstrative Slide 30, as pointed out even
22 here, the chick still has the freedom to move its wings forwards and
23 backwards. It's not being held in place. And so, we think that really the
24 characterization of the chick as supporting is more accurate than restraining.
25 Even if there's a little limitation on whether it can easily pull its wings
26 straight down.

1 JUDGE MURPHY: Well, here's where, you know, how are we
2 supposed to interpret the prosecution's history statement about Yavnai,
3 right? Because at least at the point of image capture, the wings are spread.

4 MR. OLLIS: Right.

5 JUDGE MURPHY: But they're supported on the poles.

6 MR. OLLIS: They are.

7 JUDGE MURPHY: And then, because it was Dr. -- Mr. LeCroy's
8 deposition, he seemed to agree that that would restrain or restrict the wings
9 from moving in (CROSSTALK) --

10 MR. OLLIS: Yes, I think he didn't agree that it restrains them.
11 But he did agree that it, there is some limitation of movement, a little bit,
12 there's some restriction. And I think that's, obviously, an important
13 distinction from our perspective.

14 JUDGE MURPHY: Well, yes. Because all we have to go on is
15 what was said in the prosecution history.

16 MR. OLLIS: Right. Which, again, as we pointed out, we think
17 this is a mistake. But the prosecution history's -- we just think it was a
18 mistake, frankly. That there should not have been -- not only should the
19 word not have been introduced, but that restraint and support are two
20 different concepts, ultimately. And the Board can correct that error here.

21 And then briefly, Your Honors. There are two other bases of for
22 grounds, excuse me, for invalidating Claim 1.

23 JUDGE EASTHOM: And can we just clarify? You think it's a
24 mistake because there may not be written description, support. Is that the
25 reason? Or what's the --

26 MR. OLLIS: Two, well, yes. We -- that's the first mistake. We

1 think there was no written description support, and frankly, it's unclear what
2 unrestrained means. Because we're wrestling with even the platform has
3 sidewalls, which seem to, if -- and we're taking this view, that this particular
4 view that's being advocated.

5 But even in general, we think ultimately the best interpretation of
6 restrained is more the one that's the Tao version, that you're just holding the
7 chicken in place. That's really the restraint. And so, the approach that
8 seems to have been taken was really just a mistaken approach at the end of
9 the day. That's -- we think that's the best one.

10 The Goodwin is a classical, older system in a hatchery where there
11 are multiple stations for doing different processes to chicks. And in the
12 middle, we have the sexing station. And the chicks come up the conveyor
13 and they drop. There's a fall.

14 Pierre has an idea that if you put a chick in a falling position and
15 you take its fixed image, you can determine the sex. And it tells you how to
16 do that. But it doesn't give you anything about the mechanical structures
17 that get a chick into a moving position in the first place.

18 And so here we have the chick on a moving conveyor. It gets right
19 to the end, it falls off, takes a picture. It's a natural point in the system
20 because you're -- the whole goal of all of these things is to replace the
21 manual sexing station.

22 It's a very natural, logical place to put it. And again, this goes back
23 to kind of the points I made earlier. The degrees of sophistication for
24 routing chicks and all that sort of thing is quite high. So yes, there's no
25 details on how you build the rest of the conveyors to send the chicks off
26 wherever you wanted to next send them.

1 But that's not claims, and that's not an issue here. It's only for
2 Claim 1.

3 JUDGE MURPHY: You know, in this figure of Goodwin that you
4 have on Slide 32, there's also no sidewalls shown.

5 MR. OLLIS: Exactly, exactly. And so, that goes to the point that
6 all of the conveyors, Mr. LeCroy's pointed out, that's typical approach in
7 patent drawings. You're just trying to focus on the part that you're interested
8 in.

9 And in fact, there are sidewalls here. And so, that's part of the
10 reason we think it's unrestrained. This is no different than the chick on the
11 unrestrained platform -- excuse me, the platforms that are moving in the
12 patent. So we think it's a nice, simple combination that fits well for
13 particularly for a few of the claims, Claim 1. And similarly, the other
14 combination is Pierre and Gershman.

15 Turning now to claim, sorry, Slide 25. And again, Pierre is
16 looking for mechanical structure that puts the chicks in a falling position.
17 Gershman does exactly that. You have the plate and that gets the chick
18 feeling like it's falling.

19 And so it's a very natural pairing with the Pierre, starting with
20 Pierre, which wants to take the picture of the chick in falling position. It just
21 needs a system to do it. But you can look around and then find this.

22 There was, I think -- I don't know that we need to get into this too
23 much. But the slides in the record, we obviously disputed a lot of the
24 pushback that came from the Patent Owner on the chicks being injured or
25 falling too far, traffic jams, all these other issues. We think -- we introduced
26 Mr. Lee Croy in significant part to point out that these are really just

1 overstating the concerns here.

2 And again, at this point, we're trying to get developmental systems.
3 We're trying to get proof of concepts for these things. That's really what we
4 were at the phase in terms of development.

5 And then, finally, just briefly, there was some evidence, or at least
6 some argument briefly made about secondary considerations with respect to
7 obviousness. Dr. Keener acknowledged -- I'm on Slide 5 here of the
8 demonstratives, that he didn't know whether there was ever any commercial
9 system. There's no evidence in the record of any commercial success of
10 anyone making this.

11 And, in fact, turning to the last Slide 34 of Petitioner's
12 demonstratives, you know, there's no evidence of long felt need. There's no
13 evidence of achieving anything here, of results achieved. So there are no
14 unexpected results. We don't know anything about whether the claim
15 systems actually achieved high throughput or greater safety, or any of these
16 things.

17 And we believe, therefore, that there's no impact from any
18 secondary considerations in these arguments. And so, I think with that, I'm
19 close to the 45 minutes.

20 Again, we believe that fundamentally, the issues are that the wrong
21 claim interpretations are being applied by Patent Owners, and they're
22 reading these various references too narrowly. I mean, there's clear
23 statements that we believe support in Gershman and Pierre, et cetera, Patent
24 Owner's positions.

25 And there's -- all of these references have to be taken in their
26 entirety. So I don't know if there are any further questions here at this point

1 from the panel.

2 JUDGE EASTHOM: Thank you.

3 MR. OLLIS: I reserve the balance of time.

4 JUDGE EASTHOM: Thank you very much.

5 MR. ROBSON: Good morning, again, Your Honors. This is
6 Matthew Robson on behalf of Patent Owner.

7 JUDGE EASTHOM: Good morning.

8 MR. ROBSON: So, Your Honors, I'd like to start today going
9 right to the moving platform to support an unrestrained chick limitation.
10 And Your Honor had asked whether there's agreement that this requires both
11 that the platform be moving at the same time as it's supporting the chick.

12 We would contend, Your Honor, that that is an undisputed
13 construction at this point in the proceeding. Because Patent Owner
14 presented in its Patent Owner response a construction of this term, supported
15 by expert testimony, that I have here on the screen. And this is Paper 16.

16 JUDGE MURPHY: Counsel, this is a slide? Or just the --

17 MR. ROBSON: This is just our Patent Owner response.

18 JUDGE MURPHY: Okay.

19 MR. ROBSON: So this is --

20 JUDGE MURPHY: Which page in the response, please?

21 MR. ROBSON: This is page 21, Your Honor. On page 21 what
22 we said is Patent Owner submits that this plain, ordinary meaning is, quote,
23 "A platform in motion supporting an unrestrained chick as it transports the
24 chick from a first location to a second location."

25 And in reply, Petitioners did not dispute that this was the
26 construction. In fact, in their reply, which I've now put up on the screen --

1 their reply is Paper 19, at page 3. They state Targan discusses the
2 interpretation of three phrases in its POR.

3 Its proposed interpretation of two phrases related to the moving
4 platform is consistent with Petitioner's application of the claim. And this is
5 the claim construction portion of their reply brief. They do not brief the
6 construction of moving platform. They only brief the construction of
7 unrestrained chick, and they presented no to expert testimony regarding the
8 moving platform limitation. The rest of their reply brief goes on to attempt
9 to apply --

10 JUDGE MURPHY: Well, but let me stop you, there. Isn't the
11 dispute over whether there needs to be movement and support of a chick
12 throughout the process or just at certain points in the system as its claimed?
13 Because you have a system claim, not a method claim.

14 MR. ROBSON: Correct, it's a system claim. Your Honor, so the
15 chick must be supported on a moving platform. So there must be both
16 movement of the platform and the chick being supported while there is
17 movement of the platform.

18 JUDGE MURPHY: But can there be movement without
19 supporting the chick for any period of time?

20 MR. ROBSON: Not within the system. No. What's described
21 is --

22 JUDGE MURPHY: And where do you read that in the claim?

23 MR. ROBSON: Where is that in the claim? So the claim --

24 JUDGE EASTHOM: But wait a minute. Can I -- just to make it
25 maybe more simple. Don't your chicks jump up during movement?

26 MR. ROBSON: Sure, on the moving platform.

1 JUDGE EASTHOM: But then they're unsupported.

2 MR. ROBSON: Well, when they jump up, just like someone
3 jumping up on a floor, you're still supported by the floor, we would contend.
4 And as another point Your Honor, the patent dependent claims expressly
5 contemplate vibrating the chick while it's on the platform, which would
6 entail some amount movement.

7 JUDGE EASTHOM: So at some portion during the movement,
8 they're not -- they're unsupported?

9 MR. ROBSON: Their feet are not maybe touching the platform,
10 but they're still supported by the platform.

11 JUDGE EASTHOM: I don't understand that.

12 JUDGE MURPHY: Yes, how does that work?

13 MR. ROBSON: Well, because the chick, while it's on the
14 platform, at all points within our system, is going to be upheld by the
15 moving conveyor. It's not going to be falling down through the floor. It's
16 not going to be falling on the floor, it's going to be supported by the
17 conveyor. And it could move naturally as it as it can, right? It's --

18 JUDGE EASTHOM: And how's that any different than Gershman
19 when the chick falls part of the way, and then they can -- it'll catch up
20 eventually to the plate?

21 MR. ROBSON: So in Gershman, there is no disclosure in
22 Gershman that the chick will ever be on the plate while the plate is moving.
23 Your Honor mentioned when it catches up to the plate. At that point, Your
24 Honor, the plate has already hit the shock absorbers. Okay? And the plate
25 has stopped.

26 There's no disclosure in Gershman. And this is Petitioner's burden

1 to show that there would be disclosure in Gershman, that there's ever a time
2 where that plate is moving.

3 JUDGE EASTHOM: What about in Gershman -- well, first of all,
4 let me -- I think, let me ask you about this. The claim, as my colleague
5 suggests -- said, is, and you agree, it's a system claim. So it only has to be
6 capable of supporting a chick while it's moving at most, right? Under In Re
7 Schreiber? The famous popcorn case?

8 I don't know if you remember, but in that case, there was a there
9 was a funnel that was prior art and it was an oil funnel. And it was ruled to
10 be prior art, anticipate a funnel for passing one popcorn kernel at a time,
11 even though the prior art funnel didn't say anything about popcorn.

12 So in your case, we do have something that says something about
13 chicks. But if I have a -- Gershman has a platform upon which a chick can
14 be placed, and the person holding the platform can move the chick down a
15 little bit and then move it faster, and that's all the claim really requires, in my
16 view, because it's a system claim under Schreiber.

17 MR. ROBSON: So with respect to the system claim, it is a system
18 claim. But the Patentee here has used an active verb here describing what's
19 in its system, a moving platform. It could have claimed a --

20 JUDGE EASTHOM: It's moving -- it's moving -- it's moving the
21 way I described Gershman, it's still moving.

22 MR. ROBSON: So to address that, Your Honor, Gershman never
23 describes, as Petitioner's expert admitted, a point where the plate is moving
24 less than G. The only thing disclosing Gershman is that the plate is going to
25 move down more than G.

26 JUDGE EASTHOM: Remember, I told you about the popcorn

1 case, though. That the prior art reference never discusses how it would pass
2 one kernel at a time, which the claim stated. But it was an oil funnel. All it
3 did is pass oil in the reference.

4 And the Court said, hey, you got the same structure as you have
5 over here. They have to be, you know. So when we have a picture of the
6 guy in Gershman, he's holding a chick on there. Then that person has to
7 start moving it really fast, according to the disclosure in Gershman.

8 Before it starts moving really fast the chick's still on the platform.

9 MR. ROBSON: Yes. And, Your Honor, we think the critical
10 distinction is that at that point, while the chick is on the platform, under
11 Gershman disclosure, the plate is not moving. Gershman is very clear that
12 anytime the platform is moving the chick -- and it says, it quotes, it says,
13 "without support" --

14 JUDGE EASTHOM: Let me ask you this.

15 JUDGE MURPHY: Wait, can I ask --

16 JUDGE EASTHOM: Go ahead, sorry.

17 JUDGE MURPHY: Sorry, Judge Easthom. Just so we're clear,
18 I'm reading from Gershman, which is Exhibit 1003 on page 3. And it says,
19 this is on the bottom of the page, where it says -- it's titled one stage, and
20 then it has a series of numbered statements.

21 And it says -- and this is -- and I'm focusing your attention on this
22 Counsel because, as Mr. Ollis said, this is the petition's argument for why
23 Gershman discloses a moving platform to support an unrestrained chick.
24 Right?

25 In terms of the movement and the support aspect, Gershman says,
26 quote, "chickens are placed on a moving plate and are photographed during

1 the fall," closed quote. Why do we need to go anywhere past chickens are
2 placed on the moving plate? Why wouldn't that satisfy the first limitation of
3 the claim?

4 MR. ROBSON: Sure, Your Honor. Let me just turn, because it
5 may be helpful, to our Slide 31. Your Honor, what's shown in Gershman,
6 even though it uses the term moving, when -- sorry, down here.

7 JUDGE MURPHY: Okay.

8 MR. ROBSON: I'll move closer. In Gershman, it's undisputed
9 that when the chick is placed on the plate, the plate is stationary. It is not
10 moving.

11 JUDGE MURPHY: Where does it say that?

12 MR. ROBSON: Well, one thing I'll direct you to is Petitioner's
13 expert testimony. Then --

14 JUDGE MURPHY: No, where does Gershman say that?

15 MR. ROBSON: Well, so Gershman shows a chick on a stationary
16 plate. And that's at the point with the where the chick is placed on the plate.

17 JUDGE MURPHY: Well, Gershman has a still image of a person
18 holding a, quote, "moving plate with a chick on."

19 MR. ROBSON: Well, but it also discloses that when the plate
20 moves, it moves down faster than G. It drops out from under the plate (sic)
21 faster than G. And I think, I think that was also what Petitioner's expert, Mr.
22 LeCroy, how he was reading it.

23 Because at his deposition, and we asked him, and this is on Slide
24 31, at that point, when the chick is placed on the plate, the plate is stationary,
25 right? Correct. And I was asking -- we were asking him directly about the
26 sentence in Gershman Your Honor is referring to.

1 At page 2 of Gershman, which is also on our slide, that chicken are
2 placed on a moving plate. So I really think there shouldn't be any dispute by
3 their expert's admission that when you interpret Gershman, it's talking about
4 placing the chicken on a stationary plate.

5 JUDGE MURPHY: Okay. But that's not what Gershman says.
6 So, but beyond that, the rebuttal to your position is that, well, that's an initial
7 acceleration, if I understand Petitioners argument correctly. And based on
8 Mr. LeCroy's declaration and deposition testimony is that Gershman
9 discloses an initial acceleration.

10 And that person of skill in the art would understand that there's a
11 necessary deceleration, that the chick will drop back onto that plate and be
12 supported while the plate is in motion. Then they're saying, Gershman
13 suggests that by using the phrase initial acceleration and disclosing shock
14 absorbers. So why is that wrong?

15 MR. ROBSON: So, Your Honor, if I may direct you to a slide that
16 may help us. Excuse me. I'm just going to get to this.

17 JUDGE MURPHY: Yes. No, take your time.

18 MR. ROBSON: So Your Honor's question is about the initial
19 acceleration. Let me just turn to -- so Your Honor, we would submit that it
20 doesn't matter that it's an initial acceleration downward that is more than G.

21 Because, as Your Honor also noted, at no time in Gershman does it
22 disclose that the plate is going to move at a point less than G. That's what
23 their expert had explained. In Gershman, when it discloses how the plate is
24 moving, it says expressly the chick will be - this is on our Slide 20, without
25 support.

26 It'll be without support. And it doesn't disclose any point where

1 the plate is moving more than G and there will be support. So the fact that
2 it's the initial acceleration we would submit is irrelevant to disclosure of
3 Gershman.

4 And Gershman makes absolutely clear, if we turn to the next slide,
5 to Slide 20. That any time it's moving, the purpose of this is it's designed to
6 ensure that the chick loses support. Here we have on Slide 21 from
7 Gershman at page 5.

8 It says it is logical to propose that in order to secure the symptoms
9 of reflex opening up the wings, the legs should lose support faster than they
10 can move down. So Gershon is going to the - this is talking about the initial
11 part here.

12 And Gershman is making sure that this plate moves down so
13 quickly that the chicks' wings can't -- excuse me, legs can't even react to it.
14 Can't, can't even muster up any support or with contact plate. This is a
15 system that is designed, designed so that the chick loses support, which is
16 really the opposite of what our patent claims, the '124 patent. Because in our
17 patent when there is movement, when the plate is moving, it's designed to
18 provide support to the chick.

19 JUDGE EASTHOM: Well, what about -- that's why I was asking
20 you about the part where the person is holding the platform, right? So we
21 agree the person is able to move the platform slowly if they want, right?

22 MR. ROBSON: Well, that's not disclosed in Gershman, Your
23 Honor.

24 JUDGE EASTHOM: Well, let me read you what Schreiber says.
25 And by the way, Schreiber is at 128 F.3d 1473. And it said, although
26 Schreiber is correct that Harz address the use of the disclosed structure to

1 dispensed popcorn, the absence of a disclosure relating to function does not
2 defeat the Board's finding of anticipation.

3 So you're arguing that it doesn't specifically say that. But that's
4 irrelevant. It says it is well resettled that the recitation of a new intended use
5 for an old product does not make a claim to that old product patentable. See
6 In Re Spada. And then on and on, and it cites other cases.

7 So that's my question. I don't understand if I'm holding a platform
8 and there's a chick on it, and the disclosure says I can move it faster than G,
9 obviously I can move it slower than G, also. That's -- well, that's where I'm
10 having trouble.

11 MR. ROBSON: Sure, Your Honor. So, Your Honor, it's not that
12 our argument is only that Gershman doesn't disclose just moving the plate a
13 little down. It's that Gershman teaches the opposite. It teaches that you
14 should ensure that the chick loses --

15 JUDGE EASTHOM: At certain point -- nobody's disputing that.
16 Of course, we, I think everybody understands that. We're talking about
17 when you're not moving it that fast.

18 MR. ROBSON: Gershman teaches the opposite of not moving it
19 that fast. It teaches you must, what you should be doing --

20 JUDGE EASTHOM: You're saying Gershman teaches you
21 absolutely must move it as fast as you can all the time?

22 MR. ROBSON: Gershman only teaches that the platform moves
23 downward faster than G. And it teaches that you should do that at the very
24 start, so that the chick loses support.

25 JUDGE EASTHOM: And I'll return -- I'm not going to keep
26 hammering you on this or asking you about it. But I'm sorry, but I just keep

1 returning back to Schreiber. And it says, even though Schreiber, or
2 Gershman, the prior art doesn't say that, if it's able to do that, then you still
3 have a teaching of that.

4 MR. ROBSON: So I don't have the case in front of me. But I
5 don't know if, in that case, the prior art reference not only didn't disclose it,
6 but taught not doing that. Taught that, like in our case, you actually should
7 make sure that you move down, faster. It would be contrary to the teachings
8 of Gershman to slightly move the plate down.

9 JUDGE EASTHOM: Okay. And I think I understand your
10 position. Thank you.

11 JUDGE WORMMEESTER: Counsel, I have a question. The '124
12 patent, at column 6, when it's describing applying the stimuli like blowing
13 the air and vibrating, it causes the chick to feel unbalanced and in an effort
14 to regain its balance, the chick begins to lift and flap its wings so that the
15 cameras can take the pictures.

16 And so I'm at column 6, starting at about line 16. So in this case,
17 in this example, also the chick is not supported, right? Because it's lifted off
18 the platform. So how is that different in Gershman?

19 MR. ROBSON: So, Your Honor, I go back to the point that a
20 vibrating mechanism, if you have a vibrating conveyor, and the chick is on
21 it, the chick is still supported by the conveyor, even if it's vibrating the chick
22 up and down. It'll always return to the conveyor. And even if the chick
23 loses its balance, becomes unbalanced, that is the point of the angled
24 platform. The angled platform is still there to provide support to the chick.

25 JUDGE WORMMEESTER: So when you're moving the plate
26 downward, is it still supporting the chicken?

1 MR. ROBSON: No, because the chick cannot at any point in that
2 process find any support for its legs on the plate. It actually -- Gershman
3 says, as we see on Slide 21, the chick is to lose support. It's to be without
4 support. Whereas, in our conveyor belt, the chick is supported on the
5 conveyor the whole time while it's stimulated, whether it's air blower or
6 vibration.

7 JUDGE WORMMEESTER: But even when it lifts up?

8 MR. ROBSON: Yes. Because even if the feet are not in contact
9 with the conveyor briefly, it is still supported by the conveyor. The chick is
10 not going to drop down, drop off of anything. It's -- I would go back to, just
11 like a floor supports a person, even if they're jumping up and down, the
12 conveyor is providing support to the chick. The distinction in Gershman is
13 that there is no point where the chick in the free fall can be supported by the
14 moving platform.

15 JUDGE MURPHY: What do you mean?

16 JUDGE WORMMEESTER: But it's just going to keep flying.
17 They move the plate out so that the chick just falls.

18 MR. ROBSON: But no, Your Honor. At some point the platform
19 is going to hit the shock absorbers, and then the plate -- then the chick will
20 land on the plate. But what's important here is there's no disclosure in
21 Gershman that that plate is still going to be moving and be decelerating
22 while the chick is on it.

23 And Petitioner's expert admitted that in Gershman, the plate is
24 going to hit the shock absorbers before the chick does. That's the natural
25 result of the fact that the plate moves down faster than G. And it's the
26 Petitioner's burden to show that Gershman discloses an embodiment where,

1 under our construction, which we submit is undisputed, where the plate is
2 both moving and supporting the chick.

3 They haven't done that, because nowhere in Gershman does it
4 disclose that when the platform is hitting the shock absorbers, that by the
5 time the chick reaches it, which admittedly is after it hits the shock
6 absorbers, the plate is still going to be moving while the chick is on. There's
7 no teaching or suggestion in Gershman on that score.

8 JUDGE MURPHY: Counsel, can I -- let me follow me up on that,
9 please. In Gershman, the Petitioner's argument, as I understood it, is that
10 Gershman says a chicken is placed on a moving plate, and they cite to Figure
11 3 in Gershman, which is a still image of a chick on a moving plate that is
12 literally being placed by hand onto, I guess, the shock absorbers, or whatever
13 the unit is that's going to push them down. Why isn't that a chick moving on
14 a plate while it's being supported on the plate?

15 MR. ROBSON: So I go back to the point that it's undisputed, even
16 by their expert, that when you place the chick on the plate, that initial point,
17 the chick is now supported, but it is not moving. The plate is not moving,
18 and the moment the plate moves --

19 JUDGE MURPHY: That's not what Gershman says. It literally
20 says, place the chick on a moving plate.

21 MR. ROBSON: Yes, I think, Your Honor, their expert, when he
22 was interpreting this reference, did it our way. He said, well, it's saying
23 moving plate. But I know it's not moving. I know it's stationary when you
24 place the chick on the platform.

25 JUDGE MURPHY: Let me ask you a different question. In the
26 Patent Owner's response, they repeatedly state that Gershman, the plate in

1 Gershman, is entirely stationary. And I do not find that statement or
2 suggestion anywhere in Gershman. Can you point me to where Gershman
3 teaches that?

4 MR. ROBSON: Well, I don't think that we believe that the plate in
5 Gershman is always entirely stationary.

6 JUDGE MURPHY: It says it three times --

7 MR. ROBSON: Oh --

8 JUDGE MURPHY: -- on page 27 and 28 of your response.

9 MR. ROBSON: -- maybe I can clarify. What we are intending to
10 express is that whenever the chick is supported in Gershman, the plate is
11 stationary. Not that the plate is always stationary, but --

12 JUDGE MURPHY: But you used the words entirely stationary,
13 and you used it three times, which caught my attention. So I checked the
14 reference, and I don't find that statement, or a fair suggestion of that
15 statement. And so, I'm asking you to tell me where I should read to find
16 that, other than an expert's deposition testimony.

17 MR. ROBSON: Well, sure, I mean, you know, stationary or not,
18 it's a binary thing. Because entirely stationary is not needed. If it's
19 stationary, it's not moving. It's stationary.

20 JUDGE MURPHY: Okay.

21 MR. ROBSON: Okay. So, on Gershman, I'd like to turn -- direct
22 Your Honors to Slide 32 where we discuss 3 -- Dependent Claim 3. Because
23 Your Honors, we would submit that even if Petitioners are found to have
24 met their burden on independent Claim 1, which we obviously disagree with,
25 Dependent Claim 3 should still be upheld, because Gershman does not
26 disclose the additional limitations of Dependent Claim 3.

1 Now Dependent Claim 3 recites -- and it's on Slide 32, the system
2 of Claim 1, wherein the stimuli may be one or more of the following group.
3 And it lists four stimuli: an angled conveyor, a vibrating conveyor, a strobe
4 light, or a stream of air blowing on the chick.

5 And Dependent Claim 3 depends from Claim 1. And that's where
6 we find the antecedent basis for the stimuli. And the stimuli is 1, as
7 independent Claim 1 mentions, to cause the chick to open its wings. Then,
8 as we know, the imaging occurs. Now, there's no dispute that in Gershman,
9 the stimuli that causes the chick to open its wings for imaging is the fall, is
10 the drop that we've been discussing.

11 Now Petitioner's, for Dependent Claim 3, they present two
12 arguments, really, in their briefing. The first is they claim, well, Dependent
13 Claim 3 says maybe one or more of the following. So Gershman, or any
14 reference, could meet this without using any of the four recited stimuli.

15 We would contend that is incorrect under long standing Federal
16 Circuit precedent that you should not interpret a claim in a way that would
17 render it superfluous. And that's exactly what Patent Owner is doing in this
18 construction.

19 The second argument that they present, and I will move to Slide 32
20 in our presentation. The second argument that they present is they claim that
21 because Gershman mentions an air blower, that air blower can qualify as
22 meeting Independent, excuse me, Dependent Claim 3, where it cites air
23 blowing on the chick.

24 But the major flaw in this argument is that there's no disclosure
25 that the air blower in Gershman is designed to or will cause the chick to
26 open its wings at all. And Dr. Keener, our expert, explained that the purpose

1 of the air blower in Gershman is to blow the chick off the plate.

2 And in that context, there would be no reason to cause the chick to
3 open its wings because the chick has already fallen, already been imaged by
4 that stimuli, Your Honors. And tellingly, their expert, Mr. LeCroy did not
5 come back with any expert testimony that the blower in Gershman would be,
6 as their argument goes, would actually cause the chick to open its wings.

7 So we would contend that Dependent Claim 3 is not disclosed by
8 Gershman. And even if Claim 1 were to be found invalid, which we
9 disagree with, Claim 3 should be affirmed.

10 JUDGE MURPHY: Well, I mean, I'd like to come back to
11 Counsel's argument on the use of may be. I mean, their argument, as I
12 understand it, is, you know, this is not a Markush group, right? It's not
13 selected from the group consisting of these various stimuli. So if it's not a
14 Markush group, how are we supposed to interpret may be, at all?

15 MR. ROBSON: Well, I think we should interpret, may be in a way
16 that gives life and meaning to the claim. That does provide -- make these
17 actual limitations that it has to be -- or that it should be one of one or more
18 of the recited stimuli. Otherwise, dependent claim would be entirely
19 superfluous.

20 JUDGE EASTHOM: So just to follow up, you say Gershman
21 discloses that the fan is to blow these chicks off the platform?

22 MR. ROBSON: That was our expert's testimony on that, and --

23 JUDGE EASTHOM: Well, let's accept that as true. I don't
24 understand why that that doesn't satisfy the claim.

25 MR. ROBSON: Sure. Your Honor, so as our expert testified, it's
26 not necessarily the case that anytime you blow air on a chick, you're going

1 to, it's going to open its wings. The claim --

2 JUDGE EASTHOM: But it doesn't have to always do that,
3 because, again, this is a system claim.

4 MR. ROBSON: So Claim 1, and the system claim recites at least
5 one stimuli to cause the chick to open its wings,

6 JUDGE EASTHOM: Right. As long as the fan is capable of
7 allowing some of the chicks -- a chick to open their wings, and it can blow
8 the chick off the platform, I would think it's capable of making their wings
9 raise up.

10 MR. ROBSON: Well, Your Honor, I would submit that the
11 Patentee didn't draft this in a way that the stimuli is capable of causing the
12 chicks to open its wings. It's just --

13 JUDGE EASTHOM: Well, that's, that's, that's case law when you
14 have a claim like this, the ParkerVision, there's a difference between
15 configure to and capable of. I don't think this is very similar to the Schreiber
16 case where you don't even need the chick to satisfy the claim.

17 So as long as, you know, you have the stimuli that's reasonably
18 capable of doing what the function says, and you have the same structure.
19 Do you have -- do you use a fan as a recited structure, right?

20 MR. ROBSON: In our disclosure, one of the ways of stimulating a
21 chick, again, to cause the chick to open its wings for imaging is air blowing
22 on the chick.

23 JUDGE EASTHOM: So what if air causes it in your patent, why
24 doesn't air cause it somewhere else?

25 MR. ROBSON: Because the Gershman system is designed such
26 that the stimuli to cause the chick to open its wings is --

1 JUDGE EASTHOM: But that's not what my question is, though.

2 MR. ROBSON: So in Gershman also given that the purpose of
3 this hair blower is to move the chicks around, there would be no reason for
4 the chick to open its wings at them. It's already been imaged. It's already in
5 fall.

6 JUDGE EASTHOM: There doesn't have to be a reason. It's the
7 same stimuli that you're using, so it necessarily would do the same thing,
8 right?

9 MR. ROBSON: Well, our stimuli would have to be sufficient, of
10 sufficient force for the chick to open its wings.

11 JUDGE EASTHOM: Okay.

12 MR. ROBSON: Yes.

13 JUDGE EASTHOM: Okay, thank you. I think I understand your
14 argument.

15 MR. ROBSON: And you know, our expert had testified that just
16 because you have an air blower, air blowing on the wings, it doesn't mean
17 that it's going to cause a chick to open its wings. And their expert didn't
18 speak to that at all.

19 So, Your Honors, if I may, I'd like to turn to the Yavnai system,
20 and particularly whether the poles restrain the chick. And I direct Your
21 Honors to Slide 37 where we discuss the construction of unrestrained chick.

22 Now there's a claim construction dispute between the parties on
23 unrestrained chick, but we would submit that under either construction,
24 Yavnai does not meet the unrestrained chick limitation. We have here on
25 Slide 37 their expert's admission at his deposition when we asked him, okay,
26 well, would you agree, right, that the poles under the chick wings will

1 prevent it from moving its wings freely, right? And his answer was, correct.

2 Now, if you look at Petitioner's proposed construction, it's a chick
3 that is able to freely move its wings while on the platform. I think directly
4 under their construction, the chick in Yavnai is restrained because it cannot
5 freely move its wings, and it follows directly under their construction.

6 And also under our construction, where it's that the chick is free to
7 move as it naturally can on a moving platform, Yavnai fails because
8 naturally, the chicken move its wings freely, and it can't when the Yavnai
9 poles are under the wings.

10 And Your Honors had asked about the prosecution history, which
11 is highly relevant here. Because in the prosecution history -- and this is now
12 I'm referring to Slide 42, the unrestrained chick limitation was added
13 specifically to distinguish the Yavnai reference.

14 And I think Your Honor asked, does this work as a disclaimer?
15 Yes, it does. It's explaining that this, what our system is not what Yavnai
16 does. We are not restricting the movement of those wings.

17 That is why this limitation was added. And actually, in the Notice
18 of Allowance, the Examiner stressed, stressed -- the only emphasis he had
19 was, an unrestrained check. Right?

20 When he's allowing these claims over Yavnai, after the initial
21 rejection, the Examiner is stressing the unrestrained chick limitation. So
22 whatever Yavnai teaches, the prosecution history shows that it's not teaching
23 an unrestrained chick.

24 JUDGE EASTHOM: So are you arguing that your claim requires
25 it to be unrestrained throughout the whole process?

26 MR. ROBSON: We would contend that the chick must be

1 unrestrained while it is stimulated and imaged. Okay? So those are the -- so
2 it has to be, you know, we recite it's a moving platform to support an
3 unrestrained chick. That's limitation 1. Limitation 2 is there isn't --

4 JUDGE EASTHOM: Limitation 1, I was asking about that.
5 Because that's what the prosecution history is about, right?

6 MR. ROBSON: Yes. Where it says an unrestrained chick, yes.

7 JUDGE EASTHOM: Right. So are you saying that the claim
8 requires it to be unrestrained? That limitation throughout the whole process?
9 I'm just trying to get a handle on what we're talking about.

10 MR. ROBSON: So the claim speaks of a stimulation step and an
11 imaging step, where it uses -- where it refers back to the chick. So at least at
12 those points, stimulation, and imaging, it must be an unrestrained chick, we
13 would contend. Because the antecedent basis for the chick there is the
14 unrestrained chick.

15 JUDGE EASTHOM: So it only has to be unrestrained when you
16 take a picture, is that what you're saying? Or --

17 MR. ROBSON: So, no. Because it would have to be unrestrained
18 while it's stimulated as well. So the claim recites in the first limitation a
19 moving platform to support an unrestrained chick, and that's the introduction
20 of an unrestrained chick.

21 The next limitation recites that the chick undergoes the stimulating.
22 And then, the next limitation recites the chick, again, is imaged. So
23 stimulating imaging, because of the antecedent basis, would have to go back
24 to unrestrained chick.

25 JUDGE MURPHY: Yes, I want you to talk about -- take me
26 through the claim and your response to Mr. Ollis' argument that the

1 antecedent basis should be a chick in the preamble --

2 MR. ROBSON: Sure.

3 JUDGE MURPHY: -- not an unrestrained chick in the first
4 limitation.

5 JUDGE EASTHOM: But Judge Murphy, let me just get a quick
6 answer here.

7 JUDGE MURPHY: Sure.

8 JUDGE EASTHOM: So unrestrained, you're only saying it has to
9 be unrestrained during those two other limitations? When it's stimulated and
10 when it's, you take a picture of it?

11 MR. ROBSON: In, in -- yes. In Claim 1 it requires that it be
12 unrestrained at those two points.

13 JUDGE EASTHOM: And not at other points?

14 MR. ROBSON: Well, I don't think the claim speaks to other
15 points. But what's claimed at those two points is the chick must be
16 unrestrained, under our construction. If you'd like me turn to the antecedent
17 basis?

18 JUDGE MURPHY: Yes, let's do that.

19 MR. ROBSON: So I think I already went through. We have on
20 Slide 44 the Claim 1, how, in limitation 1, you have an unrestrained chick.
21 And then it's the chick that's stimulated in the chick that's imaged.

22 We would contend, but the antecedent basis for that, the only valid
23 antecedent basis is an unrestrained chick. Now, what Petitioners are doing
24 is, as Your Honor noted, is reaching back into the preamble, so skipping
25 over limitation 1, where it recites an unrestrained chick, and saying, well,
26 there's antecedent basis there in the preamble.

1 And we think this is clearly rejected by the Federal Circuit's
2 reasoning in Shoes by Firebug. In that case, really, it was a great case,
3 because is there an example of when it is proper to look to the antecedent
4 basis in the preamble, and when it's not proper to look for antecedent basis
5 in the preamble.

6 And if I could start it, I'd actually start with the example of when it
7 is proper to look to the preamble for antecedent basis. So I'm referring now
8 to Slide 49. And this claim, this is one of the claims that was at issue in
9 Shoes by Firebug, Claim 1.

10 And it recited an internally illuminated textile footwear comprises,
11 and then the next time the footwear was mentioned, it uses the article the,
12 the footwear. So here the Federal Circuit held, well, the only antecedent
13 basis for the footwear has to be in the preamble. Thus, we'll refer back to
14 the preamble for antecedent basis.

15 Now our claim is very different from this one, because the next
16 time we discuss a chick, it doesn't use the article 'the'. It doesn't say the
17 chick, referring back to the preamble. After the preamble, we reintroduce
18 the chick as an unrestrained chick, using the article 'a'.

19 And that's critical to the reasoning in Firebug. And let me turn
20 back if I may. Okay, so Slide 46 has the claim that the Federal Circuit found
21 it was improper to find antecedent basis in the preamble for. And the reason
22 was really that there's an intervening limitation using the article a, a
23 footwear.

24 We can see here, in the preamble, it says an internally illuminated
25 textile footwear comprises, then, the next limitation is a footwear, and the
26 next limitation, the footwear. And the Federal Circuit held the antecedent

1 basis with the footwear is a footwear. Not what's in the preamble.

2 And we would say this is similar to our claim. Where there is an
3 intervening introduction, reintroduction of the chick, as an unrestrained
4 chick, as we show on Slide 48 of our slides. I mean this -- critical was to the
5 Federal Circuit, was this reintroduction of the limitation.

6 And we have that reintroduction. And therefore, it's improper to
7 reach back into the preamble. And under Shoes by Firebug, the antecedent
8 basis for the chick would stimulate an image must be, in our view,
9 unrestrained.

10 JUDGE EASTHOM: Isn't that an opposite? That's just saying that
11 you're not going to read the textile limitation into the claim, right?

12 MR. ROBSON: The preamble into the claim?

13 JUDGE EASTHOM: Right.

14 MR. ROBSON: So, Your Honor, the Federal Circuit, actually, in
15 the Shoes by Firebug case, they discussed this because when you're
16 answering the question of whether the preamble is limiting, one way the
17 preamble can be limiting is that there's antecedent basis in the preamble,
18 excuse me, in the claim.

19 There's antecedent basis for an element in the claim in the
20 preamble. When that's the case, then the preamble can be limiting. And I
21 direct Your Honor to Shoes by Firebug. This 1367, where the Federal
22 Circuit explains this.

23 They say dependence on a particular disputed preamble phrase for
24 antecedent basis may limit claim scope because it indicates a reliance on
25 both the preamble and claim body to define the claimed invention. So, you
26 know, while the Federal Circuit is addressing whether the preamble is

1 limiting, it's also answering the question of antecedent basis.

2 JUDGE MURPHY: Well, what's your response to Mr. Ollis'
3 argument that here, that's what we have. We have a preamble that is
4 essentially limiting? You know, you read it, particularly when you
5 (INDISCERNIBLE) intended the claim, referring back to the determination
6 of the sex of the chick.

7 MR. ROBSON: So, Your Honor, two responses that. First,
8 Petitioners have never claimed that the preamble is limiting. That would
9 have been a matter for a claim construction. And I believe Your Honors had
10 mentioned in the initial determination that there was no suggestion by, in the
11 petition, that this was a limiting preamble, or something to that effect.

12 So they never raised that claim construction dispute. But the
13 second answer is that our Claim 1 defines a structurally complete invention
14 without the preamble. The preamble is merely reciting a purpose.

15 If you look through our limitations, everything, all the structure
16 that you need is there. So that's an independent reason, aside from the fact
17 that there is not antecedent basis in the preamble, for why the preamble is
18 not limiting here.

19 So what we believe, Your Honor, is that our construction is
20 correct. That at the point of imaging and stimulation, the chick must be
21 unrestrained, even under Petitioner's construction that would not require
22 that.

23 We would submit Yavnai still doesn't disclose the unrestrained
24 chick limitation. Because, as our expert, Dr. Keener explained, from the
25 moment the chick enters the Yavnai conveyor, the poles will restrain it from
26 lateral movement. And that's necessary because Yavnai has to keep the

1 chicks on that track. Keep them in alignment, to get onto the poles
2 underneath their legs.

3 JUDGE EASTHOM: How? Counsel, how does that make sense
4 if, you know what, in light of your patent, when you have the walls there,
5 you don't say those are restraining, right?

6 MR. ROBSON: No, those walls, Your Honor, those widely spaced
7 walls in between them, the chick is free to move as it naturally does.

8 JUDGE EASTHOM: Well, I mean, what about in the left end of
9 the Yavnai, isn't that the same thing? Because the poles are at ground level,
10 aren't they? They're angled from left to the right, or however you want to
11 look at it. So where the chick is -- first gets on, it's doesn't seem like there's
12 much restraint there. The poles are at its feet, right?

13 MR. ROBSON: So in our embodiment, in Figure 6, the chick is
14 able to move laterally from side to side.

15 JUDGE EASTHOM: So you're only -- you don't cover your
16 embodiment with the -- is that what you're saying? Your claim's not
17 covering the embodiment that has the sidewalls?

18 MR. ROBSON: No, Your Honor. We're -- I'm explaining that in
19 our embodiment, the chick is not restrained, because it could move laterally
20 as it naturally can. Whereas in Yavnai, the chick has to be constrained
21 because there are no sidewalls further spaced apart that allow the chick to
22 move as it naturally can. Without the poles, in Yavnai --

23 JUDGE EASTHOM: I'm sorry? I didn't understand that. There's
24 no walls you were saying, so, and that the poles are at their feet. So why is it
25 restrained when the poles are at their feet? I just don't understand that part.

26 MR. ROBSON: Because if the poles did not restrain the chick

1 laterally, there would be nothing to stop the chick from walking off the
2 platform.

3 JUDGE EASTHOM: Well, that's just like your picture you just
4 told me about, right?

5 MR. ROBSON: No, Your Honor. Because in our picture, the one
6 point of distinction is the width. Our walls are not preventing the chick from
7 moving naturally over the width between the walls as it naturally could. Just
8 like a person walking down a hallway is not restrained by the -- you
9 wouldn't say that that person is restrained. And they can move as they
10 naturally can when they're walking.

11 JUDGE EASTHOM: And then, so when you have the poles by the
12 chickens' feet, they can hop over those poles, right?

13 MR. ROBSON: I don't think there's any disclosure in the Yavnai.
14 They can hop over the poles. And that would be creating an inoperable
15 system, if Yavnai allowed that. The system is designed to keep the chicks
16 on that track. It has --

17 JUDGE EASTHOM: Well, then let's go back to your other
18 embodiment that doesn't have the walls. Is that inoperable?

19 MR. ROBSON: I'm sorry, which other?

20 JUDGE EASTHOM: Didn't you say you have another
21 embodiment that doesn't have walls?

22 MR. ROBSON: No. So Figure 6 shows sidewalls that --

23 JUDGE MURPHY: Well, Figure 1 shows them without sidewalls
24 too.

25 JUDGE EASTHOM: Thank you.

26 MR. ROBSON: Well, Figure 1 is showing a particular

1 perspective. And then Figure 6 is showing more --

2 JUDGE EASTHOM: Okay.

3 MR. ROBSON: -- disclosure. That's different from Yavnai
4 because, you know, Yavnai at no point says that there are these sidewalls.
5 All Yavnai discloses is the poles.

6 JUDGE MURPHY: Let me ask you this. If we accept your view
7 of antecedent basis, and so at the point of image capture, to capture at least
8 one image of the chick, referring to the unrestrained chick, you're saying
9 Yavnai was distinguished because at the point of image capture those poles
10 restrained the chick, even though the wing tips are being imaged?

11 MR. ROBSON: At the point of image capture in Yavnai?

12 JUDGE MURPHY: In Yavnai, yes.

13 MR. ROBSON: Yes. The chick cannot freely move its wings, and
14 it is restrained at the point of image capture. I don't know if I answered
15 Your Honor's question.

16 JUDGE MURPHY: Well, what we're basically having a
17 wordsmithing discussion over what's the difference between restraining,
18 restricting, and supporting. And I'm trying to take the, you know, the
19 holistic view. What's the purpose of the patent? The purpose of the patent is
20 to image wings that are open in. In Yavnai, are the wings open at the point
21 of image capture?

22 MR. ROBSON: The wings are held open. So it's not only, you
23 know, capture an image of the wings, it's image of an unrestrained chick.

24 JUDGE MURPHY: Understood. Yes, let's accept that for the
25 moment, yes.

26 MR. ROBSON: In Yavnai, the chick's wings are open because it

1 can't close them because of the poles. The poles restrict its movement. And
2 therefore, we submit that would preclude it from being an unrestrained
3 chick. And without the -- I'm not sure what that is.

4 JUDGE EASTHOM: I don't know either. I don't -- but you have a
5 minute or so left before your 15 minutes and are into rebuttal.

6 MR. ROBSON: Oh, yes. About the -- I just would like to touch
7 on the support versus restraint. As we set forth in our brief, we don't view
8 these as mutually exclusive concepts that you either support or restrain. And
9 Patent Owner's, excuse me, Petitioner's expert spoke to what --

10 JUDGE MURPHY: How could they not be mutually exclusive?
11 You distinguish the invention based on Yavnai supporting the wings at the
12 point of image capture.

13 MR. ROBSON: Well, so Yavnai says support the wings.

14 JUDGE MURPHY: Yes.

15 MR. ROBSON: We distinguished over Yavnai by calling it an
16 unrestrained chick. So the way that it's supporting the wings in Yavnai can't
17 be unrestrained. Otherwise, we wouldn't have distinguished it.

18 JUDGE MURPHY: Well, Mr. Ollis would say the Examiner made
19 a mistake.

20 MR. ROBSON: Well, we obviously disagree. And we think, we
21 think it's pretty clear in Yavnai that those poles, once the poles are under the
22 wings, those wings are restrained. There's no way for it to move its way its
23 wings down, and that's needed for the image capture.

24 JUDGE EASTHOM: Let me ask you this. It seems like you're
25 obscuring the prosecution history right now by making these arguments.
26 You know, during prosecution, you said -- it seemed like you were saying

1 that it can't -- that you wouldn't have an unrestrained chick throughout the
2 process. That those references teach against that.

3 And now you're saying, no, the claim only requires it to be
4 unrestrained at these two points of -- one of them is the stimuli, and then the
5 other ones when you take the picture.

6 MR. ROBSON: So Your Honor, all I'm pointing out is that Claim
7 1 only speaks to those, those points. So if those points -- if what's described
8 in Claim 1 is the entire process, then then, yes.

9 JUDGE MURPHY: It's not a process.

10 MR. ROBSON: It's not a process. It's a system. If Claim 1 is
11 capturing the whole system, that's claimed that it is, then the only points
12 where we have the chick language is when it's imaged and processed.

13 JUDGE EASTHOM: Well, I mean, you're making a different --
14 you're backing off of your more narrow focus that you had during
15 prosecution history right now, right? I mean, isn't that obscuring the
16 prosecution history?

17 MR. ROBSON: Well, I don't think so, Your Honor. Because we
18 were presented with Yavnai. We just -- we want to distinguish --

19 JUDGE EASTHOM: You make your argument. And you said it's
20 got to be unrestrained throughout the whole process. And now you're saying
21 it doesn't have to be.

22 MR. ROBSON: I understand it's not a process claim. But
23 throughout Claim 1, what's recited there, it must be an unrestrained chick.

24 JUDGE EASTHOM: Not, not -- oh, okay. Because I thought
25 before you said it only has to be unrestrained at those two points.

26 MR. ROBSON: The confusion, sorry, Your Honor, is just, I was

1 making the point that Claim 1 only uses the chick, the term the chick, at
2 those two points. But I wasn't trying to limit the term more so.

3 JUDGE EASTHOM: Okay. So just to be clear, the claim based
4 on prosecution history requires the chick to be unrestrained throughout the
5 whole process. Is that what you're saying the prosecution history says?

6 MR. ROBSON: Yes, throughout Claim 1's system, it would have
7 to be unrestrained.

8 JUDGE EASTHOM: Okay. Thank you.

9 MR. ROBSON: So, Your Honors, I'll reserve the rest of my time
10 on this.

11 JUDGE MURPHY: I have one more question. Given your view
12 of the antecedent basis in Claim 1, is it correct that Gershman discloses the
13 claim except for moving and supporting the chick simultaneously?

14 MR. ROBSON: The only limitation in Gershman that is, that
15 appears to be missing in -- well no. Actually, so Gershman is missing --

16 JUDGE MURPHY: And the database.

17 MR. ROBSON: Yes, the database.

18 JUDGE MURPHY: Understood that.

19 MR. ROBSON: As well as the moving platform to support an
20 unrestrained chick limitation, yes.

21 JUDGE MURPHY: Okay, thank you.

22 JUDGE EASTHOM: I have you for 12:35 on rebuttal, Mr. Ollis.
23 Thank you. I mean, Mr. Robson. I'm sorry. You're finished, right?

24 MR. ROBSON: Yes. I'm just, you know, just entangling myself
25 here.

26 JUDGE EASTHOM: And Mr. Ollis, you have 17:17 to continue.

1 MR. OLLIS: Yes, I think I just need a minute or two.

2 JUDGE EASTHOM: Okay.

3 MR. OLLIS: I'm not even sure if I need the monitor. But let me
4 just get this up, just in case. I think I'm going to start. I just briefly want to
5 circle back. I think we've talked a lot about the antecedent basis issue. If --
6 I guess I'll just offer maybe, if it's relevant to the Board's consideration,
7 obviously, that case was only presented in the surreply.

8 In terms of the actual briefing, if that's believed to be an important
9 case, if it would be beneficial to have supplemental briefing response, I just
10 wanted to throw out that possibility. Because obviously we haven't had a
11 chance to present any written response to that, if that would helpful.

12 JUDGE MURPHY: Understood. So you would like the
13 opportunity to respond. Is that --

14 MR. OLLIS: Yes, to particularly Firebug, the Shoes Firebug, I
15 can't remember. I keep calling it Firebug.

16 JUDGE MURPHY: Okay, Firebug.

17 MR. OLLIS: Firebug case, yes. If that would be helpful? If the
18 Board believes it would be relevant, then we would be pleased to do it.

19 JUDGE MURPHY: So noted.

20 MR. OLLIS: Earlier, starting with Gershman, I think there were a
21 couple of interesting point made by Your Honors comparing kind of the
22 question of how is the falling plate of, I think of Gershman, any different
23 than when the chick is jumping up and down on the left side of the plate in
24 Yavnai, or even if there's vibration and the chick's caused to, maybe jumps
25 up, is startled, and flaps its wings, and is off the plate.

26 And how can that be supported, for example, though, with example

1 in the patent, or even on left side of Yavnai, but Gershman not? And I think
2 it's a very good point. We submit that there really is no difference.

3 And that's a good way to look at it, in addition, frankly, that
4 ultimately, all of it there's a brief separation, but the chick's still there to
5 support -- or the plate, the moving platform, conveyor, whatever it is, is still
6 there to support at the plate (sic).

7 Ultimately, they're all really pretty -- operating pretty similarly.
8 And the platform is going to be there to catch the chick. It's still supporting
9 it. They seem to agree that, so long as the --even as I thought I understood
10 their arguments, even if the chick is momentarily off the plate for a little bit
11 because it jumped up, the floor, the platform is still there to support it.

12 And our position would be, well, if that's true, then similarly, that's
13 equally true in Gershman. I don't see the difference conceptually between
14 what the examples that Judge Wormmeester pointed to, I think in the patent,
15 maybe better examples, I don't remember, either you Judge Murphy or Judge
16 Easthom, but one of the two of you had pointed to Yavnai about when you're
17 jumping. So I just wanted to note that.

18 I think Your Honor, Judge Murphy, you asked a question about
19 the page 3 statement in Gershman. And you said, why do we need to go any
20 further than this? And it says, what does it teach? And it teaches that you're
21 putting the chick on the moving platform or the plate.

22 And we agree that's really all there is with this. That's -- we're
23 done. We've satisfied, we believe, at that point in time. We don't have to
24 get into all the rest of this. It's really a very simple analysis.

25 JUDGE MURPHY: Well, that's why I asked your opposing
26 counsel, and not you.

1 MR. OLLIS: Right. No, I appreciate that. But I obviously just
2 wanted to reiterate that we certainly agree with that point, or that question.
3 There was some -- a number of statements that were just made by counsel
4 for Targan about Mr. LeCroy saying this, or saying that, or characterizing
5 this.

6 I think some of the questions, and I don't have all of them at my
7 fingertips, but he was asked, does Gershman state this or the reference state
8 that? And he would say, no, it doesn't state that. And then that was in their
9 arguments to try to be converted to, well, therefore the reference doesn't
10 teach --he admits the reference doesn't teach something.

11 But wasn't -- if one looks carefully at some of these questions, I
12 would just invite the Board to look closely and you'll see the number of
13 times he was asked, does it state? Not does it teach, or what does it
14 implicitly, or how does the system function?

15 There were also some questions with respect to Mr. LeCroy about
16 he admits that he put it on the plate or a stationary plate. If you look at the
17 transcript where that particular quote is being addressed, it's dealing with
18 page 5, was the start of that. I can dig out the quote if we need to. But it's at
19 page 5.

20 JUDGE MURPHY: I have it.

21 MR. OLLIS: Yes. And so, it's not actually dealing with the first
22 statement on page 3. That, you know, obviously, is the starting point for our
23 analysis. It was dealing with a different statement in Gershman and then
24 trying to sort of bootstrap in that therefore all of Gershman teachings are
25 based on that one comment.

26 I think there was just, again, briefly touching on Claim 3, there's a

1 lot of discussion of the purpose of the system of whether, in Gershman, the
2 blowing the chick off the plate, that that's not the purpose isn't to get it to
3 open its wings.

4 The purpose of Gershman is irrelevant. The question is, how's the
5 chicken react? And the only evidence of the record is, when you blow a
6 chick, I mean, air on the chick, it's going to open its wings. I think Dr.
7 Keener disputed it a little bit.

8 But then counsel came back and said, well, you have to blow it
9 hard enough, I think, and to cause it to open its wings. Well, if we're
10 blowing hard enough to blow it off the plate, I would hope that in common
11 sense, that that's enough to cause it to open its wings and stimulate the chick.

12 JUDGE EASTHOM: Is there any disclosure in the patent about
13 the direction of the wind or anything?

14 MR. OLLIS: No, I think all of these are very just general
15 statements that were left to -- I understand to generally about how it works.
16 I don't know if it was Judge Eastham if you had mentioned this.

17 But if it's a similar structure, one would expect the same results. If
18 you've got a fan and you're going to blow it on the chick, the patent seems to
19 indicate that that will cause the chick to open its wings. So unless there are
20 any other points?

21 Again, I could go into -- I would offer to potentially brief if
22 needed, on the distinctions between, you know, the different claims and the
23 independent claims and the illumination system of Firebug, if that's helpful.

24 But I don't know that there are any other points that I think you
25 need to address unless you have specific questions.

26 JUDGE MURPHY: I have just one follow up.

1 MR. OLLIS: Sure.

2 JUDGE MURPHY: Coming back to the claim construction point
3 about a moving platform.

4 MR. OLLIS: Yes?

5 JUDGE MURPHY: The parties, I'd like to direct your attention
6 Mr. Ollis to Claim 3 -- excuse me. Column 3.

7 MR. OLLIS: Okay.

8 JUDGE MURPHY: In the '124 patent.

9 MR. OLLIS: Okay.

10 JUDGE MURPHY: And in particular, line 62 to 67.

11 MR. OLLIS: Okay. Hold on one moment. I'll pull that up on the
12 screen if that's all right. Sorry, what? Column 3 is that?

13 JUDGE MURPHY: Yes, column 3, lines 62 to 67. And there was
14 some reference to this in the petition. And I'm just -- and I'm not sure how
15 much it matters. But it's defining a conveyor.

16 MR. OLLIS: Defining a conveyor? Oh, yes. Okay, going back to
17 the -- yes.

18 JUDGE MURPHY: The '124 patent describes how that a
19 conveyor shall include a moving platform. And then to come back to Judge
20 Easthom's question earlier, it talks about capability of moving. Is that --
21 why isn't that lexicography? Or what should we do with that when we
22 construe a moving platform to support a chick?

23 MR. OLLIS: That essentially is it's capable of and it's sufficient. I
24 don't think we disagree with that position that essentially it's capable of.
25 Frankly, we think that all these references at some point have it.

26 So we didn't even need to reach that issue, or return, or rely on that

1 particular construction. And since, therefore, since we thought all of the
2 systems, at least, particularly Yavnai and Gershman, already have it, we
3 didn't need to sort of parse the language that carefully, because the systems
4 already had it. We're not opposed to that. That may be a correct view. But
5 we don't even think it that -- just because it already has the moving plate.

6 JUDGE MURPHY: Yes, it sounds like the dispute may come
7 down to what support is or is not.

8 MR. OLLIS: That could be a fair question. Yes, Your Honor.

9 JUDGE MURPHY: Okay, thanks.

10 MR. OLLIS: Thank you.

11 JUDGE EASTHOM: And then, just -- I'm still pondering the
12 prosecution history on page 196, Exhibit 1002. And your friends verified
13 that the claims based on this history preclude having the chick be
14 unrestrained at any point during the --

15 MR. OLLIS: What page was it? Sorry.

16 JUDGE EASTHOM: It's on page 190 -- well, I'm sorry. I don't
17 know what -- how you guys -- we have a working file. We don't --

18 JUDGE MURPHY: It's Exhibit 1002.

19 JUDGE EASTHOM: Yes, in there.

20 MR. OLLIS: Yes, I'm in there.

21 JUDGE MURPHY: And it's page 196, the number page 196.

22 JUDGE EASTHOM: Right. Sorry, thank you.

23 MR. OLLIS: Okay. Is this the right one? The right place here?

24 JUDGE EASTHOM: It's at the bottom. Oh, it's in the middle of
25 the second. In addition --

26 MR. OLLIS: Okay.

1 JUDGE MURPHY: See where it says, in addition Yavnai?

2 MR. OLLIS: Yes. In addition, Yavnai teaches the chick.

3 JUDGE MURPHY: That's the paragraph.

4 JUDGE EASTHOM: And it says, a person of skill would be
5 discouraged from pursuing a system that allows a chick to move
6 unrestrained through the system on the basis of a -- now, I understand this
7 turns on what we mean by unrestrained, and whether that's clear. I get that.
8 But if that's all okay, then it seems to be a clear disavowal here about what
9 the breadth of this claim is.

10 MR. OLLIS: Is that anything that allows a chick to be
11 unrestrained at any point in system isn't covered?

12 JUDGE EASTHOM: Right.

13 MR. OLLIS: Yes. I mean, that's, that's really narrowing the scope
14 of the claim dramatically, though, if it doesn't allow any point in time. Our
15 view, I guess, would be that, on that point, that the prosecution history is
16 somewhat unclear.

17 I mean, again, it doesn't relate perfectly to what's claimed. We're
18 not dealing with a process claim. The system isn't covering -- and they're
19 trying to characterize the entirety of the system. And since under Phillips, if
20 when we're interpreting a claim, if the prosecution history is not entirely
21 clear, it may not be helpful in trying to pin down a meaning for the claim.

22 JUDGE EASTHOM: Okay.

23 MR. OLLIS: And here to us, this seemed to be a situation where
24 the counsel was arguing, frankly, their arguments got a little bit out of
25 alignment with, or maybe more than a little bit out of alignment, with what
26 was actually claimed. And so, we just wouldn't give too much weight to

1 that. I think it was incorrect.

2 JUDGE MURPHY: But on a different point. But on Yavnai, what
3 is your response to counsel's evidence that your expert acknowledged that
4 the wings are restrained at the point of image capture in Yavnai?

5 MR. OLLIS: We think that that's -- well, it depends on, first of all,
6 on the interpretation. Obviously, we're not -- that's assuming, we're not
7 going with the chick must be held in place. But even under these other
8 interpretations, we still think there's sufficient, even on the right end, again,
9 setting aside the left side, that at that point, there's still a fair amount of
10 freedom of movement.

11 Even if there's a little bit of restriction, at that point, we have
12 trouble distinguishing between the sidewalls that you've got on your
13 platform, for example, and the wings. I mean, the chick's up against the
14 sidewall. It's also going to be restrained.

15 It's under that kind of an interpretation. And there's still some
16 freedom here to move the wings in other directions. And that's sufficient,
17 we believe, that there's still some freedom of movement, even if that's the
18 test.

19 JUDGE MURPHY: And so, under that theory, you would say
20 there's not a clear disavowal of Yavnai?

21 MR. OLLIS: Correct. We think, again, we think there was
22 mistake. We think the Examiner was misunderstanding the words here.
23 And that there's still some freedom of movement. It was what they were
24 trying to argue. But we think there was a mistake here, and there's not a
25 clear disavowal.

26 JUDGE EASTHOM: I'm going to ask your friend too, but it looks

1 like there's an argument here based on the teachings of the combined Tao
2 and Yavnai. Which as I understand it, Tao, they also say Tao teaches away.
3 Because Tao -- was Tao, the one -- the reference that glues or holds a chick
4 down in place, do you know?

5 MR. OLLIS: Tao is the reference that I think that they're call it the
6 retainer, the chick retainer. They kind of look like they're splayed out on
7 these little carriers. If I recall though --I don't recall Tao being one of the
8 base references. Tao is relied on, I thought, for some of the other --

9 JUDGE EASTHOM: I thought they said Tao in view of Yavnai,
10 and it said Claim 1 is not rendered obvious by Tao in view of Yavnai in that
11 page we were just on. But I don't -- I didn't scour any closer than that.

12 MR. OLLIS: Sorry --

13 JUDGE EASTHOM: That's 196.

14 MR. OLLIS: Oh, you in the prosecution history?

15 JUDGE EASTHOM: Right.

16 MR. OLLIS: Oh, oh, oh, I'm sorry. I thought -- I was looking for
17 the ground.

18 JUDGE EASTHOM: Sorry. No, I'm trying to figure out what
19 they're meaning by this statement. When they say it teaches away from Tao
20 and Yavnai. And I'm trying to figure out if they're saying, what -- how the
21 claim is distinguished over Yavnai, or if it's just over this combination. So
22 I'm going to ask my friends that too. But --

23 MR. OLLIS: I thought they were -- and I apologize. I do not
24 remember all the details of the prosecution. My recollection was that there
25 were different rejections based on -- that they were just trying to point out
26 that each, in Tao and Yavnai, Tao's holding the chick down, and this is

1 different. And then Yavnai, it would have the poles, and it's different.

2 JUDGE EASTHOM: Okay.

3 MR. OLLIS: I don't know necessarily that it was the combination
4 of the two.

5 JUDGE EASTHOM: Okay. I appreciate --

6 JUDGE MURPHY: The Tao's retainer unit actually physically
7 restrains the chick --

8 MR. OLLIS: Right.

9 JUDGE MURPHY: -- on the moving platform, right?

10 MR. OLLIS: Right, right.

11 JUDGE EASTHOM: Okay.

12 JUDGE MURPHY: Whereas Yavnai clearly does not. But at the
13 point of image capture --

14 MR. OLLIS: The poles are close to the chick --

15 JUDGE MURPHY: -- the poles are close, and the wings are
16 supported.

17 MR. OLLIS: Right.

18 JUDGE MURPHY: And I guess they're restricted? Their
19 movement -- degree of movement is --

20 MR. OLLIS: They're movement is a little bit restricted. And the
21 question is, is that actually the same as restrained? And this is where I
22 agree, Your Honor. At some point, you get into this wordsmithing
23 challenge. Because there's a new word that was introduced during
24 prosecution that wasn't in the specification, and we're all left to wrestle with
25 it. Anything further, Your Honors?

26 JUDGE MURPHY: I have no further. I don't see any other ones,

1 thank you very much.

2 MR. OLLIS: Thank you very much.

3 MR. ROBSON: So if I may, Your Honors, I'd like to start with the
4 questions about the prosecution history here. So some of the relevant
5 disclosure we were discussing appears on page 196 of Exhibit 1002 of the
6 prosecution history.

7 The second full paragraph there reads, in addition, Yavnai, et al.
8 teaches restraining a chick through the use of poles 64 or cups 40 to restrain
9 the restrain the chick in order to cause the chick to open its wings.

10 So you know, as a initial matter, this is what we've discussed
11 before. We are distinguishing over Yavnai. Saying Yavnai is restrained.
12 The claim goes on. This goes to, Your Honor's -- excuse me, the
13 prosecution history statements go on, and this, I think, is relevant to Your
14 Honors questions.

15 That states, amended Claim 1 is directed to a system having a
16 moving platform to support an unrestrained chick. A person of skill in the
17 art would be discouraged from pursuing a system that allows a chick to be
18 moved unrestrained through the system on the basis of the teachings of Tao
19 et al. and Yavnai et al.

20 I think critical here is the Applicant is referring here to Amended
21 Claim 1 and the system of Amended Claim 1. So when it's talking about
22 throughout the process, it's talking about what's recited in Claim 1. I just
23 want to be clear. I'm not -- I was not referring to other unclaimed elements
24 that there may be. It's a comprising claim.

25 JUDGE MURPHY: No. The question is, how is that consistent
26 with your antecedent basis argument for a system claim, Claim 1?

1 MR. ROBSON: Well, because in Claim 1 --

2 JUDGE MURPHY: It's not a process claim. It doesn't say, the
3 claim doesn't say, through the process, right?

4 MR. ROBSON: I understand that was the language in the
5 prosecution history.

6 JUDGE MURPHY: Well, through the system, I should say.
7 Through the system.

8 MR. ROBSON: I understand that that's not the language. That
9 this prosecution history referred to process. But when we look to the system
10 here, it's very clear that the system refers to the chick being stimulated, the
11 chick image. And that goes back to the unrestrained chick.

12 JUDGE EASTHOM: Right. And I wasn't trying to make your
13 claim so narrow that it was precluding things that aren't recited in the
14 system, just to be clear. I think I was more trying to drive at with what
15 Judge Murphy was pointing out.

16 And also, my next question that's sort of related to that is that, you
17 know, it's almost seemingly -- it's like a Rorschach test or whatever --
18 however you pronounce it. But I don't know if you're arguing here that you
19 wouldn't combine Tao with Yavnai because Tao has such a restraint
20 throughout the whole process, that you wouldn't combine those to have
21 unrestrained in any part of the system. I wonder, you know, it's just not
22 super clear to me how to read that. And I wonder if that's a reasonable
23 reading what I just told you?

24 That, in other words, you're just saying, hey, you know, these two
25 references, teach away -- Yavnai teaches away from modifying Tao since
26 Tao is restrained all the way. And it's totally restrained, these chicks are.

1 And so, are we talking about whether Yavnai itself teaches restraint number
2 one, or even restraint throughout the whole process?

3 MR. ROBSON: I think that Your Honor this is kind of a general
4 statement that both Tao and Yavnai would teach one of ordinary skill away
5 from having an unrestrained chick in the system. Because both of them
6 require restraint.

7 Tao has the -- it says the system is only successful when the chick
8 is restrained on the chick retainer unit. And Yavnai, the poles, as we've
9 discussed, restrain the chick while it's on the conveyor, throughout the
10 conveyor.

11 JUDGE WORMMEESTER: Counsel, in Yavnai, though, it says
12 due to that -- so I'm on paragraph 42 about three quarters of the way down.
13 Due to the vibrating motion, that the chick loses its equilibrium --

14 MR. ROBSON: I'm sorry, Your Honor, where are you? I didn't
15 hear it.

16 JUDGE WORMMEESTER: Paragraph 42.

17 MR. ROBSON: Forty-two.

18 JUDGE WORMMEESTER: It's the third full sentence up from
19 that page, from the bottom.

20 MR. ROBSON: Yes, I see, Your Honor. Due to the vibrating
21 motion --

22 JUDGE WORMMEESTER: The chick loses its equilibrium,
23 jumps up and spreads its wings. So there it's unrestrained, right?

24 MR. ROBSON: No, Your Honor. I submit, it's restrained from
25 lateral movement at that point. And then, you know, the next sentence is
26 discussing how the chicks that have jumped up, you know, shown

1 (INDISCERNIBLE), the polls support the spread wings, but -- so this is sort
2 of two steps. When the pole -- when the chicks are jumping up, they're still
3 restrained laterally by the poles.

4 JUDGE WORMMEESTER: Does the claim say they can't? Is
5 that in the claim?

6 MR. ROBSON: The claim recites an unrestrained chick, in our
7 claim, right? In the '124 patent. And there's been two proffered
8 constructions. You know, Petitioner's construction is that unrestrained
9 means the chick can move its wings freely. And as we went through, the
10 chick in the Yavnai can't move its wings freely at the point of imaging ours.

11 Our is that the chick is able to move as it naturally can. Just being
12 able to jump up and down in one direction doesn't mean the chick can move
13 as it naturally can. It would also have to be able to move laterally, which is
14 prevented by the poles in Yavnai.

15 JUDGE WORMMEESTER: Isn't it moving naturally, though,
16 when it feels the vibration and it's just going up?

17 MR. ROBSON: Well, but it can't move naturally in the lateral
18 direction, because the poles are keeping it there, keeping it on track to get
19 into alignment for imaging. We wouldn't suggest that just one degree of
20 movement is unrestrained, Your Honor. If you can't move laterally, for
21 example, the feet and the chick are being restrained in that direction.

22 JUDGE MURPHY: How is that any different than having
23 sidewalls on a conveyor? I don't understand that distinction.

24 MR. ROBSON: I really think, Your Honor, it's a matter of the fact
25 that the sidewalls that the '124 patent is teaching, are relatively wide
26 compared to the chick. So the chick has its freedom of movement within the

1 sidewalls. Whereas, in Yavnai --

2 JUDGE MURPHY: Well, now, you're talking that that's a
3 question of degree.

4 MR. ROBSON: Well, I think it's a critical distinction in that
5 Yavnai the poles have to be narrow enough so that a chick is forced into that
6 alignment for proper imaging and stimulation.

7 JUDGE MURPHY: Let me ask you this. In the '124 patent, is
8 there any description of an unrestrained chick?

9 MR. ROBSON: The unrestrained chick is illustrated in Figure 6,
10 and throughout the process. Well, the process described doesn't require
11 restraining the chick at all, right? Because what we're using is either an
12 angled conveyor or an air blower. The chick need not be restrained
13 throughout the process. And that's shown, for example, in the Figure 6.

14 JUDGE MURPHY: So Figure 1 is a chick on a conveyor.
15 Sidewalls aren't shown there.

16 MR. ROBSON: The sidewalls aren't illustrated in that --

17 JUDGE MURPHY: But they're --

18 MR. ROBSON: -- that cut --

19 JUDGE MURPHY: -- they're there?

20 MR. ROBSON: Yes.

21 JUDGE MURPHY: And so that's an unrestrained chick. And so a
22 conveyor with sidewalls is within the scope of your claim, as long as the
23 chick is not otherwise restrained?

24 MR. ROBSON: As long as the chick can move as it naturally
25 can --

26 JUDGE MURPHY: Where does it say that?

1 MR. ROBSON: -- inside the walls.

2 JUDGE MURPHY: Well, anywhere?

3 MR. ROBSON: Well, looking at, for example, Figure 6, as the
4 reference, the chick is able to move laterally, move up and down how it
5 wants within the context of --

6 JUDGE MURPHY: So a chick that can jump up and come back
7 down onto a platform, that's part of your claim?

8 MR. ROBSON: We -- yes. So we contend in our claim that so
9 long as the chick is going to return to a platform, is going to return to a
10 support, that chick is supported. Just like I submitted, when a person jumps
11 up and down on the floor, person is still supported by the floor.

12 And I think this brings up a prior point about -- well, so, yes, we
13 believe that so long as the chick is going to come back to his support, it still
14 meets the claim. And that's illustrated by the vibrating mechanism.

15 When you're vibrating something, you will have moments where
16 the chick's feet are off the ground. But so long as it returns to the platform,
17 and specifically, so long as it has at least one image taken of it while it's
18 supported by the platform, you're going to meet the claim.

19 JUDGE MURPHY: Let me ask you this way. This is -- it seems
20 to be a negative limitation. It's not restrained. So it's a negative limitation.
21 And a lot of recent Federal Circuit laws say there has to be pretty clear
22 disclosure about that.

23 And maybe you even have to tell us what the benefits are of being
24 unrestrained. And so, in light of that, I know we don't have written
25 description issues here, but when we look at the prosecution history, and try
26 to interpret this term, that seems to be something that's sort of in a gray area

1 right here.

2 MR. ROBSON: So, Your Honor, I would note that -- so when the
3 patent discusses the problems that it's solving, it notes that in manual chick
4 handling, when you pick up the chick, and that's one instance example of
5 restraining it, you're increasing the risk of injury to the chick.

6 And so, our system, as it's described, permits and allows for the
7 lack of any restraint on the chick while it goes through the stimulating and
8 the imaging, the described process of Claim 1. And it's illustrated in Figure
9 6, as well.

10 JUDGE MURPHY: All right. But I mean, from what I
11 understand, just a picture of something that includes that negative, you
12 know, that the negative limitation reads on isn't sufficient to support a
13 negative limitation.

14 MR. ROBSON: So my argument is not that only Figure 6
15 provides support. It's that when read in the full context of the specification,
16 including the problem that the patent is solving, this entire system permits,
17 as described throughout the disclosure, it allows for the unrestrained chick to
18 be successfully sexed, which was in the prior art.

19 JUDGE MURPHY: Okay, I don't have any other. I appreciate
20 that. Thank you, counsel. I don't have --

21 JUDGE EASTHOM: Oh, I just wanted --

22 JUDGE WORMMEESTER: I have one more question. Sorry.
23 You know, the only movement that I can see of the chick in the '124 patent
24 is on -- is where it begins to lift and flap its wings. Is there any discussion of
25 lateral movement?

26 MR. ROBSON: So, Your Honor, I believe that the reason why

1 that movement is shown about flapping the wings is because that's how --
2 why the, you know, the image has to be taken of the chick flapping its
3 wings. But you could see in the image of the Figure 6 that the chick would
4 be able to move laterally.

5 JUDGE EASTHOM: I don't have any other questions. Did you
6 have another point to make?

7 MR. ROBSON: I just wanted to say, Your Honor, we'd be happy
8 to brief the popcorn, Schreiber case, if that would be helpful for Your
9 Honor.

10 JUDGE EASTHOM: We'd appreciate that. Yes, thank you very
11 much. We will consider what we need. Thank you.

12 MR. ROBSON: Thank you very much.

13 JUDGE EASTHOM: And I guess we're adjourned. And we just --
14 I'm on behalf of the panel, and we want to thank both sides. Very, very
15 helpful for us to help sort this out. So with that, we're adjourned.

16 (Whereupon, the above-entitled matter went off the record at 4:00
17 p.m.)

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