

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

EYESMATCH, LTD., (CAUSE NO. 2:23-CV-363-JRG
)
Plaintiff, ()
vs. ()
SAMSUNG ELECTRONICS CO., LTD., ()
et al., () MARSHALL, TEXAS
() DECEMBER 6, 2024
Defendants. () 9:00 A.M.

MARKMAN HEARING

BEFORE THE HONORABLE RODNEY GILSTRAP
UNITED STATES CHIEF DISTRICT JUDGE

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1 THE COURT: Good morning. Please be seated.

09:01:12 2 For the record, we are here for the claim construction
3 hearing in EyesMatch, Limited, versus Samsung Electronics, et
4 al., which is under our Case No. 2:23-363.

09:01:27 5 Would counsel note their appearances for the record?

6 MR. MANESS: Good morning, Your Honor. Josh Maness
7 and Will Nelson and Natasha Saputo on behalf of the Plaintiff
8 EyesMatch, Limited.

9 THE COURT: All right. Thank you, Mr. Maness.

10 MR. GILLAM: Good morning, Your Honor. Gil Gillam,
11 Jose Villarreal, and Margaret Welsh for Samsung. We're ready
12 to proceed.

13 THE COURT: All right. Thank you, Mr. Gillam.

14 I will also note for the record that earlier this morning
09:02:01 15 we distributed to counsel for both sides a set of preliminary
16 constructions for the list of disputed terms. The intent of
17 issuing those preliminary constructions is not to prevent
18 either side from taking whatever positions they believe are
19 appropriate on these disputed terms; rather, the intent of the
20 preliminary constructions is to give notice to the parties as
09:02:29 21 to where the Court is after the initial review of the briefing
22 and the record so that you can focus your arguments where you
23 think the Court may have most gone astray.

24 And I will say that I do reserve the right to amend these
25 preliminary constructions, and not uncommonly do alter them

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1 based on the arguments received at this hearing, so I hope
2 that they'll be taken in that spirit.

09:03:01

3 I would like to hear the arguments on a term-by-term
4 basis, but I'm happy to group them or take them in any order
5 counsel think is most efficient. I will also state that I did
6 review the technical tutorials offered by both sides, but I'm
7 happy to hear any additional argument that addresses
8 technology as well.

09:03:28

9 So having said that, I'll turn it over first to counsel
10 for Plaintiff.

11 MR. NELSON: Thank you, Your Honor. William Nelson
12 on behalf of the Plaintiff.

13 The parties have met and conferred based on your
14 preliminary ruling, and there is a selected set of terms that
15 the parties will argue. And the parties have agreed that
16 where one party has an issue with the preliminary
17 construction, they will go first.

09:04:00

18 And with that, the parties intend to argue the
19 'transformation mapping' limitation as the first one. Samsung
20 will go first on that.

21 THE COURT: All right. Thank you, Mr. Nelson.

22 MR. NELSON: Thank you.

23 MR. GILLAM: Your Honor, may I approach and hand
24 these up to the Court?

25 THE COURT: Certainly.

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1 MR. GILLAM: Thank you.

2 MR. MANESS: Your Honor, may I approach?

09:04:29 3 THE COURT: Yes. Thank you, Mr. Maness.

4 MR. VILLARREAL: Good morning, Your Honor. Jose
5 Villarreal for the Defendants. May it please the Court.

6 THE COURT: Good morning.

7 MR. VILLARREAL: Your Honor, as Mr. Nelson said,
8 we're going to address the 'transformation mapping/mapping
9 transformation' term first.

09:04:56 10 And I am going to -- throughout my argumentation today,
11 I'm going to make reference to our slides today, and I'm going
12 to mention the slide number; maybe a Samsung No. 4,
13 defendants' slide No. 4.

14 So, Your Honor, turning to slide No. 4 for Defendants'
15 presentation, we have the terms 'transformation mapping' and
16 'mapping transformation' and the proposed constructions. It's
17 important to note here, Your Honor, that the parties have
18 already agreed that the meaning of 'transformation mapping' is
09:05:29 19 the same across both patents, and, moreover, that the term
20 'mapping transformation' has the same meaning. And the terms
21 are found both in the '109 and the '110 Patent; the 'mapping
22 transformation' term, only in the '110 Patent.

23 So, Your Honor, Samsung's construction is at least
24 modifying the point of view and the field of view prior to
25 displaying the image. EyesMatche's construction is a selected

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1 set of image transformations.

09:05:59

2 Moving to slide -- Defendants' slide No. 5, our concern
3 with Plaintiff's construction is that it's really not a
4 construction; it's unbounded, and we believe it's unsupported
5 by the specification, as we're going to discuss throughout
6 these slides.

09:06:26

7 One of the points is that there's really no explanation
8 as to what the criteria for the selection is. There is some
9 criteria in the claim itself, which is that it should mimic a
10 mirror, but that's already in the words of the claim. So it
11 has to be a selection that mimics a mirror, so a concern is
12 that that selection as written here is unbounded. And so, for
13 example, the transformation, it's just a selected set of image
14 transformations. The transformations selected could have
15 nothing to do with mimicking the mirrors, and --

09:06:58

16 THE COURT: Well, and why does each term have to
17 capture the entire invention? This is a broad term. Isn't
18 the real limitation in the mimicking a mirror?

09:07:28

19 MR. VILLARREAL: Your Honor, that is the limitation,
20 and we have proposed a very specific meaning for what that is
21 based on the specification. However, the transformation
22 mapping can include a broader type of transformations, and the
23 subset that we have defined are the ones that mimic a mirror
24 -- for mimicking the mirror. So what we have defined as the
25 transformations that are required are field-of-view and

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1 point-of-view modifications. Within that broad set of
2 transformation, there's narrower sets that accomplish
3 different ways to make an image look like a mirror.

4 THE COURT: Show me what you have in the
09:07:58 5 specification that indicates that 'transformation mapping'
6 should be defined in the manner you are proposing.

7 MR. VILLARREAL: Thank you, Your Honor.

8 So let's see. Moving to slide No. 11. The patent is
9 very clear that a field-of-view modification is necessary to
10 mimic a mirror. Samsung slide No. 11 is a depiction of figure
09:08:28 11 7 in the patent. Figure 7 in the patent is a stick figure, so
12 we tried to make it more clear here, but it's -- other than
13 that it's faithful to the patent.

14 And so what it shows is that -- an individual facing a
15 camera that's taking their image and shown on the screen as if
16 it were a mirror. When the individual is at a further
17 distance, the top part of the individual is going to be cut
18 off; and as the individual moves closer, the bottom part of
19 the body is cut off. And the patent is very clear that the
09:08:56 20 reason for this is that the field of view of a camera is
21 static, and so that's a problem.

22 And then moving, Your Honor, to slide No. 12, slide
23 No. 12 explains why it is that a point-of-view modification is
24 necessary, and the reason is, as shown in slide No. 12, which
25 is a depiction of figure 8 in the patent, it shows that an

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09:09:29 1 individual, as they are captured by the camera, as they get
2 closer the image is going to be distorted and the head of the
3 individual is going to look larger and take a substantial part
4 of the screen.

5 THE COURT: Isn't that true only if the camera is
6 not on high level?

7 MR. VILLARREAL: That's absolutely correct, Your
8 Honor.

09:09:59 9 And if I may move to slide No. 13, the patent talks about
10 a figure 6 embodiment where it attempts to solve at least part
11 of the issue. We don't believe that it solves all the issue.
12 The patent is clear that you still need a field-of-view
13 modification and we argue that it would need a point-of-view
14 modification but in this embodiment, which would purportedly
15 solve some of these issues, you have an individual in front of
16 the screen and a camera that's behind the screen, but the
17 specification makes clear that this is a situation that it's
18 not practical.

19 THE COURT: Well, you just --

20 MR. VILLARREAL: Yes, your Honor.

09:10:25 21 THE COURT: You just admitted that there are
22 situations where you don't have to modify the point of view if
23 the camera, for instance, is on eye level. So why does your
24 construction require that?

25 MR. VILLARREAL: Well, Your Honor, because this --

1 the embodiment of figure 6 we argue, Your Honor, is disclaimed
2 by the patent. It is disclaimed through disparagement. The
3 patent talks about this embodiment as being not practical
4 because the camera is going to block--pardon me--the screen is
5 going to block the camera. It's only a theoretical
6 embodiment.

09:11:00

7 The specification says that in theory it is possible to
8 overcome this problem by using a semi-transparent screen or
9 multiple pinholes with multiple cameras, but then it goes on
10 to say that it may be too expensive and complex to implement.
11 And so, therefore, it proposes a solution where the camera is
12 at the perimeter of the screen.

13 And so, Your Honor, there is case law that finds
14 disavowal through disparagement--as we have cited here the
15 *Openwave versus Apple* case. In that case the Federal Circuit
16 found that an embodiment that included significant disparaging
17 comments was disavowed. In the *Openwave versus Apple* case,
18 the Federal Circuit found that the embodiment that included
19 mobile devices with computer modules was too expensive, too
20 bulky, too inflexible, and commercially infeasible. Your
21 Honor, we think that this is very analogous to the situation
22 we have here, and this is a case that's on point.

09:11:28

09:11:56

23 Now Plaintiff argues that because the mobile devices and
24 computer modules were part of the prior art, that that's a
25 different case, but the case is clear that the disparagement

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09:12:27 1 -- that the disavowal hinges on the disparaging comments and
2 not on the fact that it had anything to do with the prior art.
3 We think, Your Honor, that our case is very similar. For
4 example, the specification mentions figure 6 as not practical,
5 theoretical, and too expensive and complex to implement.

6 Your Honor, further, the patent is silent on how to
7 implement this expensive and complex system. There is really
09:12:58 8 nothing in the patent that shows how a camera could work
9 behind the screen and be able to follow the user's eyes or
10 work with a semi-transparent screen with multiple pinholes.
11 It's just simply not there.

12 So, Your Honor, we don't think that the language that
13 expresses just a preference; (verbatim) it actually is an
14 intent to claim an embodiment where the camera is in the
09:13:29 15 perimeter of the display.

16 THE COURT: I guess part of my problem is not just
17 the element you're talking about there, but the fact that
18 'transformation mapping' is a general term, and you're wanting
19 to read into it particular limitations that apply to this
09:13:57 20 situation where the transformation mapping is aimed at
21 mimicking a mirror, and that's a later limitation.

22 MR. VILLARREAL: It is. And we think that the
23 patent discusses many transformations that can be done to
24 mimic a mirror, and they all fall within the subset of a
09:14:24 25 field-of-view or a point-of-view modification. And so the

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1 transformation mapping could include -- has to include at
2 least a field of view and point of view to fix the two issues
3 that we discuss, Your Honor.

4 And within those specific transformations, mimicking a
5 mirror requires specific outcomes of the transformations,
6 which we have defined those in our construction--flipping the
7 mirror, maintaining double the distance to the camera, and
8 approximately the same size. So those are specific outcomes
09:15:00 9 of the technical transformations, the actual image processing
10 that gets done in the image. And so that -- Your Honor, I
11 would distinguish those two things in that way.

12 THE COURT: You know, if the term was, let's say,
13 'processing' to achieve a certain outcome, would you say that
14 'processing' has to be limited to just what achieves that
09:15:26 15 outcome, or that that is a matter of construing the outcome?

16 MR. VILLARREAL: It would -- processing would cover
17 the -- whatever it -- possibilities it could take to achieve
18 the outcome. And I think that our case here is analogous
19 where a field-of-view and a point-of-view transformation,
20 those terms are actually not overly narrow because there is --
21 the patent identifies a number of specific transformations
09:15:58 22 that fall as a subset of the field-of-view transformation.

23 THE COURT: All right.

24 MR. VILLARREAL: Your Honor, and if I may also point
25 to further extrinsic evidence as support that the embodiment

1 of figure 6 is not claimed.

2 The provisional application, after all the disparaging
3 language of figure No. 6, the provisional application said,
4 "In this invention we disclosed a practical method to
09:16:27 5 implement the ideal system described above with a
6 fixed-mounted camera located at the perimeter of the screen."
7 So this was what the inventor wanted when he filed the
8 provisional application.

9 So it he moved to the final application, this language
10 was changed, but it really didn't do anything better because
11 it doubled down on the disparagement of figure 6. And the
12 language was replaced with, "As explained with reference to
09:16:59 13 figure 6, it may be too complex or expensive to place the
14 camera behind a display. Therefore, in the following
15 embodiments a practical method is provided to implement."
16 So, Your Honor, we believe this is further evidence that the
17 embodiment that could limit the point-of-view distortion is
18 disclaimed.

19 THE COURT: What do you say to the *Sycamore IP* case
20 that the Plaintiff cites in response to that?

09:17:30 21 MR. VILLARREAL: Well, Your Honor, that case, if I
22 remember correctly, says that -- related to a fact where
23 language was changed between the provisional and the final
24 application, and the Court said, Well, you look at the
25 language in the final application and not in the provisional.

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09:17:55 1 That's -- if I remember correctly, that's the outcome of the
2 case. Here what I'm saying is that even the final application
3 doubles down on the disparagement of figure 6.

4 THE COURT: So what does the provisional application
5 add to that?

6 MR. VILLARREAL: Well, the provisional application
7 here just shows us a story as to what happened. The language
8 was changed -- in the provisional it showed that the invention
9 was limited to the embodiment with a camera at the perimeter.
10 Even -- and even though the language was changed, the final
09:18:29 11 language doubled down on the disparagement of the embodiment
12 of figure 6. So it's not exactly the same language, but I
13 think it leads to the same result.

14 THE COURT: All right.

15 MR. VILLARREAL: Well -- and, Your Honor, even if
16 Your Honor finds that the embodiment of figure 6 is not
17 disclaimed, we argue that this embodiment still requires a
18 point-of-view and field-of-view modification.

09:18:58 19 The patent -- going to slide No. 18, we have a portion of
20 Dr. Myler's declaration at paragraph No. 52. There he quotes
21 the patent itself, which says that, "In reference to figure 6,
22 an adaptive FOV is required in order to compensate for changes
23 in distances between the user and the screen," so there should
24 be no dispute that figure 6 has a field-of-view modification.

09:19:27 25 However, Doctor Myler also points to the -- how figure 6

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1 is described, and it -- as shown here in Samsung's slide No.
2 18, it -- figure 6 is described as an outcome that has low
3 image distortion. It doesn't say it has no image distortion;
4 it's still going to have a point-of-view distortion. And
5 Dr. Myler's declaration states that it's impossible to have a
09:19:57 6 camera follow faithfully the eyes of a user behind the screen.
7 And so, therefore, Your Honor, even if figure 6 is not
8 disclaimed, there's still going to be some point-of-view and
9 field-of-view transformation necessary.

10 Moving on to the specification --

11 THE COURT: I find that argument --

12 MR. VILLARREAL: Yes.

13 THE COURT: -- is interesting that you're saying
09:20:27 14 that your expert says the way the embodiment is described in
15 the patent is impossible means we should not rely on it?

16 MR. VILLARREAL: Well, it -- Your Honor, what we
17 know is that the specification -- the patent does not describe
18 at all how this should be done. There's no enablement. And
19 we know claim construction is different than enablement. But
09:20:58 20 the point is that there's no description to allow a person of
21 ordinary skill in the art to do this. And so the expert,
22 based on his knowledge, has said you really -- you can't --
23 I'm not aware of a situation where you can faithfully follow
24 the eyes of a subject with a camera behind the screen.

25 THE COURT: All right.

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09:21:25 1 MR. VILLARREAL: Your Honor, moving to slide No. 19,
2 after describing all of the issues that the figure 6
3 embodiment has and describing how a -- what those are, the
4 patent goes on to generally describe what needs to be done to
5 mimic a mirror. And at '109 Patent, column No. 15, lines 59,
6 to 16:7, the patent expressly says that "Attempting to solve
09:21:59 7 the virtual mirror problem by only flipping the image
8 vertically, as was proposed in the prior art, is insufficient
9 to create a mirror experience." And then it goes on to say
10 that the way you fix this as "by performing an adaptive POV in
11 adaptive FOV prior to displaying the image on the screen
12 results in an image that mimics a reflection of a mirror
13 positioned at the location of the screen."

09:22:25 14 So this language is towards the front of the patent, and
15 then following this section is where the patent goes into a
16 lot of details about different ways that you can do this. But
17 it kind of highlights the concept that you need to do both the
18 POV and FOV if you want to mimic a mirror.

09:23:00 19 Moving to slide No. 20, the patent repeats that further
20 down in column 15, lines 41 to 45, and 15:48 to 52. It
21 discusses the to enable generated a convincing mirror
22 experience from a camera located in front of the user and in
23 spatial offset, from the screen a computerized method is used
24 to manipulate the captured image (verbatim).
25 And then it goes on to say, The computerized method

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1 receives as input the image captured by the camera and
2 performs a transformation of the image to correct, one, the
09:23:29 3 point of view, and, two, the field of view of the camera, to
4 fit the viewpoint that would occur with a conventional mirror.

5 So we think that these statements are strong, strong
6 evidence that that's what -- those are the transformations
7 that are required per the specification of the patent.

8 Your Honor, Plaintiff proposes the claim differentiation
09:23:58 9 argument in support of their construction, arguing that
10 Samsung's construction is inaccurate. And so Plaintiff points
11 to -- and, Your Honor, in slide 21 we have the '110 Patent,
12 claim No. 1, and then dependent claim No. 2. Plaintiff argues
13 that because claim No. 2, which depends from 1, has a mapping
14 transformation where it's possible to select multiple
09:24:27 15 transformations, and it's possible to select two
16 transformations that are just field of view and not--pardon
17 me--are just point of view and not field of view. And so,
18 therefore, Plaintiff's argument is that it breaks the claim
19 differentiation doctrine.

20 But Your Honor, the Federal Circuit has said that
21 generally the claim differentiation doctrine is applied --
22 or the concept is that each claim has a different scope, so
23 that can be applied to independent claims or, of course, to
09:24:59 24 dependent claims. And so here the -- still claim 2 has a
25 different scope than claim 1. And, moreover, we're not trying

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1 to read anything from claim 2 into claim 1. So we don't think
2 that it's -- the claim differentiation argument necessarily
3 applies here.

09:25:28 4 And further, Your Honor, we would point that claim No. 1
5 of the '110 Patent already states that the mapping
6 transformation generates an image that appear to be captured
7 from a different point of view, and then it defines what that
8 means. It says, "wherein the different point of view
9 corresponds to an image taken from a different angle and a
10 different distance." A different angle is a different point
11 of view; a different distance, it's a different field of view.

12 So claim No. 1 includes a point of view and field-of-view
09:26:00 13 modification already as far as the '110 Patent is concerned.

14 THE COURT: So why would we need to read that into
15 'transformation mapping'?

16 MR. VILLARREAL: The reason for that, Your Honor, is
17 that claim No. 1 in the '109 Patent does not have that express
18 language; it has different language; and the parties have
19 agreed that those terms should be construed the same through
20 both patents.

09:26:29 21 THE COURT: I would think that the fact that it is
22 separately claimed in the '110 Patent would indicate that it's
23 not inherent in the term.

24 MR. VILLARREAL: And -- I mean, as to the '110
25 Patent, you're right--it's already there--so it wouldn't be

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1 necessary; but as to the '109 Patent, that specific language
2 is not there.

09:26:57 3 And if -- your Honor, if the I can go to the '109 Patent,
4 claim 1, shown in slide No. 22, here we have a transformation
5 mapping to modify the image -- yeah, applying the
6 transformation mapping to the image to modify the image such
7 that it appears to mimic a reflection of a mirror. And here,
8 Your Honor, we don't have the express recitation of both a
9 point-of-view and field-of-view requirement, but the -- I will
09:27:24 10 point out that the preamble, the parties have agreed that it's
11 limiting. And the preamble shows that the whole purpose of
12 this claim is to display a mirror mimicking image.

13 And the -- as we have gone through, Your Honor, it's our
14 position that the specification clearly requires that to mimic
15 a mirror, the transformation mapping has to have at least a
16 point-of-view and a field-of-view modification.

09:27:57 17 So that would be my response--that the '109 Patent does
18 not expressly have that, but the language in the claim and the
19 and the specification would so require the transformation
20 mapping have this requirement (verbatim).

21 THE COURT: Well, your argument would render the
22 additional limitation in the '110 Patent surplusage, wouldn't
23 it?

24 MR. VILLARREAL: It -- yes, it would. Your Honor,
25 it's -- the -- you know, the claims were written as they have

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09:28:28 1 been, and we have to live with the claims as they're written.
2 And so we're trying to make the best that we can with the
3 evidence and the patent, the specification, and the intent of
4 the patent. So the way the claims were written through
5 different patents, you know, it's not going fit perfectly into
6 all of the general tenets of claim construction.

7 THE COURT: All right.

09:28:58 8 MR. VILLARREAL: Okay. And, Your Honor, I think
9 Plaintiff cites -- in their reply brief, and maybe their
10 opening brief also, they rely on two quotations from the
11 specification of the patent where it says, The appropriate
12 transformation is selected or the best transformation is
13 selected. And so we believe, Your Honor, that this -- these
09:29:29 14 quotes are taken out of context from a broader discussion that
15 relates to a registration process that's described in whole
16 between columns 20 to 24. And with Your Honor's indulgence, I
17 may go -- if I may go a little bit into what that process is.

18 Moving to slide No. 25, the registration process is a
09:29:54 19 process to calibrate the system. And as shown in slide 25,
20 the process begins at 1100 of figure 11 where at the factory a
21 calibration target is selected and target pointers are placed
22 on the target. And that is done as shown in figures 10A and
23 10B where either an individual or a doll is set up with
24 pointers and reference images are taken. Once the reference
09:30:28 25 image is obtained, another image is taken at the actual

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1 service location and then the registration of the image is
2 performed.

09:30:56 3 Now, once this is done, the patent talks about -- moving
4 to slide No. 26, the patent talks about using the images to
5 select the transformations that most faithfully are going to
6 do -- reflect the mirror. And it goes through a number -- a
7 number of different very specific transformations, including
8 the language that Plaintiff's pointed to.

09:31:29 9 And for example, here just in the next column -- at '109
10 Patent column 23:41, to column 24:3, the patent talks about
11 for example a -- it says, "a highly effective transformation
12 is a tilt transformation." So that's not to say that it's an
13 embodiment that only calls for tilt transformation; it's just
14 describing what it is, an option. And then it says, "Another
15 transformation parameter is elevation transformation." Again,
16 this is not an embodiment; it's just describing possible
17 transformations that can be used, and so on and so forth.

09:31:58 18 But the bottom line is that at the end, the patent is
19 clear and it states that "It has been shown that performing
20 tilt, elevation, and scale translations provide a rather
21 convincing image that very effectively needs to be" -- "that
22 only needs to be a right to left reverse to very effectively
23 mimic a mirror."

24 So Your Honor, when it comes down to the transformations
25 needed to mimic a mirror, the specification is clear that

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1 these are the ones that should be done, at least.

09:32:26 2 THE COURT: I don't think that that is informing
3 what the necessary definition of 'transformation mapping' is;
4 I think that's describing the transformation mapping required
5 to mimic a mirror.

6 MR. VILLARREAL: Correct, Your Honor.

7 I mean, it is -- it's describing the transformation
8 mappings to mimic a mirror. That's correct. And that's what
9 the claim language says. I mean, it -- claim No. 1 of the
09:32:57 10 '109 Patent is "transformation mapping to mimic a mirror."

11 THE COURT: I understand that, but that's not the
12 term I'm construing.

13 MR. VILLARREAL: Correct, Your Honor.

14 We're discussing 'transformation mapping', and so we're
15 trying to define the type of -- the -- at least the type of
16 transformations that are required.

17 And in that column, for example, there is very specific
18 type of transformation. It talks about, for example, a tilt
09:33:26 19 transformation. Well, that's a subset that would fall under
20 point-of-view transformation. It discusses an elevation
21 transformation. That is a subset of a point-of-view
22 transformation. So within this larger definition of point
23 of view and field of view, there is very specific things
24 discussed in the patent that could be done. And certainly the
25 patent mentions, Well, you could choose this one, you could

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09:33:56 1 choose the other, but when it comes down to it, it's quite
2 clear that what they teach a person of ordinary skill in the
3 art is that a point-of-view and a field-of-view translation
4 are the ones that mimic a mirror.

5 So that's our point, Your Honor.

6 THE COURT: Under your construction, it wouldn't be
7 transformation mapping unless it affected both the point of
8 view and the field of view.

09:34:27 9 MR. VILLARREAL: With -- yes, that would be our
10 construction; that it would require at least to have both. It
11 could have other transformations, but it would have at least
12 those two. And the reasons for that, Your Honor, is that the
13 camera, especially the one in the camera where it's in the
14 perimeter of the screen, is just -- it's just going to have
15 significant distortion.

16 THE COURT: I think that the term 'transformation
17 mapping' is broader than the construction that you're
18 proposing, and that's the problem I have with it.

09:34:59 19 MR. VILLARREAL: Okay. Well, Your Honor, let me --
20 I'm just going to wrap up. Basically our point is that, in
21 our view, the patent is very clear that to do the mimic in the
22 mirror, that those are the two transformations required, for
23 the reasons we have explained--right?--the distortion of the
24 field of view and the point of view; and that the patent goes
09:35:29 25 on to explain through columns and columns and columns

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1 different specific transformations that fall within this
2 point-of-view and field-of-view modifications that could be
3 done and that are open-ended. And so those, in our view, are
4 not specific enough to say that those are the ones that should
5 mimic a mirror, because that's what's required here.

09:35:56

6 So, Your Honor, that's our point, and I'll -- if Your
7 Honor doesn't have anymore questions, I'll turn it over to
8 Plaintiff.

9 THE COURT: All right. Thank you, Mr. Villarreal.

10 MR. VILLARREAL: Thank you, Your Honor.

11 MR. NELSON: Good morning, Your Honor.

12 Could I ask that we switch over to the EyesMatch
13 presentation? Thank you.

14 William Nelson on behalf of the Plaintiff.

09:36:26

15 I'm going to focus my presentation on the presentation we
16 just heard from counsel, so I can skip past the dispute.

17 I think the claim language, Your Honor, makes quite clear
18 that a transformation mapping is nothing more than a set of
19 image transformations that have been selected to achieve the
20 recited visual effect in the claims. They're different in the
21 '109 and '110 Patents.

09:36:56

22 In the '109 Patent the transformation mapping is one to
23 modify the image such that it appears to mimic a reflection of
24 a mirror; in the '110 it's to generate modified images that
25 appear to be captured from a different point of view of the

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1 camera's actual point of view.

2 And the dependent claims I think, Your Honor, quite
3 clearly demonstrate that the mapping transformation that is
4 recited in the independent claim can be selected from any
09:37:28 5 number of different types of transformations that are recited
6 in this claim but also in the specification. And as we've
7 identified in our briefing, claim 2 tells you that the mapping
8 transformation of claim 1 can be satisfied by any two of the
9 following. And as we've described in our briefing, that claim
10 allows combinations which modify only the field of view or
09:37:59 11 only the point of view, which tells you that the mapping
12 transformation of claim 1 cannot require both a field-of-view
13 and point-of-view modification. It may be, as counsel said,
14 that other elements of the claim require you to conduct a
15 point-of-view modification or a field-of-view modification or
16 both, but that's not inherent to the transformation mapping.

17 And the same is true of the '109 Patent where claim 3
09:38:27 18 tells you that the transformation can be met by two
19 transformations--a tilt transformation and an elevation
20 transformation--for which there is no dispute that those are
21 only point-of-view modifications. The claim can be met by
22 conducting a point-of-view modification.

23 The specification tells us that that's what a
24 transformation mapping is--it's a selected set of image
25 transformations. The specification uses permissive language

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09:38:57 1 throughout about what can be used for the transformation,
2 identifying a whole series of transformations that may be
3 appropriate to what's in front of the camera. Again, it says
4 it can include any combination of correction; may also include
5 certain types of transformations.

6 I've already addressed the claim differentiation issue
7 there.

8 I don't understand counsel's argument about claim
9 differentiation. It's quite clear that the language of claim
09:39:28 10 1 about what a transformation mapping is can be met by any two
11 in the '110 Patent of those transformations, and it is
12 absolutely a -- and it is the case that that combination could
13 be field-of-view-only modifications or only point-of-view
14 modifications. And the same is true of the '109 Patent. And
15 it's clear; it's black letter law that a construction of the
09:39:57 16 independent claim cannot exclude what's in the dependent
17 claim, and that's what their construction would do.

18 Of course, with respect to the figure 6 embodiment, it
19 is absolutely the case that the figure 6 embodiment requires
20 only manipulation of the field of view. That's what the
21 specification says. That arrangement of the camera behind the
22 mirror allows for mimicking a mirror only by manipulating the
23 field of view.

09:40:28 24 And I want to turn to the disparagement argument, the
25 disclaimer argument.

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1 You heard today and you saw in the briefing that Samsung
2 says, Well, the figure 6 embodiment is disclaimed. And I just
3 want to focus on the difference between the cases they're
4 citing and the argument they're making and what is actually
5 said in the specification.

09:40:56

6 This argument that is being made is that an embodiment is
7 described in the specification but somehow disclaimed by
8 disparaging it. That is difficult to understand in view of
9 the description of the embodiment in the specification. And
10 the *Openwave* case that counsel described to you is not on all
11 fours with this situation. In *Openwave*, there was a single
12 disclosed embodiment, and that single disclosed embodiment
13 disavowed a mobile device at -- combined with a wireless
14 computer module as something that met that embodiment. And
15 that's not the case here. We have an embodiment that says you
16 can accomplish mimicking a mirror by manipulating the FOV
17 only. It doesn't say that this is excluded from the
18 embodiments; it says this is an embodiment of the claims.

09:41:27

19 There is nothing in the specification that actually
20 disclaims the embodiment. It's a recited embodiment in the
21 specification. And it's black letter law that it's improper
22 to exclude a disclosed embodiment. And, of course, that
23 disclaimer argument cannot be squared with the fact that the
24 dependent claims, in fact, call out only an FOV modification
25 or a point-of-view modification.

09:41:58

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09:42:26 1 In addition, even if this argument that somehow that
2 figure 6 embodiment is disclaimed, even though it's described
3 in the specification, there are other embodiments which make
4 very clear that the image transformations that are to be
5 applied is permissive. This is another embodiment. In other
6 embodiments a system is provided, and the transformation
7 includes any combination of correction for angle, tilt,
8 azimuth, scale, spatial translation. It may also include
09:42:57 9 manipulation of the eyes. That is not the figure 6
10 embodiment, and the language is entirely permissive.

11 The argument you heard about the claim language requiring
12 both a POV modification and an FOV modification, well, first
13 of all, with respect to the '109 Patent you heard the argument
14 that, Well, because the patent recites resizing the image, it
09:43:28 15 already includes an FOV nation in a transformation mapping.
16 But to be clear, Your Honor, the resizing recited in '109
17 Patent step 1d is separately claimed than the transformation
18 mapping. It says in 1c, "apply a transformation mapping to
19 modify the image such that it appears to mimic a reflection of
20 a mirror." 1d says, "resize the image."

21 Now claim 6, the dependent claim, tells you that, indeed,
09:43:57 22 the resizing, which is a field-of-view modification in d, can
23 be part of the transformation mapping, but that tells you it
24 need not be in claim 1. So this argument that this claim
25 somehow requires as part of the transformation mapping a

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1 field-of-view modification is just wrong in view of the plain
2 language of the claims.

3 And just to address quickly the argument that was made
4 about the '110 Patent, it is absolutely the case that if
09:44:25 5 transformation mapping required both a POV modification and an
6 FOV modification, there wouldn't need a need to recite it in
7 the claim, but it does so here.

8 Thank you, Your Honor.

9 THE COURT: All right. Thank you, Mr. Nelson.

09:44:57 10 Mr. Villarreal, if you want to respond to that, you may,
11 or we'll move on to the next term.

12 MR. VILLARREAL: Thank you, Your Honor.

13 We can move on to the next term, which is 'it appears to
14 mimic a reflection of a mirror'. And here, Your Honor, we
15 have agreed with counsel for Plaintiff that they are going to
16 go first and Defendants are going to rebut.

17 THE COURT: All right.

18 MR. VILLARREAL: Thank you, Your Honor.

19 THE COURT: Thank you.

09:45:29 20 MR. NELSON: Thank you, Your Honor. Will Nelson
21 again.

22 And so I think the -- to elaborate on the agreement, the
23 parties are going to treat the argument here for 'appears to
24 mimic a reflection of a mirror' as also covering the issue for
25 'mirror tracking mode', which is a term in the preliminary

09:45:56 1 construction term No. 8, because really the construction ends
2 up essentially addressing the same issue. And so I intend to
3 address those together, and I think counsel has agreed he will
4 address those together as well.

5 THE COURT: That makes sense.

6 MR. NELSON: Thank you.

7 So I'm aware -- we've seen your preliminary construction,
8 Your Honor, and I'll focus my presentation on those issues.

09:46:20 9 So it appears -- this term appears in the '109 Patent,
10 claim 1, and step 1c. And as you know, EyesMatch has proposed
11 a plain meaning construction that just means that the
12 mimicking reflection of a mirror is -- appears to mimic an
13 image that would have reflected from a mirror, while Samsung's
14 construction, which the Court has adopted in the preliminary
15 form, requires some very specific requirements in order to
16 mimic a mirror, which is that it -- the reverse reflection
17 must appear at approximately -- that's an addition sort of
18 halfway through the briefing from Samsung, double the distance
09:47:00 19 to the camera, and the reflection maintains approximately the
20 same size regardless of the use or movement.

21 So, in our view, Your Honor, that construction proposed
22 by Samsung is improperly narrow in view of what the
23 specification says and what the claims say, and would, in
24 fact, exclude disclosed embodiments in the specification in
09:47:25 25 which the size that's shown in the inventive device is not at

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1 all the same size as would be reflected in the mirror, but is,
2 in fact, smaller.

3 So I think it's important to note that the specification
4 itself teaches consistently that 'mimicking a mirror', which
5 is what is claimed here, simulates a conventional mirror--not
6 that it duplicates one exactly, or even approximately; it
7 says, We manipulate the image such that it resembles a mirror
09:47:59 8 image, i.e.,--which just means that is--an image the user
9 would have seen if the screen was actually a standard mirror.
10 So it just resembles a mirror. It need not duplicate the
11 attributes of a mirror exactly.

12 Again, the specification says, We're just trying to
13 generate a convincing mirror experience; not that we're trying
14 to duplicate the optical properties of a mirror exactly.

15 THE COURT: So what do you contend 'mimicking a
16 mirror' means?

09:48:30 17 MR. NELSON: It means what the claims say, and let
18 me focus on that. Apologies.

19 So what it means to mimic a mirror is to do what is
20 described in the '109 Patent, claim 1--you obtain a digital
21 image, you flip it and reverse it. That's in our construction
22 but that's already occurring here.

23 THE COURT: So you don't ascribe any additional
09:48:57 24 meaning to 'mimicking a mirror'.

25 MR. NELSON: It is an outcome of the processes that

1 are claimed right here, which is flipping, applying a
2 transformation mapping, and resizing.

3 THE COURT: The fact that it's an outcome doesn't
4 mean it's not limiting.

5 MR. NELSON: It -- the point is, Your Honor, in our
6 view, that it is -- we understand and agree it is limiting,
7 but modifying the image such that it appears to mimic a
09:49:26 8 reflection of a mirror occurs when you apply a transformation
9 mapping; a selected set of image transformations in
10 combination with the flipping and resizing that occurs in the
11 claim.

12 THE COURT: So your position would be that
13 'mimicking a mirror' is surplusage there; it doesn't it
14 doesn't need to be in the claim.

15 MR. NELSON: It's not that it's surplusage; it's
16 that it does not require separate construction, because we've
09:49:54 17 -- the claim tells you that this claim is a method for
18 operating a system having a monitor, a camera, and a
19 processor, so as to display a mirror mimicking image on the
20 monitor by performing the following steps. That's how you
21 generate a mirror mimicking image. And you do it by flipping
22 the image, applying a selected set of transformations, and
23 resizing the image. That results in mimicking a mirror.

24 THE COURT: Well, that --

25 MR. NELSON: Modify -- I'm sorry.

09:50:27 1 THE COURT: Couldn't that result in all kinds of
2 images that wouldn't mimic a mirror?

3 MR. NELSON: No, Your Honor. No, Your Honor.

4 The transformation mapping is, as we've noted,
5 intentionally broad, but it's a set of transformations that
6 are intended to resemble the image that would have appeared in
7 a mirror, as our construction proposes.

8 THE COURT: Well, that's not what your construction
9 of 'transformation mapping' was.

09:50:59 10 MR. NELSON: That's right, Your Honor. Our
11 construction of 'transformation mapping' is a selected set of
12 image transformations. Here in this claim it is in service of
13 modifying the image such that it appears to mimic a reflection
14 of a mirror.

15 THE COURT: If we don't construe 'mimicking a
16 reflection of a mirror' as a limitation, then you can have
17 transformation mapping, resizing, displaying, which would not
09:51:31 18 result in what is being claimed as the invention, would it?

19 MR. NELSON: No, Your Honor.

20 In our view, the result of these three steps, which are
21 the steps that display a mirror mimicking image on the
22 monitor, create that result. You flip the image; you reverse
23 it--that's claimed; you resize the image--that's claimed; and
24 you --

25 THE COURT: Resizing the image could make it huge or

09:51:59

1 tiny. How does that mimic a mirror?

2

MR. NELSON: You are resizing the image to reduce variations caused by changes in the object's distance to the camera. You're not just deciding on any form of resizing that you want; you are resizing to reduce the variations caused by changes in the object's distance.

7

09:52:27

8 So this claim tells you that this is how you generate a mirror mimicking image, and you select the most appropriate set of image transformations to modify that image so that it appears to mimic a reflection of a mirror. And the claim doesn't limit you to one way of doing that; it says you select the appropriate ones.

13

09:52:56

14 Now, I think the most important thing to focus on here is that, if adopted, that construction proposed by Samsung would exclude an embodiment disclosed in the specification with no basis. At column 21, lines 1 to 6, the patent itself says, The scaling of this image for mirror mimicking can be matched and cropped to represent the true size of a supposed reflection at a mirror. Now, that's Samsung's proposal--that it is double the distance, or approximately the double the distance to the user, and remains approximately the same size no matter how much they move. Or slightly smaller--that is, the generated reference in the image should match the true size of the user--that's again Samsung's construction--or smaller to fit the screen, if preferred.

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09:53:57 1 Now, Samsung's proposal would exclude this expressly
2 disclosed embodiment in which the image of the user is not
3 shown at double the distance, not at the same size regardless
4 of distance, but, in fact, smaller.

5 Now, Samsung added 'approximately' to its construction to
6 try and address this. Your Honor, 'smaller' and
7 'approximately the same size' are not synonymous; they are
8 different. This patent allows the implementation to provide
9 an experience in which the user's image is smaller than double
09:54:30 10 the distance. Samsung's proposal would exclude that without
11 basis. 'Approximately the same size' and 'smaller' are not
12 synonyms.

13 THE COURT: 'Slightly smaller' and 'approximately
14 the same size' are pretty close.

15 MR. NELSON: Your Honor, I -- and -- I don't agree
16 with -- that -- in common language or to a layperson that
17 'slightly smaller' and 'approximately the same size' are
18 synonymous, but the specification tells you in the next
09:54:59 19 sentence that it can match the true size or smaller to fit the
20 screen. That's unbounded. It says you can make this image
21 smaller to fit the screen. For instance if you have a small
22 screen, you can make that image smaller. That is not
23 synonymous with 'approximately the same size'.

24 THE COURT: So does that mean that that necessarily
25 is mimicking a mirror?

09:55:27 1 MR. NELSON: Yes. A smaller image that is mimicking
2 a mirror is within the scope of mirror mimicking. This is the
3 '109 Patent which expressly discloses how you can, in the
4 patent's view, mimic a mirror.

5 If I could address the language that Samsung is relying
6 on.

09:55:56 7 So the language that Samsung is relying on is actually in
8 the background of this patent. It's at column 2, line 4 to 27
9 of the '109 Patent. And there what the patent is attempting
10 to describe is the optical properties of a conventional
11 mirror. It's not saying this is what we will do without fail;
12 it says this is what a mirror works like; we're going to do
13 something that resembles that. But nowhere does the
14 specification describe any embodiment in which what is
15 actually happening is the user is always or approximately the
09:56:26 16 same size and always approximately double the distance.
17 That's what a conventional mirror does.

09:56:53 18 THE COURT: If your claim did not require mimicking
19 a mirror, I would agree with you that all you would need to do
20 is whatever the other limitations are. But this claim
21 specifically requires mimicking a mirror, and I don't think
22 you're giving that any meaning. You want to just use those
23 words again, but if you don't like the definition that the
24 Defendant has come up with, that definitely has a basis in the
25 specification, what definition of mimicking a mirror do you

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09:57:27 1 want to be given to the jury? Because I think that this claim
2 can't be understood properly without giving some meaning to
3 'mimicking a mirror'.

4 MR. NELSON: Your Honor, I'm going to return to the
5 language of the claims. And I think in the context of the
6 claim language our construction makes -- will make sense to
7 the jury and they will be able to determine it because the
8 question will be has the image been flipped, has it been
9 resized, has a transformation mapping been applied. The
09:57:59 10 requirement of absolute fidelity to a mirror is not even an
11 embodiment, but a description of a conventional mirror, and
12 the embodiments disclosed in the specification say that any
13 number of transformation mappings can be applied to result in
14 this.

15 THE COURT: Well, you are, in effect, then, just
16 reading out what you have highlighted in yellow
17 there--"modifying the image such that it appears to mimic a
09:58:29 18 reflection of a mirror," and, instead, you're saying step c is
19 apply broad transformation mapping, and then step d is
20 resizing, and e is displaying, and the like, and there is no
21 affect being given to what you say is the outcome.

22 MR. NELSON: Your Honor, it's -- I would say this.
09:58:58 23 It's not that we intend to give no meaning to the claim; it's
24 that it doesn't need construction--that in light of the other
25 operations recited in the claim, the jury will readily

1 understand what it means to mimic a mirror; that the user
2 appears as if they would if they were in a mirror. That's
3 easily understandable by the jury.

4 And the technical requirements of the claim for
5 infringement are not there, but in the application of a
09:59:27 6 transformation mapping, the resizing, and the flipping. The
7 jury doesn't need further construction given that to know what
8 it means to mimic a mirror. It's if you apply these
9 operations. Inserting an additional requirement that is far
10 narrower than any disclosed embodiment, and, in fact, excludes
11 embodiments, isn't helpful and actually improperly removes
12 disclosed embodiments from the scope of the claim.

09:59:58 13 THE COURT: Are there other arguments you have based
14 on removing embodiments other than what you refer to in column
15 30?

16 MR. NELSON: So I think the repeated emphasis in the
17 specification that what you're attempting to do is create an
10:00:26 18 image that resembles a mirror image, rather than duplicates it
19 a exactly, support that--that, look, we are just trying to
20 give an experience that for the user resembles a mirror image,
21 but not imports a requirement that requires double the
22 distance, same size every time.

23 THE COURT: Well, so you would have the jury think
24 that all it takes to mimic a mirror is that there be a
25 reflection.

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1 MR. NELSON: No. The specification tells you that's
10:00:57 2 not required -- or that's not enough. I agree with that. And
3 it actually distinguishes the prior art from that. What is
4 required is to apply a transformation mapping. And a
5 transformation mapping is not an image flip; it's a
6 point-of-view modification, such as a perspective correction,
7 a translation, it could be a field-of-view modification such
8 as a crop and zoom, or it could be both. But the
10:01:29 9 specification tells you it has to be more than flipping the
10 image. And, in fact, flipping the image is separately
11 claimed.

12 So no, I don't agree that reversing the mirror image is
13 enough. It tells you you have to apply an appropriate set of
14 image transformations.

15 THE COURT: I wasn't talking about reversing the
16 image; I was talking about your proposed construction for this
17 term is just saying that it would appear to mimic the image
10:01:59 18 that would have reflected from a mirror, i.e., from a
19 reflective surface.

20 MR. NELSON: And I'm sorry if I missed the question,
21 Your Honor.

22 THE COURT: Well, I'm -- how does that explain to
23 the jury, or to anyone, what mimicking a reflection of a
24 mirror is?

10:02:28 25 MR. NELSON: Well, Your Honor, I would submit that

1 every layperson knows what it is, in general, to look in a
2 mirror, and what the claim is telling us is that this is how
3 you obtain a mirror mimicking effect. The preamble, which
4 we've all agreed is limiting, is performing these steps to
5 perform a mirror mimicking image. It includes obtaining the
6 image; flipping it, i.e., reversing it; applying that
7 transformation mapping, whatever is the appropriate
8 transformation mapping--possibly a resize, possibly a
9 translation in space; and then possibly a perspective
10 correction; and then resize it and display it, and the result
11 is a mirror mimicking image. The claim language gives the
12 jury everything it needs to make sense of something it already
13 intuitively understands, which is what's it like to look in a
14 mirror.

15 THE COURT: You know, the fun thing is I don't think
16 that there's anything intuitive about what the specification
17 says it takes to mimic a mirror. The fact that it appears
18 double the distance or that it maintains the same size, those
19 are things that I think the specification is describing that
20 most people don't know.

21 MR. NELSON: Your Honor, it is making that
22 description in connection with a conventional mirror. It is
23 not attempting to describe what the claimed invention does as
24 a narrow set of requirements. It could do that, but the claim
25 itself is what is describing what it means to mimic a mirror

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1 in the context of the invention--flipping, a transformation
2 mapping, and a resizing.

10:04:28 3 THE COURT: All right. I do understand that
4 argument.

5 MR. NELSON: I just -- Your Honor, with that, I
6 think I'll let counsel respond. Thank you.

7 THE COURT: All right. Thank you, Mr. Nelson.

10:05:00 8 MR. VILLARREAL: Thank you, Your Honor.

9 Initially let's -- Your Honor, let's look at EyesMatch's
10 proposed construction. It's appears to image the image that
11 would have reflected -- that would have reflected from a
12 mirror, i.e., from a reflective surface. So the first part,
13 it's not a construction; it just repeats in other ways the
10:05:28 14 same words of the term. And then it says, "i.e., from a
15 reflective surface." It improperly expands even further the
16 unclear 'mimic of the image'.

17 Going to slide 32, it includes any reflection from any
18 reflective surface, Your Honor. You could have within the
19 scope a reflection from a drop of water, from a shiny object,
10:05:58 20 anything -- any sort of reflection that looks nothing like a
21 mirror, which is what the claim requires. And so, therefore,
22 Plaintiff's construction is unbounded and it's inaccurate.

23 What I would like to address next is the purported
24 embodiment that is not -- that is excluded.

25 And Your Honor, on slide 38, first of all, the quotation

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10:06:27 1 here from the '109 Patent at columns 21 -- column 21, lines 1
2 through 6, if you recall, Your Honor, we talked about the
3 registration process where a reference image is obtained and
4 then another image is obtained and then there is this
5 registration. This language refers to a reference image. How
6 do you obtain a reference image? It has nothing to do with
7 the actual image that's displayed once a transformation
10:06:56 8 occurs; it's talking about generating a reference image. So
9 that's number one.

10 But more importantly, Your Honor, Plaintiff's argument is
11 that -- assuming that this language was actually related to
12 what -- to the actual displayed image, Plaintiff's argument is
13 that Defendants' construction does not account for the true
14 size of the use -- that the patent teaches that it doesn't
10:07:29 15 have to be the true size of the individual being displayed.
16 But Your Honor, Defendants' construction never requires that
17 the true size of the individual be displayed. In fact, it
18 can't be. Like Plaintiff's counsel said, you may have a very
19 large display life size, you can have a phone size display.
20 So you are never going to get at the size of the individual.
21 Maybe in specific circumstances you may.

10:07:58 22 What Defendants' construction is, is that it maintains
23 the same size regardless of the user's movement. So if you
24 have a small screen, the individual that you're going to see
25 is going to be -- look -- is going to appear the same size

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1 whether they move further or closer. It's not going to be
2 this -- the true size or, you know, the real size of the
3 individual. That has nothing to do with our construction.

4 The same thing with double the distance to the mirror.
10:08:27 5 We're not talking about displaying the actual size of the
6 individual.

7 So, Your Honor, we don't think this is applicable, and,
8 furthermore, as we understand their argument, it has nothing
9 to do with Defendants' construction.

10 And now, Your Honor, if I may, I would like to go through
11 the support for Defendants' construction.

12 And it's true that a lot of the language cited in
10:08:58 13 Defendants' brief is from the background, which is actually
14 really important. It teaches what the plain -- what the
15 patentee was trying to claim, and it's not narrower -- it's
16 not narrowed to a specific embodiment.

17 And so in '109 Patent at 1 -- column 1, line 63, to
18 column 2:3, the patent's talking about the prior art says that
10:09:25 19 a few alternatives have been proposed by prior art around the
20 combination of a camera and a screen to replace a conventional
21 mirror. And then it says, However, these techniques are not
22 convincing and are not acceptable. And so what -- the whole
23 purpose of the patent is to create a convincing mirror
24 experience.

25 And, in fact, the patent, in describing the embodiments,

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1 it talks about "further embodiments, methods, and apparatuses
2 are provided utilizing a camera and a flat screen display to
10:09:59 3 create a convincing mirror experience." And that's -- those
4 are the embodiments that are claimed in the claims at issue
5 here where you're trying to create -- mimic a mirror, and the
6 background teaches that the prior art was not convincing.

7 So what does it take to be convincing? Well, Your Honor,
8 the background of the patent teaches us what it takes to
9 provide a convincing mirror experience. It's not an exact
10:10:26 10 mirror experience, but it's what the patent says that would do
11 this convincing mirror experience.

12 Moving to slide 35 at column 2:28 to 40, the patent
13 teaches us that a difference between a camera and a mirror is
14 that one's image is reversed. So we know that. But the
15 patent also teaches us at column 15 that attempting to resolve
16 -- or to solve the virtual mirror problem by only flipping the
10:10:57 17 image vertically, as was proposed in the prior art, is
18 insufficient to create the mirror experience.

19 So what does this say? What this tells us, Your Honor,
20 is that flipping the image is a necessary condition, but it's
21 not sufficient. So the patent tells us that more needs to be
22 done to create that convincing mirror experience.

23 And moving to slide No. 36, the patent describes, then,
10:11:29 24 what are the things that a mirror does. And it's in that
25 section, it's right after -- it describes that the issue with

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1 the prior art is that it doesn't have a convincing mirror
2 experience.

3 And then it goes on to teach, well, these other things
4 that a mirror actually does. And so it says, "When a user
5 looks at himself in the mirror, what he actually sees is a
6 reflection of himself as if he was standing at the distance
7 that is double the distance to the mirror." Well, we're not
10:11:57 8 saying that it's exact, and I think Plaintiff made the point
9 that Defendant was trying to say that it was exact, and that's
10 why we added the language 'approximately', because we're not
11 saying exact. So it's not an exact reflection as it would be
12 in the mirror, but it's approximate, and so it's going to be
13 approximately double the distance to the mirror.

14 Moving on to slide No. 37, the background of the patent
15 similarly teaches that when the user approaches a mirror, the
10:12:27 16 field of view angle increases, which is why he continues to
17 see himself -- to see the same size reflection so that the
18 user actually sees himself roughly at the same size but
19 closer. So this is the other requirement that we believe the
20 patent teaches is necessary to create a -- you know, a
21 convincing mirror experience, such as is claimed in the
22 patents.

23 THE COURT: Mr. Villarreal --

24 MR. VILLARREAL: Yes, Your Honor.

25 THE COURT: -- in that slide --

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1 MR. VILLARREAL: Yes.

2 THE COURT: -- You just had up, it uses the term
3 'roughly at --

4 MR. VILLARREAL: Yes.

10:13:00 5 THE COURT: -- the same size. Is that what you're
6 intending by 'approximately'?

7 MR. VILLARREAL: Yes, Your Honor.

8 THE COURT: All right. Is there any reason why
9 'roughly' wouldn't accomplish the same thing?

10 MR. VILLARREAL: I think 'approximately', Your
11 Honor, is more exact. 'Roughly' is very vague, Your Honor,
12 and so it would be more difficult for the jury to -- I think
10:13:29 13 -- when you're talking about a distance, when you say
14 'approximately', it's a little more precise; when it's
15 'roughly', it's more vague, so I would say that
16 'approximately' is more accurate for what we're -- what the
17 patent is intending to claim, which is that convincing mirror
18 experience.

19 THE COURT: All right.

20 MR. VILLARREAL: Thank you, Your Honor.

21 Your Honor, and we had discussed with Plaintiff that as
22 far as 'mirror tracking mode', I think what both parties want
10:13:58 23 to do is -- 'mirror tracking mode' is just a mode of tracking
24 the user wherein we have whatever the Court decides the
25 construction should be for 'mimicking the reflection of a

1 mirror', so we don't need to argue that. And so I'll turn it
2 over to Plaintiff if he wants to respond.

3 Thank you, Your Honor. Or, Your Honor, unless you have
4 any other questions.

5 THE COURT: What is your response to the argument by
6 the Plaintiff on the 'mirror tracking mode', that the proposed
10:14:30 7 construction doesn't properly capture 'tracking'?

8 MR. VILLARREAL: Let's go to 'mirror tracking mode'.

9 Your Honor, we believe it does because if the -- it's --
10 Defendants' construction basically shows what happens as the
11 individual potentially moves and maintains the distance. So,
10:14:58 12 Your Honor, I don't think that that's -- I think that that's
13 captured by our construction. And I believe we had -- we had
14 discussed with Plaintiff that we had agreed that the
15 construction, whatever Your Honor chooses, would be
16 (unintelligible), but Samsung's constructions captures the
17 movement of the user to the extent that it does.

18 THE COURT: All right.

19 MR. VILLARREAL: Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Villarreal.

21 MR. NELSON: I would just like to address -- William
10:15:29 22 Nelson, Your Honor. Apologies. I would like to address just
23 two things I heard from counsel.

24 The first is that the argument that the embodiment in
25 which the image of the user is smaller than the true size is

10:15:58 1 somehow only related to a reference image. So that
2 discussion, which is running from column 20 into column 21 of
3 the specification is talking about the reference image, but,
4 of course, the reference image is the baseline image that will
5 be used to generate the mirror mimicking image. So what it's
6 telling you is that what you will generate based on a
7 comparison of the captured image and the reference image is an
8 image that on the screen is smaller than would be the true
9 size.

10 And I just want to address that true size point, too.
11 Counsel suggested that true size here in the specification
10:16:28 12 just meant, well, obviously in the mirror it's not the true
13 size of me standing here. That's not what the specification
14 is saying. It says it exactly in these words. "The scaling
15 of the image" -- this is at column 1, line 21. "The scaling
16 of the image can be matched and cropped to represent the true
17 size of a supposed reflection or be smaller." It's not
10:16:58 18 talking about someone standing up in their true size.

19 THE COURT: And that may be right about the passage
20 you're reading, but the construction that we're talking about
21 does not involve true size; it just says "maintaining the same
22 size regardless of movement."

23 MR. NELSON: But, Your Honor, in -- the
24 specification makes clear -- very clear in that background
25 section that we both discussed that the true size of a

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10:17:29 1 supposed reflection is double the distance of the user to the
2 mirror. That's what it's referring to. It can be that, which
3 is what Samsung says, or it can be smaller. And that
4 construction that Samsung has proposed does not address this
5 embodiment in which that image of the user is smaller than the
6 true size as would be reflected in a mirror, which would be
7 the user at double the distance. That construction excludes
8 it. 'Approximately' doesn't capture it; 'roughly' doesn't
10:17:59 9 capture it. That embodiment is excluded by the construction.

10 Thank you, Your Honor.

11 THE COURT: All right. Thank you, Mr. Nelson.

12 Why don't we go ahead and take the morning recess now.
13 We'll be back in 15 minutes to hear the rest of the arguments.
14 Thank you.

10:35:28 15 (Brief recess.)

10:35:29 16 THE COURT: Good morning. Please be seated.

17 All right. What is the next term that the parties want
18 to take up?

19 MS. WELSH: Your Honor, Margaret Welsh.

20 The next term we wanted to talk about was 'non-ordered
21 steps'.

22 THE COURT: All right. Thank you, Ms. Welsh.

23 MS. WELSH: So the issue with claim 1 of the '109
10:35:58 24 Patent is that it requires us to render 'non-ordered steps'
25 superfluous, or either there's a logical inconsistency with

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1 respect to the claim that we need to address. And neither of
2 these solutions are permissible, and so Defendants' position
3 is that this claim term is indefinite.

4 If we start with the claim, claim 1 lists 'non-ordered
5 steps', and both parties agree that the preamble here is
6 limiting. If we look at the preamble, it says, "non-ordered
10:36:29 7 steps comprising." And patentee's choice of 'comprising' here
8 is important. 'Comprising' is well-known to mean 'including'.
9 And so if we look at the claim on its face, we have
10 non-ordered steps comprising a list of steps, steps 'a' a
11 through e. Dr. Myler testified for Defendants that the claim
12 language plainly indicates non-ordered steps comprise at least
13 steps a through e.

10:36:58 14 The problem, though, is that there's a clear logical
15 inconsistency when you look at the steps. When you look at
16 the steps, you have performing the non-ordered steps we just
17 discussed 'a' through e that can be performed in any order,
18 but the claim actually does require an order. As EyesMatch
19 puts it, these non-ordered steps require some logical order;
20 they must -- the non-ordered steps actually require some
21 order.

22 So looking at the steps, you have step 'a' which has a
10:37:30 23 digital image, and that digital image then provides the
24 antecedent basis for steps b, c, and d. Step e requires that
25 image again, and then has after 'performing', flipping and

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1 transformation and resizing. So looking at these non-ordered
2 steps, you have step 'a' coming first, step b, c, and d coming
3 after step 'a', and then step e coming at the end. So you
4 have order to these non-ordered steps that's required in the
5 preamble.

10:38:01

6 To reconcile this inconsistency -- logical inconsistency
7 in the claim, what the proposed construction is is to parse
8 out these steps, and to say that step 'a' and e is actually
9 ordered and step b, c, and d are non-ordered.

10:38:29

10 There's a number of problems with this proposed
11 construction, however; mainly being that the -- both parties
12 agree the case law here that unless the steps of a method
13 actually recite an order, the steps are ordinarily not
14 construed to require one, meaning that if we just take out
15 non-ordered from these claims, we would have the same
16 construction that's proposed here where we would look at the
17 claims and you would have step 'a' and e being ordered and
18 step b, c, and d being non-ordered. So just looking at the
19 claims, you've rendered 'non-ordered' superfluous, giving it
20 no meaning or deleting it from the claims, which we are not
21 permitted to do.

10:38:56

22 THE COURT: Why would you -- if it didn't say
23 'non-ordered', why would you assume that b, c, and d have no
24 order?

25 MS. WELSH: Looking at the case law, steps of a

1 method actually recite an order, the steps are ordinarily
2 not -- unless the steps of the method actually recite an
3 order, the steps are ordinarily not construed to require one.
10:39:27 4 So if you take out 'non-ordered' from the preamble, you would
5 look and you would say as, I mentioned earlier, that 'a' and e
6 require the order to become first and second -- first and
7 last, but the steps in the middle, as the Federal Circuit has
8 said, they don't require an order because one is not required
9 there.

10 THE COURT: Well, that would be something you would
11 have to determine by examining the limitations in each step,
12 wouldn't you?

13 MS. WELSH: Right. And so looking at the
10:39:59 14 limitations in each step, they don't require an order; they
15 would be non-ordered where it was not giving any meaning to
16 that term 'non-ordered' in the preamble.

17 And I note on EyesMatch's argument that a person of
18 ordinary skill in the art would consider 'non-ordered steps'
19 only to include steps b through d, I think that's not the
10:40:29 20 pertinent question; the pertinent question is looking at the
21 claims and what the claims require, that every term of a claim
22 has a specific meaning. But here EyesMatch's own person of
23 ordinary skill in the art took inconsistent positions. In
24 this case they said that the non-ordered steps were b through
25 d, but in the *Facebook* case where this declaration came from,

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1 they said that the non-ordered steps were b through d, but
2 then also f through h.

10:40:56 3 And so a person of ordinary skill in the art looking at
4 this specific construction is not able to tell whether -- what
5 the steps of the order are. So giving meaning to the
6 'non-ordered' term in this construction and the preamble,
7 which both parties have agreed need certain weight, is
8 important. And we can't do that here without deleting
9 'non-ordered steps' or rendering 'non-ordered steps'
10 superfluous, and so this term should be indefinite.

10:41:25 11 THE COURT: I do think that the way the claim is
12 constructed makes the only reasonable understanding of it that
13 'a' has to be first because you have to obtain an image before
14 you can do any of these other things, and that d makes clear
15 it identifies what the non-ordered steps are.

10:41:57 16 The 'wherein' clause immediately after --
17 I'm sorry--e.

18 The 'wherein' clause immediately after e refers back to
19 flipping, transformation mapping, and resizing as the
20 non-ordered steps. And I think that renders it fairly easy to
10:42:27 21 understand, even though it is a little confusing that the
22 preamble recites 'non-ordered steps'. But I don't think that
23 that makes the claim something that a person of ordinary skill
24 couldn't understand. But I understand the argument.

25 MS. WELSH: Yes. Thank you, Your Honor.

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1 And just on that point, too, under that interpretation of
10:42:56 2 the steps, 'non-ordered' is just providing clarity and adding
3 clarity to what the claims already require and what the
4 Federal Circuit already says about the steps and how they must
5 be performed. But clarity is not enough. Every term needs to
6 have a meaning, and with this proposed construction,
7 'non-ordered steps' just does not have the meaning.

8 THE COURT: All right. Thank you, Ms. Welsh.

10:43:37 9 MR. NELSON: One second, Your Honor. Apologies.

10 So to respond briefly, Your Honor --

11 William Nelson again on behalf of the Plaintiff.

12 The preamble does recite "performing non-ordered steps
10:43:58 13 comprising," but to respond directly to the argument that you
14 just heard that somehow 'non-ordered' in the preamble is
15 superfluous, has no meaning, is inconsistent, it's just not so
16 in view of plain language of the claims.

17 The preamble itself says what we have here is "a method
18 for operating a system so as to display a mirror mimicking
19 image on the monitor by performing non-ordered steps
10:44:29 20 comprising." The preamble tells you, How do I display a
21 mirror mimicking image on the monitor? Well, you perform the
22 non-ordered steps.

23 And the claim is quite clear about what those non-ordered
24 steps are in the way that you've described during counsel's
25 argument, which is that it is clear that a digital image is

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10:44:56 1 obtained, and then -- in step 1a, and then displayed in step
2 1e, but the mirror mimicking image is created by steps 1b
3 through 1d, which are, in fact, non-ordered and can occur in
4 any order. The specification imposes no order, the claim
5 language itself imposes no order on those steps; they just
6 -- the claim language requires, as you said, only that it
7 occur after step 1a and before step 1e.

10:45:28 8 And the claim repeatedly confirms which are the
9 non-ordered steps. They are, in accordance with step 1f and
10 1h, the steps that are performed on a series of images--again,
11 steps 1b through 1d.

10:45:58 12 I just want to address one more point, which is that you
13 suggested that the use of 'non-ordered' in the preamble
14 created some confusion, and counsel argued that, Well, we need
15 clarity. Well, that's not the law. The law says reasonable
16 certainty. *Nautilus* and the cases that follow it tell us that
17 what is required is reasonable certainty, and this claim
18 provides it. The plain language of the claims, particularly
19 in view of the specification that describes which steps are
20 the ones that mimic a mirror, can be performed in any order as
21 long as it occurs before the image -- or after the image is
22 taken and before it's displayed.

10:46:28 23 So this claim plainly meets the standard that actually
24 controls here, which is reasonable certainty.

25 Thank you.

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1 THE COURT: Thank you, Mr. Nelson.

2 And I should point out, just to make sure counsel
3 understand, the preliminary construction here is plain
4 meaning. The note is designed to let counsel know what the
5 claim construction order will reflect the Court thinks the
10:46:54 6 plain meaning is. So that note is not something that would go
7 to the jury as a construction; the construction will be plain
8 meaning. The intent of the note is to let you know what the
9 experts will be governed by in terms of the reasoning that
10 will be reflected in the order.

11 MR. NELSON: Thank you, Your Honor, for the
12 clarification. That is the understanding. I went into the
13 discussion with counsel, if -- I'll leave it to him whether
10:47:28 14 there is something to address there.

15 Thank you.

16 THE COURT: All right.

17 MS. WELSH: Thank you, Your Honor. Margaret Welsh
18 again with the Defendant Samsung.

19 And just one follow-up point on that with the plain
20 meaning going to the jury, I think that there's a question
21 here. We've all confirmed that 'non-ordered' in the steps is
22 -- in the preamble is confusing, and so providing a plain
10:47:59 23 meaning to the jury would not add the further clarity that was
24 needed.

25 Thank you, Your Honor.

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1 THE COURT: Well, if -- you know, the Court can put
2 together a construction that would pass all that on to the
10:48:20 3 jury, but unless one of the experts takes a different
4 approach, I don't see how the jury would be drawn into any
5 confusion about the use of 'non-ordered'.

6 MS. WELSH: And just on that note, Your Honor, I
7 don't know that -- we haven't gone into the infringement
8 expert reports yet, but Dr. Myler has testified that
9 'non-ordered steps' for the Defendants comprise at least steps
10:48:58 10 'a' through e. That would be the ordinary meaning of
11 'non-ordered steps'--that 'a' through e could be performed in
12 any particular order.

13 THE COURT: And he'll be prohibited from taking that
14 position at trial. If one of the experts takes a position
15 that's inconsistent with the claim construction order, you
16 know, I would expect that testimony to be stricken.

17 MS. WELSH: Understood. Thank you, Your Honor.

10:49:28 18 THE COURT: Thank you.

19 So the question is what is the next term you want to
20 address.

21 MS. WELSH: Your Honor, Margaret Welsh again with --
22 for the Samsung Defendants.

23 The next term we wanted to talk about was 'varying the
24 rate'.

25 THE COURT: Yes.

1 MS. WELSH: Thank you, Your Honor.

10:49:57

2 So to streamline the parties' positions here, Samsung's
3 proposed construction is "varying the rate at which two or
4 more of the non-ordered steps are performed on the series of
5 images." The question is whether the varying the rate
6 requires two or more steps or if only one step is required.

10:50:25

7 Defendants' construction is looking at the claim language
8 itself. If we look, the last term of this claim limitation
9 has "varying the rate at which the non-ordered steps,"
10 'steps' being plural, and then uses the plural verb
11 'are'--"are performed on a series of images." So clearly and
12 unambiguously the claim is requiring for varying the rate of a
13 plurality of steps, or two or more, as in Defendants'
14 construction.

10:50:55

15 Just to note on the case law with respect to the term
16 'the non-ordered steps' and construing 'the' to mean one or
17 more, EyesMatch cites to the case *Free Motion Fitness versus*
18 *CYBEX*. That claim is distinct -- that case--sorry--is
19 distinguishable here. The issue in that case was with respect
20 to 'a single cable' or 'the single cable', and noting that 'a'
21 or 'the' in that case when it referred to 'a single cable'
22 could mean one or more cables. Here the claim is not in the
23 singular, and we're not trying to read the plurality into what
24 is singular in the claim. Here the claim clearly requires
25 'non-ordered steps' being plural, and that they are performed,

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1 plural.

2 EyesMatch's construction to address the clear and
3 unambiguous claim language, they come up with this loop theory
4 saying that any one of the steps in the loop can be varied to
10:51:59 5 vary the rate of the non-ordered steps. But this theory is
6 inconsistent with the claims. It's reading a singular step
7 into a claim that clearly requires a plurality of steps.

8 Any questions, Your Honor?

9 THE COURT: Yes, Ms. Welsh.

10 Is your argument based just strictly on your
11 understanding of grammar, or is there something in the
10:52:26 12 specification that you think indicates that this step would
13 require two or more?

14 MS. WELSH: Thank you, Your Honor.

15 The problem with the specification, as Dr. Myler has
16 testified for the Defendants, is that it's really not clear
17 and it doesn't provide the written description or enablement
18 for this 'varying the rate' step. EyesMatch points to a part
19 of the specification where it's talking about updating
20 transformation parameters as the user gets farther and closer
10:53:00 21 to the screen, but it's really not talking about EyesMatch's
22 loop theory or one step in the theory being updated or varied.

23 And so, yes, the argument that I am making is with
24 respect to exactly what's listed in the claims because the
25 specification doesn't provide the needed clarity there.

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1 THE COURT: All right. Thank you, Ms. Welsh.

2 MS. WELSH: Thank you, Your Honor.

10:53:36 3 MR. NELSON: Thank you, Your Honor. Will Nelson on
4 behalf of the Plaintiff again.

5 The claim language here is found in 1h, "varying the rate
6 at which the non-ordered steps are performed on the series of
7 images," and that language 'on the series of images' is
8 important to understanding of the claim construction issues
9 here.

10:54:05 10 As we talked about in the dispute just prior to this, in
11 EyesMatch's view the non-ordered steps in the claim are steps
12 1b through 1d--that is to say, flipping, applying
13 transformation mapping, and resizing the image. And the
14 question is what does the claim tell us about how the rate at
10:54:29 15 which those steps, those non-ordered steps, are performed
16 vary. And the claim language itself makes very clear in step
17 1f that what's occurring is that these non-ordered steps,
18 steps 1b through 1d, are performed not once, not on one image,
19 but on a series of images from the live video feed on the
20 camera. To meet the claim, this set of steps must be
21 performed on a series of images, not one.

10:55:01 22 And so when counsel says, Oh, well, EyesMatch has
23 concocted a loop theory, I don't know what they mean by that.
24 The claim language says that these non-ordered steps are
25 applied on a series of images as the camera obtains digital

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1 images.

2 And the -- it's black letter law, and this is law that
3 Samsung Defendants have cited, that the enumerated steps of a
10:55:30 4 method claim must all be practiced in order to infringe. And
5 so it's quite clear in the plain language of the claim that
6 the rate at which the non-ordered steps are performed on the
7 series of images, as recited in claim 1f, can be varied by
8 skipping even one step on an image in the series.

9 So we've got an example here on this slide, which is
10 slide 7 of our presentation, in which what we see is the claim
10:55:59 11 against two images. The first image here, each of those
12 non-ordered steps 1b through 1d is performed. On the second
13 image, each of those steps are performed. The flipping,
14 applying a transformation mapping, and resizing are performed.
15 We have now performed this -- these steps on a series of
16 images, more than one. We've done it twice. That meets the
17 claim. That infringes.

10:56:27 18 But in a second example, for instance on slide 8, we see
19 that for the second image the process skips the transformation
20 mapping step. It doesn't perform it. The non-ordered steps
21 have not been performed on a series of images in this case.
22 That is how the rate may be varied--skipping even one step.

23 And the plain language of the claims makes this clear,
24 but the specification does, too. On slide 9 we've got the
10:56:59 25 '109 Patent at column 27, lines 41 to 63. The specification

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1 discloses embodiments in which the rate that the non-ordered
2 steps are applied is varied by skipping only the
3 transformation mapping. It says right here--and this is the
4 discussion of varying the rate that both parties have
5 addressed in their briefing--Another feature that may be
6 implemented is the frequency of transformation parameter
7 updates. And it says, According to one embodiment, if the
8 user removes amount of less than, say, 25 centimeters, the
9 transformation mapping is performed at a lower speed, less
10 frequently. It doesn't say anything about the flipping and
11 resizing; just the transformation mapping is by varying. So
12 the specification tells us that by varying one step of those
13 non-ordered steps, you can vary the rate at which they're
14 performed.

10:57:30 15 This argument about the plural that you just heard that,
16 Well, because the claim says 'non-ordered steps' in the
17 plural, more than one of them must be varied, that can't be
18 squared with the actual claim language which says that what
19 you're doing is performing those steps on a series of live
20 images from the camera. And it's black letter law that
21 excluding that embodiment isn't proper, absent some persuasive
22 evidence to the contrary.

23 That's the end of my presentation, Your Honor.

24 THE COURT: All right. Thank you, Mr. Nelson.

10:58:39 25 MS. WELSH: Just one point, Your Honor.

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1 I think EyesMatch's argument makes clear how clearly
2 they are reading the claims not to meet the plain and ordinary
3 meaning of how the claims are drafted and to take out the
4 plurality requirement of the claim.

10:58:56

5 And going to the specification that EyesMatch talked
6 about that I mentioned earlier, EyesMatch points to this part
7 of the specification as requiring -- as only requiring varying
8 the rate of transformation mapping step. However, as I
9 mentioned earlier, this part of the specification is talking
10 about when a user gets closer to a screen or farther away from
11 the screen. As EyesMatch has already said in its briefing,
12 when a user's distance changes frequently, they're going to
13 have resizing the image to reduce the variations cause, which
14 must occur more frequently.

10:59:28

15 And so while the spec does not provide clarity for
16 varying the rate, this part of the specification it's not
17 clear if we're talking about transformation mapping being
18 varied or something more; resizing the image as well as this
19 transformation mapping.

20 Thank you, Your Honor.

10:59:53

21 THE COURT: All right. Thank you, Ms. Welsh.

22 MR. NELSON: Your Honor, Will Nelson again.

23 If it's acceptable, I think we can move on to the next
24 term.

25 THE COURT: All right.

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1 MR. NELSON: And that is 'adaptive transformation
2 mapping'.

3 Now, we've been through the discussion of 'transformation
4 mapping'. The Court's proposed or preliminary construction
11:00:26 5 here is 'a continuously variable transformation mapping'. And
6 the issue for EyesMatch is that it's not at all clear what
7 Defendants mean by 'continuously variable'. As we'll see in
8 their briefing, they have denied that 'continuously variable',
9 which is their term --

10 THE COURT: It's the patentee's term.

11 MR. NELSON: Yes. But the point is that they have
11:00:59 12 equated that with real time, meaning real time or continuously
13 varying the parameters in real time. Now, they've said that's
14 not what their construction is; it just means 'continuously
15 variable; that it must continuously change across the
16 operation of the system. But their own expert has made quite
11:01:27 17 clear--and I'm on slide 15--that 'continuously variable' means
18 changing in what he calls real time. This is the declaration
19 of Defendants' expert Dr. Myler. He says, "This means that
20 the FOV"--field of view--"must change in real time and, as
21 such, must be continuously variable." And again, at paragraph
22 95 of Dr. Myler's report, "The system must continuously vary
23 in real time".

24 There's a problem there, Your Honor. If that's what
11:01:59 25 Defendants mean by 'real time', that excludes embodiments

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1 disclosed in the specification--and here I'm on slide 16--in
2 which it's quite clear that the transformation mapping can
3 vary is a semi-real time. And again, we are here looking at
4 the portion of the specification in which there's a discussion
5 of varying the rate of performing the steps.

6 The specification makes very clear that one
7 embodiment--and there's no evidence that that embodiment is
11:02:29 8 somehow disclaimed, disparaged or excluded; in fact, it's
9 claimed in the '109 Patent explicitly--in which what's
10 happening is that the transformation parameters are varying
11 not in real time, which is what Defendants appear to say
12 'continuously variable' means, but, in fact, slower than
13 that--in semi-real time. There is no basis to exclude this
14 embodiment if that's what Defendants contend 'continuously
15 variable' means.

11:02:58 16 Now, as a matter of fact, the patent here--and I'm on
17 slide 13--makes quite clear, although the Defendants have
18 relied upon this use of 'i.e.', "adaptively, i.e.,
19 continuously variable," and Defendants have equated that with
20 'changing the parameters in real time'. The specification
21 makes quite clear here that 'adaptive transformation' and
11:03:28 22 'real time transformation' are two different concepts.

23 So it can't be what Defendants say 'continuously
24 variable' means. It's not in real time. That would -- that
25 is both contrary to this passage in the specification, and

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1 it's contrary to the disclosed indictment in which the
2 parameters are varying not in real time, but are actually
3 slowed down.

11:03:59 4 And so, in our view, what it means to be an adaptive
5 transformation, based on the plain language of the claims in
6 the specification, are that you're adapting to the changes or
7 adapting to what the user is doing in the stream of images.
8 The claim tells you that you're generating a stream of images
9 of the user, you're detecting the presence of the user, and
10 once you've done that, you apply an adaptive transformation
11 mapping. 'Adaptive' here means adapting to what the system
11:04:28 12 perceives in front of it, which is the user and their changes
13 in motion.

14 The specification makes very clear what 'adaptive' means.
15 It means based on tracking the position of the user. This is
16 at column 15, lines 55to 58. Again, at column 23 the
17 specification makes clear that what drives the image
18 transformation process is the presence of the user; them
19 coming into the scene, them leaving the scene, them moving
20 forward and moving back.

11:04:59 21 Now, it is the case that there is one part of the
22 specification that says "adaptive, i.e., continuously
23 variable," and Defendants have relied upon that as an active
24 lexicography that cannot be overcome. Well, the first thing
25 to note is that the 'adaptive' use here is in connection with

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1 only the field of view, not in connection with 'transformation
11:05:29 2 mapping' generally. And I disagree -- we disagree that the
3 patentee acted as the lexicographer with respect to 'adaptive
4 transformation mapping' by doing that, in particular, if
5 'continuously variable' means in real time, which it cannot in
6 view of the specification.

7 And the law is clear--this is the *Pfizer* case we
8 discussed in our briefing--that 'i.e.' alone, particularly
9 where the intrinsic evidence, such as the claim language and
11:05:57 10 the language of the specification tells you something
11 different, cannot be the basis for a limiting construction
12 like this. This is the *Pfizer* case.

13 And again, the -- to the extent that Defendants contend
14 that 'continuously variable' has to mean 'real time'--and
15 that's what they contend; that's what their expert
16 said--that's excluded by the specification. Adaptively and in
17 real time, two different concepts.

18 THE COURT: Well, there's certainly nothing in the
11:06:30 19 preliminary construction that endorses real time. Are you
20 suggesting that that is a dispute that the Court needs to
21 resolve?

22 MR. NELSON: Well, I think that is precisely
23 Defendants' position about what 'continuously variable' means,
24 and I expect we'll see in an expert report that 'continuously
25 variable' means 'real time' with the *imprimatur* of the Court,

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11:06:58 1 so I do think that it needs to be resolved here.

2 THE COURT: Well, it certainly is, to some extent, a
3 question of fact and technology that typically the experts
4 would weigh in on from a claim construction standpoint. I'm
11:07:28 5 not sure the record is clear enough about what 'real time'
6 means in this context compared to 'continuously variable', but
7 I do think that 'continuously variable' means something more
8 than just adapting to a change.

9 MR. NELSON: I understand that point, Your Honor.
11:07:55 10 And if we reach a point where it's clear that the construction
11 does not adopt 'real time' as synonymous with 'continuously
12 variable', I think it does become what you suggested, which is
13 a question for the experts to opine on and the jury to
14 resolve. But what I don't want to leave here today is with a
15 ruling that seems to adopt what Samsung clearly says, which is
16 that 'continuously variable' means 'real time'.

17 THE COURT: All right.

18 MR. NELSON: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Nelson.

11:08:47 20 MS. WELSH: Your Honor, Margaret Welsh for
21 Defendants with respect to the adaptive transformation term.

22 And Defendants will rest largely on their briefing. I
11:08:58 23 think that our briefing is clear with respect to
24 transformation mapping and being continuously variable. The
25 'continuously variable' is consistently used throughout the

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1 specification as being adaptively -- transformation variable
2 talks about continuous tracking adaptive POV and adaptive FOV.

3 I'm happy to answer any questions, Your Honor.

11:09:27 4 THE COURT: Can you point to anything in the
5 specification that would define 'continuously variable', as in
6 'real time'?

7 MS. WELSH: I cannot, Your Honor, at this moment.

8 And as our briefing made clear, I don't think -- I think
9 that EyesMatch is conflating 'continuously variable' and 'real
10 time' to argue against the 'continuously variable'
11 construction. In our briefing we noted that 'continuously
12 variable' and 'real time' are different. 'Continuously
11:09:57 13 variable' means that something can be varied continuously, one
14 after another without discreet pauses, and so I don't think
15 that there is an issue with that.

16 THE COURT: All right. So you're not contending, in
17 other words, that 'continuously variable' means in 'real
18 time'.

19 MS. WELSH: Correct, Your Honor.

20 THE COURT: All right. Thank you, Ms. Welsh.

21 MR. NELSON: Your Honor, I don't have a further
22 response to that.

11:10:27 23 And I believe -- and I'll ask counsel to confirm. I
24 believe that takes us through what the parties intend to argue
25 today.

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1 MR. VILLARREAL: We agree, Your Honor.

2 THE COURT: All right. Well, thank you for the
3 arguments. They have been helpful. And I will consider them
4 further and try to get a claim construction order out
5 promptly.

6 And with that, we're adjourned. Thank you.

7 (End of hearing.)

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