

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD.,
Petitioner,

v.

NETLIST, INC.,
Patent Owner.

IPR2022-00062 (Patent 9,858,218 B1)
IPR2022-00064 (Patent 10,474,595 B2)

Record of Oral Hearing
Held Virtually: Wednesday, February 15, 2023

Before JON M. JURGOVAN, SHEILA F. McSHANE, and KARA L.
SZPONDOWSKI, *Administrative Patent Judges*.

IPR2022-00062 (Patent 9,858,218 B1)
IPR2022-00064 (Patent 10,474,595 B2)

A P P E A R A N C E S

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ALSO PRESENT:
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The above-entitled matter came on for hearing on Wednesday,
February 15, 2023, commencing at 1:38 p.m. EST, by video/by telephone.

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

2 JUDGE JURGOVAN: This is a consolidated trial
3 hearing for the following cases: IPR2022-00062, concerning
4 U.S. Patent Number 9,858,218 B1, and IPR2022-00064,
5 concerning U.S. Patent Number 10,474,595 B2.

6 The date is February 15, 2023, approximately 12 --
7 I'm sorry, 1:40 Eastern Time.

8 With me on the panel today are Judges Sheila
9 McShane and Kara Szpondowski. I'm Judge Jon Jurgovan.

10 Who will be speaking on behalf of the petitioner
11 today?

12 MR. CHANDLER: Good morning, Your Honor. Theodore
13 Chandler from Baker Botts on behalf of the petitioner. I'll
14 be presenting today. With me is lead counsel, Eliot
15 Williams, and our colleague, Ferenc Pazmandi.

16 JUDGE JURGOVAN: Thank you.

17 And who will be speaking for patent owner today?

18 MS. SPIRES: Good afternoon, Your Honor. This is
19 Sara Spires from Skiermont Derby on behalf of patent owner,
20 Netlist, Inc.

21 JUDGE JURGOVAN: Thank you. Okay. As stated in
22 the hearing order, each party will have up to 90 minutes to
23 present their arguments for IPR2022-00062 and IPR2022-00064.

24 Since Petitioner bears the burden of proving its
25 case by preponderance of the evidence, Petitioner will begin,
26 followed by patent owner. Each party may reserve time for

1 rebuttal, limited to the opposing party's presentation.

2 We cannot see your demonstratives or exhibits, so
3 please identify page numbers of your demonstratives, papers,
4 and exhibits as you speak so that the judges can follow along
5 with your presentation.

6 Please identify yourselves as you begin speaking so
7 that the court reporter will know who you are. After the
8 hearing, please remain on the line in case the court reporter
9 has any questions to ask of you about terms that may have
10 been used in the hearing or other matters that were not
11 understood.

12 As this is a public hearing, third parties may be
13 listening on the line. None of the information in this
14 hearing has been designated as confidential. If for some
15 reason you need to discuss confidential information, please
16 let us know in advance so that we can address the matter at
17 that time.

18 If at any time you experience any technical
19 difficulties that impair your ability to represent your
20 client, please alert us and contact the number that you were
21 given to resolve the issue.

22 Each party has filed a motion to exclude evidence
23 in this case. You can, if you wish, address your motion to
24 exclude during your argument time; however, it is unlikely
25 the panel will rule on your motions today.

26 Do the parties have any questions before we begin?

1 MR. CHANDLER: No, Your Honor.

2 JUDGE JURGOVAN: Okay. Petitioner, you are up.

3 And how much time would you like to reserve?

4 MR. CHANDLER: 20 minutes for rebuttal, Your Honor.

5 JUDGE JURGOVAN: Okay. Ready when you are.

6 MR. CHANDLER: Thank you, Your Honor.

7 We have some slides, which were marked as

8 Exhibit 1082, and so I'll be referring to those during my

9 argument.

10 So starting with Slide 5, this shows an overview of
11 the '218 patent, and then Slide 6 shows an overview of the
12 '595 patent. Both the '218 and '595 patents share the same
13 specification, and the claims in both patents are very
14 similar.

15 The claims in both patents require a memory module,
16 shown in red on Slide 6; they require a module controller,
17 shown in green, that's located on the memory module; and they
18 require a memory controller, shown in blue, that's located in
19 the host computer.

20 The claims also require an open-drain output that's
21 shown as a purple line. And I'll talk about that purple line
22 more on the next slide, which is Slide 7. So both patents
23 disclose and claim an open-drain output, shown here in
24 purple, that connects multiple memory modules, shown in red,
25 to the memory controller off to the left.

26 So what is an open-drain output? As explained by

1 Netlist's expert in the quote on the right side of the
2 screen, an open-drain output creates a logical OR function,
3 O-R, meaning that if either memory module connected to the
4 purple line pulls the signal low, then the output of the open
5 drain signal will be low, and the signal will only go high if
6 both memory modules let the signal go high.

7 As admitted by Netlist's expert, an open drain is a
8 very old technique that's about 40 years old. The benefit of
9 an open drain is that it allows one wire to indicate whether
10 either the first memory module or the second memory module is
11 pulling the signal low, thus creating a wired-OR function.

12 Slide 9 shows the instituted grounds. We are
13 relying upon the same three grounds for each IPR. And as
14 shown in pink, Ground 2 is the same combination of references
15 that was used in IPR2018-00303 to invalidate all of the
16 claims in the related '623 patent, as I will discuss a little
17 bit later in my argument.

18 Slide 10 shows the prior art references on a
19 timeline. The references that we are relying upon are above
20 the timeline. Below the timeline, on the bottom right, you
21 can see the provisional application, filed June 12, 2009, and
22 the non-provisional application filed June 14, 2010.

23 And then above that, you see in purple, is the
24 JEDEC proposal, dated November 11, 2009, which falls in
25 between the provisional application and the non-provisional
26 application, which gives rise to the first question that I

1 will discuss, which is whether the claims of the '218 and
2 '595 patents are entitled to the date of the provisional
3 application on June 12, 2009.

4 Slide 12 summarizes our position, which is that the
5 provisional application, marked as Exhibit 1008, does not
6 provide Section 112 support for the claims of the '218 and
7 '595 patents.

8 On the top of Slide 12, we have shown Figure 3 of
9 the provisional application, and we've called out the
10 footnote from Figure 3 in a red box. I will discuss this
11 footnote in more detail later, but the only point I want to
12 make now about that footnote is that Netlist argues that this
13 little footnote provides a whole lot of 112 support for many
14 different claims in the '218 and '595 patents, and we
15 disagree with that.

16 As shown in the table on the bottom of this slide,
17 there are four groups of claim limitations that we contend
18 are not supported by the provisional application. We have
19 numbered these on the left side 1, 2, 3, and 4. For 1, 2,
20 and 3, it's essentially the same issue for both the '218
21 patent and the '595 patent. And for Number 4, it's an issue
22 that's unique to the '595 patent.

23 Slide 13 talks about the first claim limitation in
24 both the '218 and '595 patents that we contend is not
25 supported. This claim limitation requires that the edge
26 connections or pins of the memory module are not active

1 during training. The institution decision considered this
2 issue and correctly concluded, in our view, as shown in the
3 middle of this quote, that, quote, the provisional does not
4 refer to training or edge connections or provide any
5 indication that the inventor was in possession of the
6 foregoing limitations, end quote.

7 Slide 14 shows Figure 3 of the provisional. And as
8 I mentioned previously, Netlist relies heavily on the
9 footnote of this figure to argue that there's 112 support for
10 several different claim limitations, including this one.
11 Now, the footnote to the figure says, quote, MB training,
12 which I have underlined in red. And as shown on the right
13 side of this slide, Netlist's expert has admitted that the
14 phrase, MB training, is the only time that the word training
15 is used anywhere in the provisional application.

16 So Netlist is trying to argue that this isolated
17 reference to MB training means that the edge connections or
18 pins are not active during training. But quite simply, the
19 provisional does not say that. The provisional just says, MB
20 training, without any discussion about whether or not the
21 pins or edge connections are active or not.

22 Slide 15, on the left side, quotes from Netlist's
23 patent owner response. And Netlist has taken a highly
24 unusual position in this IPR to try to show 112 support for
25 the claims. Rather than point to its own provisional
26 application to show 112 support, Netlist is pointing to two

1 proposals made to the JEDEC standard-setting organization,
2 marked as Exhibits 1039 and 1015, as shown on the slide with
3 the red arrows.

4 Now, Exhibit 1039 is a proposal that was made to
5 JEDEC eight days before Netlist's provisional application was
6 filed. Exhibit 1039 is a proposal that was made by another
7 company named Inphi. Exhibit 1039 is not a proposal that was
8 made by Netlist. Exhibit 1015 is the final version of the
9 proposal that was originally presented as Exhibit 1039.

10 There is no evidence in the record that Netlist
11 made any contribution to either Exhibit 1039 or Exhibit 1015.
12 There's also no evidence that Netlist disclosed these JEDEC
13 proposals to the examiner during prosecution.

14 We contend that Exhibit 1015 is prior art to the
15 claims of the '218 and the '595 patents, and we contend
16 Exhibit 1015 renders those claims obvious, while Netlist
17 contends that Exhibit 1039 and Exhibit 1015 provide 112
18 support for the claims of the '218 and '595 patents.

19 So like I said, it's a highly unusual situation
20 where Netlist is trying to show 112 support. Rather than
21 pointing to the provisional, Netlist is pointing to JEDEC
22 proposals that Netlist did not contribute to, which Netlist
23 did not disclose to the examiner, and which we believe are
24 prior art to the claims and invalidate the claims.

25 Slide 16 summarizes Netlist's theory on the left
26 for why the JEDEC proposals provide 112 support. And on the

1 right side, we have two Federal Circuit cases that, in our
2 view, explain why Netlist is wrong as a matter of law.

3 The green box on the left shows Netlist's theory,
4 which is that when the provisional application referred to,
5 quote, MB training, Netlist argues a person of ordinary skill
6 would have understood that MB training could refer to MB-DRAM
7 interface training from the JEDEC proposals, which we have
8 shown in green.

9 Now, there are two legal problems with Netlist's
10 theory. First, as shown by the Federal Circuit's decision in
11 Rivera, quoted on the upper right, the written description
12 inquiry looks to the four corners of the specification. The
13 knowledge of ordinary artisans may be used to inform what is
14 actually in the specification, but not to teach limitations
15 that are not in the specification, even if those limitations
16 would be rendered obvious by the disclosure in the
17 specification.

18 Here, Netlist is making an obviousness argument
19 with respect to MB-DRAM interface training, shown in green,
20 but under the Rivera decision, obviousness is not sufficient
21 to satisfy 112. Instead, Netlist must stay within the four
22 corners of the provisional application itself to show 112
23 support.

24 There's a second problem with Netlist's theory,
25 which is that the claim limitation in question here is not
26 active, which is a negative claim limitation. And as shown

1 by the Federal Circuit's Novartis decision, quoted on the
2 bottom right of this slide, while a negative limitation need
3 not be recited in the specification in haec verba, there
4 generally must be something in the specification that conveys
5 to a skilled artisan that the inventor intended the
6 exclusion. The written description requirement cannot be met
7 simply through simple disregard of the presence or absence of
8 a limitation.

9 Here, there's nothing in the specification that
10 conveys that the inventor intended that the invention
11 requires the edge connections or pins be not active during
12 training. There's simply nothing in the specification either
13 way.

14 Slide 17 shows a further problem with Netlist's
15 theory. On the left side of this slide, we have a generic
16 memory module where we have illustrated with a purple line
17 where the edge connections or pins would be located. And
18 remember, the claim language requires that the edge
19 connections or pins are not active during training.

20 Now, Netlist points to the training that we've
21 highlighted in green, labeled MB-DRAM interface training, to
22 try to suggest that the provisional satisfies the claim
23 language. However, that is not the only training that was
24 disclosed in the JEDEC proposals that Netlist points to. The
25 red box on the left shows that there were three other types
26 of training that did require the edge connections or pins to

1 be active. Host-MB training, shown in red, requires the edge
2 connections and pins to be active. The same is true for host
3 interface CA Clk-to-CMD training, and the same is also true
4 for MB initialization training.

5 There is simply nothing in the provisional to show
6 that the inventor intended the phrase, MB training, to refer
7 to the green box rather than the red box or some other type
8 of training altogether. The provisional is silent on what
9 type of training was intended.

10 Slide 18 has a -- shows another problem with
11 Netlist's theory. This slide quotes an argument from our
12 reply brief. And as we explained in our reply brief, the
13 provisional application set out to solve the problem of the
14 host computer, MCH, being in standby, idle, or wait, while
15 the memory subsystem controller completes its task. And the
16 provisional expressly states that the notifying method allows
17 the MCH to execute independent command while it is waiting
18 for a notification signaling for the memory subsystem
19 controller. A person of ordinary skill would have understood
20 that such an independent command may include data
21 communication, in which case the edge connections would be
22 active. That understanding is consistent with the proposed
23 solution to the problem identified by the provisional.

24 So the point here is, even if MB training
25 supposedly referred to MB-DRAM interface training, the
26 purpose of the provisional was to allow the memory controller

1 to execute, quote, independent command, and that could have
2 included communications across the purple line, in which case
3 the edge connections would be active, contrary to the claim
4 requirement.

5 Slide 19 shows the second limitation in both the
6 '218 and '595 patents that we contend is not supported. This
7 claim limitation requires memory read or write operations not
8 associated with training. The institution considered this
9 issue and correctly concluded, in our view, as shown in the
10 first sentence highlighted in yellow, quote, this portion of
11 the provisional does not contain any discussion of training
12 sequences or the various operations, data signals, or edge
13 connections, end quote.

14 Slide 20 shows that we are again dealing with a
15 negative claim limitation. So on the upper right of this
16 slide, we have reprinted the quote again from the Novartis
17 case that there must be something in the provisional to show
18 that the inventor intended the exclusion.

19 As shown on the left side of this slide, Netlist is
20 pointing to the phrase, quote, normal operation, underlined
21 in red, to try to show 112 support for the negative
22 limitation read or write operations not associated with
23 training. The problem with Netlist's argument, as shown on
24 the bottom right of this slide, as our expert, Dr. Alpert,
25 explained, training could occur during normal operation.

26 Now, it's true that training could occur during

1 initialization, but it's also true that training could occur
2 during normal operation, and there's nothing in the
3 provisional that shows that the inventor intended that his
4 training would only occur during initialization. Again, the
5 provisional is simply silent on this point, and under the
6 Novartis case, silence is not sufficient for 112 support.

7 Slide 21 shows that I asked Netlist's expert about
8 this issue. Remember, the claim language requires a read or
9 write operation not associated with training. But when I
10 asked Netlist's expert, quote, would a person of ordinary
11 skill in the art know about read and write operations on a
12 memory module that are associated with training, he answered,
13 yes. Directly contrary to what the claim language requires.

14 And it's not surprising that he answered yes,
15 because if we look at the specification of the patent, on the
16 right side of this slide, we see that the specification
17 admits that, quote, read, slash, write operations can be
18 performed while in initialization mode. And again,
19 initialization mode is when training can occur.

20 So both Netlist's expert and the specification of
21 the patent, both admit that read or write operations can be
22 associated with training, contrary to the requirement of the
23 claim language. Again, the provisional is silent on what was
24 intended, and the Federal Circuit's decision in Novartis
25 tells us that silence is not sufficient for 112 support.

26 Slide 22 shows the third claim limitation in both

1 the '218 and '595 patents that we contend is not supported.
2 This claim limitation requires one or more training
3 sequences. The institution decision considered this issue
4 and correctly concluded, in our view, quote, we agree with
5 petitioner that the provisional does not explicitly discuss
6 training sequences and, at this stage of the proceeding, are
7 not persuaded that the mere reference to MB training in
8 connection with Figure 3 sufficiently discloses these
9 limitations, end quote.

10 Slide 23 summarizes what's going on here. As shown
11 on the left side, the provisional only discloses, quote, MB
12 training. And as explained by our expert, on the right side
13 of this slide, there is no disclosure in the provisional of
14 one or more training sequences.

15 Slide 24 shows the fourth claim limitation that we
16 contend is not supported. This limitation is only in the
17 '595 patent. It requires one or more N-bit-wide data signals
18 where the number N is at least 32. The institution decision
19 considered this issue and correctly concluded, in our view,
20 quote, even assuming one would have known of 64-bit I/O
21 configurations for data signals, that does not provide
22 support for the recited N-bit-wide data signals over the
23 entire range of N being at least 32, end quote.

24 And then Slide 25 shows that our expert,
25 Dr. Alpert, agrees with the reasoning of the institution
26 decision. As explained by Dr. Alpert, the terms data signal,

1 bit, width, and 32 are found nowhere in the provisional, much
2 less the concept of data signals of a certain width,
3 particularly at least 32.

4 There's -- this is Slide 26, which raises one more
5 issue that I would like to point out with respect to Section
6 112 support, and that is that the patent owner had a burden
7 of production with respect to Section 112. And as I will
8 explain on the next slide, our contention is that patent
9 owner did not satisfy that burden of production.

10 So as shown on Slide 27, Section 112 requires a
11 written description of the invention to make and use the
12 same. It's not enough for the provisional to disclose each
13 claim limitation in isolation or in the abstract. The idea
14 of Section 112 is that the provisional should provide written
15 description of putting all those claim limitations together,
16 such that there's a memory module that satisfies all of the
17 claim limitations.

18 But when I asked Netlist's expert if the
19 provisional application actually provides a written
20 description to make and use a memory module as claimed in the
21 '218 patent or the '595 patent, he had no opinion on that
22 question. And I asked him repeatedly, over many pages of his
23 deposition, and he repeatedly refused to offer any opinion on
24 that question. As a result, our contention is that Netlist
25 failed to satisfy its burden of production with respect to
26 Section 112 because there is no testimony from any witness

1 that the provisional application provides a written
2 description of the invention to make and use the same.

3 Turning to Slide 29. If the board agrees with us
4 that the provisional application, dated June 12, 2009, does
5 not provide 112 support, the next question is whether the
6 JEDEC proposal, shown in purple, dated November 11, 2009, and
7 marked as Exhibit 1015, is a printed publication that can be
8 used as prior art in this IPR with respect to the
9 non-provisional application, dated June 14, 2010.

10 Slide 30 raises the issue, what is JEDEC? So JEDEC
11 is the leading standard-setting organization for memory
12 modules. It's been around for over 50 years. There are over
13 3,000 volunteers representing nearly 300 member companies.
14 And JEDEC's standards and publications are designed to serve
15 the public interest. This testimony and evidence comes from
16 Julie Carlson from JEDEC, who submitted a declaration marked
17 as Exhibit 1050.

18 Slide 31 summarizes some of the witnesses relevant
19 to this question of printed publication. There are a lot of
20 witnesses and a lot of exhibits that we've put into the
21 record relevant to this question of whether Exhibit 1015 is a
22 printed publication, so we created a few slides summarizing
23 the relevant witnesses and the relevant exhibit numbers to
24 try to make it easier for the board to find the evidence that
25 we're relying upon to show that Exhibit 1015 is a printed
26 publication.

1 So some of the witnesses are Julie Carlson,
2 custodian of documents at JEDEC, and she has a number of
3 exhibits, including her declaration marked as Exhibit 1050.
4 That declaration attached documents marked as Exhibits A
5 through J, and those Exhibits A through J were also
6 separately submitted in both IPRs with their own exhibit
7 numbers, such as 1051, 1015, et cetera.

8 Another important witness is John Halbert. He was
9 an Intel engineer who participated in the relevant JEDEC
10 committees and task groups between the years 2001 and 2017,
11 his declaration, Exhibit 1054, and he was also deposed, as
12 was Julie Carlson.

13 Another witness is Dr. SJ Park. He's a Samsung
14 engineer who participated in the creation and approval of the
15 JEDEC proposal marked as Exhibit 1015. He also has a number
16 of exhibits.

17 There's also a declaration from the Internet
18 Archive. The Internet Archive maintains the Wayback Machine,
19 which archives copies of public web pages, including, in this
20 case, public JEDEC web pages from 2009.

21 And then Robert Murphy is Netlist's technical
22 expert, and he made a number of admissions in his declaration
23 and deposition, agreeing that JEDEC materials were
24 disseminated to persons of ordinary skill in the art.

25 Slide 32 summarizes some of the exhibit numbers
26 relevant to the JEDEC proposal. I won't go over these

1 exhibit numbers now, because I'll discuss them in subsequent
2 slides.

3 Slide 33 lists out the exhibit numbers --

4 JUDGE JURGOVAN: I'm sorry. Can I just stop you
5 right there?

6 MR. CHANDLER: Yes.

7 JUDGE JURGOVAN: I've got some questions about
8 this. So there's the document that's called the JEDEC Manual
9 of Organization and Procedure.

10 MR. CHANDLER: Yes.

11 JUDGE JURGOVAN: If you look at that document --
12 I'm on the Exhibit 1050. It's at page 205. I think it also
13 occurs on page 160. Yeah, Section 4. And it talks about the
14 procedure that's used to generate one of these committee
15 letter ballots, which I believe is what Exhibit 1015 is,
16 which you're relying on for your combination. It's a
17 document you call JEDEC.

18 MR. CHANDLER: Mm-hmm.

19 JUDGE JURGOVAN: In Section 4, it indicates that
20 the procedure is, you start with -- there's a motion for --
21 there's a committee ballot, and then if it's approved by the
22 committee, then that ballot goes up to the board. The board
23 has to approve it. And then after the board approves it, if
24 they do, it's published. So if you look there, it says, Step
25 7, publication. And as I understand your arguments, you're
26 saying that publication occurs actually at sometime before

1 what these manual -- what the Manual of Organization and
2 Procedure says. Publication can only happen at Step 7, after
3 committee approval and board approval. And I don't find any
4 evidence in the record that this letter ballot was ever
5 approved by a committee or it was ever published by JEDEC.

6 Can you explain to me what's going on here and why
7 you consider JEDEC still to be a publication in view of this
8 procedure?

9 MR. CHANDLER: Yes, Your Honor. So the short
10 answer is that JEDEC's definition for publication is not the
11 Federal Circuit's definition for publication. According to
12 the Federal Circuit, a printed publication is a document that
13 is accessible by interested members of the relevant public.
14 So anybody --

15 JUDGE JURGOVAN: Without restriction, right?
16 There's a qualifier there. It's not just available to any
17 person of the interested public. There's more than that. It
18 has to be without restriction, correct?

19 MR. CHANDLER: Correct. There's no restriction on
20 the dissemination of the JEDEC materials, because anybody can
21 join JEDEC. And furthermore, the testimony of both John
22 Halbert and Netlist's technical expert is that the contents
23 of these presentations at Step 1 to JEDEC would be
24 disseminated throughout the industry, such that persons of
25 ordinary skill would know about them.

26 So if you look at the facts of this case, they are

1 very similar to the M&K versus Samsung case in the Federal
2 Circuit, where, again, everybody in the industry would know
3 about JEDEC. And we've got the quote here on Slide 34 of our
4 presentation that a reference will be considered publicly
5 accessible if it was disseminated or otherwise made available
6 to the extent that persons interested and ordinarily skilled
7 in the subject matter of the art, exercising reasonable
8 diligence, can locate it.

9 So, yes, JEDEC -- go ahead.

10 JUDGE JURGOVAN: The members of a committee are not
11 free to disclose that letter ballot outside of the committee,
12 outside of JEDEC. I believe that's what the organization
13 (indiscernible) procedure requires, right? I think there's
14 some circumstance under which a committee leader could talk
15 about an approved letter of ballot outside of the committee,
16 but there's actually a prohibition on actually discussing
17 confidential information outside of the committee, which this
18 letter ballot would be.

19 And I'll also point you to JEDEC's documents and
20 publications, Section 8.1. It says, prior to publication,
21 the following documents including, but not limited to, all
22 JEDEC standards, publications, manuals, minutes, surveys,
23 questionnaires, press releases, registration data formats,
24 and workshop proceedings formulated by the board, committees,
25 and subcommittees must be approved by the JEDEC legal
26 counsel.

1 So that sounds to me like a restriction on the
2 publication.

3 MR. CHANDLER: Again, Your Honor, there's a
4 distinction between what JEDEC is referring to as publication
5 and what the Federal Circuit has told us is publication,
6 which is that anybody interested in the field can join JEDEC
7 in the same way that anybody can pay to get a subscription to
8 a magazine. If you don't pay for the subscription of the
9 magazine, you're not going to get it, in the same way that
10 you don't pay for --

11 JUDGE JURGOVAN: Okay. But when they do so,
12 they're bound to the JEDEC -- when they join, they are bound
13 to the JEDEC document on organization and procedure, correct?

14 MR. CHANDLER: Correct. And there's nothing in
15 this manual of procedure, marked as Exhibit 1048 or 1049,
16 which covers the relevant time period. Nothing in the manual
17 requires confidentiality. There are restrictions on
18 copyright, but there are no restrictions on confidentiality.
19 This statement, Section 8.1 about publication, this is going
20 to copyright. It's not going to whether persons of ordinary
21 skill in the art were allowed to learn about the proposed
22 JEDEC standards.

23 And it's -- I think it's important that even the
24 inventor here in the provisional application put in the
25 provisional a reference to JEDEC with the expectation that
26 somebody would know -- a person of ordinary skill would know

1 what was being discussed. Both John Halbert and Netlist's
2 expert and these manuals, 1048 and 1049, make clear there's
3 no confidentiality restriction.

4 So there -- and to be clear, there's sort of two
5 different issues here. One is, public accessibility is
6 satisfied simply because anybody could join JEDEC at any
7 time. And the same --

8 JUDGE SZPONDOWSKI: Counsel --

9 MR. CHANDLER: Go ahead.

10 JUDGE SZPONDOWSKI: But individuals can't join
11 JEDEC; isn't that true?

12 MR. CHANDLER: Well, individuals are part of JEDEC,
13 but I think your question is that JEDEC is -- the way JEDEC
14 charges money is by company, which actually makes it, you
15 know, less money. So on Slide 34, we show that JEDEC at this
16 time charged \$2,000 per company, and then that gave access to
17 all the engineers, no matter how many engineers. All the
18 engineers would have access to everything within JEDEC for
19 that one flat fee.

20 And the Federal Circuit told us in the Centripetal
21 Networks case that public accessibility is not limited to
22 circumstances of free or academic distributions.

23 JUDGE SZPONDOWSKI: But an interested individual
24 can't just join JEDEC, can they, if the membership is limited
25 to a company?

26 MR. CHANDLER: No. I think they just need to

1 create a company. I mean, anyone can create a company as an
2 individual.

3 JUDGE JURGOVAN: So is it your view, then, that
4 just these 23 different companies and their representatives
5 that are discussing this letter ballot and sharing it among
6 each other, I guess, as they're voting on it, that that --
7 even if they're bound by confidentiality and they can't
8 disclose it outside of JEDEC, that would still, in your view,
9 be a publication?

10 MR. CHANDLER: Yes, Your Honor, because JEDEC is
11 publicly accessible. And not -- I mean, it's not just 23
12 companies. You know, who can join JEDEC? Everyone can join
13 JEDEC. Slide 34. There's no evidence that anyone had ever
14 not been allowed to join JEDEC.

15 Slide 36, there are hundreds and hundreds of
16 members of JEDEC. Basically every company you can think of
17 was already a member of JEDEC. It would be hard to identify
18 a company that was not already a member of JEDEC. Members
19 included Apple, Canon, Cisco, Dell, Google, Hewlett Packard,
20 IBM, Intel, Microsoft, Motorola, Nokia, Northrop Grumman,
21 Panasonic, Qualcomm, Sony, Sun Microsystems, Texas
22 Instruments. Even the United States Army was a member of
23 JEDEC.

24 So JEDEC was not a secret organization. It was
25 extremely widely known. And to the extent a person of
26 ordinary skill in the art was not already a member of JEDEC,

1 they certainly could have easily joined JEDEC, just like all
2 of the other companies had already done.

3 And remember, going back to Slide 34, you know,
4 what is the legal test? GoPro, in the Federal Circuit case,
5 said that accessibility goes to the issue of whether
6 interested members of the relevant public could obtain the
7 information if they wanted to. You know, if they wanted to.
8 So a person of ordinary skill, if they wanted to, could
9 simply join JEDEC, and they would get this information. It
10 was not confidential. The purpose of JEDEC is public --

11 JUDGE JURGOVAN: A standards organization like
12 JEDEC -- and let's think about this practically. I mean,
13 they're developing a standard. Why would you let people that
14 are not bound by JEDEC's patent policy have access to what
15 the standard is going to be in the form of a committee letter
16 ballot, for example?

17 MR. CHANDLER: There's -- your question reminds me
18 of the Rambus case, where the Federal Circuit thought about
19 that very issue. And there's a footnote in the Federal
20 Circuit's Rambus case where the Federal Circuit specifically
21 noted that JEDEC is not confidential. And that entire Rambus
22 decision was about JEDEC's patent policy, and the Federal
23 Circuit specifically noted in that footnote that JEDEC is not
24 confidential. There's no public -- no confidentiality
25 restriction.

26 So, I mean, your question is sort of a policy

1 question about how JEDEC should organize itself, but the
2 JEDEC manual does not have any confidentiality restrictions.
3 The JEDEC document we're talking about, Exhibit 1015, is not
4 marked confidential. And, you know, why does JEDEC exist?
5 It's for the public interest, to create standards for the
6 public.

7 JUDGE McSHANE: Counsel, so this Exhibit 1051,
8 right? It's called this committee letter
9 ballot. There was a task group that developed the --
10 you know, the technical requirements associated with this,
11 this letter ballot, right? So you had this task group, and
12 then you had the committee itself that voted on this proposal
13 -- or let's call it that. Yeah, it's called a proposal.

14 So my question to you is -- and I'll get to the
15 question here in a minute. But the Patent Owner basically
16 has contended and put in some evidence that the committee
17 treated this but they had some
18 confidentiality considerations. You know, there's evidence on that, okay, as
19 to
20 this ballot, okay? And you can address that. But there's
21 also the issue about the task group and any confidentiality
22 provisions that might attach to this letter ballot associated
23 with that group.

24 Are you contending that the public
25 accessibility is by the task group, by the committee members,
26 or both?

1 MR. CHANDLER: Both. Because when you join a
2 committee of JEDEC, you can participate in the task group.

3 So Slide 47 discusses the evidence in the record
4 about task groups. The task groups are where the actual
5 technical work would take place every week. So you would
6 have committee meetings a few times a year at hotels,
7 resorts, usually, and then in between those committee
8 meetings, members of the committee would create these task
9 groups to have weekly working sessions to refine and modify
10 the proposal.

11 So in this particular instance, the original
12 proposal by Inphi was Exhibit 1039 on June 4, 2009. Between
13 June 4, 2009, and November 11, 2009, when the proposal was
14 voted upon, there would have been weekly meetings of the task
15 group, and that task group would be members of the committee.
16 But again, there's no confidentiality, and so those members
17 of the task group very likely would be talking to their
18 suppliers, their business partners.

19 And that's the testimony that we got from John
20 Halbert, which is -- and John Halbert was an engineer at
21 Intel who worked at JEDEC from 2001 through 2017. And his
22 testimony is that there was, on Slide 53, no rule or other
23 requirement that members treat ballots, technology
24 presentations, or meeting minutes as confidential. Rather,
25 these documents were freely disclosed and distributed within
26 JEDEC's committees and subcommittees.

1 And then on the right side of this slide, we asked
2 John Halbert whether there were any nondisclosure agreements
3 that JEDEC had with anyone. His testimony was, no.

4 And then he was asked, at any of the JEDEC meetings
5 that you attended between 2001 and 2017, do you ever recall
6 being instructed by anyone that you had to keep the
7 information learned at that meeting secret? And his answer
8 was, no.

9 And then we've also got the testimony from
10 Netlist's expert on Slides 56 and 57, where Netlist's expert
11 admitted that a person of ordinary skill would have known
12 about JEDEC, meaning they would have -- they would have
13 joined JEDEC, or they certainly had the ability to join JEDEC
14 if they wanted to. But even if they weren't a member of
15 JEDEC, Netlist's expert admitted, as shown on the bottom
16 right of Slide 57, that in his opinion, quote, one of
17 ordinary skill in the art, as I've stated in my declaration,
18 would have understand [sic] the content of those proposals,
19 even though they may not have been specifically in JEDEC or
20 on the committee.

21 So to answer the question, our position is that
22 both the committee and the task groups did not have
23 confidentiality restrictions, and therefore, the proposal
24 could be disseminated from those members. But, you know,
25 regardless, the test is public accessibility. A person of
26 ordinary skill in the art would join JEDEC.

1 And the GoPro case in the Federal Circuit is
2 important because that's the case where the Federal Circuit
3 reversed the board on this issue. The board had taken a
4 narrow view of public accessibility. In GoPro, there was a
5 trade show, and the board said, you know, this trade show is
6 pretty narrow and specific. We don't think that's public
7 accessibility. And the Federal Circuit said, no. The test
8 for public accessibility is whether interested members of the
9 relevant public could obtain the information if they wanted
10 to.

11 Now, on this question of joining JEDEC and finding
12 the right committee, Slide 39 shows that JEDEC had a catalog
13 on the internet, marked as Exhibit 1072, where JEDEC lists
14 out all of its committees, and it also lists out documents
15 that those committees have made available on the internet.
16 So a person of ordinary skill in the art would have known
17 from the internet, publicly accessible, I mean, no
18 restrictions whatsoever, that the relevant JEDEC committee is
19 JC-40, working on digital logic.

20 The testimony from John Halbert on the bottom left
21 of Slide 39 shows that JEDEC publicized the JC-40 committee
22 working on digital logic. And then a person of ordinary
23 skill, if they joined JEDEC, they would be able to find
24 relevant documents. As John Halbert explained in the middle
25 of this quote, a person of ordinary skill could search or --
26 the quote is, you can search for particular words by date, by

1 item number, however you want to search for the document
2 you're interested in. Furthermore, there were meeting
3 minutes where JEDEC tracked presentations by item number, and
4 if that wasn't enough, you could always call a person at
5 JEDEC, and they would help you find what you were looking
6 for. So our position is that --

7 JUDGE JURGOVAN: So what we're looking at here --
8 excuse me. So what we're looking at here is -- you can only
9 see if you use your password. You join JEDEC --

10 MR. CHANDLER: No. No.

11 JUDGE JURGOVAN: -- and use your password to get
12 inside.

13 MR. CHANDLER: To be clear --

14 JUDGE JURGOVAN: Is there any evidence that a
15 public-facing interface with JEDEC actually provided this
16 committee letter ballot externally to JEDEC?

17 MR. CHANDLER: To be clear, Slide 39 shows in the
18 upper left, Exhibit 1072, which is publicly facing, so JEDEC
19 was advertising JC-40 as the relevant committee.

20 To your point, was the committee ballot on a
21 website that didn't require a login, that is not our
22 position. That's not what the record shows. What the record
23 shows is a person of ordinary skill would have known to join
24 JEDEC, and once you join JEDEC and you join this committee,
25 then you get access to all the documents, including the
26 ability to vote for documents in the committee, such as the

1 letter ballot, so --

2 JUDGE JURGOVAN: Did the content of this committee
3 letter ballot ever find its way into any JEDEC publication
4 that anybody in the public could go and access?

5 MR. CHANDLER: Again, anybody can access by joining
6 JEDEC. And as Netlist's expert admitted, persons of ordinary
7 skill would have known about the contents of Exhibit 1015.
8 If a person of ordinary skill wanted their own copy of
9 Exhibit 1015, while respecting the copyright of JEDEC, they
10 could join JEDEC, and they would get a copy of it that way.
11 If they didn't join --

12 JUDGE JURGOVAN: So JEDEC has a publicly facing
13 internet page where you can scroll down, you select the
14 standard, and you pay your money and they'll give it to you.

15 MR. CHANDLER: Correct. And that's how it is
16 for --

17 JUDGE JURGOVAN: What I hear you saying is that the
18 committee letter ballot was never available on the internet
19 for anybody not associated with JEDEC to pay their money and
20 get access to it. It was only available internal to JEDEC.

21 MR. CHANDLER: I mean, I think we're mixing two
22 things, which is that in the same way that I have to pay for
23 my subscription to the newspaper to get a copy of the
24 newspaper, you have to pay to join JEDEC. But JEDEC is not
25 confidential. The work that JEDEC was doing is not
26 confidential. The committee letter ballot was publicly

1 accessible to members of the interested public if they wanted
2 it.

3 The law -- the Centripetal Networks case, shown on
4 Slide 55 here, makes clear that public accessibility is not
5 limited to circumstances of free or academic distributions.
6 In the same way that the New York Times has a copyright
7 restriction that prevents you from reproducing or
8 distributing the front page of the New York Times, JEDEC has
9 a similar copyright restriction that prohibits making copies
10 of JEDEC presentations. Instead, if you want a copy of the
11 New York Times or if you want a copy of the JEDEC proposal,
12 you pay for it.

13 JUDGE JURGOVAN: I think I understand your
14 position. Thank you.

15 MR. CHANDLER: Thank you.

16 JUDGE McSHANE: Mr. Chandler, is there any evidence
17 here that shows that this Exhibit 1051, that it was available
18 that lists this document in a repository, albeit
19 for access by JEDEC members, at about the contemporaneous time that
20 this proposal was out?

21 MR. CHANDLER: Yes, Your Honor. So I would direct
22 you to Slide 39, which, again, is the testimony of John
23 Halbert, which is that JEDEC would index and catalog all of
24 its materials, and it would do it by committee number. So
25 JC-40 is the relevant committee. It would also permit
26 searching for documents by words, item number, however you

1 want to search for it.

2 And furthermore, one of the benefits of membership
3 of JEDEC, shown on Slide 37, is that once you join JEDEC,
4 once you pay the money for JEDEC, as quoted in the middle of
5 this slide, JEDEC offers free distribution of all standards
6 and publications to its member companies via email and also
7 has email distribution of all other JEDEC materials.

8 So Exhibit 1015 -- I think you said 1051, but 1015
9 is the exhibit that we're relying upon. Exhibit 1015 would
10 have been emailed to all of the members of the JC-40
11 committee and distributed that way, and then the members
12 would have gone and voted on it, and then they would have
13 come together in person to count the votes and to formally
14 memorialize that that proposal had been adopted.

15 JUDGE McSHANE: Right, Mr. Chandler. But here's
16 the question: Do we have a copy of any email with that
17 transmittal in the record? Or do we have a copy of a
18 printout showing that this document was available at that
19 time?

20 MR. CHANDLER: Yes, Your Honor. We have both the
21 declaration of Julie Carlson and the declaration of SJ Park,
22 where they both attached the email document that transmitted
23 the ballot. So that was the email that would have gone to
24 all of the committee members. And let me see if I can pull
25 it up.

26 So this, Exhibit 1051, is the -- according to both

1 the declaration of Julie Carlson and SJ Park, Exhibit 1051 is
2 what would have been emailed to all of the committee members,
3 and you see that it's -- there's that attachment at the
4 bottom there. It says, Download NBO9320-PDF. That is
5 Exhibit 1015. That is the proposal that was voted on.

6 JUDGE McSHANE: I
7 understand that, but here's the deal. Yeah, there's
8 testimony, but I don't actually see an email.
9 Maybe I'm just missing something, but I don't.

10 MR. CHANDLER: This, Exhibit 1051, is the testimony
11 that both Julie Carlson and SJ Park referred to as to how
12 this was distributed. There's no question that it was
13 distributed because we know that it was voted on and that,
14 you know, 20 different companies approved it. So there's
15 plenty of corroboration in the record that this was
16 distributed. It was actually reviewed.

17 Again, the legal test does not require anyone to
18 actually receive it. This was -- again, an important part of
19 the GoPro decision is that the test for public accessibility
20 does not require showing that anyone actually received it.
21 The test only requires that somebody, if they wanted to get
22 it, could have gotten it. And here, we've shown both. We've
23 shown that a person of ordinary skill could join JEDEC and
24 get it. And we've also shown that there were at least 20
25 different companies that actually received this and actually
26 voted in favor of this proposal.

1 JUDGE McSHANE: Okay. Thank you.

2 MR. CHANDLER: Okay. I should probably move on,
3 given time, but are there any other questions on printed
4 publication?

5 JUDGE JURGOVAN: None from me. Thank you.

6 MR. CHANDLER: All right. So Slide 62 gives an
7 overview of the prior art that we're relying upon. There are
8 three grounds that are the same for both patents. Netlist
9 really just focused on Grounds 1 and 2, and Netlist doesn't
10 really focus on Kim in Ground 3, so I'm not going to talk
11 about Kim. I'll just focus on Grounds 1 and 2, which is the
12 combination of Hazelzet and JEDEC or, in Ground 2, the
13 combination of Hazelzet and Buchmann.

14 So Hazelzet is shown on Slide 63. And Hazelzet
15 discloses a -- it's shown on the left side of this slide.
16 Hazelzet discloses a memory module with four ranks of memory,
17 as shown in yellow highlighting. And as shown in the purple
18 box, Hazelzet has a register in the middle of the memory
19 module.

20 On the right side of this slide is an image from
21 Netlist's technology tutorial showing the layout of Hazelzet
22 had been standardized by JEDEC and was called a registered
23 DIMM or an RDIMM. In an RDIMM layout, the address, command,
24 and clock signals, which are shown as red dots on the right
25 side, those are buffered by a register, shown in purple,
26 while the data signals, labeled DQ/DQS, are not buffered.

1 Slide 64 shows that Hazelzet teaches that his
2 memory module can operate in multiple modes, shown in blue,
3 including an ECC mode and a parity mode. And Hazelzet also
4 teaches using an open-drain output, shown in purple, to
5 report errors to the host computer.

6 Slide 65 shows our second reference, which is the
7 JEDEC proposal marked as Exhibit 1015. Going back slightly
8 to this question of printed publication, there's something I
9 can point out here on this slide, 65, which is the JEDEC
10 proposal is not marked confidential, and it has indexing and
11 cataloging. You see the committee is JC-40. The item number
12 is 142.35. There's a subject, and then there are also
13 keywords at the bottom, DDR3, MB, memory buffer, LRDIMM, and
14 initialization. And again, the purpose of those keywords is
15 to make it easier to find the document within the
16 organization.

17 Now, the JEDEC proposal concerns an LRDIMM memory
18 module, which is shown on the right side of this slide. An
19 LRDIMM memory module buffers both the data signals and the
20 address, command, and clock signals using a memory buffer,
21 which is shown in the red box. So on the previous slide, 63,
22 we showed an RDIMM, which just buffers the address, command,
23 and clock signals, and on this slide, 65, we see an LRDIMM,
24 which buffers all of the signals, including the data signals.

25 Slide 66 gives some of the details of the JEDEC
26 proposal marked as Exhibit 1015. On the left side of this

1 slide, in green, we show that the JEDEC proposal disclosed
2 training the memory buffer. And at the bottom, in purple, we
3 show that the JEDEC proposal discloses using an open-drain
4 output, labeled error out, that signal when training on the
5 memory module had been completed.

6 Slide 67 shows our third reference, Buchmann, which
7 is Exhibit 1016. Buchmann is shown on the left side. As
8 shown by the red box, Buchmann has a memory buffer in the
9 middle of the memory module that buffers all the signals,
10 including data signals.

11 And then on the right side of this slide is an
12 image from Netlist's technology tutorial showing the layout
13 of Buchmann had been standardized by JEDEC and was called a
14 fully buffered DIMM or an FBDIMM. In the FBDIMM layout, all
15 of the signals, including the data signals, are buffered by
16 the red box, which is labeled AMB, which stands for advanced
17 memory buffer. So an FBDIMM is like an LRDIMM in that all of
18 the signals, including data signals, are buffered on the
19 memory module.

20 Slide 68 gives a little bit of an overview of
21 Buchmann. And the point we want to make here is that
22 Buchmann disclosed training during initialization and also
23 disclosed notification when the training was done.

24 Slide 70 summarizes the combination for Ground 1.
25 So we've got Hazelzet at the top, and on the upper right, we
26 summarize the key disclosures in Hazelzet. Again, Hazelzet

1 has a DIMM memory module with four ranks of memory, shown in
2 yellow. Hazelzet discloses error reporting on an open-drain
3 output, like the UE line shown in purple. Hazelzet discloses
4 operating in different modes, and Hazelzet discloses that
5 each mode uses the same open-drain output for reporting
6 notifications back to the host computer.

7 JEDEC, at the bottom of this slide, discloses data
8 buffering, which we've highlighted in red, which lowers the
9 electrical load on the memory module. JEDEC discloses
10 operating both in an initialization mode and a normal mode,
11 and JEDEC teaches using the same open-drain output, called an
12 error out, which we've highlighted in purple, to report an
13 error in normal mode and report training completion during
14 initialization mode.

15 Slide 71 summarizes the combination for Ground 2
16 between Hazelzet and Buchmann, and it's a very similar
17 combination as Ground 1. Buchmann discloses many, if not
18 all, of the same things as JEDEC. They're very similar in
19 this regard. So, you know, Hazelzet disclosed what we just
20 talked about in the last slide. Buchmann, like JEDEC,
21 discloses data buffering to lower the electrical load on the
22 memory module. Buchmann discloses operating in an
23 initialization mode and a normal mode, and Buchmann discloses
24 reporting training completion during initialization mode.

25 Slide 72 discusses some of the motivations for the
26 combination. Specifically, the first issue is, you know, why

1 would there be a motivation to add data buffering to
2 Hazelzet? And there are a few reasons for this. Both
3 Buchmann and JEDEC disclose data buffering. The advantage of
4 data buffering is that it lowers the electrical load when you
5 have multiple ranks of memory. And the benefit of lowering
6 the electrical load is that you can increase the speed at
7 which the signals operate, thereby increasing performance and
8 capacity. And specifically, Hazelzet disclosed four ranks of
9 memory, and thus there would have been a motivation to use a
10 data buffer on Hazelzet's memory module when using the
11 high-speed DDR3 memory devices that were standard as of 2009.

12 Slide 73 talks about the motivation to add training
13 during initialization. Again, both Buchmann and JEDEC
14 disclose training during initialization. Training provides
15 obvious benefits, especially when using high-speed memory
16 devices like the third-generation DDR3 memory devices.
17 Training ensures proper operation and communication for
18 memory operations, and training optimizes read and write
19 operations, thereby providing reliable performance during the
20 subsequent normal operation.

21 Slide 74 talks about the motivation to use an open
22 drain for signaling training notifications. Again, both
23 Hazelzet and JEDEC taught using open-drain outputs for
24 providing notification signals. It was obvious that an
25 open-drain output could be shared by multiple memory modules
26 to create the wired-OR function that we discussed earlier on

1 Slide 7. It was obvious to use the existing open-drain
2 output on the memory module because that output was not
3 otherwise being used during training, and so it would be
4 efficient to use the existing --

5 JUDGE JURGOVAN: Counsel, five minutes.

6 MR. CHANDLER: Thank you.

7 It would be efficient to use the existing signal
8 paths, and JEDEC specifically disclosed using an open-drain
9 output for training notification signals during
10 initialization.

11 I want to talk about collateral estoppel in
12 Ground 2 because Ground 2 uses the same combination of
13 Hazelzet and Buchmann that was used in the prior final
14 written decision, IPR2018-00303, to invalidate all of the
15 claims of the '623 patent. And thus, our position is that
16 Netlist should not be given a second bite at the apple to
17 challenge the combination of Hazelzet and Buchmann.

18 It's important to note that in these two IPRs
19 today, Netlist does not dispute that the combination of
20 Hazelzet and Buchmann satisfies all of the claim limitations
21 of the '218 and '595 patent. Netlist is just challenging the
22 combination of Hazelzet and Buchmann, but that's an issue
23 that was already considered and was already decided against
24 Netlist in this prior IPR, and thus, under collateral
25 estoppel, Netlist should be precluded from taking a second
26 bite to challenge the combination of Hazelzet and Buchmann.

1 Slide 77 shows two legal bases for collateral
2 estoppel. One is 37 CFR 42.73(d)(3), which states that,
3 quote, a patent applicant or owner is precluded from taking
4 action inconsistent with the adverse judgment, end quote.

5 And then the second basis is Federal Circuit
6 precedent. And on the bottom right of this screen is a
7 recent Federal Circuit case that came out after our reply
8 brief. This is the Google versus Hammond, 54 F.4th 1377,
9 which was decided on December 8, 2022. The Google decision
10 doesn't change the law, but it does a nice job summarizing
11 the law of collateral estoppel.

12 And the thing I want to emphasize here is that the
13 Federal Circuit emphasized in Google that, quote, patent
14 claims need not be identical for a collateral estoppel to
15 apply, so long as the differences between the unadjudicated
16 patent claims and adjudicated patent claims do not materially
17 alter the question of invalidity. And the Federal Circuit
18 also went on to state that this is a legal question based on
19 underlying facts.

20 And here, as shown on Slide 78, the '623 patent,
21 the '218 patent, the '595 patent, they're all -- have the
22 identical specification. They're all based on the same
23 provisional application filed June 12, 2009, and the same
24 non-provisional application filed June 14, 2010.

25 As shown on Slide 79, all three of these patents
26 are talking about the same thing. They're talking about a

1 memory module, in red, memory controller, in blue, and a
2 module controller, in green, that has this open-drain output
3 shown in purple.

4 During prosecution, as shown on Slide 80, the '623
5 claims were rejected as not patentably distinct from the '218
6 claims, and so Netlist filed a terminal disclaimer. And as
7 shown on Slide 81, the '595 claims were also rejected as not
8 patentably distinct over the '218 claims, and so again
9 Netlist had to file a terminal disclaimer.

10 So our position is that the prior final written
11 decision should preclude Netlist from challenging the
12 combination of Hazelzet and Buchmann and that ground --

13 JUDGE JURGOVAN: One minute, Counsel.

14 MR. CHANDLER: Thank you.

15 And that Ground 2 is dispositive of both of these
16 IPRs. If the Board here agrees with the combination of
17 Hazelzet and Buchmann, that would invalidate all of the
18 claims in the '218 and '595.

19 So I'll rest for now, but before I do, are there
20 any questions on collateral estoppel?

21 JUDGE JURGOVAN: None from me.

22 MR. CHANDLER: Thank you.

23 JUDGE JURGOVAN: Patent owner, you can begin when
24 you're ready. How much time would you like to reserve for
25 rebuttal?

26 MS. SPIRES: I'd like to reserve 20 minutes, Your

1 Honor.

2 JUDGE JURGOVAN: Okay. You can proceed when ready.

3 MS. SPIRES: Thank you.

4 Your Honors, I'd like to start by focusing on a
5 foundational issue that, quite frankly, moots the argument
6 that Samsung has just made in its technical discussion. And
7 as you're aware, this foundational issue is that JEDEC, which
8 is Exhibit 1015, is not prior art to either of the Netlist
9 patents at issue here.

10 JEDEC is not prior art for six primary reasons.
11 The first, Samsung has not provided evidence that Exhibit
12 1015 was not disseminated to anyone but its 23 authors in
13 committee JC-40.4. Second is that only the 23 authors in
14 committee JC-40.4 even had the ability to access Exhibit
15 1015. Third, there is no evidence that the relevant portion
16 of Exhibit 1015 was ever disseminated or discussed with
17 anyone beyond the 23 authors in committee JC-40.4. Fourth,
18 it's undisputed that JEDEC's policy prohibited distribution
19 of Exhibit 1015 to non-JEDEC members. Fifth, a POSA could
20 not find and access Exhibit 1015 on the JEDEC website. There
21 is zero evidence that they could. And sixth is that Exhibit
22 1015 is dated five months after the June 12, 2009,
23 provisional priority date of Netlist's patents.

24 So starting with the first point, Samsung has not
25 provided evidence that Exhibit 1015 was disseminated to
26 anyone but its 23 authors in committee JC-40.4. The Federal

1 Circuit has explicitly held a work is not publicly accessible
2 if the only people who know how to find it are the ones that
3 created it. That's the Samsung versus Infobridge case cited
4 in the briefing.

5 So here, where Exhibit 1015 was created by the
6 JC-40.4 committee and then allegedly distributed for a vote
7 to that committee -- I heard counsel say earlier, distributed
8 to a vote to JC-40. It was not. The testimony is
9 unequivocal from Samsung's own declarant, Ms. Carlson, that
10 this was distributed to the JC-40.4 committee for vote. That
11 distribution is legally insufficient for public
12 accessibility.

13 If we dig a little deeper into the facts in this
14 issue, we see that on pages 26 and 27 of the petition,
15 Samsung relies on paragraph 7 of Ms. Carlson's declaration,
16 which is Exhibit 1050, for the alleged distribution of
17 Exhibit 1015. And in paragraph 7 of Exhibit 1050,
18 Ms. Carlson states that on November 9, 2009, Item Number
19 142.35, which is Exhibit 1015, was approved by the DDR3 MB
20 task group, and that was referred to JC-40.4 to vote for
21 ballot approval. JC-40.4 to vote for ballot approval is what
22 she said.

23 And then she goes on to state that after approval,
24 committee letter ballot JC-40.4 09320, which she calls the
25 letter ballot, was distributed to the members of the JEDEC
26 JC-40.4 -- again, that committee only, the authoring

1 committee -- on November 11, 2009.

2 And then finally, she says that the letter ballot
3 for Item 142.35 itself distributes this Exhibit 1015 to
4 JC-40.4 in a link labeled, Download MB09320.PDF. That is how
5 this was distributed. Her testimony is unequivocal as to
6 that point. There is not a document that was distributed
7 that can somehow be handed around. There was an email
8 allegedly sent that had a link with a download and a series
9 of letters and numbers that don't really tell anyone
10 anything, and that is where she alleges that the 23 companies
11 that are members of the JC-40.4 committee could have accessed
12 Exhibit 1015. Again, these are the 23 authors of the
13 document. So Samsung argues --

14 JUDGE JURGOVAN: Counsel.

15 MS. SPIRES: Yes, Your Honor.

16 JUDGE JURGOVAN: When you push that link, what
17 happens? Does a password-protected Voting Machine come up on
18 your screen, or what's the -- is there any barrier there
19 where you have to enter a password in order to be able to
20 access the Voting Machine?

21 MS. SPIRES: Yes, absolutely, Your Honor.

22 We do not have any re-enactment as to what would
23 have happened at that point. None of Samsung's declarants
24 actually recreated what would have happened. But Petitioner
25 -- or Patent Owner has put into evidence, you can see on
26 Slide 12, a declaration that explains exactly what would have

1 happened here. And this is consistent with the document that
2 you were showing -- referencing earlier that gave the whole
3 protocol for going from a ballot to a standard.

4 And here we see on Slide 12, this is Exhibit 2026.
5 This is from Netlist's expert -- Netlist's declarant. It
6 says, the mechanism by which the relevant committee members
7 reviewed and voted -- and this is paragraph 11 of Exhibit
8 2026. Paragraphs 11 and 12 is what's referenced on this
9 slide. And so he says that the mechanism by which the
10 relevant committee members reviewed and voted on a JEDEC
11 committee ballot, both in 2009 and after, was an internal
12 JEDEC software program called the JEDEC Voting Machine posted
13 by JEDEC on JEDEC's private intranet servers, and access to
14 JEDEC's private intranet and the JEDEC Voting Machine was
15 limited to relevant committee members and required a JEDEC
16 login and password.

17 And the declarant -- and then in paragraph 12, the
18 declarant goes on and says, when a committee ballot was
19 prepared for a vote, it was placed on the internal JEDEC
20 Voting Machine, and a ballot posted on JEDEC's Voting Machine
21 could only be accessed using JEDEC-issued credentials by
22 JEDEC committee members designated to vote on the particular
23 ballot.

24 And there is nothing in the record that contradicts
25 this testimony. Ms. Carlson, Samsung's declarant, also
26 agreed that the documents would come in an electronic form

1 that would have to -- that would only be able to be linked
2 from the email. And so if someone did not receive this
3 email, so if they were not a member of the 40.4 committee --
4 so the members of the 40.4 committee are going to have the
5 access information, the login and password. But they are
6 going to click on this link in an email, and then that will
7 send them to JEDEC Voting Machine. JEDEC Voting Machine has
8 to have JEDEC credentials, and not just credentials that you
9 are a member of JEDEC, but credentials that you are a member
10 of JEDEC Committee 40.4, because these are the only people
11 that are authorized to access this document. There is no
12 testimony in here, in the record, to the contrary.

13 We see on Slide 13, we go on to paragraph 13. From
14 -- this is the Park declaration. We have that upon clicking
15 the link, a committee member would need to log into the JEDEC
16 Voting Machine and could then navigate to the specific
17 committee ballots to which they had access and on which they
18 may vote.

19 The next slide goes on saying -- on Slide 14,
20 there's -- paragraph 15 of Exhibit 2026 is set out and saying
21 that once a committee member navigated on JEDEC's voting site
22 to a ballot, such as Exhibit 1051 -- and that's where we have
23 a little exhibit confusion. Exhibit 1051 is the ballot
24 notice, so just the document that you -- that they are saying
25 they got in an email, and they're saying that then you would
26 click Exhibit 1051 in order to get to the Voting Machine for

1 Exhibit 1015.

2 And so the member could click a further link in the
3 notice -- so that's the Exhibit 1051 ballot notice -- to
4 review the committee ballot itself, so that's a document like
5 Exhibit 1015. But access to a notice, like Exhibit 1051, or
6 the ballot itself, like Exhibit 1015, was still limited to
7 members of respective underlying committee members who can
8 access the notice and ballot and are identified in the
9 notice. So on Exhibit 1015, it says that the distribution is
10 to members of JC-40.4 for voting.

11 And so Exhibit -- and then paragraph 16, we see
12 that even if a JEDEC committee member were to have forwarded
13 an email -- and again, there is zero evidence in this case
14 that any JEDEC committee forwarded an email. There's
15 actually evidence that they were prohibited from doing so.
16 But even if they had forwarded an email from JEDEC announcing
17 that a ballot was available to a non-committee member or a
18 member of the public, the recipient of such email could not
19 access or view the committee ballot at issue, and that's
20 because they have to have the proper login and password.

21 We heard counsel saying, oh, but someone could have
22 joined JEDEC. Even if someone went through the steps of
23 joining JEDEC, then they have to join Committee JC-40, then
24 they have to join JC-40.4, because that is what is referred
25 to here, and then they have to actually have had access at
26 this time.

1 There is absolutely no evidence in the record that
2 someone could go and later in time, but still within the time
3 frame that we're talking about that's relevant to this case,
4 so before the priority date of the patent, actually have gone
5 in, joined all of these relevant committees -- and at this
6 point, they have no way of knowing that there is even a
7 ballot to be interested in because this is confidential, and
8 there is nothing, absolutely nothing that Samsung has shown
9 that there is a listing anywhere of this ballot.

10 Every document they've shown you of, oh, a POSA
11 could have gone and joined JEDEC, and they could have gone
12 and found all these documents associated with the JC-40
13 committee, not one time has Samsung shown you in that list of
14 documents that there is a single ballot listed. Never. If
15 that existed, I assure you, they would have shown you. They
16 did not, because it does not exist.

17 There is no evidence that there was any kind of
18 listing that a POSA could have drilled down and said, oh, I'm
19 interested in this. I want to join this committee so I can
20 vote on this ballot. Absolutely not. They could not have
21 found out about this ballot. They would not have gotten the
22 email, and they would not have the ability to even just be
23 interested, searching around, and find it.

24 JUDGE McSHANE: But, Counsel, let me ask you
25 something. Let's
26 say you've joined, and you're a member, and you've decided to

1 join this task group, okay? Now, wouldn't the task group
2 have knowledge that they're developing something that will
3 end up on a ballot?

4 MS. SPIRES: Yes. Absolutely.

5 JUDGE McSHANE: Okay.

6 MS. SPIRES: The task group has knowledge that they
7 will develop something that's on a ballot. But the
8 difference here is that now we're in the Infobridge case.
9 That is exactly the Infobridge case.

10 JUDGE McSHANE: Okay.

11 MS. SPIRES: So first, you have to join -- so there
12 are steps to join this task group. First, you have to join
13 JEDEC, then you have to join the JC-40 committee, then you've
14 got to join JC-40.4, which is the relevant committee here,
15 then, among that group, you have to somehow end up in the
16 task group. There is no testimony as to how people are
17 selected for or can join a task group, whether there is a
18 selection process, whether they can automatically join. Zero
19 testimony about whether any interested party can join a task
20 group.

21 But if they do, and all of this happens, and
22 somehow in this -- and keep in mind, there is a 21-day
23 period. All of the testimony in this case is that this
24 ballot is live for 21 days. After that, Ms. Carlson calls it
25 an expired ballot. And so I cannot imagine a world in which
26 a POSA is interested in going and looking at an expired

1 ballot that they can no longer vote on, comment on, anything
2 like that. But if they do go and join this task group, well,
3 then you're in Infobridge.

4 And so in Infobridge, what the law found -- the
5 Federal Circuit said it's clear that the authors of a
6 document having -- the authors of a document having access to
7 that document cannot count toward public dissemination when a
8 document is distributed to them. And so that's going to
9 apply to the task group and to all of the members of
10 Committee JC-40.4.

11 And keep in mind, we have no idea what the
12 differentiation is among the task group and the committee.
13 We know that to be in the task group, you have to be in the
14 committee. So in the Venn diagram, there's certainly an
15 overlap. It could be an entire overlap. We don't have any
16 evidence that not every member of the committee is a member
17 of the task group. But somehow, there is a task group that
18 is at least a subset, if not fully consumed in JC-40.4.

19 And so what Infobridge says in this case is that
20 they -- you need to look to the knowledge of those outside of
21 the authoring organization. The Federal Circuit said
22 specifically that -- the Federal Circuit looked at the SRI
23 case and the Bayer case. And the SRI case was the one where
24 the Federal Circuit noted that the evidence suggested that
25 there was only one non-SRI person, who in that case was
26 Dr. Bishop, who knew about the availability of the reference

1 and held that that militated against a finding of public
2 accessibility, that there was only one non-SRI person. They
3 were not concerned with how many SRI people knew about this
4 document, because that was the authoring organization.

5 And that was similar in Bayer, where there was --
6 the reference at issue was a student thesis that was only
7 accessible to members of a faculty review committee, being
8 that the primary author is obviously a student, but then
9 you've got the faculty review committee that's still
10 collaborating with the student. And they concluded that
11 accessibility to applicant's thesis by the three members of
12 the graduate committee, under the circumstances of the
13 present case, did not demonstrate that the work was publicly
14 accessible.

15 And so the Federal Circuit said that those two
16 cases, SRI and Bayer, taken together suggest that a work is
17 not publicly accessible if the only people who knew how to
18 find it are the ones who created it. That is why SRI focused
19 on the knowledge of those outside the authoring organization
20 and why Bayer discounted the knowledge of various professors
21 on a faculty committee reviewing student theses, whom the
22 Federal Circuit continued and said, to hold otherwise would
23 disincentivize collaboration and depart from what it means to
24 publish something.

25 That is key here because the only evidence that
26 Samsung has presented is this alleged email distribution to

1 the JC-40.4 committee and some subset of that committee,
2 which would be the task group. But those are the exact
3 people that the Federal Circuit held in Infobridge cannot
4 count towards public dissemination, because to hold otherwise
5 would disincentivize collaboration.

6 And the evidence here is that this is exactly like
7 the Infobridge case on collaboration. So what we had in
8 Infobridge was that there was -- the testimony was that there
9 was a committee that was JCT-VC and that those members were
10 part of, as the Federal Circuit held, ongoing collaborative
11 efforts to draft the WD4 reference.

12 They say that there was a lead author of this
13 reference, Mr. Bross, but just because there was a lead
14 author, they said that the board did not err in treating the
15 other JCT-VC members who knew about this ongoing project like
16 the faculty advisors in Bayer or the in-house employees in
17 SRI. And so the board therefore properly focused on whether
18 those outside of the JCT-VC knew about the JCT-VC website in
19 considering whether posting the WD4 reference on the website
20 made it publicly accessible. We're saying the board was
21 right to look there because dissemination within the JCT-VC
22 committee was not public accessibility, undermining Federal
23 Circuit law. And in that case, we were talking about a
24 committee of 250. 250 individuals. One lead author. But
25 because there was a collaboration back and forth, the Federal
26 Circuit said, no. We want to incentivize collaboration.

1 That's particularly important in a standard-setting
2 organization like this, which, as Samsung's counsel
3 acknowledged earlier, is a public interest organization. It
4 is in the public interest to have a standard-setting
5 organization and to have such an organization that can
6 collaborate without this collaboration creating prior art.
7 If we didn't have this, then you would be left to the lead --
8 the biggest companies in the area having to do everything by
9 themselves. They wouldn't be able to collaborate with other
10 companies. So the Federal Circuit says it does not want to
11 disincentivize collaboration and depart from what it means to
12 publish something, and so this collaboration on a document is
13 not enough.

14 And if we look at this, this collaboration is not
15 just the task group. It is between the task group and the
16 JC-40.4 committee. What Ms. Carlson said was that this was
17 -- let's see. I'm sorry. Samsung's declarant, Mr. Halbert,
18 testified at his deposition, which is Exhibit 2022, and in
19 particular, at page 50, starting around line 20, and
20 continuing to page 52, around line 14, he testified that the
21 committees participate in the authorship of standards in the
22 back-and-forth with task groups.

23 And specifically what he said was that for JEDEC to
24 finalize a standard, a draft standard would be presented in
25 the committee where, quote, people would have a chance to
26 read it -- this is in the committee -- and then bring up

1 objections to parameters that were in the spec, point out
2 typographical errors and such, and then it would be sent back
3 to the task group to clean up, and then it would repeat again
4 until everyone was satisfied. Then it would be voted on in
5 committee and sent to the board of directors.

6 So this is exactly the type of collaborative
7 process talked about in Infobridge, the task group being the
8 lead authors or potentially those who put together -- the
9 sponsor who put together the inside presentation here, which
10 is what this one was based on, and then there's a
11 back-and-forth and the collaboration among the task group and
12 the committee.

13 This is also consistent with the testimony from
14 Samsung's declarant, Ms. Carlson, which can be found in
15 Exhibit 2024. And there, on page 24, beginning around line
16 20, through page 26, line 9, Ms. Carlson testified about the
17 ballot tally for Exhibit 1015. The ballot tally is on page
18 43 of Ms. Carlson's declaration, which is Exhibit 1050. And
19 in her deposition, she talked about how there's a C in the
20 top column that stands for comment and a P on the ballot
21 tally that stands for postcard, which means whether a
22 response was made to the comment.

23 So in the case of the ballot found at Exhibit 1050,
24 page 43, which is the ballot for Exhibit 1015, we see Intel
25 provides a comment to Exhibit 1015. So we can see that even
26 when a standard has reached committee vote, committee members

1 are still allowed to, and, in fact, do, and in this case, did
2 continue to comment on the draft standard being voted on. So
3 this is the collaborative effort that is exactly what the
4 Federal Circuit talked about in Infobridge.

5 So Samsung has only alleged that the 23 authors in
6 committee JC-40.4 were the ones that received Exhibit -- or
7 had access to Exhibit 1015. And according to the Fed
8 Circuit, not a single one of those authors in exhibit -- in
9 Committee JC-40.4 can count towards dissemination.

10 Now, in Infobridge, the Federal Circuit went on and
11 looked at a website. Well, Samsung's counsel keeps talking
12 about the website, but that is -- the website here is even
13 less convincing for public accessibility than in Infobridge.

14 In Infobridge, you had a website that the Federal
15 Circuit found not to show public accessibility, because
16 someone had to actually drill in and say -- know that -- and
17 the document was posted so that anyone in the public could
18 access it without login credentials like the case here. But
19 they would have to go into the website and search by city
20 because -- and the city Torino, in that case, was the one
21 where the document was posted. And you would have to know
22 that you're looking at documents discussed in Torino and then
23 drill through all of these documents, because they weren't
24 labeled in ways that made it clear what you wanted, until you
25 could find the correct document.

26 They said that is not sufficient public

1 accessibility. There's no way for someone that's even
2 interested in this topic to really know. I mean, yes, if
3 they had all the time in the world and they just wanted to
4 click into every single link on the website, could they
5 eventually find it? Possibly. Not the case here, where
6 here, you can't even know that it exists, and if you do, you
7 still can't access it because you're not a member of the
8 committee. But in that case, the Federal Circuit said that
9 is not public accessibility. That is not someone interested
10 in the area able to exercise reasonable diligence,
11 reasonable, and find the document.

12 Here, there is zero evidence that this document was
13 available publicly in any way, shape, or form or that it was
14 even indexed or listed publicly. There's no evidence that it
15 was on JEDEC's website so that a POSA would have the
16 motivation to say, hey, I want to contribute to this ballot.
17 I'm going to go join JEDEC, join the committee, join the
18 relevant subcommittee, and somehow get all of that done
19 within the 21 days -- hopefully, if they found out on the
20 first day of the ballot -- that this ballot is available and
21 get in there and look at it before the ballot expires in 21
22 days. That is not public accessibility.

23 In addition, there's no evidence that the relevant
24 portion of Exhibit 1015 was ever disseminated to anyone
25 beyond the 23 authors in Committee JC-40.4. So Jazz Pharma
26 requires Samsung to establish that the document either has

1 been disseminated or otherwise made available to the extent a
2 POSA exercising reasonable diligence can locate it.

3 Samsung is doing a bunch of hand-waving here and
4 saying, oh, but a POSA could have joined JEDEC, they could
5 have found this, they would have known. There is no evidence
6 that this was ever disseminated. The only evidence that they
7 have presented that anyone has ever disseminated this
8 information is -- that they refer to in one of their slides
9 earlier, is honestly, I would say, a misstatement. If we
10 look at what was said, it's on -- which slide? One of
11 Samsung's slides from earlier, they said that Netlist's
12 expert, Mr. Murphy, said that a POSA would have known about
13 the content of Exhibit 1015. If you look at the context of
14 what Mr. Murphy said, this honestly cannot be accurate.

15 There had been a lot of discussions about Exhibit
16 1039 that we've talked about earlier that was -- that
17 Samsung's counsel talked about, which was a pre-provisional
18 document, the Inphi presentation, that Samsung has
19 acknowledged a POSA would have known about. Netlist has
20 acknowledged a POSA would have known about. It's even
21 referred to in Netlist's provisional. Possibly that's what
22 Mr. Murphy was referring to here, and he misspoke. I can't
23 speak for him to know what he was intending to say here. But
24 what I can know is that what he said is not what Samsung is
25 taking this to mean.

26 And so what he said was that a POSA would know that

1 the MB on a DDR3 LRDIMM refers to memory buffer -- so that's
2 talking about the provisional -- that buffers data, address,
3 and command signals, and that a POSA would know this based on
4 the information they would have known via word of mouth,
5 et cetera, then he said, from the JEDEC proposal, Exhibit
6 1015. There is zero evidence that a POSA would have known
7 about the JEDEC proposal, 1015.

8 And here, this also is not evidence that he would
9 -- a POSA would have known about this proposal, for a reason
10 that was spelled out in the briefing. And yet despite this
11 being spelled out in the briefing, Samsung still is
12 presenting this argument today as if this is some key fact in
13 the case. But what Samsung is omitting is that -- Samsung's
14 counsel said at the beginning of the deposition, which is at
15 Exhibit 1077, page 33, lines 13 to 17. Samsung's counsel
16 instructed Mr. Murphy, during our deposition today, unless
17 stated otherwise, can you please answer my questions from the
18 perspective of a person of ordinary skill in the art as of
19 June 12, 2009?

20 Mr. Murphy answered -- Mr. Murphy answered that he
21 would do his best to do that.

22 Samsung's counsel, when questioning Mr. Murphy in
23 the portion Samsung put on their slides earlier, did not ask
24 Mr. Murphy to deviate from his testimony from the perspective
25 of a person of ordinary skill in the art as of June 12, 2009.
26 But it is undisputed that Exhibit 1015 did not exist as of

1 June 12, 2009. We've seen Exhibit 1015. It has a date on it
2 that it was -- let's see. We'll look at it.

3 Exhibit 1015 right here, the cover page, Slide 8,
4 was a proposal that was approved by the task group on
5 November 9, 2009. And then we have testimony that this was
6 sent by a link to the members of JC-40.4 on or around
7 November 11, 2009.

8 So whatever Mr. Murphy meant to say -- people
9 misspeak all the time. This was clearly him misspeaking, as
10 was pointed out in the briefing to Samsung already. He could
11 not have been saying that a POSA would have known, from the
12 perspective of a person of ordinary skill in the art as of
13 June 12, 2009, that they would have known anything based on
14 Exhibit 1015, considering that it is undisputed that Exhibit
15 1015 did not exist at that time.

16 It's also undisputed that JEDEC's policy prohibited
17 distribution of Exhibit 1015 to non-JEDEC members. I know we
18 heard this earlier, talking about quotes from Mr. Halbert,
19 Samsung's counsel mentioned, but despite this being called
20 out in the briefing, Samsung's counsel continues to ignore
21 that Mr. Halbert actually retracted the statements from his
22 declaration in his deposition. So at Exhibit 2022,
23 Mr. Halbert -- grab this -- at Exhibit 2022, Mr. Halbert
24 stated -- he was asked on Exhibit 2022, page 23, that -- is
25 it your understanding that JEDEC policy permits JEDEC
26 committee members to distribute pending committee ballots to

1 non-JEDEC committees [sic]?

2 And he answered -- he said, so the answer -- you're
3 saying, is it against policy to distribute ballots to
4 non-JEDEC members? The answer is, yes, it is against policy.

5 He reiterates that answer in the next question. He
6 said, is it contrary to JEDEC policy for committee member --
7 JEDEC committee members to distribute a pending committee
8 ballot to a non-JEDEC entity?

9 Answer, yes.

10 Are there any other questions I can answer for
11 Your Honors about the prior art status of Exhibit 1015 before
12 I move on to the technical arguments?

13 JUDGE JURGOVAN: None from me.

14 MS. SPIRES: Okay. I will cover the provisional
15 access -- or the provisional issues if there is time. I
16 think that the prior art status of JEDEC is well-covered --
17 or the non prior art status -- by the fact that it's not a
18 public -- was not publicly accessible, but -- and I think
19 those arguments are spelled out fairly well in the briefing.
20 But I will come back to them if there is time.

21 But turning to Samsung's technical arguments. Even
22 assuming that Exhibit 1015 is prior art, which it is not,
23 Samsung's technical arguments still fail for four primary
24 reasons. First, the data buffer that Samsung proposes adding
25 to Hazelzet simply does not exist. Second, Hazelzet teaches
26 away from adding a buffer to its system. Third, even adding

1 a buffer to Hazelzet's system does not lead to the claimed
2 invention. And fourth, it would not have been obvious to use
3 an open drain for training notifications.

4 So turning to the first argument, that the data
5 buffer that Samsung proposes adding to Hazelzet does not
6 exist. So Samsung says, all right, we've got Hazelzet. It
7 doesn't have training, but it honestly doesn't need training
8 because it doesn't have a buffer. But if we add a buffer,
9 then we can get some training.

10 So they have all these reasons they want to add a
11 buffer. Put those aside. What buffer are they trying to add
12 to Hazelzet? A POSA looking at Hazelzet would have known
13 that there was no such buffer in existence at the time that
14 could be added to Hazelzet to buffer the data, and Samsung
15 did not propose a solution for how it would add a memory
16 buffer that buffers data to Hazelzet, as it was required to
17 do under Federal Circuit law.

18 And I'm not talking about Samsung not showing the
19 details of bodily incorporation, but instead not explaining
20 how a POSA would have done what it had never done before this
21 time, which was modifying an RDIMM interface like the one in
22 Hazelzet to include adding a memory buffer that buffers data.
23 It simply had not been done before this time, and a POSA
24 would not know how to do this. This whole modification is an
25 entire invention in and of itself that would have to be done
26 in order to make this combination, and Samsung provides no

1 information as to how a POSA would have done this. And so
2 Samsung cannot simply hand-wave to meet its burden of showing
3 a motivation to make this modification, much less a
4 reasonable expectation of success in doing so.

5 So the LR -- the DDR3 LRDIMM buffer in the JEDEC
6 proposals. So we've got two options, right? They're saying,
7 you can add a buffer from JEDEC, or you can add a buffer from
8 Buchmann. But neither works. So the DDR3 LRDIMM buffer
9 that's in the JEDEC proposals was not in existence at the
10 time of the provisional application, or the time the utility
11 application was filed, even.

12 The JEDEC proposal, we've seen it, Exhibit 1015.
13 It is a nine-page document. There is no architecture
14 provided. The JEDEC proposals just touched on certain
15 proposed features of a buffer, but were not complete and
16 provided no architectural guidance as to how to actually
17 implement this buffer. The JEDEC proposals didn't offer any
18 high-level architecture or even describe the main functions
19 of the buffer. They were only focused on addressing the
20 portion of what would later become the memory buffer --
21 addressing, sorry, the address portion of what would later
22 become the memory buffer.

23 And the first publication of the LRDIMM DDR3 MB
24 spec was not available until October 2014. That's the JESD
25 82-30 document was Version 1. So we are looking at five
26 years that it took POSAs working in this field to actually

1 come up with the architecture in JEDEC that adds a buffer to
2 this sort of interface. But Samsung saying, oh, let's just
3 do it now, despite the fact that all we have about this is a
4 nine-page document, Exhibit 1015, with no architectural
5 disclosures.

6 JUDGE JURGOVAN: Counsel.

7 MS. SPIRES: Yes.

8 JUDGE JURGOVAN: If the RDIMMs buffered the
9 address, the command, and clock signals, why would it be so
10 difficult to transfer that technology to buffering also the
11 data signals? Is the data moving faster, or is there some
12 limitation there?

13 MS. SPIRES: It is. So you're moving into another
14 section where it is moving faster, but you also have the
15 issue that you're adding in this new section of control. You
16 can't just slap a buffer on there. You have to now figure
17 out how to control this buffer. You have to add a bus to add
18 this buffer.

19 And actually, Hazelzet tells you not to do it.
20 Hazelzet -- if you look at paragraph 3 of Hazelzet, it says
21 that -- stop adding things to -- adding additional circuitry,
22 you are breaking the devices. What Hazelzet says in
23 paragraph 3 in about the middle of the paragraph, it says --
24 it's talking about all the prior art solutions, and it's
25 saying, although these solutions provide systems with the
26 ability to achieve the specified bandwidth objectives, the

1 overall quantity and types of failures in the memory
2 subsystem outside the data path itself has actually increased
3 due to the added circuitry associated with each memory
4 device. So you've got the buffers are going to introduce a
5 lot of timing issues for the data that are going to have to
6 be worked out.

7 And so this is the type of thing -- so this is why
8 it took POSAs five years to go from Exhibit 1015 to actually
9 having a specification with an architecture. Let's say
10 adding a new bus, dealing with all the timing issues,
11 figuring out all of the other issues that are going to
12 happen. And again, looking at Hazelzet, a POSA is going to
13 say, they're saying, do not add more circuitry to the memory
14 device. But that is actually what petitioner is proposing to
15 do, to add more circuitry. Hazelzet warns against
16 reliability issues caused by redrive logic involved in
17 buffering. And so a POSA looking at Hazelzet would not be
18 motivated to add an incompatible or incomplete buffer to
19 Hazelzet. And why would they? Hazelzet does not need a
20 buffer.

21 Samsung's counsel has said, oh, well, you'd add a
22 buffer because you want to add a buffer when you're dealing
23 with four ranks like in Hazelzet. But look at Hazelzet
24 paragraph 8. It says, an object of the present invention is
25 to provide an enhanced 28-bit 1:2 register, also referred
26 herein as a buffer, that supports four ranks of memory

1 devices intended for use with memory subsystems, such as dual
2 in-line memory modules having dynamic random access memory,
3 DRAM, chips thereon.

4 So Hazelzet says it is built from the ground up to
5 support four ranks and without adding all this additional
6 circuitry. Hazelzet says again, paragraphs 4, 5, 7, it goes
7 on saying it accomplishes all of the goals that it has for
8 high-density four-rank memory devices without adding
9 additional circuitry.

10 Paragraph 4, Hazelzet says that the invention
11 wanted to provide a comprehensive solution that includes the
12 capability of high-memory density and a high degree of fault
13 tolerance and the overall differentiated system reliability
14 long desired in the server market. And it goes on and talks
15 about how, in paragraph 5, saying that there were these
16 solutions where cost was not -- that were incredibly
17 expensive, but there were not solutions available for the
18 low- or mid-range server markets. They have not been
19 available. And so they said, all right, we're going to
20 figure out a way to do this. And what Hazelzet said is that
21 it accomplishes all of the goals, and without adding this
22 second buffer.

23 And then you look to -- so even if a POSA wants to
24 add a buffer to Hazelzet, then JEDEC doesn't tell you how to
25 do it. It took POSAs actually working in this field five
26 years to figure out how to do this, but Samsung wants to just

1 say -- wave its hands and say, a POSA would have known how.
2 They absolutely would not have. They want to add a buffer
3 from thin air.

4 So the other alternative is that, well, you look to
5 Buchmann. And they have made this combination. They say,
6 look, Buchmann has a buffer. We'd add that.

7 Wrong. A POSA would have known that you cannot add
8 the buffer from Buchmann into Hazelzet. So a POSA would have
9 known that the only type of memory buffer that was available
10 at the time to a POSA, what they could have used, is what's
11 available in Buchmann. So if they're really, for some
12 reason, wanting to add a buffer, that is probably what
13 they're going to do, is they're going to say, okay, the only
14 buffer that we have -- buffer that buffers data that we know
15 about is an AMB, such as the one in Buchmann.

16 But Buchmann's AMB buffer is not compatible with
17 Hazelzet's memory module. Buchmann's buffer is an AMB that
18 works with an FBDIMM interface. It's very clear about that.
19 And specifically, Buchmann's AMB buffer works with a serial
20 link to drive 13 data lanes, 2 spare lanes, and a clock in a
21 downstream direction and receive and drive 20 data lanes, 2
22 spare lanes, and a clock in an upstream direction. And
23 that's Buchmann at Column 4, lines 14 to 19. But Hazelzet's
24 memory module, on the other hand, is coupled to a parallel,
25 not stereo like Buchmann, but a parallel memory bus,
26 including a 72-bit wide data bus.

1 So a POSA would have known that if you're trying to
2 add Buchmann's AMB to Hazelzet's RDIMM interface, you're now
3 creating basically a Frankenstein DIMM, where the AMB would
4 be expecting to receive serial packetized information from
5 the host, because this is what the AMB would receive in
6 Buchmann's FBDIMM interface, for which the AMB was actually
7 designed. But Hazelzet's DDR3 host system would not be
8 sending packetized information to the AMB, because it's not
9 connected in series with other modules like in an FBDIMM
10 interface, but instead, it's on a multidrop bus. So
11 Hazelzet's host system would know how -- would not have any
12 idea how to interact with Buchmann's AMB, and conversely,
13 Buchmann's AMB would not know how to interact with Hazelzet's
14 host system.

15 So again, we've got Samsung trying to put two
16 things together without explaining how on Earth they would do
17 this. I know that they show some architectural slides,
18 saying, oh, this would have been easy. Look. Look at how
19 similar these architectures are. Or they show slides from
20 presentations. These are the highest level slides so that
21 visually, the architecture can look the same, but these
22 architectures are incredibly different.

23 For instance, Samsung had a slide that showed -- or
24 purported to show that LRDIMM and FBDIMM with data buffers
25 were known alternatives to RDIMM. But you look at that slide
26 from Samsung, which I think was their Slide 93, Figure 2 from

1 Exhibit 2007, and it actually shows that FBDIMMs like in
2 Buchmann are not interchangeable with RDIMMs like in
3 Hazelzet. They're in different columns. They are never used
4 interchangeably, and they cannot be, because they're
5 different architectures from different standards.

6 So the only way you're going to create this kind of
7 Frankenstein DIMM that Samsung is saying a POSA would create
8 here is hindsight. There is no other reason to do that.
9 There are no documents that Samsung has ever pointed to where
10 a POSA is trying to combine an AMB from an FBDIMM interface
11 into an RDIMM. At this point in time, that is just
12 absolutely unheard of. And what it would take to do that is
13 frankly mind-boggling, and there also would have been no
14 reason to do that.

15 So Samsung just says, oh, it would have been
16 obvious to use an open drain for training notifications
17 because that's one of the claim elements.

18 With hindsight, sure. Yes. So if you have the
19 patent in front of you, it's obvious. But if you're looking
20 at this combination, Hazelzet and Buchmann -- Samsung's
21 counsel acknowledged at the beginning of their argument that
22 Buchmann already has a notification system that exists for
23 notifying the host when -- of training completion. It
24 absolutely does. And it is not the system that Hazelzet
25 uses. It is a system that works in Buchmann's AMB. It is
26 absolute -- provides absolutely no reason to use the

1 open-drain system of Hazelzet. So while open drain was known
2 and reporting error using open-drain output was known, using
3 -- in the prior art, using an open-drain signaling during
4 training was never known or suggested before the priority
5 date of the patent.

6 So the whole point of the invention is to use a
7 pre-existing pin in a new way, using this pre-existing
8 error-out pin in a new way. But that pin does not exist in
9 the architecture of the FBDIMM in Buchmann, and the benefit
10 of using it for a different purpose is completely lost if
11 you're now having to add it into the system in order to get
12 to the claim elements.

13 So Buchmann already has a set protocol for
14 reporting training completion, so why would a POSA abandon
15 that and accomplish it by adding in a multidrop bus somehow
16 and accomplishing notification through the error-out pin in
17 Hazelzet, which does not work with the serial system of
18 Buchmann? So Buchmann's trainings -- and see Buchmann's
19 Figures 4 and 5 -- and this is also explained at Buchmann
20 Column 6, line 51, to Column 7, line 2. You see that
21 Buchmann's trainings are performed in a cascade interconnect
22 memory system, where the memory buffers on different modules
23 are successively trained. And you look at Figure 4, and you
24 see that each memory module can hand shake with the system
25 memory controller and/or with its neighboring modules using
26 the SBC link. And so Buchmann then requires the completion

1 of a training state at one module in order to initiate a same
2 training state at another module, and then the progression of
3 the training sequence ends at the system memory controller.

4 So in other words, Buchmann's training ends
5 naturally at the system memory controller. So when its
6 training ends, it ends at the system memory controller,
7 notifying it that the training has ended, and so it has zero
8 use for adding somehow in an open-drain signal to indicate
9 that training has ended.

10 So if you're going to take -- somehow try to create
11 a Frankenstein DIMM by putting Buchmann's buffer onto
12 Hazelzet, well, the one advantage you have from this is that
13 now you need training because you have this data buffer.
14 Buchmann has the training, and it has a built-in notification
15 system for letting the host know that the training is done.

16 There is zero reason, and Samsung has not provided
17 one, for a POSA to strip out the notification system, or just
18 in addition, even, add in another notification system using
19 the UE line of Hazelzet. That absolutely would not be done.
20 And if you add an open-drain signal, you also lose the timing
21 of the AMB. And so you're not only ignoring the fact that
22 you already have a notification system that lets you know the
23 -- as soon -- lets the host know that training is done as
24 soon as it is done, but you also now are going to screw
25 things up by adding an open-drain signal to accomplish the
26 exact same result of letting the host know exactly when

1 training is done.

2 And the patent talks about the advantages of this
3 invention, of the notification system, as opposed to the
4 prior art that had the pulling method where just periodically
5 the host system would pull the memory device to find out if
6 it was done with training, or the kind of wait method, which
7 is what the prior art did, and we talked about this being
8 obvious.

9 Exhibit 1039, which is the -- sorry, Inphi
10 presentation that we've seen so many times talked about, that
11 presentation actually was, as Samsung's counsel pointed out,
12 very shortly before this date, and yet -- find that
13 presentation. There.

14 If we look at Slide 25, we see that what the Inphi
15 presentation does at Slide 25 and then going onto 26, this
16 uses the wait method. And so it says down here on the bottom
17 left, host must wait a predetermined number of cycles before
18 moving to the next step, and this is after enabling the MB
19 DRAM training.

20 And so this is what the prior art says. It says
21 that you're going to -- the prior art says, look, this is
22 good enough. We're adding in -- we're talking about now
23 having -- taking over training from the host so that now the
24 host is going to somehow have to figure out when training is
25 complete. And the Inphi presentation says, all right, what
26 we're going to do is we're going to wait a certain number of

1 cycles. So they're saying it would have been obvious to add
2 notification. Well, the prior art at this time, which is
3 very, very shortly before the provisional date, sees this
4 issue and does not add a notification system.

5 So like I said, I agree there absolutely were prior
6 art systems that added notification, like Buchmann, but it
7 did it in a way that did not use a UE line. And so now
8 you're trying to somehow take Buchmann with its Frankenstein
9 combo of Hazelzet and tell it to somehow add a multidrop bus
10 so that it can even perform notification on the Hazelzet UE
11 line.

12 But say you accomplish all that and somehow manage
13 to deal with all the timing issues that look at, say, Exhibit
14 1025, from PDF page 30 of that. You see the timing of the
15 AMB spelled out. You're going -- if you add an open-drain
16 signal, you're going to lose the timing of that diagram.
17 You're going to have to figure all that out. But if you do,
18 what reason do you have to use the UE line other than
19 hindsight?

20 This is honestly one of the most classic cases of
21 hindsight I have ever seen. There just is no reason to say,
22 all right, we're going to steal Buchmann's buffer, which
23 works perfectly fine in Buchmann, is not going to work in
24 Hazelzet, but we'll ignore that fact, and then we're going to
25 ignore both Buchmann's training notification system, which
26 works perfectly fine in Buchmann, and we're going to somehow

1 cobble it together and get rid of something that works and
2 make it into something that doesn't and provides no extra
3 benefit. Both of these systems are going to notify the host
4 when everything is done. That's what Samsung says, why
5 people would want to add the UE line notification system,
6 because that's a way that will notify the host when every
7 module is done. Well, so does Buchmann's system.

8 If you're looking at Figure 4, its notification
9 system, it goes from TS0b, and then that is going to signal
10 to TS0a, to the first module, MB0, and then when that's done,
11 it's going to send back one, back to the host the TS0c, which
12 is then going to trigger TS0b at MB0. When that's done, it's
13 going to trigger the next module to go start TS0a. When
14 that's done, it sends TS0c back to MB0, and so on and so
15 forth, until you get to the final module, MB3, where when
16 it's done with TS0d, you're now -- it's going -- it doesn't
17 have anywhere else to report, so it's going to say, okay,
18 TS0d is done, and it's going to send that back to MB2, to
19 MB1, to MB0, back to the host.

20 So it is only -- the host only gets the signal when
21 every single one of these training operations has been
22 complete for every module because each module successively
23 triggers the next. And so you go through -- it's only when
24 everything is complete that the signal is sent. That is the
25 advantage that Samsung articulated for the open-drain UE
26 signaling from Hazelzet, but Buchmann already achieves that

1 advantage. So all you're doing is using hindsight to create,
2 basically, a Frankenstein model in order to include this in
3 the combination.

4 I'll say, even in talking earlier about adding the
5 buffer being obvious, even if you add a buffer to the
6 Hazelzet system, that still does not lead to the claimed
7 invention. So I showed you the system right here from Inphi,
8 but there's also the fact -- if we look at the provisional,
9 it calls out that this was not what was being done in the
10 prior art. So if we look at the provisional, page 1 of the
11 provisional, it says, in a paragraph that starts, although --
12 this is Exhibit 1008 at PDF pages 22 to 23. It says,
13 although the notifying method is an advantageous handshaking
14 method between the MCH and the memory subsystem controller,
15 the LRDIMM proposal requires the MCH to insert a waiting
16 period.

17 So that's what we're talking about right here, the
18 Inphi presentation. And the shortcoming of the current --
19 the provisional goes on and says, the shortcoming of the
20 current -- the LRDIMM proposal is that instead of adopting
21 the notification -- so saying instead of doing exactly what
22 Netlist says you should do, adopting a notification, saying
23 Netlist proposes this, it's shot down. That's in the
24 provisional. So they say, instead of adopting the
25 notification, the proposal requires the MCH to be in standby,
26 idle, or wait while the memory subsystem controller completes

1 its task.

2 We have actual evidence of what POSAs would have
3 done when faced with this need to have some sort of handshake
4 between the MCH and the memory subsystem controller. And
5 when faced with that, what happened was not that POSAs said,
6 oh, yes, we should do this notification system. We should
7 use an existing UE pin -- existing UE line -- use the
8 error-out pin in a way that it has never been used before.
9 And instead, they said, no, we're just going to do -- insert
10 this waiting period, because that's what's easy. That's what
11 POSAs wanted to do, something that worked with the systems
12 that were already there.

13 JUDGE JURGOVAN: Counsel, you have about 11
14 minutes.

15 MS. SPIRES: Okay. Do Your Honors have any other
16 questions on the Grounds 2 or 3 arguments -- or the Grounds 1
17 and 2 arguments, or would you like me to move on to the
18 provisional support?

19 JUDGE JURGOVAN: What I think I personally would
20 like to hear about is why this case is different from the 303
21 case, IPR2018-00303.

22 MS. SPIRES: So Slide 42 helps us a little bit
23 here. This is -- here, the issues are not identical, and
24 that's what matters here. I know we heard a little bit about
25 patent owner estoppel in the briefing. I didn't hear about
26 that there. Today, I only heard about collateral estoppel

1 because we -- I guess that was pointed out in the briefing,
2 that patent owner estoppel does not apply to IPRs since they
3 are not actions by the patent owner.

4 But collateral estoppel applies to preclude a party
5 from relitigating an issue if the prior action presents an
6 identical issue, and that's the VirnetX case. Rimfrost says
7 the identity of the issues that were litigated is what
8 determines whether collateral estoppel should apply. Here,
9 the issues are not identical.

10 We've listed the two different obviousness issues
11 on this slide, Slide 42, that petitioner has raised that are
12 different from what they raised in the previous IPR. And
13 this says first that you would add Buchmann's data
14 functionality to Hazelzet, and second that you would combine
15 Buchmann's training into Hazelzet's new or added
16 initialization mode and not Hazelzet's ECC mode or normal
17 operation.

18 And the petitioner actually acknowledges this. If
19 you look at the bottom of this slide -- and this is in the
20 petition at pages 38 to 41 as well. And they said, to the
21 extent patent owner might argue that in a prior IPR,
22 IPR2018-00303, the Hazelzet and Buchmann references were
23 combined in a different way, and that somehow is evidence of
24 hindsight, that is incorrect. And then they say, there's
25 more than one obvious way to combine references.

26 The reason they say this is because they did. In

1 the 303 IPR, petitioner suggested to combine Hazelzet and
2 Buchmann references in a different way. And so the test
3 here, where the test is the identity of the issues that were
4 litigated, petitioner has acknowledged that there is no
5 identity of the issues that are litigated. So with this
6 first element, the adding Buchmann's data buffering
7 functionality to Hazelzet, you see in the briefing
8 depositions from Samsung's experts from the prior IPR as well
9 as here because he had to change his story when he came here.

10 In the prior IPR, petitioner did not argue that you
11 would need to add Buchmann's data buffering functionality to
12 Hazelzet, and they encountered some problems. So the
13 Buchmann's data buffering functionality to Hazelzet, here,
14 the petitioner's expert acknowledges, if you have Hazelzet,
15 you have -- without Buchmann's data buffering functionality
16 or some other data buffering functionality, there would be no
17 motivation to add training. Absolutely none. That's because
18 the training isn't necessary. The host can communicate
19 directly with the memory device, and so it doesn't -- it
20 doesn't need to have the training. It can also -- it has
21 full visibility into the memory device, so it wouldn't need
22 the notifications.

23 But the petitioner ran into a problem when here you
24 have the training elements that were not present previously,
25 and so now they have this issue of, well, without data
26 buffering, they can't -- the training -- they found out in

1 the prior IPR is that the training from Buchmann's --
2 disclosed in Buchmann absolutely does not work without the
3 data buffering. And so petitioner previously tried to just
4 add Buchmann's training to Hazelzet, but that is
5 nonfunctional without the data buffering.

6 And so here they're now saying, okay, okay, true,
7 we agree that Buchmann's training will not function in
8 Hazelzet without also adding data buffering functionalities.
9 Now they're saying, all right, in addition to adding the
10 training, first we're going to go backwards a step, and we're
11 going to try to manufacture a motivation to add Buchmann's
12 data buffering. And then once you have data buffering, now
13 you need the training, and so you can add the training into
14 Hazelzet. And that's where the second part comes in, that
15 they're now combining Buchmann's training.

16 But they're not just adding Buchmann's training
17 into Hazelzet. They're adding it into Hazelzet's new
18 initialization mode. Because keep in mind, Hazelzet by
19 itself does not have a training mode. Hazelzet has two
20 different error modes, but those are both modes within the
21 same -- within the operation mode, the normal operation mode.
22 Those are not a mode for training and a mode for operation.
23 And so you have to add this new initialization mode into
24 Hazelzet, and then after you do that, that's where you have
25 to add the training.

26 So with the issues not being identical, a big issue

1 here is that a POSA would not have added Buchmann's data
2 buffering functionality to Hazelzet. We've talked at length
3 today about why that is, because this is the -- Buchmann's
4 data buffering is AMB designed for an FBDIMM interface.
5 Hazelzet -- one's serial, one's parallel, Hazelzet's RDIMM --
6 all the reasons that we talked about earlier, you're not
7 going to add Buchmann's data buffering functionality. So
8 this combination just does not work. It's not something a
9 POSA would have done.

10 And Samsung does not explain how it would have made
11 this work or why it would have done this. There just was not
12 -- at this point in time especially, but even now, different,
13 but at this point in time, there is no interchangeability
14 between FBDIMM of Buchmann and the RDIMM of Hazelzet. And so
15 you're not going to be adding this AMB from Buchmann that is
16 expecting serial packetized data into Hazelzet's parallel
17 system. So with these new arguments, patent owner estoppel
18 absolutely cannot apply.

19 There are -- Petitioner ran into some roadblocks
20 with some admissions from its expert in previous cases. And
21 so recognizing that is needing to modify its combinations in
22 order to try to meet the claim limitations in this case that
23 are different than the ones previously, and so they've added
24 these two new issues, which actually raise significant
25 nonobviousness issues in this case.

26 JUDGE JURGOVAN: Three minutes, Counsel.

1 MS. SPIRES: Okay. If you don't have -- do you
2 have any other questions about the collateral estoppel issue?

3 JUDGE JURGOVAN: I do not. Thanks.

4 MS. SPIRES: Okay. Then in my last three minutes,
5 I will just briefly touch on the provisional support issue.

6 Samsung's counsel did a lot of talking about what's
7 in the prior art and that there are references to Netlist's
8 patent referring to presentations in the prior art. Netlist
9 does not disagree with the fact that the things that are
10 being referenced are in the prior art. Absolutely, Exhibit
11 1039 is prior art and is something a POSA would have known.
12 Samsung alleges that. Netlist agrees with that. There's a
13 reason that Netlist's provisional actually references Exhibit
14 1039.

15 And so the case law is very clear that a petitioner
16 -- a patentee is not required to make their patent into a
17 treatise and recite everything that a petitioner -- that a
18 POSA would have known in the art at the time. They can rely
19 on what a POSA would have known. And here, they even
20 reference a previous -- the Exhibit 1039 Inphi presentation
21 in order to demonstrate what they're talking about that a
22 POSA would have known. And so it is not at all unusual if
23 they're saying that we're referring to prior art saying, look
24 here, this is what a POSA would have known. And it's not
25 just the Inphi presentation. You can go into the JEDEC spec
26 -- or the JEDEC standards and see evidence of what a POSA

1 would have known as well. That is exactly what we've talked
2 about here.

3 So -- but talking about, say, these negative
4 limitations. I kept hearing this about how there's no
5 disclosure. There is. If we look to Slide 32, for instance,
6 we see Figure 3 of the proposal -- or of the provisional.
7 Petitioner keeps calling this bottom section a footnote.
8 It's a bit of a kind of jury trial tactic that you don't
9 usually see in the PTAB, along with the mugshot pictures in
10 the slides. But in any event, this is not a footnote. This
11 is an explanation of what the actual invention is. And it
12 says, error-out pin, low during MB training, high signal
13 indicates that training is done, high during normal operation
14 unless a parity error occurs.

15 This is what the invention is. It is using this
16 error-out pin in a new way. The old way was that -- what a
17 POSA always would have known, that during normal operation,
18 the error-out pin is high unless a parity error occurs. A
19 POSA absolutely would have known that. Samsung does not
20 disagree with that.

21 And then in normal operation, prior art, what
22 you're going to have is you have -- if there is a parity
23 error, then the pin is pulled low. That's going to tell the
24 host not to communicate with the memory device because
25 there's a parity error, and it's going to need to resend its
26 signal, do something to fix the parity error.

1 So here they're saying, all right, we're going to
2 use this same pre-existing pin in a new way. We're going to
3 use it and make it so that it is pulled low during MB
4 training and then driven back high when the training is done.
5 A POSA would absolutely have known that when the error-out
6 pin is low, that you are not going to be communicating with
7 the device -- with the memory device. And this is from the
8 way it works with the parity error. You're not going to
9 communicate with the memory device when there's a parity
10 error either.

11 And so what would happen, imagine, if the error-out
12 pin -- or if the host did go ahead and communicate with the
13 device when the pin was low? Well, then, how is the device
14 going to know if there is a parity error? If it's ignoring
15 the fact that it's low during -- the pin is low during MB
16 training and it's going ahead and issuing normal read/write
17 commands and there's a parity error, the host is going to
18 have no idea because the pin is already low and the parity
19 error is not going to be issued. So absolutely a POSA would
20 have known that these things are mutually exclusive, that
21 you're going to have the error-out pin is low during MB
22 training, meaning normal read/write operations are not going
23 to occur.

24 And this is all throughout the JEDEC standards,
25 that a POSA would have known that when training is going on,
26 you are not going to have the normal read/write systems. So

1 for instance, you look at Exhibit 1056, which are the JEDEC
2 standards for DDR3 --

3 JUDGE JURGOVAN: Counsel, you're eating into your
4 rebuttal time. You're about two minutes over.

5 MS. SPIRES: Okay. Well, I will just refer you,
6 then, to Exhibit 1056, page 43 shows a POSA knowing about
7 this -- would know about this on/off and how this works. And
8 also, if you look at -- let's see -- Exhibit 1029, which is
9 another one of the JEDEC standards, at pages 9 and 10, again,
10 you will see that on page 10, Figure 4, the LPDDR SDRAM is
11 ready for any valid comment that happens at Step 11. Every
12 step before that, there was a no-op or a deselect issue so
13 that the memory device would not be accessing or active --
14 the host would not be accessing a memory device at that
15 point.

16 But I'll save the rest of my time for rebuttal.

17 Thank you.

18 JUDGE JURGOVAN: Thank you. I want to hear from
19 Petitioner now. Cannot hear you.

20 MR. CHANDLER: Thank you.

21 I'd like to start with the question of printed
22 publication again. There's several Federal Circuit cases
23 that I think are important. Judge Jurgovan had asked me
24 about, wouldn't the JEDEC patent policy suggest that you want
25 to keep proposals confidential, and I had referred to the
26 Rambus case, so I just want to give that citation for that.

1 That's 318 F.3d 1081. And in the Rambus case, that's all
2 about the JEDEC patent policy.

3 And the Federal Circuit noted on page 1085 of that
4 case, quote, minutes of the JEDEC meetings and copies of the
5 published JEDEC standards are available to members and
6 nonmembers alike, end quote. And then later, in the footnote
7 on page 1102, in footnote 9, the Federal Circuit found,
8 quote, because JEDEC's minutes are available to nonmembers
9 and because there are no confidentiality agreements between
10 individual members, a member's revelations of future
11 intentions to file an application likely would jeopardize
12 some foreign patent rights, end quote.

13 So again, the point is --

14 JUDGE JURGOVAN: What's the date of the decision?
15 What's the date of the decision, please?

16 MR. CHANDLER: 2003.

17 JUDGE JURGOVAN: 2003. Is this under the same --
18 the same JEDEC policy as we're dealing with here?

19 MR. CHANDLER: There's -- I'm not aware of any
20 difference. If you look at the JEDEC manuals, 1048 and 1049,
21 again, there's nothing about confidentiality in them. The
22 only reference to confidentiality is survey ballots.

23 So, I mean, here's the manual. You search for
24 confidential, the only reference is to these survey ballots.
25 And Exhibit 1015 is not a survey ballot. Exhibit 1015 is a
26 technical proposal. Survey ballots are different. The JEDEC

1 manual says, surveys that contain company sensitive material
2 that must remain confidential shall be stripped of any
3 reference. So survey ballots are the one area where there is
4 confidentiality within JEDEC. Otherwise, there's no
5 confidentiality. Exhibit 1015 --

6 JUDGE JURGOVAN: What about the copyright section?
7 Can you search on copyright for a second?

8 MR. CHANDLER: Sure. I think -- 4.1, copyright.

9 JUDGE JURGOVAN: Yeah.

10 MR. CHANDLER: Yeah. I mean, this is the same
11 thing as the front page of the New York Times.

12 JUDGE JURGOVAN: It says, for internal use, right,
13 without restriction?

14 MR. CHANDLER: Correct. And that's --

15 JUDGE JURGOVAN: Use of materials outside are at
16 the discretion of the board. So there's some sort of
17 restriction there, correct?

18 MR. CHANDLER: Again, it's a copyright restriction,
19 the same copyright restriction that applies to the front page
20 of the New York Times. If I want to go to the New York
21 Times, I need to pay money. I have to enter a password.
22 I've got to log in. It's the same thing with JEDEC.

23 There are three Federal Circuit cases that I think
24 are key. First is GoPro in 2018. In GoPro, the Federal
25 Circuit reversed the board on printed publication. The board
26 had taken a narrow view of printed publication. The Federal

1 Circuit rejected that and emphasized that the question is
2 accessibility. So in GoPro, it was a trade show, and the
3 Federal Circuit held that the trade show was publicly
4 accessible because a person of ordinary skill would be
5 interested in joining it.

6 The second case that you heard a lot about from
7 counsel for Netlist was the Infobridge case, which involved
8 Samsung. This is a great case for Samsung. It's a great
9 case for us because in this case, the Federal Circuit again
10 rejected the board's narrow view of printed publication and
11 remanded. And if we look at the end of the decision, on
12 pages 1374 to 1375 -- let me just read some of it at the
13 bottom right here. Rather than requiring Samsung to prove
14 that persons of ordinary skill actually received a LISTSERV
15 email, the Board should have considered whether Samsung's
16 evidence established that an ordinarily skilled artisan could
17 have accessed the WD4 reference after exercising reasonable
18 diligence based on the LISTSERV email. This might include
19 examining whether a person of ordinary skill exercising
20 reasonable diligence would have joined the LISTSERV. See,
21 e.g., GoPro.

22 So that's exactly what we have here. The
23 Infobridge case was another standard-setting organization
24 case, like JEDEC. And our record, like the Infobridge
25 record, shows that a person of ordinary skill would have
26 known about JEDEC, would have joined JEDEC, and by joining

1 the committee, would have received all of the emails
2 distributing the JEDEC proposals and also distributing the
3 JEDEC ballots to vote on them.

4 The third case that's really important is the M&K
5 case, which is also against Samsung. And the reason is that
6 the M&K case is the same fact pattern as Infobridge. So in
7 Infobridge, the Federal Circuit rejected the board's narrow
8 view of printed publication and remanded back to the board,
9 and then the appeal after remand was named M&K Holdings. So
10 both M&K and Infobridge examined the exact same
11 standard-setting organization, and in M&K, the board wrote a
12 long decision and found, based on GoPro, that the proposal to
13 a standard-setting organization was a printed publication.
14 And then on appeal to the Federal Circuit in M&K, the Federal
15 Circuit agreed and said, yes, the proposal to a
16 standard-setting organization was a printed publication.

17 And if you look at the facts of M&K, both from the
18 Federal Circuit's decision as well as the Board's underlying
19 decision, they are very similar to the facts of this case.
20 They're very similar. The standard-setting organizations
21 were created, both of them, for the public interest. You had
22 -- people in the industry all knew about the organization,
23 all joined the organization, were welcome to join the
24 organization, and there was no confidentiality restriction.

25 Now, the one difference that has been raised is
26 JEDEC requires money to become a member, and to, you know,

1 make sure that people pay money, you've got to log into JEDEC
2 with your password. But again, that's the same for the front
3 page of the New York Times. It's the same for many printed
4 publications. They charge money, and you don't get access
5 until you pay for them. I mean, that's also true for the
6 local library. I can't get into the local library without my
7 library card, and that library card often costs money to get
8 it. So money does not defeat printed publication.

9 I want to talk about the facts of the printed
10 publication sort of starting from the beginning,
11 chronologically, because I think it's helpful to understand
12 sort of exactly what happened. So Slide 43 of our Exhibit
13 1082 shows that there is a public JEDEC web page on the
14 internet that anyone can go to that lists all of the JEDEC
15 committee meetings. And so there was a committee meeting on
16 June 2009 in Montreal at the Omni Mont-Royal hotel, and the
17 web page shows you that it's the JC-40 committee. And as we
18 discussed earlier, JEDEC also had its catalog of committees
19 that published to everyone on the internet what each
20 committee was about. This Exhibit 1071, which has the agenda
21 -- that has the list of meetings, also in the middle there,
22 it says, download agenda. Unfortunately, the Internet
23 Archive doesn't have a copy of that, but that also shows
24 that, you know, not only were the meetings published, but
25 that JEDEC was sharing the agenda for the meetings.

26 So what happened at this meeting in June 4, 2009?

1 That's shown on Slide 44. Inphi made this presentation,
2 Exhibit 1039. The presentation is numbered, 142.35. It's
3 important to keep that number in mind because that's the same
4 number that was used for the final ballot. So 142.35 stays
5 the same. That's how you can find the presentation, both the
6 original presentation and the final proposal.

7 Slide 45 are the meeting minutes of what happened,
8 and this shows all the people listed on this slide received
9 Proposal 142.35, including SJ Park on the bottom left from
10 Samsung, including Hyun Lee, the named inventor on the '218
11 and '595 patents. On the right side in yellow highlighting,
12 it says, the TG will work the details. That means the task
13 group will work the details of this proposal.

14 Slide 46 shows, on the left, Exhibit 1039, which
15 was the original proposal on June 4, 2009. On the right is
16 the final proposal that was voted on, November 11, 2009,
17 marked as Exhibit 1015. The point I want to make here is the
18 proposal is very similar, both the original proposal on the
19 left, the final proposal on the right. So, you know,
20 proposal 142.35 changed a little bit, but it was very similar
21 both from the beginning to end, and the difference was the
22 task group would have weekly meetings to make refinements to
23 this proposal between June of 2009 and November of 2009.
24 Neither one of these proposals is marked confidential.
25 There's no evidence of confidentiality restrictions on
26 Exhibit 1039 or Exhibit 1015. And the testimony from John

1 Halbert as well as Netlist's expert is that a person of
2 ordinary skill in the art would have known about the contents
3 of both of these proposals.

4 Slide 47 is the testimony from John Halbert and
5 Dr. Park about the task groups meeting every week between
6 June of 2009 and November of 2009 to refine the proposal.

7 Slide 48 shows that the task group approved the
8 final draft of the proposal, November 9, 2009, and then sent
9 it for distribution to the committee on November 11, 2009,
10 for voting.

11 Slide 49 shows Exhibit 1015. Again, no
12 confidentiality restriction. This is the final version.
13 It's the same number, 142.35. That makes it easy for
14 everyone to find both at -- you know, at every committee
15 meeting, they could refer to it as 142.35.

16 Slide 50 shows Exhibit 1037 is the tally of votes.
17 So there are 20 companies that voted on Exhibit 1015, and
18 these are, you know, the largest companies in the world that
19 are working on this, so Dell, IBM, AMD, Intel, Micron,
20 Samsung, Sun Microsystems, Texas Instruments, as well as
21 patent owner, Netlist.

22 And then we have the testimony on Slide 51 from SJ
23 Park where -- if you look in the upper right, the testimony
24 here shows that Dr. Park testified that he and his colleagues
25 at Samsung had a copy of the document marked as Exhibit B to
26 his declaration, which is the JEDEC proposal, Exhibit 1015.

1 There were a lot of statements by Netlist's counsel
2 that somehow the Voting Machine is locked down and that the
3 only way to access the document is if you go through all this
4 security into the Voting Machine. That's inaccurate. The
5 vote is secured, but the document you're voting on is just a
6 PDF that could be distributed to anyone. And the testimony
7 from Dr. Park here is that he and all his colleagues at
8 Samsung had copies of Exhibit 1015, and they reviewed it
9 before they voted on it. I mean, obviously they want to look
10 at it before they vote on it.

11 So it's not the case that there was some
12 restriction on the document itself. The restriction was to
13 cast your vote, yes. I mean, there's a password to make sure
14 that your vote is casted correctly and that someone can't
15 change your vote. But the document itself was not
16 restricted. To the contrary, the document itself would have
17 been discussed in the task group every week, and the task
18 group had to approve the document on November 9th before it
19 was distributed for formal voting on November 11th. Same
20 document. So the task group had this document. They were
21 distributing it with no confidentiality restrictions.

22 But then what happens after the vote? There's
23 another committee meeting. Again, this is the -- Slide 52
24 shows the public JEDEC web page advertising to the whole
25 world that there was a committee meeting in December of 2009.
26 JC-40 is the committee. This time, they met at the Grand

1 Wailea resort in Maui, Hawaii. And the testimony of Dr. Park
2 is that at this meeting in Hawaii, the votes in favor of
3 Exhibit 1015 were counted, and so therefore, the proposal
4 passed, and that was discussed at this committee meeting in
5 Hawaii.

6 Slide 53 shows that John Halbert testified that
7 there was no confidentiality. Counsel for Netlist tried to
8 suggest that John Halbert retracted his declaration, shown on
9 the left side here. That's incorrect. I encourage you to
10 read John Halbert's deposition, Exhibit 2022. It's a short
11 deposition, only 55 pages or so. He did not say that it was
12 confidential. He just said that it would be against JEDEC
13 policy to provide copies of presentations, which, again, is a
14 copyright restriction. But as you can see on the slide here,
15 John Halbert specifically testified that there was no
16 nondisclosure agreements, he was never instructed to keep
17 anything secret, and furthermore, with respect to actual
18 documents, what John Halbert testified is that Intel would
19 meet with its suppliers and partners and would discuss JEDEC
20 proposals, and Intel did not check to see whether those
21 suppliers and partners were members of JEDEC or not.

22 And that's entirely consistent with the testimony
23 of Netlist's expert, shown on Slides 56 and 57. And there is
24 a lot of testimony by his expert. I mean, it goes on for a
25 lot more than just these pages. So again, I encourage the
26 board, take a look at his testimony, Exhibit 1077. It starts

1 around page 49 and it goes on to, I think, page 62. So 20
2 minutes of testimony about whether JEDEC was, you know, known
3 to persons of ordinary skill and whether proposals were
4 known. And his answer was yes.

5 You see on the bottom left here, he said, people
6 would know through word of mouth. And that word of mouth,
7 that's exactly what the Federal Circuit found in M&K Holdings
8 was evidence of public accessibility. So if you look at the
9 Federal Circuit's decision, 985 F.3d at page 1380, the
10 Federal Circuit said that word of mouth is evidence that a
11 document was publicly accessible in a standard-setting
12 organization.

13 Even Netlist's declarant, Dr. Yang, agreed that
14 technology proposals or ballots would be discussed. Now, he
15 tried to limit the discussion among members, but either way,
16 there's no dispute that Exhibit 1015 was available to all the
17 members. It wasn't locked up in the Voting Machine. You
18 could get copies of Exhibit 1015. You could discuss them
19 with all the other JEDEC members. There was no
20 confidentiality restriction, and there was no limit that
21 prevented you from discussing it with people outside of
22 JEDEC. There was only this copyright restriction, but there
23 was no confidentiality restriction.

24 I want to go now to the question of collateral
25 estoppel. So the claims don't have to be identical for
26 collateral estoppel to apply. This was the quote on the

1 bottom right of Slide 77. The Federal Circuit said that
2 collateral estoppel will apply as long as the difference in
3 the claims, quote, does not materially alter the question of
4 invalidity.

5 And so if we turn to Slide 76, this is the final --

6 JUDGE JURGOVAN: Two minutes, Counsel.

7 MR. CHANDLER: Thank you.

8 This is the final written decision, Exhibit 1034 at
9 page 12. The board already considered the combination of
10 Buchmann and Hazelzet. They found that those references are
11 analogous. They found that there was a motivation to combine
12 them. They found that there was a motivation for a
13 notification signal indicating the status of training. The
14 board found that it was a predictable and expected result.

15 In response to this, Netlist argues that the data
16 buffer should somehow relieve them from collateral estoppel.
17 But even in this prior IPR, Buchmann has a data buffer. The
18 combination in the prior IPR involved Buchmann and included a
19 data buffer. And this is something we pointed out in our
20 reply brief, Paper 35, at page 26. In the middle here, it's
21 highlighted in yellow, where we wrote, in the prior IPR,
22 Dr. Alpert already explained that, quote, Hazelzet would be
23 modified to extend the buffering to include the data and
24 strobes, end quote. And this was Dr. Alpert's deposition in
25 the prior IPR, and it's marked in this IPR as Exhibit 2002,
26 pages 78 and 81 and 82.

1 So data buffering was an issue in the prior IPR
2 because, again, Buchmann has a data buffer, and so you'd have
3 to combine Buchmann with this data buffer and Hazelzet, and
4 the combination that Dr. Alpert made before did include the
5 data buffer.

6 Just briefly on this notion of RDIMM versus LRDIMM.
7 On Slide 91, this shows all --

8 JUDGE JURGOVAN: Counsel, your time is up, so if
9 you could just finish your thought.

10 MR. CHANDLER: Yeah. On this slide, I just want to
11 point out that JEDEC had standardized memory modules without
12 data buffers, that's shown on the left, and they had
13 standardized memory modules with data buffers, shown on the
14 right, such as the FBDIMM and LRDIMM, and those were known
15 alternatives. It was known that you could have a memory
16 module with data buffering or without data buffering. So
17 there's nothing special or, you know, nonobvious about a
18 memory module with data buffering.

19 Thank you for the opportunity to be heard,
20 Your Honors.

21 JUDGE JURGOVAN: Thank you. We'll go to patent
22 owner for 16 minutes of rebuttal.

23 MS. SPIRES: Thank you, Your Honor.

24 Showing the slide that petitioner just had up on
25 the screen saying that there were known alternatives of FBDIMM
26 and RDIMM. The slide is a bit misleading in that it is

1 citing on the known alternatives Exhibits 1077, 1079. It's
2 citing exhibits that are Netlist documents from 2017. Yes.
3 When you go from 2009 to 2017, there have been a lot of
4 advances in technology and things that are within the skill
5 of a POSA now were not within the skill of a POSA then. So
6 we cannot look to whether now -- or in 2017, a POSA -- which
7 is what petitioner is trying to get you to do -- a POSA could
8 have been able to interchange these interfaces. They could
9 not do that in the relevant time period here, and there is no
10 evidence that they could have.

11 Working backwards on the collateral estoppel issue.
12 The order of combination in the prior IPR is different, and
13 that is critical here. In the prior IPR, they said, okay,
14 you would add the training. We're going to add training from
15 Buchmann to Hazelzet. And once you've added training, well,
16 now you need to have a buffer because the training isn't
17 going to function without the buffer. That is the opposite
18 of what they've argued here. And they've said over and over
19 they did not argue that here. And the reason they didn't
20 argue that here -- if you look at Netlist's Slide 57,
21 petitioner's expert admitted -- it says, it's your opinion --
22 the question, it's your opinion that one of skill in the art
23 reading Hazelzet would not be motivated to add any training
24 to Hazelzet, correct?

25 And he says, I'm not aware of any reason that they
26 would be motivated to add training.

1 That is from testimony that was dealt with in --
2 that came up because of the prior IPR, where they're now
3 saying, okay, you would not have been motivated to add
4 training to Hazelzet. In the prior IPR, they argued, yes,
5 you would. We're saying this is all evidence of hindsight in
6 this case because now they're saying, oh, no, no, no, it's
7 not because you can't add training without the buffer that
8 that's why they're adding the buffer. They're trying to get
9 training, so now they're going to add the buffer so that the
10 training will actually function.

11 Now they're saying, oh, no, no, no, yeah, we get
12 it, that's hindsight. The buffer won't -- or the training
13 won't work without the buffer. Now they're saying, no, no,
14 no, we're not trying to add the buffer because of training;
15 we're trying to add the buffer for this density reason,
16 despite the fact that Hazelzet already said that it's
17 perfectly capable of dealing with the four-rank density. And
18 they specifically say over and over again that they are not
19 arguing in this case that they are combining Hazelzet and
20 Buchmann because of this training issue. They're saying that
21 the training comes later. And that is critical here as to
22 why you would do this, because if they're arguing what they
23 did previously, that you're going to want to add training to
24 Hazelzet, and once you've added training, you now need to add
25 a buffer to make the training work, well, then they're struck
26 with their admission from their expert that a POSA would not

1 have had a motivation to add training to Hazelzet and their
2 case is over.

3 And so here, that's why they are saying -- just
4 backing away from everything they said in the prior IPR where
5 they argued training first, and then the buffer comes later.
6 Now they're saying, no, no, no, we understand we can't do it
7 that way. And so they're saying, nope. Forget about the
8 training. That's not our motivation to add the buffer. The
9 motivation to add the buffer is that you're going to want to
10 have this density and reliability, all the things that
11 Hazelzet actually says it already does. So despite the fact
12 that there is no motivation, they still say, fine, you want
13 to do it. And then they say, okay, now that you have a
14 buffer, you need training. Those are entirely different
15 arguments with entirely different motivations to combine.

16 And so talking about this identity of claims. I
17 never talked about identity of claims. The claims are not
18 identical. But the Federal Circuit has said that we need
19 identity also of issues. It's not just of claims. They said
20 claims do not have to be identical, but they say that the
21 issues litigated do have to be. They say it is -- the
22 Rimfrost case, they say that it is the identity of the issues
23 that should -- that were litigated that determines whether
24 collateral estoppel should apply.

25 And so the issues here are not identical, and they
26 cannot be, because if they were, petitioner's argument would

1 fail right out of the bat -- right out of the gate here
2 because of the admission from its counsel -- or its expert
3 previously.

4 Backing up a bit. Counsel talked about the Rambus
5 case. The Rambus case is talking about the confidentiality
6 of JEDEC minutes. JEDEC minutes are not at issue here. If
7 we look at the related Rambus case when it's at the District
8 Court, we see a little bit more in detail about what the fact
9 disputes are the District Court is dealing with and not the
10 Federal Circuit. And they said at 330 F.2d 679 at 694, note
11 20, Eastern District of Virginia, 2004, to come back down,
12 there are disputes of fact regarding whether proposed JEDEC
13 standards were available to non-JEDEC members and whether and
14 to what extent they were to remain confidential.

15 Although it is undisputed that minutes of JEDEC
16 meetings were available to non-JEDEC members, they said here,
17 it is unclear what these minutes consisted of. And according
18 to Infineon, proposed standards offered at JEDEC were
19 supposed to remain confidential, and then they go on. They
20 don't end up deciding that issue. They said this issue has
21 to be sorted out after the factual record is developed at
22 trial.

23 But JEDEC -- Rambus does not stand for the fact
24 that JEDEC proposed standards or, especially here, ballots
25 are not confidential. It says that meeting minutes are not
26 confidential. And that's in line with what we've seen in the

1 case law, where -- for instance, GoPro that Samsung keeps
2 citing to. In GoPro, you have a conference that people can
3 walk into where there are documents actually distributed.
4 That is not the case here. Here, the only documents that
5 were alleged to be distributed are to the authors, the
6 authoring organization.

7 And that is the key distinction here among this
8 case, M&K, GoPro -- Infobridge specifically distinguished
9 GoPro, and what it said in doing so, it said, applying both
10 SRI and Bayer to the facts -- or, sorry, it said, unlike the
11 conference attendees in GoPro or Medtronic, JCT-VC members
12 were part of ongoing collaborative efforts to draft the WD4
13 reference.

14 That is the difference, the distribution that
15 happened in GoPro to conference attendees. You're looking
16 at, okay, you've got conference attendees that are not part
17 of the authoring organization. That's why in SRI, they
18 didn't care about the distribution among SRI members. They
19 said, okay, outside of SRI, who saw this?

20 That's the same thing in Infobridge. Counsel's
21 saying it's a good case for Samsung. Yes, it certainly was
22 remanded, but not on the issue we care about it. It was
23 remanded because the factual record was not developed with
24 respect to who was on the LISTSERV. What the case said was
25 that there was testimony that -- from the lead author of the
26 WD4 reference that the LISTSERV included JCT-VC members who

1 had attended the Torino meeting, as well as other interested
2 individuals. And that was what had to be developed there,
3 was, okay, who are these other interested individuals? What
4 email are they getting? Is that covered by an expectation of
5 confidentiality? What are the circumstances of the email?
6 Those are all the things that the Fed Circuit had to be
7 developed in the factual record there. What the Federal
8 Circuit held that the board did right was in looking outside
9 of the JCT-VC members who are public accessibility. Because
10 they said, they were the authoring organization, and so
11 distribution to them cannot be public dissemination.

12 And so here, you have testimony that there was --
13 the LISTSERV potentially included, in addition to the members
14 or the authors, other interested individuals, and they needed
15 to know who those were and explore that issue. But the fact
16 remains that the holding of Infobridge is that you cannot
17 have public accessibility when the only people that know how
18 to find the document are the authors.

19 This is the same for M&K. That one wasn't
20 discussed in Samsung, but it's the same thing. The
21 references were formally presented to conference attendees
22 who were not authors of the document, same as in GoPro.

23 Distribution to people who are not authors of the
24 document is not what we have here. We have zero evidence
25 that there was distribution to people who are not authors of
26 the document.

1 Samsung's counsel keeps talking about Park and how
2 he says he had seen the document. Samsung is a member of the
3 committee, which Park actually acknowledges, and that he said
4 he voted on this. He was Samsung's representative. That
5 means that he was one of the authors of this document. So
6 this does not -- or Samsung and he, as a voting
7 representative, are the authors of this document. So
8 distribution where Park says he had it, that's the same
9 evidence we already have, that the 23 voting members of this
10 -- or the 23 authors of the committee, JC-40.4, could see the
11 document under cover of password and -- username and
12 password.

13 And I know counsel just said that the -- there was
14 no confidentiality -- that the document wasn't restricted.
15 Yes, the document was restricted. It may not have been a PDF
16 document where you're having to enter -- where the document
17 cannot be printed or something like that. If you are having
18 to enter a username and password in order to see a document,
19 that is a restriction. That is not something that someone --
20 an interested member of the public can just see.

21 So back on confidentiality. I echo with -- if you
22 look at what Mr. Halbert said, he said that -- he
23 acknowledged that there is confidentiality. He said that it
24 was JEDEC policy not to distribute the ballots to non-JEDEC
25 members. I don't personally know what the difference is
26 between something that's against JEDEC policy and something

1 that violates confidentiality. If it is against JEDEC
2 policy, then there is a restriction. End of story.

3 And Netlist's expert, Mr. Yang -- or declarant,
4 Mr. Yang, said the same thing. Exhibit 2026, his
5 declaration, he said, paragraph 20, both in the 2009 to 2010
6 time frame and throughout my time at JEDEC, it was understood
7 and the practice of JEDEC members that committee ballots were
8 treated as confidential with the committee.

9 That's exactly what was said here, and that's
10 exactly consistent with what Mr. Halbert said, where he said
11 that it was against JEDEC practice to distribute the
12 committee ballots.

13 So the cases have consistently held that the
14 standard for public accessibility is whether a person of
15 ordinary skill in the art could, after exercising reasonable
16 diligence, access a reference. So this is saying that under
17 the subsection -- the argument subsection that relates to the
18 LISTSERV, that -- if a POSA could have access after
19 reasonable diligence. So that's in Infobridge, are we --
20 looking at the LISTSERV, could a POSA have accessed this
21 LISTSERV and done so and been able to get ahold of the
22 document with reasonable diligence? But here, they can't --
23 a POSA still cannot access this document. Reasonable
24 diligence cannot be effectuated because Exhibit 1015 is
25 behind Subcommittee JC-40.4 with a restricted mailing list
26 and a timed expiration.

1 And counsel keeps talking about how JEDEC was known
2 to a POSA. Of course it was. There's no dispute about that.
3 We can stop talking about that point. But there is no
4 evidence that the relevant portion of Exhibit 1015 was ever
5 disseminated to anyone beyond the 23 authors of the
6 committee.

7 JUDGE JURGOVAN: Two minutes, Counsel.

8 MS. SPIRES: Thank you.

9 Counsel has said that someone could have gone in
10 and joined -- if they're interested in this issue, they could
11 have gone in, they could have joined JEDEC, they could have
12 joined the JC-40 committee, then they could have joined the
13 JC-40.4 subcommittee, and then they would have had access to
14 this document. And again, that's assuming this is in the
15 21-day period that this document is live, otherwise, it's an
16 expired ballot.

17 But somehow they find out about this thing. We
18 don't know how, because there's no evidence that anyone ever
19 knew about this ballot outside of the committee. But if they
20 do, guess what, they join this committee. They are now one
21 of the authors, and so even that is not public distribution,
22 because Infobridge says that when there is the back-and-forth
23 collaboration, then you are looking at an authorship, and
24 that is not public dissemination. If you are joining in this
25 time frame before the ballot has expired, you're joining
26 Committee JC-40.4, you are now a member of the authoring

1 organization. You are now going to have voting privileges,
2 which means you are going to have to sit there and say, do I
3 want to comment? Do I not?

4 We've seen the testimony. It is a back-and-forth
5 iteration. It goes back and forth, back and forth. There is
6 not a requirement that the Fed Circuit has issued in
7 Infobridge that there be evidence that all 250 members
8 actually participated in the back-and-forth. The fact that
9 they were members of the authoring organization was enough
10 for the Federal Circuit to say, you have to look outside of
11 the authoring organization, the authoring group for public
12 accessibility. So if someone -- the only way that someone
13 can access this document is to actually join this committee,
14 which makes them a part of the authoring organization, and it
15 is not publicly accessible.

16 The only way that this document could have been
17 publicly accessible would have been for it to be distributed
18 in a relevant time frame outside of the relevant committee,
19 and there is absolutely zero evidence in the record that that
20 was ever done. And there is zero evidence in the record that
21 a POSA could have gone online and found this document in any
22 way, shape, or form. There's no evidence that it was
23 indexed, that it was listed, that they could have said, oh, I
24 want to get -- be interested in that document and gone and
25 sought it out.

26 Under Jazz, dissemination, talking about relevant

1 aspects of a document, not enough. If you look at Exhibit
2 1015, the relevant part of this document, the part that
3 actually talks about the error out --

4 JUDGE JURGOVAN: Finish your thought, Counsel.
5 Time's up.

6 MS. SPIRES: Thank you, Your Honor.

7 The part of the Document 1015 that talks about
8 error out, that is one line. Literally one line of the
9 nine-page document. There is absolutely zero evidence that
10 this relevant portion of Exhibit 1015 was ever discussed with
11 anyone outside of the authoring JC-40.4 committee.

12 Thank you, Your Honor.

13 JUDGE JURGOVAN: Thank you for your presentations.

14 Let's ask the court reporter if he had any
15 questions about spellings or anything that he didn't
16 understand.

17 THE REPORTER: Yes, I do, Your Honor. Once we go
18 off the record, I can verify that.

19 JUDGE JURGOVAN: Yes. Let's go off the record.

20 (Off the record at 4:42 p.m. EST.)

IPR2022-00062 (Patent 9,858,218 B1)
IPR2022-00064 (Patent 10,474,595 B2)

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