

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TELADOC HEALTH, INC.,
Petitioner,

v.

DATA HEALTH PARTNERS, INC.,
Patent Owner

IPR2024-00616 (Patent 11,144,554 B2)
IPR2024-00617 (Patent 11,151,142 B2)

Record of Oral Hearing
Held: June 11, 2025

Before JO-ANNE M. KOKOSKI, ROBERT J. WEINSCHENK, and
ANDREAS BALTATZIS, *Administrative Patent Judges*.

IPR2024-00616 (Patent 11,144,554 B2)

IPR2024-00617 (Patent 11,151,142 B2)

APPEARANCES:

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The above-entitled matter came on for hearing on June 11, 2025,
commencing at 1:00 p.m., via video teleconference.

1 P R O C E E D I N G S

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3 JUDGE BALTATZIS: Good afternoon.

4 MR. SOLOMITA: Good afternoon.

5 MS. SPIRES: Good afternoon.

6 JUDGE BALTATZIS: Today we will hear arguments in IPR2024-
7 00616, concerning U.S. Patent Number 11,144,554, and IPR2024-00617,
8 concerning U.S. Patent Number 11,151,142. I am Judge Baltatzis. I am
9 joined today by Judge Kokoski and Judge Weinschenk. Let's start with
10 appearances, beginning with Petitioner.

11 MR. SOLOMITA: Good afternoon, Your Honor, it's Michael
12 Solomita from Norton, Rose, Fulbright on behalf of Petitioner, Teladoc.
13 With me, I have co-counsel Jeremy Albright and Stephen Guzzi, and I
14 believe we have representatives of our client, John Albright, Chris
15 Lambrecht.

16 JUDGE BALTATZIS: All right, Patent Owner?

17 MS. SPIRES: Good afternoon, Your Honor, Sarah Spires from
18 Skiermont Derby on behalf of Data Health Partners, Inc., and on the right of
19 me, I also have my co-counsel, Ryan Hargrave.

20 JUDGE BALTATZIS: All right. Thanks for joining us today.
21 Before we begin, I would like to remind the parties that each of the judges
22 has a copy of the demonstrative exhibit you provided. During your
23 argument, please identify clearly and specifically the demonstrative
24 referenced by slide or screen number so that everyone can follow along, and
25 to ensure clarity and accuracy of the court reporter's transcript. We request

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1 that you keep your line muted when you are not speaking, and please keep in
2 mind that the remote nature of this hearing may result in audio lags so please
3 pause prior to speaking so as to avoid speaking over others. Of course, if
4 you have any interruption or connection issues, let us know immediately so
5 we can pause and get that fixed.

6 As set forth in our hearing order, each party has 90 minutes to
7 present their arguments. Petitioner will proceed first and may reserve time
8 for rebuttal. Petitioner, how much would you like to reserve for your
9 rebuttal?

10 MR. SOLOMITA: Thirty minutes, Your Honor.

11 JUDGE BALTATZIS: Okay. And Patent Owner, you will also
12 have 90 minutes to present your case, and you may reserve your time for a
13 surrebuttal. How much time would you like to reserve?

14 MS. SPIRES: Twenty minutes, Your Honor.

15 JUDGE BALTATZIS: Okay. We anticipate probably having a
16 break before the rebuttals, but we can do that earlier if anyone needs one.
17 And with that, Petitioner, you may proceed.

18 MR. SOLOMITA: Thank you, Your Honor. May I share my
19 screen so we can all see the demonstratives?

20 JUDGE BALTATZIS: Sure. But don't forget to pick out the
21 pages so the judges can follow along remotely as well.

22 MR. SOLOMITA: Yes, Your Honor. Just give me one moment.
23 Okay. Hopefully you're seeing my demonstratives; is that correct?

24 JUDGE BALTATZIS: Yes, sir, I can see it.

25 MR. SOLOMITA: Okay. Let me just make it a full screen mode
26 so we can see it a little better. Okay, Your Honors, unless you have any

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1 specific questions, I'm going to get into my presentation, starting with our
2 demonstratives that was shown.

3 So, Your Honor, overall, we feel strongly that we presented strong
4 prior art that invalidates the claims at issue. For example, the core reference
5 that we have is this Douglas reference, which we believe clearly discloses
6 the same time of goal tracking system as the two patents at issue here. In
7 order to avoid this clear prior art, and other prior art we presented, the Patent
8 Owner imports numerous limitations into the claims, which we believe are
9 unsupported by the intrinsic record. We also believe the Patent Owner
10 creates factual and legal arguments that are unsupported by the record and
11 frankly, reality.

12 In fact, a number of the positions that the Patent Owner has
13 presented, were dealt with and rejected in the Board's institution decision.
14 So, I'd like to start, Your Honor, after that overview, with the first claim
15 term.

16 JUDGE BALTAZIS: Okay.

17 MR. SOLOMITA: Okay. So, our first slide here, which is on
18 page 2 of the demonstratives is just to orient ourselves on the grounds for the
19 first patent at issue that we're covering, the '554 Patent, and this is IPR2024-
20 00616. And the next slide, page 3 of our demonstratives, lists the claim
21 terms that are at issue, and on the right side, we have a column just to
22 indicate whether those are the same terms, or issues, that are in the other IPR
23 proceeding.

24 As you'll see here in the right column, there were a number of
25 claim terms that are the same, so we won't repeat those arguments when we
26 get to the '142 Patent, but again, just want to orient ourselves using this

1 chart.

2 Okay. So, the first issue that we'll tackle is the claim limitations of
3 the '554 Patent, which relate to plan of action, goals, and thresholds. So, the
4 Patent Owners argue that we sort of used the same disclosure in Douglas for
5 these limitations, particularly, that the goals and plan of action are one in the
6 same.

7 And as we've shown on this chart, that's not the case. We have
8 consistently argued that these three limitations are separately disclosed in
9 Douglas. Specifically, we've identified goals 52 and final goals 62 as the
10 claim goals, one-month goal, 61 as the thresholds, and the plan of action as a
11 therapeutic program.

12 And just to orient ourselves on Douglas, since it's such an
13 important reference, Douglas has, in their Figure 2, that's shown on page 6
14 of our demonstratives, a patient prescription form, that's filled out by a
15 physician, and the physician identifies a number of information for this
16 particular patient, including in section 3, the physician will circle, does the
17 patient need smoking cessation? Have you described nicotine patch or gum?
18 Does the patient need weight reduction?

19 So, based on the entry in this prescription form, the Douglas
20 system will then generate a program for the particular patient. And the next
21 step is that, the system generates the screen for the physician to say, here is a
22 proposed plan of action or program for the patient. Would you like to edit it
23 or design a separate program? And you see there's a number of items that
24 are at issue here for the therapeutic plan for the patient.

25 In the next chart, if the physician would like to modify the
26 particular program for a patient, he or she -- and this patient is Fred Smith,

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1 the physician would identify, or be presented, with selections on the diet
2 intensity, exercise, et cetera, and can again modify the program.

3 Based on the input from the physician there, Figure 6, Slide 9 of
4 our demonstratives, we have a program for Fred Smith. We see his name.
5 We see a number of parameters for this particular program, and there are the
6 current conditions for different line items, along with one-month goals and
7 goals. So, again, we're presenting the plan of action as being the overall
8 program of Douglas, and within the Douglas program there are one-month
9 goals, which are the thresholds to go towards the final goals. And the Board
10 agreed that these are separate teachings in the institution decision, and
11 Douglas does disclose these separate items, therefore we're not arguing that
12 the same disclosure of Douglas satisfies multiple limitations.

13 Now, there's an example the Board gave, which was weight loss
14 for the plan of action, which is underlined here on page 10. And the Patent
15 Owner initially took issue with this, saying that the Petitioner never
16 identified weight loss as a claimed plan of action, but we pointed out, in our
17 reply, that that wasn't the case. I've omitted a number of the citations as they
18 go on extensively, but this slide, page 12, is from our reply that rebuts Patent
19 Owner's argument that we did not disclose weight loss in example of the
20 plan of action. And that position was not challenged in Patent Owner's
21 surreply.

22 JUDGE WEINSCHENK: Mr. Solomita?

23 MR. SOLOMITA: Yes.

24 JUDGE WEINSCHENK: This is Judge Weinschenk. Can you
25 explain to me why the one-month goal is a threshold, while the final goal is
26 different in that it teaches a goal? Why is one a threshold and one a goal?

1 MR. SOLOMITA: Because you want to measure progress of a
2 patient towards your ultimate goal. And let me go back to Figure 6. So,
3 there is a program that's designed for this particular patient to reach some
4 end goals, but as you see, there's a now column, there's a one-month goal,
5 and there's the final goal. So, this Douglas program, just like the '554 Patent,
6 wants to modify behavior, whatever these different parameters, whether it's
7 smoking, losing weight, his medication, blood pressure, et cetera. So, you
8 want to have a mechanism for measuring the progress of the patient towards
9 those final goals, and the way you do that is, along the way, you measure the
10 patient's progress using these one-month goals. So, those are the thresholds
11 to see if the patient is progressing towards the ultimate goals.

12 JUDGE WEINSCHENK: Wouldn't the final goals also then be a
13 threshold to see whether you've met your final goals or not?

14 MR. SOLOMITA: Well, I believe that's the ultimate end goal,
15 which is different than thresholds. At that point -- and Douglas talks about
16 this, you can either take the patient out of the program, say, they're
17 completed, depending on where you end up, so that's really your final end
18 goal is your 62, and 61 is your thresholds along the way, just like the '554
19 Patent.

20 JUDGE WEINSCHENK: Okay, I understand. Thank you.

21 MR. SOLOMITA: Thank you, Your Honor.

22 JUDGE BALTATZIS: Mr. Solomita --

23 MR. SOLOMITA: Yes.

24 JUDGE BALTATZIS: -- if I could follow-up on a different
25 question. Patent Owner has presented this in the response as an issue of
26 claim construction.

1 MR. SOLOMITA: Yes.

2 JUDGE BALTATZIS: What's your position on the claim
3 construction? You're saying that these elements are separate. Does that
4 mean you accept this claim construction that these have to be separate and
5 distinct? What's your position on the claim construction argument?

6 MR. SOLOMITA: It's perfect timing with my next slide, Your
7 Honor, if I may, on page 13. What the Patent Owner is really arguing is,
8 there can be no overlap between these elements. That's their initial
9 argument in their POR. But then, even later in their surreply, they say,
10 almost always, there is some relationship between the claims, and two
11 separately listed elements, they say, cannot co-exist as the same element, but
12 instead have to be distinct and identified boundaries. They want to say that
13 there can be no overlap whatsoever between plan of action goals and
14 thresholds. And they base their argument, as you pointed out, on the Becton
15 presumption.

16 But as we note here in our slide on Page 15, the Google case tells
17 us the presumption is always rebutted -- may always be rebutted, in the
18 context of a particular patent. So, let's look at the intrinsic record on this
19 claim construction issue, of the fact at issue.

20 So, if we look at Claim 1 of the '554 Patent, "There is a
21 determining, by the one or more providers, treatment assistance for the
22 client, which is used for establishing goals, a plan of action and thresholds
23 for the client, wherein the thresholds represent certain points of progress
24 towards the goal." Again, what we covered with the earlier question. So,
25 there's clearly an inter-relationship between the goals, and the plan of action,
26 and the progress with measuring the thresholds against the progress of the

1 patient.

2 And the second part of Claim 1 states, "Modifying the plan of
3 action by the one or more providers, in response to one or more of the
4 thresholds not being met." So, again, the plan of action can be modified if
5 the thresholds are not met. Inter-relationship, again, between these three
6 elements.

7 And finally, here in Claim 7, there's an establishing of the goals
8 and the plan of action for the client utilizing goal creating and tracking
9 software. So, the goal creating and tracking software, are used to establish
10 goals and a plan of action. Again, this inter-relationship is clear in the
11 claims.

12 And frankly, Patent Owner's position that these things have to all
13 be completely separate wouldn't make sense in light of the claim language.
14 And what really makes sense, Your Honors, using common sense, of course,
15 when you have a plan, a plan of action, you're going to have goals and you're
16 going to have thresholds. We see it in the '554 Patent. We see it in Douglas.
17 We see it in everyday life. What plan of action doesn't have goals and
18 thresholds? You always want to say, hey, I want to lose some weight, how
19 did I do that? Well, along the way, I want to lose five pounds a week to get
20 to my ultimate goal. Plan of actions will always contain, in this context
21 particularly, goals and thresholds. So, their position that these elements
22 have to be completely separate under the Becton line of cases just doesn't
23 make sense.

24 And if we look at the spec., there's also some helpful disclosure
25 that indicates that goals, plan of action, and thresholds are all inter-related.
26 On page 17 of our demonstratives, we identify that. And the case law that

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1 the Patent Owner really relies on, is the situation in infringement. Let's say,
2 some of these cases, where a Patent Owner is identifying a single component
3 in the accused product that satisfy two separate claim limitations.

4 So, in that situation, the Courts will look at the spec, will look at
5 the claims and say, well, that just doesn't make sense to us, because the spec
6 is very clear, the claim is very clear, these have to be separate limitations,
7 and you're taking a mechanism that just can't be two different things,
8 physically, in the structure. And there's invalidity cases that are very similar
9 that say, you've taken the same single disclosure and reading it on two claim
10 elements. We are not doing that here, as identified in the earlier slide. We
11 are separately identifying the plan of action, the goals, and the thresholds.

12 So, what Patent Owner is really arguing is, well, we have this
13 Becton presumption, and the other side hasn't rebutted that, therefore we
14 win, and our only supporting argument is the abstract. And first of all, we
15 have rebutted, as I just pointed out, this Becton presumption. But secondly,
16 even if you look at their own evidence, which is abstract, it says, goals and
17 plan of action are established in response to treatment and assistance.

18 Again, at the end, the determination is made whether thresholds
19 associated with the goals are being met based on the compiled data. Their
20 own evidence, and this is all they have to support their completely separate
21 and distinct argument, doesn't support their position.

22 And the final argument, just to close on this particular limitation,
23 Patent Owner argues, we conflate weight loss with the plan of action, and
24 that just isn't the case. So, there's a plan of action, as we point here in our
25 Petition, on page 20 of our demonstratives, the Douglas program provides
26 for weight loss, and that's a typical type of program. There are other things,

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1 like smoking cessation, reduction of alcohol consumption, and dietary
2 improvements. So, there's a program that can be designed for many
3 different types of patients in their situation, and within that program you
4 have goals and one-month goals, so we're not conflating weight loss
5 program. Weight loss, or actually the weight of a patient, could be part of
6 that program, as we identified, and it makes sense. Again, you want to lose
7 weight, you're going to weigh yourself along the way to see if you've met
8 that particular end goal.

9 So, that concludes my presentation on plan of action goals and
10 thresholds. Any other questions, Your Honors?

11 JUDGE BALTATZIS: None from me.

12 MR. SOLOMITA: Okay. Hearing none --

13 JUDGE BALTATZIS: Thank you.

14 MR. SOLOMITA: Okay. Hearing none, let's move on to another
15 limitation, which is assign the client to one or more providers in response to.
16 So, here, the Board dealt with this issue as well, and they agreed in the
17 institution decision that Douglas discloses, assigning the clients to one or
18 more providers in response to selections from the administrator. On page 23
19 of our demonstratives, we have a snippet from institution decision.

20 So, the Patent Owner's arguing again, similar to our prior
21 limitation, that Petitioner maps assigning and selections to the same element.
22 That the entry of the patient prescription form by the administrator, and
23 that's that Figure 2 of Douglas, is both the assigning and selecting, and that
24 can't be the case. But again, that's not what we're arguing. We're arguing,
25 selections -- the limitation selections to the entry of info from the
26 prescription form. So, the case administrator takes that Figure 2 prescription

1 form of Douglas and enters that information into the Douglas system. That
2 is the selection part. And this is on page 25 where we support that position
3 based on excerpts from the Petition. And the next slide, 26, gives examples
4 from Douglas that we cite in the position of how that Figure 2 prescription
5 form, that we show on the right side, is used by Douglas to enter the
6 information that the physician provided.

7 But then, separately, we also map assigning to separate elements.
8 So, assigning maps to achieving the state of being assigned. So, in other
9 words, in the Douglas system, once the case administrator enters that
10 information from the Figure 2 prescription form, the system then will assign
11 the patient to the physician so that Douglas can do a number of different
12 things, which is shown on page 28. The system allows user to keep in
13 constant contact, alerts the physician, automatically provides reports, et
14 cetera, as we show in excerpts from Douglas, which was cited in the Petition
15 at pages 15 to 16.

16 So, the actual system taking that selection of the physician, making
17 that association within the system, and setting up this association, is the
18 assigning in the claim language. So, there are two separate parts of Douglas
19 that we're relying upon for the claim limitation, and we repeat this position
20 again in our reply as indicated on page 29 of the demonstratives.

21 So, what does the Patent Owner do? Well, they're advocating for a
22 claim construction that selections have to be a deliberate and active choice
23 by the administrator, and we show an excerpt from the POR on page 30.
24 They don't brief this, even though the Court has asked them to do that, in the
25 institution decision. There's no separate claim discussion briefing on this,
26 and they cite to specification, which doesn't help their position, as you see in

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1 the bottom right of page 31. There's no description in the spec that says
2 selection has to be a deliberate and active choice. And in fact, when you
3 look at other parts of the spec, the '554 Patent just talks about your typical
4 concept of what is a selection. And even their experts said, it just needs a
5 typical selection by a user in this context.

6 So, we rely on the plain and ordinary meaning of selection, which
7 is clearly satisfied by the Douglas reference. And we also have an additional
8 obviousness argument if selections have to be something unique. There's
9 GUI disclosures, graphical user interface disclosures, in Douglas, which
10 would clearly satisfy selections. So, that is the end on that --

11 JUDGE BALTATZIS: (CROSSTALK) --

12 MR. SOLOMITA: Go ahead, Your Honor.

13 JUDGE BALTATZIS: Mr. Solomita, before we go to the next
14 issue then -- so, just to confirm, we have two potential teachings here. One
15 is, you mentioned kind of the plain and ordinary meaning of selection. How
16 does that match up with entering information from the prescription form?

17 MR. SOLOMITA: Yes. So, Douglas talks about the case
18 administrator taking the prescription form and entering that information --
19 go back to Figure 2, I have it here. So, Figure 2, there is a patient name and
20 physician name. So, Douglas discloses the administrator setting up a new
21 patient based upon the information in that form, and the physician, or case
22 administrator, enters the patient into the system. So, this information will be
23 entered into the Douglas system. That is the selection we're talking about
24 for the claim language, the entry of the patient name and the physician name,
25 and then, Douglas goes ahead and links those two together to do all those
26 items I discussed earlier.

1 JUDGE BALTATZIS: And then, I guess on the alternative
2 argument, that Douglas has a GUI that you can make selections with, is it
3 that it'd be obvious to use the GUI to select a physician? Is that a correct
4 understanding of that argument?

5 MR. SOLOMITA: You are correct, Your Honor. This is -- if the
6 Board were to say, well, selections means something more than just entering
7 the information, Douglas discloses GUI components, and it's in our Petition
8 as we show here on page 33 of demonstratives, checked boxes, double-
9 clicks; all kinds of things, in case the Board decides there has to something
10 more than just entering, Douglas discloses that on a GUI-based selection.

11 JUDGE BALTATZIS: All right, thank you.

12 MR. SOLOMITA: You're welcome. So, next limitation is the
13 client management program. And this is an argument where the Patent
14 Owner says that Claims 6 and 13 are sort of on conflict with respect to
15 where the client management program resides.

16 So, what we point out on page 35 of our demonstratives is that
17 Claims 6 and 13 require different things for the client management program,
18 which I'll call CMP. Claim 6 on the left side says, the CMP is executed by
19 the computing or communication devices, and it's utilized to receive data
20 and track progress of the goals. Claim 13, which is an independent claim,
21 not related to Claim 6 at all, says, the server executes the CMP and does a
22 number of things such as receive, assign, determine; compile, et cetera.

23 So, when we mapped Claims 6 and 13, we mapped two different
24 CMPs.

25 So, in Claim 6, we mapped to the Chitiveli use of the analytics
26 client 140 as we show on page 36 of our demonstratives. There is a cloud-

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1 based system in Chitiveli that has this analytics client that will allow for the
2 access and satisfying the limitations of Claim 6 to utilize that client
3 management -- I'm sorry computing -- sorry, client management program to
4 receive data. Chitiveli works in that way, and in Claim 6, we combine
5 Chitiveli with Douglas.

6 Now, Claim 13, we relied upon Douglas only, which has a client
7 management program on the server to do all those things that we discussed
8 earlier for Claim 13, the receive, assign, et cetera. So, we're mapping to two
9 different things. And the Patent Owners are arguing, well, we're conflating
10 these things, and that can't be the case.

11 JUDGE WEINSCHENK: Mr. Solomita?

12 MR. SOLOMITA: Yes.

13 JUDGE WEINSCHENK: This is Judge Weinschenk. Can you go
14 back to that slide real quick for me, the prior slide with the claim language?

15 MR. SOLOMITA: Yes.

16 JUDGE WEINSCHENK: No, 36.

17 MR. SOLOMITA: My apologies. Go ahead.

18 JUDGE WEINSCHENK: Okay. So, am I to understand this
19 correctly, that for Claim 13, Douglas has a CMP on a server --

20 MR. SOLOMITA: Yeah.

21 JUDGE WEINSCHENK: -- that meets Claim 13 for Claim 6
22 because it requires the CMP to be on a computing device, not a server. You
23 brought in Chitiveli to modify Douglas to show that the CMP could be
24 executed somewhere else, other than a server?

25 MR. SOLOMITA: That is correctly correct, Your Honor. I should
26 have pointed out the other blue language in Claim 6, which says, the

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1 computing or communication device. So, you're right, that's why we
2 brought in Chitiveli for Claim 6; didn't need it for Claim 13.

3 JUDGE WEINSCHENK: Okay, I understand. Thank you.

4 MR. SOLOMITA: Thank you. So, the Patent Owner really
5 doesn't contest, in the appeal or that Douglas's server-side system in
6 Chitiveli's client-side analytics claim, are client management programs.
7 Instead, they say, these mappings cannot both be true and they're
8 contradictory allegations. But, as we just pointed out, the mappings fit the
9 claim language, with the help of Your Honor pointing out that point. But in
10 any event, they say, in the surreply, that Chitiveli discloses a server that
11 executes its program, an analytics client, but this argument wasn't raised in
12 the POR.

13 So, we just want to say that it should be forfeited as an initial
14 position. We didn't see it in the POR, this is something from the surreply as
15 we point out on page 38. But in any event, it's not wrong. You can have
16 both situations as we just talked about. You have the CMP on Douglas's
17 server. And even in the combination for Claim 6, where it's Chitiveli's plus
18 Douglas's system, you can have the CMP on Douglas's server and also have
19 the CMP on Chitiveli's analytics client on these computing devices. So,
20 even their position is technically wrong, but not required in in our opinion
21 for the claims. That concludes that claim limitation.

22 So, let's move on to the next one, which is a database in
23 communication with the server. So, the Patent Owner is really taking issue
24 with the term in communication with. In the upper left of Slide 41, it says,
25 the database in communication with the server. And they're saying that,
26 well, we didn't specifically call out the language in communication with

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1 Douglas. But as we point out in our Petition, we cite to the network server's
2 508 that includes databases 522, and as we show on the right side of Slide
3 41, the network server includes inner-circle servers 515. This actually a typo
4 that is corrected in other parts of the Petition. The inner-circle server should
5 be 514.

6 But in any event, the network server 508 contains this inner-circle
7 server. And then if we look at the excerpt from Douglas, which is in our
8 Petition and shown at the bottom left, Douglas says that the network server
9 and the servers 510-516, these inner-circle servers, including 514, have
10 access to the database. So, our view is, that Douglas discloses the
11 communication -- a database in communication with, by virtue of the
12 language in Douglas that there's access by the servers to the one or more
13 relational databases. That's our position. Yes, Douglas doesn't use the exact
14 language, in communication with, but it uses what we think is the equivalent
15 of access to.

16 So, in this slide, on page 42, again we say that Patent Owner's
17 surreply is really unsupported in its attorney argument, that access to a
18 database does not mean it actually communicates, and that's where we
19 disagree with the Patent Owner. We do believe to one of ordinary skill in
20 the art, when there's access to a database, that means that the server is in
21 communication with the database.

22 Next limitation is a processor for executing a set of instructions
23 and Limitations 17[a]. So, in our Petition that's shown on Demonstrative 44,
24 we actually cite -- and this is a hotlink, meaning, if you were to click on this
25 in the PDF, it would take you to limitation 13[a], which we repeat at the
26 bottom left. And in that section, we have a statement that Douglas's system

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1 is software and therefore a processor executes the system. And in fact,
2 Douglas, as we show on the right side -- and this excerpt was cited in our
3 Petition at 41, states that the system is constructed using C++ programming
4 language.

5 So, putting this together, Your Honor, we think there's clear
6 disclosure of a processor for executing a set of instructions. Now Douglas
7 says, software, and it says the software is C++, and the Patent Owner is
8 really taking issue with us not saying, a set of instructions, explicitly. But
9 again, software, in our view, is a set of instructions, as shown in Douglas
10 with the C++ programming language, and it's clearly executed by the
11 processes. We think our argument is strong and is supported by Douglas in
12 our Petition. And again, their argument is, that we didn't put the word
13 instructions in our papers, but again, we think it's clearly mapped that
14 Douglas's software is a set of instructions.

15 What they really argue is, a POSITA wouldn't understand that
16 argument. We disagree, and in the computer science realm a POSITA in this
17 particular realm would clearly understand software to be a set of
18 instructions.

19 I'll move on, Your Honors. Next, we have determining whether
20 the data required is received from each of the providers, and then the
21 sending alert limitations. Just to orient ourselves, we're talking about Claim
22 10 of the '554 Patent that's shown on Slide 47. So, Claim 10, the key
23 language is whether the data required is received from each of the one or
24 more providers. So, we have to ask ourselves, what is the data in Claim 10?
25 And naturally, we look to Claim 1, and Claim 1 says, periodically receiving
26 updated data from the one or more providers. So, we know that, the data, in

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1 Claim 10 is the updated data that's periodically received from the one or
2 more providers.

3 What the Patent Owner is trying to argue, it seems, from their
4 papers as shown on Slide 48, is that the data is somehow associated with
5 performance of the desired outcomes, or it has to be all required data. But
6 again, that's not what Claims 10 and 1 require. And what we're arguing is
7 that, it would have been obvious for Douglas's system to determine whether
8 the client data was missing, and if so, send an alert.

9 And as we show on Slide 50, Douglas correlates the patient's input
10 with the physicians to check for accuracy, and Douglas's system also
11 periodically correlates the updated patient health information with program
12 goals to determine the patient's progress and compliance. And as such, if
13 there was some data missing, it would not correlate, and thus there would be
14 an alarm that the proper data is not received. This is shown on page 50 of
15 our demonstratives.

16 JUDGE WEINSCHENK: Mr. Solomita?

17 MR. SOLOMITA: Yes.

18 JUDGE WEINSCHENK: This is Judge Weinschenk. Is there any
19 express disclosure in Douglas of determining whether the required data is
20 received from the provider? Because it looked like you were just arguing
21 that it would have been obvious to do so because it would have been
22 beneficial. Is there anything in Douglas that actually teaches to do that?

23 MR. SOLOMITA: Well, it's -- the citations, what I have here,
24 where there are threatening or potentially dangerous situations that the data
25 indicates, and that's where you'll get the alert. So, there's not -- to answer
26 your question --

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1 JUDGE WEINSCHENK: That's a little different, right --

2 MR. SOLOMITA: Yes.

3 JUDGE WEINSCHENK: -- Mr. Solomita?

4 MR. SOLOMITA: Yeah.

5 JUDGE WEINSCHENK: That's a little different --

6 MR. SOLOMITA: Yeah.

7 JUDGE WEINSCHENK: -- because that's checking the data that
8 you already have and seeing if it presents a life-threatening situation. It
9 doesn't actually check to see if there's missing data, right?

10 MR. SOLOMITA: That's right. And that's why we're arguing
11 obviousness here, as we show on Slide 49, Your Honor, that there are some
12 dangerous, threatening situations based on the data. And so, we're arguing
13 one of ordinary skill in the art would say, that the physician inputs data, for
14 example, during a follow-up office visit, and if there's something wrong with
15 that data, for example, the blood pressure is too high, too low, or the weight,
16 or whatever the category is, that would trigger an alert. And if there was no
17 data at all, for example, their EKG said, you don't have a pulse, you're dead,
18 zero data, data missing, that would be an instance where it would be a
19 threatening or potentially dangerous situation. So, it is an obviousness
20 argument.

21 JUDGE WEINSCHENK: This would require -- sorry to interrupt
22 you --

23 MR. SOLOMITA: Yes.

24 JUDGE WEINSCHENK: -- this would require some modification
25 of Douglas because it doesn't have this feature, right?

26 MR. SOLOMITA: Yeah, I don't know if I would call it a

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1 modification, but certainly one of ordinary skill in the art would have to look
2 at the Douglas disclosure and come to that conclusion. Yes, Your Honor.

3 JUDGE WEINSCHENK: Okay. Is there a particular reason why
4 someone would do this without the benefit of hindsight, without looking at
5 the claim and saying that, oh, I'd want to do this? Is there some particular
6 reason why this would be so obvious that without it being an actual feature
7 of Douglas that you would go ahead and add it?

8 MR. SOLOMITA: Yeah. Again, I'd point to this threatening or
9 potentially dangerous situations that the data indicates. And again, it's the
10 missing data could result in some erroneous, or threatening, or dangerous
11 situations. That's what I would focus on in Douglas, supporting that
12 obviousness position.

13 JUDGE WEINSCHENK: Okay.

14 MR. SOLOMITA: The other part of Patent Owner's argument is,
15 that the alert is somehow equivocal because they point to, in their surreply
16 excerpts from Douglas, that says, the system accepts the patient data, and it
17 may. But we pointed out in our reply that they're pointing to a second
18 sentence in a paragraph of Douglas. And if we look at the prior sentence, it's
19 unequivocal the system accepts. So, that's just to rebut their position that the
20 input of data may or may not happen, and that's just not correct.

21 And we also submitted supplemental declaration as part of our
22 reply, Your Honor, and this addresses some of the things I was talking about
23 with the updated patient information; the data being missing, and that was
24 not challenged in the surreply. In fact, they didn't cross examine our expert
25 based on the supplemental declaration. So, I would point you as well, Your
26 Honor, to the supplemental declaration of our expert, which is Exhibit 1025

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1 at paragraphs 31 to 36, as indicated on our Slide 52, to support our
2 argument.

3 May I move on, Your Honors? Okay.

4 Next argument is, that Grounds 4, 6, and 8 -- and this is a similar
5 argument for the '142 Patent, they're not sufficiently disclosing the details of
6 our combination, so I put together a slide to try summarize our positions.
7 So, Ground 3 of the 616-IPR for the '554 Patent, as shown on Slide 54, is
8 based on Douglas, and it's a link to Douglas, and Ground 4 is Douglas plus
9 Wager. And then, for Grounds 3 and 4, we argue that -- we added in the
10 Chitiveli reference. As we show on the right side, again, Ground 3 is
11 Douglas-Chitiveli, Ground 4 is Douglas plus Wager-Chitiveli. In other
12 words, we're taking the combinations of Douglas alone, Douglas plus
13 Wager, and adding Chitiveli in the same way for Grounds 3 and 4.

14 For Ground 3, the Patent Owner didn't dispute that it's sufficiently
15 disclosed, but they do take issue with Ground 4. And we're arguing that
16 Chitiveli's applied in the same way for both Grounds 3 and 4, and therefore,
17 just having links to the prior sections we think is sufficient without having to
18 again spit out the Douglas/Wager combination, which we covered earlier in
19 the Petition. And it's the same situations for Grounds 5 and 6. Five is
20 Douglas-Klotsche, 6 is Douglas-Wager. Again, those same two
21 combinations where we're adding Klotsche in the same way. And finally,
22 for Grounds 7 and 8, it's Douglas and Koh and then it's Douglas-Wager plus
23 Koh, Koh is being applied in the same way.

24 So, our position is, we don't need to repeat again the Douglas and
25 Douglas-Wager combinations. We talk about Douglas and adding either
26 Chitiveli, Klotsche, or Koh, and there's no need to repeat the Douglas-Wager

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1 combination for that same application.

2 JUDGE BALTATZIS: Mr. Solomita?

3 MR. SOLOMITA: Yes, sir.

4 JUDGE BALTATZIS: You pointed out the links. Is there
5 anything else that we can rely on? Headings, the summary of the grounds,
6 or is it just that the one argument follows the other? What can we rely on
7 here to make sure that these arguments were in the Petition?

8 MR. SOLOMITA: Yeah, if you go back and read the Douglas-
9 Wager combinations, and then again, we have a description of adding the
10 additional reference, like Chitiveli, Klotsche, and Koh to Douglas, so we've
11 got that detailed explanation. And the Douglas versus the Douglas-Wager
12 combination doesn't change. So, it's really just looking back at the earlier
13 parts of the Petition, and then looking at the -- we have the description of
14 Douglas plus Chitiveli in our Petition that spells this all out, how Chitiveli
15 would be used, and it's not impacting the Wager addition in Grounds 4, 6,
16 and 8. As you can imagine, trying to repeat those arguments, I think it
17 would add a lot of words and probably put you folks to sleep to have to read
18 that again.

19 JUDGE BALTATZIS: All right.

20 MR. SOLOMITA: Okay. So, now we go to motivation to
21 combine Douglas and Wager, a different ground. Again, we don't have to
22 get to this point if the Board believes that Douglas is sufficient. But if we
23 do, the Patent Owner challenges this combination saying there's no
24 motivation to combine Douglas.

25 Now, a number of these arguments have already been dealt with in
26 the institution decisions. There was -- I forget if it's four or five grounds that

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1 were in the POPR that the Board rejected in the institution decision. So, I
2 won't go through those again, because we believe that our reply summarizes
3 those positions, links them to the POPR, and then identifies the Board's
4 position on those.

5 But we would like to address two new arguments that we saw in
6 the surreply for the motivation to combine Douglas and Wager. So, first, on
7 Slide 57, we say that, Patent Owner offers a new argument that a patient
8 would have looked to the primary care provider for referrals instead of
9 assignments be an incorporated Wager interface.

10 Now, remember, we talked about Douglas. Wager is a way of
11 coordinating the visits and assignments of the providers to the clients or
12 patients. And so, we were re-using Wager for that sort of automatically
13 generating of assignments for provider needs. And so, the Patent Owner is
14 saying that you wouldn't look to Wager for a number of reasons. And there's
15 a new argument here that you wouldn't look to Wager because you would
16 stick with the primary care referrals.

17 So, again, we think this is a new argument that should be rejected.
18 But even so, I think a POSITA would have been motivated to make the
19 assignments using the Wager interface. And there are a number of instances
20 when you'd want to do that, as we state on demonstrative 57. When you
21 have a primary care provider that just can't make a referral for a specific
22 ailment. They just don't have the network, or they don't understand the
23 ailment very well, so you'd want to have an automatic referral system, like
24 Wager, or if the referral was low quality, the patient didn't like the referral,
25 or if the patient doesn't like their primary care. So, there's a lot of different
26 reasons why you wouldn't want to just stick to a referral from your primary

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1 care physician, which is what the Patent Owner's arguing would cut against
2 the motivation to combine Douglas and Wager.

3 And there's a second new argument, that the assignments via
4 Wager wouldn't advance prompt care. Again, this is new, which we think
5 the Board should reject, but even so, that's not what we're recommending
6 Wager to be used. We're not recommending Wager to be used in a
7 detrimental way, which is what the Patent Owner seems to be always
8 arguing. We want to use Wager in a positive way, where you look at the
9 skillset, and you look at the capacity of a particular provider. And Wager
10 makes that link saying, okay, you have this ailment, we've got this network
11 of providers that have the specialty, and they're free, let's link the patient
12 with that particular provider. So, we think these two additional arguments
13 should be rejected as new, but even so, do not support the argument that you
14 can't combine Douglas and Wager.

15 So, we have a number of slides in our demonstratives, Your Honor,
16 which starting on page 59, but that relates to the motivation to combine that
17 was dealt with in the institution decision in our reply, so in the interest of
18 time, I'm going to skip over those and get to the next limitation.

19 Now, we talk about the motivation to combine Douglas and Koh.
20 And Koh has the concept of data mining, and that's where we say that a
21 POSITA would be motivated to combine Douglas and Koh.

22 So, as we show on Slide 70, on the left side, Douglas recommends
23 default goals. We talked about that when we looked through Figures 4 and
24 so on of Douglas. But it doesn't indicate how those recommendations are
25 made, although Douglas talks about a large amount of data that's being
26 generated.

1 Now, Koh teaches that large amounts of data can be mined to
2 provide treatments and best practices as we show on the right side of Slide
3 70. So, we say it would be natural for Douglas to be combined with the data
4 mining of Koh. And so, the Patent Owner complains that Koh doesn't have
5 enough details of data mining to be combined with Douglas, but the claims
6 don't require a particular type of data- mining.

7 As we show in the middle part of Slide 71, the claims just say, data
8 mining are the compiled data to determine best practices, and it's definitely
9 taught by Koh. And the spec. provides no details as to any specific type of
10 data mining; instead, it only vaguely refers to data mining known in the art.
11 So, it actually says, the database 26, (sic) - again, this is an excerpt from the
12 '554 Patent on Slide 71. The database 206 may be configured for data
13 mining of available information and data, as is known in the art. So, this
14 requirement that there has to be lots of detail in Koh as to the actual data
15 mining, we think is false, in light of the claim language, and the teachings in
16 the '554 Patent. So we do believe there's motivation to combine Douglas
17 and Koh for those reasons.

18 Next, we get to automatically communicating alerts in response to
19 language. So, I just wanted to put a slide in here, just to orient ourselves,
20 that the reply arguments are rebutted here. So, the POR argue that the alarm
21 in Douglas was an option and not automatic. We rebutted those positions, as
22 shown on demonstrative 73, and there was no response in discovery reply,
23 so I'm not going to address that limitation any further.

24 And likewise, we have an argument by the Patent Owner that
25 Chitiveli is not a printed publication, as shown on Slide 75. They're making
26 this argument -- I'm sure Your Honors are familiar with this argument that

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1 it's not a printed publication under Section 311. We pointed to a case in our
2 reply, a Lynk Labs case, where the Federal Circuit said it is. Maybe this
3 issue would change in the future, but as such, Chitiveli clearly is prior art
4 under the current base law, and that position wasn't addressed in the
5 surreply.

6 Okay, Your Honors. So, we've completed the first IPR
7 presentation for the 616 IPR and the '554 Patent, now we're going to move to
8 the 617 IPR, which is the '142 Patent.

9 Again, on Slide 76, we orient ourselves to the grounds. And on
10 Slide 77, I listed the claim terms and issues, and I've highlighted in yellow
11 the ones that do not overlap with the issues we just covered in the '554
12 Patent. So, I'm just going to address these four highlighted claim
13 limitations, or issues, and not the ones that are the same as what we dealt
14 with in the '554.

15 So, the first limitation is actually two limitations that I deal with
16 together. There's the term wizard application along with projected closure
17 dates. So, for wizard limitation, the Patent Owner is arguing that it cannot
18 be within an application, it must be the application, and we've cited to the
19 POR on demonstrative Slide 79. They also say that, the wizard would
20 require active facilitation of input through sequential or hierarchical
21 prompts.

22 And our position, those limitations are not supported, contrary to
23 the spec. and also contrary to ordinary usage. So, the '142 Patent doesn't use
24 the term wizard application other than in the claim language. In the
25 specification, the '142 Patent uses the term goal wizard and wizard. And
26 there's no requirement in the claims or spec that the wizard application be

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1 the application or requires that active facilitation through a sequential or
2 hierarchical prompts, as we just covered. Instead, the specification -

3 JUDGE WEINSCHENK: Mr. Solomita?

4 MR. SOLOMITA: Yes, sir.

5 JUDGE WEINSCHENK: This is Judge Weinschenk. If we read
6 the term wizard application to mean that it doesn't have to be sort of a
7 standalone, or the application, aren't we reading that term, application, out of
8 the claims then? Do we risk doing that?

9 MR. SOLOMITA: I don't think so, Your Honor, because I was
10 just covering, the specification contemplates implementing various
11 functionality using an application. So, I think that the spec. uses the term
12 wizard and goal wizard really to mean the wizard application.

13 JUDGE WEINSCHENK: Just as long as the wizard functionality
14 is part of some application, then it's a wizard application?

15 MR. SOLOMITA: Correct.

16 JUDGE WEINSCHENK: It doesn't have to be the only
17 functionality in the application?

18 MR. SOLOMITA: Correct, Your Honor.

19 JUDGE WEINSCHENK: Okay.

20 MR. SOLOMITA: So, we're not separating out functionality to
21 each unique wizard app. That's not what the '142 talks about, that you take
22 one function that has to be a separate application. That's clearly not what the
23 '142 talks about. It has multiple functionality within the same wizard
24 application, or what they call goal wizard or wizard. So, what we --

25 JUDGE WEINSCHENK: Is there anything in the spec. that tells
26 us what the wizard application does?

1 MR. SOLOMITA: No, other than what I pointed here, Your
2 Honor, which is really from our reply, that just is functionality that's
3 consistently throughout the wizard or goal wizard in the '142. You'd have to
4 read the whole spec., but there's nothing that says we need standalone wizard
5 application for a given functionality, and certainly nothing about active
6 facilitation or sequential hierarchical prompts for at least those requirements.

7 JUDGE WEINSCHENK: Okay, thank you.

8 MR. SOLOMITA: Sure. What we ended up doing then, is
9 looking at the term wizard, which is in the spec., and we used the Microsoft
10 definition that a wizard is an interactive help utility within an application
11 that guides the user through each step of a particular task. And our position
12 is, Douglas clearly satisfies that.

13 But even getting to that hierarchical requirement, we think that
14 Douglas would satisfy that. We don't think it's a requirement of claims, but
15 if it were, Douglas does talk about prompting for assigning multiple
16 intensity levels, and we saw that in an earlier slide for Douglas, and here on
17 demonstrative 81, we cover that position. Again, don't think it's a claim
18 requirement, but if it were, Douglas would satisfy that particular
19 requirement.

20 And we think that there -- sorry, let me stop there and turn to the
21 projected closure date, which is a separate limitation. It's actually in Claim 4
22 and not Claim 3, which is the wizard application. But the Patent Owner's
23 arguing that a projected closure date necessarily requires some kind of end
24 or finality as shown on demonstrative 82. So, they're saying the closure date
25 has to be the absolute final date of anything, and we disagree with that based
26 upon the specification of the '142, which says, a projected closure date is

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1 utilized to keep users and clients focused on reaching a designated goal in a
2 reasonable period of time, and that may be pre-determined, for example, one
3 year. There's nothing in the Spec. that says it has to be the end or final date,
4 it's just some closure date to some part of the program. And we pointed to
5 Douglas's one-month goals as satisfying that particular requirement of
6 projected closure date, because it's used to determine whether the patient is
7 properly progressing, and that's confirmed by their own expert as shown on
8 demonstrative 83.

9 So, moving on, Your Honor, to the next limitation of wherein the
10 data includes at least intervention plans. So, this is an interesting situation in
11 Claim 1, where we've tried to color-code this to orient ourselves. So,
12 intervention plans is in Claim 6, which we'll get to in a second, but Claim 1
13 has two renditions of data, the first one in yellow on slide 85 states, data
14 associated with the treatment or assistance of each of the clients. Then
15 there's the green, which states, data associated with at least performance of
16 the desired outcomes. Now, the green colored limitation is received from
17 providers utilizing computing or communication devices.

18 So, the Patent Owner is trying to argue that both of these,
19 essentially, have to be received from the providers utilizing computer or
20 communication devices. We're pointing out that it's only the data associated
21 with at least performance of the desired outcome. So, that's important, as we
22 see in the next slide, carrying over that color-coding.

23 Claim 6 says, the data includes at least intervention plans. Again,
24 we have to ask ourselves, what data? We think that the data associated with
25 the treatment or assistance of each of the clients is really what Claim 6 is
26 talking about, because that's when the intervention's plans would come into

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1 play, it's when you have a treatment and assistance, not the performance of
2 desired outcomes necessarily. But there's an issue here with what Claim 6 is
3 referring to when it says, the data includes intervention plans. But again, our
4 position is that, Claim 6, as we're referring to, the data associated with the
5 treatment, yellow to yellow, or assistance of each of the clients, and that
6 does not require that it be received by the providers utilizing computing or
7 communication devices as shown as blue.

8 Okay. Next, moving on -- and I am going to probably take a few
9 minutes of my rebuttal time, I recognize that, potentially. Next, we have
10 prompting the provider --

11 JUDGE WEINSCHENK: Mr. Solomita, can I ask one question
12 about the previous slide, please?

13 MR. SOLOMITA: Yes.

14 JUDGE WEINSCHENK: This is Judge Weinschenk. Did you
15 make an argument that even if we read it the way that Patent Owner does,
16 that there's an intervention plan received from the provider utilizing
17 computing devices?

18 MR. SOLOMITA: I'd have to actually check that, Your Honor. I
19 don't believe so. I'll ask my co-counsel to maybe let me know if we did. I
20 believe the data from the providers was that example of having an office
21 visit, where the provider is sort of giving the office the updated data, and
22 that's through the communication's device. I don't believe we argued that
23 intervention plans were provided by the communication devices, but to be
24 honest with you, Your Honor, I don't remember off the top of my head. I've
25 got a comment from my co-counsel that we didn't make that argument, at
26 least not clearly.

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1 JUDGE WEINSCHENK: Okay, thank you.

2 MR. SOLOMITA: You're welcome, Your Honor. So, next, we
3 have --

4 JUDGE BALTATZIS: Mr. Solomita --

5 MR. SOLOMITA: Yes.

6 JUDGE BALTATZIS: -- before you get going, just about a 5-
7 minute warning on your time before you go into your rebuttal.

8 MR. SOLOMITA: Thank you, Your Honor. I think I may take a
9 little bit of that, but not too much. I should wrap up in the next 5 or 10
10 minutes. So, next limitation, prompting the providers to provide data
11 associated with assigned clients. This is Claim 10 of '142, and what the
12 Patent Owner, again, is arguing, is a narrow construction that prompting
13 requires guiding the user through competing fields.

14 And again, you hear this theme throughout their arguments, where
15 they're adding limitations to a lot of the claims to get over the prior art,
16 which we just think, frankly, are not supported by the claim language or the
17 specification.

18 So, here, there is a citation on Slide 88 to the specification, where
19 the '142 talks about prompting a user to enter fields and information. And
20 then, they have an example that says, a series of probes or questions may
21 guide. But again, they're reading a limitation from an example in the spec.,
22 and the spec. says the process begins with prompting a user. You know, the
23 plain and ordinary meaning of the term prompting, in our review, and we
24 think Douglas satisfies that because it does prompt providers to provide data
25 associated with the clients. And we have the example in Figure 4 that we
26 cite here from our Petition of entering blood pressure data and other things.

1 And we have to keep in mind that Claim 10 depends from Claim 1,
2 where Claim 1 you create the fields, and Claim 10 you prompt the provider
3 to send the data, which clearly is what Douglas does.

4 And this is the last argument, Your Honor, which is whether
5 Virginia's analogous is a prior art or not. So, on Slide 92, we've got a
6 comparison of disclosures of the '142 Patent on the left side and Virginia on
7 the right side. Let's start with the right side. Virginia's a guide to
8 transitioning students with autism to adulthood, using an individualized
9 plan, having measurable educational goals, and it uses the minimum growth
10 line, just like what the '142 Patent talks about, tracking goal progression for
11 individuals with autism, and the use for educational instruction with the
12 minimum growth line.

13 So, clearly, we think Virginia is analogous prior art. To get around
14 this, the Patent Owner argues that, well, the '142 has a very specific field of
15 endeavor, and it's a specific structure; i.e., data compilation via computing
16 devices, data assessment, and automated alerts and notification. This is
17 shown on demonstrative 93. And they rely upon the abstract and a small
18 excerpt of the '142 -- (INDISCERNIBLE -- TECHNICAL DIFFICULTY).

19 Your Honors, can you still hear me? Okay, sorry.

20 JUDGE BALTATZIS: Yeah, you broke up for a minute, you're
21 back.

22 MR. SOLOMITA: My apologies. So, we're showing on the
23 bottom of demonstrative 93, the evidence that the Patent Owner is relying
24 upon for arguing that there's a specific structure in the '142 that would
25 eliminate Virginia's analogous prior art. If you read this -- we won't take the
26 time to do that, there's nothing in the '142 Patent about this so-called specific

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1 structure. It's just a general description of using a computer to modify
2 behavior to achieve goals with thresholds along the way under a plan of
3 action.

4 And we've got a case here on Slide 94 that says that, when we look
5 at analogous art, the field of endeavor is not limited to the specific point of
6 novelty, or the narrowest possible conception of the field, or the particular
7 focus within the field. So, again, clearly, we think Virginia is analogous art,
8 and that would be enough, we think. But Virginia's also reasonably
9 pertinent because it's the same problem addressed in the '142, as we show on
10 Slide 95, how to assess an individual's progress towards a goal, and that's
11 what Virginia does. Again, in the autism context, just like '142 talks about
12 regarding tracking goal progression for individuals with that autism.

13 So, that concludes my presentation, Your Honor.

14 JUDGE BALTATZIS: All right, thank you. Any last questions?

15 JUDGE WEINSCHENK: Nothing from me, thank you.

16 JUDGE BALTATZIS: All right. Patent Owner, and I apologize
17 earlier to you, Mr. Solomita, I did not realize now that I was keeping time on
18 my own device here instead of putting it on the big clock so I'll do that for
19 Ms. Spires. Just to confirm, 70 minutes, correct?

20 MS. SPIRES: Yes, Your Honor.

21 JUDGE BALTATZIS: All right. Whenever you're ready.

22 MS. SPIRES: Unless Your Honors have any questions that you'd
23 like me to address on the outset, I'd like to begin where Petitioner did, which
24 is with the claim element comment to all claims of the '554 Patent, which is,
25 determining, by the one or more providers, treatment and assistance for the
26 client, which is used for establishing goals, a plan of action, and thresholds

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1 for the client. The Patent Owner slides for this claim element began at
2 Patent Owner's demonstratives, which is Exhibit 2009 at Slide 24.

3 Moving to Slide 25, we see that the Becton case held that, where a
4 claim lists elements separately, as done here, there is a presumption that
5 those components are distinct. And this is sometimes called the Becton
6 presumption or Becton separateness, all the same thing.

7 Moving to Slide 26, we see the procedure for applying the Becton
8 presumption that the Federal Circuit held -- articulated earlier this year in the
9 Regeneron case. And in that case, the Federal Circuit held that, the first step
10 is to evaluate the applicability and effect of the claim construction principle,
11 reiterated in Becton, that explains where a claim lists elements separately,
12 the clear implication of the claim language is that those elements are distinct
13 components of the patented invention.

14 So here, a plan of action, goals, and thresholds are all separately
15 recited in the challenged claims. I have never heard Petitioner argue
16 otherwise. They have argued that they've rebutted the presumption, but not
17 that these three claim elements are separately recited. So, it seems
18 undisputed that the Becton Presumption applies. And so, we move to step 2
19 at Slide 27.

20 And here, the Federal Circuit says that, okay, we have the
21 presumption, it applies, now we consider whether the evidence overcame the
22 clear implication of separateness under Becton. And this is where things go
23 a bit haywire in Petitioner's argument, and that they're not applying this as a
24 presumption.

25 In the briefing they're saying, look, the Petitioner hasn't done
26 anything to show that these things must be separate. Well, that's backwards.

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1 We have, and that's not how this works. Here, there is a clear implication of
2 separateness, and that's going to apply unless the evidence is going to
3 overcome this. As you would expect, to overcome a clear implication of
4 separateness, the evidence has to be strong. Petitioner did not even address
5 this until reply, but has never shown any strong evidence that this
6 separateness has been rebutted.

7 So, what Patent Owner has shown is an example from the
8 specification, that just like the claims, recites the goals and the plan of action
9 separately. So, in the abstract, the '554 Patent says, in response to selections
10 from an administrator, goals and a plan of action are established for the
11 client in response to treatments and assistance required. So, you've got both
12 goals and the plan of action being established here, not goals and/or a plan of
13 action, or a plan of action that may have a subset of goals. You've got two
14 things here being established.

15 And if we look to Slide 28, you see the intrinsic evidence that
16 Petitioner is using, trying to say, hold on, hold on, the intrinsic evidence
17 actually shows that these things are not separate, but that's not actually the
18 case. They're looking at Claim 7, but Claim 7 still talks about goals, a plan
19 of action, and thresholds as separate elements. It says, the method,
20 according to Claim 1, further comprising, establishing the goals and a plan
21 of action, not one either/or a subset for the client, utilizing goal-creating and
22 tracking software. So, this same software can be used to establish the goals
23 and the plan of action, fine, but they are separate things, wherein the data,
24 goals, plan of action, compiled data, and thresholds are associated with the
25 account of the client. These are each itemized things that have to be
26 associated with the account of the client. They cannot be each associated

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1 with the account of the client if these things are subsets of each other and not
2 distinct.

3 So, if we look at Claim 29 -- sorry, Slide 29, what we see is what
4 the case law means when it's talking about evidence that's needed to
5 overcome the clear implication of separateness. Petitioner keeps arguing
6 that there's inter-relatedness among these claim elements. And so, because
7 they are inter-related, that one can affect the other, or that a plan of action
8 can be modified based on goals not being met, that somehow these things --
9 you can point to one for both of them, which is just not the case, and that is
10 not what this separateness means. It doesn't mean that the two can't be
11 related. It means that they have to be separately identifiable. So, if you've
12 got a Venn diagram, these two things are not going to intersect. So, we've
13 got --

14 JUDGE BALTATZIS: Ms. Spires?

15 MS. SPIRES: Yes, Your Honor.

16 JUDGE BALTATZIS: If I could interrupt, just to confirm. So,
17 that -- I guess the line between separate and distinct and inter-related. So,
18 they can -- and again, you can look at the thresholds to modify the plan of
19 action. I think the claims say that, right?

20 MS. SPIRES: Yes.

21 JUDGE BALTATZIS: They can interact in some way; they just
22 have to be separately shown. Is that --

23 MS. SPIRES: Absolutely.

24 JUDGE BALTATZIS: -- the correct understanding?

25 MS. SPIRES: Yes, it is. And we see that in a lot of examples of
26 the case law that apply the separateness; that there is an interaction between

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1 the claim elements, but they still have to be separately defined.

2 So, if we move to Slide 30, we see some of that. So, in this one, in
3 Becton itself, had a spring means connected to said hinged arm. These are
4 certainly not so separate that they're not inter-related; they're connected to
5 each other. And so, I mean, if spring means connected to a hinged arm, you
6 can imagine one's going to affect the other. This doesn't mean that one can't
7 affect the other, but they have to be two separate things. Here, we are
8 talking about structural elements so you have to have a spring means that's a
9 distinct structural element from the hinged arm in Becton. Same in
10 Comcast. We had a speech recognition system coupled to a wireless node.
11 They're coupled, so they're certainly inter-related, but they have to still be
12 distinct elements, they can't be the same thing.

13 And then looking back to Slide 29.

14 JUDGE WEINSCHENK: Ms. Spires?

15 MS. SPIRES: Yes, Your Honor.

16 JUDGE WEINSCHENK: This is Judge Weinschenk. Do you
17 have a specific example from the specification of the challenged patent that
18 shows us how you would have a plan of action that is completely separate
19 from the goals? Is there some sort of example of this in the specification
20 that might help guide us?

21 MS. SPIRES: The examples are when they are separately listed.
22 But it always talks about -- anytime the specification talks about a plan of
23 action, it also talks about goals. So, we see that in the abstract it's talking
24 about goals and a plan of action are established, or in Claim 7, it's talking
25 about the goals and a plan of action -- establishing the goals and the plan of
26 action for the client. And so --

1 JUDGE WEINSCHENK: Other than, for example, using those
2 terms separately, there's not, like, a figure or something that shows us what a
3 plan of action would look like, and what the goals would look like, and what
4 the thresholds would like, and how they're completely separate? Is there an
5 example like that?

6 MS. SPIRES: There's not one that I can think of off the top of my
7 head. And this is where the importance of the presumption comes in, in that
8 we are facing a situation, where there's not a lot of intrinsic evidence one
9 way or the other as to how these things are applied. And so, we've got the
10 two items from the intrinsic evidence that both parties have shown, which is
11 from the abstract, where goals and a plan of action are separately
12 enumerated, and in Claim 7, where there's goals and a plan of action are both
13 established utilizing goal-creating and tracking software. That's what we've
14 got to go on. And that's where we know that separateness has to apply.
15 Because what the Federal Circuit said is that, if you had the claim element
16 separately recited, looking back at Slide 27, you're at step 2, where you're
17 supposed to consider whether the evidence overcame the clear implication of
18 separateness under Becton.

19 So, we know we're in this clear implication of separateness, no one
20 has disputed that the claim elements are separately recited, and now we have
21 to decide whether the evidence overcomes this. And there's nothing here
22 where the evidence would overcome and say, wow, this is so strong that it is
23 actually going to mean that these claim elements can -- you can point to one
24 claim element and get two -- or one item and get two elements.

25 And I think this is where Slide 29 examples are helpful, because
26 you see that, even in situations, where there is a specification that has an

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1 embodiment, where the claim elements are separate, and an embodiment,
2 where the claim elements are actually joined together and they're not
3 separate and distinct, the Federal Circuit has consistently said that's not
4 enough to overcome Becton separateness. Even when there is an
5 embodiment that is not going to be claimed, if you're applying Becton
6 separateness, as long as there is an embodiment still that would fit in the
7 claims if we applied the separateness, then we're going to still apply the
8 separateness.

9 And so, here you had the Kyocera case, and so that one had a
10 written description that contained two embodiments, one of which was not
11 claimed when applying Becton separateness, but the Federal Circuit went
12 ahead and said, yes, Becton separateness does apply. Same for the Comcast
13 case, where there was a speech recognition system, and the wireless node,
14 and the specification contained in embodiment, where the speech
15 recognition system is in a wireless node. And so, that's kind of what they're
16 trying -- what Petitioner is trying to do here. They're trying to say, like,
17 goals are in the plan of action, but they specifically say in the Petition that,
18 the plan of action includes the goals. And so, in that case, there was an
19 embodiment, where the speech recognition system is in a wireline node.
20 And the Federal Circuit said, no, that's not enough to overcome Becton
21 separateness because the specification also describes an embodiment with a
22 speech recognition system near a wireless node. So, in those cases they said,
23 no, not enough to overcome.

24 So, here, we're not nearly to this sort of extreme. We're at a case,
25 where you've got clear implication of separateness. Is there anything strong
26 enough to overcome to say, look, these things really are one in the same?

1 No, absolutely not.

2 JUDGE BALTATZIS: Ms. Spires, just to kind of go to -- it's my
3 understanding, Petitioner's argument is that Douglas teaches three separate
4 things, right? The intermediate goals as thresholds, the final goals as goals,
5 and the therapeutic program's the plan of action. Why isn't that enough to be
6 the separate elements?

7 MS. SPIRES: If you look at Slide 31, they have said, specifically,
8 that the plan of action includes the goals. So, if you see -- I don't think I
9 have a slide on it, but in the Petition, at pages 25 to 26, they said that the
10 claimed plan of action is met by Douglas's overall therapeutic program.
11 That includes the above goals. So, here they're saying, you've got a Venn
12 diagram, and you've got the therapeutic program, and you've got -- the above
13 goals are wholly-subsumed within the therapeutic program.

14 And so, you're in the wireline node that's in -- or the speech
15 recognition system in the wireline node that we were in, in Comcast. They
16 said this many times throughout the Petition. And also, their expert even
17 said, at his -- it was Exhibit 1012 at paragraph 83 said that there's a plan of
18 action, which he had as parenthetical (therapeutic program), including goals
19 52, and final goal 62, as well as one-month goals 62 or threshold. So, he
20 said that the plan of action wholly-subsumes both the goals and the
21 thresholds.

22 So, they have said, very explicitly, that the plan of action includes
23 the goals. These are not two separate things. And where we can really see
24 this go haywire is with the weight loss example that they were talking about
25 earlier. So, if we turn back to Petitioner's Slide 12 they had up on the screen
26 earlier. In this one, they underlined and said, Petitioner cites to multiple

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1 portions of Douglas, which disclose weight loss as an example of a plan of
2 action. Okay. Well, then, they're going on and saying -- their Slide 20 that
3 Petitioner does not conflate weight loss with a plan of action. And they cite
4 a portion of their Petition that says, Douglas's program provides for goals,
5 one-month goals, and final goals for e.g., weight loss.

6 So, in the Petition, they're saying the plan of action, Douglas's
7 program provides for goals of weight loss. In fact, an argument earlier, they
8 acknowledged that weight loss in one of the goals, but in the Petition that is
9 not what they said. And say, back to Slide 12 of Petitioner's slides, they're
10 saying that they cite to multiple portions of Douglas, which disclose weight
11 loss as an example of a plan of action. They are specifically pointing to one
12 thing, weight loss and saying, this satisfies goals, this satisfies plan of action.
13 That is exactly what the Federal Circuit has said you cannot do.

14 In fact, even in the case law that Petitioner provided in their slides,
15 they were saying, look, the case law is about you pointing to one thing and
16 saying this equals two claim elements. That is exactly what they're doing
17 here.

18 They have said, in one instance, in their reply, that weight loss is
19 an example of the plan of action. In their Petition they said, no, weight loss
20 is a goal, which it cannot be both. They are pointing to both, and that's the
21 problem here.

22 Their expert tried to realize kind of the issue with this and tried to
23 back away from it. And so, in his deposition, he came back and said,
24 actually, actually, plan of action is moving from where you are now to your
25 goals. And that sounds reasonable to me, that a plan of action would be
26 moving from where you are to the goals. In my view, that's how the '142

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1 Patent uses plan of action, but that is not what they labeled the plan of action
2 as when they set forth their mapping in the Petition. They said a plan of
3 action is the entirety of the therapeutic program, including goals, final goals,
4 as well as one-month goals or thresholds. So, they chose how they mapped
5 the plan of action, they mapped it to Douglas's therapeutic program, and in
6 doing so, they end up pointing to the exact same thing, an example being
7 weight loss and saying, look, this is the plan of action, it's weight loss, look,
8 this is a goal, it's weight loss. They cannot do that. The Federal Circuit is
9 incredibly clear that that is not sufficient, and so they have not met their
10 burden of demonstrating that Douglas discloses the claimed plan of action
11 goals and thresholds as claimed in the '142 Patent. I'm sorry, the '554 Patent.

12 Do Your Honors have any other questions on that claim element?

13 JUDGE BALTAZIS: None here.

14 JUDGE WEINSCHENK: No, thank you.

15 MS. SPIRES: I will move on then to the next claim element that
16 affects all claims of both patents. If we look at -- moving back to Patent
17 Owner's slides, which is Exhibit 2009, we go to Slide 33. And this is
18 assigning each of the clients to one or more of the providers in response to
19 selections from an administrator.

20 The key here -- there are two main points here. We've got that you
21 have to have the assigning the client to one or more providers, you have to
22 have selections from the administrator, and you have to have the selections
23 being in response to assigning. There are three things happening here, and
24 Petitioner has pointed to one thing. They are mapping both assignment and
25 selection to the same step in Douglas. This is contrary to what they argued
26 just now, where they said, oh, there's this separate assigning statement --

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1 separate assignment that happens in the background. That is not in the
2 briefing. If you look in the Petition, there is nothing in the Petition that says
3 that -- what Counsel stated earlier. He said that assigning in the Petition
4 maps to achieving a state of being assigned. And he said the system
5 assigned the patent to the physician, but he doesn't cite anything from
6 Douglas for this, and he doesn't cite anything from the Petition for this
7 because that is not what was argued. There is no separate assigning of any
8 physician resulting from the selections.

9 So, what you see in Slide 33, Petitioner argues that assignment of
10 the client to a provider is satisfied by the administrators entering the patient
11 prescription form into the Douglas's system, and that's different from what
12 we heard earlier today. We can see this is what the Petition says.

13 And if we move to Slide 34, they said in the Petition, a POSITA
14 would have understood Douglas's disclosure of the administrator entering
15 this patient -- physician information from the patient prescription form to the
16 disclosure of the administrator's assignment of the patient to the physician
17 within Douglas's system." This is absolutely contrary to what you heard
18 argued earlier today.

19 And we see on that same slide what they said is selection. They
20 say, additionally, by entering the patient prescription form, the case
21 administrator's assignments of the patients to the physician constitute
22 administrator's selection of each of the patients and of the physician to be
23 assigned to that patient. We're seeing the same thing.

24 So, back to Slide 33, they're arguing assignment is satisfied by the
25 administrators entering the patient prescription form into the system. And
26 they're saying this input of information from the prescription form is the

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1 claimed selection. And, arguably, they say that that's done by double-
2 tapping the prescription form. But we know that Douglas's prescription
3 form is a paper form so it cannot be double-tapped so that's not going to
4 happen.

5 But we have the issue that is similar to the claim that we were just
6 talking about, where they're saying, there's an assignment, and this has to be
7 done in response to selections. But what they map this to for both is the
8 same thing. They're saying, this administrator is going to take this
9 prescription form, and they're going to enter this information into the
10 computer, this is the selection, and this is the assignment, both happening.
11 There's nothing happening in response to what they're doing, it is happening
12 simultaneously. This is one step. This is both the selection and the
13 assignment. If that's the case, then the claim language in response to
14 selections from the administrator is completely read out, you're just
15 assigning the client to one or more providers. Or, you could read out
16 assigning the client to one or more providers, and you'll just have selections
17 from the administrator. But this claim --

18 JUDGE WEINSCHENK: Ms. Spires?

19 MS. SPIRES: Yes.

20 JUDGE WEINSCHENK: This is Judge Weinschenk again. For
21 this claim limitation, do you have an example from the specification that
22 shows us what was intended by the assignment language and the selection
23 language such that we know sort of in context what that means?

24 MS. SPIRES: There is a bit more information for this one. Let me
25 get the information for you. So, this -- if we look at the specification,
26 column 11, lines 13-18, it says that, provider administrators -- and so, again,

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1 this is the context of the '142 Patent, where the -- see, that's -- I guess I'm
2 giving you a citation to the '142 Patent. It's a little bit frustrating in these --
3 the citation differs whether you're looking at the '142 or the '554, despite the
4 fact that they are the same claim limitations. But for the '142 Patent, the
5 citation site is column 11, lines 13-18, and it says, provider administrators,
6 214, may manage their team of service providers 216, who work directly
7 with clients 224, to administer information and data, such as goals and
8 objectives 236. The provider administrators may have complete access to
9 the service providers and the clients, to assign the clients to individual
10 service providers through the user interface. And in this whole section is
11 where the '142 Patent is talking about how the assignment works.

12 And so, basically, you've got -- in this system, in the '142, it's
13 envisioning provider administrators that are not basically clerical workers as
14 they are in Douglas. In Douglas, you've got someone's whose job is just to
15 set people up in a system. They take a prescription form from a physician
16 and they say, okay, I'm going to enter this data, there we go. The '142 is not
17 talking about this, it's talking about providers, where you've got -- they are
18 not clerical, but they are people that are actually skilled healthcare workers
19 that can have the ability to directly assign and have the knowledge necessary
20 to make assignments.

21 JUDGE WEINSCHENK: Ms. Spires?

22 MS. SPIRES: Yes.

23 JUDGE WEINSCHENK: This is Judge Weinschenk. That
24 sentence you read to me from column 11 that says the provider
25 administrators may have complete access to the service providers and the
26 clients to assign the clients to individual service providers through the user

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1 interface.

2 MS. SPIRES: Yes.

3 JUDGE WEINSCHENK: So, it sounds like what is happening is,
4 that the administrator uses some sort of interface to select a provider, which
5 results in an assignment. How is that different from what's happening in
6 Douglas? Maybe it's not a dropdown menu, maybe it's just entering the
7 doctor's name, and it certainly seems like the administrator is using some
8 sort of interface to select a provider, which results in an assignment. Is there
9 some distinction I'm missing between the challenged patent and Douglas?

10 MS. SPIRES: I think there are several distinctions here. The first
11 is that, in the '142 Patent, there has not been an assignment at this point.
12 And so, in Douglas, the assignment to the physician has been made by the
13 physician actually filling out the prescription form. So, they have said, this
14 is my patient, I want them to subscribe to this system, and a clerical merely
15 selects the -- whatever it is in the system, a dropdown box, or whatever, to
16 say, okay, I am confirming, here's what the physician that is assigned to this
17 person, I'm clicking this physician, and we're done. So, the assignment has
18 already happened in Douglas, and then we just have a selection from the
19 administrator. And so, these are separate things, and the assignment is not in
20 response to a selection from the administrator. The administrator didn't do
21 any of the assigning.

22 In the '142, we do not have -- the service provider is already
23 assigned. We have, okay, someone's coming out of, say, surgery, whatever
24 it is, they need all of these different things. The provider is going to say,
25 okay, we're going to subscribe the person into the system and manage their
26 team of service providers. So, we're going to say, this person needs this type

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1 of treatment, this type of treatment, this type of treatment, here's their
2 assignments for these service providers. And so, you have that assignment
3 as being -- the service administrator is going to select the service providers,
4 and that's going to make an assignment.

5 And that assignment is going to be similar to what Counsel talked
6 about earlier, that there's going to be something in the backend of the '142
7 Patent that's saying, all right, we are making a selection and now assignment
8 is happening in the system.

9 There is nothing that Petitioners have ever cited to in Douglas that
10 talks about this sort of backend happening. Again, this is -- the first time we
11 heard about this was in reply, not in a Petition where they have to actually
12 map assignment. What they map the assignment to, in the Petition, was just
13 selecting a dropdown box. They did not say, and Douglas has this backend
14 that's now going to create these assignments. They were silent as to that.

15 They just mapped, look, we've got a selection, here we go. We're
16 going to click a dropdown box and say this is the service provider that's
17 going to be assigned to this patient. And they said, look, it's already
18 happened, there's an assignment, I'm going to select that. And they said, for
19 both things, that that is assignment, that they are saying, all right, I am now
20 assigning this patient to the physician, despite the fact that that assignment
21 has already occurred and then they're saying, look, that is selection as well.

22 They did not say in the Petition what's happening in the '142, that
23 there's this backend -- that there's a selection, and now the system, itself, is
24 going to make the assignment happen, where this patient is now assigned to
25 provider. The Petitioner is silent on that. The Petitioner says absolutely
26 nothing about how this assignment would occur, they just say that the

1 selection is the assignment, full stop.

2 And that's a theme that we see throughout the Petition, is that
3 there's a lot that they're expecting everyone to just assume. And this is
4 where we go to the Corephotonics case. And so many of Federal Circuit
5 cases, on this point, they say, the IPR Petition must provide an
6 understandable explanation of the element-by-element specifics of the
7 patentability challenges, including identification, in particular, portions of
8 prior art in which the Petitioner is relying. And that is what is just not
9 happening. So many elements here, including this one. They just say, all
10 right, you've got an assignment, all right, you've got a selection; done. And
11 they don't say, hey, actually, when we said that the person's assigning, we
12 meant, and everyone should have known that we meant that there is this
13 system in Douglas, which is not disclosed in Douglas, that there's some
14 backend that's going to assign the patient to the physician. And, in fact,
15 there's nothing in Douglas that says that it does that. And so, Douglas is
16 silent on this, the Petitioner is silent on this, and, in fact, they don't even say
17 a POSA would have recognized that this would happen; nothing. They are
18 just silent.

19 And so, it's not until reply that they say, hold on, hold on, that's not
20 what we meant. We might have said that the assignment and selection are
21 both, say, selecting the physician's name, but that's not what we meant. And
22 so, that's what we see throughout here. In the reply, they keep saying, oh,
23 we said this in the Petition, yeah, great, but that's not what we meant. But
24 both the statutes and the Federal Circuit have made clear your Petition -- you
25 have to make your case-in-chief in your Petition. You don't get to say, oh,
26 okay, once it's been -- the flaws have been pointed out, now say, oh, okay,

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1 we actually meant something else, and that's what's happening here.

2 Do Your Honors have other questions on that claim element?

3 JUDGE BALTATZIS: Nothing from me.

4 MS. SPIRES: What I'd like -- I'd like to move on Slide 37. This is
5 Patent Owner's Slide 37 to the database in communication with the server
6 configured to store the data, goals, plan of action, compiled data, and
7 thresholds with the account associated with the client and the one or more
8 providers. And this is relevant to Claims 13 and 16 of the '554 Patent and
9 Claims 11 and 16 of the '142.

10 And this is one, where -- kind of in -- along the theme that we were
11 just talking about. The claim specifically says that, there must be a database
12 in communication with the server. And there is absolutely nothing in the
13 Petition that says the database is in communication with the server. What it
14 says is that the server includes one or more relational databases. And they're
15 saying now, oh, well -- they're arguing that a POSA would not have
16 understood that a network server, including one or more relational databases,
17 would have been in communication with the databases.

18 But that even goes too far because they did not argue that a POSA
19 would have understood. And that's literally what they needed to do, was to
20 say, Douglas discloses that network server finally includes one or more
21 relational databases, 522, and then said, and a POSA would have understood
22 that a network server, that includes one or more relational databases, this
23 server would have been in communication with the database and provide
24 evidence to support that. That is what's missing. Claim element that they
25 just assume, okay, we're going -- I don't know what they're assuming. They
26 just -- there's a claim element that they just flat-out did not even provide an

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1 allegation for much less any evidence.

2 And so, then they are -- when Patent Owner comes back and says,
3 look, even if you'd alleged this, which wouldn't have been the case, and
4 doesn't provide any evidence. Well, there's a reason. Patent Owner's not
5 allowed to provide evidence in surreply. And so, for the first time on reply
6 they're saying, oh, well, a POSA would have known this. There's not a lot
7 that Patent Owner can do at that point, in terms of supplying evidence in
8 saying that the network server does not have to -- that a database that has
9 access to a server does not have to be in communication with that server.

10 But that still goes farther than we need to. Because again, the
11 Federal Circuit has made incredibly clear that the Board's job is not to
12 reconstruct a Petition to what a Petitioner maybe could have argued, it's to
13 say, look, this is what the Petition says, and we're not obligated to, and nor
14 should we put into the Federal Circuit -- cobble together what a Petitioner
15 could have argued. The rulings are supposed to be made based on what the
16 Petition argued.

17 And this is similar, if we look at the next slide, which is Slide 39.
18 And this is for Claims 17 to 20 of the '554 Patent. I have a typo here,
19 apologize for that, but Claims 16 to 20 of the '142 Patent. This is a
20 processor for executing a set of instructions. This is similar, but actually a
21 bit worse than the last.

22 And so, here, we've got either server or a controller comprising --
23 depending on the Patent you're looking at a processor for executing a set of
24 instructions, at Slide 40. And then at Slide 41, we see the evidence that was
25 here. All Petitioner did for this claim element is they say, that Douglas
26 discloses or renders obvious this claim element, and then, they're analysis is:

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1 see this other element. And if we look to this other element, which is
2 Limitation 13[a], it says, a server communicates with communications
3 devices through a transceiver utilizing one or more networks. The server
4 includes a processor that executes a client management program too. That's
5 the claim element under (CROSSTALK) --

6 JUDGE BALTATZIS: Ms. Spires, can you hold on for one
7 minute?

8 MS. SPIRES: Yes, I could.

9 JUDGE BALTATZIS: Ms. Spires -- thanks.

10 MS. SPIRES: No problem.

11 JUDGE BALTATZIS: Judge Weinschenk has some
12 communication issues --

13 MS. SPIRES: Okay.

14 JUDGE BALTATZIS: -- so, he's got to rejoin.

15 MS. SPIRES: We've all been there.

16 JUDGE BALTATZIS: Let me actually pause the time. There we
17 go.

18 USHER: All right, the judge is back; connected. Thank you.

19 JUDGE WEINSCHENK: My apologies for that, I'm sorry.

20 MS. SPIRES: No problem.

21 JUDGE BALTATZIS: All right. Whenever you're ready, Ms.
22 Spires.

23 MS. SPIRES: Sure. So, I'll just restart onto this section. So, I was
24 saying, that similar to the argument that we just saw on the in
25 communication, we've got kind of an even more egregious form of an
26 omission of the claim element allegations for Claims 17 to 20 of the '554

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1 Patent and Claims 16 to 20 of the '142 Patent.

2 And so, if we look at Patent Owner's Slide 40, we see what's
3 required, that you've got a server or a controller comprising a processor for
4 executing a set of instructions. And then if we see at Slide 41, what is
5 alleged here, which is that -- it says, Douglas discloses or renders obvious a
6 processor or any other patent controller within the network server for
7 executing a set of instructions for implementing Douglas's system. So, they
8 make the allegation, but they provide zero evidence. Now, what they do is,
9 they take us to a citation to Limitation 13[a], which is the at the bottom of
10 Slide 41, and that limitation does not talk about a set of instructions. And
11 so, not surprisingly, Petitioner's analysis of that limitation does not talk
12 about a set of instructions.

13 And what they're now going to -- looking at -- and if you
14 remember the slides earlier from Petitioner, when they were -- I don't
15 remember the slide number, but they had a bunch of arrows going, okay, you
16 have to go from this slide to this slide, and then here's the citation. This is
17 exactly what the Federal Circuit said cannot happen. You're not supposed to
18 cobble together things to come up with an allegation. But even if we did
19 cobble together everything that Petitioner's trying to get us to cobble
20 together, we're still not going to come up with a processor for executing a set
21 of instructions.

22 So, they've got claim element 13[a] that they cite to. It says
23 absolutely nothing about instructions, but it has a citation to Douglas at 5:22
24 to 25. And they're, like, saying, oh, okay, well, that made our case. Douglas
25 at 5:22 to 25 is shown in Slide 42. All this says is that Figure 59 is a block
26 diagram of the therapeutic behavior modification program's compliance

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1 monitoring and feedback system, and that Figure 60 is a flow diagram,
2 illustrating certain aspects of the therapeutic behavior modification
3 program's compliance monitoring and feedback system. There is nothing
4 here that says that there is a processor for executing a set of instructions.
5 That's just kind of insane to me that we are supposed to get there from this
6 evidence here.

7 And, again --

8 JUDGE BALTATZIS: Ms. Spires?

9 MS. SPIRES: Yes, Your Honor.

10 JUDGE BALTATZIS: For this one, if I could interrupt, this is
11 Judge Baltatzis. They also do cite the expert's declaration for -- again, this
12 Douglas is a system's -- a software with a processor that executes it, and then
13 the expert declaration, you know, has another citation that they put on their
14 slide. Can we rely on that for evidence?

15 MS. SPIRES: I'm going to give a yes and no. Yes, you can rely
16 on the citation, but this is where, I think, the Federal Circuit has again been
17 clear that unexplained citations are not sufficient. And so, a citation, yes,
18 but unexplained, no. And that's where, again, using Corephotonics as an
19 example, it says that the IPR Petition must provide an understandable
20 explanation of the element-by-element specifics of the patentability
21 challenges.

22 And so, it really goes to whether -- and again, this is the Board's
23 judgment call, but whether, in your opinion, the citation that's provided is
24 sufficient to provide an understandable explanation of the element-by-
25 element specifics of the patentability challenges. And so, here, we've got
26 citations that are not even for a claim element that has the word instructions.

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1 And so, certainly, we're not intending to show to the Patent Owner that's
2 trying to defend itself to the Petition, that this is the allegation that there's a
3 set of instructions.

4 But then, they're still citing portions that, even if you go into the
5 citations, we still don't see something that's an understandable explanation.

6 And so, we've got to go many steps removed to the point that they are now
7 putting in a supplemental expert declaration, which for all the reasons we've
8 put in our briefing, is absolutely improper evidence at this point because
9 that's part of the prima facie case, and so that has to be included in the
10 Petition. But that's the first time that they're saying, oh, yeah, but a POSA
11 would have known that this is C++, and so that this would have had a set of
12 instructions. We are so many steps removed from the claim element that we
13 had there, which was -- look back at what the analysis is. The analysis is
14 Slide 41. It's all set out there. See Section VII.A.9(b) (Limitation 13[a].
15 You are not going to go to that claim element and see any understandable
16 explanation of the element-by-element specifics for why there's a prosecutor
17 for executing a set of instructions. And I think -- and that's where I'd say it's
18 a step too far. That you're looking at a citation -- no one's going to be
19 looking at element 13[a] and into the citations for something that should be
20 an explanation of why there are instructions when that claim element didn't
21 even have any instructions. And again, there is nothing there that says that.

22 And so, this is another -- I mean, the -- we have two -- the
23 Intelligent Bio-Sys. case that gets cited all the time, where the Federal
24 Circuit says, look, the rules are harsh, but this is what the Petitioner knows
25 when they decide to file an IPR, that they're held to what they put in their
26 Petition, and it's an expedited proceeding and so, this is what it is. What

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1 they said in their Petition was absolutely nothing with respect to executing a
2 set of instructions.

3 For the next claim element, we look at Slide 43. This is relevant to
4 the '554 Patent Claims 6 and 13, and the '142 Patent Claims 2 and 11. And
5 this is the client management program that's executed by the computing or
6 communication devices.

7 And so, on Slide 44, we see what both claims require, and this is
8 using the Claims 6 and 13 from the '554 as an example, but the claims are
9 the same as 2 and 11 in the '142 patent. And so, Claim 13 has a server
10 includes a processor that includes a client management program, whereas
11 Claim 6 has a client management program is executed by the computing or
12 communications devices.

13 And so, what Petitioner has said now, on reply, is that, look, we're
14 looking for two different combinations because we understand that there are
15 two different executions. And so, looking at Slide 45 is what they're saying
16 for Claim 13, where a server includes a processor that executes the client
17 management program. They're looking just to Douglas. And they're saying
18 that Douglas's PCs 500 are green, and they're used by physicians to transmit
19 data to the network server red.

20 But then, in Claim 13, they're saying -- going to Slide 46, that
21 they're relying on Chitiveli combined with Douglas to get the execution over
22 into the client computer system. But what they're ignoring in Chitiveli is
23 that it still, just like Douglas, uses a server. And in Slide 46, the server here
24 is red, and that server executes its program, which is the content analytics
25 tool in blue, and then it has an analytics client yellow, and so that's basically
26 just the user interface that is contained on the client computer system green,

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1 and that communicates to the content analytics tool on Chitiveli's server
2 through cloud network 120.

3 And so, Petitioner's trying to say, oh, no, no, no, this analytics
4 client is the client management program. That is not what Chitiveli
5 discloses. If it was, it would not need to use network 120 and talk to the
6 content analytics tool on the server's system. What Chitiveli discloses is that
7 it's like Douglas, or Douglas has some sort of user interface system,
8 presumably. And so, there is not a difference here between Douglas and
9 Chitiveli. We've got the client's computer system, the physician computer
10 system; has got some sort of interface here in Chitiveli's analytics client, and
11 then that's going to go through the network to the server where the content
12 analytics tool is, which is the client management program.

13 And so, we have absolutely nothing different for Claim 13's
14 evidence from what we have in Claim 6. So, we've got -- they can't be right
15 in both of these situations. Either the client management program is
16 executed by the computing or communication device or by the server. What
17 we see in the evidence is that it's executed in both instances on the server,
18 and in neither instance on the client communication device.

19 JUDGE WEINSCHENK: Ms. Spires, this is Judge Weinschenk.
20 So, it sounds like the real issue here is with Claim 6 of the '554 Patent that
21 requires the client management program to be executed by the computing or
22 communication devices?

23 MS. SPIRES: Yes.

24 JUDGE WEINSCHENK: Because you're saying, even in the
25 combination, the client management program is still executed on the server;
26 is that correct?

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1 MS. SPIRES: That's correct, yes.

2 JUDGE WEINSCHENK: Okay, thank you.

3 JUDGE BALTATZIS: Just a quick follow-up on that. This is
4 Judge Baltatzis. It's my understanding that the argument is that there could
5 be, like, two different client management programs. Why is the one in
6 Claim 6 -- how could that -- I'm not putting this -- so, is it because of, like,
7 the function that is has in Claim 6, right, the client management program, is
8 utilized to receive the data and track practice of the goals? Does that mean
9 that Chitiveli doesn't teach that on the client device or is it -- just to confirm,
10 like, one, does it have to be the same client management program for both
11 Claims 13 and 16? And if not, is it because Claim 6 has this different step
12 that can only be done -- that Chitiveli and Douglas has done on the server
13 side rather than on the device side?

14 MS. SPIRES: The patent uses the term client management
15 program, and it's my understanding that we don't have a claim construction
16 dispute issue on this claim, but, typically, when a patent uses the same claim
17 term, it's using the same claim term consistently throughout the patent, and
18 so, I'd expect it would be the same. But even if it's not, Chitiveli still makes
19 clear that its client management program is executed on a server.

20 If you look at Chitiveli, it's in paragraphs 35, and Chitiveli is
21 Exhibit 1004. Paragraphs 35 to 37 and 43 of Chitiveli explain that what's
22 happening -- that the client management program is actually executed on the
23 server. And it says that, the client computer system executes only the
24 analytics client or the web browser used to log in. And so, this is really just,
25 you pull up Chrome, you go into the web browser. None of the functionality
26 of this actually happens. It just takes the data that is put into the analytics

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1 client and sends it over to the content analytics tool, and that's where the
2 client management program is executed.

3 And so, it says that the actual functions of the program, which
4 include the analytical processing, generation of reports on the analyzed data
5 to monitor progress on issues, and dynamically, generating reports as new
6 data is provided is performed by the content analysis tool 110, which resides
7 on the server.

8 So, we've got the functions -- everything that is the function of the
9 client management program is on the server with, basically, a web browser
10 used to log in on the client computer system that is the analytics client.

11 JUDGE WEINSCHENK: So, I guess the argument is that
12 Chitiveli then can't be used to -- or Chitiveli's analytics tool, which is on the
13 device, can't be utilized to receive the data and track the progress of the
14 goals as recited by Claim 6? Is that right?

15 MS. SPIRES: Correct. And especially, the tracking and the
16 progress of the goals, that specifically is going to happen in the content
17 analytics tool. You've got that it says that it is -- all of the analytics
18 processing, the generation of reports -- generating reports as new data is
19 provided, all those things that are what you just talked about from the claim,
20 that have to happen from the server, and those are all happening on the
21 server side, not the client computer system side.

22 JUDGE WEINSCHENK: All right, thanks.

23 MS. SPIRES: So, if we look next to Slide 47, this is now Claim 10
24 of the '554 Patent and Claim 7 of the '142 Patent. The claim element is
25 determining whether the data required is received from each of the
26 providers, and sending an alert to one or more providers in response to

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1 determining there is missing data for one or more clients associated with the
2 one or more providers.

3 And if we look to Slide 48, we see the entirety of what Petitioner
4 provides for this claim. They talk about -- that Douglas discloses sending an
5 alert to the client's provider, should there be a threatening situation. And
6 then they say that, since client data could indicate a threatening or
7 potentially dangerous situation, it would have been obvious for Douglas's
8 system to determine whether client data was missing, and if so, send an alert
9 to the provider associated with the client, and doing so, would have
10 encouraged the provider to enter the missing data, allowing Douglas's
11 system to identify and potentially uncover threatening or potentially
12 dangerous situation indicated by the data. That's all we've got.

13 We see the problems in the next slide, in Slide 49. The Petition
14 does not allege, even once, that Douglas discloses the claimed determination
15 of whether data is received from each of the providers. It's again, same thing
16 we've seen, element by element, where there's a claim element here that
17 Petitioner just ignores. They're saying this determination might be made
18 from missing data. They do not talk about caring whether there is a
19 determination whether data is received from each of the providers.

20 And as discussed, even where Douglas discloses that it has the
21 ability to accept updated patient data from the patient directly, that this input
22 is just permitted not required. And that's important because that shows that
23 Douglas doesn't require there to be data received from each of their
24 providers; in fact, it's not requiring data from the providers at all.

25 And so, it's not going to need to -- since it doesn't require there to
26 be data to be sent from each provider, it certainly isn't going to require that

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1 there's a determination of whether data is received from each of the
2 providers. And there's not evidence -- I think that was acknowledged earlier,
3 that there is such a determining step in Douglas, instead it's an obviousness
4 argument. But Douglas does not indicate that it tracks provider-specific data
5 completeness.

6 And we can see in Slide 50 what the '142 Patent talks about with
7 respect to this determination and the alert, and it does give the figure that is
8 copied onto Slide 50. And the highlighted element talks about receiving an
9 alert to the service provider indicating that there is missing data.

10 And so, this was -- and if we even look a step above, receive data
11 from users and prompt for any required data that's not collected. And so, the
12 '142 Patent has this required data. And I see in the claims that it's required
13 data from each of the providers, and it checks to see whether this data is
14 collected. There's absolutely nothing in Douglas saying that there is a
15 reason for it to care whether data is provided from each of the providers, it
16 cares about prompting the user. So, this is about telling the user, hey, you
17 need to do better on these goals. You need to submit input. This is the same
18 type of thing that we have on all of our devices, every day, where you've got
19 your devices alerting you, hey, fill in this information so that we can run
20 some sort of analysis.

21 So, Douglas cares about accepting updated patient data, but again,
22 even that is not required, it's only permitted. And it does not talk at all about
23 caring about data being received from each of the providers. It says it can
24 accept data from providers, but not that it must accept data from each of the
25 providers, and certainly not that it's going to have some sort of issue
26 requiring an alarm if the data is not sent from each provider.

1 Then we look to Slide 51 and see the Petitioner does concede that
2 no alarm is sent in Douglas for missing provider data. And so, that's the -- I
3 think Exhibit 2006, page 55, line 22 to 56(9). Petitioner's expert said they
4 agree that Douglas doesn't explicitly point out missing data.

5 And so, we see what Douglas is existing or what mechanisms do
6 is, to support compliance monitoring, not data completeness. And so, there's
7 no suggestion in Douglas that missing provider data is noteworthy, let alone
8 significant enough to trigger an alarm. Douglas doesn't provide the
9 framework or the logic for handling missing data as an actionable condition,
10 and implementing functionality would require modifications in Douglas's
11 architecture and operation with no motivation for doing so. And we
12 recognize that, in the supplemental declaration, Petitioner's expert has now
13 said, oh, Douglas does have this sort of framework or logic for handling
14 missing data. Again, that's a bit too little, too late in that what missing data?
15 There's nothing in the Petition that says that Douglas makes a determination
16 that there is missing data.

17 So, even if we're to accept what their expert says, that it has this
18 framework or logic where it could make a determination about handling
19 missing data, Douglas has not disclosed that it does, and has not disclosed
20 that it cares about data completeness. Douglas says it cares about
21 compliance monitoring.

22 And so, there's no reason it would be obvious either for a POSA to
23 take Douglas, which does not care about data completeness. Everything
24 about entering data is permissive not mandatory, and it only cares about
25 compliance monitoring. And then somehow flip this and say, okay, it needs
26 to care so much about data that it needs to determine whether there's missing

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1 data from each provider and then send an alert. This is just several steps
2 removed from what's disclosed in Douglas so this would not be obvious to a
3 POSA.

4 Moving to Claim 6 of the '142 Patent. In Slide 52, we see that this
5 is the element, wherein the data includes at least intervention plans, desired
6 outcomes, and objectives, recorded activities, and general notes.

7 And if we look to Slide 53, we see that there are additional
8 requirements on Claims 6's data because it depends from Claim 1. And
9 Claim 1 tells us that this data -- that is the antecedent basis of data in Claim
10 6, must be associated with at least performance of the desired outcomes by
11 each of the clients, it must be compiled. It must be received from the
12 providers utilizing computing or communication devices in communication
13 with the server. And finally, in Claim 6 that this data must include at least
14 intervention plans, desired outcomes and objectives, recorded activities, and
15 general notes.

16 JUDGE WEINSCHENK: Ms. Spires?

17 MS. SPIRES: Yes.

18 JUDGE WEINSCHENK: This is Judge Weinschenk. How do you
19 respond to Petitioner's argument that there are two different types of data
20 recited in Claim 1? There's also the one you mentioned on your slide here,
21 and there's also, I believe, data associated with the treatment or assistance of
22 each of the clients. How do we know which data Claim 6 is referring back
23 to because there seemed to be two in Claim 1?

24 MS. SPIRES: In Claim 1, we look to -- I do believe there are two
25 different types of data. There's one data that qualifies as the antecedent
26 basis. We've got the first data -- first time data is used in Claim 1 is in --

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1 Claim 1 talks about -- let's see -- so, we've got compiling data associated
2 with at least performance of the desired outcomes by each of the clients
3 received from the providers utilizing communication (sic) or communication
4 devices in communication with the server.

5 JUDGE WEINSCHENK: Can you also go up to about line 32? It
6 says creating fields required for compiling data associated with the treatment
7 or assistance of each of the clients from the providers.

8 MS. SPIRES: Right.

9 JUDGE WEINSCHENK: Is that a different data or is that the
10 same data that Mr. Somolita referred to as associated? It seems to be
11 different. One is associated with treatment or assistance and one is
12 associated with at least performance of the desired outcomes. Are they
13 different or are those the same data?

14 MS. SPIRES: It might be the same data, in that we've got the
15 fields requiring -- creating fields require for compiling data and its data
16 associated with the treatment or assistance of each of the clients from the
17 providers. So, that's a very general form of what the data requires. And so,
18 you're creating the fields that are required for compiling this data. And then,
19 a few steps down, you are now compiling the data. And so, there's only one
20 step here, where you are creating fields that are required for compiling data,
21 and that is the one that's around line 32, like you said. And then, naturally,
22 after you created fields required for compiling data in the method, you are
23 then, in a later step of the method, going to compile the data. And so now,
24 you're --

25 JUDGE WEINSCHENK: So, it's your position that the first
26 mention to data is just creating fields for sort of accepting the data, and then

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1 the actual data that's being compiled is in that second limitation, and that's
2 the one that Claim 6 refers back to?

3 MS. SPIRES: Correct. If you see the first discussion of the
4 compiling data, it's talking about the creating fields. And so, it's not placing
5 a large limitation on the compiling data, it's compiling data that's associated
6 with the treatment or assistance of each of the clients from the providers.
7 And so, at that point, you've created the fields and provided a general
8 limitation as to what this data is going to be, and now you're going to
9 compile data. Well, the data associated with at least the performance of the
10 desired outcomes, et cetera, is still data that is associated with the treatment
11 or assistance of each of the clients for the providers.

12 So, you've got the general limitation as to what the fields are for,
13 so that's compiling this data it's associated with. And now, you're coming
14 down to compiling, and it's exactly what data associated with the treatment
15 or assistance of each of the clients from the providers -- are you compiling?
16 It's the next data. You're compiling data associated with, and then it gives at
17 least certain things that have to be compiled. You could have more, it says,
18 at least certain things that have to be compiled. You could have more, it
19 says, "at least," and the creating fields is much broader. And that one is
20 going to show, yes, you can create the -- that you could -- that allows for the
21 "at least" language that's in the later compiling so that you can include other
22 things as well in this compilation if you would like. But what has to be
23 included is the, at least the performance of desired outcomes by each of the
24 clients received from the providers.

25 And importantly, if we look at Slide 54, we see that the data in the
26 Petition for Claim 6 is not disclosed by Douglas as being received from

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1 providers utilizing computing or communication devices in communication
2 with the server. So, the Petition discloses positive intervention plans,
3 exercise and stress management programs, negative interventions, such as
4 notifications sent to physicians, goals 51, 61, 62, and patient health data, and
5 comments/changes. There is no allegation in the Petition, indeed there can't
6 be, that each of these items identified in the Petition for Claim 6 was
7 received from providers utilizing computer or communications devices in
8 communication with the server.

9 I know I'm running a little low on time so I'm going -- unless Your
10 Honors have questions on the claim elements of prompting the providers to
11 provide data associated with assigned clients in the '142 Claim 10, or on the
12 wizard application projected closure date for Claims 3, 4, and 14 of the '142
13 Patent, I'll move on to the combinations. I think our arguments are set out
14 well in the briefing.

15 So, looking at Slide 67, where we've got -- arguing that a POSA
16 would not have a motivation to combine Douglas and Wager. Importantly,
17 Petitioner keeps relying on this Figure 57 of Douglas to say that a POSA
18 would have -- from Figure 57 -- recognized a need to reassign patients based
19 on their caseloads, and trying to even out their caseloads. And despite the
20 fact that in the deposition, their expert said that this figure has absolutely
21 nothing to do with the overall caseloads of physicians. It talks about only
22 year to date so it doesn't talk about open or closed, so it doesn't say current
23 coronary artery disease cases without regard to what other cases these
24 physicians may have.

25 And so, no POSA is going to look at Figure 57 and say, oh, my
26 gosh, we have a horrible problem. We need to redistribute these cases

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1 among the physicians, and so we're going to implement Wager in order to do
2 this automatic assignment that will redistribute so that patients can receive
3 more prompt care.

4 This is where Petitioner comes up with their need for combining
5 these different references, and it's just not true. I want to say, they continue
6 this argument, even on reply after -- as we see in Slide 68, their own expert
7 said that this is not what that slide shows. They said that there's no
8 indication on how many non-coronary artery disease year-to-date cases any
9 of these physicians in Figure 57 have, and that's correct. And they confirm,
10 that this is just year-to-date coronary artery disease cases. And it says,
11 current caseload is not on this list in any of these columns.

12 So, the need that Petitioner's identify for redistribution, and their
13 reason for going into Wager is just, honestly, not what the -- it's a
14 misinterpretation of Douglas's Figure 57, and it's a misinterpretation that
15 their own expert agrees is a misinterpretation.

16 I think that the other elements of the Wager combination are set
17 forth as to other reasons that a POSA would not have combined
18 Douglas/Wager are set forth pretty fully in the briefing, but if there are any
19 other questions on the Douglas/Wager combination, I'd be happy to answer
20 those.

21 JUDGE BALTAZIS: No questions for me.

22 MS. SPIRES: Moving on to Koh. So, Douglas and Koh, I think
23 the important part here, and if we look at Slide 76, we argued that a POSA
24 would not have been motivated to combine Douglas and Koh. Because Koh
25 is only talking about organizational data analysis. They talk about huge
26 amounts of data. I think they use copious amounts is the motivation behind

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1 Koh, and its aspirational goals for organizational data analysis and data
2 mining, whereas Douglas focuses only on individualized patient engagement
3 and compliance.

4 And so, there's actually nothing in Koh that says how a POSA
5 should use its mining of copious data in order to determine best practices for
6 a physician that they could implement in Douglas. It's great that they think,
7 yes, Koh could have all these implications. Someday you could use all this
8 organizational data analysis and come up with all of these things that could
9 help patients, but it says absolutely nothing about how that would be done.
10 Everything in Koh is aspirational, it does not give any clue as to how to use
11 this organizational data analysis; specifically, for an individualized patient. I
12 think that's set forth pretty fully in the briefing.

13 But, importantly, even if you did combine Douglas and Koh, they
14 still don't disclose Claims 5, 12, or 13. Because, as we've seen many times
15 before, and looking at Slide 78, Petitioner does not allege that any best
16 practice would be recommended to providers or that any best practice would
17 be associated with a client assigned to the providers, which is what the
18 claims actually require. And so, we're again in the situation that there are
19 claim elements, such as needing to have a best practice, and that the best
20 practice is associated with a client assigned to the providers, and Petitioner
21 does not provide any allegation as to how a POSA, even looking at Douglas
22 and Koh, would use these references to come up with these claim elements,
23 it's just silent as to that. Similarly, for Claim 18, the Petition does not
24 meaningfully address the requirements of Claim 18 at all. I think that's set
25 forth in the briefing.

26 I'm one -- I see I'm into my rebuttal time by a few seconds, but I

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1 will just conclude here that, with respect to the combination of
2 Douglas/Wager, plus a third reference, whether that be Chitiveli, Klotsche,
3 Koh, or Virginia in Slide 81, Petitioner does not provide any explanation as
4 to how this combination would work. They're saying, oh, you should have
5 known that we meant, the way Douglas and Wager was combined in a prior
6 ground, but they didn't say that. And we heard Counsel say, oh, that would
7 have been exhausting for you all to read that. No, it wouldn't. All they had
8 to do was say, look, we're combining Douglas and Wager in the same way as
9 in the ground above, and now we're adding Chitiveli, and here's how it's
10 going to be included; one sentence. But we are left with actually no
11 information as to how Wager is incorporated. This is a different ground, and
12 it's a different ground that does not reference the other grounds and say, hey,
13 this is how you're going to incorporate the combination.

14 And so, again, we've got -- using the Intelligent Bio-Systems case,
15 but you can pick any of the Fed. Circ. cases on this, saying that the initial
16 Petition has to identify with particularity, the evidence that supports the
17 grounds for the challenge to the claim, and so on and so forth.

18 And I will skip the other references, unless you have a question on
19 Virginia as analogous art.

20 JUDGE BALTATZIS: None here.

21 MS. SPIRES: Great. Thank you, Your Honors.

22 JUDGE BALTATZIS: All right. Is everyone okay with taking a
23 5-minute break since we've been here for a couple of hours? All right, let's
24 do that. Let's take a 5-minute break and reconvene -- I have 3:15.

25 Reconvene at 3:20. All right, very good. Thank you.

26 (Whereupon, the above-entitled matter went off the record at 3:15

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1 p.m. and resumed at 3:20 p.m.)

2 JUDGE BALTATZIS: All right, we can get started. Mr.
3 Solomita, I have you rounded up to 30 minutes for your rebuttal, and you
4 may proceed whenever you're ready.

5 MR. SOLOMITA: Thank you, Your Honor. I'm going to share
6 my demonstratives again and be mindful of the points of the record. Okay.
7 So, I'm going to try to go through Patent Owner's counsel's arguments in
8 order to rebut them, starting with the plan of action and goals.

9 I heard opposing counsel make a number of statements to the fact
10 that these elements cannot be the same thing, they must be two separate
11 things or separately shown. And as Your Honor pointed out, we've always,
12 from the beginning, disclosed separate elements, or separate disclosures of
13 Douglas for these three elements, as we show on Slide 5 of our
14 demonstrative, so this really should not be an issue at this point. And Patent
15 Owner's counsel tackled Claim 7 of the intrinsic record, but ignored Claim 1,
16 as was also pointed out earlier, which talks about modifying the plan of
17 action in response to one or more thresholds. Again, this inter-relationship
18 is clear from the intrinsic record.

19 So, when we get to the Becton Presumption, we always have to
20 look at case law and the context. And in those cases that the Patent Owner
21 identifies, which we show on Demonstrative 18, those are the situations as I
22 mentioned, where the same component of an accused product, for example,
23 is used for multiple limitations, and it's clear from the claims and the
24 specification in those cases that the claim elements must be separate.

25 So, again, the first argument is, we are treating them separately.
26 It's always been our case from the beginning. Even the Board acknowledged

1 that in the institution decision. And then, the case law, we have to look at in
2 context. We are not -- our situation is not what these cases are talking about,
3 where we're taking the same disclosure from Douglas and applying it to
4 multiple claim elements.

5 Now, the issue, of course, is goals versus plan of action. And if I
6 can go back to demonstrative page 9, which is Figure 6 of Douglas. So, if
7 you have the therapeutic program, Fred Smith, that's the plan of action, and
8 that includes goals amongst many different things as we see. In this plan,
9 we have not just a weight category, there's smoking, there's other blood
10 work, there's psychological; there's even medication at the bottom. So, the
11 plan of action is not the same thing as the goals. And when we take that
12 weight loss example, the plan of action is not just weight loss.

13 Now, when we talk about a weight loss program, of course, we're
14 going to talk about weight as a threshold and a goal. Naturally, that's the
15 point of the plan. But, again, Douglas has much more than just weight loss.
16 And even if we just talk about weight loss, of course, the goals are going to
17 have weight to them as we see in Figure 6, there's a weight line with Fred
18 Smith's details, there's a column for now, there's one-month goals, and goals.
19 So, we're not saying the weight loss program is the same thing as the goals.
20 Now, of course, the goals are going to include weight loss, but we're not
21 conflating those two.

22 Really what the Patent Owner, I would parse it, is arguing, is on a
23 Venn diagram analogy she's using, goals are a small circle within a larger
24 circle of plans, you know, there's some overlap. But, again, there are many
25 other items that are in Douglas's plan, one of which is weight. So, we're
26 not --

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1 JUDGE WEINSCHENK: Mr. Solomita?

2 MR. SOLOMITA: Yes, Your Honor.

3 JUDGE WEINSCHENK: This is Judge Weinschenk. I mean,
4 wouldn't it be appropriate when we have a plan of action and goals to think
5 about the goals to be the things that you have listed here, like, the weight
6 you're going to achieve, the BMI you're going to achieve? But the plan of
7 action, right, is how you're going to get there. Is there anything in this
8 Douglas that shows how you would achieve those goals?

9 MR. SOLOMITA: Well, that's why you have these thresholds
10 along with the way with the final goal. And then also, if you look at Figure
11 2, when the physician designs this program, they enter a number of
12 parameters. You know, does the -- if you look here, it's a bit small, in 30,
13 does the patient need weight reduction, yes, or no? If yes, what's the target
14 weight? So, there is Douglas's disclosure of getting to that target weight as
15 part of the design initially by the physician. And again, in Figure 6, you
16 have your now, one-month goal, and goals for getting there.

17 JUDGE WEINSCHENK: Okay.

18 MR. SOLOMITA: And, Your Honor, we can't lose sight of
19 common sense here, which I said earlier. If you have a plan of action, of
20 course you're going to have goals and thresholds. I can't conceive,
21 particularly in the '554 Patent context, why would you have a plan of action
22 that's completely separate from goals and thresholds? Clearly, the '554
23 Patent doesn't talk about that, as was pointed out earlier, and it defines
24 commons sense and logic. Certainly, to one of ordinary skill in the art
25 looking at this.

26 Okay. So, let me move on to the next argument, which was the

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1 assigning in response to. And Patent Owner, as you heard, says that we
2 alleged the same limitation, or the same disclosure, and Douglas satisfies
3 both limitations, and that's just not correct.

4 So, as we show on Slide 25 of our demonstratives, the selection
5 maps of the entry of prescription form, but then, on Slide 27, we've got an
6 excerpt from our Petition that says in Douglas's system, the patient is
7 assigned to that physician. Again, I think we've been clear that the
8 prescription form is entered by the case administrator. Once that entry is
9 made in the system, the Douglas software then links the physician with the
10 patient, so that a number things can happen, as we show on Slide 28, such as
11 keeping constant contact, alerting, and so on, so they are separate
12 limitations.

13 And then in the reply brief, and I'm not sure if Patent Owner's
14 counsel actually read this, but in the reply brief, we clearly respond to that
15 position to make clear again that it's separate. As you see on demonstrative
16 29, we spell this all out. So, I'm not sure where she gets her position that
17 we've never said these things. That's just false.

18 And then, Patent Owner's counsel also made this argument, this
19 sort of temporal argument that the assignment has already happened when
20 the patient sees the physician. Now, they brought this argument up in the
21 POPR, which the Board rejected. If we look at the Board's institution
22 decision on Page 13, they had stated that, there are no temporal limitations in
23 the claim that required an administrator assigning a provider to the client
24 before the provider begins treating or assisting a client; likewise, there are no
25 limitations that exclude an administrator selecting a provider within the
26 system, even if that provider has already seen or begun treating the client

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1 outside the system. Again, that's Paper number 9 on page 13.

2 And I would urge the Board to stick with that position, because I
3 think it's the right one, that there are no temporal limitations of the claim that
4 would support Patent Owner's arguments.

5 So, next I'll move on to the database and communication argument,
6 which is demonstrative Slide 40. And, Your Honor, the Patent Owner's
7 counsel is ignoring our citations in the Petition.

8 As we show on Slide 41, we say that the network server 58 (sic)
9 includes databases. There's a citation to Douglas, and Douglas says, have
10 access to. So, we clearly cite to Douglas. We cite to another section of the
11 Petition of Limitation 13[a] that we discussed, and clearly there's support in
12 the Petition. Now, are the words there in this particular claim? Well,
13 Douglas says, have access to. And we have an obviousness argument. Have
14 access to, in our view, is what a POSITA would understand to be in
15 communication with, and we think that's clear in the Petition.

16 Moving on to the processor argument on our Demonstrative 43, a
17 processor for executing a set of instructions. So, this one I really don't
18 understand Patent Owner's position. So, as we cite here, the Petition, Paper
19 1 of 48 to 49, has a hot link to Limitation 13[a]. In Limitation 13[a], there
20 are various cites to Douglas. Now, in her demonstratives, she only focuses
21 on Douglas 5:22 to 25 on our Slide 44 here. She ignores the other part of the
22 Petition on page 41, which cites the Douglas 25:22 at 26, and we repeat that
23 citation on the right side of Slide 44, which says, the system is constructed to
24 use the programming language.

25 So, if we go back to the top here, for Limitation 17[a], we state,
26 Douglas discloses or renders obvious a processor within network server 58

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1 for executing a set of instructions. So, I'm not sure what more she wants us
2 to say because a processor for executing set of instructions is there. Those
3 words are use. So, her statement that it's nowhere to be found, it's the first
4 time we're saying it. That's just not correct, it's false. And then, again, if we
5 look at Limitation 13[a], we say, Douglas's system is software and therefore
6 a processor executes it, citing to Douglas, which talks about programming
7 language. So, again, I encourage Patent Owner's counsel to look at what we
8 actually argued because it's clearly there.

9 So, next, we'll turn to client management program. And as I
10 mentioned earlier, and this begins in our Demonstrative 34, and if we look at
11 35, these are different claims requiring different things, and they're not
12 related to each other. So, clearly Claim 6 says, as Your Honor pointed out,
13 you have a client management program that is utilized to receive data, and
14 that's just what Chitiveli's software does, 140, the analytic software 140.
15 Whereas, Claim 13 says, the server executes a client management program
16 to do a number of different things. So, clearly, they're different claims, and
17 we point to Chitiveli for Claim 6, and in 13 we point to the CMP that's in the
18 server of Douglas.

19 JUDGE WEINSCHENK: Mr. Solomita?

20 MR. SOLOMITA: Yes.

21 JUDGE WEINSCHENK: It sounds like Patent Owner's arguing
22 though, that even if you brought in Chitiveli for Claim 6, that the client
23 management program in Chitiveli is still executed on the server and not the
24 computing device. Do you have any response to that argument?

25 MR. SOLOMITA: I do, Your Honor. Again, I go back to Claim
26 6. The client management program, that's executed by the computing or

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1 communication devices, it's utilized to receive the data and track progress of
2 the goals. So, it's receiving the data, and that's exactly what analytics 140
3 does in Chitiveli (CROSSTALK) --

4 JUDGE WEINSCHENK: Does it also track the progress of the
5 goals?

6 MR. SOLOMITA: Yes, we believe so, Your Honor.

7 JUDGE WEINSCHENK: Is that in your Petition somewhere?

8 MR. SOLOMITA: I knew you were going to ask that. I was
9 trying to see if I could find that. Let me just take a quick look.

10 JUDGE WEINSCHENK: You can come back at the end if you
11 want.

12 MR. SOLOMITA: Okay. Let's look at -- okay, sorry. I've just
13 been told to look at Slide 36, which is our Petition. PC's 500, which are the
14 remote devices used by physicians to transmit patient data to the network
15 server for tracking patient's progress towards their goals, would have been
16 done so using a Chitiveli -- I'm sorry, client application, like Chitiveli's
17 analytics 140, and they're utilized in combination with Douglas's system; can
18 receive the data and track progress of the goals. So, that's our citation, Your
19 Honor.

20 JUDGE WEINSCHENK: I see a citation to, I think, your
21 declarant's statement of paragraph 146. I don't see a citation to Chitiveli,
22 specifically. I don't know if you have that as well or if I should just look at
23 paragraph 146 and see if it's there.

24 MR. SOLOMITA: Let me see what we have. So, we have a
25 citation of paragraph 36 of Chitiveli on Slide 39 of our demonstratives and
26 also the Bergeron declaration at 137. So, let me look at Chitiveli 36. Yeah,

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1 that's the paragraph I would point to, paragraph 36 of Chitiveli, Your Honor.

2 JUDGE WEINSCHENK: Thank you.

3 MR. SOLOMITA: You're welcome. Just bear with me one
4 moment, I just want to look at another citation. Okay, I think that's it for
5 client management program. Okay. Now, Claim 10, we had some
6 discussion about that earlier. This is the missing data from a provider.

7 And so, again, we're talking about the updated data that's received
8 from the provider. And we had focused on the alerts that Douglas talked
9 about. Douglas talks about sending an alert to client providers should the
10 client's data indicate a threatening situation. So, we have an obviousness
11 argument, that that alert would apply to data that's missing from a provider.
12 I just want to make that clear. I believe I discussed it earlier, but maybe
13 didn't make it so clear so I wanted to reiterate that point that we've got an
14 obviousness argument here.

15 Okay. I'd like to move on to intervention plans. So, this starts --
16 we have a slide -- I'll go to Slide 86 of our demonstratives, which we
17 covered. And again, there's data in Claim 6, and we have to ask ourselves,
18 what's the data? So, we had discussed earlier that the data, which includes
19 intervention plans, would be the data associated with the treatment or
20 assistance of the clients. That's what intervention plans on. And that
21 limitation --

22 JUDGE WEINSCHENK: Mr. Solomita?

23 MR. SOLOMITA: Yes.

24 JUDGE WEINSCHENK: Patent Owner made the point that that
25 limitation you're pointing to on 86, that's highlighted in yellow, it's just
26 talking about creating fields required for compiling that data. It's not until

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1 the limitation that you've highlighted in green, where you're actually
2 compiling data, and it would seem that that would make more sense than
3 what Claim 6 is referring back to is the compiled data.

4 MR. SOLOMITA: But that's the data for at least performance of
5 the desired outcomes, not the intervention plan, in our view. And as she
6 mentioned, this is very specific data that's being compiled, and we argue that
7 that's not the intervention plan. And Claim 6, itself, doesn't discuss
8 compiling, it just says, the data includes at least intervention plan. So, we're
9 left to sort of guess which data in Claim 1 is Claim 6 referring to? And
10 when we talk about intervention plans, that is with the treatment and
11 assistance of each of the clients, not at least performance of the desired
12 outcomes, that's specific compiled data.

13 And let me move on to Douglas and Wager combination. Our
14 demonstratives begin on this subject on Slide 55, and we've got some
15 rebuttal to Figure 57. Just let me get the right page. Okay. So, we've set
16 forth some rebuttal in our Slide 64, which keeps going to 65 and 66. Our
17 point is that Douglas talks about workloads. That's what Figure 57 says, that
18 you have a physician in the same specialty that has different workloads.

19 So, of course, you're going to want to balance those workloads,
20 and Wager talks about that, about its importance of balance workload. So,
21 Figure 57 was referred to for the concept of a physician, even in the same
22 specialty. Here, we see two cardio specialists that have different caseloads,
23 so you'd want to balance the caseloads, and that's what Wager's really all
24 about, so there would clearly be motivation to combine Wager with Douglas
25 in that context.

26 And then, let me address the argument of motivation to combine

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1 Douglas and Koh. So, opposing counsel said Koh is aspirational. But if we
2 look at our demonstrative, Slide 71, the '554 Patent talks about database 206,
3 configure for data mining of available information and data as is known in
4 the art. So, there's no details in this '554 Patent about how to do data
5 mining. And there's obviously case law out there that states that the prior art
6 should be held to the same standard as to the disclosure in the specification.
7 And for the record, let me give you one citation for that. So, if we look at In
8 Re Epstein, E-P-S-T-E-I-N, 32 F.3d, 1559, that stands for the proposition the
9 prior art should be held at the same level of detail as a spec. So, the
10 argument that Koh doesn't have all the details of data mining runs afoul of
11 what the '554 Patent discloses on data mining.

12 Let me move over to the Patent Owner's demonstratives because I
13 do want to address a couple points when we're talking about Douglas and
14 Koh. So, page 78 of the demonstratives says that, Douglas and Koh still do
15 not disclose Claims 5, 12, and 13 with respect to best practices. So, I do
16 want to rebut that by pointing to the record. Let me cite the '142 Petition.
17 Bear with me one moment. Oh, my apologies, just trying to get to the right
18 cites, Your Honor.

19 JUDGE BALTAZIS: Okay.

20 MR. SOLOMITA: So, we could either cite to '142 or '554. In the
21 '554 Petition on page 68, we talk about certainly best practices, which the
22 Patent Owner said we did not. And you'll see it here towards the bottom --
23 the third line from the bottom, best practices from such data. So, it's clearly
24 in our Petition. Just for the record, I'll pull up the '142 Petition as well.

25 So, in the '142 Petition, if we start looking at page 61, it's the same
26 arguments, where we see that there's best practices from page 61 to 67, and

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1 we refer the Board to -- we're talking about best practices. It's clearly in --
2 we see it here on 64, I'll highlight it here -- it's throughout pages 61 to 67 of
3 the '142 Petition.

4 So, this argument in Patent Owner's demonstratives, that we never
5 talked about, never alleged best practices, is false. And again, associated
6 with the client assigned to the providers is also discussed in those sections as
7 well, Your Honor, so I just wanted to rebut that point -- those two points.

8 Okay. And the final argument that I'll address has to do with the
9 grounds that they say were not sufficiently disclosed. Let me just orient
10 myself to that slide. Here we are. So, on our Slide 54 of our
11 demonstratives, we have links, Your Honor, and that's the whole point of
12 having links is so you can point to other parts of the Petition. And again, we
13 think we clearly point to the other parts of the Petition that support our
14 combinations for Grounds 4, 6, and 8.

15 So, Your Honor, I believe that's all I have on the rebuttals, unless
16 you have any questions.

17 JUDGE WEINSCHENK: Nothing else for me, thank you.

18 JUDGE BALTAZIS: No other questions. Ms. Spires, I'll do the
19 same and round up to your 20 minutes, and when you're ready, you can
20 begin.

21 MS. SPIRES: Thank you, Your Honor. I will try to go in order as
22 well. So, Petitioner said they have always disclosed separate disclosures of
23 Douglas for the elements of a plan of action, goals, and thresholds, but
24 they're ignoring the fact that -- as I showed earlier, that is just not true. They
25 even said earlier, that -- he said, if you're using the Venn diagram, it's in
26 circles, that the goals are a large circle within a smaller circle of plans. I

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1 think he may have switched that, and it's supposed to be that plans are a
2 large circle with a smaller circle of goals, but either way, they're admitting
3 that one is encompassed within the other in their allegation. And, in fact, it's
4 more than that, they literally use them synonymously.

5 As we talked about earlier, when I pointed you to Petitioner's
6 demonstratives at Slide 12, where they said that, Petitioner cites to multiple
7 portions of Douglas, which disclose weight loss as an example of a plan of
8 action. But then, contrasting with their Slide 20, which is from the Petition,
9 it says, indeed, Douglas's program provides for goals, one-month goals, and
10 final goals for e.g., weight loss. And they're talking about, oh, that's just
11 because weight has to be in there. Of course, weight loss encompasses
12 weight. It doesn't say weight, it says weight loss. So, they are saying,
13 "weight loss," quote, "is a goal and is a plan of action." That is exactly what
14 the Federal Circuit said can't happen.

15 And what they're trying to do, to make this confusing is, they're
16 trying to shift from what they alleged in the Petition is a plan of action to
17 what, under the '142 Patent really would have been a better mapping a plan
18 of action, which they seemed to have thought of later because their expert
19 tried to go there in his deposition. You'll see him say, Petitioner's expert at
20 Exhibit 2006, at 25, lines 15 to 26, line 1, and this is where he tried to say
21 that a plan of action is moving the patient from their current status to the
22 claim goals.

23 And I asked him, did he ever state that in his declaration? And he
24 said, no. He's like, oh, I can't find it. I can search for it, but I don't recall
25 making that statement. He did not make that statement. I know they call it a
26 memory test, it was not. We gave him a Word searchable, and he could not

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1 find it because it is not there. He did not ever say -- and they did not say in
2 the Petition, that a plan of action is moving the patient from their current
3 status of the claim goals.

4 And that's what they keep conflating here saying, well, yeah, but
5 you have to have a plan of action that moves with respect to the goals
6 because you've got the weight -- if weight loss is not what they said or,
7 sorry, if plan of action is not what they alleged, which is the entirety of the
8 therapeutic program, including the goals, the thresholds, all of the things.
9 But if it's the plan of action of moving the patient from their current status of
10 the claim goals, well then, you've got the movement that you see in the
11 claims, the interaction. They're still separate things.

12 But if it was that allegation, which again, they did not make, then
13 you would have, okay, a physician says, someone's at 170 pounds, I'd like
14 them to be at 160, 160 is your goal, your plan of action is how are we going
15 to get the person from 170 to 160? Or how are we going to get them from
16 the current status to the claim goals? Great. That would be -- that's what
17 they're now trying to say is a plan of action. That is not what they alleged in
18 the Petition at all, and their expert acknowledged that in his deposition.

19 What they said in the Petition was, the entirety of Douglas's
20 therapeutic program is the claimed plan of action. And so, that's got the
21 weight loss, and the smoking cessation, and the reduction of alcohol
22 consumption; all of these things. So, it's not just that we've got the goal for
23 weight loss, and the goal for smoking cessation, and the goal for reduction of
24 alcohol consumption, they're saying it encompasses all of these things, such
25 that it's not how you get from your 170 to 160. It's the entirety of the
26 program, which includes something that is unclaimed in their view, or I

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1 guess it would be a part of the plan of action because everything in Douglas
2 is a part of the plan of action. And so, you're getting to the -- going from
3 170 to 160 is how you would get to the goals, but that is not what the
4 program is under their definition. Under their definition, a plan of action is
5 the entirety of the thing, which includes these goals. It is not how you get
6 from one to the other. They did not say that.

7 And I urge you to go look through the Petition. We laid out, very
8 carefully, every single time they cited the plan of action, and showed how
9 every single time that they talked about the plan of action, never said
10 anything about it being getting from one thing to another or how you get to
11 your goals. What they always just said is, that a plan of action is Douglas's
12 entire therapeutic program and everything that it entails, full stop.

13 JUDGE BALTAZIS: (INDISCERNIBLE - TECHNICAL
14 DIFFICULTY).

15 MS. SPIRES: Because that's what they said, we end up -- that's
16 where some of this confusion comes in of them saying, oh, they have to be
17 interactive. It's not about them being interactive. They're trying to say that
18 somehow you don't need to have separate elements for plan of action and
19 goals because of the fact that the plan of action can change if your goals
20 change or if you aren't reaching your thresholds. Yes, if you try to say, hey,
21 I want to go from 170 to 160, and you're not getting there, you would need
22 to change how you're going to get there. But, again, that's not the plan of
23 action, not under their definition. They said that it is the entirety of the
24 program that is the plan of action, such that it's going to change.

25 Under their definition, every time a goal changes, anything
26 changes. It's just unwieldy the way they defined it. They defined it in a way

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1 that the law just does not allow. Had they defined plan of action, as they
2 tried to later, as getting from the current status of the claim goals, it all may
3 have made a lot more sense. But they are held to their Petition, where that is
4 not what they said. What they said was, the plan of action is Douglas's
5 therapeutic program, which includes the claim goals and the thresholds, full
6 stop.

7 JUDGE BALTATZIS: I guess the question I have, Ms. Spires, and
8 this is Judge Baltatzis is that, they have identified kind of separate elements,
9 or separate components, in Douglas and lined those up with the separate
10 components that are recited in the claims. Why isn't that enough?

11 MS. SPIRES: Respectfully, I don't agree that they have because
12 they are not separate. They said that the claimed plan of action is the entire
13 therapeutic program. And then they said, they are the goals that are existing
14 inside the therapeutic program. They said there are thresholds that are
15 existing inside the therapeutic program. These are not separate. They
16 identify two things that are inside the Venn diagram of plan of action, they
17 just are not separate.

18 This goes along with the case that we saw earlier from the Federal
19 Circuit, where they said that one element within another element was not
20 going to be sufficient, that that violated the separateness. Where there was
21 one element, and they were trying say -- let me see what the case was so I
22 don't completely butcher it. So, it was a speech recognition system, and
23 there was an embodiment, where the speech recognition is in a wireline node
24 and they said, no, that is not separate. There was another embodiment where
25 the speech recognition was near a wireline node, they said, yes, that's
26 separate.

1 But where the speech recognition system was in a wireline node,
2 it's not that they didn't identify what they thought the speech recognition
3 system was and the wireline node was, but they said that one cannot be
4 encompassed in the other. They are not separate if that's the case, and that is
5 exactly what's happening here. So, that's the Comcast Cable case that's cited
6 in the briefing and is at Slide 29 of Patent Owner's demonstratives. I mean,
7 that's the case where we are, and so that's exactly why -- that they're saying
8 they identified separate things, but they didn't. They identified one thing
9 that's inside another thing, and that is not separate per the Federal Circuit
10 precedent.

11 JUDGE BALTATZIS: So, yes, just applying it back then to the
12 claim construction, how is the claimed plan of action separate? You know,
13 aren't the thresholds and the goals also somehow related, or follow your plan
14 of action, the claimed plan of action?

15 MS. SPIRES: So, under the -- they're absolutely separate when
16 they're identified correctly. So, if you have, under the '142 or the '554 --
17 sorry, this is all '554 -- under the '554 Patent, where you go with a claim plan
18 of action, not as the entirety of the thing, because again, that's incorrect, but
19 if the plan of action is as they tried to switch to later, moving from the
20 current status to the claim goals, well, then you've got, say, again, using
21 weight loss as an example, your goal is to be at 160, you're at 170, that's
22 your current state, a threshold would be the one month, or what they're using
23 as one month, they want to be at 165, and that's going to be the kind of
24 marker as I talked about.

25 And your plan of action would be, what does this person need to
26 do in order to get to their goal? And this would shift if they didn't hit their

1 threshold. So, it would be, we want them to be exercising, reducing calories;
2 all the usual suspects, and then at one month, if they haven't hit the
3 threshold, that plan of action can change, but they are still all different
4 things.

5 A plan of action is -- and again, not under -- I want to be very
6 clear, not under how they define the plan of action, but under the actual
7 patent, how it defines the plan of action, would be that it would be, you have
8 the plan of action, and it is how we get this person to their goal of 160,
9 whatever the number was I gave, and the threshold is the marker in between.

10 But what they have said is not that the plan of action -- this was
11 honestly the mistake in their Petition. They did not say the plan of action is
12 how you get this person to lose weight. What plan, the caloric restriction,
13 the exercise; those sorts of things? They said, the plan of action is the entire
14 thing, such that the plan of action includes goals. And they flat out say,
15 black and white, the plan of action includes the goals, but the plan of action
16 doesn't include the goals. The plan of action is, we are trying to get
17 someone over to it, but the plan of action is what's going to change and
18 move around.

19 It's going to be, we want the person to exercise 20 minutes a day.
20 We want the person to eat 1,500 calories or less a day. The plan of action is
21 not, we want the person to reach 160 pounds, that is the goal. So, they are
22 separate. The plan of action should be, under a proper identification, at least
23 in my view of the patent, would be how you get to that goal. Instead, they
24 say, it's honestly nonsensical. And that's part of the confusion of it, I think,
25 is that their identification doesn't make sense for the plan of action to be
26 everything, to be the goals, the thresholds, everything about Douglas, and

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1 about weight loss, and smoking cessation, and all of these things, that the
2 entire thing is the plan of action, such that the goals are a part of the plan of
3 action, you're not identifying separate things, because you've now identified
4 the plan of action as something that includes the goals. Well, you can't
5 really identify the goals because they're part of it. That's not something new
6 to identify. It's already been identified by identifying the plan of action,
7 which includes the goals. So, you're now redundantly identifying the goals.

8 JUDGE BALTATZIS: And just to kind of go to the definition of
9 plan of action, is there anything in the specification that defines it as moving
10 the client from one state, or one health state to the next? Are there any
11 definitions, other than what we've already looked at, like at the abstract that
12 just says, these are separately recited?

13 MS. SPIRES: I'm not aware of a definition in the specification of
14 that version of plan of action. And the first time I heard plan of action
15 defined that way was from Petitioner's expert in their expert declaration,
16 where they tried to switch their identification of plan of action to that
17 definition, and acknowledged that they did not actually use that definition in
18 identifying the plan of action in the Petition or in their expert declaration.
19 And so, that's when we started looking and saying, okay, well, that would
20 make sense in the '554 Patent if you did that, but that's not what you did, and
21 they actually acknowledged the citation I gave earlier on page 25 to 26 of
22 their declaration, that they did not actually apply the definition of moving a
23 patient from the current status of claim goals in identifying plan of action for
24 the Petition.

25 JUDGE BALTATZIS: So, really, we just have the -- kind of the
26 plain and ordinary meaning to rely on or to fall back on without some sort of

1 express definition?

2 MS. SPIRES: Right. I think the parties would agree that what
3 Petitioner's expert said would be a plain and ordinary meaning of the plan of
4 action. But despite that, that's not what the Petitioner alleged the plan of
5 action was. They alleged, in this case, that the plan of action in Douglas is
6 the entirety of Douglas's therapeutic program.

7 JUDGE BALTATZIS: Okay, thank you.

8 MS. SPIRES: So, for assignment, there are a lot of allegations that
9 we didn't read the briefing, I assure you that we did. And if you look, it was
10 on the slides earlier in the Petition at 19 to 20 is where they say that, a
11 POSITA would have understood Douglas's disclosure of the administrator
12 entering this physician/patient information from the patient prescription
13 form to be Douglas's disclosure of the administrator's assignment of the
14 patient to the physician within Douglas's system.

15 So, they can say all they want right now, that assignment is some
16 back-end thing that happens, it's not. It is exactly what they talked about for
17 selection. For both things, they said it was the administrator entering the
18 patient/physician information from the patient prescription form as the
19 assignment. That is in the Petition of 19-20, so that is very clearly incorrect.

20 For the databases. Again, we're not ignoring a citation. The
21 citation that we talked about says, has access to the databases. It does not
22 say, access to is the same as in communication with. And they're saying,
23 they have an obviousness argument so it would have been obvious. Well,
24 again, they did not make that argument. They did not say that it would have
25 been obvious to a POSA that the database having access to the server is the
26 same as being in communication with the server.

1 First, that's incorrect because access to the communication line
2 does not have to be used. But, second, they did not make that argument.
3 They had to actually say that that was their argument, and they did not. The
4 law is clear that it's insufficient to just omit the argument and assume
5 everyone knows what they're going to talk about.

6 Same for the set of instructions. They are talking about -- I
7 thought this was interesting. Later, they rely on a hot link, which, fair
8 enough, I don't think the Fed Circuit would take kindly to thinking a hot link
9 is sufficient. I would tell you that I've reviewed documents and paper, and
10 there's no such thing as a hot link for reviewing something in paper. But,
11 regardless, they know good and well that that was not useful. They didn't
12 say that in their reply. That's the first time I've heard today about hot links.
13 But in this element, they did what they should have. Now, granted, they still
14 didn't do enough, but they did do what should be done, which is they
15 actually cited to Limitation 13[a] and said, see this section over here, when
16 they're trying to refer back to something. Maybe they hot linked that, maybe
17 they didn't. I have no idea, but they didn't just rely on that. They said, look,
18 we're looking at Limitation 13[a]. Clearly, that's at least the minimum of
19 what's required.

20 But even when they do go back to 13[a], and they're saying, oh, we
21 didn't focus on all the citations, you can look at the citation we focused on, is
22 because that's the one they focused and didn't reply. But I don't care which
23 citation you look at that, they included in Limitation 13[a], not a single one
24 talks about instructions. They say, oh, we lied, because we said that they
25 didn't actually allege this claim element about instructions. That's actually
26 incorrect. It says specifically they did allege it, but only in a conclusory

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1 fashion in the heading, when they're saying that this element exists, and they
2 did not provide a single bit of evidence.

3 And the law is incredibly clear that you cannot just say, this
4 element is in Douglas, poof, there you go, and that's sufficient, you have to
5 actually provide evidence. There is zero evidence, because there is no
6 analysis, because the only time they talk about instruction is in saying, in the
7 conclusory fashion that is not allowed, that Douglas includes a set of
8 instructions, when they're actually reciting the claim language.

9 Chitiveli, I think you all got it exactly right. The citations I gave
10 you earlier, paragraphs 35 to 37; 43, show that Chitiveli -- all the analytical
11 processing, that sort of thing is not -- is all done at the server end. And you
12 pointed to paragraph 36. Yes, I agree. Also, paragraph 37. If you're
13 looking at those, look at what 110 does. The content analytics tool 110 from
14 Chitiveli is talked about there, and it talks about how it generates period
15 reports, and the analyzed data; all the things we talked about for generating
16 insights as new data is provided to the content analytics tool. All of the data
17 analysis happens on the server end in Chitiveli.

18 Talking about missing data from a provider for Claim 10. So,
19 they're arguing they have an obviousness determination on this missing data
20 from the provider, but it still fails for all the reasons that we stated
21 previously, because they're still missing this claim determination of whether
22 there is data missing from the provider and any motivation for tracking data
23 completeness.

24 Intervention plans, I think you all got that right as well. They
25 didn't meaningfully respond to our argument about the context of the claims.
26 You don't have to guess what data Claim 6 is referring to, it's clear from the

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1 context of the claims. And they said that Claim 6 doesn't discuss compiling
2 data, that's incorrect. It came from Claim 1 so it does discuss that.

3 JUDGE BALTATZIS: All right, Ms. Spires, we're out of time.

4 MS. SPIRES: Okay.

5 JUDGE BALTATZIS: If you could conclude.

6 MS. SPIRES: I'll stop there. Thank you, I appreciate it.

7 JUDGE BALTATZIS: All right, very good. Thank you. All
8 right, that was very helpful by both the parties. Thank you very much. The
9 case is now submitted to the panel for a determination and preparation of the
10 final written decisions. We are adjourned.

11 (Whereupon, the above-entitled matter went off the record at 3:59
12 p.m.)

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