

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

HANSHOW TECHNOLOGY CO., LTD.,)
Plaintiff,) Civil Action No.
SES-imagotag SA et al) 2:23-CV-00174-RWS-RSP
Defendants.)
_____)

OFFICIAL TRANSCRIPT OF PROCEEDINGS - MARKMAN HEARING
BEFORE MAGISTRATE ROY S. PAYNE
December 13, 2024, 1:30 p.m.
MARSHALL, TEXAS

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1 WHEREUPON. . .

2 The following proceedings were had beginning at
3 1:32 p.m.:

4 THE COURT: For the record we're here for the
5 Claim Construction Hearing in Hanshow Technology versus SES,
6 which is case number 2:23-174 on our docket.

7 would counsel state their appearances for the record.

8 MR. ACOSTA: Matt Acosta for defendants with my
9 colleague Alex Jacobs, and Grant Kinse].

10 THE COURT: All right. Thank you, Mr. Acosta.

11 MR. CULBERTSON: Good afternoon, Your Honor.
12 Geoff Culbertson for Hanshow Technology. And today with me
13 I have Gary Hnath --

14 MR. HNATH: Good afternoon, Your Honor.

15 MR. CULBERTSON: -- and Brady Nash from Mayer
16 Brown, and then from the Arch Lake Firm I have Shen Wang and
17 Hao Tan. And we also have a client representative, Mr. Yang
18 Zhao (phonetic) from Hanshow. And we're ready to proceed.

19 I didn't make it upfront to drop off our materials.
20 May I approach to do that?

21 THE COURT: Yes, Mr. Culbertson.

22 MR. CULBERTSON: Thank you.

23 THE COURT: Go ahead. I will also note for the
24 record that earlier this afternoon we distributed to counsel
25 for both sides a set of preliminary constructions of most of

1 the disputed terms. The intent of those preliminary
2 constructions is not to prevent either side from arguing
3 whatever position they think is appropriate; rather the
4 intent is to let counsel know where the Court is after the
5 initial review of the briefing in the record so that you can
6 focus your arguments where you think the Court has most
7 missed the mark.

8 I do reserve the right to alter these preliminary
9 constructions and not uncommonly do change them based on
10 the arguments received at this hearing. So I hope that
11 they will be taken in that spirit.

12 I would like to have the terms argued on a
13 term-by-term basis, but I'm happy to take them in whatever
14 order counsel think is most efficient. And certainly if
15 the terms are closely related, I'm happy to group them
16 however counsel think they should be.

17 So having said that, I'll turn it over first to
18 counsel for plaintiff.

19 MR. TAN: Your Honor, this is Hao Tan from Hanshow
20 for plaintiff.

21 THE COURT: If you would speak at the microphone,
22 I'll be able to hear you much better.

23 MR. TAN: Thank you, Your Honor. So I represent
24 the first three terms, because they're kind of related to
25 each other, if I may.

1 THE COURT: Yes. Go ahead.

2 MR. TAN: So the first three terms are in the '216
3 patent, which is about interactive electronic tag device
4 communication system and method. The system includes
5 background server, base station, tag device, and external
6 device. They're showing on the screen. On slide three
7 they're basically two examples of this system.

8 THE COURT: If you would speak a little louder or
9 closer to the microphone, I'll be able to hear you better.
10 You're very soft spoken, and I'm very old.

11 MR. TAN: Sorry about that, Your Honor. I'm just,
12 you know, not used to this. I try my best.

13 THE COURT: I understand.

14 MR. TAN: So on slide four, you know, I think we
15 have the parties position about claim construction.
16 Actually in the IPR proceeding the defendant's expert
17 adopted and stated that he will give all the claims terms
18 plain and ordinary meaning.

19 And Hanshow actually generally agrees with the
20 preliminary construction adopted at this stage that's in
21 the preliminary construction order for all these three
22 terms.

23 That being said I would like to point out a slight
24 potential nuance in the third term about the base station
25 comprises two wake-up modes, a normal wake-up mode, and a

1 fast wake-up mode. If I may, I will jump to that term.

2 So as stated here, you know, alternatively Hanshow's
3 position for this term, the first part is pretty much the
4 same with the Court's preliminary construction. But for
5 the second part, we generally also agree with the Court,
6 but we think we may just say, well, in the base station
7 sets a wake-up duration that is longer than the monitoring
8 period of the normal monitoring period, and the fast
9 wake-up mode wherein the base station sets a awake-up
10 duration that I think we can just maybe stop there without
11 saying that it has to be longer than the monitoring period
12 of the fast monitoring mode.

13 The reason is that here the fast wake-up mode is
14 compared to the normal wake-up mode, just as the fast
15 monitoring mode is compared to the normal monitoring mode.

16 So if we could maybe change the last -- the end of
17 the current preliminary construction, I think that may
18 better to be more consistent with what the patent
19 disclose.

20 THE COURT: You know, we're drawing on the
21 disclosure in column 1 starting at around line 32 of the
22 '216, which is discussing the wake-up duration. And that's
23 where that language comes from. And that's the closest
24 thing that I've been able to see in the specification about
25 this term.

1 MR. TAN: Your Honor, we agree with your
2 observation here. And showing on the screen also on slide
3 31 we do have this section highlighted in section one
4 talking about the wake-up duration which is slightly longer
5 than the monitoring period of the tag device.

6 Showing also on the screen on the right side we have
7 the other sections talking about the fast wake-up mode and
8 normal wake-up mode. So on the right side on the top of
9 slide 31, The base station is further configured to
10 receive the control instruction and the second data,
11 communicate with the electronic tag device in the fast
12 wake-up mode.

13 So there, which is also actually showing by the tag
14 tutorial of the defendants, you know, the fast wake-up
15 mode basically kind of work or corresponds to the fast
16 monitoring mode in the tag device, which I also see this
17 in --

18 THE COURT: How does the section that you were
19 just referring to there from column 4 inform the issue of
20 what the fast wake-up mode is?

21 MR. TAN: Your Honor, from a POSITA's perspective
22 the fast wake-up mode is using the normal wake-up mode as a
23 reference. So the fast is compared to the -- is about the
24 monitoring -- the wake-up period, the duration. Wake-up
25 duration is compared to that of the normal wake-up mode.

1 THE COURT: All right. And so what you are
2 proposing should be done to the preliminary construction is
3 what again?

4 MR. TAN: I think in the end of the preliminary
5 construction maybe we don't need to say that it's longer
6 than the monitoring period of the fast monitoring mode.

7 THE COURT: All right. I understand that request,
8 and I'll consider it further. Thank you.

9 MR. TAN: Thank you, Your Honor.

10 THE COURT: I didn't mean to interrupt your
11 argument. I just wanted to make sure I knew what that
12 suggestion was. So go ahead.

13 MR. TAN: Yes, Your Honor. I will show a few more
14 slides on these two terms about the wake-up modes.

15 So here on the right side of Figure 3 on slide 30,
16 it's an example embodiment which also shows on the left
17 side. There's a small figure -- there's a small step,
18 numerical number 5, issuing an instruction in the fast
19 wake-up mode, base station, and then send that to the tag
20 device and the tag device receiving the instruction and
21 entering the fast monitoring mode on that end.

22 So as stated in the slide subject, the specification
23 describes this two wake-up modes corresponding to the two
24 monitoring modes on the tags end.

25 So I understand Your Honor's reasoning using the

1 language from the section one. And we generally agree
2 with that, but I just don't think, you know, we need to
3 further limit, you know, the fast wake-up mode which is
4 duration, because I think, just as Your Honor construed
5 the first two terms about the normal monitoring mode and
6 fast monitoring mode, here the normal wake-up mode and
7 fast wake-up mode can use the normal wake-up mode as an
8 objective boundary to construe its scope.

9 THE COURT: All right. Thank you.

10 MR. TAN: Thank you, Your Honor. I pass to the
11 defendants on --

12 THE COURT: On these three terms?

13 MR. TAN: Yes.

14 THE COURT: All right. Thank you, Mr. Tan.

15 MR. TAN: Thank you, Your Honor.

16 MR. ACOSTA: Good afternoon, Your Honor.

17 THE COURT: Good afternoon, Mr. Acosta.

18 MR. ACOSTA: I think we, too, will only, at least
19 for the '216 patent, will be arguing A through C on the
20 Court's preliminary construction. So I believe those are
21 the ones that Mr. Tan just addressed, and I think we'll
22 stand on the briefing as to D and E for the '216.

23 THE COURT: As to which?

24 MR. ACOSTA: The D and E, so fast wake-up
25 instruction and external device.

1 THE COURT: All right.

2 MR. ACOSTA: So I think it's helpful for -- just
3 to state here what our general view of what this invention
4 and patent is about. And so obviously you've seen the
5 patent, you've seen the title, and you know it involves
6 electronic tag devices. I'm going to call them tags for
7 everybody's convenience. It seems the parties have accepted
8 that convention.

9 Okay. So Mr. Tan put up Figure 1 and -- or Figure 3,
10 and we saw that and I have that as well, and we'll talk
11 about it a little bit. You look at Figure 1 and you look
12 at Figure 2, and essentially this is a data flow at its
13 core that starts from an external tag device on Figure 1,
14 moves what I'll call upstream through the base station and
15 the background server, cause that first data that's moving
16 upstream, starts with the external device, moves all the
17 way to the background server.

18 Then the background server takes that first data,
19 changes it into second data, and creates something called
20 a control instruction, and pushes that back down to the
21 base station. Then the base station takes those two
22 pieces of information and generates what the patent refers
23 to as the fast wake-up instruction. It sends those back
24 down to the electronic tag in the downstream flow.

25 The electronic tag gets them and then goes back to

1 the normal monitoring mode. And so that's underlying the
2 invention.

3 Now, then we get to the normal monitoring mode, the
4 fast monitoring mode, the normal wake-up mode, and the
5 fast wake-up mode. And the question really for all four
6 of these things is, what are those, in light of the
7 specifications and as a POSITA may otherwise understand
8 them to be?

9 And besides -- I'll start by saying in Hanshow's
10 briefing, besides saying a POSITA would understand what
11 these things are in light of the specification, there's
12 really no contention -- and we have no contention -- that
13 outside of the specification in the general understanding
14 in the art, that any POSITA would know what naturally a
15 normal monitoring mode, fast monitoring mode, normal
16 wake-up mode, and fast wake-up mode would be. So outside
17 the context of the patent.

18 So for all of these things we have to look at what
19 the disclosure actually says in the specification. And
20 then also I think very importantly here in light of the
21 claims, because the claims tell us actually a lot about
22 what or what not these terms do and mean.

23 So we'll go to normal monitoring mode. And we
24 appreciate very much that the Court has endeavored to
25 construe these terms, because we believe that there are

1 serious disagreements between the parties as to each one
2 of these three terms.

3 Normal monitoring mode the Court largely adopted
4 Hanshow's construction talking about the relative
5 monitoring periods of the normal and fast monitoring
6 modes. And this goes to what we discuss as the second
7 dispute. And I will get there in a second.

8 The first dispute, which I think is much easier to
9 address, is whether normal, in this context and in context
10 of the specification, means a default mode. And the Court
11 retained the word normal in its proposed construction.
12 And my first question for the Court is, Is it using the
13 word normal in the sense of default? Because that's
14 really the disagreement between the parties.

15 We think the specification and then also the
16 extrinsic evidence is absolutely clear that normal is a
17 default. And if the Court is questioning, Oh, what
18 distinction are you talking about, everybody would know
19 normal to be default. Well, we think so, too. We
20 absolutely think so, too, in light of the specification.

21 And the reason why this invention must work that day
22 is just its very nature. This invention begins -- these
23 claims begin upon a data interaction from the external
24 device to the tag, and the rest of the time before this
25 invention is even implicated the tag is supposed to be,

1 and the way the specification talks about it, in its
2 normal monitoring mode. And so the distinction between
3 normal and fast, right, is not simply, oh, one is
4 different than the other at any given time period. Right?
5 Just because incidentally you have something switching
6 between a shorter monitoring period, a longer monitoring
7 period, a shorter monitoring period incidentally doesn't
8 make it normal.

9 According to the specification what normality means
10 is default. You were there. You were in normal
11 monitoring mode until this data interaction happens and
12 then things change, according to the claims, according to
13 Figure 1, 2, and 3. And so that's why we stress default.

14 THE COURT: When you use default, are you using it
15 with some meaning that requires that there be some
16 affirmative presetting? And part of my concern about
17 default is that it injects another word that has other
18 possible meanings, and I don't know that it improves on
19 normal. Tell me what you understand by default.

20 MR. ACOSTA: So what default means is that it is
21 the base -- and I'm going to use more words to define
22 default, but I think default is clearer than normal. But it
23 is the base state of these tags. It is the monitoring mode
24 that is the foundational state of the tags before a data
25 interaction. And these are not my words or defendants'

1 words. These are words that are used by Hanshow's expert.
2 These are words that are used explicitly in the patent. So
3 you look at the specification 451 through 54.

4 By default the electronic tag device performs
5 monitoring in a normal monitoring mode. And that's where
6 we're taking that word from, because, you know, it's
7 consistent with the way this invention is supposed to
8 work.

9 And then Mr. Sourì -- or Dr. Sourì, excuse me, has in
10 his expert report that, for example, the normal monitoring
11 mode is the default or normal state of the electronic tag
12 device.

13 Now, Your Honor, I just want to say something. If
14 the Court tells me today that normal -- and/or if Hanshow
15 agrees that normal and default are essentially synonyms,
16 then I don't think we have a dispute anymore, because our
17 understanding of the dispute is that Hanshow wants normal
18 to mean something besides default. And we're not quite
19 sure what that is, but --

20 THE COURT: I don't think you have yet told me
21 what you understand the default mode to be. Does that have
22 to be something that is hardwired in? Does it have to be
23 something that is preset in accordance with certain design
24 parameters? Or is it just the way the device normally
25 operates?

1 MR. ACOSTA: I think -- so a lot of those, I
2 think, are overlapping. The idea is that, you know, you've
3 constructed a system of tags and it operates some way, and
4 you have a monitoring mode which has something to do with
5 the monitoring periods.

6 And this system is constructed, operates, in such a
7 way where most of the time it is in its normal monitoring
8 mode. And by that I simply mean that it's its natural --
9 I'm trying to find different words than default -- but its
10 default state. And then the invention happens --
11 right? -- which starts with a data interaction from an
12 external device.

13 Now, you know, it could have been 20 years that this
14 tag was in a normal default monitoring mode and then all
15 of a sudden here comes the external device. The data
16 interaction happens and that causes the tag to enter its
17 fast monitoring mode as the claims and the specifications
18 describe.

19 Does that clarify what I mean by default?

20 THE COURT: well, it is, I think, a fairly
21 ordinary understanding of normal, that normal is the mode in
22 which it operates other than when it's moved into the fast
23 mode. I'm not sure how default improves on that.

24 MR. ACOSTA: And that's why I said earlier if that
25 is the understanding of the Court that normal and default

1 are essentially synonyms and that is the understanding of
2 Hanshow, I'm not sure that we have a dispute. Our concern,
3 very real concern, I believe, is that what normal will
4 ultimately come up in an expert report, you know, if it's
5 simply retained, what that will end up meaning is not fast.
6 And that's it. Right?

7 And so anything other than a different state of the
8 tag device -- right? -- is a normal state, and anything
9 that has characteristics of the fast state is not a normal
10 state, and back and forth. And so the natural state, the
11 default state, the base state, of the tag at that point
12 really doesn't matter. Right? It's just, oh, I'm not
13 that. It doesn't matter how long I am, it doesn't matter
14 data interaction, nothing. It just means I am not that at
15 any moment in time, and I'm normal. Right?

16 And so that's the concern that we have, because
17 default makes it very clear that there is a constant state
18 of the tag device, at least as far as monitoring goes,
19 that is disturbed only when this data interaction begins.

20 And then, you know, according to the claims it enters
21 a fast monitoring mode, which we'll talk about in a
22 second.

23 THE COURT: Is it part of your position that this
24 default mode is a mode that doesn't change? In other words,
25 it doesn't vary? That if the device has a monitoring mode

1 that varies based on certain events, that would not be a
2 normal mode?

3 MR. ACOSTA: Let me -- I hope this answers your
4 question. It is not from a practical matter or what we
5 believe the state of the art that the inventors of this
6 patent are talking about when they're writing their
7 specification. It is not simply the reality that these tags
8 with monitoring periods and modes and whatever they are, are
9 static in terms of electronic processes at all.

10 I mean, I will tell you in reality -- right? -- all
11 kinds of things can change these processes incrementally;
12 sometimes a lot, sometimes a little. For example,
13 temperature. Right? Other electronic interference.
14 Right? And so it is certainly not our position -- and in
15 fact we think our constructions -- and I'll get to more of
16 this later -- actually reflect the reality that these tags
17 are not absolutely static devices.

18 what I mean by default here is that this is -- you
19 know, whoever programs the tag -- right? -- supposed to be
20 the state that the tag stays in until the data interaction
21 that's talked about in this method in the system in the
22 patent occurs. And then at that point the claims start
23 and we get to a fast monitoring mode at some point, or at
24 least that's what the claims say.

25 And then we go to the end and the claims say it

1 returns to the normal monitoring mode, and that continues,
2 continues, until the next data interaction, and then all
3 of a sudden we go to fast according to the claims again.

4 And so we're not reading any -- if the Court is
5 concerned we're reading anything else into default besides
6 simply saying that this is the natural state of the tag
7 until disturbed by the data interaction, we're not.
8 That's simply what we mean.

9 what we are concerned about is that simply there
10 being two different what you can identify or might call
11 modes means that you can say, oh, this different thing,
12 this different state of the tag, regardless of whether
13 it's default or the natural state of the tag, is a normal
14 mode. And that is not what's intended, discussed, or
15 supported by anything in these patents.

16 So if that's not actually a dispute, then we're fine.
17 And that's why I say if normal and default are essentially
18 synonyms, there's no dispute.

19 THE COURT: Help me out. I just want to hear it
20 again. Your concern is that what will be argued to be the
21 normal mode?

22 MR. ACOSTA: Okay. So let me give you an example.
23 And this example is not taken from either of our systems
24 based on where we are in this case right now. I am just
25 going to give you the example.

1 Imagine there is what you would consider the state
2 that a tag is in; I'll call it default, what we've been
3 talking about. Right? Then there is a second state of
4 the tag, or let's say there's a natural fluctuation that
5 happens just because of the programming, and the
6 monitoring period changes. Okay? And then there is a
7 third state of the tag that is either intended or is a
8 third way where the monitoring period fluctuates. Right?

9 And the only way that someone accusing infringement
10 can argue that one of those three is a normal monitoring
11 mode for any reason is the second -- or between normal and
12 fast is between the second and third scenario. Right? So
13 not what is considered the default. Not what was
14 programmed as the default.

15 But simply saying, oh, we have a third monitoring
16 period that was either incidental or intentional and then
17 we have a not the third monitoring period but the second
18 monitoring period that is incidental and, therefore, we
19 have a normal monitoring mode and we have what we're going
20 to call the fast monitoring mode.

21 Neither of those things are the default mode. They
22 just happen to be different from each other. And that is
23 really what we're worried about. Simply being different
24 doesn't make it normal, is really what it comes down to.

25 THE COURT: And in your opinion what makes it

1 normal is the way it was programmed to operate?

2 MR. ACOSTA: I mean, yes. If you're creating the
3 system, the default mode would be, you know, where you are.
4 If it's a monitoring mode it would be where the tag is in,
5 the state it's in, until you have this data interaction.

6 And if that's an intention of the programming -- I
7 think naturally it would be, right? -- then that is, you
8 know, normality is default, where it is before there's the
9 data interaction.

10 THE COURT: So --

11 MR. ACOSTA: But I think the spec and the experts
12 all call it default.

13 THE COURT: Under the scenarios you're talking
14 about, a device could be programmed to operate one way, but
15 because of the environmental influences you mentioned, it
16 actually typically performs differently.

17 MR. ACOSTA: I think that happens all the time.

18 THE COURT: So what is the normal monitoring mode
19 in that situation? The way it's operating or the way it was
20 designed to operate that it doesn't really operate?

21 MR. ACOSTA: Well, it's -- and this is -- I'm glad
22 you brought up that problem, because this is a real problem
23 later on. And that's why I will, as a footnote, I will say
24 we identified fast monitoring mode as indefinite. Right?
25 We did not identify normal monitoring mode as indefinite.

1 And the anchor that makes normal monitoring mode not really
2 indefinite either, or not really indefinite, is that it is a
3 default.

4 So to answer your question, if for some reason, you
5 know, there are situations where monitoring periods are
6 changed because of environmental factors, because of some
7 other factors not having to do with, you know, this system
8 or whatnot, then the default mode is, yes, what you
9 intended, what the programmer intended, for this tag to be
10 in a state. Right?

11 And of course, I mean, this is a patent infringement
12 case, so method, system, whatever, until there's a data
13 interaction. And then you can -- you know, we can go on
14 to the other claim terms and, according to the claim,
15 you're supposed to change, switch, to a fast monitoring
16 mode.

17 But what normality is, is, you know, if you program
18 the system, the system operates by default in this
19 monitoring mode. And, you know, I understand the concern,
20 I really do, about how this adds anything to normal.

21 I think the POSITAS, Hanshow's expert, certainly our
22 expert, and then those inventors that are writing the
23 specification, they don't have trouble with the word
24 default. They use it, and that's what they use -- they
25 use it specifically to describe the normal monitoring

1 mode.

2 So if the question is we're trying to construe what
3 normal monitoring mode is and we focus on normal and
4 there's a dispute about what exactly does that mean, which
5 there is here, default is what I think every POSITA that
6 has made an appearance in this case, either through the
7 patent or otherwise, has described this normal monitoring
8 mode as.

9 THE COURT: I understand the way in which people
10 substitute words. But they're not always taking into
11 account the effect that has on proving infringement of a
12 claim. And if you're talking about determining what the
13 intent of the creator of the device was, that's a little
14 different than determining what the ordinary operation of
15 the device is.

16 MR. ACOSTA: I'm not saying that at all. I don't
17 think that the test is intentioned. Certainly not I don't
18 think the test is intentioned. I think with fast monitoring
19 mode, that's when you get in trouble with intention. And
20 we'll talk about that.

21 But the idea is you're programming it. Right?
22 You're programming it. And it doesn't matter what your
23 intention is. You write a program, and the program says
24 you're going to be -- you're going to be monitoring for
25 communications at intervals, which was essentially what

1 we've proposed as a construction, and you're going to be
2 monitoring for communications at intervals and you're
3 going to be doing that, or at least attempting to do that,
4 until there's some sort of data interaction, at which
5 point there's going to be some switching to fast
6 monitoring mode.

7 And then after that interaction is over with or
8 complete, you're going to go back to this default normal
9 monitoring mode. So, you know, if there's natural
10 fluctuations between it -- right? -- what it was
11 programmed to do is to do exactly what it did -- right? --
12 which is stayed in this program state until there's a data
13 interaction and then it changes to some different state
14 and then it comes back to the original program state.
15 Right?

16 So I think at least for this one, this term "normal
17 monitoring mode," you can identify, okay, this is the mode
18 where this tag is going to be in most of the time until
19 something external happens. And that's the way it was
20 programmed. It's going to be in this state most of the
21 time. That's the way it's programmed. Something external
22 happens and it changes state.

23 And so that's what we mean by normal and default.

24 THE COURT: I do think that normal carries with it
25 the connotation that it is the state most of the time, and

1 whether that is actually something that was programmed or is
2 just the way in which the device normally operates is the
3 concern I have about the use of the word default.

4 MR. ACOSTA: Okay. I understand. And I don't
5 think for this term we're really concerned with incidental
6 operation, because default, I think, implies some
7 programmed -- and I'll use the word intention. But what I
8 mean by that is you programmed it to do this thing. The
9 instructions you put into the program are supposed to be the
10 default state.

11 So by intention I simply mean is when the programmer
12 is programming, this is what he meant. This is what he
13 put down in the program. And that's -- it's going to stay
14 here until the external -- the external interaction
15 happens.

16 THE COURT: By design is what you're --

17 MR. ACOSTA: Yeah.

18 THE COURT: -- communicating?

19 MR. ACOSTA: No. Exactly. Exactly. By design
20 this is the way whatever system you're programming, whether
21 it be infringing meeting the claims or not, by design this
22 is going to be the state that the tag stays in all the
23 time -- I won't even say most of the time -- all the time
24 until there's some external data interaction, at least
25 within the context of this invention and these claims.

1 Okay.

2 THE COURT: If a device had multiple modes, one of
3 which was a fast mode that was what is described in this
4 invention, would the fact that there are multiple designed
5 modes take it outside the scope of this claim?

6 MR. ACOSTA: That there are multiple designed
7 modes. Actually that possesses a very big issue that I want
8 to address, and that goes with fast monitoring mode.
9 Because you could design systems that have as many modes as
10 you want. Right? And those -- each one of those modes may
11 affect things that are talked about in this patent like
12 battery life, like responsiveness, et cetera, et cetera.

13 However, not all those modes would be either normal
14 monitoring modes or fast monitoring modes as described in
15 this patent, nor do they necessarily achieve or fail to
16 achieve the results that are talked about in this patent.

17 And talking in the abstract, I think, is kind of
18 difficult, so I do have examples in a second with respect
19 to fast monitoring mode.

20 But this is the -- as far as normality goes and
21 default, I think that's my argument and that's what I
22 would urge the Court to consider when final constructions
23 come out. I just don't want to end up looking at an
24 expert report and then arguing, oh, normal doesn't mean
25 something other than default, because I'm seeing some

1 construction of it in an expert report that says, oh,
2 normal simply means different than the other thing,
3 different than the other mode. And that's our concern.

4 So any other questions, Your Honor?

5 THE COURT: Well, I don't know if you're going to
6 get there, but I would like to hear your reaction to the
7 suggestion that the plaintiff has made about the preliminary
8 construction C.

9 MR. ACOSTA: Yes. I can start there and come back
10 to fast monitoring mode if you would like. But I would like
11 to address at some point the second part of the Court's
12 construction, which I think came from Hanshow's
13 construction, that normal means monitoring period longer
14 than fast and fast means monitoring period shorter than
15 normal.

16 I'd like to address that, but I can move directly to
17 C if you would like.

18 THE COURT: I just wanted to make sure you were
19 going to get there.

20 MR. ACOSTA: Absolutely. I just want to make sure
21 I've answered all your questions on this first dispute.

22 THE COURT: I think you have.

23 MR. ACOSTA: So I'm going to -- first of all, we
24 proposed a construction for normal monitoring mode that was
25 essentially, you know, the tag is listening for

1 communications, is monitoring for communications, at
2 intervals, and we think that all the intrinsic evidence says
3 that that is the definition of a monitoring mode.

4 A monitoring period is for the purposes of waking up,
5 listening for communications, and that happens at
6 intervals according to all of the experts and I think
7 what's explicit in the specification.

8 So we propose that. That doesn't necessarily have to
9 be the Court's construction; however, what we don't think
10 is correct is to make these two terms, fast and normal,
11 entirely relative on each other. And that is because the
12 major issue that is explicit in the extrinsic evidence is
13 that no expert, no POSITA, for the reasons you've already
14 described, which is there are fluctuations, there are all
15 kinds of different factors that may affect the length of a
16 monitoring period, and no expert believes that a shorter
17 monitoring period makes a mode a fast monitoring mode.

18 Obviously fast is a term of degree. I don't think
19 that's really in question. But both experts -- there's
20 Dr. Shamos, our expert; and Dr. Sourì, Hanshow's expert --
21 and we'll go with Dr. Sourì: wouldn't you agree that
22 there are circumstances where a monitoring period might be
23 shorter but you wouldn't consider the monitoring period to
24 be a fast monitoring mode. Right? Because it depends on
25 the source of that discrepancy.

1 So now what we have the expert saying is it's not
2 about shorter monitoring periods. It really isn't. It's
3 about what the source of those shorter monitoring periods
4 are.

5 So then now that brings us exactly to the problem.
6 When does a normal monitoring mode -- at what -- what is
7 the measure, where is the line, where a normal monitoring
8 mode becomes fast? Because it's certainly not simply a
9 shorter monitoring period. So we have to find a line.
10 It's a term we agree we need some anchor and
11 specification. And we have absolutely none. Absolutely
12 none.

13 And Hanshow dances around this. Their expert dances
14 around this. They, in their brief, dance around it. And
15 the only other things they can find besides, oh, just a
16 shorter monitoring period, which we know it's not, is,
17 okay, well, it has something to do with battery
18 consumption.

19 If your battery consumption is higher, then you're in
20 a fast monitoring mode. It has to do something with
21 response time. If your response time is faster, then
22 you're in a faster monitoring mode. And then of course
23 their construction and what the Court has preliminarily
24 adopted, okay, it has something to do -- it has something
25 to do with the monitoring period.

1 So at some point this -- either all or a combination
2 of these are, you know, considered, and then we arrive at
3 a fast monitoring mode. The problem with that is we just
4 don't know when we've arrived, and there's nothing in the
5 specification or otherwise that tells us when we've
6 arrived at a fast monitoring mode.

7 THE COURT: You are a technical person. Explain
8 to me how a shorter monitoring period is not faster.

9 MR. ACOSTA: How a shorter monitoring period is
10 not faster?

11 THE COURT: Yes.

12 MR. ACOSTA: Okay. A shorter monitoring period
13 doesn't necessarily have to be faster. Let me -- this, I
14 think, elucidates a lot of this. Okay. So you have a
15 monitoring period all the same in these three scenarios.
16 Right? You are for three seconds listening, for three
17 seconds not listening. Right? That's consistent with the
18 specifications definition of the monitoring period and what
19 all the experts in this case agree on.

20 Then you have a second scenario. You've got same
21 monitoring period but you're only listening for two
22 seconds and you're not listening for four seconds. That
23 saves battery life. Now, you're not going to have faster
24 communication because you're not listening very often.
25 You're only listening for two seconds. But you're going

1 to save battery life.

2 Then you have a monitoring period once again exactly
3 the same length where you have a faster communication,
4 because you're listening for four seconds and you're not
5 listening for two seconds and -- but the monitoring period
6 is exactly the same.

7 Now, Your Honor, you can call these modes if you want
8 to. You can say, oh, three seconds/three seconds is the
9 default mode; two seconds/four seconds is the saves
10 battery mode; and four seconds/two seconds is the faster
11 communication mode.

12 But according to the Court's preliminary construction
13 and Hanshow's construction, there is only one mode here.

14 THE COURT: What there isn't is a shorter
15 monitoring period.

16 MR. ACOSTA: Exactly. All three of these modes
17 are -- even though you've saved battery life with one, had
18 faster communication and have a balance on the other, all of
19 these three modes are either normal or fast.

20 THE COURT: None of them are shorter, and that is
21 what the preliminary construction is based on. So how does
22 this speak to that?

23 MR. ACOSTA: So a shorter monitoring period.
24 Right? Your question was, Does it have to be faster?

25 THE COURT: No. I was saying how is it not faster

1 if it is shorter?

2 MR. ACOSTA: Exactly. Okay. So now -- and I
3 don't have a slide for this, so excuse me. Imagine that
4 second scenario right there was a shorter monitoring period.
5 It was one second shorter. Okay? And so you are listening
6 for two seconds and not listening for two seconds. Right?

7 well, you are listening more often in that scenario
8 than you are in the longer monitoring period. But then
9 you go to the third example and you shorten that by one,
10 and once again you're listening for four seconds and not
11 listening for one second.

12 The point of this being is you have a shorter
13 monitoring period and you can -- in that shorter
14 monitoring period, you can be not listening for 5.5
15 seconds and listening for .5 seconds. Now, the monitoring
16 period is shorter. Right? You have a shorter monitoring
17 period, which is listening plus not listening.

18 But you are most of the time not listening and your
19 communications are not faster, because most of the time
20 you are not listening.

21 THE COURT: Dr. Souri's comment that it depends on
22 the source appeared to me to be talking about the sorts of
23 things that can cause a change in the monitoring period that
24 might not be something that could be counted on as a faster
25 monitoring mode.

1 Are you saying that Dr. Sourì said that a shorter
2 monitoring period does not result in a faster
3 communication?

4 MR. ACOSTA: I think what Dr. Sourì says is that
5 if you can identify a shorter monitoring period, just
6 because you've done that doesn't mean it's a fast monitoring
7 mode. And that's what Dr. Shamos said as well.

8 So if you look at -- so we're ultimately going to
9 have to apply these constructions here. And we've already
10 talked a little bit about fluctuations for all different
11 sorts of reasons. Some of those might be environmental;
12 some of those might be other design mechanisms, whatnot,
13 not having to do with, you know, sort of the data flow
14 that's described in this invention.

15 But what we do know is that if you look at these
16 constructions, Hanshow's construction and the Court's
17 preliminary construction, that those environmental factors
18 become very important for identifying a fast monitoring
19 mode. Not to mention anything else. But if you can find
20 an environmental factor where at a point now the tag has
21 changed to it has now a shorter monitoring period
22 incrementally, no matter how much incrementally, because
23 the construction doesn't say and the patent doesn't say,
24 then you've now identified a fast monitoring mode.

25 And if the Court's concern is environmental factors

1 not being particularly relevant, I would say that's one of
2 our major concerns, too. And according to Hanshow's
3 construction, they are very relevant, because Hanshow has
4 an oscilloscope, we have an oscilloscope, we have a
5 voltmeter, you know, so we can measure down pretty
6 precisely whether there's changes in things or not.

7 And if we measure down not as precisely as, you know,
8 the greatest measuring devices known but pretty precisely,
9 and if you see a fluctuation of a monitoring period --
10 which, by the way, can be, you know, either a fluctuation
11 in the awake cycle time or the asleep cycle time -- then
12 all of a sudden, according to the Court's construction and
13 Hanshow's construction, you've arrived at a fast
14 monitoring mode, because now you have a shorter monitoring
15 period.

16 And that's just applying the construction. You look
17 at it and you say a mode that has a shorter monitoring
18 period than the monitoring period of the normal monitoring
19 mode. What that requires is a shorter monitoring period.

20 THE COURT: The claim doesn't just require that
21 there be a faster mode but that the faster mode be invoked
22 for certain reasons.

23 MR. ACOSTA: The claim requires only that the
24 electronic tag device enter a fast monitoring mode.

25 THE COURT: well, that it be configured.

1 MR. ACOSTA: Well, it says it's configured to
2 receive first data --

3 THE COURT: Transmit data.

4 MR. ACOSTA: -- transmit data, and enter the fast
5 monitoring mode.

6 THE COURT: That's right. So it's not just that
7 it has variations but that it's configured to enter this
8 fast mode upon certain happenings.

9 MR. ACOSTA: And the fast mode -- so is it -- what
10 I hear you saying is that the configured portion of it means
11 it needs to be the intent that the monitoring period be
12 shorter specifically?

13 THE COURT: Yes.

14 MR. ACOSTA: Upon these things happening.

15 THE COURT: The fast mode as it's construed by the
16 Court at this point is the mode that has the shorter
17 monitoring period than the normal mode.

18 So, yes, the device would have to be configured to
19 enter that fast mode with the shorter monitoring period in
20 response to receiving/transmitting the data as described.

21 MR. ACOSTA: So if you go to Claim 14 --

22 THE COURT: Okay.

23 MR. ACOSTA: -- so here the language is a little
24 different. And I -- for the system claim -- right? -- it
25 uses the word configured.

1 THE COURT: Yeah. Claim 14 is all about the way
2 it's configured. It's the software program. Right?

3 MR. ACOSTA: Correct. And the -- it doesn't
4 say -- well, I mean, it says that these instructions have to
5 work this way. Right? But it doesn't say at this step --
6 right? -- that it's configured to do these things. It just
7 says that, you know, the program comprises receiving,
8 transmitting, and then entering a fast monitoring mode.

9 In any event, the other problem that we have here is
10 the one I tried to articulate and is that just because you
11 have a shorter monitoring period doesn't necessarily mean
12 that you have a faster response time, that it saves
13 battery life or any of those things. Those are not
14 necessarily connected.

15 And so if you want to look at it from a benefits of
16 the patent invention perspective, you can have a
17 monitoring period that's the same length and get those
18 benefits; you can have a monitoring period that's shorter
19 and not get those benefits. It really depends on what's
20 inside of the monitoring period that actually gets those
21 benefits or not.

22 But the monitoring period itself your question was,
23 Can it be shorter and not faster? well, the monitoring
24 period can be shorter, but that doesn't necessarily mean
25 that the tag is monitoring more often.

1 THE COURT: Explain that to me how, if the period
2 is shorter, it doesn't mean that monitoring is more
3 frequent.

4 MR. ACOSTA: Okay. So we have three seconds/three
5 seconds up there. And so the monitoring period is six
6 seconds. Right? Now you have a second mode -- right? --
7 that's only monitoring for one second and not monitoring for
8 four seconds.

9 So the total monitoring period is five seconds, but
10 you're not monitoring for four of those seconds and you're
11 only monitoring for one of those seconds.

12 THE COURT: Well, what you're describing is that
13 you have monitoring periods that are structured differently.
14 You're not just changing the duration of the monitoring
15 period. And so what we're dealing with here is if you
16 have -- if you're just varying the duration and not coming
17 up with there's only one second of monitoring and five
18 seconds of dead time, then faster is a consequence of
19 shorter.

20 MR. ACOSTA: And that -- I mean, that is
21 absolutely the case. What I'm describing has to do with
22 more than just the length of the monitoring period. There's
23 a change that's more than just the length of the monitoring
24 period. That's precisely our issue, is that the
25 constructions here, the preliminary construction and

1 Hanshow's construction, doesn't say everything else has to
2 stay the same in a monitoring period, but the monitoring
3 period gets shorter. That's not what it says.

4 It says that the monitoring period is shorter than of
5 the normal monitoring mode. And so you can change all
6 sorts of things in that construction within the monitoring
7 period. All you have to find, when determining
8 infringement, is a monitoring period that is shorter,
9 because that's the definition now.

10 And it doesn't matter whether you've changed aspects
11 within that monitoring period. It is agnostic as to any
12 changes within the monitoring period, whatever they may
13 be. It is simply a monitoring period that is shorter than
14 the normal monitoring period.

15 I mean, within that term, you're right. An
16 infringement was -- if infringement was determined based
17 on a term, that would be a good argument. But
18 infringement is based on the whole claim, and the claim
19 requires a whole lot more than just the shortening of a
20 monitoring period.

21 MR. ACOSTA: And I don't disagree with that. But
22 in the context of these claims, the monitoring period or the
23 monitoring modes, if you look at the claims, don't really do
24 a lot. They exist, they switch between each other, and
25 that's about it, because the rest of it is a data

1 interaction. The rest of it is data travels upstream, data
2 travels back downstream. And so they -- really what you're
3 talking about is if you're looking at these claims and
4 you're saying what infringes, you're looking at very closely
5 what the definition of a fast and normal monitoring mode is,
6 because there aren't really a lot of limitations besides
7 whatever the definitions of those are that require those
8 limitations. And that's simply the reality of the claims.

9 So this is a very important issue. And what we're
10 trying to demonstrate here is that basically from every
11 single angle -- if the claim said something different --
12 right? -- then maybe this would be -- or if, you know,
13 maybe there's some definition no one's advocating that
14 says everything else has to be equal but you're shortening
15 the monitoring period -- right? -- then, you know, that
16 certainly would be a different situation.

17 But the specification doesn't really say everything
18 else has to be equal but you're shortening the monitoring
19 period. It simply says there is a monitoring period and
20 there are two modes. So that's the real concern.

21 And within the context of what the specification
22 teaches us and the sparseness of the claim as to what the
23 monitoring modes actually do and are required to do, fast
24 monitoring mode simply has no objective standard, because
25 you start defining it as, oh, it's simply a shorter

1 monitoring period, well, then you get to -- you must get
2 to the question of, okay, well, does the shorter
3 monitoring period actually -- you know, how is that
4 caused? why is that caused? Does it save battery life?

5 And Sourì does say it really depends on what's
6 causing that shortness. And, you know, we didn't even
7 really get into this because of space limitations, but
8 there's a concern, too -- there's testimony that even more
9 demonstrates this about, oh, it can't just be
10 incrementally; it needs to be orders of magnitude and --
11 which are undefined orders of magnitude, depending on, you
12 know, how big the change is. Not just environmental
13 factors.

14 And so that's really the problem here, is that
15 there's no objective basis for this term of degree to
16 figure out, okay, when have you gone from a normal
17 monitoring mode and now you're in a fast monitoring mode?
18 Because simply changing the monitoring period is not going
19 to cut it. Is not going to work.

20 THE COURT: All right. Make sure you get to that
21 last --

22 MR. ACOSTA: That's where I'm going right now.
23 where I'm going right now. All right.

24 The base station comprises two wake-up modes; a
25 normal wake-up mode and a fast wake-up mode.

1 Your Honor, I'd just like to point out something
2 fundamentally. The claims do not require a normal wake-up
3 mode for anything whatsoever other than to exist. It says
4 the base station -- this limitation says the base station
5 has two wake-up modes; normal and fast. But never again
6 in the claim does the normal wake-up mode do anything.

7 And, in fact, the only thing that the fast wake-up
8 mode does is the base station is currently presently in a
9 fast wake-up mode when it communicates back downstream to
10 the electronic tag device. And that is the only thing
11 that a wake-up mode, whether normal or fast, does.

12 It is apparently the state of the base station when
13 it's communicating back downstream to the electronic tag
14 device, the fast wake-up mode is.

15 The normal wake-up mode does absolutely nothing. And
16 if you want to confirm that, it's not just in the claims.
17 It's in Figure 3. Nowhere in Figure 3 does it even have a
18 normal wake-up mode.

19 Mr. Tan pointed out number 5 over there on the left
20 that says issuing an instruction in the fast wake-up mode.
21 But nowhere in that figure does it actually have a normal
22 wake-up mode do anything.

23 And so that means this invention or this -- the
24 claims and this figure, could it always be in the fast
25 wake-up mode? And the only role of the normal wake-up

1 mode is that even though it doesn't do anything, you may
2 be able to identify it, whatever it is.

3 And that's a huge problem, Your Honor, that we have a
4 limitation in a claim that doesn't actually do anything.

5 THE COURT: How is the normal wake-up mode
6 limitation in the claim if it doesn't -- if it's not called
7 out?

8 MR. ACOSTA: Exactly. That is precisely the
9 question. It is a limitation. The limitation is -- it's
10 right at the beginning of every claim. It says, The base
11 station comprises two wake-up modes; a normal wake-up mode
12 and a fast wake-up mode. That is the last time normal
13 wake-up mode appears in this claim.

14 THE COURT: And why is that a problem?

15 MR. ACOSTA: Because we have no idea what it is or
16 what it does, and it doesn't need -- it doesn't need to do
17 anything or have any role in this claim or this invention
18 but to exist.

19 THE COURT: So it's not a limitation?

20 MR. ACOSTA: It must exist in order for you to
21 meet the claim language, but it doesn't have to actually do
22 anything. And that's not just a problem with the claim.
23 You can look at Figure 3. That's a problem with how this
24 invention is even talked about, how they walk through it in
25 the specification. No one tells you what a normal and fast

1 wake-up mode does.

2 Now, let me address the Court's preliminary
3 construction. And I saw this and I immediately knew right
4 off the top of my head where you got it. And it's from
5 column 1, as you said. It's from column 1, lines around
6 134 through 143. And that talks about the wake-up
7 duration.

8 And Mr. Tan had put up a highlighted quote from there
9 and -- but I think it's important to read this. It says,
10 If a base station device which communicates with the
11 radiofrequency module intends to communicate with a
12 certain electronic tag device, the electronic tag device
13 needs to be waked up for first period.

14 And then it says, Hereinafter refers to the wake-up
15 duration of the base station device. Right?

16 So the base station device has a wake-up duration.
17 I'm not -- I'm not sure what that means, because the base
18 station device is never said to be asleep. And also
19 earlier in the specification, just lines earlier, it says
20 that a monitoring mode is the tag fluctuating between
21 asleep and awake and asleep and awake and asleep and
22 awake.

23 And the tags are -- there's no dispute. The tags are
24 always doing that. Either it's in its normal monitoring
25 mode or its fast monitoring mode. The tags are either

1 asleep or they're awake and they keep fluctuating back and
2 forth and back and forth and back and forth. And so
3 there's no problem with communicating, because if you look
4 at Figure 3 once again, the tags are communicating all
5 kinds of data.

6 The tags are receiving data, they're communicating
7 data, and that's because they are awake. They'll be
8 asleep, but then they come back awake. So what a wake-up
9 duration is, is really hard to wrap your head around. And
10 then it becomes even worse when you're trying to say, why
11 is this a characteristic of the base station, which it has
12 to be according to the claims?

13 The base station comprises two modes; a normal
14 wake-up mode and a fast wake-up mode. Okay. So what --
15 now we have to ask, based on the specification, based on
16 the claims, what changes about the base station to make it
17 from a normal wake-up mode and fast wake-up mode? And we
18 just don't know.

19 And the Court says, in its preliminary construction,
20 the base station -- so I'll read it from the beginning.
21 The base station comprises two wake-up modes for waking up
22 an electronic tag device. Well, nothing in the claims
23 requires waking up. And also the tags, by definition of
24 monitoring periods, are waking up during their monitoring
25 periods.

1 So when are they waked up? When is the base station
2 waking them up? Is the base station waking them up when
3 they're asleep? Because if they're asleep, there's
4 nothing that says an asleep tag can receive
5 communications. If they're already awake and able to
6 receive communications, then you don't need to wake them
7 up because they're already awake.

8 And then we go on. The base station sets a wake-up
9 duration. When does it set this? According to the claim
10 and Figure 3 that we're looking at this, it never has to
11 set anything. All the fast wake-up mode does -- because
12 the normal wake-up mode doesn't do anything -- all the
13 fast wake-up mode does is the base station is in it, is
14 communicating in its fast wake-up mode.

15 So something about the base station has occurred, is
16 in existence, when it is communicating. The question is
17 what that is. And I promise you I'm not trying to be coy.
18 I've thought about this a lot, a lot. And I do not know
19 what a fast wake-up mode does.

20 I couldn't even speculate to you. I've seen
21 Hanshow's construction, I've seen this construction, I've
22 looked at the specification over and over and over again,
23 and I can't figure it out. Because it seems absolutely
24 superfluous. If you say it has something to do with a
25 change in the base station that allows it to communicate,

1 well, the specification already says that the base station
2 communicates. And there's nothing about the base station
3 that before it's in a wake-up mode it can't communicate,
4 because it's receiving communications all the time.

5 If you look at 2(a), it's receiving communications
6 from the electronic tag. And so what Hanshow says -- and
7 I realize this is taken out of that portion of the
8 specification -- is it sets a wake-up duration. It has
9 something to do in correspondence with the monitoring
10 modes.

11 But, first of all, that's not in the claims. There
12 is no corresponding normal wake-up mode that does
13 anything. That base station doesn't switch from its
14 normal wake-up mode and then back again like the
15 electronic tag device does with the monitoring mode. It
16 can always be in fast wake-up mode.

17 And all it has to do is in step five, communicate in
18 that mode. And what does it communicate? I guess a fast
19 wake-up instruction, a second data, and a control
20 instruction. But how does that change the base station at
21 all? I don't think it does. There's nothing in the claim
22 that says it does. There's nothing in the specification
23 that would seem to suggest that there's some operational
24 change in the base station. There's no setting
25 limitation, as the Court proposes, because the base

1 station is in it's fast wake-up mode when it communicates
2 the fast wake-up instruction.

3 So it's not setting anything. It's not -- it's
4 certainly not communicating with the electronic tag when
5 it's asleep and not listening for anything. And if it's
6 supposed to be waking something up, how is it waking up
7 the tag when the tag is already awake and receiving, you
8 know, communications?

9 There's just no explanation about what this does or
10 why it's there. And that's the -- that's the big problem.
11 And Hanshow's proposal obviously -- and you've looked at
12 it -- doesn't have any basis in the specification.
13 There's nothing about assumptions that are programmed,
14 what those assumptions might be, or whether those
15 assumptions even need to be reconciled at the end of the
16 day.

17 The Court's proposed construction says that the base
18 station sets a wake-up duration that is longer than the
19 monitoring period of the normal monitoring mode. I would
20 ask the Court to consider why that has to be there, why
21 that is even a limitation in the claim, why it would be a
22 limitation in the claim, why it needs to exist whatsoever
23 in order for this invention to work.

24 Because that ability, if this is indeed supposed to
25 be an ability -- right? -- to set or setting, that ability

1 has no role in what these claims are doing. And it also
2 is not triggered anywhere in the language of the claim.

3 So Mr. Tan, to address what he asked the Court to do,
4 he said to take out that last part about longer than the
5 monitoring period of the fast monitoring mode. Well, I
6 think if you're going to take that language from the first
7 column talking about the wake-up duration, and if the
8 Court feels that that absolutely informs what these two
9 things are and feels strongly about it, then I think you
10 need to put that in there, because it certainly is part of
11 that discussion.

12 As sparse as the discussion is, longer than the
13 monitoring period of the fast monitoring mode, it is in
14 here and it seems to be -- whatever they're talking about
15 in terms of wake-up duration, it seems to be important to
16 the concept of wake-up duration.

17 And what I see a wake-up duration is, is the duration
18 that the tag is woken up, which is a subset of the
19 monitoring period, because that's what the specification
20 says that the monitoring period is, periods of awake and
21 asleppness. And that's what the experts agree.

22 As to the standards for indefiniteness, we've cited a
23 few cases that I think are on point. The Secor case is
24 from New Jersey. Talks about a low angle. And though,
25 you know, the words low and angle might be readily

1 identifiable, there's simply no objective meaning. And
2 this discussion is particularly interesting and it goes to
3 this case. There's no objective guidance on how to
4 achieve or what qualifies as a low angle. You just take
5 that language and you put it to the wake-up instructions
6 here.

7 There's no objective guidance on how to achieve a
8 fast wake-up instruction or a normal wake-up instruction
9 or what qualifies as a fast or normal wake-up instruction.
10 There's just no guidance on how it changes the role of the
11 base station whatsoever, what about the base station is
12 changing throughout the claim or what it does.

13 Likewise, one of Your Honor's, I would say fairly
14 recent cases, to Sarah, you obviously remember it,
15 realtime, in substantially realtime. Substantially
16 realtime ended up being indefinite, and that's because
17 there's no delineation about when realtime became
18 substantially realtime and vice versa. They were both
19 used in the claims. The Court said they had to be
20 different because they are different words.

21 Here normal wake-up mode, fast wake-up mode, they are
22 different. They have to do something differently. But
23 according to the claims, the normal wake-up mode doesn't
24 do anything. It doesn't really even need to be there,
25 besides the fact that it is a claim limitation that

1 exists.

2 And you asked earlier how that can be. The way it
3 can be is if you write the claims this way. You say base
4 station has two things; one of them does something. And
5 that's the way the claim is written.

6 The base station comprises these two things, and one
7 of them does something somewhere in the claim. And all
8 that means is that the base station can be -- you can
9 define it however you want to and you can try and figure
10 out what the fast monitoring mode is and assign any
11 operation to it that you can theoretically and say the
12 base station can have that operation always.

13 All you have to do is find something else and call it
14 a normal wake-up mode, and there you go. All of a sudden
15 you've infringed. Even that normal wake-up mode doesn't
16 actually do anything. And that's why these terms are
17 absolutely indefinite.

18 And to reiterate as to Mr. Tan's point, I think if
19 you say it has something to do with setting wake-up
20 duration, then I think -- at least it seems that the
21 concept here that they're saying is that the wake-up
22 duration needs to be set somewhere longer than a
23 monitoring period. That's what it says. And that
24 language has been put in here.

25 I don't know why you would clip off that last part of

1 this discussion.

2 THE COURT: All right. Thank you, Mr. Acosta. We
3 do have a lot of ground to cover.

4 MR. ACOSTA: You're very welcome.

5 MR. TAN: Your Honor, I just have two quick points
6 at this time, and then I pass to my co-counsel about the
7 remaining terms.

8 So first about -- can we switch back to my --

9 THE COURT: Mr. Tan, tell me what your
10 understanding of the meaning of normal is in connection with
11 the monitoring mode.

12 MR. TAN: Yeah. I'm going there, Your Honor.

13 THE COURT: Good.

14 MR. TAN: Let's move to slide 16. So here on the
15 right side, Your Honor, if you look at the bottom right, By
16 default the electronic tag device performs monitoring in a
17 normal monitoring mode supported by the first communication
18 path. And then the base station communicates with the
19 electronic tag device in a normal wake-up mode.

20 THE COURT: And so what is your understanding of
21 normal? Is it the way the mode in which the device operates
22 most of the time, or is it the mode in which the device was
23 designed to operate?

24 MR. TAN: Your Honor, I think you understand this
25 part clearly based on the preliminary construction we have.

1 I think it's just the way the tag device normally works in.

2 THE COURT: So it would be -- I guess that's what
3 I'm trying to probe, is what normal means to you and is it
4 based on the design of the device that you determine the
5 normal mode?

6 MR. TAN: Your Honor, I think it is my
7 understanding in some embodiments that would be the way that
8 could be construed as normal.

9 THE COURT: And do you object to the idea that
10 normal and default have the same meaning in this context?

11 MR. TAN: Your Honor, Hanshow disagree with that
12 characterization. And as you mentioned earlier, we don't
13 know where and what default really means here in this
14 patent. POSITA in reading this patent would take -- even
15 impossible to understand what default really is here,
16 because it's not used in this patent, the default mode
17 together.

18 And also as you just mentioned, default, you know --
19 I think opposing counsel also used different words to
20 characterize that. I don't know which or what default
21 really means.

22 THE COURT: So your position would be that normal
23 is related to the way in which the device operates most of
24 the time?

25 MR. TAN: I think that's one way to characterize

1 it, Your Honor.

2 THE COURT: What's another way?

3 MR. TAN: Okay. Let me also -- that's the other
4 thing I would like to point out. It's also on this slide
5 actually. Here the highlighted part, as you can see, If
6 there is a communication request, the electronic tag device
7 enters a data transmission mode for data reception, then
8 executes or stores the received instructions and data.

9 So the tag device, as opposing counsel pointed out --
10 actually there's plenty of them in the warmer up here in
11 Texas. You can go and look at them. The tag device is
12 most of time working as a paper tag. Just shows the price
13 and the item name. Maybe there's a coupon discount things
14 displayed on that tag.

15 So the tag, once it receives some data on instruction
16 to change that display, it can certainly receive data and
17 then update its display.

18 THE COURT: All right. Thank you, Mr. Tan.

19 MR. TAN: Thank you, Your Honor. I pass to my
20 co-counsel.

21 THE COURT: Before we move on, we're going to take
22 the afternoon recess. So we'll be back in 15 minutes.

23 (Break taken.)

24 MR. WANG: Your Honor, may I?

25 THE COURT: Yes.

1 MR. WANG: My name is Shen Wang. I'm from Arch &
2 Lake for plaintiff. I'm going to cover term D and E, or
3 four and five, of the '216 patent.

4 So the fourth term of '216 patent, which is also
5 number D, a fast wake-up instruction, see the slide 33.

6 So for this term both sides agree this can be
7 construed by plain and ordinary meaning. You know, the
8 dispute is VusionGroup said should have a construction,
9 and Hanshow does not believe any construction is needed.

10 So we disagree -- "we" meaning plaintiff and
11 Hanshow -- disagree with VusionGroup's construction,
12 particularly regarding, you know, this fast wake-up
13 instruction is remain in the fast monitoring mode such
14 that data can be received by the electronic tag device.

15 This is incorrect. This is directly against the
16 patent drawing. If we go to the next one, next slide.

17 So as VusionGroup's counsel mentioned, this is Figure
18 3 of the '216 patent. As both side agree, this reflect
19 the dimension in the number 5, which is the base station.
20 It say issuing an instruction. In this case it's this
21 fast wake-up instruction in the fast wake-up mode.

22 And then the electronic tag device for the 6 receive
23 this instruction and the quitting the fast monitoring
24 mode. So this is, you know, certainly not remain in the
25 fast monitoring mode, as suggested by the defendant's

1 counsel, or defendant.

2 If you're reading the claim language itself, it's
3 pretty consistent with the positions, you know, against
4 VusionGroup's position, which is saying, you know, base
5 station is further configured to -- you know, in the fast
6 wake-up mode, as highlighted in yellow, transmitted a fast
7 wake-up instruction and also the control instruction in
8 the second data to the electronic tag device through the
9 first communication path, and also saying the electronic
10 tag device is further configured to receive such fast
11 wake-up instruction.

12 So certainly not talking about remain fast wake-up
13 mode. And, furthermore, the Claim 5 and 6 talking about,
14 you know, this tag going to switch to the normal mode if
15 this fast -- if this wake-up instruction is not received
16 or is after certain period of time and talking about, you
17 know, even it's received.

18 But the control instruction in the second data not
19 received, it still switch to the normal monitoring mode at
20 the tag after preset time range.

21 So it's pretty clear this is a fast wake-up
22 instruction just like a handshake. Pretty much just, you
23 know, ask the tag to allow the data to be transmitted, and
24 after the tag agreed to receive the data and, you know,
25 it's quitting the fast monitoring mode and the transmitted

1 data. After transmission finished, it switched to the
2 normal monitoring mode.

3 we believe it's clear, and the Dr. Sourì agree with
4 this position. Particularly Dr. Sourì said the fast
5 wake-up instruction as portion that is transmitted from
6 base station while in the fast wake-up mode to electronic
7 tag device while it is in the fast monitoring mode.

8 And the receipt of the fast wake-up instruction by
9 the electronic tag device allows the electronic tag device
10 to receive the control data and the second data from base
11 station.

12 So first we -- you know, Hanshow does not think this
13 term need to be construed. Alternatively, if the Court
14 think it need to be construed, I think we can construe
15 this term to be instructions from the base station to the
16 electronic tag device requiring the electronic tag to
17 remain awake during the data transmission before
18 completion.

19 I think that's pretty clear. It's consistent with
20 the claim language. It's consistent with the
21 specification.

22 THE COURT: So do you object to the preliminary
23 construction?

24 MR. WANG: To the extent regarding, you know,
25 remain awake for time period or for time range that is

1 longer than the monitoring period of the fast monitoring
2 mode because, you know, it just saying stay awake to
3 transmitted data before switch.

4 I mean, the claim language does not talking about
5 time range. Particularly that's not talking about time
6 range that is longer than the monitoring period of the
7 fast monitoring mode.

8 THE COURT: All right.

9 MR. WANG: Your Honor, that's all I have for fast
10 wake-up instruction term.

11 Regarding the external device, which is fifth term of
12 this patent, Hanshow can accept a preliminary construction
13 from the Court. We have no further comments unless Your
14 Honor have any questions.

15 THE COURT: Not at this time, Mr. Wang. Thank
16 you.

17 MR. WANG: Okay. Thank you.

18 MR. JACOBS: Alex Jacobs for defendants. We're
19 generally happy with the Court's construction, the
20 preliminary construction, for fast wake-up instruction, but
21 I think it's still worth talking about because I think, you
22 know, Hanshow and SES still have, like, a fundamental
23 disagreement over what this term means. Right?

24 As he said, you know, originally we came in with it
25 keeps it in the fast monitoring mode so that data receive

1 electronic tag device.

2 Now, Hanshow originally put up instruction that they
3 withdrew, but, you know, it's in the pleadings, it's on
4 the record. It's presumably something they understood at
5 the time to be a plain and ordinary meaning of the term.
6 An instruction sent from the base station to a certain
7 electronic tag device to wake up electronic tag device
8 while the base station is in its fast wake-up mode.

9 And that's the disagreement, Your Honor, because, you
10 know, kind of much like what the Court came up with, we
11 just understand that the tag can't receive anything while
12 it's asleep. Right? Something needs to keep it awake for
13 the data to go through.

14 And Hanshow brought up Figure 3. Well, says it
15 receives the instruction and quits the fast monitoring
16 mode. That's technically true, but it's leaving out the
17 fact that you need to send the second data the control
18 instruction along with it. Right? So you need this fast
19 monitoring mode to ensure the tag stays awake and so that
20 data can flow.

21 And if the tag doesn't receive the fast wake-up
22 instruction within a certain period of time, it will go
23 back in normal monitoring mode, but the whole point of
24 this is to keep it in this awake state to ensure this
25 transmission happens in the most efficient way possible.

1 And, you know, the intrinsic record agrees with that.
2 The extrinsic record agrees with that. Dr. Sourì, we
3 asked him fast wake instruction tells the tag to stay
4 awake; he said, yes, to stay awake in the fast monitoring
5 mode.

6 So we're generally fine with the construction that
7 the Court has come up with as written. I think it's
8 important to note to keep the wake-up duration in there.
9 They have remain awake for a time range longer than the
10 fast monitoring mode. I think that's still integral to
11 the construction because, again, it's all about ensuring
12 that the tag doesn't go back to sleep in the middle of
13 this transmission.

14 For external device, you know, we just stand on the
15 pleadings.

16 THE COURT: All right. Thank you, Mr. Jacobs.

17 MR. JACOBS: Of course.

18 MR. WANG: Your Honor, may I?

19 THE COURT: Yes.

20 MR. WANG: Yeah. I just address opposing counsel
21 really quick. So, I mean, we both side agree when we
22 transmitted data, the data, to the tag, electronic tag
23 device, the tag device need to stay awake.

24 But the Hanshow's position is the electronic device
25 stay awake doesn't mean it needs to be in the fast

1 monitoring mode. It can -- you know, the fast wake-up
2 instruction is to awake the tag device and start transmit
3 the data after completed and switch to normal monitoring
4 mode.

5 It does not need to be -- the tag device does not
6 need to be in the, you know, fast monitoring mode due to
7 the transmission.

8 I think I want to make a clarification on that.

9 THE COURT: All right.

10 MR. WANG: That's all.

11 THE COURT: Thank you, Mr. Wang.

12 MR. WANG: Thank you.

13 THE COURT: Let's move on to the next term.

14 MR. NASH: Good afternoon, Your Honor. Brady Nash
15 on behalf of Hanshow. So I propose -- in addressing the
16 terms I'll start with term F, and I believe term H is
17 related to the remarks I'm going to be making. And I've
18 taken away counsel's slide presentation. Seems as if they
19 have a similar flow to their analysis.

20 So just kind of by way of background, the two
21 patents, the '210 patent and the '994 patent, disclose
22 service management systems that rely on bearer tags, and
23 these systems include a communication network that
24 connects user equipment, a services platform, and a
25 network billing system. And these patents are directed

1 towards the management of services associated with the
2 bearer tags and the billing arrangement associated with
3 those management systems.

4 The first term that's in dispute here is the term
5 barrier tag. And Hanshow is generally fine with the
6 Court's proposed construction, though I'd like to add kind
7 of a caveat to make sure the Court understands Hanshow's
8 position. And, you know, potentially VusionGroup will
9 agree as well.

10 In taking a look at the specification it discloses
11 the bearer tag 105 is a near field communication tag, a
12 radiofrequency identification tag, contactless card,
13 barcode, or any combination thereof that contains
14 information related to the one or more corresponding
15 services.

16 And as long as the Court's construction and as long
17 as the understanding of the parties remains that a bearer
18 tag can be each one of these types of things, Hanshow's
19 fine adopting the Court's construction.

20 And, you know, that's based primarily on the fact
21 that the parties and the experts agree that this has a
22 plain and ordinary meaning.

23 Now, moving to term H, the initiating determination
24 of service information related to the one or more services
25 from the bearer tag, with kind of that caveat that Hanshow

1 has presented with the term bearer tag of ensuring that
2 the term is encompassing of NFC tags, RFID tags, barcodes,
3 contactless cards, or combinations thereof, Hanshow's
4 understanding of the dispute with this term is where the
5 initiating determination of service information is
6 occurring.

7 And, for example, if we take a barcode as an example
8 of bearer tag, if I pull out my phone, scan a barcode or
9 maybe a QR code, my phone will look at that information
10 and process the information that's contained in the bearer
11 tag or part of that bearer tag, and the phone itself will,
12 you know, maybe take me to a website or a different
13 location or maybe process the information.

14 And Hanshow's understanding and position with term H,
15 the initiating determination of service information,
16 related to the one or more services, from the bearer tag,
17 is that as long as the services information is contained
18 within the bearer tag doesn't necessarily need to be
19 creating data or processing data.

20 You know, in some circumstances that may be the case
21 if we're dealing with needing more sophisticated bearer
22 tags, but with the example of a barcode, a barcode is
23 incapable of processing information. It would be more
24 like an address where you scan it and it tells the reader
25 or the device that's interacting with the tag where to go

1 and how to move forward, which that's been Hanshow's
2 understanding of where the dispute's been at, is where the
3 initiating determination of services is taking place.

4 But if the Court has no questions, I'll pass the time
5 over to counsel to respond at least with regards to the
6 terms F and H, and we can go from there.

7 THE COURT: I'm not sure whether the concern you
8 just raised is reflected anywhere. Are you expecting it to
9 be reflected in the construction or are you just stating a
10 position for the record?

11 MR. NASH: Well, I'd say it's stating it for the
12 record and it's an attempt to acknowledge that we agree with
13 the Court's construction but only to the extent that the
14 Court shares a similar understanding as we do and that both
15 parties understand -- have a similar understanding of how
16 that's actually being construed.

17 Because our concern is, you know, for example, if we
18 look at, I believe it's Claim 2 of the '994 patent -- so
19 I'm looking on column 22 of the '994 patent. Claim 2
20 states, The method of Claim 1 wherein the bearer tag is a
21 near field communication tag, a radiofrequency
22 identification tag, a barcode, a contactless card, or
23 combination thereof. And our understanding is based on
24 the Court's construction, it still needs to be enabled or
25 allow Claim 2 to be enabled based on how the Court is

1 construing it.

2 So that would not limit the scope of what a bearer
3 tag is to some -- or I guess it would not include what a
4 bearer tag is as not being a barcode, you know, something
5 that doesn't necessarily have a processor, doesn't have
6 the ability to change or update if you're dealing with a
7 printed barcode or a QR code, but rather it's something
8 that the reader can interact with and, based on the
9 information associated with that barcode, can instruct the
10 reader how to proceed in the process.

11 THE COURT: You know, as long as the barcode
12 contains information relating to the services -- and I can
13 imagine there are barcodes that wouldn't -- but if it does,
14 I mean, obviously that listing of exemplary tags is in the
15 spec and falls within the scope of the claims. But we don't
16 normally include in the construction nonexclusive lists
17 of --

18 MR. NASH: Certainly. Certainly. And, again,
19 Hanshow is fine with the Court's proposed construction, but
20 I wanted to kind of raise the caveat of our understanding of
21 what a bearer tag is and how a bearer tag -- and this
22 initiating determination of service information are
23 interrelated and why Hanshow has insisted on, you know, an
24 adoption of either the plain and ordinary meaning or its
25 alternative construction.

1 But, again, we're fine with the Court's construction
2 so long as that caveat is understood.

3 THE COURT: All right. Thank you, Mr. Nash.

4 MR. KINSEL: Good afternoon, Your Honor. Grant
5 Kinsel for VusionGroup.

6 THE COURT: Good afternoon.

7 MR. KINSEL: Let me take up where Mr. Nash
8 stopped. I share the Court's confusion. I'm not sure what
9 Mr. Nash's caveat relates to. The dispute here is claim
10 construction. Both parties have put in their respective
11 constructions. None of this discussion that was in
12 Mr. Nash's recent statement really has anything to do with
13 any of those constructions.

14 The dispute, at least with respect to the initiating
15 determination of services information, was whether one can
16 initiate determination of services from information
17 contained by the bearer tag, which was VusionGroup's
18 construction or merely through the use of the bearer tag.

19 And I think the Court's construction is correct. We
20 don't have an objection to the Court's current
21 construction. I just -- I'm not sure what the scope of
22 Mr. Nash's caveat was or how that relates to the claim
23 construction or really, frankly, even how to respond to
24 it, because I'm not sure what it relates to, because it's
25 not part of any of the claim constructions that were

1 either adopted or offered by any of the parties. So --

2 THE COURT: So you have staked a position as well
3 on the record. And that's fine.

4 MR. KINSEL: Exactly. So to the extent it needs
5 to be stated, we dispute whatever the caveat is and we'll go
6 from there.

7 I think in terms of bearer tag, I don't think there's
8 much to add. We agree that a list of nonexclusive
9 conventional technology isn't necessary for this
10 construction. We otherwise agree with the Court's
11 construction.

12 So unless there's questions with respect to bearer
13 tag or initiating determination of services, I'll move to
14 a different topic.

15 THE COURT: I thought the argument regarding
16 bearer tag was seemingly based on the UCC was an interesting
17 argument.

18 MR. KINSEL: Well, it's not based on the UCC, but
19 it is an interesting argument, and I would like to -- if the
20 Court will indulge me, I'm happy to take it up. So let me
21 back up a little bit and let's just talk about it, because I
22 do think it's important.

23 You know, there is a widely understood meaning for
24 phrases like bearer tag. So bearer bonds, bearer
25 instruments, bearer securities, these are well understood

1 terms. And what do they mean?

2 THE COURT: And what do those have to do with
3 bearer tag?

4 MR. KINSEL: It's the use of the phrase "bearer."
5 So when you use bearer as we have here, it connotes the
6 notion that the possessor of the instrument, for example, a
7 bearer note or bearer instrument or bearer security, has
8 rights to those things. And you can actually see this
9 throughout the specification.

10 So this isn't something I made up. The specification
11 describes precisely this. Let me just give you a couple
12 of quick overviews of that, where that is. Take a look at
13 Figure 6, 6B to be precise. What 6B shows is the tag
14 inside of the box.

15 So when this patent was prosecuted, what Nokia was
16 worried about was that we had these pre Smart cellphones
17 and you had to punch in a whole bunch of codes in order to
18 find something that you wanted. And so the idea was,
19 well, why don't you package like little credit card type
20 things with the cellphones so that when somebody gets
21 possession of that tag, they can use it.

22 And in fact this whole specification is all about
23 having possession of the tag, just like a bearer note or
24 bearer security or bearer bond. You have to have it to
25 use it.

1 So, for example, you have the tablet. So what does
2 that mean? That means you have possession of the tag.

3 THE COURT: You have to possess the phone to use
4 it, too, but that doesn't have anything to do with whether
5 it's a bearer phone or not.

6 MR. KINSEL: Correct. But bearer phone isn't a
7 claim term. Bearer tag is. And this isn't a situation
8 where the phrase bearer appears anywhere in the
9 specification except for in connection with this term.

10 So, you know, whenever -- Hanshow tried to explain
11 this as, well, what bearer tag means is the tag bears
12 information. But by my count -- and I'll just skip to
13 it -- by my count there's at least ten different
14 occurrences where the inventors could have said such a
15 thing, and they never did.

16 Instead what they said when they wanted to explain
17 that a tag has something is they used a common
18 suppression. The tag contains information. It doesn't
19 bear information. So there really is no other explanation
20 for the use of bearer except for invoking the idea that
21 would be common and understood by the inventors that a
22 person who has that item has the rights to that item.

23 In fact, if you look at the embodiment that talks
24 about limiting use by location, what does that mean? That
25 means that the system is looking to where the person who

1 has possession of the tag is located. In fact, the
2 specification even specifically describes how you do that.

3 so if you look at column 9, lines 50 through 58,
4 you'll see the specification describing exactly how the
5 system figures out where the possessor of the tag is to
6 determine whether that possessor of the tag is eligible to
7 redeem the benefits of that tag.

8 I mean, to me, Your Honor, that is a perfect
9 encapsulation of what a bearer tag is all about. If I'm
10 in New York and the system doesn't allow redemption of a
11 certificate in New York -- and that's the nature of this
12 system -- then it's -- the reason it doesn't allow that is
13 because I am in possession of the tag, but I'm in the
14 wrong place.

15 As soon as I go from Georgia to Washington, D.C. or
16 New York to Washington, D.C., I then become eligible to
17 redeem the benefits of that tag. And that's really the
18 key teaching of this patent, is that the person who has
19 the tag has the rights to it.

20 So it's a little bit like, Your Honor, like a coupon
21 from a Sunday Times. Okay? I clip out my coupon. I go
22 and I buy orange juice. I'm entitled to redeem that
23 coupon if I show it to the cash register. In that sense
24 the coupon is a bearer tag.

25 In fact, Dr. Sourì agreed with me that in certain

1 circumstances a coupon from the Sunday Times would be a
2 bearer tag. And it's a bearer tag not because it has
3 information on it; it's a bearer tag because I can redeem
4 it. That's what makes it a bearer tag. And so, you
5 know --

6 THE COURT: Well, that all is interesting. But I
7 do think if we're going to have time for the rest of the
8 terms, we do need to make progress.

9 But I'll look further at your -- at your theory.

10 MR. KINSEL: Okay. Thank you, Your Honor.

11 Let me then, with my somewhat limited time, I do want
12 to talk about services platform, because I think that's a
13 very important one that we should talk through.

14 And this one is what we thought was a 112(6) term.
15 Your Honor's current view is that it's not, so let me, if
16 I may, just jump to a discussion of that.

17 So this would be, for recordkeeping purposes, items I
18 and J from the Court's preliminary construction list.

19 I want to kind of set the table here because we're
20 talking about means-plus-function. And and what we know,
21 Your Honor, is that Section 112(6) applies when a claim
22 term recites function without reciting structure.

23 So it recites what the thing does but doesn't tell
24 you what the thing is. That is the sort of nub of
25 means-plus-function claiming. Does the claim term tell

1 you what it is or just what it does?

2 And that is a perfect encapsulation of what these
3 claims are. So let's just take a look at that. I want to
4 bring up Claim 1 and just walk through it. This is the
5 services platform term and this is from Claim 1 of the
6 '210 patent. I'll use this as exemplary for the other
7 one.

8 Here's the whole phrase. A services platform for
9 management of one or more services according to a billing
10 arrangement. So what do you know from that claim term?
11 What do you know from that phrase? You know what the
12 services platform does. It manages one or more services
13 according to a billing arrangement.

14 But you have no idea what the services platform is.
15 Okay? The claim term doesn't -- the claim itself doesn't
16 tell you what services platform is. So we have to look at
17 the word itself. Does services platform by itself denote
18 a structure or class of structures as known in the art?
19 That's the question. That's the test that the Federal
20 Circuit requires being applied here.

21 THE COURT: Of course it's in the context of the
22 specification. It's not isolated to the claim.

23 MR. KINSEL: Well, but for purposes of the first
24 step of the 112(6) analysis, it really is. The Federal
25 Circuit specifically says you are not allowed to use the

1 description of a preferred embodiment to breathe structural
2 life into a term that doesn't have it to begin with.

3 I can show you a case that says precisely that. So
4 here is --

5 THE COURT: That's not what I was saying.

6 MR. KINSEL: Oh. I'm sorry. I misunderstood you
7 then, Your Honor.

8 THE COURT: You have to consider whether the term
9 in the context of the specification is a reference to
10 structure as opposed to pure function.

11 MR. KINSEL: That's correct. So we look at the
12 specification to see if there's anything in there that tells
13 us what the structure of that is. And there's nothing in
14 the specification that tells you that except for the
15 preferred embodiment.

16 And so we don't get to use that preferred embodiment
17 to find that the term itself is structural. You start
18 with the claim terms. That's the law. So if you look at,
19 for example -- let me just pull up -- let me just pull up
20 MTD for the Court, because I think it's important. So
21 this is the MTD case, a 2019 Federal Circuit case.

22 Just as it's improper to import limitations from the
23 specification into the claims; however, a preferred
24 embodiment disclosed in the specification cannot impart
25 structure to a term that otherwise has none.

1 THE COURT: That's the key part, a term that
2 otherwise has none.

3 MR. KINSEL: Correct. So where do we look to see
4 if it has structure? We have to look, for example, in the
5 art. Is there any -- is that term used in the art? And it
6 is undisputed that the term is not used in the art.

7 Here's what Dr. Souri says: A person skilled in the
8 art at the time of the invention would have known and
9 accorded no special meaning to the term services platform.

10 Well, what, Dr. Souri, does services platform mean?
11 Is it a functional term or a structural term? Let's look
12 at what Dr. Souri actually said. Okay? Because
13 Dr. Souri, I think, makes this case a total layup. Let's
14 look at his testimony, because I think that's really where
15 this is all made.

16 In your view in the context of the specification, a
17 services platform is any device, component, or some
18 combination of hardware and software for managing services
19 corresponding to bearer tags. Answer: Correct.

20 So any combination of hardware or software that
21 performs the function is a services platform. That's
22 almost the literal definition of means-plus-function
23 claiming. That's why I asked it that specific way.

24 But it actually is even more -- it gets even worse
25 for Hanshow, because here's what he said to my next line

1 of questioning. Is there any combination of hardware and
2 software that can manage one or more services according to
3 a billing arrangement that is not a service platform?

4 Answer: I can't think of any.

5 So we know every combination of hardware and software
6 that performs the function is a services platform. We
7 know there are no combinations of hardware and software
8 that can perform the function and not be a services
9 platform.

10 what else do we know? We know that a services
11 platform is not defined by any particular arrangement of
12 hardware and software. Here's what he said. Is a
13 services platform defined by any particular arrangement of
14 hardware or software? Answer: Defined by a particular
15 arrangement? I don't know if it needs to be limited to a
16 particular arrangement. It needs to have certain
17 capabilities, function. It needs to have certain
18 capabilities that I discuss in terms of managing services
19 corresponding to bearer tags.

20 Your Honor, this is the definition of
21 means-plus-function claiming. When the expert says that
22 anything that performs the function is the thing, that's
23 the epitome of means-plus-function claiming. Here's what
24 the Federal circuit says about those kinds of claims.

25 This is a brand-new case. Came out in October 2023.

1 It's a WSOU case versus Google. What structures will the
2 claim limitation read on? Any that fulfill the function
3 of managing collaborative applications. This is the
4 epitome of functional claiming; a black box that captures
5 any and all structures that fulfill the function, just as
6 if "means" was used.

7 That is exactly what we're talking about here. And
8 Dr. Souri handed that to me on a silver platter. It
9 wasn't -- he wasn't my expert. That would be the
10 testimony I'd have my expert give. It was the testimony
11 that their expert gave. He is conceding that when you
12 look at the specification and you dive in, what you see is
13 that services platform is a purely functional black box.

14 Whatever software, device, combination of those
15 things, performs the function is the services platform.

16 THE COURT: What is the role that the services
17 platform plays in this claim?

18 MR. KINSEL: The services platform is the thing
19 that is supposed to do all of the magic. Right? So it's
20 this black box of -- it's this black box of modules. The
21 specification calls them modules, which is, as we all know,
22 is a nonce term from the Williamson case.

23 It's just a big box that does a whole bunch of stuff
24 and out comes the management of the service. Bills come
25 out and services are managed and voila. It's a black box.

1 That's what it is.

2 THE COURT: It's a third-party device or
3 component?

4 MR. KINSEL: Yeah. See, that's the problem, Your
5 Honor. According to Dr. Souri, it's anything. It's
6 anything that manages -- that performs the function recited
7 in the claim. So any combination of hardware and software
8 owned by anyone doing anything.

9 No matter how it was defined, no matter how it was
10 implemented, no matter how many modules there are, no
11 matter who runs it, as long as it is managing the one or
12 more services according to a billing arrangement, it's by
13 definition a services platform. That is black box
14 functional claiming.

15 THE COURT: And the magic that you're referring
16 to, what does that have to do with the method that is being
17 claimed here?

18 MR. KINSEL: So the question for
19 means-plus-function claiming is, is there a structure --
20 sometimes the Federal Circuit will say, Is it a structure or
21 class of structures? Is there some structure that we can
22 point to, some type of software, some type of hardware, some
23 mechanism that we can point to that's known in the art that
24 does this thing that the claims are recited? That's --

25 THE COURT: The claims simply recite transmitting

1 something to a service platform. Right?

2 MR. KINSEL: That's right. And so we need to
3 understand what a services platform is. What is a services
4 platform? That's the problem. Because there is no
5 structure that is a services platform known in the art.

6 So this would be -- let's assume that this said a
7 processor for managing one or more services according to
8 billing arrangement. The way that would play out in this
9 Court would be one side would say, well, processors are
10 kind of black boxes; they do whatever it is that you
11 program them to do.

12 The other side would say, well, you know, everybody
13 knows how to program a processor and everybody knows what
14 a processor is; you can point to it; it's in the computer.
15 That's how that would play out with the word processors.

16 The problem here is we don't even have a processor to
17 grasp, because we know that the term services platform is
18 not used in the art. It's just not there. There's no
19 dictionary definitions; there's no encyclopedias; there's
20 no other patents; there's nothing to which the Court can
21 point that will give structure to this term.

22 And because there's no structure inherently in the
23 term and because the claim language itself doesn't require
24 any structure, the term is a black box. It doesn't have
25 any meaning.

1 You could change this term, Judge, to a means for
2 management of one or more services according to a billing
3 arrangement. You would know nothing more about the claim.
4 Or what if it said a module? A module for management of
5 one or more services according to a billing arrangement?
6 Would you know more about the structure of the claim? No,
7 you wouldn't know what that module is. You wouldn't be
8 able to identify it.

9 Same thing with device. A device for management of
10 one or more services according to a billing arrangement,
11 who knows what that is. Right? And that's -- these
12 terms -- means, module device -- these are all known nonce
13 terms, and services platform falls into that same
14 category. It has no meaning and that's the fundamental
15 problem.

16 THE COURT: And what does the services platform do
17 in this method other than receive some transmission?

18 MR. KINSEL: It does what's recited. It performs
19 the function of management of one or more services according
20 to a billing arrangement. That's what it does. But that's
21 only what it does, Your Honor. That's not what it is.
22 Right?

23 That's -- the management of one or more services
24 according to a billing arrangement, that's describing its
25 function. It's managing one or more services according to

1 a billing arrangement. That's what it does. That doesn't
2 tell you what it is. And when we're talking about
3 means-plus-function terms that's the key issue. Does the
4 claim term tell you what it is? Does it tell you if it's
5 a structure or class of structures known in the art?

6 And the term services platform is unknown in the art.
7 There's no evidence whatsoever that it's in the art. And
8 Dr. Sourì believes it to be a 100 percent functional term.
9 That means whatever you want it to mean at any given time.
10 Any combination of hardware, any combination of software,
11 all the hardware, all the software, device, some software,
12 some device. Doesn't matter, because there's no structure
13 associated with it.

14 That's the fundamental problem, Your Honor. And I
15 actually really believe that this term is a lay-up for
16 means-plus-function claiming. Given this testimony I
17 don't think there is a way to square that term with the
18 prevailing law in the Federal Circuit. I think it is
19 impossible. There's just simply no way, given Dr. Sourì's
20 testimony. It's just impossible.

21 So that's the services platform. I would urge the
22 Court to rethink it.

23 I do want to point out one last thing. You know,
24 Hanshow, in its reply brief -- I think it's footnote six,
25 cites a couple of cases. I think -- I don't know if the

1 Court has read those cases. Let me pull them up here.
2 Yeah, ewatch, Advanced Communication Designs. Hanshow
3 cites those two cases for the proposition that a platform
4 is known in the art. That's why they cite those cases.

5 If the Court hasn't read those, I'd urge the Court to
6 do so, because those two cases show just how tenuous this
7 position really is, because neither of those cases discuss
8 112(6). 112(6) cases, they're all pre williamson.

9 So no side in those cases was contending that the
10 term platform was a means-plus-function term. And so
11 there's simply no authority that Hanshow's identified or
12 that the experts have identified that suggests that
13 services platform has any structural meaning whatever.

14 THE COURT: And I assume you don't have any cases
15 on platform and whether it's known in the art either?

16 MR. KINSEL: Well, we know it's not known in the
17 art because the expert said so.

18 THE COURT: Okay.

19 MR. KINSEL: Well, I mean, respectfully, Your
20 Honor, that's where we're supposed to be looking. Right?
21 We're supposed to be looking for what the person of skill in
22 the art thinks these terms mean. And, you know, I know the
23 Court sees these cases all the time and sees these issues
24 all the time.

25 And what usually you see in those cases is you'll see

1 the side claiming that the term is not a
2 means-plus-function term. They'll put in a whole bunch of
3 declaration testimony that will say -- you know, when it's
4 a software module, they'll say everybody knows how to make
5 a communication module. Here's one that you can buy off
6 the shelf or here's one that, you know, I invented when I
7 was a freshman in my freshman dorm, and here's this one
8 and here's that one.

9 That's usually the way this works. That's not the
10 way this one worked. The way this one worked is the other
11 side admitted that the term is not used in the art. And
12 that's critical. It's absolutely critical.

13 So let me -- obviously unless the Court has some
14 questions that I can answer, I'm happy to do so, I think
15 where counsel and I ended up talking before the break was
16 that we would jump to term N of the billing arrangement
17 term, the one for which there's no -- there's no
18 preliminary construction.

19 We're happy to talk about anything in between what I
20 just talked about, but Mr. Nash and I talked about perhaps
21 we would just go ahead while I'm up here and talk about
22 that mobile communication service provider limitation.

23 THE COURT: You can start on that term by helping
24 me understand what the dispute is.

25 MR. KINSEL: Yeah. So that one is a little

1 tricky, so let me jump to -- let me jump to that one, if I
2 may. So here's where we are, billing arrangement. The
3 dispute here is who has to have the billing arrangement; the
4 mobile communication service provider and the user or the
5 service provider and the user? That's what this dispute is
6 all about.

7 And it's a little bit obscured, I'll say, by the way
8 the claim constructions have sort of worked out. The
9 proposed constructions. It's a little bit of ships
10 passing in the night. So I can understand the Court's
11 hesitation on this one because there is a little bit of a
12 disconnect.

13 So if I may let me just sort of walk you through the
14 claim language and I'll tell you where our position is,
15 unless the Court has a question.

16 THE COURT: Are you contending that the mobile
17 communication service provider has to be one of the cellular
18 carriers?

19 MR. KINSEL: We are not. No, we're not. Our
20 position is -- our position is that the billing arrangement
21 has to be between the mobile service provider. We
22 haven't -- there's no claim construction on that term.
23 Nobody's really made a proposal on that particular term.

24 But the billing arrangement has to be between whoever
25 that is and the user. And the reason for that is the

1 claims say expressly that. And so let me just pull up the
2 claim so we can talk more specifically about it.

3 There are two limitations -- this is from the '994
4 patent -- there are two limitations that are kind of at
5 issue here. The first one reads, A determination of
6 service information related to one or more services
7 offered by one or more service providers independent from
8 a mobile communication service provider that has a billing
9 arrangement with the user account associated with the user
10 equipment. That's the first part of the claim.

11 Later in the claim that term, billing arrangement,
12 serves as an antecedent basis. So we see that later in
13 the claim. A services platform communicating with the
14 mobile communication service provider for managing one or
15 more services and for one or more costs according to the
16 billing arrangement. Okay?

17 So what the claims -- let me just lay out what the
18 claims are really talking about. There's sort of three
19 parties -- I think we described it as two in our briefing,
20 but it's really three when you throw in the user. So
21 there's the user. Right? So the user has a cellphone and
22 they -- you know, they're the ones who are going to
23 activate the services.

24 There's the mobile services provider, the mobile
25 communication services provider. That's a second party.

1 And that second party is the party with whom the user has
2 a relationship. That's what the claim says.

3 And then there's a third party, and that's the
4 service provider. So in the context of these claims it's
5 like, you know, an e-mail provider or a game provider or
6 something along those lines. So those are the three
7 parties that are at issue here.

8 So the question is, and the dispute here for this
9 term is, with who does the user have to have a billing
10 arrangement with? Is it the service provider that's
11 providing e-mail or is it the mobile communication service
12 provider? The answer is the specification and the claims
13 expressly say that the relationship is between the user
14 and the mobile communication service provider. That's
15 what the claim says.

16 The reason this is a dispute is because Hanshow's
17 infringement contentions take a different approach. So
18 let me pull up Hanshow's infringement contention. That's
19 Exhibit 11, page 9. What you see here is Hanshow saying
20 that the services provider in its infringement theory is
21 the retailer. So the retailer with the electronic shelf
22 tag is the service provider.

23 And then it goes on to say that the service provider
24 has the billing arrangement with the user. So Hanshow's
25 view, at least for purposes of infringement, is that the

1 billing arrangement exists between the service provider
2 and the user.

3 Now, that is directly contrary to the actual claim of
4 the language, the claim language itself, because the claim
5 language says, as I just showed you, that it is the mobile
6 communication service provider that has a billing
7 arrangement with the user account associated with the user
8 equipment. And so that's the dispute.

9 THE COURT: All right. Well, I certainly think
10 that the language of the claim supports what I understand is
11 your position, which is that the billing arrangement with
12 the user is with the mobile communication service provider,
13 not the other service provider who is independent from a
14 mobile communication service provider.

15 MR. KINSEL: That's our understanding of the plain
16 language of the claim. The problem is that the infringement
17 contention suggests otherwise. And I think that the way
18 that Hanshow's proposed claim construction is articulated,
19 it's calculated to allow that infringement theory that is
20 contrary to the claim.

21 And so that's really why Hanshow's construction is
22 incorrect, because they're reading this construction --
23 I'm not exactly sure how they're reading it, but they're
24 reading their proposed construction as allowing for a
25 billing arrangement between the service provider and the

1 user instead of the mobile communication service provider
2 and the user, as specifically and explicitly required by
3 the plaintiffs. That's why Hanshow's construction is
4 incorrect.

5 THE COURT: All right. Let me hear from them and
6 I'll give you a chance to respond.

7 MR. KINSEL: Thank you, Your Honor.

8 MR. NASH: Just as an initial matter going back to
9 our discussion on bearer tags and the initiating
10 determination of service information, counsel brought up
11 their arguments about bearer of the tag. And as explained
12 in Hanshow's briefing, the term bearer tag never appears in
13 the specifications. It's not a term recognized by any of
14 the experts, and the VusionGroup's attempts to import
15 banking and financial dictionary definitions falls outside
16 the scope of the relevant technology dispute in this case.

17 But I'll first start by addressing the services
18 platform terms.

19 THE COURT: Why don't you address this most recent
20 one while we're on it and then we'll go back to the services
21 platform.

22 MR. NASH: Certainly. So the parties in this
23 case, the dispute is whether the term mobile communication
24 service provider has a billing arrangement with the user
25 account associated with the user equipment requires

1 construction. Here Hanshow proposes that the plain and
2 ordinary meaning be adopted. And there are a couple of
3 issues with VusionGroup's construction and the arguments
4 presented.

5 The first issue that the VusionGroup has run into is
6 their reliance on Hanshow's -- excuse me -- their first
7 problem is they've introduced evidence in violation of
8 patent rule 4-3, which requires the prior claim
9 construction of the parties exchange extrinsic evidence
10 that they intend to rely upon.

11 And that includes dictionary definitions and other
12 sources that they'll seek to present arguments related to.

13 And in this case VusionGroup has introduced and
14 improperly relied on Hanshow's infringement contentions to
15 support its claim construction position.

16 THE COURT: I'm assuming that the only reason
17 they've mentioned that is to try and show the Court that
18 it's a material dispute. But I'm certainly not considering
19 the infringement contentions with respect to how the claim
20 should be construed.

21 But what I guess I need to hear is, Does the
22 plaintiff dispute that this term is referring to a billing
23 arrangement between the user and the mobile communication
24 service provider rather than a billing arrangement between
25 the user and service providers independent from a mobile

1 communication service provider.

2 MR. NASH: So Hanshow doesn't dispute that the
3 billing arrangement is between the mobile communication
4 provider and the user account associated with user equipment
5 or with the user. The claim is very clear on that point.

6 The dispute, though, is whether other parties can be
7 involved in the billing arrangement and --

8 THE COURT: What does that mean, other parties
9 being involved in the billing arrangement?

10 MR. NASH: So Hanshow's understanding is that
11 VusionGroup has this counterintuitive belief that the
12 billing arrangement can only be between the mobile
13 communication service provider and the user, when in fact as
14 VusionGroup has acknowledged there is a third party
15 described and disclosed and discussed in the specification
16 and involved in this billing arrangement.

17 So you have a mobile communication service provider,
18 you have an independent service provider, and a user. And
19 it's Hanshow's position that the -- or it's Hanshow's
20 understanding that VusionGroup is seeking to limit the
21 billing arrangement to only include the mobile
22 communication service provider and the user when in fact
23 there are multiple parties that can be involved in the
24 billing arrangement, including the mobile communication
25 service provider and the user.

1 THE COURT: So can you give me a description of
2 what it is you're describing there? How would it be that
3 some other party was involved in the billing arrangement
4 between the mobile communication service provider and the
5 user?

6 MR. NASH: Certainly. So if we looked at -- one
7 example could be a -- kind of discuss in the specification
8 with cellphones. If you purchase an application, that --
9 you know, you might have a billing arrangement with your
10 cellular provider, so AT&T. And if I purchase an
11 application on my device, the mobile -- the services
12 provider, so AT&T, could be billed for my purchase of
13 that -- the game that I purchased on my cellphone. And as a
14 user I'm getting the benefit of that.

15 Another example could be an arrangement if I go into
16 a grocery store and I use a -- I purchase some items and I
17 scan my credit card. In that situation there would be a
18 billing arrangement between the store and myself and also
19 including my credit card company, because the credit card
20 company is being utilized to cover the costs of that, the
21 item, which I'll have to pay at a later date.

22 So there are multiple parties that can be involved in
23 these billing arrangements, and it's not limited to just
24 the mobile communication service provider and the user.

25 THE COURT: So the examples you gave didn't seem

1 to relate to a billing arrangement between the mobile
2 communication service provider and the user.

3 MR. NASH: well, they do in the sense that if I
4 have a credit card that I'm charging to, I still have a
5 billing arrangement through that credit card company and
6 with the store, and there's still a billing arrangement in
7 that sense. Other examples could be --

8 THE COURT: All right. But I'm talking about in
9 the context of this limitation, which is differentiating
10 between service providers independent from the mobile
11 service -- mobile communication service provider that has
12 the arrangement with the user.

13 Is there -- are you suggesting that there can be
14 someone besides the mobile communication service provider,
15 as in the carrier, that would be involved in that
16 arrangement?

17 MR. NASH: I'm not sure if I'm following what
18 you're saying there, Your Honor.

19 THE COURT: I'm just trying to figure out whether
20 you are reading this more broadly than it appears to me to
21 be.

22 MR. NASH: And I wouldn't say that we're reading
23 it more broadly than it appears to be. I would say our
24 position is that the mobile communication service provider
25 and the user are certainly involved in the billing

1 arrangement, and they're parties to that billing
2 arrangement. But the exclusion of other parties and other
3 entities in the billing arrangement is improper. And other
4 entities and parties may be part of that billing arrangement
5 as well.

6 THE COURT: And how would that relate to
7 determining whether other service providers are independent
8 from the mobile communication service provider.

9 MR. NASH: Sorry. Can you say that again?

10 THE COURT: Well, I am at a loss to understand how
11 that relates to the construction of this limitation. The
12 proposal that you made changed the term from mobile
13 communication service provider to a provider of mobile
14 communication services, I think?

15 MR. NASH: Correct.

16 THE COURT: Why? What is the significance of
17 that? Are you suggesting that that is broader than the
18 carriers?

19 MR. NASH: I don't know if I'd say it's broader.
20 I would say it's consistent with the terms usage in the
21 specification. So here the alternative proposal by Hanshow
22 is a provider of mobile communication service wherein the
23 provider has a billing arrangement with a user account and
24 the user account is associated with the user equipment,
25 which is involving different entities.

1 But it involves -- again, it involves the mobile
2 communication service provider and the user of the user
3 equipment are certainly involved in the billing
4 arrangement. But other parties as well may be involved.

5 And VusionGroup has acknowledged and agreed that, you
6 know, at least three parties are involved in these billing
7 arrangements or in this process. So the exclusion of
8 additional parties is improper.

9 And I would say that we generally agree with
10 VusionGroup's construction so long as there's no
11 limitation to exclude third parties.

12 THE COURT: I think what the defendants are
13 talking about is the claimed billing arrangement in that
14 limitation, which is with the mobile communication service
15 provider.

16 What would third parties have to do with that? Are
17 you suggesting that the user could have a relationship
18 with a third party that would actually constitute a
19 billing arrangement with a mobile communication service
20 provider?

21 MR. NASH: Can you repeat that question for me? I
22 apologize.

23 THE COURT: Okay. No. That's all right. I
24 just -- I don't understand the position that you're taking
25 on this term. But I don't have to understand it.

1 You can go ahead and talk about the service platform
2 term.

3 MR. NASH: So Hanshow, again, agrees with what the
4 Court said, preliminary construction of this term is not
5 subject to Section 112 and that its plain and ordinary
6 meaning should be adopted.

7 And as -- and, you know, kind of in response to a
8 couple of the arguments raised by counsel, counsel has
9 cited to the MTD case to support its position, but that
10 case is actually distinguishable here. I don't have it in
11 front of me, but I reviewed it before coming in.

12 And in that case the Court determined that the
13 term -- the term that was in dispute in that case didn't
14 actually appear in the specification, and the Court
15 determined that the determined dispute was a
16 means-plus-function term, which I think makes it
17 distinguishable here, because in this case services
18 platform does appear in the specification and is described
19 and referred to multiple times.

20 Moreover, a services platform, to offer the Court,
21 you know, an example, would be the platform on which
22 systems or things are built. So in the world of computer
23 programming, if I'm designing a website, at its very core
24 a website consists of a bunch of ones and zeroes and you
25 have different layers of code or programs that are built

1 on top of it in order to enable a programmer to, you know,
2 use mail code to eventually get to a user interface that's
3 appropriate.

4 So the services platform in this case is the platform
5 that enables the management of services corresponding to
6 the bearer tags. And one example of a services platform
7 is provided in Figure 2B of the specification. And here
8 it's illustrating a variety of components that can make up
9 the services platform.

10 So in this example there's a services portal, there's
11 a billing server, a service activation server, a payment
12 gateway, services catalog. And these components and these
13 elements, they're all built on top of the services
14 platform. So the services platform is what's enabling the
15 management of services corresponding to the bearer tags
16 based on the various components that are built on top of
17 it.

18 THE COURT: What do you say to the defendant's
19 argument that your expert conceded that it was functional
20 claiming?

21 MR. NASH: Yeah. Certainly. So as explained by
22 Dr. Sourì, a person of skill would understand that a
23 services platform is a known type of device for managing
24 services corresponding to a tag.

25 In fact, Dr. Sourì opined that the term services

1 platform has no special meaning because it's a well-known
2 word in the relative field of art. And that's the
3 argument that the VusionGroup is -- or those are the types
4 of statements VusionGroup is trying to rely on to argue
5 that it's a nons-term. And in fact Dr. Sourì opined that
6 it's a well-known word in the relevant field of art.

7 In fact, just before I got up here my colleague
8 Googled services platform, and it pulled up a list of
9 examples of what a services platform is.

10 And in this case the services platform is a known
11 type of device and component or some combination of
12 hardware/software for managing the services corresponding
13 to the bearer tags, as explained by Dr. Sourì.

14 So it's Hanshow's position that the Court, in its
15 preliminary construction, was correct and that a person of
16 skill would understand what a services platform is and
17 would be able to implement a services platform consistent
18 with the teachings in the action.

19 THE COURT: So are you saying at some point in his
20 testimony Dr. Sourì indicated that he was not saying that
21 the services platform was any device, component, or
22 combination of hardware and software for managing services?

23 MR. NASH: So is your question that he stated that
24 it wasn't?

25 THE COURT: Yes.

1 MR. NASH: No. I would say his testimony was
2 consistent with this disclosure and his use of -- in
3 paragraph 105 of his declaration, his use of the phrase
4 managing services corresponding to the bearer tags indicates
5 exactly what a services platform is. It's the thing or
6 device or the combination of hardware and software on which
7 components are built and utilized in order to manage the
8 services for the bearer tags, which based on the Court's
9 discussion with counsel it seems that's the Court's
10 understanding of the term as well.

11 And, you know, examples of platforms could be I have
12 a banking application on my phone, and that banking
13 application is a platform where it has different
14 components. I have a checking account, a savings account,
15 and I can access my credit card account which enables me
16 to book travel arrangements and utilize credit card
17 claims, but it's all performed through that platform --
18 the platform of those components are available to me
19 through the app.

20 So a services platform is a known term in the art,
21 and a person of skill would readily understand that.

22 THE COURT: All right.

23 MR. NASH: And if there are no questions there,
24 I'd like to now turn the Court's attention to the service
25 management request term. So this is term G.

1 And in this case the -- Hanshow respectfully
2 disagrees with the Court's construction. The dispute
3 between the parties is whether the term service management
4 request should be in its plain and ordinary meaning or if
5 the Court should construe it.

6 And as an initial matter, the Court is well aware
7 that -- of the -- that the case law governing claim
8 construction, and in order to offer -- in order for
9 VusionGroup to overcome the presumption that the plain and
10 ordinary meaning should apply, they need to demonstrate
11 that two exceptions -- one of two exceptions are
12 applicable, whether that be lexicography or disavow. And
13 in this case that hasn't been demonstrated.

14 And, additionally, the claims, not the specification,
15 are the -- are what define the scope of patent protection.
16 And the patentee is entitled to the full scope of their
17 claims. VusionGroup's construction is nothing more than
18 an improper attempt to limit the scope of the claims to a
19 preferred embodiment.

20 And this embodiment is shown here and highlighted
21 here to the left on the screen. And here a service
22 management request, it may include a request that
23 identifies a service and it may contain information for
24 managing the service, but the request should not be
25 narrowed to require both of those elements.

1 You know, VusionGroup in their -- in their -- I
2 believe it was their reply brief argued -- or maybe it was
3 in their opening brief because they didn't have a -- or
4 reply brief. But they argued that the absence of
5 identification information and information for managing a
6 service would result in something that includes no
7 information at all about services and would render the
8 system inoperable.

9 This argument ignores that a person of skill would
10 understand that a request contains information required to
11 process the specific request. And that's demonstrated
12 here in the specification in that column 6 as highlighted
13 on the page. It states, It is contemplated that the
14 request is made for the other information needed to
15 process specific requests.

16 But VusionGroup's construction is an improper attempt
17 to limit the scope of the term service management request
18 to require both -- request that identifies the service and
19 a request that contains information for managing the
20 service.

21 And those are things that may be included in the
22 request but are not required.

23 THE COURT: All right. I understand your position
24 on their proposal. What's your position on the preliminary
25 construction?

1 MR. NASH: Again, we -- Hanshow disagrees with the
2 preliminary construction because it's -- again, it's
3 requiring the identification of a service and the
4 identification of the user. And the services management
5 request is certainly related to the management of --
6 certainly related to the request to manage services, as
7 proposed in Hanshow's proposed alternative construction, but
8 it shouldn't be limited to require additional elements or
9 factors.

10 THE COURT: You know, I'm drawing on the passage
11 in the '210 specification, column 6, line 50, because there
12 clearly is a dispute as to what the plain meaning of this
13 term is. And so I'm looking to the specification for
14 guidance on that.

15 If you have other passages that you think are a
16 better representation of the meaning, I'd be happy to
17 consider them.

18 MR. NASH: I would have to do a more detailed
19 review of the specification, so I'm not aware at this time.
20 But I think when you read the specification as a whole, it's
21 very clear that the term service management request should
22 not be limited to both something that identifies a service
23 and an identification of the user.

24 Now, it certainly will include information that's
25 related, or it could include that type of information, but

1 all that's required is the request relates to the
2 management of the services.

3 THE COURT: Is there anything in the specification
4 you can point to?

5 MR. NASH: Again, I would have to do a more --
6 have a closer review of the actual specification to respond
7 to that question.

8 So at this time, you know, I don't want to waste the
9 Court's time by rereviewing the specification to answer
10 that, but I do believe the specification does provide
11 support and a clear understanding of what the term
12 services -- or what a service management request is.

13 THE COURT: All right.

14 MR. NASH: Okay. So the next term --

15 THE COURT: Let me let the defendant respond to
16 what you've said on this term. But what is your next term?

17 MR. NASH: So the next term on my list is term K,
18 which is whether the preamble is limiting. And then --

19 THE COURT: All right. We'll turn to that after
20 the defendant responds.

21 MR. KINSEL: Thank you, Your Honor. With respect
22 to the service management request, I think it's pretty clear
23 that the service management request is sort of the thread
24 that connects the user's phone to the platform that allows
25 for the services to be managed.

1 And as the Court, I think, has correctly construed
2 the term, there has to be some baseline information that
3 the system uses in order to manage those requests. You
4 have to say this is the service that I want to manage and
5 this is what I want to do with it.

6 And I take the Court's construction to be in line
7 with that. And our position is that that's correct. In
8 terms of a specific statement about what the service
9 management request is, I think the Court's selection of
10 column 6 is a perfectly appropriate place to look. That's
11 what the service management request is.

12 I'm prepared to talk through a little bit about what
13 that thing is because I do think it helps sort of
14 elucidate why the Court's construction is correct, but I'm
15 happy to skip through that.

16 If the Court would like to hear a little bit of
17 background about what the service management request
18 actually is. I can talk you through that. But if it's
19 unnecessary, I won't burden the Court with that.

20 THE COURT: All right. I think that given where
21 we are, do you have other terms that you are wanting to
22 argue?

23 MR. KINSEL: I do not. But I did want to respond
24 quickly, if I may, less than five minutes, on the two terms
25 that the -- that I talked about previously.

1 So the billing arrangement term, I didn't quite
2 follow what the position of Hanshow is now with respect to
3 whether something is or isn't involved with a billing
4 arrangement. But what I do know is what they said in
5 their infringement contentions, and there's nothing about
6 involvement -- there's nothing about, you know, the
7 retailer being involved in a billing arrangement.

8 what it says here is that the service provider --
9 that's not the mobile communication service provider that
10 the claim requires the billing arrangement to be with --
11 is the retailer. Service provider, comma, that is the
12 retailer.

13 And then the next sentence, Further such service
14 provider, i.e. the retailer, necessarily has a billing
15 arrangement with the user account associated with the
16 user.

17 So I don't know about all of this involved with -- I
18 didn't quite track that issue. But what's clear to me is
19 that Hanshow's position is that the billing arrangement
20 can be with anybody apparently. It doesn't have to be
21 with the mobile communication service provider as required
22 by the claims. That's really the nub of the issue.

23 with respect to the 112(6) I just have to -- I have
24 to revisit this, because it sort of slipped out as counsel
25 was saying. He said that the platform is a thing or

1 device that manages the services. And that is sort of the
2 point, Your Honor. It is just a thing. It's any thing
3 that performs this function.

4 And Dr. Souri never retracted his testimony that I
5 put up here. He never clarified it. He never reduced it.
6 He never amplified it. He never changed it. He didn't
7 correct it. Didn't do anything with it except to adopt
8 it. So he's on record 100 percent that the term is
9 functional.

10 I've shown you that testimony. Happily show it to
11 you again. It's in the record already. He's on record
12 there. He hasn't changed any of that.

13 In terms of counsel's reference to his colleague
14 Googling services platform, again, I think that's sort of
15 the point. Right? Normally in these disputes all of the
16 things that came up in the Google search would have been
17 part of the record. Right? The expert would have said,
18 before his deposition, that when I look at the word
19 services platform I know that it is A, B, C, D, E, and F.
20 He didn't say any of that.

21 There's nothing in the record that Hanshow can point
22 to where that exists. The closest he came is saying,
23 well, you know, I know it when I see it. That's not
24 structure.

25 And I think I've already talked about service

1 management request. I think at least from VusionGroup's
2 perspective, we're satisfied on that term.

3 Unless the Court has some questions on these other
4 terms, we're prepared to move on.

5 MR. NASH: I realize we're coming close to 5:00 so
6 I'll try to keep my remarks brief here.

7 The next term in dispute is the preamble for claim
8 for the '201 patent. And it's Hanshow's position that
9 this preamble should not be limited. And -- and, you
10 know, just as a refresher for the Court on the case law,
11 there's no bright line of rule that requires the preamble
12 to be limiting, though it may act -- though it may be
13 limiting if it acts as a necessary component for the
14 claimed invention.

15 And here if we look at the terms that VusionGroup has
16 requested construction of, it's Claims 1 and Claims 15.
17 So they're seeking to have the preamble as limiting for
18 Claims 1 and 15. But if we look at the slide I just
19 pulled up, we'll see that the phrase one or more
20 processors only appears in the preamble of Claim 1 and it
21 only appears in the preamble of Claim 15.

22 The only other time that it appears in the claims is
23 in Claim 4. So to the extent one or more processors is
24 applicable or is intended to be limiting, it should only
25 be limiting based on its usage in Claim 4, and it

1 certainly shouldn't be limiting for claim 15, because
2 there is no antecedent basis issue that VusionGroup has
3 pointed to with regards to Claim 15.

4 THE COURT: You know, my concern really isn't with
5 antecedent basis. It's that it appears to me that the
6 preamble is necessary to properly understand what the claim
7 is. And I guess that would fall under the rubric of giving
8 life meaning and vitality to the claim.

9 MR. NASH: And again, Your Honor, I would, you
10 know, respectfully disagree with you on that. It's
11 Hanshow's position that the preamble is giving context to
12 the claim, but it's not necessarily limiting in its nature.

13 THE COURT: So you think that if we read the claim
14 starting with detecting a tap of equipment on or near a
15 bearer tag, et cetera, that we would understand the
16 invention?

17 MR. NASH: Certainly, Your Honor. And, again,
18 that's based on the context provided by the preamble. I'm
19 not inclined that the preamble has no impact on the claim as
20 a whole. It gives context to what's coming, but it's not
21 necessarily a limitation.

22 And if we look at the --

23 THE COURT: What is there in the preamble that you
24 believe should not be understood to be part of the
25 invention?

1 MR. NASH: As part of the invention?

2 THE COURT: Yeah. What do you think calling the
3 preamble limiting adds to what you would have to show?

4 MR. NASH: I mean, as far as what it adds, it adds
5 the fact that you need to have the sequences of one or more
6 instructions, which when executed by one or more processors
7 cause one or more processors to perform the following steps.

8 And, again, as far as an infringement analysis goes,
9 it won't be -- or as far as an infringement analysis goes,
10 it's still Hanshow's position that VusionGroup has this.
11 But as far as being a necessary requirement, it's not --
12 it's not needed in this case.

13 THE COURT: Okay.

14 MR. NASH: And then moving on to term L, the
15 disputed term for term L is whether the use of the word
16 "and" in this phrase "wherein managing the one or more
17 services comprises activating, modifying, discovering,
18 accessing, or setting up the one or more services, and the
19 management of the one or more services comprises
20 activation, modification, discovery, accessing, and
21 setting up the one or more services."

22 In the Federal Circuit in 2004 in Super Guide they
23 held that the phrase "at least one of," which is
24 equivalent to one or more, when it precedes a series of
25 categories of criteria, and the patentee used the term

1 "and" to separate the categories of criteria, which
2 connotes a conjunctive list.

3 However, Courts have not adopted Super Guide as a
4 per se rule that requires the conjunctive construction of
5 the word "and." And in Shotkam, the Southern District,
6 says compiled and considered a number of cases from a
7 variety of sources, which I believe is instructive in this
8 case on determining whether the term "and" should be
9 construed as conjunction or disjunctive.

10 And I think that the two points that are relative to
11 this inquiry are the last two, which is "when the
12 specification or claims apply a broader meaning than the
13 word" -- "than would be established by the conjunctive
14 construction, the disjunctive construction applies," and
15 "when the claims, specification, and evidence call for a
16 different outcome than Super Guide, the disjunctive
17 construction applies."

18 And here when we look at the claim, the cited case
19 law relied upon -- excuse me. Yeah, so the use of "one or
20 more" is equivalent to "at least one of." So the Shotkam
21 and cases cited in Shotkam are instructive for the Court.

22 THE COURT: How does the one or more that's in
23 this claim here refer to the management activities?

24 MR. NASH: So it's referring to the management of
25 the services and -- which include activation, modification,

1 discovery, accessing, setting up. So it's referring to --
2 so we have to read the claim as a whole, managing the one or
3 more services which include -- and management of the one or
4 more services which include.

5 THE COURT: That's right. It's about the one or
6 more services, not the later listing that has the "and" in
7 it, which is the management activities. Right?

8 MR. NASH: Correct. But, again, when we take a
9 look at the claim as a whole, it's Hanshow's position that
10 this term should be given its injunctive construction, which
11 is consistent with the specification and how the
12 specification describes the term.

13 And as explained by Dr. Souri, he discussed the
14 context for managing and management of services and how
15 it's described in the specification. And then based on
16 the usage in the specification and how the claim is
17 written, the disjunctive construction should be applied in
18 this case.

19 THE COURT: All right.

20 MR. NASH: And I think the remaining term is
21 predetermined billing arrangement. Hanshow agrees with the
22 Court's construction. And to the extent VusionGroup wishes
23 to make arguments, I may have a response for that.

24 But, otherwise, we're happy to rest on our briefing
25 if needed.

1 THE COURT: All right. Thank you, Mr. Nash.

2 MR. KINSEL: Your Honor, let me start with the
3 preamble. Obviously we agree. We think that the term
4 processor does bring meaning, life, vitality, et cetera, to
5 the claim terms. It also serves as antecedent basis as
6 pointed out.

7 So unless there's something specific the Court would
8 like me to react to, I'm happy to submit on that one.

9 I did want to talk about the "and" term just mostly
10 so that I could use my conjunction/junction slide. This
11 one really sort of surprised me. And let me just pull up
12 a portion of Hanshow's brief.

13 So Hanshow says, at page 26, that the disjunctive
14 construction of the word "and," so and as or, is
15 consistent with the term's plain and ordinary meaning.

16 You know, I don't know a lot. I'm not a technical
17 guy. But I do know that and -- when I say peanut butter
18 and jelly, it means peanut butter and jelly, not peanut
19 butter or jelly. That's the way the word is used.

20 And I think it's really sort of -- it's hard for me
21 to even sort of wrap my head around this one a little bit,
22 because this claim term has both, and or, and an and, in
23 effectively the same phrases.

24 So in the first phrase it says, managing one or more
25 services comprises activating, modifying, discovery,

1 accessing, or setting up one or more services. And
2 Hanshow agrees that word means or.

3 And then the next phrase is, the management of one or
4 more services comprises activation, modification,
5 discovery, accessing, and setting up of the one or more
6 services. And so that's the "and" that Hanshow wants to
7 rewrite to be "or."

8 Now, the inventor's use two different terms in the
9 same sentence, and to suggest that those two different
10 terms mean the same thing after all, you know, that would
11 be hard for me to understand.

12 And I think what the Court was getting at is an
13 important point. There are two kinds of things going on
14 here. There is the managing of the one or more services
15 and there is the management of the one or more services.
16 Those are the two phrase.

17 The managing is by the user. So the user decides he
18 or she wants to activate an e-mail program, some such
19 thing. That's what's going on in that first phrase.

20 The second phrase is about the platform that's doing
21 the management of that. And so it makes perfect sense
22 that the inventor selected "or" in that first phrase,
23 because a user doesn't necessarily want to activate,
24 modify, discovery, access, and set up services. He or she
25 may want to do one or more of those, but they don't

1 necessarily want to do them all.

2 But the platform has to have the ability to do them
3 all. And that's why the inventor selected "and"
4 intentionally there. So to rewrite that "and" as an "or"
5 would really violate exactly what the inventor sought to
6 do here. And there's just no basis for it.

7 THE COURT: And you do agree that what we're
8 talking about is the ability to do the activation,
9 modification, et cetera, by the platform as opposed to a
10 requirement that the platform do all of those things in any
11 given case?

12 MR. KINSEL: Exactly right. The platform just has
13 to have the ability to do those -- all of those things.
14 That's what the inventor said. It doesn't have to do them
15 all at the same time. It just has to have the ability to do
16 them.

17 THE COURT: All right.

18 MR. KINSEL: And unless there's any further
19 questions -- oh. On predetermined billing arrangement, I'm
20 happy to take the Court through that, but we're fine with
21 the plain and ordinary meaning of that term. But I'm happy
22 to address the question of whether it's indefinite.

23 we still believe it to be indefinite. I think we're
24 going to have an indefinite problem maybe somewhere down
25 the road, but, you know, we're happy to take that

1 construction as it is.

2 THE COURT: All right.

3 MR. KINSEL: Thank you, Your Honor.

4 THE COURT: Thank you, Mr. Kinsel. I think we
5 have covered all of the terms.

6 Is there anything else for the plaintiff?

7 MR. NASH: No, Your Honor. Thank you for your
8 time.

9 THE COURT: All right. And for the defendant as
10 well?

11 MR. ACOSTA: Nothing more from the defendant.
12 Thank you, Your Honor.

13 THE COURT: All right. Thank you, all. Your
14 arguments have been helpful, and I'll endeavor to get out a
15 clean construction order promptly.

16 (Conclusion of proceedings at 5:01 p.m.)
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Certificate

I hereby certify this 14th day of January, 2025, that the foregoing is, to the best of my ability and understanding, a true and correct transcript from the recording of proceedings in the above-entitled matter.

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