

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GLOBUS MEDICAL, INC.,
Petitioner,

v.

SPINELOGIK, INC.,
Patent Owner.

IPR2025-00225 (Patent 9,730,805 B1)
IPR2025-00226 (Patent 8,460,385 B1)

Record of Oral Hearing
Held: April 21, 2026

Before: JAMES A. TARTAL, ERIC C. JESCHKE, and
MATTHEW S. MEYERS, *Administrative Patent Judges*.

IPR2025-00225, Patent 9,730,805 B1
IPR2025-00226, Patent 8,460,385 B1

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The above-entitled matter came on for hearing on April 21, 2026,
commencing at 11:00 a.m., via video teleconference.

P R O C E E D I N G S

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JUDGE MEYERS: Good morning. We are convened for oral arguments in IPR2025-00225, which pertains to the patentability challenges of Claims 1 through 6, 11, 12 and 15 through 17 of U.S. Patent 9,730,805 and IPR2025-00226 which pertains to the patentability challenges of Claims 1 through 5, 7 and 9 of U.S. Patent 8,460,385.

I am Judge Meyers, and I am joined by Judge Tartal in the hearing room. Also appearing remotely is Judge Jeschke. Let us get started with appearances for both parties for those who will be arguing today. If anyone else is attending in person or remotely with you today but will not be speaking, please identify them as well. Following the hearing, please confirm with the court reporter to ensure that there are no questions regarding the spellings of names or terms.

All right. We will start with appearances for Petitioner in the 225 proceeding.

MR. ZINDA: Yes, Your Honor. Stephen Zinda on behalf of Petitioner. I'm joined by my partner, James Hall. And we may have --

JUDGE MEYERS: Sorry, one second. The audio is not coming in clear. That might be on my end. Hold on one second. All right. Can you start over, please, Counselor?

MR. ZINDA: Yes, Your Honor. Stephen Zinda on behalf of Petitioner. I'll be arguing for the '805 (INDISCERNIBLE) hearing. I'm joined by my partner, James Hall. And then we may have the client representative listening in remotely, Jay Jani of -- VP of Globus.

1 JUDGE MEYERS: Okay. Thank you. You know, appreciate you
2 standing up. But unfortunately, the mic is not picking up on your audio. So
3 please feel free to sit down. The parties can feel free to sit down.

4 MR. ZINDA: Thank you.

5 JUDGE MEYERS: Okay. One more time, what was your name?

6 MR. ZINDA: Stephen Zinda, on behalf of Petitioner. I'm joined
7 by my colleague, James Hall.

8 JUDGE MEYERS: Got you.

9 MR. ZINDA: And the client representative Jay Jani may be
10 listening in.

11 JUDGE MEYERS: Okay. All right. Now Patent Owner, please.
12 And feel free to sit down.

13 MR. FULLER: Good morning. Thank you, Your Honor. This is
14 Michael Scott Fuller, on behalf of the Patent Owner. I believe I'll be the
15 only (INDISCERNIBLE).

16 JUDGE MEYERS: All right. We are still having some mic issues.
17 Well, let's see. Hold on one second. And it's definitely got you too now.

18 MR. FULLER: Is this better for me?

19 JUDGE MEYERS: That is much better, yes. All right.

20 MR. FULLER: I think it wasn't turned on.

21 JUDGE MEYERS: Okay.

22 MR. FULLER: My fault.

23 JUDGE MEYERS: All right. No problem. All right. And
24 everyone can hear me all right?

25 MR. FULLER: Yes, Your Honor.

1 JUDGE MEYERS: Okay. Great. All right. So we have reviewed
2 the briefs and evidence and we're prepared today with some questions. The
3 questions and their answers will help us decide the issues in these cases. In
4 the interest and fairness and due process, we must limit our considerations to
5 the arguments and evidence already presented on the record. We have the
6 briefs and evidence available to us on our computers.

7 I'll also be following along on a paper copy. So if we look away
8 from the camera during the hearing, we may be consulting documents from
9 the record or taking notes. But please know that we're paying close attention
10 to your arguments and carefully considering the case. If we interrupt you,
11 we'll apologize in advance, but we do so to be able to ask you questions that
12 may be essential to our resolution of the issues or to keep the hearing on
13 track with the time.

14 To ensure that the hearing transcript is clear, we ask that you speak
15 directly to the microphone when talking and to identify specific slide
16 numbers, figure numbers, and any other pertinent identifying information
17 when referring to the demonstratives. One other item before we begin is that
18 we do have a public audio line open during this proceeding. There doesn't
19 appear to be any confidential matter on the record, so this shouldn't be an
20 issue. But I just want to confirm if that's correct with both of the parties.

21 MR. FULLER: That's correct, Your Honor.

22 MR. ZINDA: Correct, Your Honor.

23 JUDGE MEYERS: All right. Great. So we expect the parties to
24 begin with arguments for the 225 case. And then after a short 10-minute
25 recess, probably, we'll conclude with arguments for the 226 case. Per the

1 hearing order, Paper 18 in both cases, each party will have 60 minutes total
2 time to argue their cases. They don't need to use that much time, but that is
3 the amount of time they're allotted.

4 Petitioner will open the argument and may reserve rebuttal time,
5 which may not exceed more than half of their total time. Patent Owner will
6 then respond to Petitioner's arguments and then may reserve surrebuttal
7 time, also not to exceed more than half of Patent Owner's total argument
8 time.

9 Please remember that your arguments should be limited to only
10 those arguments previously presented in your briefs. Please make it clear
11 which challenges and claims you're addressing at all times. And then we ask
12 the parties to hold any objections regarding a party's arguments until it's your
13 time at the podium to note any of those objections.

14 Judge Tartal has generously offered to maintain a clock in the
15 courtroom, and he will try to give each party a five-minute warning during
16 their opening argument and the same for their reserve rebuttal time. There
17 should also be a timer in the hearing room that may be set up. All right. So
18 with that, let's begin. Petitioner, do you wish to reserve any rebuttal time?

19 MR. ZINDA: Yes, Your Honor. I'd like to reserve 20 minutes.

20 JUDGE MEYERS: Very good. You may begin when you are
21 ready.

22 MR. ZINDA: May I approach the podium?

23 JUDGE MEYERS: Please. Thank you.

24 JUDGE TARTAL: Counsel, it will indicate 40 minutes on the
25 clock, and that's with the assumption that you have 20 minutes surrebuttal

1 time. And anything you don't use in the 40 minutes, assuming it isn't all the
2 40 minutes, will be carried over to the rebuttal period.

3 MR. ZINDA: Thank you, Your Honor. Thank you, Your Honors.
4 So on the prehearing conference call there were three issues that the board
5 had identified that it wanted to -- us to address at this hearing. So I wanted
6 to make sure -- I will get to those issues fairly early in my presentation. And
7 then if I don't have time to get to everything else, I'd be happy to rest on the
8 papers and preserve my rebuttal time.

9 First thing I want to get to is level of ordinary skill in the art,
10 obviously important to deciding validity and invalidity. We proposed a level
11 of ordinary skill in the art which the Board applied for purposes of
12 institution. That was not contested by Patent Owner. We provided the
13 declaration to Mr. Brad Culbert for evidence relating to the person of
14 ordinary skill in the art. I just want to note that Patent Owner did not cross
15 examine Mr. Culbert on any of his testimony. Patent Owner also did not
16 offer any rebuttal testimony to Mr. Culbert's testimony or submit any of the
17 evidence of its own. So Mr. Culbert's declaration is largely un rebutted.

18 One of the issues that the Board had referenced on the prehearing
19 conference call was this alleged distinction between a threaded anchoring
20 screw and the claimed anchoring member in the claims. Because that was a
21 central focus of the Patent Owner's response was arguing that there's a
22 difference between the threaded bone screws of Blain and Bray versus the
23 anchoring members that are disclosed or I guess claimed in the '805 Patent.

24 The first thing I want to note is if you turn to page 47 of Patent
25 Owner's response, they admit that the bone fasteners of Blain are anchoring

1 members. And I'm going to quote it. Quote, unquote, "Blain discloses a
2 bifurcated system where anchoring members (fastener 6) are guided by
3 separate guide tubes 18." So there's no question or really any dispute that
4 the bone screws of the prior art that we've relied on qualify as anchoring
5 members.

6 All of the distinctions that they attempt to make in their briefing
7 are based on picking or referencing very specific embodiments from the
8 specification and arguing that those features from the specification should be
9 read into the claim limitation anchoring member. That's, in our view, a
10 claim construction issue. They haven't proposed anchoring members for
11 claim construction, and they certainly haven't provided any basis for reading
12 any of these limitations into the plain and ordinary meaning of anchoring
13 members.

14 And it's not just that, it hits that -- every limitation that they've
15 asked the board to read into anchoring member is actually contradicted by
16 the specification. And we put together a bullet point list here. This is all in
17 our briefing. But they argue, for example, that the anchoring members have
18 to be pushed in or hammered or barbed or that they exclude threaded screws.
19 But the specification of the patent teaches that quote, unquote "anchoring
20 members of some embodiments have threads, the threads allowing
21 anchoring members to be screwed into the desired position." So that is no
22 different than the screws of the prior art that we've relied upon, the
23 anchoring screws.

24 They also argue throughout their -- Patent Owner's response that
25 the anchoring members in the claims have to allow for some form of

1 polymer injection. And in the specification there are examples of some
2 embodiments where there's a central lumen that goes through the anchoring
3 member. But the patent, again, teaches that there -- that that's just one
4 embodiment. The specification teaches also that the anchoring members,
5 quote, unquote, "may be without a central lumen," end quote.

6 And I'll also note that that position that there has to be an injection
7 capability through the anchoring member is completely contradicted by their
8 (INDISCERNIBLE) in litigation. And I'm going to show a slide that -- an
9 exemplary slide that shows how our -- the accused products work, none of
10 them have a passage for injecting polymer through them or anything through
11 them. And so it's not clear how they could accuse us of infringement in
12 district court litigation and now take a completely contradictory position
13 before the Board about what their claims require.

14 Also note that with respect to this PMMA injection requirement
15 that they say the claims require, if you look at Claims 7 and 20, those claims
16 are not challenged, but they do require a passageway for polymer, right? So
17 the pending claims essentially give rise to a claim differentiation argument,
18 right? The broader claims don't require those passageways; the dependent
19 claims do. And so that's just further evidence that the claims are not limited
20 -- as limited as the Patent Owner would want the Board to believe.

21 And a lot of their arguments make mention of a flexibility
22 requirement of the anchoring members. Specification, again, teaches that
23 the anchoring members are flexible in some embodiments while being rigid
24 in other embodiments. Again, that is expressly stated in the specification.
25 So there's no requirement that the anchoring members have to be flexible.

1 And again, the accused products in the litigation are not flexible. They are
2 rigid anchors. So there's an inconsistency there.

3 And I'll also note that Claims 18 through 20, which are not
4 challenged in this proceeding, all require that the anchoring member be
5 comprised of a flexible material. So again, we have the claims challenged
6 here that don't have a flexible requirement, and then we have other claims
7 that do. We did not challenge the other claims because we have not relied
8 on prior art that has flexible anchoring members.

9 And then lastly, Your Honors, they have this argument that the
10 anchoring members have to have some sort of flange. Again, the
11 specification teaches that that's just one embodiment. It says, quote,
12 unquote, "In some embodiments, flanges at the base of the anchoring
13 members fit into recesses." And then if you look at Claim 13, which again is
14 not challenged, that claim requires flanges. The claims at issue - the
15 independent claims do not require flanges.

16 So the point is, Your Honor, there's no basis for reading any
17 additional requirements into the term anchoring member. They admit in
18 their own briefing, again on page 47 of the Patent Owner's response, that the
19 fasteners of Blain, the threaded screws, are anchoring members. And they
20 did not propose a claim construction for this term. They did not provide any
21 legal arguments as to why any of those limitations should be imported from
22 the specification into the term anchoring member. And for that reason, we
23 do not believe that anchoring member is limited in any way.

24 And then one other argument that they do make is they are -- they
25 conflate the curved channel limitation with the independent claims. And

1 they essentially say, well, the anchors have to be designed to go through a
2 curved channel. Well, the curved channel is only relevant to Claims 5 and
3 16. There's no curved requirement in any of the other claims that have been
4 challenged. And so they're sort of just conflating the curved channel.
5 They're basically arguing that there's a curved requirement in all of the
6 claims when that's clearly not the case.

7 JUDGE TARTAL: Counsel, this is Judge Tartal. Just to clarify,
8 you started with the level of ordinary skill in the art. Was there any dispute
9 over that or was there an issue on that particular definition or not?

10 MR. ZINDA: Your Honor, there was no dispute. They have not
11 disputed. I don't think they adopted our POSITA definition, but they applied
12 it. They didn't contest it, which is common. But I don't think there's any
13 -- there is no active dispute about the level of ordinary skill in the art or that
14 Mr. Culbert qualifies. So that's uncontested.

15 Now I want to go on the same anchoring member called a claim
16 construction issue. They don't call it claim construction, but they're actually
17 proposing claim constructions on this issue. This is a snippet from their
18 infringement contentions. And as you can see, our accused anchors have no
19 injection capability whatsoever. So if the claims really did require that, then
20 why did they sue us? Secondly, they're not flexible. If there was a
21 flexibility requirement, again, why did they sue us?

22 I get that sometimes parties have to change positions a little bit or
23 take nuanced, subtle differences from what they did in litigation when they
24 get presented with an IPR challenge, but this is just a complete inconsistency
25 in the arguments they made before the District Court. Also important to

1 note that during prosecution, the examiner identified the threaded screws of
2 a reference called Duffield as the anchoring members.

3 And so I've annotated with a blue square here to show the
4 anchoring members that the examiner identified. The applicant did not
5 dispute the examiner's identification of those as anchoring members. And
6 on the right, I put Blain's anchoring members in blue, which you'll notice
7 look almost identical. They're threaded screws with a head that's got a shape
8 for a screwdriver mechanism. And then the reason the claims were actually
9 allowed was because they added that limitation, the limitation that requires
10 the delivery mechanism extends outside of the patient's body to a medical
11 practitioner. That was why the claims were allowed.

12 So they never disputed the examiner's application of anchoring
13 members to the prior art, which is how we're applying it. And again, their
14 own patent teaches that the anchoring members can be screws. The
15 specification teaches they can be rigid. It teaches they can be straight. They
16 don't have to be curled. It teaches they can have threads, and they can be
17 screwed in. So by any definition, that is a screw. And the prior art qualifies
18 under that reading.

19 And if there are no questions on anchoring member, I'm going to
20 move on to another claim construction term.

21 JUDGE TARTAL: Just one comment. You were referring to
22 Slide 5 in your last discussion?

23 MR. ZINDA: Yes, Your Honor. I'm sorry. I'm going to try my
24 hardest.

25 JUDGE TARTAL: Just a reminder.

1 MR. ZINDA: Thank you for reminding me. I've done this a lot
2 and I tend to forget. I'll try to remember to call out slide numbers as I
3 progress. It's a tough habit.

4 Now, going to Slide 6, there were two terms that we proposed for
5 construction explicitly, one was housing. This term is only relevant to
6 Claims 2 to 4 because that's -- those are the only claims that recite a housing.
7 And we propose plain and ordinary meaning a component that protects,
8 covers, supports, or contains another component. This is consistent with the
9 specification.

10 The specification teaches that the delivery housing, which is 610,
11 channels house and guide the anchoring mechanism. So it's describing how
12 there are channels in the housing that house the anchors as they are deployed
13 to the implant for insertion into the bone. And then we've supported our
14 construction with just three general purpose dictionaries that show -- I think
15 they're all pretty consistent in terms of the way they describe a housing. So
16 that's our construction for housing.

17 Patent Owner did not apply or propose a construction. They attack
18 our construction and say it's wrong. They don't really explain why it's
19 wrong. They argue instead that the word housing should have all of these
20 additional requirements that we don't think have any support in the
21 specification or in any of the evidence that we've cited. For example, they
22 argue that the housing in the claims has to house the quote, unquote
23 "retention mechanism."

24 But if you read claim -- the claims at issue, Claim 2, for example,
25 the retention mechanism does not have to be in the delivery housing. It does

1 not say that the retention mechanism is in the delivery housing. While the
2 specification teaches that it can be, that is not a requirement in the claims.
3 So again, they're reading very specific embodiments from the specification
4 and trying to say those are required by the claims when they're not.

5 Claim 2 only requires that delivery housing guides each
6 independent anchoring mechanism. And the specification itself teaches that
7 the delivery housing, quote, unquote "houses the anchoring members." And
8 so that's exactly the way we've applied it to the prior art. They argue that the
9 housing has to be unified. I'm not entirely sure what unified means, but the
10 components we've identified as housings in the prior art are -- we believe
11 they're unified.

12 But we also believe there's no reason to read in the word unified
13 into the term housing. For example, you could have two half shelves that
14 come together and clip together, which is common for a lot of commercial
15 products in terms of housings. I don't know if they would say that's not
16 unified or not. In our view, it would be. I guess what they're trying to argue
17 is it has to be like a contiguous piece of material. And in our view, that's
18 just an unwarranted additional requirement to the term housing.

19 They also argue that the housing has to quote, unquote
20 "permanently house," but that's not consistent with the specification. The
21 specification teaches that the anchoring members are housed in the delivery
22 housing. And remember, the anchoring members are not permanently in the
23 delivery mechanism. They're only in the delivery mechanism for purposes
24 of deploying them down to the implant and then inserting them into the
25 bone. So again, there's no requirement for that in the claims and there's no

1 support for that in the specification.

2 And then finally, they argue that the housing has to be formed of
3 several separate structural components -- or sorry, excludes a housing
4 formed of several separate structural components that form a modular
5 assembly. In our view, that's a remarkably narrow interpretation. As
6 discussed before, you could have two half shells that come together and
7 clipped together, that would be a housing under any ordinary definition of
8 the word. And they're arguing that that would be excluded.

9 And again, they haven't proposed any claim construction
10 arguments to support any of these exclusions. And so with that, that's all the
11 arguments that we have on the term housing.

12 And then finally, the only other term that was proposed for
13 construction explicitly was the channel was curved. That's Claims 5 and 16.
14 I believe the parties are essentially in agreement on what that means now.
15 The channel has to follow a curved trajectory or have a curved path. And
16 under that application of the term curved channel, we've addressed that in
17 Ground 3. And we can see that under Grounds 1 and 2, curved channel
18 would not be met by the prior art as we've applied it; but under Ground 3, it
19 would.

20 Now throughout Patent Owner's response, their -- they argue
21 everything should be plain and ordinary meaning. That's their overarching
22 argument is no terms require construction. But then when you read their
23 briefing, they repeatedly refer to claim terms like channels and argue that the
24 term channel has all of these additional requirements that are found nowhere
25 in the plain meaning of that term.

1 For example, they say the channel has to have an internal channel
2 geometry designed to guide flexible anchoring members. But where in the
3 word channel do they get that definition? The only way they can get from
4 channel to that very narrow interpretation is to find something in the
5 specification that supports a disclaimer or redefinition of the term channel.
6 And they haven't done any of that.

7 JUDGE TARTAL: Counsel, can I just ask you to pause for one
8 second --

9 MR. ZINDA: Yes.

10 JUDGE TARTAL: -- and back up to something you just said, just
11 so I understand? Maybe you can just say it again. But in regards to Grounds
12 1 and 2, you were indicating that none of the assorted art teaches a curved
13 channel; is that correct? Then what would be the status of those grounds in
14 your view?

15 MR. ZINDA: So under the agreed construction of curved channel,
16 the prior art we relied on in Grounds 1 and 2 do not teach that limitation.
17 Ground 3 teaches a limitation because it has the -- in combination with the
18 Steffee reference. So that would be -- our position would be that we can't
19 satisfy -- we can't show anticipation or obviousness under Grounds 1 or 2
20 under the definition of curved channel agreed to by the parties.

21 JUDGE TARTAL: So would you be essentially withdrawing
22 those grounds? Or what would we do if there was a final written decision?
23 Is it sufficient to say that Patent Owner concedes that Grounds 1 and 2 don't
24 satisfy the curved channel limitation?

25 MR. ZINDA: I think that's fair, Your Honor. And remember,

1 that's only for Claims 5 and 16, the dependent claims.

2 JUDGE TARTAL: Okay.

3 MR. ZINDA: It's not for all of the claims.

4 JUDGE TARTAL: Right.

5 MR. ZINDA: Ground 3 was only -- Ground 3 was focused on this
6 narrower interpretation of curved channel.

7 JUDGE TARTAL: Okay.

8 MR. ZINDA: And under that narrow interpretation that is satisfied
9 by Ground 3, we would agree that under Ground 1 and 2, Claim 5 and 16
10 can't be anticipated or obvious under the construction that we've agreed to.

11 JUDGE TARTAL: Undisputed.

12 MR. ZINDA: Exactly, Your Honor.

13 JUDGE TARTAL: Thank you.

14 MR. ZINDA: And going back to the -- Your Honor, you all recall
15 that we did request to file a motion for sanctions. Part of the reason for that
16 was -- and maybe we should have been clear in our request -- is they
17 proposed no constructions in their briefing. They say plain and ordinary
18 meaning for everything. But when you read their briefing, they repeatedly
19 cherry pick limitations from the specification. And they act like they're part
20 of the plain claim language, but they don't provide any claim construction
21 arguments to support any of those positions.

22 So we just talked about channels. We talked about anchoring
23 members, how they've tried to incorporate all of these limitations into that
24 term without providing any claim construction arguments or legal support
25 for doing so. They do the same thing with delivery mechanism, delivery

1 housing, retention rod, and driving member. And the problem with that is
2 we know that Patent Owner knows the law. Because the district court
3 litigation, they spent a lot of their briefing explaining to the District Court
4 that it's not proper to cherry pick limitations from the specification and
5 import them into the claims.

6 And that's exactly what they do in these proceedings. They don't
7 call it claim construction because they know if they call it claim
8 construction, they're going to have to legally support it. So what do they do?
9 They just mix together all of the embodiments in the specification with the
10 claim language and then try to make distinctions based on what the
11 specification teaches, not what the claim requires.

12 And so a lot of our reply was focused on essentially pointing out
13 that almost every limitation they've tried to distinguish based on is not
14 actually in the claim, it's not required by the claim, and it's not supported by
15 any sort of claim construction position. In fact I think the worst part about it
16 is that almost every limitation they've tried to distinguish based on is
17 contradicted by specification. They say the channels have to be -- they say
18 that the screw -- the anchors have to be curved.

19 Specification teaches they can be straight. They say that they can't
20 have threads. Specification teaches they can have threads. Specification
21 teaches they can be screwed in. It's not just an issue of they're not
22 supporting their positions. They're taking positions that are completely
23 contradicted by specification. It's almost as if they didn't read their own
24 patent when they made these arguments.

25 So with that, Your Honors, does the Board have any questions on

1 claim construction? If not, I'm going to move into the next issue that the
2 Board had asked about during the prehearing conference.

3 JUDGE TARTAL: No questions here.

4 MR. ZINDA: Thank you. So Slide 11 -- I forgot to do on the last
5 two, sorry. Slide 11 just lays out the three grounds that we have. And as the
6 Board will recall, Blain's kind of our primary reference. We believe Blain
7 anticipates or renders obvious all of the claims except Claims 5 and 16
8 because of the curved channel limitation. And so I'm going to focus first on
9 Blain.

10 And one of the issues that the Board had raised on the prehearing
11 conference call was they wanted the parties to address the extending outside
12 the patient's body limitation which is required by both of the independent
13 claims. That's claim Element 1.2.2. This is Slide 12 in 1.2.2. And it states,
14 "Delivery mechanism extending outside a patient's body to a medical
15 practitioner."

16 And we have two positions on this, Your Honor. First, a POSITA
17 would understand that the Blain reference discloses this limitation. It doesn't
18 explicitly state that the tool extends outside a patient's body. But a person of
19 skill in the art, looking at the design of the tool and the dimensions of the
20 tool would readily understand that it necessarily does extend outside the
21 patient's body.

22 First off, first bullet point, that's because it's got a screwdriver shaft
23 or screwdriver-type shaft handle. And a POSITA would understand that
24 that's not designed to be inside the patient's body. That's designed to allow
25 the tool to be guided from outside the patient's body. Because a physician

1 would otherwise have to make an incision big enough to put their entire
2 hand into and the handle, which is something the person skilled in the art
3 would not expect a POSITA to do.

4 Second, numerous prior references show that it was very common
5 to have handles designed to be outside the patient's body. We cited, I think,
6 four or five references here that all expressly teach a handle of a surgical
7 instrument that extends outside a patient's body.

8 And then finally, Your Honors, just based on the relative
9 dimensions of the implant and guide instrument -- and you'll see that we
10 kind of denoted the implant dimensions in red there with red arrows and then
11 the guide instrument in green. Important to note that the implant is designed
12 to go between the vertebral bodies and the patient's spine. So if you look at
13 the size of the implant compared to the size of the guide instrument and the
14 handle, a person of skill in the art would understand it's going to have to
15 extend outside the patient's body.

16 Now they argue that's speculation in their response. We disagree.
17 We provided Mr. Culbert's testimony. We provided numerous exhibits that
18 showed it was extremely common to do that and that's why you have those
19 handles. But additionally, they essentially admit in their Patent Owner's
20 response that it would extend outside the patient's body. So this is on Page
21 38 of their response where they say, Blain suggests that the handle may be
22 removed precisely to avoid extending outside the patient's body during
23 fastener insertion.

24 Okay. So they're saying Blain teaches that you have to remove the
25 handle because Blain recognizes the handle would extend outside the

1 patient's body. Well, the problem is Blain also teaches the handle doesn't
2 -- can be permanent. And so if the handle is permanent, that necessarily
3 means it's going to extend outside the patient's body under their own logic.

4 Our first position on Blain was that it -- a POSITA would
5 understand it to disclose the extends outside of the body limitation, but it
6 also would have been obvious. And it would have been obvious based on
7 the general knowledge of a POSITA because they would want to make sure
8 that the shaft was long enough so that the physician wouldn't have to stick
9 his hand inside the incision and location, which allows for a smaller incision
10 and a more minimally invasive surgical procedure.

11 It also would have been obvious because a POSITA would
12 recognize that if you have your hand inside the patient's body and you're
13 using some sort of X-ray imaging to guide the tool, the hand will interfere
14 with the X-ray imaging. And a POSITA would not want to do that; ergo,
15 they would want to have the handle outside the patient's body.

16 We also argued that the modification would have been common
17 sense. You have two options. Option one, stick the handle in the patient's
18 body with your hand. And option B is have it outside the patient's body.
19 Two options, one option is clearly better than the other. And so it would
20 have been common sense to have the shaft be long enough so that the
21 implant guide instrument does not have to be within -- the handle doesn't
22 have to be within the patient's body.

23 Blain itself teaches that the relative lengths of the shafts can be
24 -- can vary, which also suggests that you can manipulate the lengths to
25 accommodate not having to have the handle inside the patient's body. And

1 then finally, this limitation is so obvious in our view that the specification of
2 their own patent doesn't actually say it. In fact, all of the arguments they've
3 made against us that you can't -- the Blain reference doesn't say it's outside
4 the patient's body, and the figures don't show the relative dimensions, you
5 can make every one of those arguments against their own patent because it
6 doesn't say that the delivery instrument extends outside the patient's body.
7 And it doesn't have figures that give you the ability to know with absolute
8 certainty what the relative dimensions are. So in our view, the fact that they
9 didn't even disclose it in their patent is evidence that it's a trivial, nonobvious
10 -- or trivial, obvious feature.

11 The Patent Owner relies on the examiner allowing the claims over
12 the prior art because of this extending outside the limitation. But at the same
13 time, they admit that the examiner mismapped the claims to the prior art
14 when the claims were allowed. Specifically on Slide 15, I've annotated in
15 blue here that the examiner was pointing to one half of the fusion implant as
16 a delivery mechanism, and then he pointed to the other half as the fusion
17 member.

18 So he was not pointing to the actual instrument used to deliver the
19 fusion implant. He was pointing to two halves of the same fusion member.
20 That's why the claim was allowed. And the Patent Owner even admits in
21 their briefing that the examiner made a mistake. So this claim was not
22 allowed because this limitation is some super breakthrough in technology. It
23 was allowed because the examiner just mismapped it and pointed to
24 something when he should have actually pointed to the instrument that was
25 used to deliver the implant.

1 Which by the way, the DeFoe reference does teach that there's an
2 instrument used to deliver the implant. The examiner could have cited to
3 that, but instead we believe mismapped it. So with that, that's all that I have
4 on this extending outside the body limitation. If the judges have any
5 questions, I'm more than happy to answer them.

6 JUDGE TARTAL: No questions here.

7 MR. ZINDA: Thank you. And so I think the other issue that the
8 Board wanted the parties to address was Ground 3. So as I mentioned
9 earlier, Ground 3 -- this is Slide 16, sorry. Ground 3 is directed towards
10 Claims 5 and 16. Claims 5 and 16 are the only claims that are being
11 challenged that require a curved channel. And you recall Blain uses straight
12 anchors. And our proposed combination is that it would have been obvious
13 to replace the straight anchors of Blain with the curved anchors of the
14 Steffee reference.

15 Now if you do that, there are two additional simple modifications
16 that you have to make to Blain system. One is you have to modify the
17 channels of the fusion implant and guide instrument to be curved or at least
18 accommodate the curvature of the anchors. That's one. And then you have
19 to use an impact driving tool instead of a screwdriver, which were very
20 common. And in fact, Steffee teaches using an impact driving tool for its
21 anchors. So that's the combination for Ground 3.

22 Now we demonstrated that Steffee is analogous to Blain and Bray
23 because all three are in the field of interbody fusion using anchors. Steffee
24 uses the curved barbed anchor, Blain and Bray both use threaded bone screw
25 anchors. The only argument that Patent Owner has against them being in the

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1 same field is that Steffee relies on graft in between the vertebral bodies, and
2 it doesn't rely on an implant.

3 But that does not render them non-analogous. For one, it is
4 common to use a graft with interbody implants. For example, you'll put the
5 implant in and then you'll inject graft in between the cage. So you actually
6 use graft material with implants like Bray and Blain's. But secondly, the
7 specification of the '805 Patent is in the field of the invention that it pertains
8 to, quote, unquote, "surgical procedures for spinal fusion and stabilization."
9 That is the same exact field as Steffee.

10 So the field of the invention is not fusion implants, and it includes
11 spinal fusion procedures that would include the use of bone graft. Now in
12 addition to being from the same field of endeavor, all three references are
13 reasonably pertinent to the problems confronted by the inventors. And the
14 patent itself teaches that it's focused on addressing considerable medical and
15 economic impact of failed spinal fusions.

16 All three references, Steffee, Bray, and Blain are all about spinal
17 fusions, right? It's just Steffee doesn't use implants, uses just graft. Steffee
18 seeks to accomplish or address that issue using a curved anchor with bone
19 graft, whereas Blain and Bray attempt to address the same problem using
20 their own interbody implant designs. And so all three references address the
21 same problem. They just do so in different ways. So in that sense, they are
22 reasonably pertinent to the problems addressed by the inventor of the '805
23 Patent.

24 Now for the motivations to combine, we offered extensive
25 testimony from Mr. Culbert, also supported by numerous prior art references

1 that show that migration caused by sagittal forces is a problem with spinal
2 fusion implants and that Steffee's bone anchor design, where the anchors
3 actually curved not just horizontally in parallel to the sagittal movement but
4 they also curved downward, that downward curvature actually helps
5 mitigate the forces that cause migration in implants and in bone graft.

6 And in fact, Steffee provides an expressed motivation to combine
7 because it states that its anchors are quote, unquote " simple yet extremely
8 effective for spinal fusion." And so there's an expressed teaching in Steffee
9 that these anchors work really well and they're simple. That in our view is
10 also a motivation for a POSITA to have relied on them.

11 And then also, a POSITA would have recognized that bone
12 -- barbed anchors like the Steffee anchor are not subject to stripping like
13 screws are. A screw can strip if you don't align it properly when you try to
14 screw it in, or it can actually strip just by enough force pulling on it. So
15 there's no risk of stripping when you use a barbed anchor like Steffee's,
16 which is another motivation to combine.

17 Now that's the motivation to take Steffee's anchors and use them
18 with Blain, with or without Bray. If you do that, a POSITA would recognize
19 that you would obviously have to make the channels of the Blain implant
20 and guide member accommodate the curvature of the anchors. In our view,
21 that's just common sense. And we explained that a POSITA would
22 immediately recognize that if you're going to go from straight screws to
23 barbed anchors -- or barbed curved anchors, you're going to have to at least
24 tweak the curvature of the channels to accommodate that shape.

25 And Blain itself actually teaches that the guide members -- this is

1 Slide 19, number 5. Blain expressly teaches the guide members may be
2 quote, unquote "nonlinear" and that they may comprise any suitable shape
3 for accurately guiding a drilling device or other instrument or fastener. That
4 in and of itself suggests that you can easily modify the guide tube channels
5 to accommodate the curvature of the anchors.

6 And then finally, Your Honors, it would have been obvious to use
7 an impact tool in this combination because Steffee's anchors are impact
8 driven. They're barbed anchors, so you don't screw them in. You have to
9 insert them with like a surgical hammer and hammer them in. And so it's
10 obvious that if you're going to go from a threaded screw to this curved
11 barbed anchor, you're going to need to use a hammer or a surgical hammer
12 or some sort of impact tool to drive it into the bone.

13 Now with respect to reasonable expectations of success, this is
14 Slide 20, we provided prior art that showed that curved anchors were already
15 known to be successful in spinal implants. So people are already using
16 curved anchors. We also demonstrated that it requires very minimal
17 machining and machining principles well-known to POSITA to make these
18 changes.

19 And granted, we are not arguing -- what is the word? I'm trying to
20 think of the legal term for it. I can't think of it. This is just a mock-up
21 design that we came up with in Slide 20 to show conceptually how easy it
22 would have been to make these changes. A POSITA would recognize that
23 all it would require, literally, is replace the screw with the anchor, the curved
24 anchor, and then just slightly tweak the channels to accommodate the
25 curvature. Those are minor design changes.

1 Now Patent Owner offered a litany of arguments against
2 motivation to combine. This is Slide 21. Number one, first thing I want to
3 note is Patent Owner does not dispute that Steffee's curved anchors would
4 mitigate migration or avoid stripping as explained by Mr. Culbert or that
5 those benefits would have been apparent to a POSITA based on Steffee. So
6 that's undisputed, that all of those things that we've argued and we supported
7 with evidence, not just Mr. Culbert's declaration but other prior art
8 references show that.

9 That's not really being rebutted by them. All of their arguments
10 are based on just incorrect statements about the combination. For example,
11 they say that the anti-backout feature of Blain or Bray negates the
12 motivation to combine because those already help prevent the anchors from
13 coming out. The curved anchor of Steffee helps prevent the anchors from
14 coming out of the bone. That's because of the quasi perpendicular trajectory
15 that the anchors take through the bone.

16 Horizontal then perpendicular cap plate of Blain and Bray, those
17 only ensure that implant and the anchors are fixed together. That does not
18 prevent the anchors themselves from coming out of the bone. And that's the
19 --

20 COURT REPORTER: I'm sorry.

21 JUDGE TARTAL: Hold on for a moment.

22 MR. ZINDA: Sure.

23 JUDGE TARTAL: I think one of our Judges is frozen.

24 MR. ZINDA: Oh, yeah. I see now.

25 JUDGE TARTAL: So if you can pause (INDISCERNIBLE). I'll

1 pause your time --

2 MR. ZINDA: Thank you.

3 JUDGE MEYERS: --- and add a few seconds to that.

4 MR. ZINDA: No problem.

5 JUDGE MEYERS: I do believe this is where he dropped off,
6 when you -- and I think the term you were coming up with was bodily
7 incorporation.

8 MR. ZINDA: You read my colleague's note, my partner's note.
9 He actually just handed me a note. That was the phrase I was looking for.
10 Thank you.

11 JUDGE MEYERS: Yeah.

12 MR. ZINDA: I appreciate it.

13 JUDGE MEYERS: No problem. All right. Bear with us a couple
14 more minutes. All right. It appears he is back on.

15 MR. ZINDA: Thank you. I think I know where you froze up,
16 Your Honor. So I'll try to pick up from there. I was on the Slide 20, the
17 reasonable expectation of success. Thank you, Your Honor. The phrase I
18 was looking for is we are not arguing for bodily incorporation. We did
19 provide a mock-up in Slide 20 just to show how simple the modifications
20 are. I mean, this is not -- no offense to my client, but not rocket science,
21 making a channel curved instead of being straight. And that's essentially the
22 only modification you would have to make in addition to adding the curved
23 anchors themselves.

24 Now Slide 21 --

25 JUDGE MEYERS: Counsel, if I can interrupt you for a second, go

1 back to that slide again.

2 MR. ZINDA: Sure.

3 JUDGE MEYERS: You talk about how Blain suggests that it
4 could be nonlinear in any shape. My question is besides it being linear, what
5 other shape besides it having a curved to it could a channel have?

6 MR. ZINDA: Blain actually teaches additionally that part of the
7 reason that you can have a nonlinear shape is to reach anatomically difficult
8 places. So if you have to -- look, I'm not a doctor. I'm an electrical
9 engineer. I guess if there was a place that you needed to get to that was
10 some unusual path to get there, you could make it whatever way you need to
11 make it to get there.

12 I don't know the feasibility of doing that. At least for the purposes
13 of this proceeding, I think obviously you can make it curved or you can
14 make it straight. And for purposes of our obviousness combination, that's all
15 you really need to add further support to our expert's testimony and the
16 evidence that we provided.

17 JUDGE MEYERS: All right. It looks like we're experiencing
18 technical difficulties again.

19 MR. ZINDA: No problem. Your Honor, would you mind if you
20 stop the -- sorry.

21 JUDGE TARTAL: Thank you for the reminder.

22 MR. ZINDA: No. I didn't want to have to go back and -- I'm fine
23 without the 30 seconds. I'll do without that extra 30 seconds.

24 JUDGE TARTAL: You're under the clock. But we're not sticklers
25 to the second. So if there's a minute or two you need to wrap up your

1 arguments, you're welcome to.

2 MR. ZINDA: Thank you. I actually think I'm at the very end of
3 what I wanted to get on the record.

4 JUDGE MEYERS: All right. It looks like he's back on. And
5 yeah, Counsel, once you get through finishing up Ground 3, I think we can
6 breeze through Ground 2. And then let's talk about some of the dependent
7 claims that are related to the housing Claims 2 through 4 after that, if that
8 sounds good.

9 MR. ZINDA: Yes, Your Honor.

10 JUDGE MEYERS: Great. Thank you. All right. I think you
11 could pretty much pick off where you left off, because I think we paused you
12 pretty quick after he let us know he was off.

13 MR. ZINDA: Yes, Your Honor. So just to go back to your point,
14 you asked about the nonlinear -- the discussion in Blain. If you look at
15 Column 8, line 13, it says nonlinear guide members may facilitate access to
16 difficult anatomical sites. And so I think Blain contemplates that they can
17 be I guess whatever feasible shape they need to be to reach an anatomical
18 site that may be more difficult than a normal site. So anyways, I'll keep
19 moving.

20 JUDGE MEYERS: Okay.

21 MR. ZINDA: Going back to the arguments that the Patent Owner
22 made against our motivations to combine, they also argue that we provided
23 no motivation for modifying the guide tubes and implant channels of Blain
24 to be curved. That's simply not true. We just discussed all the motivations.
25 For example, it would have been common sense to make them curved. And

1 so there's no basis for arguing that we provided no arguments. We offered a
2 lot of arguments on motivation to combine with respect to the curved
3 channels.

4 They argue that no person of skill in the art would have been
5 motivated to combine these disparate technologies or that we've relied on
6 impermissible hindsight. But hindsight is negated by motivation to
7 combine. And we provided multiple motivations to combine these
8 references the way that we proposed. In fact, we mentioned that Steffee
9 itself teaches that its anchor is extremely -- simple and extremely effective.
10 So there's actually an expressed teaching in Steffee that its anchor could be
11 used as an improved anchor.

12 And then finally, the impact-driven nature of Steffee's anchors
13 does not negate the obviousness of the combination. Steffee itself teaches
14 using an impact tool to drive the anchors in. And as we argued in our
15 petition, a POSITA would have understood that if you switch from a
16 threaded screw to a curved barbed anchor, you're going to have to use an
17 impact-driven tool to drive it in. So again, that's sort of just common sense.

18 And then lastly, Your Honor --

19 JUDGE TARTAL: Is there a difference between a threaded screw,
20 the impact-driven fastener, and an impact-driven fastener through a channel?
21 I think one of the items that sort of this draws attention to by Patent Owner
22 was that that is a difference, that an impact fastener driven through bone isn't
23 the same as an impact fastener driven through a preexisting channel. Is that
24 not the case, or is there a difference between those?

25 MR. ZINDA: Sorry, can you say it one more time? Sorry.

1 JUDGE TARTAL: Sure. So in Steffee, the fastener is driven
2 through bone, correct? There is no channel at all in Steffee.

3 MR. ZINDA: Correct.

4 JUDGE TARTAL: So is there a difference between an impact
5 fastener driven through a channel and an impact fastener driven directly into
6 bone?

7 MR. ZINDA: Well, in our combination, the Steffee anchor would
8 be driven directly in the bone. When you use a bone screw -- sometimes
9 they'll use a drill to start, obviously a drill to create the opening for the screw
10 to be threaded into. But if you go from the bone screw, the threaded bone
11 screws of Blain and Bray, for example, to the anchor of Steffee, it's going to
12 have to be impact driven into the bone. So in that sense there's no
13 difference.

14 The way it's being used in Steffee is no different than the way it's
15 being used in our combination, except that it's -- obviously, you have a guide
16 tube that you're putting it through. But that's an irrelevant distinction
17 because they're both still being driven into bone. Does that make sense?

18 JUDGE TARTAL: Yes. Okay. Thank you, Counsel.

19 MR. ZINDA: And then finally, Your Honor, they argue -- they
20 made all these arguments about the feasibility of making the changes that we
21 proposed. Again, we have the expert declaration of Mr. Culbert, but I don't
22 even think we need his declaration because it's so obvious based on the
23 mock-up that we did how simple this design change would have been.
24 Taking a straight channel, making it slightly curved, especially when Blain
25 itself teaches that you can make them nonlinear, just speaks to the simplicity

1 of these design changes.

2 And they also argue that -- they imply or suggest that we argued
3 that you would take this curved anchor of Steffee and drive it through the
4 straight channel of Blain. That was never part of this combination. In the
5 combination that we proposed, you would obviously have to modify the
6 channels to accommodate the curvature of the anchors. Otherwise, there
7 would be jamming, there would be friction.

8 All of that's in our petition. We address all of that preemptively.
9 So I don't know where they got the idea that we were arguing you would jam
10 this curved anchor through a straight channel. That was never part of our
11 combination.

12 And then finally, Your Honors, they have a whole argument where
13 they attack Steffee individually and say, well, Steffee doesn't teach curved
14 channels. Well, we're not relying on Steffee for the curved channels alone.
15 We're relying on Steffee in combination with Blain and/or Bray, which both
16 have channels that you have to make curved to accommodate the anchors.
17 So you can't attack the -- one of the references individually when we're
18 actually proposing a combination. And that's exactly what they're trying to
19 do with this argument.

20 And with that, Your Honors, I have nothing further on Ground 3.
21 I'm happy to answer any questions you all may have.

22 JUDGE MEYERS: Yeah. Let's skip to Dependent Claim 4.

23 MR. ZINDA: Yes, Your Honor.

24 JUDGE MEYERS: And Patent Owner's position about coupling,
25 that coupling requires locking, not just alignment, but coupling requires

1 -- there'd be some locking. Walk me through Claim 4. Do we even need to
2 get to that? Or do we just have Instrument 14 aligning with the apertures?
3 Isn't that enough?

4 MR. ZINDA: Yeah, Your Honor. That's the position we took.
5 And in fact, Blain -- that is enough. And in fact, if you look at the teachings
6 of Blain, it specifically says the aligned coupling between the instrument
7 guide and implant. It teaches that when you connect those two together, that
8 couples them. So there is no additional requirement that you have to take
9 some other step for there to be quote, unquote "coupling."

10 And in our reply, we spent quite a bit of -- we explained, A, that
11 the ordinary meaning of coupling doesn't require locking. And B, even if
12 the Board found that it did, which we would disagree with, but even if the
13 board found that it did, Blain teaches an embodiment where the -- let me
14 find the exact language. This is number three on Slide 37. Blain teaches
15 that the coupling structure 28, which -- let me go back. It may not be easy to
16 see here.

17 So the coupling structure is that -- 28 is the structure at the very
18 center of the device coupler that inserts into the opening, the central opening
19 of the implant. On Slide 37, Blain teaches that that can be snapped on, fixed
20 fitting, friction fitting, or magnetic fitting. So what does that mean? Well, it
21 means that when you couple them together, you are simultaneously locking
22 them together all in one step.

23 So the alleged separate locking step requirement that they're trying
24 to say can't be included, that would still be covered by Blain even under
25 their narrow reading of the claim limitation. So does that answer your

1 question, Your Honor?

2 JUDGE MEYERS: Yeah. That answers my question there.

3 Thank you, Counselor. And I think that's all the questions I have for now.

4 Yeah, thank you.

5 Judge Tartal, how much time do we have left?

6 JUDGE TARTAL: Just about three minutes over, so 17 minutes.

7 JUDGE MEYERS: That's 17 minutes. All right. Thank you,

8 Counselor.

9 MR. ZINDA: Thank you, Your Honor.

10 JUDGE MEYERS: All right. Patent Owner, you're up. Do you

11 wish to reserve any rebuttal time?

12 MR. FULLER: Thank you, Your Honor. I'll reserve 20 minutes as

13 well.

14 JUDGE MEYERS: Very good. As soon as Judge Tartal gives you

15 the sign, you are ready to go.

16 MR. FULLER: Great. Thank you. I'll do my best to try and

17 address the arguments in roughly the same order as my friend just did to try

18 to keep it semi-organized, even though my notes seem to be not so

19 organized. I think the first question was with regard to the level of ordinary

20 skill in the art. And as was just stated, we haven't contested the level of

21 ordinary skill in the art as stated by the Petitioner. So I think for purposes of

22 the evaluation, it's more or less agreed in terms of what that level of ordinary

23 skill is.

24 JUDGE MEYERS: Counselor, if I could interrupt you for one

25 second.

1 MR. FULLER: Sure.

2 JUDGE MEYERS: Then if we're talking about level of ordinary
3 skill in the art right now, so it looks like -- give me one second here. And
4 this is on the petition 18 to 19. So it looks like they say that one of ordinary
5 skill in the art would have had -- and I'm just going to read it straight from
6 the petition.

7 "A bachelor's or equivalent degree in mechanical engineering or
8 related discipline. For example, biomedical engineering, metals and
9 materials engineering, and at least five or six -- at least five years of
10 experience with designing, developing, evaluating, and/or using spine
11 devices. Anatomy, physiology, and biology in soft and calcified tissue,
12 including bone healing and fusion, and biomechanical and functional
13 loading of orthopedic implants."

14 All right. And then more education can supplement practical
15 experience and vice versa. So with respect to the combination of Bray or
16 Blain and Steffee, and then Blain with or without Bray and Steffee, it seems
17 like this modification is well within the level of skill in the art to modify the
18 channels based upon just machining knowledge that in this case one of
19 ordinary skill in the art possesses. And then we have Blain's suggestion
20 about linear channels, but channels of any other shape. We have the
21 Steffee's teaching about the benefits of curved anchors. What are we
22 missing here?

23 MR. FULLER: Well, there's a couple of things, Your Honor. I
24 think first of all, just to clarify, Blain when it talks about something
25 assuming any shape, it's speaking specifically with regard to the guide

1 members, not to the fusion members. And so a guide member having any
2 shape, just as my friend just noted, was specifically for the purpose of
3 providing access to hard to reach places within the human body, not to
4 facilitate some other non-direct screw mechanism.

5 JUDGE MEYERS: What you're saying makes sense. However,
6 what is the purpose of having a curved guide to bring in a curved anchor if
7 you don't have a curved channel to accept it?

8 MR. FULLER: To allow for a curved insertion of an otherwise
9 straight piece. The notion that something can be any shape is a pretty vague
10 basis to lean a motivation to combine on, especially when it's admitted that
11 the only purpose of that variety in shape would be to allow access to a
12 different point, not to provide for a wholesale change in the design from, as
13 you noted earlier, a direct screw drive which had no migration issues to
14 speak of until this litigation came about. But to change that wholesale from
15 a screwed anchor to a barbed, curved, completely different apparatus just has
16 no basis in the art.

17 And the only reason anyone would do that is by basis of hindsight
18 for purposes of invalidating this patent. So the motivation to combine
19 doesn't even exist because it's, again, manufactured. There's no discussion
20 of migration being a problem in the '805 Patent. That's not the problem that
21 the Patentee was trying to solve.

22 So to say that now migration is the basis for configuring a
23 complete wholesale change in design, approach, philosophy, method,
24 attachment, tools, et cetera -- you can call it a very simple machine, you can
25 draw a picture and say what it would look like, but that doesn't make it

1 -- that doesn't justify the motivation which is required for this combination.

2 And I think from Patent Owner's perspective, that's the point is you
3 have these disparate approaches for different purposes to overcome different
4 problems which do not exist in Blain and is not a problem that the Patentee
5 here was trying to solve.

6 JUDGE MEYERS: The '805 Patent does give a pretty broad last
7 sentence about -- that it's addressing a need in the art to avoid considerable
8 medical and economic impact of failed spinal fusions. That does give -- get
9 one of ordinary skill in the art thinking.

10 MR. FULLER: Well, it gets thinking that the screwed approach of
11 Blain solved the problem, which it did. Again, there is no mention in Blain
12 or anywhere else that the migration was a problem with these types of
13 anchors. The point of Blain having the angled inserts for the screwdrivers
14 was for this purpose, so that there would be a tight, snug fit and that the
15 migration wouldn't be a problem.

16 So again, to say that these other anchors with the barbed, curved
17 insert are better for migration, this, or that, but is not a motivation to
18 completely change a design which on its face had no faults. And again, it's
19 not a problem that the Patentee was trying to solve, notwithstanding the fact
20 that of course he wanted to minimize impacts and defects.

21 JUDGE MEYERS: Right. But then again, when you say these
22 anchors, the '805 Patent talks about screws, it talks about barbs, it talks about
23 all kinds of -- it's got the wheels spinning here of someone trying to piece
24 these different puzzle -- pieces of the puzzle together. And looking at
25 Steffee -- and Steffee talks about mitigating bone migration, that's just where

1 my head is right now.

2 MR. FULLER: I understand, Your Honor, that there is a generic
3 statement at the end, that the point is to have a quality product that does
4 what it's designed to do and is one of the reasons why the implant of Blain
5 would not look to this bone graft of Steffee. It's a different problem being
6 solved, notwithstanding the fact that they're both surgical of course.

7 But again, the problem being solved in the '805 is not a bone graft
8 problem and it's not a migration problem. So the motivation doesn't exist.
9 It's only post hoc hindsight from the Patent Owner's perspective. And that's
10 our position on that.

11 JUDGE MEYERS: Thank you. I appreciate that discussion. I
12 understand your position.

13 MR. FULLER: I'm sorry?

14 JUDGE MEYERS: I said I understand your position. Thank you.

15 MR. FULLER: Okay. I want to get back to claim construction for
16 a moment. Well, Patent Owner is not -- we're very clear that we're not
17 offering a formal construction for any term other than housing and curved
18 channel. We're not offering expressed constructions for anchoring member,
19 to the extent that the briefs talk about anchoring member embodiments that
20 are disclosed in the '805 Patent.

21 The point of those distinctions and discussions is not to draw a
22 particular construction or to assign a particular construction. We're talking
23 about the approach and, again, to distinguish between the methodologies and
24 the approaches that are taken among and between Blain and Steffee and the
25 inventor of the '805 Patent. So I just want to be clear that we are not

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1 proposing a formal construction for anchoring member. And I don't believe
2 that our briefs -- that wasn't the intent anyway is to do that.

3 So to the extent there's some argument from the Petitioner that
4 we're reading in limitations, et cetera, we are not reading in anything. We
5 are simply identifying discrepancies between the approaches of these patents
6 for purposes of distinction, not to offer a specific construction.

7 JUDGE MEYERS: And that's understood. And I think your brief
8 is very clear that you're talking about the '805 Patent and not the claim. So I
9 do think you do refer to the general '805 Patent as opposed to what a claim
10 requires.

11 MR. FULLER: Thank you, Your Honor. For the term housing
12 specifically, and then I'll get to curved channel, our argument here is just
13 simply that you don't need to construe housing. The claim simply requires
14 that the housing performs a function, that it guides the anchor. That's all it
15 does.

16 And so literally, any structure that guides the anchor in our opinion
17 would satisfy housing. So we don't believe that the panel need adopt
18 Petitioner's proposed construction. We think housing is plain on its face in a
19 clearly understandable term. And so for that reason we simply argue for
20 plain and ordinary meaning.

21 Same for curved channel, I don't really think at this point there's a
22 debate or a disagreement among the parties as to what the construction of
23 curved channel ought to be. I'm glad to field any questions on that
24 construction, if there are any. But I think it's very --

25 JUDGE MEYERS: No. I would like to jump back to the

1 construction of housing. One thing that I do think has happened in the briefs
2 is that we've kind of conflated housing and delivery housing in our
3 construction. When you ask for the plain and ordinary meaning of housing,
4 Petitioner's proposing a component that protects, covers, supports, or
5 contains another component. How do you feel about that as that being the
6 plain and ordinary meaning of housing, not delivery housing but just
7 housing?

8 MR. FULLER: Our perspective is that it just introduces ambiguity
9 where there's not one, protects, supports, et cetera. Again, the claim simply
10 requires that it be something capable of guiding an anchor. And now we're
11 talking about protecting, supporting, containing, et cetera, which in our
12 opinion introduce limitations into the claim which aren't there and which
13 otherwise are overly restrictive.

14 So again, we think of housing -- I don't necessarily have a
15 dictionary-type problem with what the Petitioners have offered, aside from
16 the fact that in the context of the claim we think it adds limitations instead of
17 clarifies.

18 JUDGE MEYERS: So Claim 2, the pertinent part which cites
19 delivery housing for guiding each independent anchoring member into the
20 fusion member. So the housing would be a component that -- what purpose
21 would the housing do here, just the housing?

22 MR. FULLER: To guide the anchor. It is a structure that allows
23 the anchor to be properly placed in whatever form that takes. Now, could it
24 also protect and support it? Possibly, possibly not, depending on the
25 configuration.

1 JUDGE MEYERS: So a component that supports another
2 structure?

3 MR. FULLER: I don't know that it would necessarily even have to
4 support it, Your Honor.

5 JUDGE MEYERS: I understand the distinction, that you're being
6 careful to make between the rods being protected, covered, and supported
7 because the rods are external and -- but I'm just trying to figure out how we
8 move forward without some sort of understanding of what the plain and
9 ordinary meaning of housing is. Because I look at it, and the rods aren't
10 housed there; they might be supported. Now that gets to the point where I
11 don't think the delivery housing need -- as claimed needs to do anything with
12 the rods.

13 But I do see where you're at. It's just hard to -- if we look at a
14 delivery housing as claimed, a component that protects, covers, supports, or
15 contains another component, it doesn't seem to be a problem. But when we
16 try to read retention rods in there, yes, I do see the issue. All right. Let's
17 move on. I do understand your position of a structure that allows an anchor
18 to be properly placed.

19 MR. FULLER: Thank you, Your Honor.

20 JUDGE MEYERS: All right. Thank you.

21 MR. FULLER: I don't believe there were any other claim
22 construction questions. And so I will move to the Ground 3 which we spent
23 quite a bit of time on, which is the Blain and Steffee combination. I think
24 we've already discussed sort of the issues that Patent Owner has with the
25 motivation to combine and the feasibility of that combination. We've

1 addressed the migration issue.

2 I think, from our perspective, even if we look at the Petitioner's
3 Slide 16, which is sort of a side-by-side comparison of Steffee and Blain, it
4 sort of shows the fundamental difference in approach between these two
5 apparatuses. So they are not simply mix and match obviously. It is a
6 wholesale change and approach which, again -- and I hate to keep repeating
7 myself, so I'll try not to. But there is not a basis, say, for the basis of
8 hindsight to combine Steffee and Blain. And I think we've covered that
9 certainly in our brief and again today.

10 Your Honor had question as to Claim 4 on Ground 3, and I do
11 want to just address that quickly. Claim 4 plainly requires that coupling is
12 what causes the alignment. It's not just setting something in the
13 neighborhood. So what we have attempted to do in our briefing is to explain
14 the fact that Steffee does not disclose this and that it is the coupling that we
15 have to stick obviously to the language of the claim. And the claim requires
16 a specific act which causes the alignment. And that's what we believe
17 Petitioner has failed to show in the prior art, in Blain or Steffee.

18 JUDGE MEYERS: Counselor, let's look at the claim language
19 here. The apparatus of Claim 2, wherein the coupling of the delivery
20 housing to the fusion member causes each channel of the fusion member to
21 be aligned with a different channel of the delivery mechanism. So coupling
22 causes alignment of the channels. And it would seem you're trying to get an
23 implied construction here that coupling requires not only alignment but
24 locking into place that it's -- once they're aligned, it has to be something
25 more than just alignment that's occurring. It has to be a secured alignment.

1 MR. FULLER: We do believe that coupling suggests far more
2 than simple alignment. Patentee certainly had alignment in the arsenal of
3 words that he could have chosen. In our opinion, the plain or ordinary
4 meaning of coupling, again, means more than just bringing two things close
5 to one another or in proximity. Coupling means some sort of fastening,
6 mechanical or otherwise, that would couple these two components together.

7 And so the simple fact of bringing something, again, next to
8 another or against another, in our opinion, I don't think anyone would view
9 that act as a act of coupling. Rather, it does require some sort of mechanical
10 lock or otherwise.

11 JUDGE MEYERS: Okay. So Petitioner is suggesting that the
12 plain and ordinary meaning of coupling is to come together and unite
13 -- come together or unite. So you're saying that it's much more than that,
14 that it's also -- there's another step. And can you direct us to anywhere in the
15 '805 Patent where it talks about that step? I know that it's got the teeth, that
16 yours has the retention teeth that kind of twist into the delivery mechanism.
17 But hasn't it already come together with the -- it has to have already aligned
18 with the implant and the delivery instrument 14.

19 MR. FULLER: I'm not aware offhand, Your Honor, of -- if you
20 give me one moment.

21 JUDGE MEYERS: Sure.

22 MR. FULLER: I'm not aware of a specific disclosure that would
23 promote a -- some sort of definition to couple. I'll direct Your Honor to
24 Column 4, line 6 of the '805 where the Patentee talks about the anchoring
25 member and the driving member being coupled together to form a unified

1 needle. That unified concept, I think, is what we're trying to get at, that a
2 coupling unifies two components. And that in our view is something above
3 and beyond simply two things being adjacent to or close to each other.

4 JUDGE MEYERS: Okay. Doesn't that kind of go against, though,
5 what you're saying of how we should look at housing, though? You're
6 saying housing -- that two modular components together can't be considered
7 one, essentially. So here you're saying that until there's some sort of
8 mechanical force that's uniting them, they cannot be aligned. Is that what
9 you're saying?

10 MR. FULLER: In theory, yeah. And again, I don't know that I'm
11 necessarily married to the word mechanical. But some sort of unification of
12 the two parts is what we would view coupling to mean.

13 JUDGE MEYERS: Okay. All right. Thank you. I also --

14 JUDGE TARTAL: Counsel, this is Judge Tartal. To clarify on
15 Claim 4, can you explain your argument for why Blain doesn't teach
16 coupling?

17 MR. FULLER: One moment. Apologies, Your Honor.

18 JUDGE MEYERS: Take your time.

19 MR. FULLER: Addressed in the Patent Owner response
20 beginning at page 49. And I think, if I recall correctly -- apologies, Your
21 Honor, I wasn't focused on this element for today. The occasion of coupling
22 in Blain is not what actually causes the alignment, that the alignment occurs
23 at a -- prior to the coupling. And again, I'm -- I think I'm paraphrasing
24 what's in our brief, beginning at page 49.

25 JUDGE TARTAL: Okay. Thank you, Counselor. If you have

1 something else to add, you're welcome to add it when we get to the
2 surrebuttal.

3 MR. FULLER: Thank you, Your Honor.

4 JUDGE TARTAL: I don't want to take up your time to sort of
5 address an issue.

6 JUDGE MEYERS: Yeah. We will reread the brief at 49.

7 MR. FULLER: Thank you, Your Honor. Apologies for not being
8 more prepared for that particular question.

9 JUDGE MEYERS: No problem.

10 MR. FULLER: I believe that those are the points that were
11 covered by Petitioner. We agree, frankly, that Grounds 1 and 2 are deficient
12 for many reasons, and especially with regard to Claims 5 and 16 and the
13 curved component. But I don't think there's really any debate at this point
14 that Petitioner's Ground 1 based on section 102 anticipation grounds isn't
15 really viable. But Ground 1, in our perspective, is really a 103 argument
16 which, again, I don't really have much to add today beyond what's in the
17 briefs.

18 And I think unless the -- oh, I did want to address one other thing.
19 So the question about the disclosure in Blain relating to outside the body,
20 Petitioner sort of says, well, that's so obvious no one even needs to talk
21 about it. It's a claim limitations, so it's material. So we can't just throw our
22 hands up and say, everybody would have known. And we can look at the
23 picture of Blain and see that the various dimensions make it ipso facto
24 outside the body.

25 I don't think that's the case at all. And you can't just assume that a

1 handle which by its own description is designed to be removed specifically
2 to avoid anything being outside the body. And when Blain talks about the
3 dimensions being variable, we view that as actually favoring the fact that
4 these things can be very small and specifically small so that they do not
5 extend outside the body.

6 So this notion of, well, you have two choices, it either is outside
7 the body or this overly dramatic picture of the surgeon sticking his entire
8 hand inside to manipulate this is not entirely accurate. These can be very
9 small, such that the incision can still be very small. And there's no reason to
10 believe that Blain is -- teaches that there must be as small an incision as
11 possible. That's not the point of Blain.

12 So the fact that the outside the body limitation exists in the claim is
13 something that has to be disclosed in the prior art. And we believe that the
14 Petitioner hasn't shown that it is clearly disclosed. With that, I will step
15 aside unless there are specific questions.

16 JUDGE MEYERS: No further questions at this time. Thank you,
17 Counselor.

18 MR. FULLER: Thank you.

19 JUDGE TARTAL: Counselor, that leaves you with something on
20 the order of 20 -- up to 27 minutes, if you needed it in your surreply.

21 MR. FULLER: Thank you.

22 JUDGE MEYERS: Judge Tartal, how much time was that left?
23 I'm sorry.

24 JUDGE TARTAL: Around 27 minutes.

25 JUDGE MEYERS: All right. Thank you. All right. Petitioner,

1 you may begin when you're ready. You have about 17 minutes left.

2 MR. ZINDA: Thank you, Your Honor. Just one moment to get
3 my (INDISCERNIBLE). All right, Your Honor, I'm ready. Can I please
4 have the screen back?

5 JUDGE TARTAL: Sure. I have the slides --

6 MR. ZINDA: Oh, you know what, I didn't plug it in. I'm sorry.
7 That would help.

8 JUDGE TARTAL: We're also looking at our copies probably
9 more than what's on the screen, other than telling us what slide to go to.
10 We're good either way.

11 MR. ZINDA: Okay. All right. So I want to start -- well, I'm
12 going to address all the points, try to address as many points as I can in my
13 17 minutes that were raised in Patent Owner's response. I want to start first
14 with the last point that was raised was this notion -- and I think Patent
15 Owner reiterated -- again, their counsel -- that the reason the handle was
16 removed in Blain is so that it avoids extending outside the patient's body.

17 But I'm going to reiterate again Blain teaches the handle can be
18 permanent. In that permanent embodiment, the handle was not removed. So
19 ergo it would be extending outside the patient's body even under the Patent
20 Owner's own logic. And we've raised that position in our reply brief as well,
21 and they never responded to it or rebutted it. And we raised it in our
22 opening arguments, and they did not rebut it then either.

23 So I just wanted to reiterate it again, Counsel, when we talked
24 about the motivation to combine with respect to Steffee with Blain, with or
25 without Bray, I think Counsel said that the only purpose of the nonlinear

1 guide tubes in Blain was to reach difficult anatomical sites. That's simply
2 not true. If you read what Blain says, Blain first says that the guide tubes
3 can have any shape. They can be nonlinear.

4 And then in a separate sentence, it says, oh, and by the way, that
5 may help reach difficult anatomical sites. So that's not a statement that that's
6 the only reason that you would ever want to have nonlinear guide tubes.
7 That's just a statement of one potential reason that you might.

8 JUDGE TARTAL: Counsel, can I just ask to get your thoughts on
9 that particular disclosure? And I think it's Slide 19 where you have the
10 quote from Blain that expressly teaches that the guide members may be
11 nonlinear. There isn't a disclosure in Blain, at least expressly, that the
12 channels can be nonlinear, correct?

13 MR. ZINDA: So to be clear, the guide -- I believe when I say
14 guide member, I think guide member and guide tube are used
15 interchangeably in Blain. So guide member is the guide tube.

16 JUDGE TARTAL: Is the channel as well?

17 MR. ZINDA: Which includes the channel, right? So that's the
18 long -- if we go back to Slide -- which you'll find on Slide 16, for example,
19 the guide tube is 18, but they also call that a guide member. And maybe I
20 should use the word guide tube because that's confusing.

21 JUDGE TARTAL: Which is --

22 MR. ZINDA: Eighteen is the guide tube/guide member.

23 JUDGE TARTAL: Okay. Right. Shown on Slide 16, which is
24 different than the channel in the implant, though.

25 MR. ZINDA: Correct. Yes, there's a channel in the implant, and

1 then there's -- yes, there's a channel in the guide instrument 14, which is the
2 whole guide delivery tool. And then there's a channel in the implant as well.

3 JUDGE TARTAL: And so is there a disclosure in Blain that
4 addresses the - we're calling it, I think, the channel in the implant itself?

5 MR. ZINDA: No, Your Honor, there's not. And I think it's
6 important to note that that's not our primary obvious -- that's not the primary
7 rationale for obviousness combination. The primary rationale is that
8 obviously if you're going to use curved anchors, you would want all of the
9 channels to accommodate the curvature. The fact that Blain itself teaches
10 that the guide member -- or I'll call it guide tubes because I think it's more
11 accurate. The guide tubes can be nonlinear.

12 There's just Evidence A, that it would be obvious that you could
13 change the shape and trajectory of the channels; and B, how simple it is. If
14 you're going to use a curved anchor, obviously you can't stick a -- well, I
15 guess it depends on the -- it depends how long the channel is. If it's a very,
16 very, very short channel, then you may not have to have a curvature in it.
17 But if it's longer, you have to have a curvature to accommodate the channel,
18 the anchor curvature.

19 JUDGE TARTAL: So I think that's sort of my question, which is
20 if -- is there any evidence that if the guide member itself is nonlinear,
21 meaning curved, that the fastener and therefore the channel within the
22 implant necessarily has to also be curved? Or could you use a straight
23 fastener with a nonlinear guide member?

24 MR. ZINDA: A straight fastener with a nonlinear -- I think it
25 depends on how -- I guess if the anchor is short enough, you could, I

1 suppose.

2 JUDGE TARTAL: Or if the guide member is nonlinear to such a
3 small degree --

4 MR. ZINDA: Right. If it's a small --

5 JUDGE TARTAL: -- it's wider than -- the diameter of the guide
6 member is wider than the diameter of the fastener. I guess my question is
7 really just is there anywhere else we should look other than what's shown on
8 your Slide 19, which is the -- I believe is supporting testimony from your
9 expert at paragraph 206, for any guidance as to -- of Exhibit 1002 as to the
10 basis for his opinion that the disclosure in Blain of a nonlinear guide
11 member supports the suggestion that the channels are also curved?

12 MR. ZINDA: I believe that's an expressed teaching from Blain
13 that we've relied upon, but it's not the only thing that we relied upon. Again,
14 I'll go back to this, the notion that if you're going to use curved anchors in
15 something that's got channels, you need to make the channel -- obviously,
16 you need to make the channels curved to a degree to accommodate them.
17 This is the best -- I think this is a very clear teaching from Blain that
18 supports our position, but that's not the only evidence we relied upon.

19 JUDGE TARTAL: Okay. Just so I know what I'm looking for,
20 then the citation to paragraph 206 is the support from -- support for that. Is
21 there anywhere else that --

22 MR. ZINDA: If you just give me one moment, Your Honor.
23 Sorry, I cited that for that particular --

24 JUDGE TARTAL: Well, I don't mean to -- it isn't meant to be like
25 a difficult -- if it's within a paragraph or two of the --

1 MR. ZINDA: I can assure you that it's within a three or four
2 paragraph --

3 JUDGE TARTAL: (CROSSTALK) --

4 MR. ZINDA: Because they were all -- all those arguments and
5 support are all in the same area.

6 JUDGE TARTAL: But there's no other reference, no other
7 disclosure, no other -- any of the documents that you cited that pertain to this
8 particular issue?

9 MR. ZINDA: I don't believe there are any other -- there's any
10 other direct evidence that we rely upon about -- with respect to having
11 curved channels.

12 JUDGE TARTAL: Okay. Thank you.

13 MR. FULLER: Yes, Your Honor. And so I want to go back to the
14 -- Patent Owner's counsel mentioned that there are disparate purposes and
15 problems involved by the '805 Patent versus the prior art. What they didn't
16 explain is why their own patent uses curved anchors and curved channels.
17 As we explained, as supported by Mr. Culbert's testimony, those help
18 mitigate migration. We believe that's the same reason they use curved
19 anchors in their own patent. Their patent doesn't tell you why they use them,
20 but we believe that's the reason that they use them. So in that sense, they do
21 address the same problems.

22 Patent Owner's counsel when asked about the claim construction
23 for housing, I believe he said that they only have to guide the anchor. But
24 that's not consistent with what the Patent Owner argues in its briefing. On
25 Patent Owner's response, page 16, they explicitly argue that the housing

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1 -- and they propose this as part of their construction, that the housing has to
2 also have the retention rod or retention mechanisms. And we just don't
3 believe that's a requirement of the claim.

4 And I do want to -- so I just wanted to clarify that's -- again, on
5 page 16 of Patent Owner's response --

6 JUDGE TARTAL: I'll turn to it real quick.

7 MR. ZINDA: One second. I gave you the wrong page number.
8 So it's actually page 12 of Patent Owner's response where they propose the
9 plain and ordinary meaning, as they understand it, of the term housing. And
10 they specifically say it has to house and guide the retention mechanisms as
11 well. And again, that's not consistent with the plain claim language.

12 And the only reason I'm mentioning that is because when Patent
13 Owner's counsel was asked about it, he said it just had to house or guide the
14 anchor members. But that's not what they put in their briefing. In the
15 briefing, they specifically argue it has to house and guide the retention
16 mechanisms.

17 JUDGE MEYERS: I understand what you're saying there, but how
18 does that relate to what we were just talking about, though?

19 MR. ZINDA: It doesn't, Your Honor. That's just purely on the
20 claim construction issue of housing. Sorry, I should have signaled that I was
21 --

22 JUDGE MEYERS: All right. I thought we were talking about the
23 curved trajectory.

24 MR. ZINDA: Apologies, Your Honor. No, I was just jumping to
25 a different point that they had raised.

1 JUDGE MEYERS: Okay.

2 MR. ZINDA: I should have made that clearer. I'm sorry.

3 JUDGE MEYERS: Yeah, no problem.

4 MR. ZINDA: And then just one final point, Your Honor, on the
5 Claim 4 issue about the coupling, their counsel argued that our position on
6 coupling is not consistent with the plain and ordinary meaning. But I want
7 to note that the only party that's put evidence in the record of what the plain
8 and ordinary meaning of coupling is, is the Petitioner.

9 The argument that their counsel just made is just attorney
10 argument. There's no support for it. And again, even if the Board was going
11 to find that coupling requires not just that they come together and mate, but
12 also that there's some sort of additional locking step that occurs
13 simultaneously, Blain explicitly teaches that, because it teaches that the
14 coupling structure can insert in and lock at the same time via magnetic
15 fitting, friction fitting. So that would satisfy the claim either way.

16 So with that, Your Honors, I'm happy to answer any other
17 questions you all may have.

18 JUDGE MEYERS: No further questions here. Thank you,
19 Counselor.

20 MR. ZINDA: Thank you, Your Honor.

21 MR. FULLER: Two very quick points I just wanted to address.
22 Counsel just spoke about the -- as for the issue of whether or not the
23 apparatus of Blain extends outside the body and directed to the disclosure
24 that certainly the handle could be removable or nonremovable as some sort
25 of gotcha that will clearly then if it's fixed, then it has to extend outside the

1 body. I remind Counsel that one of the primary things that they focus on is
2 the fact that all of the dimensions can be - they can vary.

3 So if in the embodiment where the handle is fixed and not
4 removed, certainly that doesn't dictate or require that the handle therefore
5 necessarily must extend outside the body if the removable handle is designed
6 specifically to not extend outside the body. It seems to us that a person of
7 ordinary skill in the art would certainly understand that if the idea is to not
8 extend outside the body by removing the handle, that if you make the handle
9 fixed, that you would simply make it smaller to therefore to not extend
10 outside the body.

11 I don't really want to belabor that point, but we do think that
12 Petitioner's argument that the fixed disclosure of the handle somehow
13 dictates an extension outside the body doesn't necessarily hold water. And I
14 do want to --

15 JUDGE MEYERS: Counselor, let me interrupt you real quick.
16 Given the detail of disclosure in the specification you have for this
17 limitation, doesn't that suggest that it's well within the level of ordinary skill
18 in the art to extend that handle outside?

19 MR. FULLER: I think the level of ordinary skill in the art would
20 understand that you can sort of do whatever you want. The question is why
21 would you? And Petitioners, we don't believe, have satisfied their burden to
22 show why a person of ordinary skill in the art looking at Blain would say,
23 yep, that discloses outside the body. Briefly --

24 JUDGE MEYERS: And how would you -- can you point
25 anywhere in the '805 Patent that would help us distinguish?

1 MR. FULLER: As has been noted, I don't believe the '805 Patent
2 specifically talks about inside, outside the body as being a -- something that
3 is described. And so I don't think there is a disclosure that would distinguish
4 or not distinguish Blain.

5 JUDGE MEYERS: All right. Thank you.

6 MR. FULLER: On the question of the disclosure in Blain about
7 the curved tubes, again, Counsel pointed to Blain, column 8. I want to
8 return to Blain column 8 to again strengthen and make our point. If you
9 look at Blain column 8 again -- and I'm reading the paragraph that begins at
10 line 5 and goes through about line 16. Counsel stated that the access to the
11 difficult to reach anatomical sites was just sort of an additional aside to say
12 that, well, that's just a benefit that could be reached by having these
13 nonlinear tubes.

14 But if you read Blain, and specifically starting at 13, it says
15 nonlinear guide members may facilitate access to difficult anatomical sites.
16 Nonlinear or flexible drills, screwdrivers, or other tools are known in the art
17 and may be used with the nonlinear guide members. From Patent Owner's
18 perspective, it's this disclosure that really sort of negates the Petitioner's
19 arguments when you look at it in total. Because what Blain is contemplating
20 here, as you noted, Your Honor, is not a curved member proceeding through
21 this curved guide member.

22 The only reason for the curvature of the guide member is to
23 facilitate something like a flexible drill or screwdriver, not to facilitate a
24 curved or nonlinear non-screw member. And specifically, it appears to us
25 that it still contemplates that you're going to be screwing something in even

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1 if it's in a nonlinear -- through a nonlinear guide member.

2 JUDGE MEYERS: Counselor, does Blain have any embodiments
3 where there's flexible anchors?

4 MR. FULLER: I don't believe Blain has a flexible anchor
5 disclosure off the top of my head. Thank you, Your Honor.

6 JUDGE MEYERS: Thank you, Counselor.

7 All right. This will conclude arguments with respect to the oral
8 hearing for the 225 case. We're now off the record.

9 (Whereupon, the above-entitled matter went off the record)

10 JUDGE MEYERS: All right. We are reconvened for oral
11 arguments in IPR2025-00226. Again, I am Judge Meyers. And still with
12 me are Judges Tartal and Jeschke. For the record, we will start again with
13 appearances for both parties for those who will be arguing today. And
14 again, identify anyone else who's attending in person or remotely. For the
15 226 proceeding, Petitioner?

16 MR. HALL: Thank you, Your Honor. This is James Hall. I'll be
17 arguing for Petitioner. I'm joined by my partner Stephen Zinda. And
18 possibly joining us on the audio line is our client representative Jay Jani.

19 JUDGE MEYERS: All right. Patent Owner?

20 MR. FULLER: Good afternoon, Your Honor. Or I guess good
21 morning. For the Patent Owner, Michael Scott Fuller. I believe I'm the only
22 one appearing on behalf of Patent Owner.

23 JUDGE MEYERS: All right. According to the joint
24 (INDISCERNIBLE) rebuttal time which can't exceed more than the total
25 time. Patent Owner will then respond to Petitioner's arguments and may

1 reserve rebuttal time, also not to exceed more than half of Patent Owner's
2 total time. Again, this wasn't a problem in the last proceeding, but please
3 remember that arguments should be limited to only those arguments
4 previously presented in the briefs. Please make it clear which challenges
5 and claims you are addressing at all times. And again, hold any objections
6 until it's your time to speak.

7 Judge Tartal will again be maintaining the clock and do his best to
8 give you warnings. With that, we will begin. Petitioner, how much
9 (INDISCERNIBLE)?

10 MR. HALL: (INDISCERNIBLE) minutes for rebuttal.

11 JUDGE MEYERS: Okay. Twenty-five for two cases. So I think
12 things that we've talked about regarding the Steffee reference they're
13 applicable to this case. I don't think we need to go deep into them again.
14 But I will leave that to your discretion. And you may begin when you're
15 ready.

16 MR. HALL: Thank you, Your Honors. (INDISCERNIBLE). Let
17 me address one thing too, during the prehearing call, the -- I can't remember
18 which judge had asked about Ground 1. And we had conceded that that
19 ground under the parties' agreed construction, because it relied on the
20 straight channels --

21 JUDGE MEYERS: Maintaining Ground 1, except for any overlap
22 that might be with the Moskowitz reference that we need to use for Ground
23 3.

24 MR. HALL: I'm going to Slide 3. First, there are two terms
25 proposed by the parties -- or Petitioner for construction channel and then

1 curved as the modified channel. It appears to Petitioner that the parties
2 agreed essentially with the substantive definition. There's some slight
3 differentiation here between Patent Owners and Petitioners where Patent
4 Owner is basically making it more specific as to this device. But I don't
5 think that there's any fundamental disagreement between the parties.

6 Slide 4, with the construction of curved channel, the only
7 difference really it seems to Petitioner is the use of the words path versus
8 trajectory. Again, we don't see that as a substantive difference. Indeed, the
9 Patent Owner uses path I think almost exclusively. They actually talk about
10 (INDISCERNIBLE) the construction in their response, other than in their
11 distinction between the parties on that term either.

12 JUDGE MEYERS: So for both terms, there's no substantial
13 substantive difference between the parties' positions on claim construction?
14 That's Petitioner's -

15 MR. HALL: That's Petitioner's view, Your Honor, yeah.

16 JUDGE MEYERS: Thank you.

17 MR. HALL: On Slide 5, I basically just put together an overview
18 of Ground 3, which is the Moskowitz. This combination is very simple. It's
19 a simple mechanical device. You're using Steffee's curved anchors with
20 Moskowitz's screw box. Given the fact that Moskowitz's anchors are not
21 screws, it would become really just an intervertebral implant, but you're
22 adding Steffee's curved anchors to complement the anchor curvature. You're
23 also of course using an impact driving tool instead of a screwdriver to
24 accommodate Steffee's impact-driven fasteners.

25 The motivation to combine is given in Steffee itself, the migration

1 of the screw box for the intervertebral implant because the anchor insertion is
2 more perpendicular. And I think this is covered in the papers. But if Your
3 Honors have any questions about the specifics, I'm happy to answer those.
4 An additional motivation to combine is that the non-threaded anchors with
5 barbs in Steffee are not subject to stripping and therefore less likely to back
6 out or have any sort of disjunction between the bone and the implant itself
7 after implantation.

8 And again, the motivation to combine is to minimize that
9 migration, which Mr. Culbert had testified to, which Patent Owner itself said
10 -- they said there's a general need to minimize implant migration in -- on
11 page 56 of the Patent Owner's response. So there's really not any dispute
12 that that was a known problem that one of skill in the art would be focused
13 on preventing to ensure more successful intervertebral fusion surgery.

14 Reasonable expectation of success, again, the combination requires
15 use of known machine techniques, which is really adding the curvature to
16 the drill guides. And we've already seen there -- we cited multiple examples
17 in the papers that curved anchors were well-known in intervertebral
18 implants.

19 So turning to Slide 6, Patent Owner makes several
20 counterarguments. And I've grouped -- kind of grouped them together in the
21 -- in our reply brief as well as here. But the first one is impermissible
22 hindsight. The second is that there's insufficient motivation to -- I'm sorry,
23 Your Honor, do you have a question?

24 JUDGE MEYERS: It just looked like we lost Judge Jeschke there
25 for a minute. I was going to pause you, but I think he's back.

1 MR. HALL: Okay. Thank you, Your Honor. So the second one is
2 there's insufficient motivation redesign because the combination doesn't
3 teach the use of a hollow flexible anchor or needle that's going to be used to
4 inject this hardening material or PMMA material. And the third one is that
5 there's no reasonable expectation of success because the combination
6 requires wholesale redesign. And there was a subsequent slide that talks
7 about this more specifically, but this is just one example of it. It
8 compromises the structural integrity.

9 So first off, addressing the hindsight argument, Slide 7, from what
10 we're able to tell is that this is really based on the fact that Steffee is teaching
11 these curved barbed anchors without an implant, whereas Moskowitz is
12 using straight anchors or straight screws in an actual intervertebral implant.
13 And that seems to be the basis for their hindsight complaint.

14 I guess the first response is that's attacking the references
15 individually. It's not addressing the motivation to combine that's set forth in
16 the petition that Mr. Culbert testified about. The proper test is what the
17 combined teaching suggests to one of skill in the art. And we have that from
18 -- set forth in the petition from Mr. Culbert's testimony. So it's negated here
19 because we have analogous art.

20 Slide 8, I believe this was covered in the earlier proceeding. It's a
21 fairly broad field, surgical procedures for spinal fusion and stabilization.
22 And the problem is improving fusion reliability, avoiding failed fusions.
23 Moskowitz is an intervertebral implant. It's exactly the same type of device.
24 I don't think there's any dispute that it's from the same field or addressing the
25 same problem. And we have some quotes there on Slide 8.

1 Slide 9, Steffee is from the same field. In our view, there's no
2 question that it is for spinal fusion surgery. It's also clearly directed to spinal
3 fusion stabilization. We see that from Figure 6, which we produced on Slide
4 9. And Mr. Culbert testified to this fact that it explicitly discloses using
5 Steffee's invention in spinal fusion procedures based on Figures 5 and 6. It's
6 also reasonably pertinent to improving fusion reliability. And Mr. Culbert
7 testified again to this based on implant operation was a known problem.

8 (INDISCERNIBLE). Again, Patent Owner (INDISCERNIBLE).
9 So Mr. Culbert testified to this. There was no rebuttal of that evidence.

10 If we go to Slide 10, here we have Mr. Culbert's -- some of his
11 testimony establishing the motivation to combine, which again the case law
12 motivation negates hindsight. Motivation to combine negates hindsight, and
13 analogous art negates hindsight. Mr. Culbert testified that using these
14 curved anchors lower the forces that tend to cause migration.

15 And we have the moment arm testimony, which Mr. Zinda I think
16 said that he was an electrical engineer. I'm a chemical engineer, not a
17 mechanical one. But I did take a little bit -- a few classes on that. From
18 what I understand, you have the resorption of the bone graft essentially in
19 the vertical directions and the prior art for Steffee. These implants coming
20 in at a non-perpendicular or flatter angle, as that resorption happens it's
21 going to tend to pull on those implants in a way that causes them to loosen.

22 Steffee negated that or addressed that by coming in near
23 perpendicular with the curved anchor. And so as the bone graft resorbs, it's
24 acting along the line of that anchor in that -- so it does not tend to cause the
25 implant to move either sagittally, backward and forward, or laterally side to

1 side. Another reason that Mr. Culbert testified is that Steffee's anchors were
2 more secure because they were not subject to stripping, which is a problem
3 with Moskowitz. This testimony evidence is un rebutted.

4 The Patent Owner attacks it multiple times. It's all basically
5 attorney argument. And the few times that they address or cite anything in
6 response is to Moskowitz or Steffee itself. And if you actually go look at
7 those citations, we couldn't find the support for Patent Owner's attacks. So
8 once you inspect the evidence that they're citing, it evaporates.

9 Turning to the next fundamental counterargument, Slide 11, I
10 focused here on the arguments that flexibility and the PMMA injection are
11 required. They make the same type of argument with a few other
12 limitations, such as I think the pivoting mechanism at one point. And those
13 are addressed in the briefing. They're all essentially subject to the same
14 issues. And that's set forth in our reply brief.

15 But here they're repeatedly claiming, with respect to these two
16 limitations, that the combination doesn't disclose these two limitations and
17 therefore doesn't render the claim unpatentable. There's multiple reasons
18 they're wrong. We listed readily identifiable ones here on Slide 11. They
19 haven't proposed anything other than a plain meaning for anchoring
20 member. There's nothing that they pointed to, nothing that we've seen, that
21 says these are requirements of anchoring member.

22 They admit these features in their own briefing are merely
23 preferred embodiments. They're not required by the invention as a whole.
24 We have claim differentiation (INDISCERNIBLE). Claim 10 requires the
25 anchor have an opening for the PMMA or hardening material injection.

1 Those obviously point to the fact that that's not required by the independent
2 claim, and they've done nothing to rebut that presumption. Finally, the
3 specification itself expressly states that embodiments don't include these
4 features.

5 And so Slide 12, they don't even argue that the plain meaning
6 requires these features, the claim construction. They admit they're only
7 preferred embodiments here. I've put a few of these here on Slide 12. This
8 is their response at Pages 6 and 7.

9 Slide 13, this is the claim differentiation arguments that I referred
10 to earlier. This is obviously in our briefing. But Claim 8 is what they
11 actually cite to multiple times in their response, saying the specification
12 teaches that flexible anchors are required. It's not required in the written
13 description. It's required in Claim 8, which is not one of the claims that's
14 challenged here. Claim 10, likewise, is for the PMMA or hardening material
15 injection.

16 And then finally on Claim -- I'm sorry, Slide 13, the specification
17 specifically says you can have rigid anchoring members. It specifically says
18 there are embodiments that don't use these polymer materials and the anchor
19 members can -- do not have to have the central lumen or perforations for
20 injecting those materials.

21 Slide 14, here's where we've -- I've tried to collect most of, if not
22 all of the arguments that the Patent Owner makes regarding this wholesale
23 redesign argument they make. And the way that I've understood those in
24 reading them is directed to a reasonable expectation of success. And there's
25 multiple ones here. They talk about the unique flexible anchor

1 (INDISCERNIBLE) underlying functional and compatibility, antithetical
2 insertion mechanics, critical technical barriers, structural integrity. It
3 necessarily changes the spatial relationships between channels. These are all
4 statements from their briefing.

5 Those are all absolute unsupported attorney argument. There's no
6 evidence to support any of those statements that this would require
7 wholesale redesign. The only evidence on Slide 15 -- this is not the only
8 evidence, but I've just put here paragraph 173 from Mr. Culbert's
9 declaration. This is his primary paragraph directed to this combination and
10 the reasonable expectation of success. So this is unrebutted. And Mr.
11 Culbert testifies this is a simple mechanical combination, one of skill in the
12 art would be able to do this with no problem. And there was reason to think
13 that it was going to work.

14 Addressing one of these, particularly on Slide 16, Patent Owner
15 argued that Moskowitz has this fundamental adjustability feature because it
16 is expandable. And I don't know if this was clear from the briefing, but
17 Moskowitz essentially teaches that you go in and you can raise the height of
18 this implant because the space between these vertebrae may be different for
19 different individuals. So you want to be able to adjust that intervertebral
20 height of the implant to match the intervertebral height of the individual
21 you're implanting this into.

22 So Patent Owner argues that this is somehow a problem for using
23 Steffee's screws. Patent Owner does not really explain the argument, but
24 they say there's some problem with it, without any evidence of course. But
25 that's just contradictory to Moskowitz, which says that this adjustability

1 happens. And I've put this here on Slide 16. And the bottom bullet point
2 there makes it clear that you insert the implant, you adjust the height first,
3 and only then do you begin to insert the anchors.

4 And in Moskowitz itself, you're using a drill to start the hole, and
5 then you insert the anchors. So it's agnostic to the type of fastening member
6 that you're using or anchoring member that you're using. There's no
7 evidence that Moskowitz's adjustability feature is going to somehow affect
8 the redesign or the modification proposed in the petition.

9 Slide 17 through Slide 19 -- 17, 18, and 19, I basically just tried to
10 put a chart here for quick reference for the Court, to the extent the Court
11 hasn't -- for the Board, I'm sorry -- to the extent the Board has any questions.
12 But I put Patent Owner's arguments here against these elements. And I
13 already covered them in general previously, so I don't -- I'm not going to run
14 through all of these again. But in general, they're again adding these
15 limitations to the claims that aren't required by the plain and ordinary
16 meaning. They're not required by anything they proposed. They're
17 specifically excluded as requirements by the specification, which allows for
18 different embodiments.

19 One thing I haven't talked about is the parallel channels. And we
20 see that on Slide 18 with Claims 2 through 4. I admit I was a bit confused
21 by Patent Owner's briefing -- have we lost Judge -- he's back. Okay. I admit
22 I was a bit confused by Patent Owner's briefing on this point, but I just
23 wanted to clarify. The way the claims are written, they talk about surfaces
24 of the fusion member. They don't talk about left face or right face or the top
25 and bottom faces, which is the kind of language you see in the specification.

1 And we covered this in our petition.

2 There's at least one embodiment which specifically says -- and I
3 believe it uses the word -- it requires that these channels be nonparallel to
4 specific faces of the implant. We don't see that language in the claims. It
5 doesn't use the claims nonparallel. It doesn't specify which surfaces. So the
6 Patent Owner clearly knew how to describe that embodiment, if that's what
7 was being attempted, and chose not to use that language.

8 So the language is not so specific as some of these embodiments in
9 the specification. And therefore, as we've laid out in our petition, these
10 planes are parallel or not parallel to specific surfaces, which we've identified
11 in the petition, and it meets the claim language. The fact that it doesn't
12 match one of their particular embodiments does not matter. What matters is
13 whether it satisfies the claim language.

14 Unless there are any questions on Ground 3 specifically, I'll move
15 on to Ground 2.

16 JUDGE MEYERS: That works for me.

17 MR. HALL: Okay. Ground 2, again, Slide 20. I have combined
18 or tried to make an overview of the combination. Ground 2 relies on Hess
19 and the general knowledge of one of skill in the art. And I think the big
20 difference with Hess and Moskowitz or Steffee is Hess is explicitly directed
21 -- or primarily directed to an interspinous device. And this is something
22 that's not going in between the vertebrae itself. It's going between the
23 spinous process, which is the bony part on the outside of the spine.

24 Again, I'm not a doctor or one of skill in the art in this area, but we
25 acknowledged this in our petition. It's not something we were trying to hide

1 in any way. And we explained the motivation and why Hess is analogous.
2 First off, it's analogous because it's from the same field. It's spinal
3 stabilization. But even if you discount that, it's directed to the same
4 problem. It's reasonably pertinent to the same problem. It says that it's used
5 as an adjunct to spinal fusion.

6 And one of skill in the art would have recognized -- this is
7 un rebutted testimony from Mr. Culbert, one of skill in the art would have
8 recognized that it was relevant to solving that problem of implant migration
9 based on the fact that it uses curved anchors. So going back to Slide 20, it's
10 an interspinous implant, you modify it for use as an intervertebral implant.
11 Mr. Culbert testified that you would do that by changing the shape to
12 accommodate the new placement inside the vertebrae versus the spinous
13 process. And you might also want to modify the materials to strengthen it.

14 All of these modifications are well within the skill of the art. The
15 motivation to combine, again, one of skill in the art would recognize that the
16 curved anchors have advantages. It's basically the same recognition of one
17 of skilled in the art of the benefits of Steffee's fasteners. And the reasonable
18 expectation of success, as I mentioned, you're just matching the bone profile.
19 So you're changing the shape of the device to match the placement where
20 you're putting it.

21 That's specifically suggested in Hess itself. So it's clearly
22 contemplated you might modify the materials. And obviously, there's an
23 expectation that it will succeed based on the prior art designs and the fact
24 that curved anchors, such as used in Hess, were known to be useful in
25 vertebral implants.

1 Slide 21, Patent Owner makes the same types of counterarguments.
2 Just going through these quickly, they argue that Hess is not analogous.
3 That's refuted by Mr. Culbert's unrebutted testimony that it is analogous. It
4 is pertinent to the same problem. They provide no evidence that it's going to
5 require wholesale internal redesign. They don't rebut any evidence to the
6 contrary. And of course, there's no requirement that Hess have flexible
7 anchors or anchors that can inject hardening material.

8 Again, on Slides 22 through 24, I have summarized their
9 arguments in response to each of these elements. There's nothing there that's
10 different from our briefing of course. I just wanted to give the Board a
11 shorthand. We refuted all of these. And unless the Board has any questions,
12 I'll reserve the rest of my time.

13 JUDGE MEYERS: No further questions here.

14 MR. HALL: Thank you, Your Honors.

15 JUDGE TARTAL: Thank you, Counselor.

16 JUDGE MEYERS: All right. How much time do we have left,
17 Judge Tartal?

18 JUDGE TARTAL: Under 10 minutes, so 9:48, give or take.

19 JUDGE MEYERS: All right. Counselor, you are up. Do you
20 wish to reserve any rebuttal time?

21 MR. FULLER: I believe I'll reserve 20, although I don't suspect
22 that time will be too much of an issue. But I would like to reserve 20.

23 JUDGE MEYERS: All right. You may begin when you're ready.

24 MR. FULLER: Thank you, Your Honor. Again, I'll do my best to
25 address these arguments in the same order as my friend here just did.

1 Specifically with regard to claim construction, I tend to agree that the parties
2 are, for all practical purposes, aligned in the sense of how we're proposing
3 constructions for or interpretations of the channel and the curved terms. I
4 don't know that there's really much that needs to be said on either of those,
5 save for the fact that, again, from Patent Owner's perspective we don't think
6 that there's a construction necessary for either channel or curved.

7 But to the extent that the Board does adopt a construction or apply
8 a construction, given the fact that the parties' contentions are pretty closely
9 aligned, I don't -- I'm not aware of a specific disagreement there. I do want
10 to again, as I did in the 225 case that we had earlier, reinforce the fact that
11 Patent Owner is not proposing specific expressed constructions for any
12 terms besides channel and curved, and certainly not with respect to
13 anchoring member. We're not reading in limitations into these claims. We
14 don't propose a PMMA construction for anchoring member.

15 Again, to the extent we discussed those aspects of the disclosure in
16 our brief, as was the case earlier, our intent there is simply to distinguish
17 between the design and functionality and the idea behind the motivation of
18 each of these references. So just to be clear, we're not offering an expressed
19 construction for anchoring member.

20 With regard to Claim 3, Moskowitz with the Steffee reference, I
21 don't want to again repeat all of the issues we had with Steffee, as we
22 discussed earlier with respect to the 225 case. But clearly, we think that
23 Steffee is problematic for the same reasons that it was in the 225. There's
24 not a motivation to combine these curved barbs of Steffee with a direct
25 screw configuration of Moskowitz.

1 And again, to the extent that the Petitioner talks about migration as
2 being some sort of justification to implement Steffee, the same arguments
3 that we made earlier apply here. The '385 doesn't talk about migration as
4 being a problem. Moskowitz doesn't admit some problem with migration.
5 In fact, Moskowitz sought to solve the problem of migration, to the extent
6 there was one, by having these angled direct drive screw inserts.

7 With regard to the barbed component of Steffee that Counsel was
8 discussing, that the barbed -- or the barbed feature of Steffee is purportedly
9 important to prevent withdrawal of the anchor. And we would counter that
10 by simply saying if that's the point of Steffee is to prevent withdrawal, then
11 why on earth would a person of ordinary skill proceed to modify Moskowitz
12 in such a way as to not only add spines but also add this curved feature,
13 which isn't contemplated at all in Moskowitz? Why wouldn't they just use a
14 barbed straight insert and have all the advantages of Steffee without the
15 curvature? So the curvature, in our view, is a clear hindsight argument.

16 We also point out that Steffee standing alone doesn't contemplate
17 the barbed anchors passing through any channel whatsoever. And so to the
18 extent Steffee has these curved features, if they were going to be
19 implemented with Moskowitz, Moskowitz would have seen probably an
20 easier fit to simply do away with the tubes altogether or the anchoring
21 channels altogether and just use the implementations of Steffee that didn't
22 have channels at all. So basically the channels in Moskowitz serve no
23 purpose if you're going to use the anchors of Steffee.

24 Petitioner offers the argument that, well, we're just attacking these
25 references individually instead of as a combination. I don't think that's the

1 case at all. We're looking at the combination and simply pointing out the
2 fact that the combination doesn't make sense when you look at the
3 disclosures of both individually.

4 As for Claims 2 and 4, I don't want to spend too much time on it,
5 save for the fact that I do want to point out that, yes, Claims 2 and 4 do have
6 a lot of geometric limitations to them. And the point that we're trying to
7 make in our briefs is simply that the Petitioner bears a burden of showing
8 that Steffee and Moskowitz when they're combined in a way that they
9 propose would nevertheless satisfy all of these geometric limitations. And
10 we don't think they've done that by any means. And certainly, when you add
11 the curvilinear aspects of Steffee with Moskowitz, the geometric
12 configuration gets even more problematic for a Petitioner when you get to
13 Claims 2, 3 and 4.

14 And unless there are specific questions on Ground 3 from the
15 panel, I'll briefly address the Ground 2 of the Petitioner's argument which
16 basically relies on Hess. In our view, Hess is so fundamentally different
17 from the claims of '385 Patent. It's hard to know really where to start with
18 this. Simply because Hess has curved members visually does not thereby
19 render Hess an apparatus that comprises all of the components, the
20 anchoring member, the fusion member, and the curved channels of the '385
21 Patent.

22 In our view, there's no motivation to reconfigure Hess and its
23 mechanical pressure approach to anchoring with what is disclosed and
24 claimed in the '385 Patent, which requires anchors that go into the bone, et
25 cetera. There are no curved channels in Hess, only curved members. And

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1 they don't perform any of the functionality that is claimed in the '385 Patent.

2 Briefly, with regard to Claim 7 of the '385, I would just like to
3 point out one specific point that we have is that the driving member in Claim
4 7 is not present in Hess. The fact that there's a cable that's pulled in Hess
5 does not in any way, shape, or form perform the function of Claim 7 of the
6 driving member, which is to drive into the vertebrae. So for all these
7 reasons -- and I'm happy to answer any specific questions -- we view Hess as
8 being completely distinguishable on multiple, multiple fronts. And Ground
9 2 fails in addition to Ground 3.

10 JUDGE MEYERS: No questions here.

11 MR. FULLER: Thank you.

12 JUDGE MEYERS: All right. How much time do we have left,
13 Judge Tartal?

14 JUDGE TARTAL: The time left is around 30 minutes, 52
15 seconds.

16 JUDGE MEYERS: All right.

17 MR. HALL: I don't think I'm going to use all that, Your Honor.

18 JUDGE TARTAL: I think you're around 35, 34.

19 JUDGE MEYERS: Yeah. All right. Please begin when you're
20 ready.

21 MR. FULLER: Okay. One moment, Your Honor. I'll try to
22 address Patent Owner's arguments in order. They say there's no motivation
23 to combine that's shown, the curved fasteners in Steffee with Moskowitz.
24 It's shown in spades in the petition. It's un rebutted evidence of a motivation
25 to combine. They assert -- and they did this in their response as well -- well,

1 Moskowitz doesn't cite any problem with the way that it works that would
2 motivate someone to improve it. That's not a requirement of the law.

3 And we cited this on our reply on page 23. There's no need for the
4 prior art to hold itself out as flawed or to say that there's some way to
5 improve this. It's sufficient that one of skill in the art would recognize that
6 you could combine these references in a way that's going to address the
7 problem that we see. And actually, it doesn't even have to be the same
8 problem, but it could address any problem. But address a problem that one
9 of skilled in the art would appreciate. And that's again shown in the petition.

10 They ask why would one of skilled in the art modify Moskowitz?
11 Again, that's explained in the petition, a moment arm issue. It would
12 improve the -- and limit the migration of the implant. I honestly don't
13 remember -- and to the extent that this was not in their previous arguments, I
14 would object. I don't remember Patent Owner arguing that one of skilled in
15 the art would instead use a straight fastener from -- a barb fastener instead of
16 Steffee's barb fasteners. But that's not the combination that's proposed.
17 Steffee explicitly teaches a curved fastener and explains why a curved
18 fastener is superior. And that's obviously the motivation to combine and use
19 the curved fastener from Steffee.

20 They say that there's a problematic geometric problems with Claim
21 2 to 4, you add curved channels and that this begins to solve -- or begins to
22 create these geometric problems in the implant itself. Again, those are not
23 explained anywhere in their papers. They just say that this is the case. They
24 don't provide any evidence of any such problems. And the evidence of
25 record that Mr. Culbert testified is you would maintain the same spatial

1 relationships. You're going to have the same entry and exit points. And
2 other than the internal curvature of the channel, there's no change. And so
3 there's no change in the orientation of the planes. That's the only evidence
4 of record on that point.

5 If we go to Hess, Ground 2, I believe I heard Counsel say that Hess
6 doesn't have curved channels. It does, we identify them. Those are the
7 guide tracks. As we've explained, Hess has every element of the claims. I
8 believe the last thing that they said was -- or Mr. Fuller said was that the
9 driving member we identified doesn't count because it's not the same type of
10 driving force where it's an axial driving force.

11 Well, the claim language does not require a hammer. It doesn't
12 require a specific type of driving force. It just requires -- I believe it's a
13 driving member. And we've identified that in Hess. There is a driving
14 member, it is the -- using stored energy of course, but it is driving by
15 releasing the locking wings.

16 So with that, Your Honor, we would submit that all elements of the
17 claims are shown. We've shown sufficient motivation to combine, a
18 reasonable expectation of success, the evidence is unrebutted. And for that
19 reason, we would request that the Board cancel all the challenged claims.
20 Unless there are any questions, I'll wrap up -- I'll leave it there.

21 JUDGE MEYERS: I don't see any questions. Thank you,
22 Petitioner.

23 All right. Patent Owner, you have plenty of time, I believe.

24 MR. FULLER: I have plenty of time. I'll talk very slow. I really
25 only had one point to make, and it's a counterpoint to where Counsel just left

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1 off with Hess and its purported curved channel. Again, we reiterate that just
2 because the member in Hess is curved does not thereby make it a curved
3 channel in the sense of the '385 Patent claim which requires that the
4 anchoring member pass through the channel. That doesn't happen in Hess.
5 It clearly does not happen in Hess.

6 Petitioner hasn't shown how Hess satisfies the specific claim
7 language of the '385 Patent for the anchoring member to pass through the
8 channels. And with that, unless there are questions, I'll yield.

9 JUDGE MEYERS: I don't believe so. Thank you. This will
10 conclude our arguments with respect to the oral hearing for the 226 IPR.
11 The case is submitted. We are off the record.

12 (Whereupon, the above-entitled matter went off the record at 11:45
13 a.m.)

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