

UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of:	)	Investigation No.
CERTAIN GLOW FISH TAPE SYSTEMS,	)	337-TA-1442
SAFETY HELMET SYSTEMS, AND	)	
COMPONENTS THEREOF	)	

Pages: 1 through 235
Place: Washington, D.C.
Date: July 23, 2025

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1 UNITED STATES INTERNATIONAL TRADE COMMISSION
2 Washington, D.C.
3 BEFORE THE HONORABLE CLARK S. CHENEY
4 Administrative Law Judge

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6 In the Matter of:) Investigation No.
7 CERTAIN GLOW FISH TAPE SYSTEMS,) 337-TA-1442
8 SAFETY HELMET SYSTEMS, AND)
9 COMPONENTS THEREOF)

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11
12 International Trade Commission
13 500 E Street, S.W.
14 Washington, D.C.

15
16 Wednesday, July 23, 2025

17
18 MARKMAN HEARING

19
20 The Hearing commenced in Courtroom B, pursuant to the
21 notice of the Judge, at 9:02 a.m. Eastern.

22
23 Reported by: Karen Brynteson, FAPR, RMR, CRR

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25

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

2 (9:02 a.m.)

3 CHIEF JUDGE CHENEY: Please take your seats.

4 Good morning, everyone. We're on the record now
5 in Investigation No. 337-TA-1442. This is Certain Glow Fish
6 Tape Systems, Safety Helmet Systems, and Components Thereof.
7 We're meeting together today in a claim construction
8 hearing, or a Markman hearing, to discuss some disputes
9 between the parties about the meaning of certain claim
10 terms.

11 Let's begin by having entries of appearance for
12 counsel, beginning with counsel for the Complainant.

13 MR. AROVAS: Greg Arovas, Your Honor, from
14 Kirkland & Ellis representing Klein Tools. With me is Alan
15 Rabinowitz, Ryan Kane, and Mara Greenberg.

16 CHIEF JUDGE CHENEY: Welcome to all of you. Any
17 other counsel for Complainant?

18 MR. AROVAS: And, I'm sorry, Your Honor, I
19 missed, in the back row, Mr. Paul Brinkman.

20 MR. BRINKMAN: Good morning, Your Honor.

21 CHIEF JUDGE CHENEY: Good morning. Welcome.
22 And for the Respondents.

23 MS. ROBERTS: Good morning, Your Honor.
24 Stephanie Roberts from Morgan Lewis on behalf of Respondent
25 Milwaukee Electric Tool Corporation. With me I have Jason

1 White, Calvin Brien, and Maria Doukas.

2 CHIEF JUDGE CHENEY: Welcome to all of you.

3 I think many people in this room have appeared
4 before me before, so you know that today will be a -- pretty
5 much a conversation about these claim terms, the disputes
6 that divide you.

7 There are no discovery dispute issues that have
8 been raised; is that right, Complainant?

9 MR. AROVAS: That's correct, Your Honor.

10 CHIEF JUDGE CHENEY: And Respondent?

11 MS. ROBERTS: That's correct, Your Honor.

12 CHIEF JUDGE CHENEY: Okay.

13 Why don't we just dive right in to the first
14 claim term that you've presented. Do you have any
15 agreements on the order of claim terms?

16 MR. AROVAS: Our understanding, Your Honor, at
17 least between the parties, is we just go in the order of the
18 briefs, unless there's some other order Your Honor would
19 prefer.

20 CHIEF JUDGE CHENEY: That's fine. That's
21 completely fine. And do you have an agreement between who
22 goes first on each term or does it matter? You're all going
23 to get to say everything you want to say.

24 MR. AROVAS: Yes, Your Honor. We didn't
25 specifically discuss that, although we had thought that the

1 Complainant would go first, although obviously because it's
2 a Markman hearing, I don't know if --

3 CHIEF JUDGE CHENEY: Let's switch off. Let's
4 alternate between terms. Okay?

5 MR. AROVAS: Okay.

6 CHIEF JUDGE CHENEY: So we're beginning with the
7 term "transparent"; is that right, sir?

8 MR. AROVAS: That's correct, Your Honor.

9 CHIEF JUDGE CHENEY: Okay.

10 MR. AROVAS: Okay. So I'll skip ahead. Your
11 Honor obviously has the slides. I'll skip some of the
12 background and get right into the terms.

13 But just so Your Honor knows, there's four
14 patents, two groups, eight terms together. We're going to
15 have four lawyers addressing those collectively. So I'll be
16 addressing the two terms in the glow fish tape patents, so
17 "transparent" and "light passing through." And then for the
18 safety helmet patents, we'll have Mr. Rabinowitz, Mr. Kane,
19 and Ms. Greenberg. Ms. Greenberg is our NEXT advocate.

20 CHIEF JUDGE CHENEY: Excellent.

21 MR. AROVAS: So -- all right. So with that, let
22 me go right to "transparent." "Transparent" appears in both
23 of the glow fish tape patents, the '209 and the '573. Here
24 we have on slide 10 basically the positions of the parties.
25 Klein's position is that it should be plain and ordinary

1 meaning. If the Court does give that or define what that
2 meaning is, it should just be "clear." Milwaukee's proposed
3 construction is "clear material." In red is the difference
4 between the two constructions.

5 So the issue that Klein has with what Milwaukee
6 is doing is they're just reading the word "material" into
7 the claims where the claims don't contain that language.
8 And there's nothing in the intrinsic record that would
9 suggest that that should be done.

10 If we take a look starting with the claims, you
11 know, as we always do, I have the three independent claims
12 from the '209. There are no independent claims in the other
13 patent that use the term "transparent." It appears only in
14 the dependent claims.

15 And you can see it's at the end of each of the
16 claims. And it's a fairly similar phrasing in each of the
17 independent claims, although there's two groups of claims
18 with regard to these terms. So, for example, claim 1 --
19 it's a little small -- but it says "wherein at least one of
20 the sidewalls of the case is transparent." And then claim 6
21 and 14 recite "wherein at least a portion of the case is
22 transparent." Claim 14 is the same as that.

23 So you basically have two classes of claims.
24 Sidewall is transparent or you have a case where at least a
25 portion is transparent. If we sort of make it a little bit

1 larger, this is claim 6, this is that second group of
2 claims, the "portion of is transparent" claims, claim
3 language.

4 You can see what the applicant decided to express
5 and what they didn't. They say, "at least a portion of the
6 case is transparent," which is now distinguishing from where
7 the entire sidewall is transparent, and they state the
8 purpose of that, which is "to allow luminescent material to
9 be energized by light passing through the portion." It does
10 not say how that is achieved, whether it's through an
11 opening, whether it's through transparent material, or some
12 other means. It's just there's a portion that's transparent
13 that allows the light in.

14 Now, if Your Honor recalls, what is being claimed
15 or what is the device of the apparatus that's being
16 addressed here, it's a luminescent tape. So glow fish tape
17 is -- it's a 20- or 40-foot, in these applications, rigid
18 tape that's used to snake through conduits between walls to,
19 let's say, guide wires or cables from one opening to
20 another.

21 It's luminescent over the entire length, so in
22 low light, light in a closed area, you can actually see the
23 path that the tape is taking. So it adds visibility. The
24 reason for the transparency and why it doesn't matter
25 whether it's transparent like a clear acrylic or whether

1 it's just an opening as light needs to get in to energize
2 that material. That's the purpose of this. Right? That
3 tape, when it's in light, absorbs the energy of the light.
4 Then when it's in the dark, it will luminesce or, you know,
5 glow showing where the tape is.

6 And so there's two different versions of the
7 express claim language covering different embodiments, one
8 where you have a sidewall that's transparent material, the
9 other where you just have a case that has a portion that is
10 transparent which lets this light in.

11 CHIEF JUDGE CHENEY: Please proceed.

12 MR. AROVAS: Now, on slide 14, what I've done is
13 contrasted the independent claim with the dependent, some of
14 the dependent claims. And this is relevant for the dispute
15 that we're talking about here.

16 So if you see on the left-hand side of slide 14
17 is claim 6. This is one of the claims that says a portion
18 of the case is transparent. If we look at the dependent
19 claims, dependent claims 12 and 13 specifically say where it
20 uses a transparent material.

21 So the claims themselves, if we compare the
22 independent and dependent claims, are distinguishing between
23 transparent and transparent material. "Material" is, of
24 course, the word that the Respondents are trying to read
25 into the express claim language.

1 Now, there is an argument in the briefs that, as
2 a matter of claim differentiation, that there are additional
3 limitations being made in these dependent claims. And,
4 therefore, claim differentiation isn't as strong. That's
5 actually not correct.

6 I mean, here you can see there's a clear
7 distinction between transparent and transparent material,
8 the exact same phrasing. But also if we look at claims 12
9 and 13, those claims themselves, the additional limitations
10 that are being pointed to by the Respondents, are all in
11 claim 11. This is a multi-dependent claim. So this issue
12 of there being multiple components is picked up in claim 11.

13 The only thing -- the only thing that 12 and 13
14 are adding is the fact that the transparent portion is a
15 transparent material. So this is a classic claim
16 differentiation situation where we have the two words,
17 different phrases, used in different claims, where the sole
18 addition is adding transparent material term as opposed to
19 just a transparent portion, sort of further indicating that
20 the proposed construction of the ordinary meaning that is
21 just clear, and not clear material, is correct.

22 Now, Your Honor, if we go to the specification to
23 see whether there's anything contrary to that in the
24 specification -- and this is an example on slide 16 -- we
25 see the exact same distinction that we see in the claims,

1 that there are multiple embodiments. There are, on the --
2 for example, on the left-hand side, you can see there's a
3 discussion of transparent. Up at the top, it says at least
4 a portion of the case is transparent. That's the same
5 language that we see in the claims.

6 And on the right, we see text in the
7 specification talking about embodiments that track the
8 dependent claims, which is that these first and second
9 components, which are basically the two sides of the case,
10 are made of transparent material. And so just like in the
11 claims where you see some claims say transparent, some say
12 transparent material, in the specification we see
13 embodiments that say transparent or transparent material,
14 depending on what they're talking about.

15 Now, I will note in this patent, because it
16 caught my eye when I first read the specification, they talk
17 about -- as you can see on the left-hand side, it says, you
18 know, as one feature, in one feature, according to one
19 feature. They use the word "feature" sort of the way people
20 typically use "embodiment." So they're talking about
21 alternate versions of how you could construct this glow fish
22 tape.

23 Okay. So now turning to the prosecution history,
24 it turns out that the term "transparent" was actually
25 discussed by the examiner. And I have an excerpt from the

1 prosecution history on slide 17 on the screen.

2 And what we can see here is the examiner -- this
3 is in a response to arguments that were made by the
4 applicant. So this is the examiner's final rejection in the
5 '209 patent. And the examiner notes that the term
6 "transparent" was given its broadest reasonable
7 interpretation of "clear" but then continues to say "which
8 is common and consistent with the interpretation that those
9 skilled in the art would reach."

10 And the support being used by the examiner for
11 that meaning is just dictionary definitions. There's no
12 special technical or other definition the examiner is using.
13 And the examiner notes that this is common and consistent
14 with the interpretation that those skilled in the art would
15 reach.

16 So the examiner, in reviewing these patents, was
17 using the plain and ordinary meaning, just like the plain
18 and ordinary meaning that's being proposed by Klein. And,
19 significantly, the applicant never contested, disagreed, or
20 argued that this was an incorrect meaning of transparent.
21 That was the meaning of transparent that was used in the
22 prosecution history.

23 If we look at other dictionary definitions, in
24 addition to one that the examiner used, we find that it's
25 pretty -- it's consistent. I mean, this is not --

1 "transparent" is not a word that I think is unusual to use
2 in ordinary English, and as we see in slide 18, that meaning
3 of just being clear or having the property of allowing light
4 to go from one place to another is the definition of
5 "transparent."

6 So we can see, for example, in Webster's, it's
7 "having a property of transmitting light without appreciable
8 scattering so that bodies lying beyond are seen," or the
9 synonym is "clear." In the Oxford English dictionary, it's
10 "allowing light to pass through so that objects behind can
11 be distinctly seen." So consistent with what the examiner
12 said, which is transparent means clear.

13 There is a prosecution history argument -- oops.
14 Sorry about that. Oh, let me make one more point. With
15 regard to the dependent claims, if we were to adopt
16 Milwaukee's construction and looking at the dependent claims
17 on slide 20, it's claims 12 and 13, it would create kind of
18 a redundant and nonsensical construction, right? If the
19 word "transparent" means "clear material," then claim 12,
20 for example, would say that the first and second components
21 comprises a clear material material. Right? It's -- it
22 would just be adding the word "material" twice in that
23 claim, which obviously is nonsensical. That's the whole
24 point of having claims 12 and 13, is to add the word
25 "material" to the broader independent claim, which does not

1 have that limitation.

2 Okay. So let me turn now to the prosecution
3 history, a particular prosecution history that was made by
4 the Respondents in the briefing. And I have on slide 22 an
5 excerpt from the opening brief. This is at pages 8 and 10.
6 They're very similar points articulated slightly
7 differently, but the more general articulation is on top,
8 page 8, where Milwaukee argues, during prosecution, Klein
9 expressly argued against the absence of material being
10 considered transparent. And then they continue and make a
11 similar argument on page 10.

12 And so let's take a look at that, because that's
13 entirely wrong. That's not what happened in the prosecution
14 history. So let's start with what was the art that was
15 being asserted by the Patent Office and then take a look at
16 what the responses were by the applicant.

17 So the piece of art used was something called
18 Miller. A picture of the Miller device is over on the
19 left-hand side of slide 23. And so you can see it's kind of
20 a cylindrical structure. Inside of that structure would be
21 the tape. So just like kind of a measuring tape, you would
22 pull the tape out of that center, that center cavity, and it
23 has four open slots in the case.

24 And so the argument was made by the examiner:
25 Well, if you look at Miller, it meets this requirement

1 wherein at least one of the sidewalls -- and it's looking at
2 Figure 14, which is the figure I have over on the left-hand
3 side -- of the case is transparent. So the examiner was
4 making the argument that these slots, open slots, rendered
5 the case, the sidewall transparent.

6 So as I mentioned, there are two different
7 independent claims. And there were multiple arguments that
8 were made by Klein to distinguish Miller. So there are the
9 transparent sidewall claims, that's independent claim 1,
10 which we see on the left-hand side of slide 24. We looked
11 at those earlier when I first showed all the independent
12 claims. Claim 1 says, "wherein at least one sidewall is
13 transparent." Then you have the partially transparent case,
14 where it says, just "a portion of the case is transparent."
15 For example, claim 6.

16 And so if we look at the response that the
17 applicant made to Miller, there were two arguments that were
18 made. First, the applicant said there's nothing in Miller
19 -- this is coming from the office action response in the
20 '209 patent. There's nothing in Miller that even hints at a
21 transparent sidewall, let alone teaches a transparent
22 sidewall.

23 So the point being made there is Miller was an
24 opaque sidewall with a couple openings. That's not a
25 transparent sidewall. So the sidewall structure itself was

1 not transparent. That was one argument that was being made.
2 And that would apply, of course, to the language of claim 1,
3 which talks about where the sidewall itself is transparent.

4 CHIEF JUDGE CHENEY: Can you pause for just a
5 moment?

6 MR. AROVAS: Yes.

7 (Pause in the proceedings.)

8 CHIEF JUDGE CHENEY: Thank you. Please continue.

9 MR. AROVAS: Thank you, Your Honor.

10 So we were on slide 25. So the first argument
11 being made is the sidewall itself is not transparent. And
12 that would apply to claim 1.

13 If we look at the second argument, which appears
14 on slide 26, we can see a more fundamental distinction
15 that's being made over Miller, which Miller fails to
16 disclose a luminescent material as recited in the rejected
17 claims. So there's a fundamental difference between Miller
18 that Miller is not a luminescent tape at all. So those
19 slots are not intended to allow light in to energize the
20 material as is required by the claims.

21 So Miller doesn't have luminescent material in
22 the tape at all, so it doesn't have this need for
23 transparency. And so two arguments are being made, right?
24 Number 1, the entire sidewall is not transparent and, Number
25 2, which would distinguish the broader claims, it doesn't

1 have luminescent material.

2 And so what the applicant never said, and Your
3 Honor will never see in the prosecution history, is an
4 argument that openings can't be a transparent portion of a
5 case. That was never stated, and that was not the
6 applicant's position.

7 We'll make one last point with regard to the
8 "transparent" term, and then I can turn it over to the
9 Respondents, is the IPR, in the IPR -- you know, IPRs have
10 been filed for the asserted patents. In that IPR, Milwaukee
11 is asserting invalidity based on a piece of prior art called
12 KP1. And they make the argument there, where if you look at
13 KP1 over on the left-hand side, that is a tape that has four
14 viewpoints or view ports. Those are those little holes that
15 are highlighted in yellow with the yellow label.

16 And they make the argument that that is
17 transparent, that is a transparent case. And so that's
18 entirely consistent with the meaning that's being advocated
19 by Complainant here.

20 And with that, Your Honor, I have no other
21 comments on this term, unless Your Honor has questions.

22 CHIEF JUDGE CHENEY: Let's start with that slide
23 that you have up, which is your slide 28. In connection
24 with the Miller reference and the prosecution history, I
25 believe you said that an opaque sidewall with a couple of

1 openings is not a transparent sidewall. Is that right?

2 MR. AROVAS: That's right.

3 CHIEF JUDGE CHENEY: Okay. So this slide that we
4 have -- I'm sorry.

5 MR. AROVAS: Oh, sorry. Yeah.

6 CHIEF JUDGE CHENEY: Can you stay on slide 28?
7 This slide that we have from the inter partes review with
8 the prior art called KP1, I assume that your client's
9 position is that KP1 also does not have a transparent
10 sidewall because it's an opaque sidewall with a couple of
11 openings?

12 MR. AROVAS: That's right. So just to be
13 slightly more precise, right, the claim language is "where
14 the sidewall is transparent." So -- right? So the -- in
15 claim 1. So claim 1 is saying where the sidewall itself is
16 transparent. And so the position with regard to Miller was
17 an opaque sidewall with openings is not a sidewall that is
18 transparent.

19 And that's the same position that our client
20 would take with regard to KP1.

21 CHIEF JUDGE CHENEY: Okay. If you could go back
22 with me to why this dispute is, no pun intended, material,
23 can you explain why the two parties are taking the positions
24 they're taking?

25 MR. AROVAS: Yes.

1 CHIEF JUDGE CHENEY: Okay.

2 MR. AROVAS: Actually, do we have a tape?

3 Your Honor, I realize this is a commercial
4 embodiment, but I think maybe it would be helpful to
5 visualize.

6 CHIEF JUDGE CHENEY: Sure. Does anyone have any
7 objection with me seeing the commercial embodiments to
8 understand the materiality of the dispute?

9 MR. WHITE: We do not, Your Honor.

10 CHIEF JUDGE CHENEY: Thanks. Please proceed.

11 MR. AROVAS: So I'll hold it up. I'm happy to
12 approach and show Your Honor if Your Honor would like to see
13 it closer.

14 CHIEF JUDGE CHENEY: This is just fine.

15 MR. AROVAS: Okay. So this is an example of the
16 Klein glow fish tape. And so you can see this is the tape.
17 It pulls in and out. It's a rigid tape. And it would be
18 snaked between openings. The luminescent material is
19 embedded in the tape itself. And so that luminescent
20 material has to be charged somehow, right?

21 And so in this, which is, you know, one of the
22 preferred embodiments, you have the sidewall itself is
23 transparent. So the entire sidewall, which forms the side
24 of the case, is made of a clear material. In Milwaukee's --
25 and Milwaukee actually copied this, they had this product in

1 front of them when they were designing their product, and
2 that's something that we'll talk about later in the
3 hearing -- they took a case and they put openings in the
4 case. But, unlike sort of, let's say, like Miller, the
5 Miller reference that came up, which was a non-luminescent
6 tape, they put large openings in the case to allow light to
7 pass through to reach the tape itself. I don't have the
8 Milwaukee tape here with me, but they put large openings in
9 the case to allow the light to get through because it has to
10 charge the luminescent material in the tape.

11 So that's the basic issue. So the claims are
12 being read on a product where the transparent portion of the
13 case is an opening, large openings that allow the light to
14 pass through to energize. And so the reason that Milwaukee
15 is reading in "material" is that they would argue, or they
16 do argue, that an opening is not transparent; it has to be a
17 clear plastic material that would be allowing the light to
18 pass in.

19 CHIEF JUDGE CHENEY: Could we go to your slide
20 25, please.

21 MR. AROVAS: Yes.

22 CHIEF JUDGE CHENEY: Maybe it's -- maybe I have
23 the wrong number. I'm looking for the slide that discusses
24 Miller.

25 MR. AROVAS: Yes.

1 CHIEF JUDGE CHENEY: It has a picture of Miller.

2 MR. AROVAS: It's back a little bit. There.

3 There's Miller.

4 CHIEF JUDGE CHENEY: Okay. We're on slide 23 --

5 MR. AROVAS: 23.

6 CHIEF JUDGE CHENEY: -- of your presentation.

7 I'm trying to understand with respect to the '209
8 patent, claim 1, does the Complainant assert this claim for
9 domestic industry purposes to show that their domestic
10 industry product has -- let me read the claim language so I
11 get it right -- one sidewall of the case is transparent, or
12 does Complainant also assert this claim against Milwaukee's
13 product, and so one implication of Complainant's
14 construction is that Complainant believes that openings in a
15 sidewall, like the openings in Miller, constitute sidewalls
16 or a sidewall of the case that is transparent?

17 MR. AROVAS: So claim 1 is not being asserted
18 against the Milwaukee products that have an opening and
19 opaque sidewall. Claim 1 is being used -- so claim 1 is the
20 claim that says the sidewall is transparent. That is being
21 used for domestic industry. And that is being read on this
22 product that has a completely clear sidewall.

23 That claim is not being asserted against this
24 type of approach. The Milwaukee approach is -- obviously
25 has much more in the way of openings, because it's trying to

1 charge the tape. This is not trying to charge the tape, but
2 same principle, which is, I think, what Your Honor is
3 asking, is claim 6 and 14 are being read against the
4 Milwaukee product.

5 CHIEF JUDGE CHENEY: Let me give you a moment to
6 absorb whatever you've been handed because when I'm at the
7 lectern and someone hands me something, I can't absorb it
8 because I'm thinking about something else.

9 MR. AROVAS: I appreciate it, Your Honor. I've
10 got it. I'm good.

11 CHIEF JUDGE CHENEY: Okay. Okay. So does
12 Complainant concede, then, that an opaque sidewall with
13 openings is not within the definition or is not within the
14 scope of the claim term "wherein at least one of the
15 sidewalls of the case is transparent"?

16 MR. AROVAS: Yes.

17 CHIEF JUDGE CHENEY: Okay.

18 MR. AROVAS: And that's because that claim
19 language says the sidewall itself is transparent. And the
20 sidewall in this case would be this entire structure that's
21 forming the side of the case (indicating).

22 CHIEF JUDGE CHENEY: Okay.

23 MR. AROVAS: And so in that case, the express
24 claim language is referring to a particular structure and
25 saying that that structure is transparent; whereas we have

1 the other claims, claims 6 and 14, which say that a portion
2 of the case is transparent, which allows light in, which is
3 a different phrasing and was intended to cover a broader, a
4 more general concept of just having a portion of the case
5 allowing the light in.

6 CHIEF JUDGE CHENEY: Okay. Can we go up to the
7 slide that has claims 1, 6, and 14 side-by-side? It was one
8 of your early slides.

9 MR. AROVAS: Yes, Your Honor. Slide 11.

10 CHIEF JUDGE CHENEY: Okay. So I think you're
11 making some kind of claim differentiation argument between
12 these claims. Is that right?

13 MR. AROVAS: Yes. Yes. I mean, it's different
14 phrasing. And so we believe, yeah, difference -- the
15 different phrasing has different scope.

16 CHIEF JUDGE CHENEY: Okay.

17 MR. AROVAS: Let's put it that way.

18 CHIEF JUDGE CHENEY: For people in the room who
19 have been with me through many Markman hearings, you might
20 know that there are two people that were very influential in
21 my life. One was my seventh grade English teacher,
22 Mrs. Johnston, and the other was my tenth grade English
23 teacher, Mr. Zeman. They taught me some really important
24 things about grammar and about Latin roots. And I will be
25 using those things today. I just want to let you know that.

1 So when it comes to the grammar issues of this
2 term, "transparent" is what kind of part of speech?

3 MR. AROVAS: It's an adjective.

4 CHIEF JUDGE CHENEY: It's an adjective. So it
5 must modify a noun --

6 MR. AROVAS: Right.

7 CHIEF JUDGE CHENEY: -- right? So in the first
8 claim, claim 1, I think we're all in agreement that
9 "transparent" modifies "sidewall."

10 MR. AROVAS: That's right.

11 CHIEF JUDGE CHENEY: What does it modify in claim
12 6?

13 MR. AROVAS: "Portion."

14 CHIEF JUDGE CHENEY: And "portion" is the subject
15 of a prepositional phrase, which is dependent from another
16 noun, which is?

17 MR. AROVAS: "Case."

18 CHIEF JUDGE CHENEY: "Case."

19 MR. AROVAS: Right.

20 CHIEF JUDGE CHENEY: So the thing that must be
21 transparent in claim 6 is a portion of the case, right?

22 MR. AROVAS: That's correct.

23 CHIEF JUDGE CHENEY: Is it your contention that
24 that does not mean material?

25 MR. AROVAS: That is. And I'll explain why.

1 The portion, right -- the case is the overall
2 structure that holds the device together, okay? A portion
3 of that case can be openings, right? That is part of the
4 integral structure that surrounds the tape. So that portion
5 could be clear, meaning clear in opening; it could be a
6 clear material. But there is no requirement that that case
7 has to be solid, meaning no openings.

8 And so the choice to whether to say that the
9 sidewall itself, right, because the sidewall of the case is
10 -- again, we have the case, which is the overall case,
11 right? The sidewall is that particular -- it's a structure,
12 right? The portion is just a region within that, that is
13 going to be transparent.

14 So that portion does not have to have a
15 structural function, but the sidewall does.

16 CHIEF JUDGE CHENEY: So if we were to look at
17 Miller again -- can we put that up?

18 MR. AROVAS: Yes. There's Miller, 23.

19 CHIEF JUDGE CHENEY: Where does the annotation in
20 red come from here, those words?

21 MR. AROVAS: Oh, that was added.

22 CHIEF JUDGE CHENEY: By attorneys in this
23 litigation?

24 MR. AROVAS: Yes.

25 CHIEF JUDGE CHENEY: Okay. So these slots in the

1 case are actually the case?

2 MR. AROVAS: Those are a portion of the case.

3 CHIEF JUDGE CHENEY: Why did you say slots in the
4 case, then, if they're actually the case?

5 MR. AROVAS: Oh, I added that, so I can speak to
6 that. So I was just trying to identify that -- where the
7 slots were located in the overall sort of structure. So
8 that could have been called portions of the case. I could
9 have said that. I don't think that would have been anything
10 different.

11 CHIEF JUDGE CHENEY: Are voids in the case also
12 the case?

13 MR. AROVAS: So the -- to be clear, what the
14 Patent Office was -- so I was trying to -- I was trying to
15 tie this to the issue that we're debating here. So what the
16 examiner was actually pointing to was 190, which is the
17 clamshell itself, not the slots. So that's what the
18 examiner was focused on. And we can see it in the language
19 there. It says Figure 14 in view of Figure 1, first
20 clamshell 190, and you can see just under the label that I
21 added, there's 186 and 190 on the right-hand side of Figure
22 14. So that's referring to the overall clamshell.

23 So the argument being made by the examiner in
24 this case was that the case or that side of the case itself
25 is transparent because of those openings. And so I was just

1 pointing out that you have the slots, so what I was trying
2 to identify what the examiner was saying was creating the
3 transparency.

4 CHIEF JUDGE CHENEY: So in claim 6 -- if we can
5 go back to that slide as the language of the claim.

6 MR. AROVAS: Um-hum. So I'm on slide 12, which
7 has the larger version of claim 6.

8 CHIEF JUDGE CHENEY: Yeah. This claim talks
9 about a donut-shaped case having a pair of sidewalls, right?

10 MR. AROVAS: That's right.

11 CHIEF JUDGE CHENEY: And then it talks about an
12 annular opening extending around the circumference of one of
13 the inner and outer walls.

14 MR. AROVAS: Right.

15 CHIEF JUDGE CHENEY: Is that the place where the
16 tape resides? What is that? Can you point to me on --
17 either on the commercial embodiment or on one of the figures
18 what the annular opening is?

19 MR. AROVAS: So it is this structure between the
20 two sides of the case, between the two sidewalls.

21 CHIEF JUDGE CHENEY: So what I'm struggling with
22 is you've now said that an opening is a structure. And I'm
23 trying to understand that. What is --

24 MR. AROVAS: So I'm not saying an opening is a
25 physical structure.

1 CHIEF JUDGE CHENEY: Okay. So that's what I'm
2 trying to understand here. This claim talks about something
3 called a case.

4 MR. AROVAS: Right.

5 CHIEF JUDGE CHENEY: And it talks about something
6 called an opening.

7 MR. AROVAS: Right.

8 CHIEF JUDGE CHENEY: And I presume you concede
9 that the opening is not part of the case. Because it's
10 recited as a different claim element.

11 MR. AROVAS: Yes. So here I was talking about a
12 portion of the case, right, which I'm saying can be -- a
13 portion of the case can be solid or a portion of the case
14 can be a hole.

15 CHIEF JUDGE CHENEY: And yet, the patentee, when
16 it's talking about a void, does not call it part of the
17 case, right? It uses a different word. It uses the word
18 "opening."

19 MR. AROVAS: Yes. The -- yes, I mean, the
20 applicant does use the word "opening" to talk about the
21 hole. That's right.

22 CHIEF JUDGE CHENEY: And so the void in between
23 the two sides where the tape resides, is that the case also,
24 that void?

25 MR. AROVAS: This void has a structure in it.

1 Yeah.

2 CHIEF JUDGE CHENEY: I understand it has the tape
3 in it. But is the void itself the case?

4 MR. AROVAS: The void itself -- so I'm just
5 looking at the structure and thinking about the claim. I
6 would say -- if you have an overall structure that has
7 openings, I would say that the case is the entire structure
8 as it's molded with whatever shapes or whatever things it
9 has in it.

10 So, for example -- and so I understand your
11 point, right? The point is, should the portion of the case
12 be a physical structure? Right?

13 CHIEF JUDGE CHENEY: Correct. Is that what -- is
14 that what the words of the claim say? Is that a person of
15 skill in the art would understand?

16 MR. AROVAS: Right. And so I believe that an
17 opening -- or what I am arguing is that an opening would be
18 actually part of the case. And the reason I'm saying that
19 is this claim, right, if you take -- if you look at the
20 contrast between claim 1 and claim 6, claim 1 is talking
21 about where a particular structure, a sidewall, is
22 transparent, okay? So it's calling out the particular
23 structural element as being transparent.

24 So that sidewall is a physical thing that is
25 holding this, you know, this overall structure together.

1 Okay? You see more general language being used in claim 6
2 that just says a portion of that structure is transparent.

3 Now, it's not excluding the fact that --

4 CHIEF JUDGE CHENEY: Can I pause you right there?

5 MR. AROVAS: Yes.

6 CHIEF JUDGE CHENEY: You just said a portion of
7 the structure is transparent.

8 MR. AROVAS: Yes.

9 CHIEF JUDGE CHENEY: So I think Mrs. Johnston
10 would say that means you're arguing that a structure is
11 transparent.

12 MR. AROVAS: I would say the case has a portion
13 that is transparent, okay? Okay. What does transparent
14 mean? Transparent means clear or allows the light in.

15 So in --

16 CHIEF JUDGE CHENEY: It's an adjective that
17 modifies a noun. And when you say "transparent" just means
18 clear or allows the light in, what is being modified?

19 MR. AROVAS: "Portion." So --

20 CHIEF JUDGE CHENEY: So --

21 MR. AROVAS: The portion is in the case, right?

22 CHIEF JUDGE CHENEY: Are you saying that air in
23 that portion is transparent?

24 MR. AROVAS: The opening is transparent, yes.

25 Well, the air is obviously transparent, right. But the

1 point is there's nothing physical, right, that is blocking
2 the access to the light. And so --

3 CHIEF JUDGE CHENEY: Well, there's air.

4 MR. AROVAS: Right.

5 CHIEF JUDGE CHENEY: I mean, there's -- I assume
6 that there's air that is transparent.

7 MR. AROVAS: Yes, the air is transparent, but the
8 air is outside the case, inside the case. The air is
9 everywhere, right? So the light is coming from a light
10 source and going to the tape. And so --

11 CHIEF JUDGE CHENEY: Stated differently, if we
12 were to fill the void with Play-Doh --

13 MR. AROVAS: Um-hum.

14 CHIEF JUDGE CHENEY: -- is there still a portion
15 of the case that is transparent?

16 MR. AROVAS: No, because then there would be no
17 portion of where light can enter into the inside of the
18 case.

19 CHIEF JUDGE CHENEY: And yet, I didn't change the
20 case at all.

21 MR. AROVAS: Well, we did, because we've now
22 filled the portion of the case with an opaque material,
23 right?

24 CHIEF JUDGE CHENEY: I see where your argument
25 is.

1 MR. AROVAS: Yeah. So --

2 CHIEF JUDGE CHENEY: I think you see where my --

3 MR. AROVAS: I do. And so --

4 CHIEF JUDGE CHENEY: -- my thinking goes.

5 MR. AROVAS: So let me, if I could take a
6 slightly different approach to this, because I do understand
7 what Your Honor is grappling with and I want to try to be
8 helpful, as helpful as I can.

9 CHIEF JUDGE CHENEY: Yeah, and just to let you
10 know another point that I'm struggling with, I don't see
11 this as being claim differentiation in the same way you do.
12 You say claim 1, "transparent" modifies "sidewall." Claim
13 6, "transparent" modifies nothing. I completely disagree
14 with that.

15 MR. AROVAS: And that's not what I'm saying.

16 CHIEF JUDGE CHENEY: Okay.

17 MR. AROVAS: Okay. So now, what I'm saying is in
18 claim 1, "transparent" modifies "sidewall." We agree on
19 that. What I'm saying is in claim 2, "transparent" modifies
20 "portion." So in both cases, it is an adjective modifying.

21 And then the question Your Honor is asking: Does
22 the portion have to be a physical portion or can it be an
23 opening, right? That's what we're trying to deal with.

24 CHIEF JUDGE CHENEY: I think you agreed with me
25 that it's a portion of a structure.

1 MR. AROVAS: The -- yes, there's a portion of the
2 case, correct.

3 CHIEF JUDGE CHENEY: And the case is a structure.
4 It is not a -- it's not a concept, right?

5 MR. AROVAS: That's correct. That's correct.

6 CHIEF JUDGE CHENEY: The case is a physical
7 structure.

8 MR. AROVAS: That's correct.

9 CHIEF JUDGE CHENEY: And so a portion of that
10 physical structure is what is being modified?

11 MR. AROVAS: A portion of the overall physical
12 structure, yes.

13 CHIEF JUDGE CHENEY: So now are we back to case
14 is not a physical structure; it's a concept?

15 MR. AROVAS: No, no, we're not. No, we're not.
16 And so what we're dealing with, though, is does that portion
17 have to be a solid structure or can it be an opening? Like
18 when you're injection-molding the particular case, right,
19 can a portion of that covering be an open portion or does it
20 have to be a physical material?

21 And so the distinction I'm drawing, and it's not
22 really claim differentiation in the sense we were talking
23 about with the dependent claims, is really just a different
24 phrasing and different -- a different phrasing used in the
25 different claims. And those different phrasings have

1 different meanings.

2 So if you look at the claim 6 phrasing, right, it
3 is a more general way of describing the case. As opposed to
4 saying I have a material that is transparent, which they
5 could have easily said and which is what they said in the
6 dependent claims, where it's a transparent material, they
7 just said a portion of the case is transparent.

8 Now, I understand Your Honor is asking: Well,
9 okay, does that just mean the same thing, right? If the
10 case is something which is physical, and the case is
11 something which is physical, when you say a portion of the
12 case is transparent, does "transparent" effectively modify
13 both "portion" and "case," which is what I understand you're
14 arguing or you're questioning.

15 CHIEF JUDGE CHENEY: Well, I don't think that
16 there can be any other construction than a construction in
17 which "transparent" modifies "portion" and "case."

18 MR. AROVAS: Right. And so --

19 CHIEF JUDGE CHENEY: Are we agreed on that?

20 MR. AROVAS: Yes, portion, portion is of the
21 case, "transparent" modifies "portion."

22 CHIEF JUDGE CHENEY: Okay.

23 MR. AROVAS: And so then the issue that has to be
24 decided is, okay, when the applicant phrased claim 6 in this
25 way, were they contemplating a more general way of

1 describing transparency, which is it could be a transparent
2 material, and we're not saying that claim 6 excludes a
3 transparent material, but does it require a transparent
4 material? In other words, does that phrasing exclude from
5 the scope of the claims where, instead, there's an opening,
6 which creates the transparency.

7 And when I say that that opening is part of the
8 case, right, I'm talking about, right, obviously a screw
9 hole is part of the case. That screw hole is not -- I mean,
10 it's air inside the screw hole, but it's still part of the
11 way the case is designed. And what this claim, claim 6, was
12 intended to accomplish was to, in a much more general sense,
13 describe transparency without requiring any particular way
14 of achieving that transparency, whether it's through a hole,
15 whether it's through a clear acrylic material, or some other
16 way that I can't think of.

17 They weren't claiming a specific way of doing
18 that. And they added the dependent claims, 12 and 14, to
19 specifically say where that is accomplished through using a
20 transparent material. So that's where the claim
21 differentiation argument is, is between 12 and 14, and 6.
22 Between 6 and 1, it's just different phrasing.

23 And so just like a screw hole, right, I would
24 say, at least when I think of things before this case, when
25 I would think of if I take this case apart, if I -- there is

1 three screws here, 1, 2, 3. If I took those out and I was
2 looking at that, right, that case, I would say the screw
3 hole was part of the case. Now, the screw hole is not
4 filled with a rigid material, whether it's opaque or not,
5 but the screw hole itself is still an aspect and a feature
6 of the case.

7 That's the same thing that's going on here. It's
8 saying this case just has a portion which is transparent.

9 CHIEF JUDGE CHENEY: In the commercial embodiment
10 that you are holding there at the lectern, there is a hole
11 in the middle that you can put your hand through, right?

12 MR. AROVAS: In the -- in here, yes.

13 CHIEF JUDGE CHENEY: Okay. Is that hole part of
14 the case? The one that you just put your hand through.

15 MR. AROVAS: Yeah. No, no, no, I understand. So
16 I would say no, but I think it depends on the context a
17 little bit, right? Because obviously you have all the space
18 on the outside as well. So the case has an integral
19 structure, right? So there are certain things that are
20 molded into the case structure itself, right, that have some
21 functional purpose in terms of the operation of the case.

22 The screw holes have an operational purpose in
23 the case in that they allow the screw to go through and hold
24 the two sides together, okay? Whether the center is -- the
25 center is kind of like on the outside of the product, is the

1 way I think about it, even though it's a circle. It doesn't
2 really have any functional part of the case. I mean,
3 obviously you could -- you could make this solid; you could
4 not make it solid. It wouldn't really affect the function
5 of the case.

6 In the instance that we're talking about in this
7 portion of the case being transparent, right, that is a very
8 specific feature of the case that allows the claim or the
9 product being covered by the claim to function, which is to
10 let light into the luminescent material.

11 And so I would draw a distinction, Your Honor,
12 between physical characteristics of the case that are part
13 of the case because they allow -- there's some -- they're
14 functionally connected to what the case is actually
15 accomplishing, right, because if we look at the claim,
16 right, the case is enveloping or enclosing the tape, right?
17 So it has a function.

18 If we look at the screw holes, that is a sort of
19 aspect or feature of the case that allows the case to be
20 closed and securely held together. Right? If you were to
21 look at -- I mean, we will talk about a different opening.
22 Let's talk about, let's say, an opening in the front, okay?
23 Would I say like if there's a hole in the front, that it
24 would allow the tape to come out, would that be part of the
25 case? Yes, I would say that that is part of the case

1 because that hole, right, is molded and created into a
2 physical structure to allow the case to have a particular
3 functionality.

4 And that's exactly what's going on over here, is
5 that the applicant is conceiving of the fact that, right,
6 there needs to be some way of a light getting in, and the
7 way they decided to claim it is just saying there's a
8 portion that is transparent. And so if they were to mold a
9 case and cut a hole in that case to allow that light in,
10 that hole is a feature of the case, which is tied expressly
11 to a claimed function of that case, which is to allow the
12 light in. And --

13 CHIEF JUDGE CHENEY: It would be different if the
14 applicant said wherein at least a portion of the case is
15 configured to allow the luminescent material to be energized
16 by light. That would be a different claim.

17 MR. AROVAS: Well, I -- if we look at the way
18 they wrote it, it says "wherein at least a portion of the
19 case was transparent to allow," I think saying -- at least
20 the way I'm reading it, right, to say "to allow the
21 luminescent light, material to be energized" is very similar
22 to saying "configured to allow," right, because it's saying
23 that --

24 CHIEF JUDGE CHENEY: It's totally different
25 because "configured" is a different part of speech than

1 "transparent."

2 MR. AROVAS: Right. But -- I agree with that.

3 But, certainly, the way I'm reading it, that the use of the
4 word "allow" is describing sort of the configuration -- the
5 results of the configuration, right? So "allow" is
6 permissive, right?

7 CHIEF JUDGE CHENEY: Yeah.

8 MR. AROVAS: So it's saying what the design of
9 the case permits to happen.

10 CHIEF JUDGE CHENEY: It's the function, right?

11 MR. AROVAS: Well, it's -- it is -- I mean, I
12 guess it could be viewed as a function, but I also view it
13 as a characteristic -- I wouldn't -- actually, I would
14 phrase that a little bit differently.

15 I think calling it a function is maybe a little
16 bit inconsistent with the express structure of that, that
17 clause, because by using the word "allow," it's claiming a
18 result of the configuration or structure of the case itself.
19 So it's not just saying that a function will occur, right?
20 It's saying that the portion of the case is transparent to
21 allow, right?

22 So that is saying what that configuration or that
23 structure of the case is allowing to happen. So it's
24 describing the result of the configuration of the case.

25 CHIEF JUDGE CHENEY: Anything else?

1 MR. AROVAS: No, Your Honor.

2 CHIEF JUDGE CHENEY: Before you sit down, can you
3 help me understand the implications for the investigation,
4 if I decide against you on this term? In other words, if I
5 decide that the term "transparent" in all claims is a
6 modifier for a physical structure, where does that leave you
7 in the investigation with respect to these two patents?

8 MR. AROVAS: So if I could just confer, because
9 there's a number of asserted claims. May I confer with a
10 colleague for a moment?

11 CHIEF JUDGE CHENEY: Certainly.

12 MR. AROVAS: Thank you.

13 So it would affect the two patents differently.
14 So there is one patent that doesn't have this particular
15 language, so that would be -- some claims would be
16 unaffected.

17 CHIEF JUDGE CHENEY: Can you show me what
18 asserted claim would be unaffected in -- I assume you're
19 talking about the '573 patent?

20 MR. AROVAS: Yes, Your Honor.

21 CHIEF JUDGE CHENEY: Claim 6? Are you asserting
22 claim 6?

23 MR. AROVAS: So we're pulling it up now. Yes.
24 This is '573, claim 6, "wherein at least a portion of the
25 case is configured to allow luminescent material to be

1 energized by light passing through the portion."

2 CHIEF JUDGE CHENEY: Funny enough, that was the
3 hypothetical I just asked.

4 MR. AROVAS: It was a hypothetical, yes.

5 CHIEF JUDGE CHENEY: So what is the difference
6 between the two claims?

7 MR. AROVAS: Well, this doesn't --

8 CHIEF JUDGE CHENEY: Under your construction.

9 MR. AROVAS: For our construction, well, this
10 doesn't refer to a transparent part of the case, right? So
11 it just says the case is configured to allow the light in.

12 CHIEF JUDGE CHENEY: But are they exactly the
13 same scope under your construction?

14 MR. AROVAS: Under our construction, no, because
15 this would be -- there's a difference between transparent
16 and translucent, for example. And so this would cover sort
17 of any configuration where light is allowed in, even if the
18 portion -- even if whatever allows the light in is, let's
19 say, translucent as opposed to transparent.

20 CHIEF JUDGE CHENEY: Okay. So you're asserting
21 claim 6. Is there any other claim that you would continue
22 to assert if you -- if your construction was not adopted?

23 MR. AROVAS: There also would be an issue of
24 doctrine of equivalents.

25 CHIEF JUDGE CHENEY: So you would assert doctrine

1 of equivalents for infringement of the '209 patent?

2 MR. AROVAS: That's right.

3 CHIEF JUDGE CHENEY: And you would argue, even if
4 I decided against you, that transparent has to have a
5 physical material. You would say that the lack of a
6 physical material functions in the same way to achieve -- or
7 there are insubstantial differences between --

8 MR. AROVAS: That's correct, that having --

9 CHIEF JUDGE CHENEY: -- between the claimed
10 invention --

11 MR. AROVAS: Having an opening in the case that
12 allows the light in to energize the tape would not be a
13 substantial difference compared to having a clear material
14 that allows light in to energize the tape.

15 CHIEF JUDGE CHENEY: Okay.

16 MR. AROVAS: Or insubstantial difference.

17 CHIEF JUDGE CHENEY: Thank you. That helps me
18 understand the materiality of this dispute.

19 Anything else before I hear from the other side?

20 MR. AROVAS: No, Your Honor.

21 CHIEF JUDGE CHENEY: Thank you.

22 Please proceed when you're ready, counsel.

23 MR. WHITE: Thank you, Your Honor. Jason White
24 for the Respondent.

25 I'm going to skip some of the background since I

1 think you've addressed a lot of that already. Here are a
2 couple pictures of the different products, just so you've
3 got a reference, the domestic industry product on the left
4 and then the accused product on the right.

5 And you had asked questions about the
6 configuration. You can see on the right that there's --
7 those are openings. There's no material in those openings
8 around the outside of the case. And that really is what the
9 heart of the dispute is here, whether these claims cover a
10 design where there's openings and essentially no material
11 present.

12 CHIEF JUDGE CHENEY: How is this dispute material
13 if at the end of the day after I resolve it, you still face
14 liability for '573, claim 6?

15 MR. WHITE: For "transparent," "transparent" only
16 comes into play in the '573 for dependent claims.

17 CHIEF JUDGE CHENEY: Right. So what I'm trying
18 to figure out is how does the end result of the case get to
19 some different place after I resolve this argument about
20 "transparent"? And to me, it sounds like we wind up in the
21 same place. We're now arguing about claim 6.

22 MR. WHITE: Of the '573, you mean?

23 CHIEF JUDGE CHENEY: Of the '537 patent.

24 MR. WHITE: Sure, absolutely. But then,
25 obviously, the focus is much narrower in terms of validity

1 issues. If we're talking about -- and we're going to get to
2 the second term. We think the second term implicates the
3 '573 claim 6 issue, the "configured" issue. So if you
4 decide that "transparent" means it has got to be some sort
5 of material present, we don't believe they can allege
6 infringement, at least literally, of the '209 patent. I'm
7 not sure they can allege doctrine of equivalents, but that's
8 an issue down the road.

9 If we're then focused solely on claim 6 of the
10 '573 patent, then the invalidity issues come much clearer
11 into play, at least from our perspective, for us on the
12 Respondent's side. So that's how I think it focuses the
13 issues for us.

14 CHIEF JUDGE CHENEY: Okay. Thank you. Please
15 proceed.

16 MR. WHITE: So with the disputed terms, we're
17 going to do the same. We're going to divide them up on our
18 side. I'm going to handle the first couple, and then my
19 colleagues are going to handle some as well.

20 I'll just run quickly through this. I think you
21 really touched on this a lot. We believe the disputed claim
22 language here shows that "transparent," like you said,
23 modifies the case, the portion of the case, whatever it may
24 be. And because of that, it requires there be material
25 there. It can't be the absence of material.

1 CHIEF JUDGE CHENEY: So would you agree that the
2 parties' two proposed constructions don't really get to the
3 heart of the dispute? You both agree that it needs to be
4 clear. You're not actually asking me to say that in the
5 case of, say, dependent claim 11, I substitute the words
6 "clear" and "material" for the word "transparent" because
7 then we have "clear material material."

8 So if I resolve whether "clear" must modify a
9 physical structure, that's the -- that's the heart of the
10 dispute? Is that right?

11 MR. WHITE: I think that's fair. I mean, we --
12 we talked about it, probably for a couple of these terms,
13 the best way to get to the heart of the dispute is through
14 negative limitations. It's something; it's not something
15 else. But we tried to avoid that because that's generally
16 disfavored. So, rather than saying this does not cover open
17 spaces or open windows or something like that, we went with
18 a construction that we thought addressed the issue. But I
19 agree with what you're saying, is that if you address the
20 heart of it is it doesn't have to use our words exactly.

21 CHIEF JUDGE CHENEY: So just to restate,
22 Respondents agree that the dispute between the parties is
23 whether the word "transparent" must modify a physical
24 structure, not an opening, and Respondents argue that, yes,
25 it must modify a physical structure, not an opening. Is

1 that right?

2 MR. WHITE: I think that's right. I mean to say
3 it another way, it's our position that the claims can't
4 cover an opening in a sidewall or a case. The lack of
5 material, a complete opening, is not within the scope of
6 these claims. That's another way to say, I think, the same
7 thing that you're saying.

8 CHIEF JUDGE CHENEY: Okay. Please proceed.

9 MR. WHITE: This was our way of just highlighting
10 why this is material for you on slide 14. They're saying
11 that the windowed or open slots are transparent. We don't
12 think that they are. There's simply no material there, a
13 lack of material. That's not clear, that's not transparent.

14 The specification, I think, is consistent with
15 that. And by that, I mean there is no description, no
16 drawings, nothing anywhere in the specification that talks
17 about a window or a slot or an opening in a sidewall being a
18 sidewall or a portion of a sidewall to be within the scope
19 of these claims. So you can look throughout anywhere in the
20 written description, figures, everywhere.

21 The specification repeatedly talks about the
22 transparent material being present in the different
23 components. On slide 17, it actually contrasts
24 "transparent" from "opaque" when talking about sidewalls.
25 So, again, we think it's clear the modification is the

1 material, not an absence of material.

2 And then we also focused on the rejection based
3 on the Miller prior art reference in the file history. And
4 when these claims were rejected -- we've got the passage on
5 the screen on slide 18 -- the examiner rejected all the
6 claims. So at that time, there was the sidewalls, the
7 portion, the different variants, were all rejected for this
8 same reason.

9 And Respondents' -- I'm sorry, the Complainant's
10 response was that this type of configuration, where you've
11 got an opaque sidewall with slots in it, that was not what
12 any of the claims described. So the ones that talked about
13 the sidewalls, the portions or anything like that. And they
14 went so far as to say not a single figure or even a portion
15 of a single figure shows a transparent sidewall. And that
16 was despite the presence of these, what they call now open
17 slots, just like those in the accused product.

18 The claim differentiation issue is the other
19 argument they've raised. We've already kind of addressed
20 that with Your Honor. We're not suggesting that you just
21 cut and paste, put the construction in, and make a redundant
22 statement of material, material in the dependent claims.
23 It's a rule of thumb. It's not a hard and fast rule. And
24 so we think you can address the claim construction here
25 without violating any rules of claim differentiation.

1 I'm happy to answer any questions you have on any
2 of these issues, but I think that that really addresses it.

3 CHIEF JUDGE CHENEY: Can we look at the '209
4 patent specification together?

5 MR. WHITE: Sure.

6 CHIEF JUDGE CHENEY: There are a couple of
7 different passages in the specification that I'd like your
8 explanation of how a person of skill in the art would
9 understand them. One is in column 1 around line 51. And it
10 says, "the case further includes an annular opening."

11 Does that passage suggest that an opening is part
12 of a case?

13 MR. WHITE: I don't believe so, Your Honor.

14 CHIEF JUDGE CHENEY: Why not?

15 MR. WHITE: Because it talks about it being a
16 separate component. There's actually -- the way these work
17 is there's two sidewalls and there's actually a space
18 created in the middle to allow the handle to sit in there.
19 The reason for that is the outer parts of the case, where
20 the tape is housed, need to rotate. So when you wind this
21 back onto the spool, you can hold the handle -- and I could
22 get a sample, if it would be helpful to show you that -- but
23 you hold the handle and it's stationary. And then you can
24 physically rotate the actual case around the handle
25 material.

1 And the way that happens is there's an opening
2 between the two halves that the handle -- sorry, that the
3 handle fits into. So I don't believe that that opening is
4 part of the case. There's actually no case present in that
5 opening. It's an absence of material.

6 CHIEF JUDGE CHENEY: Then why does it use the
7 word "includes," "the case includes"? Doesn't -- in patent
8 parlance, doesn't that mean that the opening is a
9 constituent element of the case? And I'll direct you to
10 another similar passage.

11 MR. WHITE: Sure.

12 CHIEF JUDGE CHENEY: In column 3, line 34, the
13 wall includes the opening, 28. Does that mean the opening
14 is part of the wall?

15 MR. WHITE: I still would say no, Your Honor.
16 Let me look at the figure and see exactly what that shows.

17 CHIEF JUDGE CHENEY: I'll give you a contrasting
18 passage. Same column, column 3, line 46, "the annular
19 opening 28" -- which is the same one that the earlier
20 passage said was included in the wall -- now it says that
21 "it is defined between each portion of the wall."

22 What do I make of these kinds of statements about
23 openings and walls and openings and cases and how a person
24 of skill in the art would understand this dispute?

25 MR. WHITE: If you could give me just one second,

1 Your Honor. Unfortunately, I don't think -- let's see.

2 So I think probably Figure 5 shows it the best,
3 if we look at that. So it's talking about -- in this one,
4 it says the wall 36, which it shows at the bottom of Figure
5 5, and then 28 is the opening next to it. But then it says
6 the wall 36 is defined by each of the components 44 and 46,
7 which seem to be the two halves, if you will. And those
8 numbers are near the top of Figure 5.

9 So as I understand it, these are almost like a
10 clamshell design. You've got two halves, the 44 and the 46,
11 that go together. And I do believe that the opening 28 is
12 located between those two. In terms of the wall 36 I'm not
13 sure exactly what that means, as it's only shown on one
14 side. It's not shown sort of on the bottom left and bottom
15 right.

16 So I think as a person of skill in the art, you
17 would view the opening 28 as what it says is being located
18 between the two clamshell halves, 46 and 44. And I'm not
19 sure why it says it's located in the wall 36 or how that
20 wall 36 is distinguishable from the two halves. And I think
21 just like on the left-hand side, when you talked about the
22 opening in the middle not being part of the case, I agree
23 with that.

24 So I just think that when you consider everything
25 in totality, and maybe some of the things are inconsistent

1 or contradictory, that somebody of skill in the art would
2 view that the opening is not part of the case. And that's
3 the best I can do for you right now, Your Honor.

4 CHIEF JUDGE CHENEY: What about column 4, around
5 line 19? It talks -- well, I guess even starting earlier,
6 around line 15, this passage "providing an opening 64 in the
7 wall."

8 MR. WHITE: Yeah. I think that's really talking
9 about where the opening is located, not saying that it's
10 part of the wall. It's just giving -- I would view that as
11 a description of the location, not the physical properties
12 of it.

13 CHIEF JUDGE CHENEY: So here in column 4, line
14 19, when it talks about an opening in the wall, it's
15 Respondent's position that the opening is not part of the
16 wall? Is that right?

17 MR. WHITE: Correct, Your Honor. It's an absence
18 of material.

19 CHIEF JUDGE CHENEY: Thank you. Anything else
20 you'd like to note?

21 MR. WHITE: The only thing I think I didn't touch
22 on was the examiner's statement in the prosecution history
23 about the definition. I think if you look at that passage,
24 it talks about the broadest reasonable construction. It's
25 not the same standard that we use here.

1 So if there was any even marginal relevance to
2 that statement, I don't think it applies or controls here.
3 That would be the only thing I would add to my comments,
4 Your Honor.

5 CHIEF JUDGE CHENEY: Okay. Thank you.
6 Complainant, anything in rebuttal?

7 MR. AROVAS: Yes, very quickly, Your Honor. And
8 so Your Honor had some questions about openings, and could
9 openings be part of the case or the physical structure.
10 And, you know, our position is obviously we believe the
11 correct construction is yes.

12 And I think if you think about the type of
13 product we're talking about, right, it's physically molded
14 or it's describing sort of a physical structure and how
15 different components, physical components go together. In
16 the particular limitation we're talking about, it's light.
17 So, obviously, light has the capacity to pass through a
18 transparent material. It also has the capacity to pass
19 through an opening.

20 But if we think about it, just the phrasing
21 itself, if I were to say I have a case that has a portion
22 that allows a screw to pass from one side to the other, so
23 the only difference I'm really making is I'm not talking
24 about light; I'm talking about a screw. That hole or that
25 portion, I mean, presumably it would be a hole, right, but

1 that portion of the case that allows the screw to pass from
2 one side to the other is part of the case. It's a feature
3 of the case. It's necessary for the case to function. It's
4 necessary for the claim limitation to be met.

5 And so the reason we look at an opening as part
6 of the case or as a portion of the case, right, is because
7 of how it is tied to the function or the result, however you
8 want to describe it, that is being expressly claimed. And
9 so it's no different if you say the case has a portion that
10 allows a light to pass through than if we were to say the
11 case has a portion that allows a screw to pass through.

12 The fact that it's a light versus a screw
13 shouldn't mean that in one case it has to be a physical
14 barrier and in the other case it can be an opening.
15 Linguistically, those are both the same.

16 CHIEF JUDGE CHENEY: This is where Mr. Zeman
17 comes in. We heard about Mrs. Johnston, right?

18 MR. AROVAS: Yes, yes.

19 CHIEF JUDGE CHENEY: Mr. Zeman taught me about
20 Latin roots. And you actually put up on your slide the
21 Latin roots for "transparent." Do you recall what they are?

22 MR. AROVAS: I don't. I have to pull up the
23 construction -- the --

24 CHIEF JUDGE CHENEY: The dictionary has them.

25 MR. AROVAS: Yeah.

1 CHIEF JUDGE CHENEY: "Trans" means across and
2 "parere" means to present one itself. It's the seem root as
3 "appear."

4 MR. AROVAS: Right.

5 CHIEF JUDGE CHENEY: Right?

6 MR. AROVAS: Okay.

7 CHIEF JUDGE CHENEY: So what -- what is the light
8 crossing?

9 MR. AROVAS: It's crossing from one side of the
10 case to the other, which is exactly what the rest of the
11 claim says when it says it allows the light -- I'd have to
12 go to get the exact language -- I'll read it from the slide
13 -- it allows the luminescent material to be energized by the
14 light passing through the portion.

15 So if we go back to --

16 CHIEF JUDGE CHENEY: But isn't the thing that is
17 transparent in that circumstance the air?

18 MR. AROVAS: Well, the air is certainly
19 transparent, okay? But what the claim is talking about --

20 CHIEF JUDGE CHENEY: What other material is
21 transparent, other than the air, in your construction? No
22 other material, right?

23 MR. AROVAS: No material. No material. That's
24 right.

25 CHIEF JUDGE CHENEY: Okay. So can the adjective

1 "transparent" modify "no material"? Is that -- is that
2 possible in the way the word is ever used?

3 MR. AROVAS: Yes, I believe it can modify "no
4 material." But it's not modifying. But I want to be clear
5 when I answer that. I'm not saying it modifies nothing.
6 Right? It's an adjective. It has to modify something.

7 CHIEF JUDGE CHENEY: Right. But can it modify a
8 void?

9 MR. AROVAS: It's modifying a void in the case.
10 I believe it can modify a void in the case, yes. Okay?

11 Because -- right -- it's like -- and actually you
12 go to, you know, to the Latin root that you're talking about
13 here, right, if we look at the bottom construction,
14 transparere, right, shine through. Light can shine through
15 a hole, right? Light can shine through a clear material.
16 If I've got, you know, a window in my house, light can shine
17 through the glass, I can open the window, and the light is
18 still shining through the window. Right?

19 CHIEF JUDGE CHENEY: When you open the window,
20 and the light comes through --

21 MR. AROVAS: Yes.

22 CHIEF JUDGE CHENEY: -- is it because the window
23 is transparent?

24 MR. AROVAS: When I open it?

25 CHIEF JUDGE CHENEY: Yeah.

1 MR. AROVAS: Obviously, it can shine through in
2 either case, right?

3 CHIEF JUDGE CHENEY: Is it because the window is
4 transparent? This is your analogy.

5 MR. AROVAS: Yes. Yes --

6 CHIEF JUDGE CHENEY: You open the window, the
7 light comes in. Does a person of skill in the art say, oh,
8 the light is coming in because the window is transparent?

9 MR. AROVAS: Well, if you look at it versus,
10 let's say, do it by contrast, right, you say the window is
11 opaque or the -- or even say, say, the wall is opaque, the
12 wall is transparent, okay? Right? So versus opaque, right?

13 So if you had the -- right -- if you had --

14 CHIEF JUDGE CHENEY: It's okay if you abandon
15 your analogy.

16 MR. AROVAS: No, no, it's -- yeah. I think the
17 screw hole is a better analogy because it doesn't -- it
18 doesn't open or not. So let me stick with the screw hole,
19 right?

20 So you take transparent, transparere, shine
21 through, okay? So something goes through. So if I talk
22 about a case that allows a screw to pass from one side to
23 the other, right, that is something moving from one side to
24 the other, that would clearly cover -- I think we'd say,
25 we'd probably agree, it would clearly cover a hole. Right?

1 Because --

2 CHIEF JUDGE CHENEY: It's just different in kind
3 from the word "transparent."

4 MR. AROVAS: Yes.

5 CHIEF JUDGE CHENEY: That's why the analogy does
6 -- the screw hole analogy does little for me.

7 MR. AROVAS: Okay. All right. So I won't --
8 then we'll move on from the screw hole analogy and talk
9 about sort of, you know, Your Honor was asking openings, can
10 openings -- going through the specification, can openings be
11 part of the case? Right? If the case is -- and this entire
12 patent is written describing physical components and the
13 geometric orientation of those physical components and how
14 they fit together, okay? And when it's saying that it has
15 an opening that allows for that annular ring, right, it's to
16 allow something to go in to occupy that space or pass
17 through that space.

18 When it talks about for an opening for the tape
19 to come out, it's the same thing, right? These are all --
20 in each of those cases, these are -- the openings are
21 physical characteristics of the case that allow a certain
22 function to occur.

23 When we deal with the issue of transparent, I
24 guess ultimately the question is, is transparent
25 sufficiently different that that same logic, right, where

1 the examiner is writing an entire patent describing the
2 physical configuration of all these parts and how they fit
3 together, and there's an opening here, there's an opening
4 there, and that it allows something to happen, when they're
5 talking about light, does it all of a sudden -- and
6 transparent, does it all of a sudden become different?

7 I don't think it does. I think that's an
8 incorrect reading of the claim, because I don't think it's
9 any different, at least my reading of it. I understand it's
10 certainly a different context and that light can pass
11 through material and physical devices can't pass through an
12 opening. They have to pass through a physical opening.
13 They can't pass through a material.

14 But it's the same concept and the same phrasing,
15 the way that claim is written, that it says it's a portion
16 of the case allows light to enter. And there's no reason
17 why that claim should be read in the more narrow sense that
18 it would exclude, right, an opening to allow the light to
19 transfer -- to transmit from one side to the other, as
20 opposed to a material that allows light to transmit from one
21 side to the other.

22 CHIEF JUDGE CHENEY: Thank you.

23 MR. AROVAS: Thank you, Your Honor.

24 CHIEF JUDGE CHENEY: Okay. Any other surrebuttal
25 from Respondents?

1 MR. WHITE: No.

2 CHIEF JUDGE CHENEY: Okay. So is there some
3 dispute for "light passing through" that is different than
4 what we've already discussed?

5 MR. AROVAS: It's highly related, if I could just
6 -- maybe I'll just make one very quick point --

7 CHIEF JUDGE CHENEY: Okay.

8 MR. AROVAS: -- and we can move on from that.

9 So what's going on here -- and, obviously, Your
10 Honor, you saw claim 6 in the '573 patent that doesn't have
11 the "transparent" term. Remember, we showed that claim up
12 on the ELMO.

13 CHIEF JUDGE CHENEY: Yes, I remember.

14 MR. AROVAS: Okay. So what's going on here is
15 that Milwaukee is trying to read the material limitation
16 into every claim, including that claim that doesn't refer to
17 transparent portions. And so the Milwaukee -- I'm on slide
18 30.

19 The Milwaukee construction is basically to take
20 that term "light passing through at least one of the
21 sidewalls," or "the portion," depending on which claim
22 you're talking about, and apply -- just read "material that
23 forms" into that language. And Your Honor can -- you know,
24 we obviously argued the other term. We believe
25 "material" shouldn't be read into the other term,

1 "transparent." Your Honor will make a decision on that.

2 There's absolutely no reason to do it in the
3 context of this additional term.

4 CHIEF JUDGE CHENEY: What is your justification
5 for changing the word "passing through"? Light passing
6 through is the claim term.

7 MR. AROVAS: Right.

8 CHIEF JUDGE CHENEY: And I think in -- first, do
9 you concede that the plain language itself requires light to
10 pass through a physical object?

11 MR. AROVAS: No. So there's two questions in
12 there. Number 1, passing through versus entering the case.
13 So our view is that the claim language itself is clear. So
14 we were trying to give sort of an explanation for what that
15 meant, that light was entering the case, but we -- you know,
16 so we're happy with the "passing through" itself. We don't
17 believe that that needs any particular further explanation.

18 We just don't believe that "material that forms"
19 should be read in.

20 CHIEF JUDGE CHENEY: Okay.

21 MR. AROVAS: Right? And so "passing through" is
22 fine language for us. So we don't believe that there's any
23 particularly significant difference between that and
24 "entering."

25 CHIEF JUDGE CHENEY: I think there's a big

1 difference between "passing through" and "entering." If I
2 pass through a field, it's not the same as entering the
3 field.

4 MR. AROVAS: So if we look at --

5 CHIEF JUDGE CHENEY: If you're fine conceding
6 that you're not arguing for "entering the case through,"
7 that's fine. We don't need to discuss it more. But if you
8 think that "entering the case through" is the same as
9 "passing through," I'm letting you know that I do not share
10 that view.

11 MR. AROVAS: So may I consult with my colleague?

12 CHIEF JUDGE CHENEY: Sure.

13 MR. AROVAS: So to answer the question about
14 whether it has to pass through material, we don't believe it
15 has to pass through a material, okay? Now, what I want to
16 be clear about that --

17 CHIEF JUDGE CHENEY: Does the dispute go beyond
18 that? Because I can resolve that dispute. But if the
19 dispute goes beyond whether it is required to pass through a
20 non-gas material, then I need to know what is it that you're
21 disputing beyond passing through the non-gas material.

22 MR. AROVAS: Yes. And so -- no, I think -- I
23 think that's really the dispute.

24 CHIEF JUDGE CHENEY: Okay.

25 MR. AROVAS: That's the dispute. So to be clear.

1 But what I want to be clear about, so we took a look at
2 claim 6, and this is why we believe "material" should not be
3 read in here, right? Your Honor, remember, had the question
4 about the "configured to" language. We took a look at claim
5 6 of the '573 patent, which has language about passing
6 through the portion, but it does not have the transparency
7 requirement.

8 So that element said "wherein at least a portion
9 of the case is configured to allow luminescent material to
10 be energized by light passing through the portion."

11 And so if we go to claim 6. This we have on the
12 screen. This is the '573 patent, the last element, column
13 7. So what the construction being proposed --

14 CHIEF JUDGE CHENEY: Please proceed, counsel.

15 MR. AROVAS: Thank you. So, right, the
16 construction being proposed would read in this "material"
17 limitation to basically all variants of the claims. So we
18 see here, we talked about this claim before in the context
19 of the material, right, transparent limitation, whether that
20 should be material. Here we say where a portion of the case
21 is configured to allow luminescent material to be energized
22 by light passing through the portion.

23 So even if Your Honor were to construe the
24 previous, where there's a transparent portion of the case as
25 requiring material, which obviously we don't believe would

1 be correct, but if Your Honor were to do that, this portion
2 of the claim, this version of the claim is actually even
3 more broad. And the construction being proposed by
4 Milwaukee would introduce "material" here.

5 And all this requires is that the portion of the
6 case is configured to allow luminescent material to be
7 energized by the light.

8 CHIEF JUDGE CHENEY: Passing through the portion.

9 MR. AROVAS: Passing through the portion, right.
10 And so here, right, following Your Honor's logic when you
11 asked about the "configured to," here the case is simply
12 configured to allow luminescent material to be energized.

13 CHIEF JUDGE CHENEY: Well, that's what that part
14 of the claim is saying, but then we still have other words
15 that have to be met, including "light passing through the
16 portion." Right?

17 MR. AROVAS: That's correct.

18 CHIEF JUDGE CHENEY: So if light were to enter
19 the case in some other way and energize the photoluminescent
20 tape, but the light did not pass through a portion of the
21 case to do so, this claim would not be -- this limitation
22 would not be satisfied?

23 MR. AROVAS: If Your Honor were to interpret this
24 as requiring a physical material that the light has to pass
25 through, that's correct.

1 CHIEF JUDGE CHENEY: Well, I mean, what if there
2 was a tiny LED inside the case, and you turn on the LED and
3 it energizes the tape, but the light that energizes the tape
4 does not pass through any part of the case because the light
5 is inside the case?

6 MR. AROVAS: Um-hum.

7 CHIEF JUDGE CHENEY: This limitation is not
8 satisfied, right?

9 MR. AROVAS: Because the light is originating
10 from inside the case, that's right.

11 CHIEF JUDGE CHENEY: So even though the case is
12 configured to allow the material to be energized --

13 MR. AROVAS: Well, if the case --

14 CHIEF JUDGE CHENEY: -- the claim limitation is
15 not satisfied because the light did not pass through a
16 portion of the case, right?

17 MR. AROVAS: Well, if you had an LED inside,
18 right, the LED is a separate component from the case that's
19 providing the light. So in that case, the case -- so if you
20 had an entirely solid case and that case had no openings, no
21 transparent material, nothing, and just had an LED inside,
22 I'm not sure why that case would be configured to allow
23 light to pass through.

24 CHIEF JUDGE CHENEY: What if the LED was
25 integrally molded into the sidewall of the case?

1 MR. AROVAS: Right. Well, the LED would be -- it
2 would be a separate component that emits light, right,
3 because -- I mean, if you had an LED on the outside and it
4 passed through a hole, yes, I would say that then the case
5 is configured that way. But --

6 CHIEF JUDGE CHENEY: Well, I mean, that defeats
7 the point of my hypothetical --

8 MR. AROVAS: Right.

9 CHIEF JUDGE CHENEY: -- which is to focus not on
10 the source of the light, but to focus on the requirement in
11 the claim that the light pass through the case.

12 MR. AROVAS: Right. So --

13 CHIEF JUDGE CHENEY: So maybe I can do it even
14 better. Let's say that it's Harry Potter --

15 MR. AROVAS: Um-hum.

16 CHIEF JUDGE CHENEY: --and he is able to conjure
17 light appearing inside the case with no physical structure
18 at all to illuminate the -- to energize the tape. That
19 would not satisfy this claim because there's no light
20 passing through the case, right?

21 MR. AROVAS: Right. So I would -- in any
22 hypothetical, the photons are going to have to go from the
23 outside to the inside. Right?

24 CHIEF JUDGE CHENEY: And they would have to pass
25 through something.

1 MR. AROVAS: And so the question is whether that
2 has to be a physical material or whether that can be an
3 opening.

4 CHIEF JUDGE CHENEY: Right.

5 MR. AROVAS: Right?

6 CHIEF JUDGE CHENEY: Okay. So we're at the same
7 spot.

8 MR. AROVAS: So we're at the same part. And so
9 my only point here was that -- you know, Your Honor had
10 asked the question: Well, okay, well what if you had
11 "configured to" language? And so we went to this claim and
12 said, okay, we have "configured to." And so the word
13 "transparent" does not appear in this claim, right? So the
14 -- right? The issue of the construction of the word
15 "transparent" is irrelevant to this.

16 So here you have a case which is just configured
17 to allow light to go from one place to another place. And
18 so then the question is: In the absence of the word
19 "transparent," just using the word "configured to," would
20 the "configured to" language permit an opening?

21 CHIEF JUDGE CHENEY: Are you asking me?

22 MR. AROVAS: No, I'm saying that's --

23 CHIEF JUDGE CHENEY: Or are you --

24 MR. AROVAS: -- that's the ultimate question.
25 And so if you look at this, right, is this doesn't say

1 anything about any sort of transparent portion of the case.
2 It simply says -- I mean, the way we read this claim is
3 simply molding the case with an opening allows the light to
4 pass from one side of the case to the other side of the
5 case.

6 And the entire purpose of this patent is your
7 tape is on the inside of a physical structure, it needs to
8 be energized somehow, light is what energizes it, so that
9 light needs to get from the outside world to the inside
10 world. And configuring a case to allow that, there's
11 nothing about that claim language, we believe, that would
12 preclude the use of an opening as the configured -- the
13 technique of configuration as opposed to some other thing
14 like a glass or plastic panel. And what they attempt to do
15 here is by interpreting "passing through" as being "passing
16 through material" is simply reading words into the claim
17 that don't exist.

18 CHIEF JUDGE CHENEY: Anything else?

19 MR. AROVAS: Nothing else, Your Honor.

20 CHIEF JUDGE CHENEY: Respondents, anything more
21 to say about "light passing through"?

22 MR. WHITE: Yes, please, Your Honor.

23 May I proceed?

24 CHIEF JUDGE CHENEY: You may.

25 MR. WHITE: Thank you.

1 I want to start with the "entering" versus
2 "passing through" because I do think there is an important
3 distinction there. The language is "passing through." It's
4 not passing around or somehow getting into the case, which I
5 think their construction would allow.

6 I think you hit on some valid examples as to why
7 that is an important part of this requirement and why we
8 shouldn't change "passing through" to just be generically
9 entering in some form or fashion. So I want to be clear
10 that our position is that those are not the same. We agree
11 with you on that one.

12 In terms of "passing through" and why this
13 matters, it's the same issue. They're saying that there's
14 openings and that light that goes through an opening where
15 there's absolutely no material at all, that it's passing
16 through the portions of the case.

17 We don't believe that's correct. Again, if you
18 read the specification, you look at the figures, there's
19 absolutely no description, no embodiment, no figure that
20 shows windows or openings or absence of material as being
21 part of the case through which light can pass. Every
22 example shows light passing through something, whether it be
23 a portion of the sidewall, a portion of the case, something
24 there. It passes through a material, not through an
25 opening.

1 We also think the Miller prior art comments and
2 rejection from the '209 patent are relevant. We didn't
3 really focus, at least I didn't in my opening presentation,
4 on the first term, on this second passage. But when they
5 were discussing Miller, they specifically said that there's
6 nothing in there that teaches a sidewall that allows
7 luminescent material to be energized by light passing
8 through such a sidewall.

9 So I think the issue of light passing through a
10 slot or an opening here was something that the patentee said
11 was not an example of light passing through the sidewall.
12 And they specifically went out of their way to say that
13 those sidewalls are opaque and would prevent light passing
14 through.

15 So in our view, this claim requires that the
16 light pass through the sidewall, the portion, the case,
17 whatever it may be, but there has to be material there.
18 There can't be an opening. If it's an opening, it's not
19 passing through the case. It may be passing around the case
20 or something else, but it's not passing through as required
21 by the claim language. And that's why we think the word
22 "material" needs to be added to the proper construction of
23 this term.

24 And unless you have other questions for me,
25 that's really our position on this term as well. It's

1 largely similar to term 1, but there are some slight nuances
2 and some slight distinctions, particularly because the word
3 "transparent" is not in claim 6 of the '573.

4 CHIEF JUDGE CHENEY: So if we were to look at
5 '573, asserted dependent claim 11.

6 MR. WHITE: Yes.

7 CHIEF JUDGE CHENEY: That depends from claim 10,
8 which depends from claim 6. I guess we don't have the
9 "material material" problem because it's a different
10 passage.

11 MR. WHITE: Right. It's a different issue. This
12 is talking about the physical structure versus sort of the
13 functional issue that we're facing here.

14 CHIEF JUDGE CHENEY: Okay. Thank you.

15 MR. WHITE: Thank you, Your Honor.

16 CHIEF JUDGE CHENEY: Any rebuttal?

17 MR. AROVAS: Yes, briefly, Your Honor.

18 So I'd like to just point out -- this is on slide
19 36 -- a portion of the specification and this concept of
20 whether passing through can be passing through an opening.
21 So here we can see this is from column 4, lines 13 to 23, in
22 the '209 patent. It talks about providing an opening in the
23 wall that allows the end to readily pass through the wall.

24 And what that's talking about is this tape
25 passing through the opening that's created between these two

1 sidewalls. So the patent is clearly talking about the
2 concept of passing through an opening as passing through.

3 CHIEF JUDGE CHENEY: And why didn't it say that?
4 Because it uses the word "opening" in the claims in other
5 places. Why didn't it say it here?

6 MR. AROVAS: Why doesn't it say that there's an
7 opening?

8 CHIEF JUDGE CHENEY: An opening, light passing
9 through an opening. You've pointed out that the applicant
10 knows how to say opening and walls --

11 MR. AROVAS: Um-hum.

12 CHIEF JUDGE CHENEY: -- in the spec. We have an
13 opening recited expressly in the claim. Why not in this
14 part of the claim where you say that it should be so
15 obvious?

16 MR. AROVAS: Because they're trying to claim more
17 generally. They're not claiming specifically an opening.
18 They're not claiming specifically a material in those
19 claims. They're claiming any way the light passes through.
20 And so I think that the attempt by the applicant was to
21 write a more general claim that would be not specific to one
22 embodiment or the other.

23 I mean, there's no doubt that they could have
24 written more claims with more embodiments, like they did for
25 the dependent claims where they said it was a transparent

1 material. But that is a more general claim that would cover
2 multiple configurations, either where it passes through a
3 physical structure or it passes through an opening.

4 CHIEF JUDGE CHENEY: Wouldn't it also cover
5 Miller?

6 MR. AROVAS: No, and that's because the argument
7 made about why Miller was different is here. Miller fails
8 to disclose luminescent material at all. So that limitation
9 is about light passing through to energize the luminescent
10 material. Miller is not a glow tape.

11 CHIEF JUDGE CHENEY: Putting that aside, what
12 about the elements of the claim that we're discussing?
13 We're not actually disputing the presence of the luminescent
14 material. We're talking about the structure that allows it
15 to be energized.

16 Are you contending that Miller does disclose that
17 structure, the structure in the scope of the claims? I
18 understand you say the claims are differentiated from Miller
19 because of the luminescent tape. But is the structure that
20 allows that tape to be illuminated disclosed by Miller?

21 MR. AROVAS: So, yes. But I want to just be very
22 precise on this. The openings, the structure in Miller with
23 the openings allows light to pass through from the outside
24 to the inside. Right? For the very same reason as we've
25 been talking about in the context of the claims.

1 Those openings in Miller are not really
2 sufficiently large to charge the tape because they're just
3 sort of little slits, but that's kind of a separate issue
4 and it's not, as I understand, what Your Honor is really
5 asking. But the question is does the Miller structure allow
6 light to pass through the case? Yes, it does.

7 CHIEF JUDGE CHENEY: And so the Miller structure
8 is only differentiated from the claim by -- let's take claim
9 6 -- the phrase in the first limitation, "comprising a
10 luminescent material"?

11 MR. AROVAS: Right.

12 CHIEF JUDGE CHENEY: That's the only difference
13 between Miller and claim 6?

14 MR. AROVAS: With claim -- I don't know if there
15 are other differences for other elements, but certainly with
16 regard to this element, that's the difference, that it
17 doesn't have the luminescent material to be energized by
18 light.

19 CHIEF JUDGE CHENEY: Okay. Thank you.

20 MR. AROVAS: Thank you, Your Honor.

21 CHIEF JUDGE CHENEY: Any other further
22 surrebuttal?

23 MR. WHITE: I would just point out that the
24 Miller rejection was a 103 so it was not relying strictly on
25 Miller. There was a combination of luminescent material,

1 which I think answers that question. And then I do --

2 THE REPORTER: I'm sorry, could you turn your mic
3 on? You can stay there. Just turn your mic on.

4 MR. WHITE: I apologize. So I thought the mic
5 was on. So I'll say that again.

6 So the rejection that we've been talking about
7 that involved the Miller reference, that was a 103 rejection
8 where Miller was the case or the container, and then it was
9 alleged to be obvious that you could combine it with
10 luminescent material from another reference.

11 I do agree with you that the example that we just
12 heard shows that if the plaintiff had -- Complainant wanted
13 to describe light passing through an opening as a possible
14 embodiment or a part of their invention, they could have.
15 They did not here. The example we saw was about where the
16 tape itself goes in and out. Had nothing to do with light
17 passing through the case.

18 And he talked about the claims, but this is
19 really about what's in the description, what is in the
20 description of the invention. And, again, there's no place
21 in the figures, the description, anywhere, that talks about
22 light passing through an opening as somehow being part of
23 the invention. And that's all I have got, Your Honor.

24 CHIEF JUDGE CHENEY: Thank you.

25 MR. WHITE: Thank you.

1 CHIEF JUDGE CHENEY: Okay. This is probably a
2 natural place for us to take a 15-minute break. We'll come
3 back at 11:05. When we return, it sounds like we're going
4 to be talking about the front and rear receptacles. We're
5 off the record.

6 (A recess was taken at 10:52 a.m., after which
7 the proceedings resumed at 11:06 a.m.)

8 CHIEF JUDGE CHENEY: Please take your seats.

9 We're back on the record now in the 1442
10 investigation. After having taken a morning break in our
11 claim construction hearing, before the break we discussed
12 the terms "transparent" and "light passing through." We're
13 now going to move on to a new claim term and the term is
14 "wherein the front receptacle and the rear receptacle are of
15 identical construction."

16 It looks like Complainant is going to go first.

17 MR. KANE: Thank you, Your Honor. Ryan Kane for
18 Klein Tools.

19 CHIEF JUDGE CHENEY: Good morning, Mr. Kane.

20 MR. KANE: And these, the following six terms
21 that we're going to go through all come from the '327 and
22 '265 patents. It's a different family that have to do with
23 safety helmet products.

24 So just to tee up the issue for Your Honor, the
25 crux of this issue is really whether or not we're going to

1 have the plain and ordinary meaning of the identical
2 construction, which Klein Tools contends means that the
3 front and the rear receptacle have the same features, or if
4 we're going to go with Milwaukee's construction of have
5 exactly the same shaped, sized, and positioned components,
6 which we contend rewrite the claim to input unspecified and
7 unclaimed shape, sizes, and positioning requirements.

8 Now I am going to start with the claims.

9 CHIEF JUDGE CHENEY: Can we start with the
10 difference between your constructions?

11 MR. KANE: Yes, Your Honor.

12 CHIEF JUDGE CHENEY: Do you -- the only thing
13 that I could see that seemed to matter was position. Does
14 size and shape, is there a dispute there?

15 MR. KANE: Yes, Your Honor, they are. And let me
16 -- maybe I can sort of cut through this and just tee up
17 the -- what the parties are really fighting about here.

18 CHIEF JUDGE CHENEY: That would be very helpful.

19 MR. KANE: Absolutely, Your Honor.

20 With Milwaukee's product, there are receptacles
21 on the front and the back. You can mount accessories on
22 them. You can mount the same accessory in the front and the
23 back, for example, the light.

24 But Milwaukee has contended that their rear
25 receptacle has slightly different sized features on it. So

1 the front receptacle might have, you know -- I'm making
2 these numbers up -- but, you know, a 10 millimeter structure
3 for one side and the back might be 8 millimeters, still has
4 a protruding nub, still has both sides of it, still mounts
5 the same accessories, but Milwaukee's defense that they are
6 trying to create through claim construction is okay, well,
7 they are not identical. They are not the precise, the exact
8 same size and shape and positioning. So that's the key
9 issue, Your Honor.

10 CHIEF JUDGE CHENEY: Can we eliminate then
11 position and shape and dispute size?

12 MR. KANE: I don't want to speak on behalf of
13 Milwaukee as to whether or not they would contend that the
14 shape or position are actually different. I have examined
15 both sets of products that are at issue in the case. I have
16 not detected or seen any difference in the shape. I really
17 do think they are focused on the size, but I don't want to
18 speak for them on that front, Your Honor.

19 CHIEF JUDGE CHENEY: Okay.

20 MR. KANE: Now, Your Honor, I just want to make
21 sure I answered your question before I move on to the
22 claims.

23 CHIEF JUDGE CHENEY: I think so. I'm sure I will
24 have more questions.

25 MR. KANE: Okay. Now, Your Honor, I have put up

1 claim 1 and claim 16 on the board here. And you can see the
2 structure -- and I have excerpted, you know, excerpted it,
3 so they are quite long claims, but the key portions of the
4 claims start with "a front receptacle having" and "a rear
5 receptacle having."

6 And you can see there is sort of this mirror
7 image. So on the left we have, "A front receptacle having
8 an external slot extending upwardly along the front side of
9 the exterior surface of the outer shell above the brim, and
10 a protruding nub, wherein the protruding nub is integrally
11 molded with the outer shell from the common material and is
12 disposed centrally relative to the external slot and
13 directly on to the exterior surface of the outer shell."

14 And claim 16 is a little bit shorter, has a few
15 -- doesn't have all those features to it, but it does have
16 "a protruding nub, wherein the outer shell forms the
17 protruding nub from the same material as the outer shell."

18 If you go to the next part of both claims, you
19 can see that it describes and claims a rear receptacle
20 having an additional external slot disposed on the rear side
21 on the external surface of the outer shell, wherein -- and
22 this is where the key language comes in -- the front
23 receptacle and rear receptacle are of identical
24 construction.

25 This is shorthand, Your Honor, to reduce the

1 number of -- the amount of repetition in the claims, to
2 refer back to the features above. So just as a refinement
3 to our construction, it is really that it has the same claim
4 features. We're not talking about unclaimed features. So
5 we do have specificity here. It is the claimed features
6 that refers back to, in the earlier part of the claim.

7 So you can see, Your Honor, we have actually
8 taken claim 1, and the claim expressly defines what
9 identical construction means. And if you substitute in
10 those features that are claimed for the front receptacle,
11 you can plug them in for the rear receptacle. And that's
12 what we contend that this language does for the claim. It
13 does the same thing for claim 16.

14 Now, you can contrast that with Milwaukee's
15 proposed construction, where they are substituting in the
16 phrase "having exactly the same shape, size, and position
17 components."

18 Now, there's nothing in the specification or
19 claims that ever suggest that it is required that the front
20 and rear receptacles have exactly the same shape, size, and
21 position components. In fact, this is just Milwaukee's
22 arbitrary selection of some attributes that they are now
23 injecting into the claim.

24 It is just as arbitrary as if they had said color
25 or finish or hardness. They are just plucking attributes

1 and sticking them into the claim without any linguistic
2 support from the specification or the claim itself.

3 Now, our construction is really rooted in what is
4 the purpose of these receptacles. And if you look at the
5 specification, Your Honor, you will see that it describes
6 the front and the rear receptacles with the same claim
7 features to allow an accessory device to be mounted
8 interchangeably on the front and the back.

9 And so you can see here, we have a quote from the
10 provisional, which is incorporated by reference into the
11 patent itself. "The rear tapered receiver slot, 11, is of
12 substantially identical design to allow for devices to be
13 stored interchangeably between the front tapered receiver
14 slot 5 and the rear tapered receiver slot 11."

15 And you can see that in paragraph 13 of the
16 provisional, there is some similar description of how this
17 product is supposed to work. One benefit of the present
18 invention allows a user to use the same portable device or
19 headlamp with a safety helmet in both the standard and
20 reverse safety helmet orientation.

21 That is because when people are on job sites,
22 sometimes they will reverse their hard hat and then you
23 still want the light in the front, so you want to pop it off
24 the front receptacle, and pop it on the rear receptacle,
25 which is now facing forward for you.

1 And you can see the secondary use of the present
2 invention is to allow a user to quickly remove and install a
3 device on the opposite side of the safety helmet. Now, this
4 is actually reinforced by the claim itself. Claim 1
5 actually describes that the safety helmet is reversible.
6 So, okay, if it is reversible, that explains why you would
7 want to and why it is claimed that the front and rear
8 receptacle would be of identical construction or have the
9 same claimed features.

10 And then it is also reinforced by the fact that
11 claims say that these accessories are mountable on the front
12 and the rear. And that's in claim 1 and in claim 16.

13 The rest of the specification also echoes this.
14 You can see this is column 6, lines 54 to 60. The user
15 might also store the second headlamp device to 201 on the
16 rear tapered receiver slot, 11, as a backup. And on the
17 front, you can switch the position of the headlamp 200 and
18 the second headlamp device 201 as necessary. So you can
19 flip them back and forth.

20 Now, our claim construction here is actually very
21 consistent with the file history. You can see on the left I
22 have an excerpt from the file history. This is actually the
23 Klein Tools representative talking about a piece of prior
24 art called Teetzel. Teetzel was sort of an Army-style
25 helmet that the Patent Office had identified.

1 And you can see that Klein Tools during
2 prosecution, this is a few years ago, 2001, had explained
3 that the combat-style helmet includes a non-reversible shell
4 and it has a front connector 140 and a rear connector 160
5 that are of different construction and accommodate different
6 devices, which are not interchangeable, right?

7 So this comes back to that idea that they need to
8 have the same claimed features so you can switch the -- you
9 can switch those accessories.

10 Now, if you look, I have a seconds passage here,
11 the applicant said okay, well the front receptacle and the
12 rear receptacle are of identical construction. The device
13 of Teetzel, the front connector, 140, and rear connector,
14 164, are of different construction because they accommodate
15 different devices.

16 And the applicant actually put in pictures of
17 those two different connecting devices. And you can see
18 that's on the right side of the slide. It is Figure 2 from
19 Teetzel and Figure 8 from Teetzel. And those don't have the
20 same features.

21 Now, Milwaukee has contended that the statements
22 by the examiner during prosecution support its construction.
23 Respectfully, we disagree. You can see this is an excerpt
24 from Milwaukee's brief. They are quoting a portion of
25 something the Patent Office had said, the examiner had

1 said -- and we have on the next slide, this is slide 52 --
2 we have actually put a little screenshot of what the Patent
3 Office actually said.

4 And you can see we have compared and contrasted
5 that with the Teetzel figures, Figures 4 and 5. So what the
6 Patent Office described was that there are these little
7 holes in the front and the back of the Teetzel combat
8 helmet. And the Patent Office was making the argument that
9 the openings and the contacts had the same size arrangement
10 and structure, making them identical receptacles.

11 So, Number 1, the examiner was not talking about
12 the term "identical construction." What the examiner was
13 talking about is a piece of prior art called Teetzel. So if
14 the examiner wants to say yeah, well, Teetzel's front and
15 back is identical, that does not mean a wit of anything with
16 respect to the term identical construction. He is just
17 making an assertion about what is disclosed in the prior
18 art.

19 So that's why Milwaukee's off base by saying:
20 Well, somehow that this statement from the examiner changes
21 the meaning of "identical construction" or reflects the
22 meaning of "identical construction." It doesn't. It just
23 reflects what the Patent Office thought was disclosed by a
24 piece of prior art.

25 Number 2, Klein Tools didn't agree with this. In

1 fact, you can see -- I mean, here we're talking about Figure
2 5 and Figure 4. And what the Patent Office is pointing to
3 is item 126 and item 124. That's completely different than
4 what Klein Tools was pointing to in its response to the
5 office action.

6 They were pointing to Figure 2 and Figure 8 and
7 the front and rear connector, two completely different
8 things. Now, there was, actually -- even after this, there
9 was actually a teleconference with the examiner. And that
10 was on June 16th, 2021, where the parties, meaning the
11 examiner and Klein Tools, did not reach agreement.

12 So Milwaukee's statement in their brief at page
13 14 that Klein Tools made no attempt to refute this is
14 actually false. There was actually a call with the
15 examiner. The summary of the call says that no agreement
16 was reached.

17 Number 3: The PTO is pointing to these holes in
18 the bottom of the Teetzel helmet, but these are kind of
19 screw holes. They are not the external slot claimed in
20 these patents. So it's not even -- we're not even talking
21 about the same kind of structure that ended up getting
22 claimed in the asserted patents.

23 Now, Your Honor, we obviously put in a definition
24 from a dictionary, basically just to show that construction
25 is the manner of constructing something. It doesn't mean

1 every possible attribute of the receptacle. Instead, it
2 just means that you have the same claimed features.

3 And here, I think that one of the more, at least
4 from my view, persuasive points is that Milwaukee really
5 concedes that their construction of identical construction
6 is simply identical. So what Milwaukee is really doing is
7 rewriting the claim to strike a couple words out of it to go
8 back to this concept of identity, you're the same in
9 every single way. Unfortunately for Milwaukee, that's not
10 what the claim says. And I think that's a fairly deadly
11 admission for them in the papers.

12 Another point that we made in our brief, Your
13 Honor, was that there's a fairly obvious problem with
14 Milwaukee's construction, which is when they say it has to
15 have the same position, it is actually not true. If you
16 look at the -- this is Figure 10 from the '327 patent. The
17 front and the rear receptacles are in different positions.

18 And so, you know, I know Your Honor knows this,
19 but if a construction that excludes the preferred embodiment
20 is rarely, if ever correct, Milwaukee knows that too, so in
21 the responsive brief, they tried to save this. And the way
22 they tried to save this -- and this is their new position --
23 is that the components are, quote, I want to make sure I get
24 this right, I think "positioned with respect to other
25 components."

1 Okay. Well, Number 1, that's not the
2 construction that they proposed. But, of course, they could
3 amend it or you could amend it, Your Honor. But, 2, they
4 don't identify the components. And, 3, this new spin on
5 Milwaukee's construction doesn't make any sense for the
6 terms shape and size.

7 So those are the other two aspects that they
8 baked into this construction because they are trying to
9 shoehorn into the claim term. And, okay, so if you say
10 well, it has to have the same shape and size with respect to
11 the other components, I don't even know what that means. So
12 they are sort of making a special exception for position,
13 because they know it would exclude the preferred embodiment.
14 So they are kind of doing a little surgery on this.

15 I think, Your Honor, unless you have questions
16 for me at this point, this is Klein Tools' presentation on
17 this issue.

18 CHIEF JUDGE CHENEY: Can we look at slide 55,
19 please, from your presentation. Not this one, the one that
20 has the definition. I might have the slide number wrong.
21 It is slide 54.

22 So you have highlighted a definition for
23 construction here from a Merriam-Webster Collegiate
24 Dictionary. Is it your position that this construction is
25 consistent with your proposed construction?

1 MR. KANE: Yes, Your Honor.

2 CHIEF JUDGE CHENEY: How does your construction
3 address, at all, the manner in which these things are
4 constructed?

5 MR. KANE: Well, if you go back, Your Honor --
6 and I'm going to go back to this part of the presentation --
7 this is slide 45, Your Honor -- identical construction. It
8 is the manner of making something. What we're saying, Your
9 Honor, is really that the applicant, Klein Tools in this
10 case, what they are trying to capture is those additional
11 features that were earlier in the claim.

12 CHIEF JUDGE CHENEY: So what was constructed, not
13 the manner of making it. Your argument is all about what
14 was constructed, not the manner of making it.

15 MR. KANE: I see what you're saying, Your Honor.

16 CHIEF JUDGE CHENEY: That's why I am wondering
17 why you highlighted that portion of the dictionary
18 definition, which was a question I had when I read the
19 briefs.

20 MR. KANE: I think what I -- you know, certainly
21 what I was thinking of, Your Honor, was the manner of
22 constructing it would be the configuration, meaning, you
23 know, I'm not saying it's injection molding, you know.

24 CHIEF JUDGE CHENEY: But isn't that what manner
25 of construction means?

1 MR. KANE: Well, I think it could also refer to
2 what's the process, art, or manner of constructing
3 something. So I think that encompasses things like, okay,
4 well --

5 CHIEF JUDGE CHENEY: Process, right? Process.

6 MR. KANE: Yes, Your Honor.

7 CHIEF JUDGE CHENEY: Not end result.

8 MR. KANE: Well, if you had two homes that had
9 the same type of construction, they were stick construction.

10 CHIEF JUDGE CHENEY: Yes.

11 MR. KANE: Well they are made from wood, from
12 2-by-4's.

13 CHIEF JUDGE CHENEY: And they could have very
14 different floor plans and the same manner of construction.

15 MR. KANE: They have the same features, though.
16 They still have a stick configuration in the walls, just
17 like in our claims, the manner of construction would include
18 putting a protruding nub wherein the protruding nub is
19 integrally molded with the outer shell. So it is actually
20 talking about how this nub, which is part of the receptacle,
21 is made.

22 CHIEF JUDGE CHENEY: None of your claim
23 construction arguments in your brief make that point. Do
24 you concede that?

25 MR. KANE: I think that what I just said may not

1 be in our papers, Your Honor.

2 CHIEF JUDGE CHENEY: But isn't that the meaning
3 of the term that you have just put up on the slide for me?

4 MR. KANE: I think that the argument that we made
5 in the brief about having this same features and how that is
6 referring back after earlier in the claim, that is certainly
7 in our brief.

8 CHIEF JUDGE CHENEY: That is. But what I'm
9 missing here is you put up a definition that talks about
10 process and manner, which you don't address anywhere in your
11 brief, and you have now highlighted how that process is
12 actually important in claim 1 because it talks about
13 molding.

14 But I don't see why you're drawing attention to
15 this definition if none of your arguments relate to it.

16 MR. KANE: Yes, Your Honor. And my colleague has
17 pointed out that we also -- we did fail to highlight the
18 next portion of the definition, "a thing constructed." So
19 that is actually completely consistent with a claim term
20 that is a thing, that comprises certain features.

21 CHIEF JUDGE CHENEY: So does this -- does the way
22 in which the word "construction" is used in this claim mean
23 the process or does it mean the thing?

24 MR. KANE: It does mean the thing, Your Honor.
25 It is not a process claim. It's simply the item that is

1 accused and the description. It's a physical item. So it
2 is an apparatus claim, not a process claim.

3 CHIEF JUDGE CHENEY: I understand it is an
4 apparatus claim. I am trying to understand if there is a
5 requirement of a certain manner of construction in this
6 term. And it sounds to me like Complainants do not think
7 that there is.

8 And in fairness, I did not see the parties
9 disputing this. It seems like both parties thought that
10 this was about whether one object is structured the same as
11 another object.

12 MR. KANE: I agree with that, Your Honor. I
13 think the only addition I would make is that the claim does
14 describe certain requirements for the features. So, for
15 example, the protruding nub needs to be integrally molded
16 with the outer shell from a common material. And so it is
17 still a thing. It is not the process by which the thing is
18 made but it still describes a physical property of the
19 feature of the nub, that's claimed here.

20 So I hope that makes sense, Your Honor. But the
21 idea of being that it needs to be integrated with the rest
22 of, in this case, a plastic helmet, so the nub needs to be
23 formed from that same plastic and be integrated into it.

24 CHIEF JUDGE CHENEY: Did you argue that at all in
25 your brief?

1 MR. KANE: Only insofar, Your Honor, as to say
2 that when we talk about identical construction here, the
3 term that is being construed, is that it incorporated the
4 taupe highlighting above. So, in other words, we weren't
5 focused on the content of like every word of what is
6 highlighted there.

7 We just made the point that this is to reduce
8 redundancy in the claim language, to explain that, okay, the
9 claimed features above that are describing these aspects of
10 the receptacle, those are in the rear receptacle through
11 this term, "identical construction."

12 CHIEF JUDGE CHENEY: So suppose that the accused
13 device for the rear receptacle had a protruding nub disposed
14 centrally relative to the external slot and directly on the
15 exterior surface of the outer shell but was not integrally
16 molded.

17 Not within the scope of the claim?

18 MR. KANE: It would not be within the literal
19 scope of the claim.

20 CHIEF JUDGE CHENEY: Because why?

21 MR. KANE: Because that protruding nub needs to
22 be integrally molded with the outer shell for it to meet the
23 literal scope of this claim.

24 CHIEF JUDGE CHENEY: Okay. Can we go to your
25 slide 57. Am I allowed to draw conclusions about figures in

1 the manner that you have done here and say: Well, it looks
2 like the one on the left is a millimeter higher than the one
3 on the right? Is there some statement in the patent that
4 these figures are drawn to scale and that I should be able
5 to draw conclusions about relative positioning and is there
6 some case law about that?

7 MR. KANE: Your Honor, I have not researched that
8 question, but what I am aware -- I am not aware of any
9 statement in the specification that says this is drawn to
10 scale. That said, the figures are part of the written
11 description, as you know.

12 And I think you can take from it anything that a
13 person of ordinary skill in the art would take from it. And
14 here, you know, even just with the naked eye, you can see
15 that these are in a different position on the helmet between
16 the front and the rear. And so from that perspective --

17 CHIEF JUDGE CHENEY: Then why all the red lines
18 and arrows if I could just see it?

19 MR. KANE: Just to assist Your Honor in looking
20 at this.

21 CHIEF JUDGE CHENEY: Would you concede it's a
22 very small difference in the patent as printed at scale,
23 like on an 8-and-a-half-by-11 page?

24 MR. KANE: What I'll say is our team was able to
25 see the difference based on a normal size printing of the

1 patent, Your Honor. And so it is certainly noticeable to
2 the naked eye. Of course, as we always do, we try to assist
3 the Court in deciding these things. And so we thought it
4 would be helpful.

5 But even if we just showed the helmet without all
6 the lines and arrows and labels, I contend, Your Honor, that
7 you could certainly see a difference.

8 And just to put the shoe on the other foot for a
9 moment, I mean, really what Milwaukee is saying is that no,
10 it has to be in the exact same spot with the exact same
11 size, with the exact same shape, which is not in the
12 specification. And so they are asking you to draw a
13 conclusion about very specific geometry and measurements,
14 which really is not rooted in the specification at all.

15 And this is merely, I think, it is mostly a
16 rhetorical point, Your Honor, that what they are suggesting
17 is inconsistent with the pictures that the applicant
18 actually put into its filing.

19 CHIEF JUDGE CHENEY: Have you ever heard the
20 phrase -- and I didn't come up with it -- patent profanity?

21 MR. KANE: I have not, Your Honor.

22 CHIEF JUDGE CHENEY: I'm surprised that there
23 actually have been scholarly articles written with this
24 phrase in it. Words like always, never, only. And the
25 reason that people call these words patent profanity is

1 because they're ultimatums, superlatives that are easily
2 defeated.

3 Is identical one of those words?

4 MR. KANE: I would say that in this case it is
5 easily defeated because of the picture that is disclosed in
6 the specification itself.

7 CHIEF JUDGE CHENEY: I think we're using the word
8 defeated in different ways. I want to make sure the record
9 is clear.

10 I meant that a claim can easily avoid
11 infringement or infringement can be defeated when the claim
12 uses words like "always," "never," "only."

13 MR. KANE: I see, Your Honor. Yeah, here, I
14 think, one of our most fundamental points is that the claim
15 does not say "identical" and it says "identical
16 construction." And that second term in the phrase needs to
17 do something.

18 And I think Milwaukee's primary point is no,
19 "identical construction" and "identical" mean the same thing
20 here.

21 CHIEF JUDGE CHENEY: Let me look at that for just
22 a minute.

23 So what meaning do you give to construction that
24 is different from just saying identical?

25 MR. KANE: It's that aspect of the claim phrase

1 that is being construed, Your Honor. We contend it means
2 that it has those same claim features that are described
3 above with respect to the front receptacle. So, in other
4 words, it has a protruding nub, wherein the outer shell
5 forms the protruding nub from the same material as the outer
6 shell. So that is what is being captured. That is the
7 identity that is required, not that it has to be the
8 same size, shape, position with respect to the front
9 receptacle.

10 And that's -- it is really just another way of
11 saying, okay, well, we are going to have these features from
12 the front receptacle also in the rear receptacle. And
13 that's what the construction piece does for us. Because I
14 do agree that the applicant could have easily written,
15 wherein the front receptacle and the rear receptacle are
16 identical. They could have written that, in which case I
17 think that would likely encompass everything about the
18 receptacle. They would have to be exactly the same in every
19 way.

20 But that is not the terminology that the
21 applicant chose for claim 1 and 16. Instead, it's this
22 identical construction phrase. And to sort of make that
23 make sense, I think, with the rest of the specification, it
24 really is about, you know, okay, you're mounting things on
25 these front and these rear receptacles. And the

1 specification itself talks about, you know, that's why
2 you're doing this.

3 And the things that engage with the nub are the
4 accessories. So that's why you need that protruding nub to
5 show up in the rear receptacle as well.

6 CHIEF JUDGE CHENEY: So let me ask you a
7 hypothetical. Suppose an accused device had a front
8 receptacle and I'm looking at claim 16, because I want to
9 avoid the molding limitation. Okay?

10 MR. KANE: Okay.

11 CHIEF JUDGE CHENEY: So we're setting that
12 molding limitation aside. So now in my hypothetical, an
13 accused device has a front receptacle that is made from
14 snapping pieces of plastic together. And the rear
15 receptacle has exactly the same shape, size, and position as
16 the front receptacle, but it is made by injection molding as
17 a single piece.

18 Is the limitation "identical construction"
19 satisfied?

20 MR. KANE: And, I'm sorry, Your Honor, I am just
21 looking at claim 16.

22 CHIEF JUDGE CHENEY: Yeah.

23 MR. KANE: Because this is only a portion of
24 claim 16. So I want to make sure I'm looking at the entire
25 claim. And, I'm sorry, in the hypothetical is the

1 protruding nub also made from the same material as the
2 front?

3 CHIEF JUDGE CHENEY: Yep. Yep.

4 MR. KANE: Okay. So --

5 CHIEF JUDGE CHENEY: One is made by snapping
6 pieces together. One is made through injection molding of a
7 single piece. But they result in exactly the same structure
8 at the end.

9 MR. KANE: I think with respect to claim 16, as
10 long as you have the protruding nub -- well, and, Your
11 Honor, I don't want to fight the hypothetical, but --

12 CHIEF JUDGE CHENEY: No, no. Ask the clarifying
13 questions you need.

14 MR. KANE: So it does say wherein the outer shell
15 forms the protruding nub from the same material as the outer
16 shell. So I think that given that language, I actually
17 think that it is still required to be part of the outer
18 shell. I don't think you could snap it on.

19 CHIEF JUDGE CHENEY: Okay. Fair point.

20 The point of the hypothetical is does the manner
21 of construction matter?

22 MR. KANE: I think the rest of the claim gives
23 some context here, Your Honor. And I note, in claim 1, it
24 does talk about integrally molded. Here it is talking about
25 the outer shell forming the protruding nub. So from that

1 sense, Your Honor, it is -- the claim overall is talking
2 about the helmet that has this protruding nub being part of
3 the outer shell.

4 And so I think that reinforces this idea that
5 when you have an identical construction in the second part
6 for the rear receptacle, it is referring back up to this
7 protruding nub and its features. So it is the helmet, but
8 it is a way to say: Hey, look, what we just described
9 above, same description here for the rear receptacle.

10 CHIEF JUDGE CHENEY: I understand that's what you
11 want it to be, but normally in patent claims, that's not how
12 we do that at all. And the scope of the words "identical
13 construction" is much, much broader than what you are
14 arguing.

15 You are arguing it should just be the same
16 limitations that we listed above again, and claims do that
17 all the time, wherein the rear receptacle comprises a second
18 external slot, a second protruding nub, a second, right?
19 That's what we see.

20 And then that allows some variation between the
21 first and the second. But that's not what your patentee
22 did. They used some language that does a lot more than
23 that.

24 MR. KANE: I do think that the phrase, Your
25 Honor, "identical construction" is -- it can't just mean

1 identical. It has to mean something less than identity.
2 Otherwise --

3 CHIEF JUDGE CHENEY: Then why not use the word
4 "similar," if that's what was meant?

5 MR. KANE: Certainly the applicant could have
6 used "similar." Although maybe that would run into some
7 indefiniteness issues.

8 CHIEF JUDGE CHENEY: Similar gets affirmed all
9 the time.

10 MR. KANE: But I do think, Your Honor, once you
11 -- if the Court looks at the rest of the claim, there is
12 additional material in the claim that reinforces this
13 reading because, for example, claim 16, talks about an
14 accessory device having a mating receptacle formed thereon,
15 at least a portion of the mating receptacle being
16 selectively engageable within each of the external slot of
17 the front receptacle or the additional external slot of the
18 rear receptacle, such that the accessory device is
19 releasably mountable on to each of the front receptacle and
20 the rear receptacle on the exterior of the shell.

21 So, in other words, yes, we have identical
22 construction. It is referring back up. But then we have
23 some additional context, where the claim is saying: Okay,
24 well, you have the identical construction, and that
25 accessory has to be able to mount on the front and the back.

1 And I think that that really harmonizes the claim because
2 the point, one of the points of this invention was to be
3 able to switch between the front receptacle and the rear
4 receptacle, if you're turning your hard hat around.

5 CHIEF JUDGE CHENEY: I understand what you want
6 the claim to do and say. I understand what the patentee
7 wanted the invention to do and say. These particular words
8 don't mean similar and they mean something different than
9 similar.

10 MR. KANE: I 100 percent agree with that, Your
11 Honor, is that "identical" does not mean "similar."
12 "Identical" means "same." And that's exactly what we put in
13 our constructions, the same features.

14 It doesn't mean that every single aspect of the
15 receptacle has to be identical from the front and the rear.
16 Otherwise, that's what the applicant would have written.

17 CHIEF JUDGE CHENEY: So let me get back to my
18 hypothetical about the manner of construction one more time.
19 I think maybe I have a new hypothetical that can help us
20 think about claim 16.

21 Suppose the front receptacle is made through
22 injection molding and the rear receptacle is made by carving
23 away a big hunk of plastic that was molded on the back of
24 the helmet with lasers until all that is left is the same
25 shaped receptacle as the front, it is formed from the outer

1 shell but they are not constructed in identical ways.

2 Does claim 16 cover my hypothetical?

3 MR. KANE: I think it would, Your Honor. And I
4 know, as Your Honor rightly pointed out, we highlighted the
5 manner of constructing, but I will just say that
6 construction is broader than that. It is also a thing
7 constructed.

8 So from that perspective, I absolutely think
9 claim 16 would cover your hypothetical, despite the fact
10 that the manner of constructing them would be different.

11 CHIEF JUDGE CHENEY: So if that's the case, you
12 are actually excluding from your construction the manner
13 part and focusing only on the thing constructed?

14 MR. KANE: I actually think that is fair, Your
15 Honor, in the sense that what we were looking at for this is
16 it's the -- it is the thing constructed. And when I think
17 of manner, I understand now that Your Honor -- and I can
18 appreciate this -- is saying manner has to do with process.

19 I think I personally was thinking about it a bit
20 more broadly, to also include the thing, such that it is
21 like, okay, well, the identical construction essentially
22 means it has the same claimed features, not necessarily
23 those features were achieved in exactly the same process.

24 And so I apologize if that was confusing in the
25 papers, and I appreciate Your Honor pointing it out, but I

1 do think that it is the thing constructed, which is
2 consistent with the dictionary definition.

3 CHIEF JUDGE CHENEY: Okay. Sometimes people say
4 this claim term is broad enough to encompass multiple
5 meanings. You are saying here we're focusing on
6 construction as the thing constructed, not construction as
7 the manner in which it was made?

8 MR. KANE: I agree with that, Your Honor.

9 CHIEF JUDGE CHENEY: Okay, thanks. Anything
10 else?

11 MR. KANE: No, just with the obvious statement
12 that I think when we put that in our papers, we were
13 thinking of it in terms of the structure, physical
14 structure, and not of the process.

15 CHIEF JUDGE CHENEY: Thank you.

16 MR. KANE: Thank you.

17 MS. DOUKAS: Good morning, Your Honor, Maria
18 Doukas on behalf of Respondent.

19 CHIEF JUDGE CHENEY: Good morning.

20 MS. DOUKAS: So I believe I heard counsel say
21 looking at their construction, the same features, what they
22 intend there is looking at the claims and you just need to
23 have the same protruding nub, the protruding nub being part
24 of the outer shell, just the elements in the claim. The
25 patentee chose not to repeat that and instead chose to use

1 the word "identical construction."

2 As Your Honor pointed out, "identical" was a very
3 specific term that the -- that the patentee chose to use and
4 has a precise meaning of exactly the same. And the patentee
5 chose to say that the front receptacle and the rear
6 receptacle have to be identical construction. They have to
7 be the same thing.

8 Respondents proposed -- I'm sorry, Complainant's
9 proposed construction does not address this. It seeks to
10 read out the word "identical." It seeks to read out this
11 precise claim language and the requirements that you need to
12 have the same thing, the same front receptacle, rear
13 receptacle. This includes, as Milwaukee's construction
14 says, the same shape, size. The components positioned
15 within each respective receptacle need to be the same.

16 And so the intrinsic record supports Milwaukee's
17 proposed construction. And I just, before I get -- really
18 this comes from the file history. And I will go over the
19 same file history statements that counsel went over with
20 respect to their construction, but before I do that, I want
21 to go to the specification.

22 CHIEF JUDGE CHENEY: Before we do that, can we
23 try to just see if there's any overlap between your
24 constructions so that I can figure out where the dispute is?

25 I explored those three categories of your

1 proposed construction with counsel on the other side, shape,
2 size, and position.

3 MS. DOUKAS: Yes.

4 CHIEF JUDGE CHENEY: Do you think that all three
5 of those matter in this case?

6 MS. DOUKAS: We think the real issue, we think,
7 is size. The receptacle and the Milwaukee's helmet front
8 and rear, it's a different size, as Klein has defined the
9 receptacle on Milwaukee's accused products, but in terms of
10 completeness for this construction, we do think that all of
11 these are necessary.

12 We don't think identical -- we think "identical
13 construction" truly means they need to be identical
14 structures. And that includes not just the size of the
15 structure itself, but the shape of the structure, the
16 components positioned within there and how they are
17 positioned needs to be identical.

18 CHIEF JUDGE CHENEY: So just so I understand, if
19 -- this is going to be a bizarre hypothetical. I apologize
20 in advance.

21 Are you familiar with a game called Spot It? The
22 little round cards, you match symbols on one card with
23 another card and the first person who see the matching
24 symbol gets the card?

25 MS. DOUKAS: Yes. I have that at home, yes.

1 CHIEF JUDGE CHENEY: So one thing that is really
2 interesting to me about Spot It, first of all, it's an
3 amazing probability problem, right, because every card has a
4 match of exactly one symbol with every other card. Truly
5 genius.

6 But one of the things that makes the game very
7 interesting to play is that the symbols aren't the same
8 size. They are in all respects the same symbol, just of
9 different scale. And that's what causes you to not be able
10 to recognize them very quickly. Like the shamrock on one
11 card might be three-quarters of an inch and the shamrock on
12 another card might be three-eighths of an inch.

13 Are you familiar with what I'm talking about?

14 MS. DOUKAS: I am, yes.

15 CHIEF JUDGE CHENEY: Are those two symbols of
16 identical construction?

17 MS. DOUKAS: I would say no. I would say they
18 are substantially identical. And this is where I think the
19 patentee could have used some qualifying language, but if
20 we're looking at a thing and we're talking about
21 identity, the definition is clear. It is exactly the
22 same.

23 And I think that covers all, not just the shape,
24 the sort of the imagery, but also the size of it. And I do
25 think that when you use -- and especially in patents, when

1 you use a claim term, identical, and don't put any
2 qualifying language, it does need to have exactly the same
3 features, or the same construction.

4 CHIEF JUDGE CHENEY: Thank you. Please proceed.

5 MS. DOUKAS: So on that point, and I think Your
6 Honor pointed this out, the patentee could have put
7 qualifying language. They clearly knew if we look at the
8 specification we have on slide 32, excerpts from the
9 specification of the '327 patent, such as at column 4, line
10 31 to 34.

11 The patentee put a qualifier in front of the term
12 "identical." They talked about in this case the rear
13 tapered slot 11 is substantially identical to the front
14 tapered receiver slot 5. They knew how to use a qualifying
15 language. They knew how to hedge a bit with respect to the
16 requirement of identity. And they chose very precise
17 claim language. They chose to say it is of identical
18 construction.

19 Now I want to turn to the file history which I
20 know counsel covered and sort of walk through the steps. We
21 have excerpted on slide 33 the examiner rejected the claims
22 and rejected this limitation of the front and rear
23 receptacle being identical construction based on Teetzel.
24 And if you look at the excerpt over to the right, what the
25 patentee said to the examiner, as can be seen from these

1 illustrations, and pointed to Figures 2 and Figures 8 of
2 Teetzel, the front connector and the rear connector are not
3 of identical construction.

4 Now, while the patentee also did talk about
5 accommodating different devices, the patentee pointed to the
6 imagery and the images of these two front and rear
7 receptacles. And you can clearly see that they are not
8 identical.

9 They have different shapes, different positioning
10 of components. This is how the patentee viewed the
11 distinction between its claimed invention and Teetzel.

12 The examiner came back, disagreed, pointed to a
13 different feature in Teetzel that it qualified and called
14 the front and rear receptacles. And that's what we have
15 highlighted on slide 34. You have the openings 124, the
16 contacts 126. They appear on both the front and rear of the
17 helmet.

18 And the examiner said that that, as the claim
19 language was written at the time, qualified as a front and
20 rear receptacle. And the examiner said that the front and
21 back receptacles have openings, 124, and contacts 126, with
22 the same size, arrangement, and structure, making them
23 identical receptacles.

24 Now, after this rejection, Klein did not dispute
25 this characterization. I heard counsel mention that there

1 was an interview, but there was no mention of this
2 particular term being in dispute or Klein saying that they
3 disagreed with the examiner's characterization.

4 Then I just want to quickly cover what we heard
5 Klein say in terms of why Milwaukee's construction does not
6 work. And looking at slide --

7 CHIEF JUDGE CHENEY: Sorry, can you go back to
8 that?

9 MS. DOUKAS: Yes.

10 CHIEF JUDGE CHENEY: The patent prosecution
11 history.

12 I am just noticing in that slide the bold phrase
13 by the examiner, the examiner characterized the applicant's
14 argument as Teetzel failing to teach the front and rear
15 receptacles being identical to each other.

16 MS. DOUKAS: Yeah.

17 CHIEF JUDGE CHENEY: Is that a gloss from the
18 examiner? Or does that phrase "to each other" appear
19 anywhere in the applicant's arguments?

20 MS. DOUKAS: It's a gloss. And if we could go to
21 Exhibit 8, page 36. So the bottom of page 36, I think it is
22 -- yeah -- so this is the examiner's rejection. Go up or
23 keep going down. Sorry. Since we didn't number them, I
24 apologize, Your Honor. Keep going down, please. I have my
25 page numbers wrong.

1 This is that same rejection. The examiner said
2 that Teetzel -- if you go towards the bottom right there,
3 Teetzel describes, you have the third line up, "a front
4 receptacle contacts 126 and openings 124 disposed on the
5 front side; the rear receptacle disposed on the rear side,
6 wherein the front receptacle and the rear receptacle are of
7 identical construction."

8 That's how he re-rejected the claims. He used
9 the phrase, the claim phrase "identical construction." I am
10 guessing, I can't say exactly what was in the examiner's
11 mind, the portion we did excerpt on the slide is the
12 examiner's response to Klein's arguments. It seems to
13 indicate he was paraphrasing in response, he kept the same
14 rejection. This is the same language he used previously.

15 He said that this is -- these structures are
16 identical construction, but in the response to the
17 arguments, he did use different terminology, but it does
18 appear to be applying to the same phrase, the same claim
19 term.

20 CHIEF JUDGE CHENEY: Thank you. Please continue.

21 MS. DOUKAS: I want to address quickly Klein's
22 counsel made a point about our construction reading out a
23 preferred embodiment. And this mischaracterizes our
24 construction. Our construction is not seeking to compare
25 the position of the front and rear receptacle as placed on

1 the helmet.

2 What it does is it seeks to attribute meaning to
3 how the claim term is written. The identical construction
4 is if you're looking at your front receptacle, your rear
5 receptacle, as I said, same size, same shape and the
6 components positioned within each respective receptacle need
7 to be identical, not how they are placed. So we disagree
8 that this applies, that it is reading out any preferred
9 embodiment.

10 And with that, unless Your Honor has any
11 questions.

12 CHIEF JUDGE CHENEY: A couple of questions. I
13 had a lot of colloquy with Mr. Kane on the other side about
14 whether identical construction refers to the process of
15 construction or that which is constructed or both.

16 Does your client have a position on that?

17 MS. DOUKAS: I think we believe it's not the
18 process of constructing. It is not a product-by-process
19 claim. It is the physical object. So in this case, the
20 construction, when you're looking at the physical rear and
21 front receptacle, are they identical, are they exactly the
22 same?

23 CHIEF JUDGE CHENEY: So there is no dispute
24 between the parties that identical construction here does
25 not mean the way that it is made?

1 MS. DOUKAS: Correct.

2 CHIEF JUDGE CHENEY: Then what about an object
3 and its mirror image like a pair of gloves? Is the right
4 glove identical construction to the left glove? Or, rather,
5 is the left glove an identical construction of the right
6 glove?

7 MS. DOUKAS: If it has -- presumably if it is a
8 pair of gloves, they have the same size and shape, if that's
9 the same. I am just thinking through.

10 I don't think they are fully identical because
11 the placement of the thumb would be, if you were looking at
12 them in the same way, I think I would not necessarily say
13 they are identical because the thumb placement, if I am
14 thinking of the gloves correctly, would be on opposite
15 sides.

16 So if the placement of sort of the finger slots
17 or the thumb slots are different, then, no. If you can kind
18 of line them up and they look -- the placement of the
19 components is the same, then, yes, I would say they are
20 identical.

21 Apologies, Your Honor, I am trying to picture
22 gloves and sort of when you flip them, how the --

23 CHIEF JUDGE CHENEY: Is it easier to think about
24 shoes?

25 MS. DOUKAS: So shoes, I would say with the

1 language "identical construction," they would not -- a left
2 and right shoe would not be identical construction. They
3 may be similar, but --

4 CHIEF JUDGE CHENEY: So they may have the same
5 size.

6 MS. DOUKAS: Yes.

7 CHIEF JUDGE CHENEY: They may have the same
8 shape.

9 MS. DOUKAS: I think the shape would vary
10 slightly because you might have your left shoe curved more
11 to account for your big toe versus your right shoe
12 accounting for your big toe on the other side. So I think
13 the shape does vary slightly.

14 So I would say that they might be very similar,
15 may be substantially identical, but with the preciseness of
16 the word "identical," I would not say that a left and right
17 shoe are exactly the same.

18 CHIEF JUDGE CHENEY: Okay. So orientation then,
19 there's some concept of that in a pairing of a shoe that is
20 not identical.

21 MS. DOUKAS: Correct.

22 CHIEF JUDGE CHENEY: Okay. Thank you. Anything
23 else?

24 MS. DOUKAS: That's it. Thank you, Your Honor.

25 CHIEF JUDGE CHENEY: Rebuttal?

1 MR. KANE: Yes, Your Honor, very briefly.

2 Just a couple of points, Your Honor. First,
3 counsel stated that Klein Tools did not disagree with the
4 examiner when the examiner talked about the Teetzel
5 reference and its holes on the front and the back being
6 identical. Can we switch -- I guess I am in control -- can
7 we pull up the -- so this is an excerpt from the file
8 history, Your Honor.

9 There was an interview.

10 CHIEF JUDGE CHENEY: Give me a page for the
11 record.

12 MR. KANE: Yes, Your Honor. So because this, I
13 believe this was raised in rebuttal, this portion of the
14 file history, I don't believe, was in the papers. But it is
15 -- I believe it is June 16th, 2021, and --

16 CHIEF JUDGE CHENEY: Do you want me to consider
17 it?

18 MR. KANE: Yes, Your Honor.

19 CHIEF JUDGE CHENEY: Does the other side have an
20 objection to me considering it?

21 MS. DOUKAS: Your Honor, it wasn't in the brief.

22 CHIEF JUDGE CHENEY: That's what I am concerned
23 about.

24 MS. DOUKAS: Yes.

25 MR. KANE: Your Honor, there was a representation

1 made that Klein Tools did not disagree with the examiner.
2 Our position is that's not correct, given the actual filing
3 history.

4 CHIEF JUDGE CHENEY: I will look at it, but then
5 I want to hear from you, Ms. Doukas, about what we're going
6 to do about it.

7 MR. KANE: This is the June 16th, 2021 submission
8 from Klein Tools. And it states specifically that the
9 rejections understand 102 in view of Teetzel were discussed
10 but no agreement was reached. So this idea that Klein never
11 said anything in response to the examiner bringing up
12 Teetzel, and calling the holes identical on the front and
13 the back, it is simply not true, Your Honor. It was
14 discussed and it was disputed. No agreement was reached.

15 Can we go back to the slides, please.

16 CHIEF JUDGE CHENEY: So, I'm sorry.

17 MR. KANE: Yes.

18 CHIEF JUDGE CHENEY: There is nothing in the
19 evidence that you have shown me that shows that the
20 applicant disputed the particular point of the holes being
21 of identical construction, correct?

22 MR. KANE: In --

23 CHIEF JUDGE CHENEY: In your opening you said
24 that your client disputed Teetzel on many grounds, right?

25 MR. KANE: That's correct.

1 CHIEF JUDGE CHENEY: We don't know from this one
2 sentence that you have shown me whether this point about the
3 holes was disputed or not?

4 MR. KANE: It was -- it was disputed. And, in
5 fact --

6 CHIEF JUDGE CHENEY: What evidence do you have of
7 that?

8 MR. KANE: So this is actually Milwaukee's
9 Exhibit 8, Your Honor. And I'm sorry, it does not have page
10 numbers on it. So I'm going to give dates. So this is from
11 the -- it looks like the January 29th, 2021 rejection from
12 the examiner.

13 And the examiner pointed to Teetzel as part of
14 the rejection, and this is under the 102 rejection, and the
15 examiner pointed to the front receptacle contacts 126 and
16 openings 124. So that's exactly what counsel is saying was
17 not disputed.

18 And then there was a response, and this is in
19 Exhibit 8, Milwaukee's Exhibit 8, when we get to the 102
20 rejection, Klein Tools expressly disputed that Teetzel did
21 not disclose a front and rear receptacle of identical
22 construction.

23 That's in the response, Your Honor. And then
24 they go on -- they go on to explain why, Your Honor. And
25 they explain why, and it is because Figure 2 and Figure 8

1 are the front and rear connector. Not those holes that the
2 examiner pointed to.

3 So in the response, my client specifically
4 pointed to the front connector, 140, the rear connector,
5 160. So that was already being hashed out. And then the
6 examiner then rejected, again, on the same grounds, pointing
7 to the holes again. And then they had the interview.

8 CHIEF JUDGE CHENEY: If you had something about
9 your -- what your client said about the holes, I am sure you
10 would show me.

11 MR. KANE: Yes, Your Honor. But I think that is
12 our -- this is the client's response to the rejection based
13 on the holes, was to explain to the examiner that these
14 pictures on the right are the front and rear receptacle of
15 Teetzel. So that was the response.

16 CHIEF JUDGE CHENEY: And your client was silent
17 about the holes?

18 MR. KANE: I don't believe the holes were
19 specifically identified in the response, Your Honor.

20 CHIEF JUDGE CHENEY: Okay. That's the other
21 side's point. Why are you contesting that?

22 MR. KANE: The only -- I think that the -- at
23 least how I understood Milwaukee's point, what it was, is
24 that they are saying hey, in the face of being told that
25 these two things were identical on the front and back of

1 Teetzel, we didn't say anything. And my point is I don't
2 think that is correct because there was a follow-up
3 interview.

4 Then the second point, I think Milwaukee's
5 hooking on to that fact that the examiner pointed to the
6 holes in the front and back of a piece of prior art to say
7 well, then that determines the scope of the claim term
8 identical construction. And that's also a problem because
9 just because --

10 CHIEF JUDGE CHENEY: It's a different argument.

11 MR. KANE: Yeah, just because the prior art has
12 identical features, does not mean that that is the scope of
13 the claim. So those are the only two points I wanted to
14 make, Your Honor.

15 CHIEF JUDGE CHENEY: Okay.

16 MR. KANE: Then the last piece is -- and I'm sure
17 Your Honor knows this, very familiar with the law -- but if
18 you're going to base claim construction on this type of back
19 and forth with the Patent Office, it needs to be a clear
20 disavowal of the claim scope. This doesn't come anywhere
21 close to clear disavowal.

22 CHIEF JUDGE CHENEY: Thank you.

23 MR. KANE: Thank you, Your Honor.

24 CHIEF JUDGE CHENEY: Any other surrebuttal?

25 MS. DOUKAS: No, Your Honor.

1 CHIEF JUDGE CHENEY: Okay. Let's move on to the
2 next claim term, "wherein the outer shell is reversible."

3 MR. KANE: If I may just introduce our NEXT
4 advocate.

5 CHIEF JUDGE CHENEY: Yes.

6 MR. KANE: So this is Mara Greenberg. She is in
7 our New York office, sits a couple doors down from me. She
8 is a third year associate. Thank you for advocating for the
9 NEXT Advocate Program. We think it's great. This will be
10 Mara's first argument.

11 CHIEF JUDGE CHENEY: Welcome to the lectern. And
12 congratulations.

13 MS. GREENBERG: Thank you, Your Honor.

14 CHIEF JUDGE CHENEY: Please proceed when ready,
15 Ms. Greenberg.

16 MS. GREENBERG: I am going to be talking about
17 the term "wherein the outer shell is reversible." And the
18 parties' dispute here is relatively narrow. The parties do
19 agree on a number of things that reversible requires the
20 safety helmet to be usable in both the front and rear
21 orientation.

22 It is not enough to just have a safety helmet
23 that can be placed on the head one way and placed on the
24 head the other way, without regard to functionality or
25 usability. So the dispute here really boils down to what is

1 highlighted in red on the slide, does reversibility require
2 that the front and back of the safety helmet have
3 substantially the same construction, such that the user's
4 view is not obstructed.

5 And Klein Tools submits that that is not a
6 requirement of reversibility. Instead, reversible simply
7 means that the safety helmet is designed to be worn in both
8 forward and reverse orientations.

9 CHIEF JUDGE CHENEY: What do you think the real
10 -- why does this matter?

11 MS. GREENBERG: So it matters in terms of
12 validity as one point, not all helmets are reversible. So
13 in terms of the examiner citing in the prosecution history a
14 helmet that is not reversible, as disclosed in that term and
15 then some arguments that Milwaukee has made in its IPRs that
16 have been incorporated by reference into its interrogatory
17 responses in this litigation, that reversibility is
18 something that a person of ordinary skill in the art would
19 just appreciate just by looking at a safety helmet.

20 So that's one thing. And then also in terms of
21 infringement, there are some products in this case that we
22 have not accused of infringing the claims that have the
23 reversible limitation because they are not designed to be
24 reversed.

25 However, the products, some of them have brims.

1 And we think that is in conflict with Milwaukee's
2 construction here, because a brim can be construed as
3 obstructing a user's view.

4 CHIEF JUDGE CHENEY: Have you engaged with the
5 other side on that point that the brim is obstructing the
6 user's view in a way that makes it not reversible?

7 MS. GREENBERG: No, we have not. But we believe
8 that's a consequence of their construction that it would
9 read out the preferred embodiment in the specification,
10 which is shown as having a brim.

11 CHIEF JUDGE CHENEY: So I get that if you were
12 trying to apply this to the fireman's helmet that I saw in
13 my picture books when I was a kid, you would have to concede
14 that's not reversible because if you turn it around, that
15 long flap would block you from seeing anything. So it is
16 not reversible.

17 But I don't think that's what anyone is arguing
18 in this investigation, so that's why I am wondering why
19 we're having a dispute about this claim term. It seems like
20 the idea of a brim is not something that defeats
21 reversibility.

22 And I understand that that might be something for
23 me to ask the other side about, but I'm just letting you
24 know, that's what -- as I read the briefs, that's what I am
25 concerned about is that it seems like the parties are

1 actually quite close to a construction and I am not quite
2 sure why we're fighting about this obstructed view issue.

3 More of a statement than a question to you. I
4 will let you take a minute to absorb that.

5 MS. GREENBERG: Sure, sure. And I don't want to
6 speak for the other side as well, so they will address this
7 too, I'm sure, when they are up too, but prior to this
8 hearing, they did ask, Milwaukee asked if we would be
9 amenable to dropping this term. And we asked if they would
10 adopt our proposed construction, and there was some
11 disagreement about that. They said no, and that they would
12 proceed with their own construction.

13 So that's really why this is still in dispute.

14 CHIEF JUDGE CHENEY: But there was some
15 negotiation or an attempt at negotiation?

16 MS. GREENBERG: Yes, a little bit of an attempt
17 at negotiation, correct.

18 CHIEF JUDGE CHENEY: Thank you. That's very
19 helpful context. Please proceed.

20 MS. GREENBERG: So the plain meaning of
21 reversible here just designed to be reversed is clear from
22 both the claims and the specification. So this is an
23 excerpt of claims 1 and 8. These are the only claims in the
24 '327 patent where reversible appears. And it does not
25 appear in the claims of the '265 patent, which is the other

1 patent that's relevant to the safety helmets.

2 So the claim describes wherein the outer shell is
3 reversible and then the front side or the rear side is
4 oriented above the face of a user. And the specification
5 also bears this out, describes two examples.

6 So there is the safety helmet worn in a standard
7 orientation. That is the frontward orientation. And it is
8 depicted with a brim here. So then it moves on to
9 describing the safety helmet in its reverse orientation.
10 The brim is only on the front. So in the reverse
11 orientation, the brim is oriented towards the back of the
12 user. It is no longer oriented to the front.

13 In both of these examples, it describes the
14 safety helmet as being usable in both of these orientations,
15 specifically with respect to the accessory device that you
16 see depicted in this embodiment and how it is able to
17 illuminate the area in front of a user. So this helmet is
18 designed to be worn in both the forward and the reverse
19 orientations.

20 And Klein Tools' construction also is in accord
21 with the meaning of reversible found in various
22 dictionaries, which requires that an object is able to be
23 reversed, turned the other way. So as we have said before,
24 we're not contending that that's the only requirement of the
25 claims here.

1 However, this is good evidence that Klein Tools'
2 claim construction is in accordance with the plain and
3 ordinary meaning of reversible.

4 So I previewed this a little bit earlier, but we
5 believe that Milwaukee's construction, the front and back of
6 the outer shell, have substantially the same construction,
7 such that the user's view is not obstructed is reading out
8 the preferred embodiment shown on the screen here.

9 In the patent, the preferred embodiment is
10 depicted as having a front brim, which we have colored in
11 purple, and it is not depicted as having a brim in the rear.
12 So the front and the rear of the helmet are of different
13 constructions. They are not of substantially the same
14 construction.

15 And the provisional, to which the '327 patent
16 claims priority, and this provisional is also incorporated
17 by reference into the specification, it describes this as an
18 intentional difference. So it says the reverse orientation
19 is often advantageous in situations requiring the user of
20 the safety helmet to look upward unobstructed by the brim of
21 the helmet.

22 So a brim doesn't fully obstruct a user's view,
23 of course, but it does impact how much a user can look
24 upwards; whereas if there's no brim on the safety helmet
25 like there is in the rear, then it does not impact the

1 user's view looking upwards.

2 And then the second part of Milwaukee's
3 construction, which is such that the user's view is not
4 obstructed, is in conflict as well. So the claims recite
5 that the safety helmet has a brim and the brim is disposed
6 to be above the face of a user in the forward orientation.

7 So the brim, like I mentioned before, is
8 something that could obstruct a user's view. This is just a
9 visual depiction of how the view could be obstructed, when
10 the brim is oriented forward and it does not have the same
11 obstruction when the helmet is used in its reverse
12 orientation.

13 And as Your Honor knows, claim construction that
14 excludes the preferred embodiment is rarely if ever correct.

15 Then, secondarily, we also believe that
16 Milwaukee's proposed construction here adds ambiguity and
17 redundancy into the claims, so the claims already recite
18 that the front or rear side of the safety helmet is oriented
19 above the face of the user when worn in both the front and
20 rear orientations.

21 So this already provides that since the helmet is
22 above the face of a user, that it is not fully obstructing
23 the user's view. So it's unclear because of the
24 requirements of the claim what if anything Milwaukee's
25 limitation, the user's view adds here. And instead it

1 renders the claims a bit ambiguous.

2 And now I just briefly want to discuss one of the
3 arguments in Milwaukee's brief, which is based on the
4 Teetzel reference, as with the last term that was discussed.

5 So Milwaukee argues that Klein's arguments
6 distinguishing Teetzel during prosecution support
7 Milwaukee's construction. And we do not believe they do.
8 So this is the safety helmet of Teetzel. It is a helmet for
9 use in military or police applications.

10 So here this is the applicant's April 7th, 2021
11 office action response. And the applicant specifically
12 called that out in the bottom highlighted portion. So
13 Teetzel is a combat or law enforcement helmet. And the
14 reason that the back extends so far down is to protect a
15 user's neck.

16 So if the helmet is protecting a user's neck, if
17 it is turned the other way, then that portion of the helmet
18 is likely going to be over the face, obstructing the user's
19 view over the eyes, probably as well. This is an example of
20 a helmet that is not designed to be turned around. It is
21 only designed to be worn in one orientation.

22 And so in this office action response, that is
23 what the applicant was pointing out to the examiner. It was
24 not saying that the requirements of reversibility are
25 non-obstruction of a user's view, for example, or

1 substantially the same construction in the front and back of
2 the helmets.

3 And that is all I have for this term. And I am
4 happy to answer any questions that Your Honor has.

5 CHIEF JUDGE CHENEY: Would the Complainant be
6 amenable to removing the word "designed" from their
7 construction and substitute something like "wherein the
8 outer shell is configured to allow forward and reverse
9 orientations"?

10 MS. GREENBERG: Yes, that's fine.

11 CHIEF JUDGE CHENEY: Thank you. That's all the
12 questions I have.

13 MS. ROBERTS: Good afternoon, Your Honor,
14 Stephanie Roberts on behalf of Milwaukee.

15 CHIEF JUDGE CHENEY: Good afternoon, Ms. Roberts.

16 MS. ROBERTS: I just wanted to go back to whether
17 this claim or claim term is relevant and the dispute over
18 that. So originally, during -- or the original infringement
19 contentions by Klein said all accused products infringe
20 claims 1 and 8, all accused helmet products.

21 They subsequently amended their contentions to
22 say that Milwaukee's safety helmets only infringe claims 16
23 and 17, which don't have the reversible term in them.
24 Milwaukee's safety helmet has this brim and then it extends
25 lower on the side. So during the briefing, Klein confirmed

1 that they were only accusing the safety helmets of
2 infringement of claims 16 and 17.

3 Once we finished the briefing, we proposed or
4 this week we proposed dropping the reversible term because
5 Klein is no longer accusing the safety helmets of claims 1
6 and 16. They responded with would we accept their
7 construction.

8 We countered with, we proposed, you know, the
9 reason we proposed dropping this term is because they are no
10 longer accusing the safety helmet of claims 1 and 8, and if
11 they are no longer accusing -- the safety helmet of claims 1
12 and 8, we don't think it is relevant but we wanted assurance
13 they weren't going to change their infringement contentions
14 and then assert that claims 1 and 8 now cover, based on
15 their construction, now cover the safety helmet.

16 They declined our offer. So we don't think it is
17 relevant but we want to, you know, we don't want to be in a
18 situation where they get their construction and say: Oh,
19 well now we accuse the safety helmets of infringement of
20 claims 1 and 8.

21 CHIEF JUDGE CHENEY: Are there any products that
22 remain accused in the infringement contentions of claims 1
23 and 8?

24 MS. ROBERTS: Yes.

25 CHIEF JUDGE CHENEY: What are those products?

1 MS. ROBERTS: The hard hats.

2 CHIEF JUDGE CHENEY: Okay. So there's been some
3 clarification among the parties about which products are
4 accused of infringing which claims, but I assume -- and you
5 can correct me if I am wrong -- that the reversibility is
6 not a defense for the hard hats; is that right?

7 MS. ROBERTS: That is correct.

8 CHIEF JUDGE CHENEY: Okay. Just in the event
9 that it might save us a bunch of oral argument time, I am
10 going to check in with the Complainant now to see if there's
11 still a material dispute because is it your understanding,
12 Ms. Roberts, that there is no material dispute about this
13 claim term anymore?

14 MS. ROBERTS: Assuming that -- well, I think it
15 depends because if they get their construction, and then are
16 going to change the infringement contentions, then I think
17 there are -- there is a material dispute about this.

18 CHIEF JUDGE CHENEY: Yeah. But if the
19 infringement contentions remain as they are, where only hard
20 hats are accused of infringing claims 1 and 8 of the '327
21 patent, and the only claims asserted against the safety
22 helmet are claims 16, then there is no material dispute
23 about the meaning of whether the outer shell is reversible?

24 MS. ROBERTS: That is correct.

25 CHIEF JUDGE CHENEY: Okay. Let me check in with

1 Complainants.

2 Who will address this for Complainants?

3 MR. KANE: Ms. Greenberg.

4 CHIEF JUDGE CHENEY: Ms. Greenberg, you can do it
5 from your location there if you will turn on your
6 microphone, please.

7 MS. GREENBERG: Sure.

8 CHIEF JUDGE CHENEY: So am I understanding
9 correctly that Complainants have waived -- waiver is knowing
10 and voluntary -- any assertion of claims 1 and 8 against the
11 safety helmet made by Milwaukee? Is that correct?

12 MR. KANE: Your Honor, given that question, I'll
13 handle this one.

14 CHIEF JUDGE CHENEY: Okay.

15 MR. KANE: Sorry, Ms. Greenberg.

16 We will not be asserting the claims that require
17 reversibility. And I don't have the numbers in front of me
18 right now, but we're not going to be accusing this style of
19 safety helmet of infringing those claims from Milwaukee.
20 The reason I can't give you a definitive list, Your Honor,
21 is because we do have a stipulation about
22 representativeness.

23 And so the climber-style helmets with the brim,
24 we will not be asserting that Milwaukee infringes the claims
25 that require reversibility. I can confirm that. And if

1 Your Honor -- for this investigation, they can be waived or
2 considered waived, but I just -- because I don't have the
3 model numbers in front of me, I don't want there to be any
4 confusion because there are some styles of helmets that --
5 it's a long list. And so I don't want there to be any
6 confusion down the road.

7 I am happy to confer with the other side on this.

8 CHIEF JUDGE CHENEY: Okay. I'm not going to
9 invest any more effort unless you can show me today that
10 there's a material dispute. And it sounds like you can't.

11 MR. KANE: Your Honor, there is a material
12 dispute. And it has to do with validity. Here Milwaukee is
13 relying on a style of helmet that is not reversible as a
14 basis for invalidity for the reversibility claims. And
15 that's why this claim term is going to come up later in the
16 case.

17 CHIEF JUDGE CHENEY: Are they relying on it for
18 103 or 102?

19 MR. KANE: I believe it is a 103 reference, Your
20 Honor.

21 CHIEF JUDGE CHENEY: So, again, I guess I will
22 ask them if they are saying that the reference teaches
23 reversibility or if they are relying on a different
24 reference for that?

25 MR. KANE: Thank you, Your Honor.

1 CHIEF JUDGE CHENEY: Ms. Roberts, or someone on
2 your team, do you want to address that?

3 MS. ROBERTS: Can we just confer really quickly?

4 CHIEF JUDGE CHENEY: Yes, absolutely.

5 MS. ROBERTS: Okay.

6 CHIEF JUDGE CHENEY: Maybe we confer over lunch
7 for 30 minutes. How does that sound?

8 MS. ROBERTS: That works, Your Honor.

9 CHIEF JUDGE CHENEY: We're off the record for 30
10 minutes.

11 (Whereupon, at 12:31 p.m., a lunch recess was
12 taken.)

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1 A F T E R N O O N S E S S I O N

2 (1:05 p.m.)

3 CHIEF JUDGE CHENEY: Please take your seats.

4 We're back on the record now in the 1442
5 investigation, after having taken a lunch break in this
6 claim construction hearing.

7 Before the break, the parties were talking about
8 the claim term "wherein the outer shell is reversible." And
9 there was some discussion about whether this dispute remains
10 material, given some of the infringement contentions and
11 validity contentions.

12 Ms. Roberts, do you have an update for me on
13 anything that might have been discussed during the break?

14 MS. ROBERTS: Yes, Your Honor. The parties, I
15 guess, still have a dispute. Milwaukee believes that there
16 is no claim construction dispute. There are two references
17 that Milwaukee -- or two primary references that Milwaukee
18 is advancing in this case that we claim teach reversible.
19 Klein disagrees that these are -- that these two references
20 teach reversible.

21 We don't believe that claim construction is at
22 issue. We believe that this is a factual issue, whether or
23 not these references teach a reversible helmet.

24 CHIEF JUDGE CHENEY: Okay. Do the references
25 have brims? Is that part of the dispute on the references?

1 MS. ROBERTS: No. That's not the dispute on the
2 -- about the references, as far as I'm aware.

3 CHIEF JUDGE CHENEY: Okay.

4 MS. ROBERTS: I think the primary one that we're
5 looking at does not have -- or it has brim, like a small
6 brim.

7 CHIEF JUDGE CHENEY: And so I'm trying to
8 understand how the brim construction proposed by Milwaukee,
9 this part about the user's view not being obstructed,
10 remains live. From your perspective, it doesn't?

11 MS. ROBERTS: We weren't proposing that the rear
12 side have a brim. That wasn't contemplated, and we didn't
13 believe that our construction was contemplating a brim on
14 the rear side. What we were -- because we didn't say it was
15 identical construction, we didn't view our construction as
16 requiring a brim and still don't view our construction as
17 requiring a brim.

18 It was -- the issue we were having was that
19 during prosecution, they had said that a reference, the
20 Teetzel reference, as you saw, that had a rear portion that
21 hung down, and our concern was that they were going to then,
22 you know, turn around and then accuse the safety helmets
23 that come down, that have the extension down, of
24 infringement.

25 CHIEF JUDGE CHENEY: Let me take it from this

1 direction. I'm going to read a construction and I'm going
2 to ask if your side can agree to it. It's not meant to be
3 that different than Complainant's construction.

4 You heard me discuss with the Complainant that I
5 wanted to get rid of the word "designed" in the
6 construction. So what I'm going to propose is: Wherein the
7 outer shell is configured to allow both forward and reverse
8 orientations.

9 I'll read it one more time. Wherein the outer
10 shell is configured to allow both forward and reverse
11 orientations.

12 MS. ROBERTS: Your Honor, we still believe that
13 that is a little too broad because it basically doesn't --
14 the functionality of when you put it on in forward and
15 reverse is to make sure it's not obstructing the user's
16 face. And then that's why we think it's a little broad, a
17 little too broad.

18 CHIEF JUDGE CHENEY: But if the other side is not
19 going to be accusing the safety helmets of infringement, do
20 you need that in there still?

21 MS. ROBERTS: For this proceeding, Your Honor,
22 we're okay with that construction. We're just concerned
23 about, you know, other products that are not at issue,
24 currently at issue, in this investigation. Or in another
25 proceeding, that it might come out that this is the

1 construction.

2 CHIEF JUDGE CHENEY: Okay. Then I think we need
3 to have more conversation. And what I'd like to talk
4 about -- it sounds like you're backing away from having
5 substantially the same construction. You're backing away
6 from that part of your --

7 MS. ROBERTS: Yes, Your Honor.

8 CHIEF JUDGE CHENEY: -- your construction?

9 MS. ROBERTS: Yeah. That was not intended to
10 require a brim. It was just intended to convey, basically,
11 that -- I don't think -- I think this kind of goes to the
12 negative limitation, that it wasn't accused -- or that it
13 wasn't going to have part of the shell that came down over
14 the eyes, if you reversed it.

15 CHIEF JUDGE CHENEY: Okay. So now this part
16 about such that the user's view is not obstructed --

17 MS. ROBERTS: Yes.

18 CHIEF JUDGE CHENEY: -- the dispute here seems to
19 be about a degree of obstruction, right? The reason a brim
20 is useful is because it obstructs a little bit of sunlight,
21 right?

22 So -- but it sounds like you don't mean to
23 exclude brims.

24 MS. ROBERTS: That is correct, Your Honor.

25 CHIEF JUDGE CHENEY: So how can we capture what

1 you need from this claim language, you know, in a less
2 objectionable way to Complainants? It may not be possible.
3 Maybe I'm just going to have to come up with something on my
4 own, if the parties can't agree.

5 Can you try pitching for me one more time why you
6 need this language about the user's view not being
7 obstructed?

8 MS. ROBERTS: I mean, we think that -- we think
9 that that's consistent with the claim language -- or with
10 the intrinsic evidence. The specification talks about
11 acknowledging that a user would need a clear view and the
12 helmet is in the rear configuration because it would
13 illuminate -- you could have a headlamp on there and it
14 would illuminate in front of the user.

15 The provisional discussed the -- discussed
16 reversibility as being advantageous, because in situations
17 where the user looks upward unobstructed by the brim of the
18 helmet or to increase the user's field of vision.

19 The prosecution history, they also, you know, in
20 arguing that Teetzel did not disclose a reversible helmet,
21 argued that the brim of the helmet was raised in the front
22 and drops towards the back such that if the helmet was worn
23 in the reversed position, that the helmet would obstruct the
24 user's view. So that's -- we think it's consistent with the
25 intrinsic evidence.

1 CHIEF JUDGE CHENEY: Under Milwaukee's proposed
2 construction, would a brim on the back of the outer shell be
3 beyond the scope of the claims? In other words, a brim on
4 the front and a brim on the back. Is that outside the scope
5 of the claims?

6 MS. ROBERTS: I think that's still within the
7 scope of the claims.

8 CHIEF JUDGE CHENEY: Even though under your
9 construction, the brim on the back would obstruct the view a
10 little bit?

11 MS. ROBERTS: Correct. But I think -- I mean, I
12 don't think -- yeah, I don't think that would be outside the
13 scope of the claims, though.

14 CHIEF JUDGE CHENEY: I think that that's the
15 dispute, but I'm not sure. What if -- I'm going to pitch
16 something to the other side, but -- and I think it's within
17 the scope of what you're arguing.

18 What if the phrase was: Such that the user's
19 view is not obstructed more than by a brim when the outer
20 shell is oriented frontwards or backwards?

21 I'll read it one more time so you can write it
22 down and think about it. Milwaukee's proposed construction,
23 with my modification, would read: Wherein the front and
24 back of the outer shell -- well, let me try again.

25 It would just say: Wherein the user's view is

1 not obstructed more than by a brim when the outer shell is
2 oriented frontwards or backwards.

3 I'll read it one more time. Wherein the user's
4 view is not obstructed more than by a brim when the outer
5 shell is oriented frontwards or backwards.

6 Could Respondents live with that?

7 MS. ROBERTS: I think that gets us closer. I
8 think the issue is the degree of the brim. You had brought
9 up the fire, you know, the fireman's helmet where if it's,
10 you know, the very large helmet, then it -- or the very
11 large brim, so I think then it kind of puts in a degree.

12 I think this is the problem we were having when
13 we were coming up with a construction of trying to get
14 negative limitations.

15 CHIEF JUDGE CHENEY: Um-hum. Any other proposals
16 that the parties might have that you think both sides could
17 agree to?

18 MR. KANE: I think what Your Honor just
19 suggested, if it was combined with Your Honor's earlier
20 statement of "wherein the outer shell is configured to be
21 worn by a user in both the forward and reverse
22 orientations," plus the part about the view not being
23 obstructed by more than a brim, I think we could be okay
24 with that because the part that I think we're -- that was in
25 our construction that's missing from just the brim piece is

1 that it's configured to be worn both in the forward
2 configuration and the rear, in the reverse. Does that make
3 sense, Your Honor?

4 CHIEF JUDGE CHENEY: It does. Do you have any
5 ideas about how we can get beyond the fireman's helmet
6 problem?

7 MR. KANE: What about, instead of referencing the
8 brim, we just say such that in the reverse configuration,
9 the view is not completely obscured? So it would go further
10 to say, you know, you -- it doesn't identify a brim per se,
11 just saying in the reverse orientation, the user's view is
12 not completely obscured, plus the configured part that I had
13 mentioned earlier?

14 CHIEF JUDGE CHENEY: What about stating it in the
15 positive, that the user's view is functional?

16 MR. KANE: I think we'd be okay with that, Your
17 Honor, if it was both wherein the outer shell is configured
18 to be worn in both the forward and reverse orientations, and
19 the user's view --

20 CHIEF JUDGE CHENEY: Remains functional?

21 MR. KANE: Remains functional. I think we could
22 live with that.

23 CHIEF JUDGE CHENEY: And then it will just be a
24 fact question from there?

25 Okay. I put some language together, and I'd like

1 to hear objections to it, if there are any: Wherein the
2 outer shell is configured to allow forward and reverse
3 wearing orientations, and the wearer's view remains
4 functional in both orientations.

5 I can read that one more time, if you'd like.

6 MR. KANE: Your Honor, speaking on behalf of
7 Klein Tools, I think our only objection to Your Honor's
8 proposal would be "to allow," and we would propose changing
9 that to "for."

10 CHIEF JUDGE CHENEY: Okay.

11 MS. ROBERTS: Your Honor, I think we have an
12 objection to the change of "for." We don't believe that
13 that narrows the dispute.

14 The other concern that we have is the functional
15 piece of it and how if we don't have a prior art -- we just
16 have a prior art reference, we don't have the actual device,
17 how do we prove that it's functionally or not --

18 CHIEF JUDGE CHENEY: Whether the wearer's view
19 remains functional in both orientations?

20 MS. ROBERTS: Yes. Like how we prove that, then.

21 CHIEF JUDGE CHENEY: I suppose it would be a fact
22 question about what is disclosed to a person of skill in the
23 art in the prior art. It may be that you can't reach
24 agreement. I wanted to try to do so in case it would help
25 narrow the issues in the case, but maybe we've gone as far

1 as we can go.

2 MS. ROBERTS: And maybe this is something we
3 could talk off-line and come back to Your Honor if we can
4 come to an agreement?

5 CHIEF JUDGE CHENEY: I'm happy to do that. I can
6 defer making a determination on this until we see how the
7 case develops.

8 MR. KANE: Your Honor, I'm happy to, you know,
9 have another try at conferring on this issue.

10 CHIEF JUDGE CHENEY: Okay.

11 MR. KANE: Our only concern would be that once we
12 get into expert -- you know, to the extent Your Honor is
13 inclined to issue a decision on claim construction prior to
14 expert reports, then it would be helpful, I think, to the
15 parties to crystallize the meaning of the term, but I'm more
16 than happy to meet with Milwaukee's counsel and continue to
17 discuss.

18 CHIEF JUDGE CHENEY: I appreciate everyone's
19 willingness to keep talking. It sounds like there's not
20 much more for us to talk about at this juncture. Is that
21 correct, Ms. Roberts?

22 MS. ROBERTS: That's correct. Unless Your Honor
23 has additional questions.

24 CHIEF JUDGE CHENEY: Mr. Kane?

25 MR. KANE: That's correct, Your Honor.

1 CHIEF JUDGE CHENEY: Okay. Just -- I think you
2 are all smart enough to know where I'm headed. So I hope
3 that helps you.

4 Let's move on then to "protruding nub."

5 MR. BRIEN: Good afternoon, Your Honor. Calvin
6 Brien on behalf of the Respondent, Milwaukee.

7 CHIEF JUDGE CHENEY: Good afternoon, Mr. Brien.
8 As I've done with your colleagues, it will be helpful for me
9 to start by understanding the difference between your
10 constructions and why it matters.

11 MR. BRIEN: Certainly, Your Honor. If we could
12 turn to slide -- it's just taking a moment to come up here.
13 There it is. Yes, Your Honor. I can kind of cut to the
14 chase here. On slide 46, the parties have two overarching
15 disputes here.

16 The first dispute is whether the terms
17 "protruding nub" and "stop" should be construed to have the
18 same meaning. And Milwaukee's position is that the terms
19 should be construed to have the same meaning because Klein
20 equated the two terms with each other in the intrinsic
21 record.

22 The second overarching dispute is about the
23 specific constructions of these terms. Milwaukee proposes
24 that the term should be construed to mean a small bump
25 extending outwardly, which in our view is consistent with

1 the intrinsic and extrinsic evidence.

2 So to your question, before I walk through that
3 evidence, why do these disputes matter? The reason the
4 parties' disputes are important is because Klein asks Your
5 Honor to change the meaning of the terms "protruding nub"
6 and "stop" to actually mean the opposite of what Klein
7 claimed and described throughout the intrinsic record to try
8 and capture one of its domestic industry products.

9 Klein's proposed constructions, which are shown
10 here on blue, on slide 46, would cover structures that do
11 not protrude or extend outwardly at all. Klein's
12 construction would cover structures that extend inwardly,
13 which is the opposite of how Klein described these terms in
14 the patents, as I can explain in a minute.

15 And as we see here at the bottom of this slide,
16 Klein's goal here appears to be to try and capture one of
17 its domestic industry -- or its domestic industry products,
18 which is shown in Respondent's Exhibit 12. This here is a
19 zoomed-in image of one of those helmets, one of the domestic
20 industry helmets. As you can see from this angle in the
21 image, Klein's helmets actually include a recess that
22 extends inwardly toward the interior of the helmet and does
23 not protrude or extend out at all. And this is contrary to
24 the intrinsic evidence.

25 CHIEF JUDGE CHENEY: Well, Mr. Brien, this seems

1 a bit of a straw man because if you go back to the slide,
2 you're telling me that Klein's construction that verbatim
3 says extending from a surface doesn't mean that, which
4 that's not what I read in the briefs. I don't know how you
5 got that from the briefs.

6 And then to argue that this indentation is what
7 Klein is calling a nub seems to ignore the other parts of
8 the structure that extend from the surface, consistent with
9 Klein's definition.

10 MR. BRIEN: So let me --

11 CHIEF JUDGE CHENEY: Am I completely off base?

12 MR. BRIEN: I think there is -- I have a little
13 bit of disconnect with what you just said, if I may explain.

14 So with respect to Klein's construction, Klein's
15 construction is broad enough to encompass a small structure
16 that extends in any direction at all from a surface, can
17 include inwardly, upwardly, downwardly, outwardly. We think
18 that that is far too broad and designed to kind of -- to
19 capture this recess.

20 CHIEF JUDGE CHENEY: Have you met and conferred
21 about this point and that's what they've told you?

22 MR. BRIEN: It's our -- it's actually our -- they
23 say this in their infringement contentions. They circle
24 that little nub -- sorry, they circle that little recess and
25 call it a nub. And --

1 CHIEF JUDGE CHENEY: The red circle here is
2 Klein's circle?

3 MR. BRIEN: No. This is our circle. This is a
4 sort of an angled view of one of their products from their
5 website. And this is just to highlight what they're
6 pointing to as the protruding nub.

7 CHIEF JUDGE CHENEY: Please proceed.

8 MR. BRIEN: Sure. And we disagree that the other
9 aspects that do extend outwardly on this image are a nub
10 because the patent makes clear that that is actually a small
11 bump, not a larger aspect of that external slot that you see
12 here in that image.

13 So if I may just talk -- start with the claim
14 language to kind of show you what's going on in the patent,
15 slide 47 shows the claim language of independent claim 1 of
16 the '327 patent on the left and independent claim 1 of the
17 '265 patent on the right.

18 And as we see here, what the patentee is doing is
19 actually using these terms interchangeably in the two
20 patents. Claim 1 of the '327 patent recites a protruding
21 nub that is integrally molded with the outer shell of the
22 claimed helmet, and then in the independent claim, claim 1
23 of the '265 patent, the patentee swaps the term "protruding
24 nub" for "stop."

25 So the two patents use the same surrounding claim

1 language to define the scope of the protruding nub and the
2 stop. So what this tells us is that the two terms have some
3 overlapping scope and that the patents use the terms
4 interchangeably, at least in the claims.

5 CHIEF JUDGE CHENEY: Doesn't the bulk of claim
6 construction law state just the opposite? When we have --
7 the only difference between these two claims being the words
8 "protruding nub" and the word "stop," that they're presumed
9 to have different meanings? Isn't that the legal
10 presumption?

11 MR. BRIEN: Are we talking about the doctrine of
12 claim differentiation?

13 CHIEF JUDGE CHENEY: We're just talking about the
14 doctrine of claim construction, that each word in the claim
15 is presumed to have its own meaning. And this -- these
16 words are not the same.

17 MR. BRIEN: Correct.

18 CHIEF JUDGE CHENEY: And this structure of other
19 parts of the claim look the same.

20 MR. BRIEN: Exactly.

21 CHIEF JUDGE CHENEY: And so then we get into
22 claim differentiation.

23 MR. BRIEN: Yes.

24 CHIEF JUDGE CHENEY: So I'm having trouble
25 understanding why you are beginning with a presumption that

1 they mean the same thing, when the law says we begin with a
2 presumption that they don't mean the same thing.

3 MR. BRIEN: Allow me to clarify. I am not
4 starting with the claim language in presuming that these two
5 terms have the same meaning.

6 CHIEF JUDGE CHENEY: Okay.

7 MR. BRIEN: I'm starting with the claim language
8 because that's what we do in claim construction. We start
9 with the claim language and then move on to the rest of the
10 intrinsic evidence. And when we do that here in this case,
11 turning to slide 48, during prosecution, Klein amended the
12 specification to add that term "stop."

13 And as shown here in the excerpts from
14 Respondent's Exhibit 8, Klein added that term in response to
15 an objection from the patent examiner where the examiner
16 found that the claimed "stop" needed to have adequate
17 support in the specification.

18 So the Patent Office gave Klein a specific
19 opportunity to describe the meaning and the scope of the
20 term "stop" in the specification, and in response, Klein
21 added the term "stop" to the specification only one time as
22 shown on the right-hand side of this slide. And after that
23 amendment, the specification now reads "a stop shown in the
24 preferred embodiment as a protruding nub 17."

25 So in this amendment, Klein described the stop

1 "as a protruding nub 17," thereby equating the two terms
2 with each other.

3 CHIEF JUDGE CHENEY: Doesn't the more natural
4 reading of the specification mean that the patentee thought
5 that "stop" was a genus of which "nub" is a species?

6 MR. BRIEN: We disagree with that because the
7 language "as a" indicates that the patentee is equating the
8 term "stop" with the term that follows that language "as a."

9 CHIEF JUDGE CHENEY: Then it follows from your
10 argument, that the preferred embodiment is the complete
11 scope of this part of the invention?

12 MR. BRIEN: No, Your Honor. That's certainly
13 Klein's argument. But this is not one of many embodiments
14 of "stop" disclosed in the specification. This is the only
15 place in the entire specification that Klein decided to add
16 the term "stop" and describe what it means.

17 CHIEF JUDGE CHENEY: In the Liebel-Flarsheim case
18 written by Judge Bryson in 2003, only embodiment disclosed
19 in the spec did not limit the claims?

20 MR. BRIEN: So I would have to go back and take a
21 look. I think that case might have been cited in the
22 parties' briefs.

23 CHIEF JUDGE CHENEY: It was.

24 MR. BRIEN: And I think the distinction here is
25 that the term "stop" is the only -- this is the only time in

1 the specification that the term "stop" appears.

2 CHIEF JUDGE CHENEY: Can you distinguish it from
3 Liebel-Flarsheim?

4 MR. BRIEN: Unfortunately, I did look at the case
5 before this hearing, Your Honor, and I do not recall whether
6 there was a single embodiment disclosed in the
7 specification.

8 CHIEF JUDGE CHENEY: That's what it stood for.

9 MR. BRIEN: Okay.

10 CHIEF JUDGE CHENEY: There was only one
11 embodiment disclosed, and the Respondent argued that the
12 claim was limited to the only disclosed embodiment. And the
13 court squarely rejected that.

14 MR. BRIEN: Here, Your Honor, there are actually
15 additional embodiments disclosed in this specification. But
16 Klein chose to use the word "stop," the claim term "stop"
17 once. So I'm not suggesting that the other embodiments --
18 I'm not suggesting that there's only one embodiment
19 disclosed in the specification, Your Honor.

20 In fact, if Klein wanted to, it could have used
21 those other opportunities to talk all about the scope and
22 meaning of the term "stop" in those other embodiments. It
23 chose not to do that. It chose to do it one time and
24 describe it "as a protruding nub."

25 CHIEF JUDGE CHENEY: It described one embodiment

1 as a protruding nub?

2 MR. BRIEN: Correct. One embodiment as a
3 protruding nub. There are no other references in the
4 specification about what a stop is or means.

5 So turning to slide 49, and I'd like to briefly
6 address what I anticipate Klein's argument is from the
7 briefs.

8 Klein argues that the term "protruding nub" and
9 "stop" should have different meanings because dependent
10 claim 2 here from the '327 patent on the right -- or, sorry,
11 on the left, recites that a protruding nub comprises a stop.
12 So Klein argues that the two terms have different scope
13 because this claim suggests that the term "protruding nub"
14 is broader than the claim "stop."

15 But we would submit that this ignores the
16 intrinsic evidence that we just saw where Klein was given a
17 specific opportunity from the Patent Office to describe the
18 scope of the term "stop" in the specification and chose to
19 only add the term once.

20 And, in fact, if we take a closer look at this
21 type of claim language, we see on the right-hand side of
22 this slide that this is just further evidence of Klein using
23 the terms interchangeably throughout the intrinsic record.
24 So where dependent claim 2 recites "a protruding nub
25 comprising a stop," independent claim 1 of the '265 patent

1 recites "a stop that comprises a protruding member," which
2 the patent suggests that this is just another name for a
3 protruding nub.

4 So in the asserted patents, Klein is using the
5 terms "stop" and "protruding member" or "protruding nub"
6 interchangeably, which is consistent with that specification
7 passage that we just saw earlier.

8 So if we could turn -- so that's the first
9 overarching issue, Your Honor, whether the term should be
10 construed to have the same meaning. I'd like to move on
11 to -- briefly to the parties' proposed constructions. And
12 the parties have a couple disputes over the specific
13 language of their proposed constructions.

14 And the first dispute is about the direction in
15 which the protruding nub extends. Milwaukee's proposal is
16 that the terms "protruding nub" and "stop" be construed to
17 mean "small bump extending outwardly." And this is
18 consistent with the intrinsic and extrinsic evidence.

19 So if we start with the claim language, as shown
20 in yellow on the bottom of this slide, independent claim 1
21 of the '327 patent recites that the protruding nub is
22 disposed directly onto the exterior surface of the outer
23 shell. So the direction in which the protruding nub extends
24 is outwardly, because that is the direction from the
25 exterior surface on which the protruding nub is directly

1 disposed, which is what the claim tells us.

2 And, moreover, the use of the word "protruding"
3 in this term indicates that the protruding nub protrudes out
4 from something. So Milwaukee includes this directional
5 aspect in its proposed construction, which is shown on
6 yellow toward the top of the slide.

7 Now, if we look at Klein's proposed
8 constructions, as shown in blue at the top of the slide,
9 Klein proposes that the direction in which the protruding
10 nub extends should be "from a surface." But as I mentioned
11 earlier, this is far too broad because it would encompass a
12 structure that extends inwardly, which is the opposite of
13 what the intrinsic record teaches.

14 CHIEF JUDGE CHENEY: You maintain that Klein
15 advances a construction of protruding nub that is not
16 protruding?

17 MR. BRIEN: Correct.

18 CHIEF JUDGE CHENEY: Continue.

19 MR. BRIEN: So if we look at the specification,
20 turning to slide 51, there are several passages that support
21 Milwaukee's proposed construction. And the first is shown
22 here, which is that same passage we saw earlier, equating
23 the term "stop" with "protruding nub."

24 And as we see in yellow at the bottom of the
25 slide, just like the claim language, the specification

1 describes the stop as a protruding nub 17 extending from the
2 surface of the hard outer shell 1 of the safety helmet 100.
3 So just like the claim language, the specification indicates
4 that the protruding nub extends from the surface of the
5 outer shell of the helmet.

6 So Milwaukee, what we're doing here is we're
7 proposing a construction that interprets these claim terms
8 in view of the specification here, so we use that language,
9 "extending outwardly," in our construction. But what Klein
10 is doing here is just importing the language verbatim from
11 the specification.

12 As we see here in blue on the slide, Klein's
13 proposed construction of "protruding nub" includes that
14 limitation extending from a surface. But that's just
15 identical -- nearly identical to the language in the
16 specification that's shown here, which describes the
17 protruding nub 17 as "extending from the surface." So we
18 think that this is an improper importation that isn't
19 warranted by any definitional language in the specification.

20 So if we turn to slide 52, I'd like to point out
21 yet another passage of the specification that supports
22 Milwaukee's proposed constructions. As we see in yellow
23 toward the bottom of the slide, this passage, which is from
24 column 4, lines 5 through 15, of the '327 patent, introduces
25 a slot 20. And it states that -- and by the way, we see the

1 slot 20 on the bottom right-hand side of the slide in Figure
2 4 from the patent. Now, this is part of the headlamp device
3 that we see in Figure 4.

4 So the specification states that a slot 20 is a
5 tapered clip 19 that receives the protruding nub 17 on the
6 outer shell 1 of the safety helmet 100 locking it into
7 place. And then the passage goes on to state that a
8 mounting bracket 4 can be detached from the front tapered
9 clip 19, which disengages the protruding nub 17 from the
10 slot to allow the headlamp 200 to be lifted out of the
11 tapered channel 16.

12 Okay. So if we unpack that a little bit and we
13 look at the figures, Figures 3 and 4, on the slide, Figure 4
14 shows that headlamp that detaches to and from the helmet
15 shown in Figure 3. And as the specification tells us, the
16 way in which this headlamp attaches and detaches to and from
17 the helmet is through that slot, 20, that both receives the
18 protruding nub 17 and then disengages the protruding nub 17.

19 And this is important because the only way in
20 which a slot can receive the protruding nub is if the
21 protruding nub extends outwardly such that it fits into the
22 slot. So this is consistent with Milwaukee's proposed
23 construction.

24 Turning to slide 53, I'd like to address the
25 other aspect of the parties' proposed constructions and that

1 is the dispute that the parties have about the structure
2 that should be included within the scope of these terms. As
3 shown in yellow on the top of this slide, Milwaukee proposes
4 that the structure of the protruding nub and stop be
5 construed as a small bump. And this is consistent with the
6 intrinsic evidence and the extrinsic evidence. And I'll go
7 through briefly just those pieces of evidence here. As
8 shown in Figure 3 --

9 CHIEF JUDGE CHENEY: Just so I know, you're
10 contending that there's some big material difference in this
11 case between the word "structure" and "bump"? And I should
12 make that distinction now and it's going to resolve some
13 disputes?

14 MR. BRIEN: I think there is -- I think there is
15 a dispute, Your Honor, because -- and I go back to this
16 redefinition of "protruding nub," which Klein is trying to
17 do. They're trying to capture something that extends
18 inwardly. And this is evidence of that.

19 So to resolve this dispute, we propose not
20 reading out the protruding aspect of a protruding nub, but
21 actually proposing some kind of language that helps define
22 what a protruding nub is.

23 CHIEF JUDGE CHENEY: So is this part of your
24 argument the same as the other part of your argument? If
25 the goal is extending outward, and that's what you mean,

1 you've already gone over that.

2 MR. BRIEN: Right.

3 CHIEF JUDGE CHENEY: And we have two words in
4 your construction that say "extend outward." Is "bump" just
5 redundant, you're just belts and suspenders here? Or is
6 there a difference between "bump" and "structure"?

7 MR. BRIEN: There's a --

8 CHIEF JUDGE CHENEY: That's not captured by
9 "outwardly."

10 MR. BRIEN: I think I follow. Well, I think that
11 we also use the term "small" in the language.

12 CHIEF JUDGE CHENEY: Both parties do.

13 MR. BRIEN: Yes, but not --

14 CHIEF JUDGE CHENEY: Is there a dispute in that?

15 MR. BRIEN: Is there a dispute --

16 CHIEF JUDGE CHENEY: In the use of the word
17 "small"?

18 MR. BRIEN: Oh, of course not. No, no, no.

19 CHIEF JUDGE CHENEY: Okay.

20 MR. BRIEN: Not with protruding nub. With the
21 term "stop," the parties do have a dispute about that
22 because we use "small" and they don't. They just say
23 "structure." We say "small bump."

24 So that -- maybe I should focus more on the term
25 "stop" here.

1 CHIEF JUDGE CHENEY: Well, if you're just saying
2 that you're construing "protruding nub" as small bump
3 extending outwardly because you want to reinforce extending
4 outwardly, then that's what I'm trying to figure out. Why
5 do we have this redundant language in your construction?
6 And if there's meaning, tell me what the meaning is.

7 MR. BRIEN: Right. The meaning or the reason
8 that we're fighting about this is because Klein's
9 infringement -- or Klein's domestic industry contentions
10 suggest that the -- their contentions are not limited to
11 that recess. Their contentions are broad enough to cover
12 other aspects of the external slot.

13 And let me just go back to the image of their
14 helmet. So --

15 CHIEF JUDGE CHENEY: "External slot" is an
16 entirely different term for construction, right?

17 MR. BRIEN: That's correct. So I'm sort of less
18 focused on the slot itself and the pieces that are inside
19 the slot, the structure that is inside the slot, which goes
20 to these terms.

21 So Klein is accusing -- or is asserting both that
22 the recess is a protruding nub and also that the structure
23 around the recess is a protruding nub. So we think that the
24 term "small bump" helps clarify, consistent with the patent,
25 that the protruding nub covers only a small bump inside the

1 external slot.

2 In Figure 3, protruding nub 17 is that tiny sort
3 of rectangular shape that is in the middle or centrally in
4 the external slot. And so we're trying to clarify what the
5 patentee in our view clearly intended to capture with the
6 term "protruding nub." Does that help?

7 CHIEF JUDGE CHENEY: I'm trying to understand why
8 the words that you propose are better than the words in the
9 claim for resolving the dispute. And I'm trying to decide
10 if "small bump" means something different to you than
11 "extending outwardly"? And if it doesn't mean something
12 different, why do we have these words in your construction?

13 MR. BRIEN: And what I'm trying to articulate is
14 that we do think that "small bump" does add something
15 material to the construction.

16 CHIEF JUDGE CHENEY: What is that thing?

17 MR. BRIEN: By use of the word "small."

18 CHIEF JUDGE CHENEY: But they also use the word
19 "small."

20 MR. BRIEN: They do there, but they don't in the
21 construction for the term "stop."

22 CHIEF JUDGE CHENEY: Okay. So that means that
23 there's a dispute about "stop" that differs from the dispute
24 about "protruding nub"?

25 MR. BRIEN: That particular dispute does differ

1 between the two terms, correct.

2 CHIEF JUDGE CHENEY: Because you think that
3 they're going to read their construction on something that
4 that's not small?

5 MR. BRIEN: Correct.

6 CHIEF JUDGE CHENEY: You've seen that in the
7 development of the record of this case?

8 MR. BRIEN: I have seen that their domestic
9 industry contentions are broad enough to cover not just that
10 recess inside the external slot but also the structure
11 around the recess.

12 CHIEF JUDGE CHENEY: Which you contend is not
13 small?

14 MR. BRIEN: We contend that it's not a small
15 bump.

16 CHIEF JUDGE CHENEY: So does the word "small" add
17 anything?

18 MR. BRIEN: We --

19 CHIEF JUDGE CHENEY: We can fight all day
20 about --

21 MR. BRIEN: Right.

22 CHIEF JUDGE CHENEY: -- how to come up with some
23 philosophical, ultimate way to describe the scope of the
24 claims. But at the end of the day, I need to be convinced
25 that a construction helps resolve a dispute.

1 And if a construction does not help resolve a
2 dispute, I'm not inclined to adopt it, because we have the
3 words of the patent themselves, which those are good words,
4 they're the words that the office issued, and so if you
5 can't convince me that your construction resolves a dispute,
6 then I'm not inclined to adopt it.

7 MR. BRIEN: And, Your Honor, I appreciate that.
8 And we also struggled with coming up with a word or a phrase
9 that could be used to describe the structure of what we're
10 talking about here.

11 CHIEF JUDGE CHENEY: Maybe that's because this is
12 not a claim construction dispute at all. This is a factual
13 dispute that you have with the other side, and everyone
14 actually knows what a protruding nub is and everyone knows
15 what a stop is.

16 And you want to convert the factual dispute into
17 a claim construction dispute. And then it becomes very
18 difficult. Do you think that that's possible?

19 MR. BRIEN: I don't think that is our intent,
20 Your Honor.

21 CHIEF JUDGE CHENEY: Okay.

22 MR. BRIEN: Of course not. We do think that the
23 parties don't -- I mean, I do think that there's very little
24 dispute about the term "small." It appears in one side's
25 construction for "protruding nub," and it appears in both of

1 our constructions of "protruding nub."

2 CHIEF JUDGE CHENEY: Stated differently, if we
3 left it out, if we left the word "small" out of your
4 construction, would there be any problem? Out of both of
5 them. I know -- I understand you want to be consistent
6 between these two terms. But does the word "small" add
7 anything to either of them?

8 MR. BRIEN: I think that it's really tough to
9 answer that because of the other side's contentions that
10 have been submitted in the case, particularly the domestic
11 industry contentions. And I just don't know how broad
12 they're going with this off the top of my head.

13 But I do think that --

14 CHIEF JUDGE CHENEY: For it to be material, you
15 would have to argue that the thing that they've pointed to
16 is not small. Is that your understanding? The feature that
17 they've pointed to in the domestic industry device is not
18 small. And that's why you want it in the claim
19 construction.

20 MR. BRIEN: Your Honor, I think that the reason
21 that we wanted it in the claim construction is to help
22 clarify this issue that the parties appear to be disputing
23 in the technical domestic industry side of the case. So I
24 think, conceptually, the answer to your question is probably
25 yes, because I think that, yes, we would still need to point

1 to something -- or we would need to argue that what they're
2 pointing to is not small, because it wouldn't cover the
3 construction if "small" was, of course, adopted as a
4 construction.

5 CHIEF JUDGE CHENEY: Okay. Continue.

6 MR. BRIEN: And so just jumping ahead briefly, I
7 think that's really mostly everything I wanted to cover,
8 Your Honor, just except for the -- we did identify an
9 extrinsic source, a dictionary definition, that does, in
10 fact, use the word "small" to define a nub. And that's just
11 another piece of evidence that we felt justified the use of
12 the word "small."

13 And so with that --

14 CHIEF JUDGE CHENEY: But I don't think anyone is
15 disputing that a protruding nub is small. So I wonder why
16 we're proposing constructions that include that when the
17 words of the patent itself, no one disputes. Like -- the
18 temptation to just argue for the sake of argument because
19 your opponent said something is very strong in claim
20 construction. I get that.

21 But I don't hear anyone saying no, the protruding
22 nub that we're going to point to in this case in the prior
23 art or in the accused device or in the domestic industry
24 product is actually -- it's giant, so we need to make sure
25 that you understand, Your Honor, that what the patent means

1 when it says "protruding nub" is something small.

2 And I don't hear that dispute. That's all I'm
3 bringing up.

4 MR. BRIEN: I understand. I think that it's --

5 CHIEF JUDGE CHENEY: And if everyone understands
6 it's small, then why are we fighting about it?

7 MR. BRIEN: I don't want to belabor this much
8 further, but I just wanted to point out that I think it's
9 extra-complicated for these two terms because of the
10 interchangeability of the two terms, "protruding nub" and
11 "stop." So perhaps that's -- because the two terms were
12 used interchangeably, we are construing the term "protruding
13 nub," and so it has to have the same meaning as the term
14 "stop."

15 And so we are using that term "small" in both of
16 the constructions for that reason. And so perhaps that's
17 adding to the challenge here with this particular
18 terminology.

19 CHIEF JUDGE CHENEY: Is it possible that the term
20 "stop" and the term "nub" are two overlapping circles in a
21 Venn diagram?

22 MR. BRIEN: That is --

23 CHIEF JUDGE CHENEY: And neither circle totally
24 encompasses the other.

25 MR. BRIEN: That is in our view not the case with

1 this particular intrinsic record, because the patentee
2 repeatedly used the terms interchangeably and described the
3 term "stop" one single time in the entire specification
4 after having -- given the opportunity to describe it a
5 multitude of ways.

6 The patentee chose to describe it "as a
7 protruding nub."

8 CHIEF JUDGE CHENEY: That's not contrary to my
9 Venn diagram theory. My Venn diagram theory is completely
10 consistent with that statement. Right?

11 MR. BRIEN: If the Venn diagram overlaps
12 100 percent, then I agree with you.

13 CHIEF JUDGE CHENEY: And if it doesn't, you
14 disagree? Even though one of the claims calls one a subset
15 of the other and the other calls the reverse?

16 MR. BRIEN: Which indicates -- correct. And in
17 our view, that means that the terms are used interchangeably
18 such that they should have the exact same meaning.

19 CHIEF JUDGE CHENEY: But that doesn't exclude my
20 construction either, right, where they overlap a little bit?

21 MR. BRIEN: We do not think that they overlap a
22 little bit. We think that they overlap 100 percent because
23 the patentee is stuck with its own words during prosecution
24 in the specification.

25 CHIEF JUDGE CHENEY: And did you want to address

1 anything about the "inhibits movement" aspect of your
2 opponent's construction or do you think that that's not
3 relevant?

4 MR. BRIEN: We think that that is not appropriate
5 because it's describing the function of the stop and not --
6 in other words -- excuse me, to put it another way, it's
7 describing what the stop does and not what it is. So this
8 is a structural limitation that doesn't connote any
9 functional aspects to it in the intrinsic record. And Klein
10 hasn't pointed to any.

11 So we think that the more appropriate
12 construction is one that construes it to define what it is,
13 not what it does.

14 CHIEF JUDGE CHENEY: Do you contend that a person
15 of ordinary skill in the art would understand what a stop is
16 in this art?

17 MR. BRIEN: In this art, seeing the term in
18 isolation from this patent?

19 CHIEF JUDGE CHENEY: Cast your mind to the time
20 of the invention. The person of ordinary skill in the art,
21 you're having a conversation with this hypothetical person.
22 You ask this hypothetical person, what is a stop. Do you
23 think that person in this art could tell you what a stop is?

24 MR. BRIEN: I think that the person of ordinary
25 skill in the art could come up with a definition of stop,

1 but that's in isolation of this patent. When you consider
2 this patent and what the patentee said in the specification
3 and during prosecution, then the answer changes.

4 CHIEF JUDGE CHENEY: So is it your position that,
5 yes, a person of skill in the art knew of an existing
6 structure, call it a stop, at the time of the invention, but
7 that the patentee redefined that in these patents?

8 MR. BRIEN: I think that is much closer to our
9 position. I think that that is generally correct, yes.

10 CHIEF JUDGE CHENEY: Okay. So you're relying on
11 clear and unmistakable definition?

12 MR. BRIEN: Not quite, Your Honor. We are using
13 the specification and the prosecution history as a guide to
14 interpret the claim term. We're not going as far as a clear
15 and unmistakable disclaimer of claim scope.

16 It's close, we think because of that language "as
17 a protruding nub." But we're not arguing -- we didn't argue
18 in the briefs that it's definitional, per se.

19 CHIEF JUDGE CHENEY: Okay. Thank you. Anything
20 else?

21 MR. BRIEN: That's it, Your Honor.

22 CHIEF JUDGE CHENEY: Okay. Let's hear from the
23 other side.

24 MR. RABINOWITZ: Good afternoon, Your Honor.
25 Alan Rabinowitz for the Complainant.

1 CHIEF JUDGE CHENEY: Mr. Rabinowitz, any dispute
2 between the parties that a protruding nub is small?

3 MR. RABINOWITZ: No, Your Honor. We also -- we
4 agree it's small. We agree that the stop is also small in
5 this context, although perhaps in other contexts it might be
6 larger.

7 CHIEF JUDGE CHENEY: Okay. So in this
8 investigation, no dispute about small?

9 MR. RABINOWITZ: No, Your Honor.

10 CHIEF JUDGE CHENEY: Okay. Please proceed.

11 MR. RABINOWITZ: So, Your Honor, to be charitable
12 to Milwaukee, they're either -- there are two ways of
13 thinking about what they're trying to say with respect to
14 what the protruding nub is. And I'm intending to take this
15 in two pieces. First, what's a protruding nub; second,
16 whether there's a difference between a protruding nub and a
17 stop.

18 So one interpretation, Your Honor, and you were
19 asking about what does a bump mean, we met and conferred
20 with the other side about constructions. And we thought the
21 constructions were pretty close. And what they told us was
22 that they saw a meaningful difference between the word
23 "structure" and the word "bump."

24 And what we have -- and they have not made this
25 so explicit in their briefing, but what we have come to

1 understand is that they view a bump -- and maybe in
2 conjunction with the phrase "extending outwardly" -- as
3 something that's universally or uniformly convex, that it's
4 not enough that it's something that protrudes outwardly from
5 the exterior. It's something that protrudes outwardly along
6 its entire length.

7 And I have, Your Honor, here an example if you'd
8 like to see of the domestic industry product. And as you
9 noted in the slides that Milwaukee presented, they're
10 focused just on one little feature. And perhaps you can
11 think of that as a box drawing exercise that Klein has not
12 done. We are not saying the protruding nub is just this
13 little indentation (indicating). We're saying that the
14 protruding nub is this bump that protrudes from the exterior
15 of the helmet. And --

16 CHIEF JUDGE CHENEY: So you could live with the
17 word "bump" too?

18 MR. RABINOWITZ: We believe "bump," except for
19 the fact that they seem to be interpreting that as a
20 uniformly convex structure --

21 CHIEF JUDGE CHENEY: Now we're going to get into
22 constructions of constructions, and I'm not doing that.

23 MR. RABINOWITZ: I understand that, Your Honor.
24 And that's why --

25 CHIEF JUDGE CHENEY: Because if that's where

1 we're going, we're just going to stick with the words of the
2 patent claim --

3 MR. RABINOWITZ: And we'd agree with that.

4 CHIEF JUDGE CHENEY: -- if you can't come up with
5 a better agreed -- or it doesn't even have to be agreed --
6 but if what the parties are proposing are not better than
7 the words of the claim to resolving the dispute between the
8 parties, the words of the claim should prevail.

9 MR. RABINOWITZ: We agree with that, Your Honor.
10 And we would be perfectly happy with the words of the claim.
11 We don't think either of these terms requires further
12 construction.

13 CHIEF JUDGE CHENEY: Okay. Please continue.

14 MR. RABINOWITZ: So we think that this is clearly
15 within the scope of the claims. This is the thing they're
16 actively and very clearly trying to exclude. We don't think
17 there's any requirement of a uniformly convex shape. It's
18 actually not anything that they support in their slides.
19 They haven't -- or in their briefing. They just use the
20 word "bump" as a means of conveying that.

21 And they -- even their own definitions don't
22 support that. Definitions don't use the word "bump." They
23 use "lump," which -- you know, I don't know that there's a
24 distinction, but it's just not a word that was used. And
25 they also refer to a protuberance.

1 But the key issue is that there is no specific
2 shape required by the patent, none at all.

3 CHIEF JUDGE CHENEY: Is there -- you heard the
4 other side say that your construction means that the
5 structure can extend inwardly. Do you intend your
6 construction to have that meaning?

7 MR. RABINOWITZ: No, Your Honor. We agree that
8 the protruding nub must extend from the surface, from the
9 outside. The context of the claim is clear, that we're
10 talking about the outer shell. It's extending from the
11 outside.

12 CHIEF JUDGE CHENEY: So you could get behind a
13 structure extending outwardly?

14 MR. RABINOWITZ: I believe that we could, because
15 we think a structure is the right approach here, because the
16 thing we have an issue with, Your Honor, is the idea that
17 there's one specific shape that is uniformly convex and that
18 -- we don't believe that that's correct.

19 CHIEF JUDGE CHENEY: So if you were given a
20 construction where a protruding nub is clarified to mean
21 that the nub extends outwardly, you could live with that?

22 MR. RABINOWITZ: I believe so, but let me just
23 confirm. Yes, Your Honor.

24 CHIEF JUDGE CHENEY: Okay. I will be asking
25 Respondents if they can live with that construction too.

1 Anything else you want to say about "protruding
2 nub"?

3 MR. RABINOWITZ: I don't want to belabor this
4 point, Your Honor. I think it's pretty clear that neither
5 the claims nor the specification specify any particular
6 shape. The one thing I do want to point out is this shape
7 here, which is shown in the figure, does not show a
8 uniformly convex structure. In fact, it shows the very same
9 structure that's in the DI product.

10 So the idea, even if it were appropriate, to
11 limit the claims to the preferred embodiment, which as Your
12 Honor knows it's not, the preferred embodiment looks exactly
13 like the DI products.

14 CHIEF JUDGE CHENEY: Can I ask you a question
15 about this shaded version of your figure?

16 MR. RABINOWITZ: Of course, Your Honor.

17 CHIEF JUDGE CHENEY: Where does Exhibit 10 come
18 from?

19 MR. RABINOWITZ: Exhibit 10, Your Honor, is the
20 engineering drawing for the DI product.

21 CHIEF JUDGE CHENEY: Okay. And there's shading
22 that indicates a light source in Exhibit 10, right?

23 MR. RABINOWITZ: I think the shading -- and just
24 to be clear, Your Honor, we have not modified that image at
25 all. We've excised part of it. It's from a much larger

1 document, but the shading, to the extent it's there, I think
2 this may have come from a CAD file, and I believe it's there
3 to show -- just to enable some perspective and see depth of
4 the features.

5 CHIEF JUDGE CHENEY: And the feature that you're
6 talking about, the view in the CAD file of Exhibit 10, as
7 well as in Exhibit 3 of the '327 patent, is squarely
8 head-on, right?

9 MR. RABINOWITZ: Yes. Yes, that's right.

10 CHIEF JUDGE CHENEY: And so could a person of
11 skill in the art looking at Exhibit 3 determine if that
12 feature is an indentation or a projection?

13 MR. RABINOWITZ: I think so, Your Honor. And
14 I've tried to annotate a little bit on the left with some --
15 this shading I did add. This is the yellow. And I think if
16 you see -- well, this is not working.

17 There's a line sort of across the center of that
18 feature. And I think that is intended to show, as you can
19 see -- because I believe that drawing came from the CAD
20 files, that is intended to show the depth.

21 CHIEF JUDGE CHENEY: The depth. So what you have
22 highlighted in yellow on slide 83 is a depression from the
23 surrounding white surface?

24 MR. RABINOWITZ: Yes, I believe that's what it's
25 representing. That is what it shows in the engineering

1 drawings. The protruding nub is sort of the larger piece
2 that includes that. And I don't mean to say "large." I
3 mean, just larger than the recess itself.

4 CHIEF JUDGE CHENEY: Oh, the kind of wedge-shaped
5 piece that is on the surface of the helmet?

6 MR. RABINOWITZ: Yes. It's a little bit easier
7 to see in this perspective shot that Milwaukee included in
8 their brief, where you're seeing it on an angle. And if
9 Your Honor would like, I can also pass this up and you can
10 see it in person.

11 But that recess that they point to is part of a
12 structure that protrudes from the outside of the shell.

13 CHIEF JUDGE CHENEY: Okay. And so in your slide
14 81, the -- is it a photograph or is it a CAD rendering?

15 MR. RABINOWITZ: I believe this photograph or
16 this image came from Milwaukee's brief. I think they
17 characterize it as a photograph of one of the products.

18 CHIEF JUDGE CHENEY: Okay. And so your
19 understanding is that the feature shown in Figure 3 of the
20 '327 patent is the same as the feature shown in the
21 photograph; is that right?

22 MR. RABINOWITZ: Yes, Your Honor.

23 CHIEF JUDGE CHENEY: Okay.

24 MR. RABINOWITZ: And to clarify a point that I
25 think Milwaukee was hinting at, you can see there's sort of

1 a wedge-shape extending from the surface of the helmet where
2 their red line is. What we're referring to as the
3 protruding nub in our domestic industry contentions is
4 inclusive of that wedge, including the very top part,
5 which -- you know, maybe you can't see it quite as well
6 there, but is a flat piece that extends outwardly from the
7 surface of the helmet and engages with a clip on an
8 accessory.

9 CHIEF JUDGE CHENEY: And so the side of that
10 wedge is a triangle?

11 MR. RABINOWITZ: Yes, that's right, Your Honor.

12 CHIEF JUDGE CHENEY: Surface? And so you're
13 contending that the patent discloses a protruding nub that
14 starts at the smallest angle of the triangle and extends
15 through the top of the triangle?

16 MR. RABINOWITZ: I believe that's right, Your
17 Honor. And I understand that that view is not quite as
18 clear in Figure 3 because it's a head-on view, but -- and I
19 understand that both the domestic industry products and the
20 drawings that come from are extrinsic evidence, but these
21 patents were written based on the designs for these
22 products.

23 CHIEF JUDGE CHENEY: So the person of skill in
24 the art looking at the drawings of the patent at the time of
25 the invention doesn't know about the 3D product that you

1 have there on the lectern, right?

2 MR. RABINOWITZ: That's correct, Your Honor.

3 CHIEF JUDGE CHENEY: And so do they know one way
4 or the other about whether 17 protrudes or indents?

5 MR. RABINOWITZ: I mean, there's certainly
6 disclosure, as Milwaukee noted, of a protrusion. And we're
7 all in agreement that there needs to be a protrusion.

8 So whether they would appreciate that that region
9 that I've highlighted in yellow is a recess, I think you can
10 see it. And perhaps my perspective is skewed a bit, having
11 familiarity with the real-world products, but there's no
12 dispute that there must be a protrusion.

13 The dispute is whether it has to be a uniformly
14 convex protrusion. And there's nothing in the intrinsic
15 evidence or in the extrinsic evidence that requires that.

16 CHIEF JUDGE CHENEY: Please continue.

17 MR. RABINOWITZ: With that, Your Honor, I think
18 I'll switch now over to the issue of the stop. And the
19 question is whether these -- the stop and protruding nub
20 refer to the same thing. We think they do not.

21 As Your Honor put it earlier, this is very much
22 an issue of an overlapping Venn diagram. You know, we can
23 see this in the claims and, particularly, in claim 2 of the
24 '327 patent, where it says, "the protruding nub comprises a
25 stop." Not all protruding nubs are stops. And, conversely,

1 as we can see in the specification in a moment, not all
2 stops are protruding nubs.

3 So this is very much a Venn diagram. And the
4 patent, what the patent is claiming is the overlap. And
5 it's simply not the case that the applicants or patentees
6 ever said these two things are a completely overlapping Venn
7 diagram. That just never happened.

8 As Your Honor noted -- I'm not going to belabor
9 the law -- there's presumed to be a difference here. The
10 stop thing, as you, I believe, discussed with counsel for
11 the opposing side, adds something functional here. And,
12 Your Honor, you heard argument about how it can't be
13 functional because it's a structure. Your Honor, I think,
14 is more familiar with the case law than I am on this, but I
15 think this comes up quite a bit in the context of
16 means-plus-function claiming, where the courts have said
17 that there's certainly certain kinds of structures that are
18 named based on their functionality.

19 I think one example that may be given is a drill.
20 A drill has the name "drill" because what it does is drill.
21 And that's -- the same thing is true of stop. And so this
22 stop adds something beyond just the shape. You know, the
23 protruding nub is a structure that extends from the surface.
24 But stop adds a functional element to that.

25 And we can see that here on slide 91 where we

1 have incorporated both of Klein Tools' proposed
2 constructions into claim 2. And you can see the
3 clarification where the original claim language says
4 "wherein the external slot of the front receptacle is a
5 receiver slot flanked by raised walls and the protruding nub
6 comprises a stop."

7 As -- using our constructions, what that says is:
8 And the small structure extending from a surface comprises a
9 structure that inhibits movement. And we think that this
10 reflects the plain meaning and also the Venn diagram that
11 you described. This is the part of the Venn diagram
12 describing stops that overlaps with the Venn -- the part of
13 the diagram that describes stops. I'm sorry, protruding
14 nubs overlaps with stops.

15 By contrast, looking at this claim language as
16 Milwaukee would prefer, regardless of the construction
17 adopted, treating protruding nub and stop would render this
18 redundant and nonsensical, because you would have the small
19 bump extending outwardly, comprises a small bump extending
20 outwardly. So it cannot be the case that one can interpret
21 this as being equated as the same thing. If that were the
22 case, this language would make no sense.

23 I want to briefly touch on something opposing
24 counsel said about the prosecution history.

25 CHIEF JUDGE CHENEY: Before you move on that --

1 MR. RABINOWITZ: Of course, Your Honor.

2 CHIEF JUDGE CHENEY: -- while perhaps the idea of
3 functionality is still in your head, something can be a stop
4 because of its structure, not merely because of its
5 function. Right?

6 MR. RABINOWITZ: I agree with that, Your Honor.

7 CHIEF JUDGE CHENEY: So something could be
8 structured to be a stop because the manner of its
9 configuration inhibits movement; whereas something else that
10 is smaller or larger doesn't inhibit movement and,
11 therefore, is not a stop. Do you have a -- any kind of
12 legal authority that helps me support that idea?

13 MR. RABINOWITZ: I don't have a case for Your
14 Honor, but I do agree with what you're saying, that
15 something can become or have this sort of functional aspect
16 to it because of its structure. I agree with that
17 completely.

18 Maybe -- I don't know if this is a perfect
19 analogy, but you were talking about potentially the
20 difference in size could turn something from something
21 that's not a stop into something that is. And perhaps
22 something like a speed bump, you know, if you have a bump in
23 the road, it protrudes from the surface. A small bump --
24 and, you know, the roads are not uniformly flat. A small
25 bump, that doesn't impede or inhibit movement. But if you

1 have a significantly larger speed bump, that could prohibit
2 movement.

3 CHIEF JUDGE CHENEY: Thanks. Anything else?

4 MR. RABINOWITZ: I did want to just quickly
5 note --

6 CHIEF JUDGE CHENEY: Prosecution history was
7 where you were headed next, I think.

8 MR. RABINOWITZ: I'm sorry?

9 CHIEF JUDGE CHENEY: I thought you were headed
10 next to prosecution history.

11 MR. RABINOWITZ: Yes, I was. I do want to stop
12 quickly on some extrinsic evidence about "stop" that refers
13 to something that impedes, obstructs, or brings to a halt or
14 a device for arresting or limiting motion. And I think this
15 goes to your question from earlier about whether a person of
16 ordinary skill in the art would know what a stop is.

17 It's a defined term. It's a term that's
18 recognized. And courts have found the same thing. The
19 District of New Jersey construed "stop" as an attachment or
20 other component that is capable of limiting the motion or
21 travel of a moving party from proceeding any further. So
22 there is a plain and ordinary meaning to this term that's
23 well understood.

24 The issue that I wanted to raise about the
25 prosecution history, counsel suggested that there was found

1 to be a lack of support for stop and that somehow an
2 amendment to the specification was equating stop with
3 protruding nub.

4 Number 1, that's just not the case. The
5 specification says the stop is shown in the preferred
6 embodiment as a protruding nub. So it's merely one
7 embodiment. Again, we're getting to that Venn diagram.

8 But the other issue is it's a mischaracterization
9 of what happened during prosecution. "Stop" is actually in
10 the original claims, which, as Your Honor knows, are part of
11 the original -- part of the specification for the purposes
12 of a 112 analysis. So the stop was already there.

13 What the -- while there was a rejection over 112
14 issues, it didn't actually focus on the stop. There was --
15 it's focused on language which I don't have highlighted
16 here, but that refers to the accessory device includes a
17 spring tab with a pawl. The examiner had no trouble
18 understanding "stop" or what it meant in the context of the
19 claims or that it was shown in the figures or elsewhere in
20 the intrinsic evidence. The issue that was the focus of
21 that amendment or that rejection was other language that is
22 not at issue right now.

23 CHIEF JUDGE CHENEY: On your slide 98 --

24 MR. RABINOWITZ: Yes, Your Honor.

25 CHIEF JUDGE CHENEY: -- showing the originally

1 proposed claims, in claim 2, does the receiver slot
2 correspond with what you highlighted in yellow as item 17 in
3 an earlier slide?

4 MR. RABINOWITZ: No, Your Honor.

5 CHIEF JUDGE CHENEY: Okay.

6 MR. RABINOWITZ: No.

7 CHIEF JUDGE CHENEY: The slot referred to here in
8 claim 2 is between the two --

9 MR. RABINOWITZ: In that embodiment, yes.

10 CHIEF JUDGE CHENEY: -- outer -- two larger
11 structures?

12 MR. RABINOWITZ: Yeah.

13 CHIEF JUDGE CHENEY: On each side of the
14 centrally disposed structure?

15 MR. RABINOWITZ: Yeah. We're getting, I think,
16 into some terms that we're going to discuss in a little bit,
17 but just using this embodiment as a frame of reference, the
18 slot is this space (indicating) here.

19 CHIEF JUDGE CHENEY: And counsel is pointing to
20 the space between the two -- what the claims call the --

21 MR. RABINOWITZ: Raised sidewalls, I believe.

22 CHIEF JUDGE CHENEY: Yes. Thank you. Please
23 continue.

24 MR. RABINOWITZ: Excuse me, Your Honor.

25 I think, Your Honor, unless you have any further

1 questions on either of these terms, that's it for me.

2 CHIEF JUDGE CHENEY: Okay. Any rebuttal?

3 MR. BRIEN: Yes, Your Honor.

4 CHIEF JUDGE CHENEY: So you heard me talk with
5 the other side about whether you could get behind a
6 construction where "protruding nub" is clarified fairly
7 minimally to resolve the dispute between the parties by
8 stating that the protruding nub extends outwardly.

9 MR. BRIEN: I don't think we can agree to that
10 because it wouldn't address the construction of the term
11 "stop."

12 CHIEF JUDGE CHENEY: Because you still maintain
13 these things have to be identical.

14 MR. BRIEN: Yes.

15 CHIEF JUDGE CHENEY: Do you want to take a
16 position if I reject that?

17 MR. BRIEN: If you reject that they should not be
18 construed to have the same meaning?

19 CHIEF JUDGE CHENEY: If I reject your position
20 that they should be construed to be identical, do you have a
21 position on whether you would further object to construing
22 "protruding nub" only to the extent to clarify that it
23 extends outwardly?

24 MR. BRIEN: I --

25 CHIEF JUDGE CHENEY: If you stand on your other

1 objection, that's fine. I just want to know if you have
2 another position on this. If you do, I will try to address
3 it. If you don't, I won't.

4 MR. BRIEN: Okay. I do think that we can't agree
5 to that -- we cannot agree to that because we think that
6 this issue is intertwined with the issue of the term "stop"
7 and what the term "stop" means. So, unfortunately, I don't
8 think we can agree to that at this time.

9 CHIEF JUDGE CHENEY: Okay.

10 MR. BRIEN: Your Honor, I think I have just one
11 overarching point that I'd like to make in rebuttal. You
12 were asking opposing counsel about protruding nub 17 in
13 Figure 3 of the patents. Protruding nub 17 is shown here in
14 Figure 3. And opposing counsel said that this is the same
15 structure as that feature in the domestic industry products.

16 That feature is a recess in the domestic industry
17 products. So this highlights the dispute here.

18 CHIEF JUDGE CHENEY: Mr. Brien, it's more helpful
19 for your side to fairly characterize the colloquy. And in
20 my colloquy with the other side, we discussed the protruding
21 nub begins at the bottom of the triangle and extends to the
22 top of the triangle of the structure on the outside of the
23 shell, that side. Right?

24 MR. BRIEN: That is what counsel --

25 CHIEF JUDGE CHENEY: That's what he agreed was

1 the protruding nub.

2 MR. BRIEN: Okay. Okay.

3 CHIEF JUDGE CHENEY: Do you recall this colloquy?

4 MR. BRIEN: I recall that colloquy, but I also
5 recalled something that he said pointing specifically to
6 that piece that he highlighted yellow on his slides, which
7 was that small tiny piece labeled element 17.

8 CHIEF JUDGE CHENEY: Did you hear him say that
9 he's not arguing that a protruding nub is something that
10 doesn't protrude?

11 MR. BRIEN: I also heard that. I also heard
12 that. But he -- but --

13 CHIEF JUDGE CHENEY: If you think this is helping
14 your case, please continue.

15 MR. BRIEN: Your Honor, I just wanted to point
16 out very briefly that this element 17 is not a recess. The
17 specification makes clear that it's not a recess because it
18 talks about element 17 receiving -- or, excuse me, it talks
19 about the slot 20 in Figure 4 of the headlamp device that
20 receives protruding nub 17.

21 So it cannot be a recess because it has to go
22 into the slot in order for this device to function the way
23 it's described in the specification. So to the extent that
24 counsel is trying to argue that element 17 is a recess, it's
25 just not correct. The patent clearly says that it's not

1 correct.

2 And unless Your Honor has any questions, that's
3 all I have.

4 CHIEF JUDGE CHENEY: Nope. Thank you.

5 MR. BRIEN: Thank you, Your Honor.

6 CHIEF JUDGE CHENEY: Okay. That brings us to our
7 last claim term, "disposed centrally to the external slot."

8 MR. RABINOWITZ: I think, Your Honor, we have two
9 more.

10 CHIEF JUDGE CHENEY: Oh, what am I missing?

11 MR. RABINOWITZ: "External slot."

12 CHIEF JUDGE CHENEY: Oh, thank you.

13 MR. RABINOWITZ: May I proceed, Your Honor?

14 CHIEF JUDGE CHENEY: You may.

15 MR. RABINOWITZ: Once again, Your Honor --

16 THE REPORTER: I'm sorry, the mic got turned off.

17 MR. RABINOWITZ: Oh. My apologies.

18 Once again, Your Honor, we think that the plain
19 language of the claims is just fine. We think both
20 "external" and "slot" are well understood terms with plain
21 meanings. And no further construction is required.

22 Milwaukee has, I think through their briefing --
23 and I don't intend to mischaracterize their positions, but
24 it seems as if they have construed the two constituent words
25 of this term independently. Their -- they appear to be

1 construing "slot" as narrow groove and to be construing
2 "external" as between two sidewalls that protrude from the
3 shell, neither of which is warranted by the evidence here.
4 So --

5 CHIEF JUDGE CHENEY: So I don't understand what
6 the dispute is. I understand you don't like their words.
7 You think your words are better. But what is it that their
8 words encompass that you can't live with?

9 MR. RABINOWITZ: So to start with, Your Honor, I
10 don't think -- I think, Number 1, "narrow" is vague. And I
11 think there are courts who have found the same thing.
12 "Narrow" is not a description that has been used in the
13 specification. And I left the hard hat back on the table,
14 but actually in the preferred embodiment, it's not shown as
15 narrow either. So that's a phrase -- that's a word that
16 doesn't come up anywhere in the specification, and it's
17 ambiguous what the scope of that term would include.

18 CHIEF JUDGE CHENEY: Okay. If we took out the
19 word "narrow," what's the dispute?

20 MR. RABINOWITZ: Then there's the issue of
21 between two sidewalls that protrude from the shell. This is
22 a clear attempt to incorporate limitations from the
23 disclosed embodiment. There's nothing about the independent
24 claims that requires there to be two sidewalls that protrude
25 from the shell. It's just not there. It's actually

1 specified in dependent claims.

2 So we're reading in limitations from a preferred
3 embodiment and rendering language from the dependent claims
4 redundant.

5 CHIEF JUDGE CHENEY: Please continue.

6 MR. RABINOWITZ: From our perspective, Your
7 Honor, we were faulted, I believe, for not construing the
8 word "slot." Our view on that is that a slot from the
9 context of the claims is clear that it's a space or an
10 opening that accommodates or engages with the receptacle,
11 the mating receptacle, of an accessory. The claims
12 themselves all describe the external slot as part of the
13 front receptacle or the rear receptacle.

14 These are the parts of the -- the receptacles are
15 the parts of the safety helmet, the claimed safety helmet,
16 that couples with the accessory devices. And you could see
17 in some of the claims here that, from the context, it's
18 clear that the external slot engages with the mating
19 receptacle.

20 So here in claim 1, it says "selectively
21 engageable within." In claim 4, it says "the external slot
22 aligns the accessory device therein." And in claim 5, it
23 says the external slot is "configured to receive." So we
24 think it's perfectly clear that the slot is an opening or
25 space that engages with the accessory device.

1 With respect to the word "external," that is also
2 clear. Milwaukee comes straight out and says that they're
3 construing the word "external" by defining that the external
4 slot is between two sidewalls that protrude from the shell.
5 There's -- that's pretty much the extent of their argument
6 on this, Your Honor. There's no citation to intrinsic
7 evidence that says when we say "external," we mean it's
8 between two sidewalls. So there's no lexicography argument.
9 There's no disclaimer argument.

10 And it's actually inconsistent with the evidence.
11 The evidence shows that "external slot" was added to
12 distinguish a prior art reference. As Your Honor knows, and
13 you saw the commercial embodiment, the products claimed
14 involve accessories that mount on the outside. And it has a
15 receptacle on the front, a receptacle on the back, to
16 accommodate those accessories.

17 This piece of prior art that was raised by the
18 Patent Office described something else entirely. It
19 described -- and I might ask my colleague to pass up the
20 helmet. Modern-day safety helmets and hard hats have
21 something inside called a suspension. You see that right
22 here in the product I'm holding up, Your Honor. There is a
23 fabric that suspends the helmet itself above the user's head
24 so that if there's an impact, there is some absorption of
25 that impact before it touches the user's head.

1 And what the prior art Bielefeld reference was
2 describing was slots on the interior of the helmet to
3 accommodate the anchors for the suspension. And so during
4 the prosecution, the applicants said: That's not what we
5 meant. We mean external slots formed on the exterior of the
6 helmet to accommodate accessories that are attached on the
7 outside. We're not talking about that interior slot, the
8 suspension, to hold the suspension. And so that's very
9 clear in the file history.

10 So "external" is a well-understood term, and it's
11 being used in its conventional context, in its conventional
12 manner to describe a slot formed on the outside. So we
13 think these issues are quite clear, Your Honor, and that
14 what we're faced with here is simply a case where Milwaukee
15 is just trying to import limitations from an exemplary
16 embodiment.

17 And you can see that here on slide 109. They're
18 pointing to this -- you can see it, it even refers to it as
19 an exemplary embodiment that describes that there is a front
20 tapered receiver slot formed between a pair of raised
21 sidewalls. So, certainly, there is a description of that in
22 the specification, but there's absolutely nothing in the
23 specification that rises to the level of lexicography or a
24 suggestion that this is a critical feature of the claimed
25 invention.

1 CHIEF JUDGE CHENEY: Can you put up the language
2 of claim 1 of the '327 patent? Do you have that somewhere?

3 MR. RABINOWITZ: I've got a portion of it over
4 here. I can get the rest of it if it doesn't have the part
5 you're looking for, Your Honor.

6 CHIEF JUDGE CHENEY: I need the part where the
7 claim term appears, which is --

8 MR. RABINOWITZ: Well, "external slot" shows up
9 in the middle of this one.

10 CHIEF JUDGE CHENEY: That's -- it's referring
11 back, right?

12 MR. RABINOWITZ: Yeah.

13 CHIEF JUDGE CHENEY: To the first time it
14 appears. The first time it appears is in the limitation of
15 "front receptacle having"?

16 MR. RABINOWITZ: I apologize, Your Honor. I'm
17 trying to get the ELMO working.

18 CHIEF JUDGE CHENEY: We've made some changes. Is
19 the ELMO on?

20 MR. RABINOWITZ: I just turned it on. I think
21 it's loading.

22 CHIEF JUDGE CHENEY: Okay. So if we could go up
23 to the limitation of a front receptacle.

24 MR. RABINOWITZ: Yes, Your Honor.

25 CHIEF JUDGE CHENEY: So this is where the slot is

1 introduced, right?

2 MR. RABINOWITZ: That's right.

3 CHIEF JUDGE CHENEY: And it says that the
4 external slot extending upwardly along the front side on the
5 exterior surface of the outer shell, right?

6 MR. RABINOWITZ: Yes, Your Honor.

7 CHIEF JUDGE CHENEY: So your proposed
8 construction says "slot formed on the exterior of the
9 helmet," right?

10 MR. RABINOWITZ: Yes, Your Honor.

11 CHIEF JUDGE CHENEY: You're adding nothing to the
12 actual words of the claim, right? It's --

13 MR. RABINOWITZ: We're not intending to, Your
14 Honor. We're trying to capture the plain meaning. And we
15 think that the claims' words are fine the way they are.

16 CHIEF JUDGE CHENEY: Okay. So why do you
17 understand your opponent -- given this language that I just
18 read, what is your opponent trying to do with the words
19 "protrude from the shell"? Is there some dispute about
20 that?

21 MR. RABINOWITZ: Yes, Your Honor. I believe this
22 is an attempt to limit the scope of the claims to capture
23 just the DI products and to exclude other slots that take a
24 slightly different form.

25 CHIEF JUDGE CHENEY: That wouldn't protrude from

1 the shell?

2 MR. RABINOWITZ: Well, I mean, there are
3 certainly protrusions in protruding walls in the accused
4 products. The difference is that theirs does not have a
5 recess between the walls.

6 CHIEF JUDGE CHENEY: Okay. Well, that's
7 something else. I'm just trying to understand why, when the
8 claim itself says that the slot is on the exterior surface
9 of the outer shell --

10 MR. RABINOWITZ: Um-hum.

11 CHIEF JUDGE CHENEY: -- we have someone saying
12 that it protrudes from the shell and we have someone else
13 saying it's on the external of the helmet. I don't
14 understand why there's a dispute.

15 MR. RABINOWITZ: Your Honor, we think the plain
16 language is clear. As far as what the dispute is, I think
17 the dispute is should it be limited to the preferred
18 embodiment or not? And we think it should not.

19 CHIEF JUDGE CHENEY: Okay. Anything else?

20 MR. RABINOWITZ: That's it, Your Honor.

21 CHIEF JUDGE CHENEY: Okay. Who will speak to
22 this for Milwaukee?

23 MR. WHITE: That will be me, Your Honor.

24 CHIEF JUDGE CHENEY: Can we start there,
25 Mr. White? What is this dispute about "the exterior of the

1 helmet" versus "protrude from the shell"?

2 MR. WHITE: Sure. I think the dispute there is
3 that their construction is much broader than ours.

4 CHIEF JUDGE CHENEY: Why not just live with the
5 words of the claim, and the claim already says that the
6 slots on the exterior of the outer shell? Why can't we live
7 with that?

8 MR. WHITE: Yeah. I think the reason that we've
9 got our's phrased the way we do is that it is not just any
10 slot; it's external slot.

11 CHIEF JUDGE CHENEY: But the claim itself,
12 there's no dispute at column 8, line 20, the claim says that
13 the external slot extends upwardly along the front side of
14 the external surface of the outer shell. Are you saying
15 there's a dispute about that?

16 MR. WHITE: I think there could be. So if you
17 followed -- I don't think there's a dispute about that, but
18 I think there's a dispute about how their construction
19 reads. So their --

20 CHIEF JUDGE CHENEY: If there's no dispute about
21 that language that I just read, why don't we just stop the
22 construction and introducing ambiguity with both parties
23 trying to change the words of the claim, if everyone agrees
24 about the meaning of the words I just read?

25 MR. WHITE: I think because -- I think the

1 application of those words is still subject to dispute.

2 CHIEF JUDGE CHENEY: Well, there's fact disputes,
3 right? You don't think their products practice the patent.
4 You don't think your products infringe. Yeah, I get that.

5 MR. WHITE: Okay.

6 CHIEF JUDGE CHENEY: But what is the dispute
7 about the meaning of the words I just read?

8 MR. WHITE: So let me give you an example. So
9 theirs says a slot formed on the exterior of the helmet.
10 With that cover, if you cut a hole in the helmet in the
11 shape of a coin slot, like they say, or a mail slot or some
12 of the examples from their brief, would that definition that
13 they've got cover that? A slot formed on the exterior of
14 the helmet. I think it would. It would cover a hole, a
15 slit cut in the exterior of the helmet. That is clearly not
16 what this is about. Not in any shape or form.

17 And so if we just say the slot is formed on the
18 exterior of the helmet and extends upward, and we let that
19 go with -- again, with their construction, potentially,
20 we're looking at a hole, a slot, a slit, a coin slot. And
21 that is not what this is about.

22 CHIEF JUDGE CHENEY: Okay. Can we pause and see
23 if this is an actual argument that they're advancing?

24 Mr. Rabinowitz?

25 MR. RABINOWITZ: Your Honor, it's not. And we're

1 not the party that asked for the construction of this term.
2 We think the plain meaning of the term is fine. We're not
3 trying to broaden it at all.

4 CHIEF JUDGE CHENEY: So you're not going to point
5 to a slot through the shell?

6 MR. RABINOWITZ: No, Your Honor.

7 CHIEF JUDGE CHENEY: Or through the hard hat like
8 the mail slot that Mr. White just mentioned and say that
9 that meets the claim language of an external slot extending
10 upwardly along the front side of the exterior surface of the
11 outer shell?

12 MR. RABINOWITZ: No, we're not, Your Honor.

13 MR. WHITE: Well, I understand that, but their
14 construction is broad enough to capture that type of a slot.
15 And that's just not in any way consistent with any of the
16 intrinsic evidence. And so --

17 CHIEF JUDGE CHENEY: You're the one asking for
18 the construction. They didn't ask for the construction.

19 MR. WHITE: Correct. We think this needs to be
20 construed. You can't just say a slot. What does that mean?
21 They have not defined the word "slot" at all.

22 CHIEF JUDGE CHENEY: Well, I -- okay.

23 MR. WHITE: The location of the slot I don't
24 think is in dispute, but what is a slot? So if we start
25 with the claim language, we know that in the context of

1 these patent claims and the specification, it's not some
2 sort of generic slot. The claims tell us, as you looked at
3 before, that the slots are part of the receptacles that
4 receive and hold the accessories.

5 The claims require specific configurations or a
6 specific purpose for these slots. If we look at the
7 specification, this helps us understand the type of slots
8 that we're talking about here. The specification describes
9 what it calls a tapered receiver slot, Number 5.

10 And that's shown on the front of the helmet in
11 this Figure 3. And it includes three different components
12 that we've highlighted in corresponding colors to make it
13 clear. There's something they called a tapered channel 16,
14 which is the space in between the two sidewalls, which are
15 the sidewalls 18, which we have in green. The tapered
16 channel we have in yellow. This is on slide 57. And then
17 there's the stop or the protruding nub which is 17. And,
18 again, that's what sticks out and engages with the receiver
19 when you put the clip in there.

20 So there's really two different parts of this.
21 There's the external portion of this, and there's the slot
22 part of this. We think the external means it has to
23 protrude from the shell, so it has got to be on the exterior
24 of the shell protruding from the shell. That's what the
25 external requires. And I think they said this. As the

1 prior prosecution history says, these are not slots on the
2 interior; they're on the exterior. We have tried to capture
3 that through the fact that it protrudes from the shell.

4 So the next piece is what is the slot? Well,
5 we've got some pretty common dictionary definitions that
6 tell us it's a narrow opening, a groove, or a slit. And
7 we've tried to combine those together. We've basically
8 tried to use both. So we've got a narrow groove that's
9 between the two sidewalls. And, again, that's consistent
10 with all the intrinsic evidence here.

11 CHIEF JUDGE CHENEY: Do you think that they think
12 it's not a narrow groove? That they're trying to read a
13 slot on something that's not a slot?

14 MR. WHITE: I think they are when you consider
15 the rest of this, when we get to term 8. So these two work
16 together. And if I can jump ahead just a little bit, when
17 you see how these two work together, you've got an external
18 slot, and then you've got this nub that's disposed central
19 to the slot.

20 When you look at how they're reading these things
21 on the accused products, that's where I think that they are
22 going to argue that a slot is not something that has got two
23 exterior walls with some space in between. It's just not
24 the way the products are made. And that's why there's a
25 dispute about this, Your Honor.

1 CHIEF JUDGE CHENEY: I understand. You have all
2 kinds of factual disputes. What I do not understand is that
3 this claim language needs clarification.

4 MR. WHITE: Well, it does when you look -- and if
5 it's okay if I'll jump ahead, if we look at the term, the
6 eighth term, the next one that's coming up, these two work
7 in conjunction with one another because the protruding nub
8 has to be disposed centrally relative to the external slot.

9 What does that mean? We think that means it has
10 got to be between the two sidewalls that form the slot. It
11 can't mean anything else. It's disposed centrally to the
12 slot. It has got to be between those two sidewalls.

13 And that's why we proposed that construction.
14 And that's why we think a construction is needed for "slot"
15 to talk about what are the bounds of the slot. And this
16 especially comes into play when you look at their
17 construction of the term "disposed centrally." They say
18 between the outer bounds of the external slot. What the
19 heck does that mean?

20 So this is why we need constructions of both
21 terms because they work together, particularly to define
22 exactly where that protruding nub is central to the slot.

23 CHIEF JUDGE CHENEY: You still haven't shown me
24 anywhere where there's a dispute about a slot being a slot.
25 You've not shown me that. So why am I adding words to this

1 claim to resolve a dispute that doesn't exist?

2 MR. WHITE: I mean, I can show you the accused
3 product, if you'd like to see that.

4 CHIEF JUDGE CHENEY: That is a factual dispute.
5 You're supposed to show me why there's some question about
6 "slot." No one knows what it means, so you, Court, you need
7 to tell us what it means. Our experts couldn't possibly
8 give an opinion on whether there's a slot in the prior art
9 or the accused device --

10 MR. WHITE: Yes.

11 CHIEF JUDGE CHENEY: -- or the domestic industry
12 products unless you tell us what a slot is. What is that
13 dispute?

14 MR. WHITE: I think it's -- I mean, if they'll
15 agree that it's a narrow groove between two sidewalls, I
16 don't think -- that's our proposition. I don't think
17 there's any other way to design, to make, to interpret what
18 a slot is.

19 CHIEF JUDGE CHENEY: There are all kinds of slots
20 that don't have sidewalls. Would you agree?

21 MR. WHITE: Not one that's external to the side
22 of a helmet. No. We've got an external slot in the context
23 of this patent claim. I don't think that there's one that I
24 can think of that wouldn't have some sort of sidewalls that
25 define the bounds of the slot on the exterior of the helmet.

1 CHIEF JUDGE CHENEY: Please proceed.

2 MR. WHITE: So if we go back to the actual
3 mechanics of this, we've talked about what the patent
4 describes, how there's a sidewall, there's a channel in the
5 middle, and then there's the nub. We talked about where
6 "slot" is defined and how it should be defined, we think as
7 a narrow groove between two sidewalls. And then the
8 "external" means that it has got to protrude from the
9 helmet.

10 I think their main argument is that if we put the
11 term "sidewall" into the independent claim, then we run into
12 redundancy with sidewalls in the dependent claims. Again,
13 it's a claim differentiation argument. It's not a hard and
14 fast rule. We think the only way to properly define this is
15 by using the term "sidewall" and that -- we talked about
16 this this morning and with one of the other terms -- we're
17 not saying we put the word "sidewall" in there twice. We
18 put it in once. And that we don't think the claim
19 differentiation or redundancy argument holds water for them.

20 CHIEF JUDGE CHENEY: Why? Why? I mean why
21 should I just say no, this presumption is out the window?

22 MR. WHITE: Because I think when you look at here
23 what is the slot that's disclosed, all the embodiments, look
24 at every single embodiment, all the figures, all the
25 descriptions, we've got one type of slot.

1 And, again, I can't think of another way to form
2 a slot on the exterior of the helmet that doesn't have some
3 sort of sidewalls to it. It has got to receive another
4 component from an accessory that slides into that slot and
5 locks into place. So how can you do that on the exterior of
6 the helmet without having some sidewalls?

7 CHIEF JUDGE CHENEY: So you're essentially
8 limiting the claim to the only disclosed embodiment.

9 MR. WHITE: Not at all. So --

10 CHIEF JUDGE CHENEY: I thought you just said no
11 other embodiments, other than the one that is in your
12 construction?

13 MR. WHITE: Sure. That's -- we're not limiting
14 it to the specific configuration, though. I mean, there's a
15 specific configuration of the preferred embodiment that has
16 got sidewalls of a certain size and shape, located in a
17 certain spot with a nub in a certain spot. We're not saying
18 it has got to be that exact configuration.

19 The only thing we're saying is that the slot
20 requires two external sidewalls, nothing more, nothing less.
21 We're not requiring it to be the exact embodiment that's in
22 the specification.

23 CHIEF JUDGE CHENEY: And you're saying that even
24 though the claims differentiate sidewalls from the slot, and
25 I'm trying to understand why, and I think your why is, well,

1 it's the only embodiment?

2 MR. WHITE: No. I --

3 CHIEF JUDGE CHENEY: Is there a different why?
4 Because maybe you can tell me the different thing that's not
5 that argument.

6 MR. WHITE: Yeah, sure. So we're not saying that
7 the sidewalls are the slot. We're saying that in this case
8 they say that the slot includes sidewalls. If you look at
9 the specification, again, the drawings, the figures,
10 everything in there, they describe sidewalls as being a part
11 of the slot.

12 And so, again, any definition you look at, I
13 don't know how you can have a definition of a slot that
14 doesn't have sidewalls. I think they're required by using
15 the word "slot" themselves.

16 CHIEF JUDGE CHENEY: So your argument for
17 overcoming the presumption that the dependent claim is
18 adding something narrower than the independent claim is that
19 it's impossible otherwise?

20 MR. WHITE: Not necessarily. And to be clear
21 too, there are other requirements in these claims, other
22 than just the sidewall. If you look at claim 6, one of the
23 additions is the front receptacle includes a first sidewall.
24 The accessory device includes a bracket. The bracket is
25 retained by the first sidewall. So it's not a --

1 CHIEF JUDGE CHENEY: So even if there are other
2 narrowing elements in claim 6 --

3 MR. WHITE: Yes.

4 CHIEF JUDGE CHENEY: -- your construction renders
5 the first narrowing element completely redundant, right?

6 MR. WHITE: It does. It does, yes, Your Honor.

7 CHIEF JUDGE CHENEY: And that is disfavored?

8 MR. WHITE: It is disfavored but not a hard and
9 fast rule.

10 CHIEF JUDGE CHENEY: And the reason that I should
11 ignore the disfavor is because -- why?

12 MR. WHITE: Because when you look at the totality
13 of the intrinsic evidence, everything here, and you look at
14 extrinsic evidence, including dictionary definitions, the
15 slot requires sidewalls. There is not a disclosure of an
16 external slot on the exterior of the helmet that does not
17 include sidewalls.

18 CHIEF JUDGE CHENEY: So we're back to only
19 embodiment is exterior sidewalls on the helmet?

20 MR. WHITE: So, again, I just want to be careful
21 to say the only embodiment. I mean, we're not limiting --

22 CHIEF JUDGE CHENEY: And that's where you keep
23 returning. You say you're not doing that, but you keep
24 coming back to that.

25 MR. WHITE: But that would -- if -- that, to me,

1 is more applicable when you try to limit to the specific
2 configuration.

3 CHIEF JUDGE CHENEY: That's what you're trying to
4 do.

5 MR. WHITE: Not -- no, we're not. We're not
6 saying the sidewalls have a certain configuration, certain
7 location, certain size, dimension. We're not trying to
8 limit this to the specific embodiment.

9 We are just saying that one component, a
10 necessary component, of an external slot is sidewalls.
11 We're not saying where they're located, how big they are,
12 what the configuration is, none of that. So we're not
13 trying to tie this directly to the one embodiment disclosed
14 in the figures.

15 CHIEF JUDGE CHENEY: Anything else?

16 MR. WHITE: On the slot, no, Your Honor. I do
17 have on the centrally located piece some additional
18 arguments, and I likely will come back to the slot issue as
19 those two relate together, but on specifically the slot
20 issue, nothing else, Your Honor.

21 CHIEF JUDGE CHENEY: Okay. Anything from the
22 other side on slot in rebuttal?

23 MR. RABINOWITZ: Very briefly, Your Honor. And
24 then I think I'll just transition to the next term.

25 CHIEF JUDGE CHENEY: Well, after we finish this

1 term, we're going to take a break.

2 MR. RABINOWITZ: Okay. Fine. So just very
3 briefly, counsel seems to be distinguishing somehow that
4 importing just some of a preferred embodiment is better
5 than, you know, limiting it to the exact thing that's in the
6 figure. But either way, all they're trying to do is import
7 limitations from the exemplary embodiment, and
8 Liebel-Flarsheim -- I'm sorry if I'm getting the name
9 incorrect -- I believe says that that's just not
10 appropriate.

11 CHIEF JUDGE CHENEY: If a person of skill in the
12 art would understand the plain language of the claims to
13 encompass more.

14 MR. RABINOWITZ: Yes, Your Honor.

15 CHIEF JUDGE CHENEY: And know how to do it, then
16 yes.

17 Okay. Anything else?

18 MR. RABINOWITZ: That's it on this term, Your
19 Honor.

20 CHIEF JUDGE CHENEY: Okay. Why don't we take
21 ten-minute break. We'll resume at 3:05 with the last claim
22 term.

23 (A recess was taken at 2:55 p.m., after which the
24 proceedings resumed at 3:08 p.m.)

25 CHIEF JUDGE CHENEY: Please take your seats.

1 Before the break, we were talking about "external
2 slot." At the risk of complete folly, I'm going to ask you
3 some more things about that, Mr. White. You have been such
4 a good sport.

5 In the immortal words of Paul Luckern, everyone
6 here is doing a great job. And anything that you are
7 detecting from this side of the bench is just me sincerely
8 trying to understand and get to the heart of the issue.

9 Would Respondent agree that the slot in claim 1
10 of the '327 patent is a void?

11 MR. WHITE: I hate to ask to define a definition,
12 but --

13 CHIEF JUDGE CHENEY: Meaning it is the space,
14 it's not the structure.

15 MR. WHITE: Oh, so let me think about that for a
16 second. So it's the space, not the structure.

17 CHIEF JUDGE CHENEY: Sure. And the reason -- if
18 we could get agreement on that, maybe that would help.
19 Because it talks about being engageable or the accessory
20 device in the last limitation being engageable within the
21 slot. You can think about that some more.

22 MR. WHITE: Yes. Thank you.

23 CHIEF JUDGE CHENEY: And the reason I wanted to
24 bring that idea up is because I wanted to see if there was
25 consensus from both parties that this void that we're

1 calling the slot is entirely outside the helmet. And if we
2 could agree to that, does that resolve your concerns?

3 MR. WHITE: I think the second answer is no, even
4 if we agree -- even if we were to agree it was a void that
5 was completely outside, I don't think that would resolve the
6 issues that are going to be teed up for the infringement
7 issues, Your Honor.

8 CHIEF JUDGE CHENEY: Because why?

9 MR. WHITE: Because the configuration of the
10 devices in the accused products, just it really becomes into
11 where the slot is, how it's constructed, and then where the
12 stop or protruding nub is with respect to the slot. It's
13 hard to explain without showing you the specific
14 configuration.

15 CHIEF JUDGE CHENEY: Okay. If it's not going to
16 work to resolve the dispute, I understand.

17 Let me throw one other idea out at you. Have you
18 ever gone running and put your key under your shoelaces?

19 MR. WHITE: I have, Your Honor.

20 CHIEF JUDGE CHENEY: You slide it along the
21 tongue under your shoelaces.

22 MR. WHITE: Sure.

23 CHIEF JUDGE CHENEY: Is that a slot?

24 MR. WHITE: I would say no, not a slot.

25 CHIEF JUDGE CHENEY: Why not?

1 MR. WHITE: I think a slot has got some
2 predefined structure with an opening. And that one you're
3 sort of forcing it between two materials. You're creating a
4 void if you would to put the key into but the void doesn't
5 preexist.

6 So I think a slot has got to have some sort of
7 preexisting space opening parameters, and that that, I
8 wouldn't call that a slot, Your Honor. And especially if
9 we're talking about the context of these claims, obviously,
10 but in general I wouldn't even call that a slot. At least
11 that's just my opinion.

12 CHIEF JUDGE CHENEY: I was trying to think of
13 slots that don't have sidewalls because that was your main
14 argument.

15 MR. WHITE: It was. In the context of this
16 patent and these claims and this description, I've
17 struggled. I thought a lot about this. You know, I didn't
18 just throw that out there. I have truly thought about how
19 you can construct a slot that's external to the helmet shell
20 that didn't have sidewalls.

21 And even the simple coin slot, if it is flush
22 with the shell, there's probably maybe even still sidewalls
23 because the shell itself creates the sidewalls but if it's
24 external to the shell, even then you're going to have some
25 sort of sidewalls that define where the slot is. So that's

1 why I was struggling with the same issue.

2 CHIEF JUDGE CHENEY: If that is necessarily so,
3 let me state that I am not sure it's legally correct for you
4 and I have to have the burden to try to conceive of things
5 that are within the scope of the claims that are not
6 illustrated in the patent. I am not sure that that's the
7 right endeavor.

8 But the -- if it is, as Respondents argue,
9 inevitable that a configuration such as that described in
10 the claim has sidewalls, then I don't understand why we are
11 fighting over the construction because, according to
12 Respondent, it is already baked in. And if it's not already
13 baked in, I think counsel's against Respondent's argument.
14 So do you understand what I'm saying?

15 If you're saying I can't conceive of this
16 structure described in the claim being accomplished with a
17 slot that doesn't have sidewalls, then there are two
18 consequences from that premise.

19 Either it doesn't matter to the case, because
20 every single thing that I look at in the prior art and the
21 accused device and the domestic industry products is going
22 to have them, or the other possibility is you're not right,
23 there can be a slot without sidewalls.

24 And if that is possible, then I have misconstrued
25 the claim.

1 MR. WHITE: Yeah, I follow you. To me, the issue
2 is going to come down to whether something that's being
3 called a slot by one party is actually a slot or not. And
4 that's where --

5 CHIEF JUDGE CHENEY: That's a fact issue.

6 MR. WHITE: It could be, but, I mean, it could be
7 depending upon what the definition of slot is, though. I
8 mean, if a slot requires two extruding -- you know,
9 protruding sidewalls, then I mean it's a pretty clear fact
10 issue as to whether that's present or not.

11 If the definition of slot is broader and it just
12 says nothing, then there's going to be disputes over fact
13 issues of whether something is a slot or not. And somebody
14 could say: Well, there's one protruding sidewall here and
15 something else on the other side or -- so then you've got
16 the issue of: Well, is it a slot or is it not a slot?

17 So that's where I think we're trying to head off
18 some of those issues, but it may be inevitable that you have
19 to hear all the evidence to see the products and then kind
20 of decide the issues as we go.

21 CHIEF JUDGE CHENEY: Thank you. Please proceed.
22 We're now on the last claim term, "disposed centrally
23 relative to the external slot."

24 MR. WHITE: I will be pretty brief on this one.

25 So the main dispute here is really what it means

1 to be disposed centrally. Klein's construction is between
2 the outer bounds of the external slot, which I think is
3 pretty vague and amorphous. You know, what are the outer
4 bounds, especially when we don't have a definition of what a
5 slot is? That's why I say these kind of two work together.

6 The broader or vaguer the definition of the slot
7 is, the looser or the broader they can read between the
8 outer bounds. That's why we have tried to mirror this to
9 our construction of slot to say if a slot has got two
10 protruding sidewalls. Disposed centrally means it has got
11 to be in the middle.

12 And putting aside the disputes about term 7, if
13 we really boil it down to disposed centrally, it comes down
14 to in the middle, positioned in the middle or between the
15 outer bounds.

16 And we think between the outer bounds is not
17 reflective of disposed centrally and that "positioned in the
18 middle" is. We've got the claim language up here. We've
19 all seen this ad nauseam today. There's an embodiment, 17,
20 is the protruding nub that it says is disposed centrally
21 relative to the slot. And, again, if we're looking at 18
22 are the sidewalls, you can see it's pretty clearly right in
23 the middle. That's the description in the specification.

24 The common meaning of central means situated at,
25 or near the center, which, again, is what we tried to

1 follow. And so there's really nothing magical about this.
2 It really comes down to whether or not -- I think everybody
3 agrees plain and ordinary meaning applies but "disposed
4 centrally," does it mean between the outer bounds of
5 something or positioned in the middle of something? And we
6 think "positioned in the middle" captures it and their's
7 does not.

8 That is all I have got, unless you've got
9 questions for me.

10 CHIEF JUDGE CHENEY: So are you taking the
11 position -- is Milwaukee taking the position that disposed
12 centrally means equidistant from who outside things?

13 MR. WHITE: I think we would probably not require
14 that exact level of precision. The problem is it's a
15 slippery slope. Once you start saying it's off the center
16 line, how far can you go? But I think it's really
17 positioned in the middle. And so that's at or near the
18 center.

19 So, again, it's hard to talk about specific
20 examples, but in this case, I really don't think there is
21 going to be a dispute about if we're talking about a
22 millimeter here or there, it is going to be,
23 conceptually-wise, whether it's in the middle or somewhere
24 else.

25 CHIEF JUDGE CHENEY: So in the courtroom right

1 now, is Ms. Roberts sitting in the middle of the courtroom?

2 MR. WHITE: Again, that's pretty close. If we're
3 talking about side to side, and if this is the exact middle,
4 close. I would probably say no. In my view, that's sort of
5 an issue of degree. It is just sort of off to the side, I
6 think, far enough. If I'm standing here, I think I am in
7 the -- sorry, positioned in the middle, even though this
8 would probably be directly down the middle.

9 So that's why I say it is -- it's a matter of
10 degree, but I don't think the disputes in this case are
11 going to come down to that level of difference. It is going
12 to be conceptually are we somewhere within the bounds or are
13 we very close to the midline?

14 CHIEF JUDGE CHENEY: Well, that's what I am
15 trying to figure out what you mean by "in the middle." I
16 think colloquially someone could say Ms. Roberts is sitting
17 in the middle of the room. And someone could -- and the
18 same person could also say Mr. White is standing at the
19 lectern in the middle of the room. And both people would be
20 understood.

21 MR. WHITE: I'm with you. That's why this is a
22 difficult one. But that's why I tried to phrase it more
23 conceptually. I mean, I definitely think between the outer
24 bounds is not the right way. I mean, if the outer bounds
25 are this courtroom, if I were to go stand next to the

1 screen, I would be within the outer bounds of the courtroom.
2 I am certainly not disposed centrally, at least side to
3 side.

4 CHIEF JUDGE CHENEY: And is that where this
5 rubber hits the road? Is that we're talking about something
6 that's slightly off of center line?

7 MR. WHITE: As it works with the construction of
8 slot, yes. And the only way I can try and describe it
9 better is there is going to be an argument that something on
10 a helmet is a slot, and there's going to be a
11 counterargument that, no, all of these things together are
12 the slot. And so the nub is somewhere within this set of
13 components, but it's certainly outside of the very narrow
14 slot.

15 And, again, just to try to speak in generic
16 issues, so it is going to be that level of conceptual issue.

17 CHIEF JUDGE CHENEY: Okay.

18 MR. WHITE: Sorry I can't do better for you.

19 CHIEF JUDGE CHENEY: Everyone is doing a great
20 job.

21 MR. WHITE: Thank you, Your Honor.

22 CHIEF JUDGE CHENEY: Thank you. Let's hear from
23 the other side.

24 MR. RABINOWITZ: Thank you, Your Honor. Alan
25 Rabinowitz again.

1 And I will try to keep this brief as well, Your
2 Honor. To start, this is another term where we think the
3 claim language itself best captures what the intended scope
4 is. We did try to offer a plain meaning construction. I
5 don't know that we nailed that.

6 We think this is one where the claim language
7 itself really gets the precision we need, and there are two
8 issues that we have with Milwaukee's proposed construction.
9 Number 1 is just getting to the claim language, what the
10 claim says is disposed centrally relative to the external
11 slot.

12 It doesn't say in the center of the external
13 slot. And so it does not require that the protruding nub be
14 in the external slot. And I don't know that that's
15 something that Milwaukee is trying to include in the claims,
16 but this is the issue with trying to redefine what are
17 already very clear terms. And that "with respect to"
18 portion of the claim has disappeared.

19 CHIEF JUDGE CHENEY: You mean relative to?

20 MR. RABINOWITZ: I'm sorry, yes, relative to.
21 And I can sort of crystallize this issue to an extent by
22 taking you to the preferred embodiment where you can see
23 here on Figure 3 what they are calling the protruding nub.
24 What is labeled 17 is actually above the top edges of the
25 sidewalls that, in this embodiment, are the outer bounds of

1 the slot.

2 So in the preferred embodiment itself, the
3 protruding nub isn't actually in the slot at all. Now, in
4 their briefs, Milwaukee says that it is, but to support
5 that, and I think this was on their slide 64, and I don't
6 have their slides, but I do have their brief, and I will
7 hopefully -- looks like the ELMO is responding more quickly.
8 I am trying to zoom in so you can see.

9 There is a dotted line there in pink or purple.
10 That is just something Milwaukee added to define an
11 arbitrary boundary for the slot that includes the protruding
12 nub. But that's not what the patent calls the external
13 slot. And that's not what a person of ordinary skill would
14 recognize as the external slot.

15 So the patent itself shows a protruding nub that
16 is not actually within the slot. And that's consistent with
17 the claim language that says "disposed centrally relative to
18 the external slot."

19 The one other point I will make, Your Honor, this
20 goes to the level of precision of "in the middle" and this
21 relates to the same issue is what do you mean in the middle?
22 In the middle from the vertical direction? In the middle
23 from the horizontal direction? Does it have to be
24 geometrically centered? Does it have to be this lectern?

25 In the preferred embodiment, it is not. It is

1 all the way at the top. Your Honor would be centrally
2 disposed with respect to the courtroom, consistent with that
3 picture.

4 So the idea of "in the middle" adds a level of
5 ambiguity and vagueness that is just unnecessary. The plain
6 language of the claim is sufficiently clear to let everybody
7 know what the scope of the claims are. And that's really
8 the only point I have to make, Your Honor.

9 CHIEF JUDGE CHENEY: Your proposed construction
10 uses the word "between." Do you think in Figure 3 that
11 element 17 is between something and, if so, what is it
12 between?

13 MR. RABINOWITZ: The way I would think about it,
14 Your Honor, is if you look at, in this embodiment, the slot
15 has those two sidewalls. And the region defined by the
16 edges, those outer bounds, in the vertical direction, the
17 protruding nub is between those bounds.

18 CHIEF JUDGE CHENEY: Meaning between a plane
19 extended to infinity?

20 MR. RABINOWITZ: I think that I would not go
21 quite so far, Your Honor. I think, you know, it would be
22 fairly -- it would be fair to say it's within, like, on the
23 front surface of a helmet.

24 CHIEF JUDGE CHENEY: Well, what I am trying to
25 get at is you're arguing that element 17 is above --

1 MR. RABINOWITZ: Yes, Your Honor.

2 CHIEF JUDGE CHENEY: -- the two sidewalls. But
3 you're also, I think, because you argue Figure 3 is within
4 the scope of claim 1, the between part of your proposed
5 construction doesn't strictly mean between the sidewalls.
6 It means between planes in which the sidewalls reside,
7 right?

8 MR. RABINOWITZ: That's right, Your Honor. And
9 just to echo one point, and I think I believe there's
10 consensus. Milwaukee can disagree with me, but I believe
11 there's consensus that this is within the scope of that
12 claim.

13 So I believe there's consensus that the
14 protruding nub is centrally disposed with respect to the
15 external slot because this is where that language comes
16 from.

17 CHIEF JUDGE CHENEY: Mr. White, is there
18 consensus on that point?

19 MR. WHITE: I think under our definition there
20 is. Under their definition -- under our definition, there
21 is. Under their definition, I'm not so sure now. There's
22 apparently more in dispute here than I thought with the
23 whole "relative to" and I think he said it was above, so I'm
24 not sure if you apply their definition, if that would fall
25 within it or not. I think it would under ours.

1 MR. RABINOWITZ: Your Honor, I will just
2 reiterate again, this is certainly a case where we think the
3 plain claim language is the best course.

4 CHIEF JUDGE CHENEY: Can you live with their
5 language, Mr. Rabinowitz?

6 MR. RABINOWITZ: I think that, as I articulated,
7 I think the two issues are that their language seems to
8 limit the slot to be -- the protruding nub to be in the
9 slot, and there's also this issue of the lack of precision
10 of "in the middle" which I think is potentially more
11 narrower than centrally disposed. Geometrically where.

12 The other more -- the bigger issue, I think, Your
13 Honor, is their construction imports limitations. This goes
14 back to the discussion we had about the protruding
15 sidewalls. There's no -- you know, not to relitigate that
16 issue.

17 CHIEF JUDGE CHENEY: Yep. I understand the
18 differences between the parties there.

19 MR. RABINOWITZ: Yeah.

20 CHIEF JUDGE CHENEY: So your contention is that
21 in the middle is narrower than centrally?

22 MR. RABINOWITZ: I think it could be interpreted
23 that way, yes, Your Honor. To me that suggests the
24 geometric center.

25 CHIEF JUDGE CHENEY: Which does?

1 MR. RABINOWITZ: In the middle.

2 CHIEF JUDGE CHENEY: You don't think centrally
3 suggests center?

4 MR. RABINOWITZ: The language that I'm
5 understanding that centrally disposed with respect to, and
6 this, again, I think, goes to the point of whether it needs
7 to be within the slot.

8 CHIEF JUDGE CHENEY: Klein agrees that the nub
9 need not be disposed within the slot, correct?

10 MR. RABINOWITZ: Yes.

11 CHIEF JUDGE CHENEY: Let me ask the same question
12 of Milwaukee. Does Milwaukee agree that the nub need not be
13 disposed within the slot?

14 MR. WHITE: I think that could be. I don't
15 necessarily agree that it's always the case.

16 CHIEF JUDGE CHENEY: Well, that's why I said need
17 not be.

18 MR. WHITE: I'm sorry, say your question again?

19 CHIEF JUDGE CHENEY: Does Milwaukee agree that
20 the nub need not be disposed within the slot?

21 MR. WHITE: I think in this example, in the
22 vertical direction, I think that's true. In the horizontal
23 direction, I think that's not true.

24 CHIEF JUDGE CHENEY: Maybe we're getting close.
25 I think you could agree with that, Mr. Rabinowitz, right?

1 MR. RABINOWITZ: I would like to confirm but --

2 CHIEF JUDGE CHENEY: The nub needs to be within
3 the slot, within the planes defined by the slot in the
4 vertical direction. Can you agree with that? You can talk
5 with anyone if you need to.

6 MR. RABINOWITZ: I will talk with my co-counsel.
7 I think that's true in the context of this example. I think
8 more broadly it might depend on the orientation of the slot.

9 CHIEF JUDGE CHENEY: Okay. Do you want to
10 confer?

11 MR. RABINOWITZ: I think I can stick with that
12 answer, Your Honor. I think in this case, it certainly
13 would be -- I would agree that it has to be sort of
14 centrally disposed in the vertical direction, even if it --
15 it doesn't necessarily need to be in the slot in the
16 vertical direction. I think within the bounds, we
17 understood that to mean as consistent, I think, with what
18 Milwaukee is saying is not horizontally off to the side.

19 The broader point I was making earlier is I do
20 think it depends on it's relative to the slot. So you have
21 to look at it from the perspective of that particular slot,
22 what's the orientation of that slot.

23 And one example maybe not quite a slot, but if
24 you were going to meet up with some friends or relatives who
25 lived on the other side of the country, one in California,

1 one in Texas, one in North Dakota, and you said let's meet
2 in a central location, centrally located there is, it's a
3 relative issue.

4 That -- what is central there will be different
5 than what is central if you're meeting up with completely
6 different people. So I wouldn't be comfortable saying the
7 language of verticality should be included in the claims
8 because I think it matters what slot you're looking at.

9 CHIEF JUDGE CHENEY: Well doesn't the claim
10 require the slot to be a vertical slot?

11 MR. RABINOWITZ: You may be right, Your Honor.
12 But in which case, that is sort of already baked in, as you
13 said earlier.

14 CHIEF JUDGE CHENEY: Along the front side of the
15 exterior surface of the outer shell above the brim upwardly,
16 extending upwardly along the front side, doesn't that mean
17 it is a vertical slot?

18 MR. RABINOWITZ: It may, Your Honor. It may. So
19 that may moot -- to my mind, that sort of moots the issue.
20 It's already kind of baked into the definition of the slot
21 in the claim.

22 CHIEF JUDGE CHENEY: So can the parties at least
23 agree that the only dispute for me to resolve is whether
24 centrally means in the middle or something else? Is that
25 the dispute, Mr. White?

1 MR. WHITE: I think here we're talking about in
2 the horizontal direction. So if that's what you're asking
3 --

4 CHIEF JUDGE CHENEY: I'm trying to decide. Is
5 that the only dispute, how far off center in the horizontal
6 direction can it be?

7 MR. WHITE: I think so, although I'm not sure
8 about this whole disposed centrally relative to the slot.
9 If we're back to it has got to be between the two sidewalls
10 and then how far off the middle can you be, I think that's
11 our issue, but I'm not sure that that's the same issue that
12 they are raising.

13 MR. RABINOWITZ: Your Honor, I am not sure that
14 this is a practical -- you know, that this is an issue in
15 the case. I am not sure that how far off something is from
16 the horizontal is actually going to matter.

17 CHIEF JUDGE CHENEY: Who wanted me to construe
18 this?

19 MR. RABINOWITZ: This was Milwaukee.

20 CHIEF JUDGE CHENEY: Do you think it's an issue
21 in the case?

22 MR. WHITE: I do. And that's why I was trying to
23 say to me it's conceptually, it is going to be the issue of
24 when somebody says some collection of components are a slot,
25 is this going to be in the middle of those components or is

1 it going to be outside of them?

2 It is not going to be an issue of how close we
3 are to the midline. That's why I said conceptually I think
4 that's going to be the bigger issue, not the precision of
5 where it is located.

6 CHIEF JUDGE CHENEY: I literally don't know what
7 I could do for you that would resolve -- I could say some
8 other words about the claim. I have no idea if it is going
9 to help you. And it probably will result in more litigation
10 about the words that I say because I -- I have struggled
11 mightily to understand the way that this matters, the
12 dispute between the parties, and I can't think of words that
13 I could give you that are going to help resolve the dispute.

14 So --

15 MR. WHITE: I could give you an example, Your
16 Honor.

17 So if you were to take that 17 and move it to a
18 position where the number 204 is pointing to, we would say
19 that's clearly not within the scope of this claim. Or you
20 could move it up to the very tippe top where the number 1 is
21 pointing, not centrally located.

22 And I'm not sure what relative to the slot, how
23 they are reading that, but I don't know how else you can
24 read that other than it has got to be in the middle,
25 centrally located, within those parameters.

1 So --

2 CHIEF JUDGE CHENEY: And I have not heard from
3 Mr. Rabinowitz that there's anything close to that kind of a
4 contention being raised in this case.

5 MR. WHITE: I think we do because their whole
6 issue is whether it has got to be within the slot or not
7 within the slot. They are saying it can be outside of the
8 slot, and we have got now narrowing of vertically, it has
9 got to be within the slot, it can't be outside of it
10 horizontally.

11 But again, I think that's the dispute we're going
12 to here, it is going to be somewhere else completely and
13 whether it's within the slot or not within the slot is going
14 to be an issue because of this whole centrally located
15 requirement.

16 CHIEF JUDGE CHENEY: The who examples that you
17 just gave are things Mr. Rabinowitz expressly said he is not
18 going to advance because it's not within the slot in the
19 horizontal direction. So I am left with materiality.

20 Anything to add?

21 MR. RABINOWITZ: No, Your Honor.

22 CHIEF JUDGE CHENEY: Okay. Then I don't think I
23 am going to give you a construction. At least at this time.

24 Okay. Any rebuttal? Anything else that anyone
25 wants to say?

1 MS. ROBERTS: Nothing from Respondent, Your
2 Honor.

3 MR. AROVAS: Nothing from Complainant.

4 CHIEF JUDGE CHENEY: Okay. I like to end a claim
5 construction hearing by giving you some guidance about what
6 I thought of the relative strength of arguments. It sounds
7 dangerous to me today.

8 Would you find it helpful for me to give you some
9 thoughts or do you think it is better for your side to not
10 have those thoughts on the record?

11 MR. AROVAS: Your Honor, I can try to address
12 that. I think certainly, you know, if you do have, you
13 know, well-formed thoughts that you want to share, we can
14 take those into account for discovery and, you know, expert
15 reports and expert positions.

16 So that is useful. But obviously I know Your
17 Honor heard a lot today and so if you're still thinking
18 about them, we certainly don't want to misconstrue any of
19 your inclinations as well.

20 CHIEF JUDGE CHENEY: Thoughts from the
21 Respondent?

22 MR. WHITE: Your Honor, we're always happy to
23 hear where your thoughts are at any given point in time. So
24 happy to hear what you have to say.

25 CHIEF JUDGE CHENEY: Okay. For the '209 and '573

1 patents, is there any possible way that we could drop all
2 claims except '573, claim 6, and dependent claims therefrom?
3 And you might not be able to answer that today. But it
4 seems like '573, claim 6, is your broadest claim when it
5 comes to this issue of transparent and light passing
6 through.

7 I realize that might present some validity
8 problems or something like that. What that would do is it
9 would mean that I wouldn't have to construe the term
10 "transparent." But maybe you're not in a position to say
11 that today.

12 MR. AROVAS: So, Your Honor, to answer that, we
13 would have to talk to the client.

14 CHIEF JUDGE CHENEY: Sure.

15 MR. AROVAS: We wouldn't be able to do that.
16 Just giving some reactions to that, we do have the DI
17 product that is using claim 1, which obviously has the term
18 transparent in it. Obviously that's a different design.

19 The other thing --

20 CHIEF JUDGE CHENEY: But your DI product would
21 also practice '573, claim 6?

22 MR. AROVAS: Yes, it would. Yes, it would. So
23 --

24 CHIEF JUDGE CHENEY: Under your theory of the
25 case. So --

1 MR. AROVAS: It is broader, that is true.

2 CHIEF JUDGE CHENEY: And the investments aren't
3 divided by patent, I assume?

4 MR. AROVAS: No. No. So, yeah, that's true.
5 The other thing in mind, and I would want to also look at
6 the prior art to see if that creates any other issues, is
7 doctrine of equivalents, which could be asserted, we
8 believe, even under the narrower construction that was
9 discussed.

10 CHIEF JUDGE CHENEY: Okay. It was worth asking.

11 Let me give just a big old disclaimer that I'm
12 going to give you my thoughts. These are not the same thing
13 as a determination about the legal meaning of the claims.
14 This is just some thoughts about the relative strength of
15 arguments that I have heard today, and that when I give you
16 a claim construction order that has the legal meaning of the
17 claims, it may differ from these thoughts. It may even be
18 the opposite of these thoughts. So these are just some
19 musings, nothing more.

20 I think that the term "transparent," in general,
21 would be understood by a person of skill in the art to
22 modify physical material. And by physical, I mean not
23 gases. Although gases, you know, they could be viewed as
24 transparent. That's just not the art we're talking about
25 here.

1 And so when the claims use the word "transparent"
2 to modify nouns like sidewall, case, component, that to me
3 weighs in favor of a solid material. '573, patent claim 6,
4 presents a little different consideration. If the claim
5 didn't say at least a portion of, and just said wherein the
6 case is configured to allow luminescent material to be
7 energized by light, and just ended there, I think that would
8 be a different kind of question, but there are other words
9 in the claim that I'm going to have to reckon with there;
10 particularly the concept of passing through.

11 On "wherein the front receptacle and the rear
12 receptacle are of identical construction," what sticks out
13 to me there in the '327 patent, claim 1, is that the claims
14 started out by describing the rear receptacle by talking
15 about an additional slot but then talks about the front
16 receptacle and the rear receptacle being of identical
17 construction.

18 And that phrase is just -- it's just a narrowing
19 phrase. It's a very narrowing phrase. I think I mentioned
20 earlier a broader claim would have repeated different
21 elements, a second protruding nub, et cetera, et cetera or
22 nub. But this claim didn't do that. It started out doing
23 that, and then changed to talk about identical construction.
24 And that's pretty narrow language.

25 Wherein the outer shell is reversible, I'm going

1 to let the parties try to confer more about that. I would
2 like the parties to consider a construction of wherein the
3 outer shell is configured for forward and reverse-wearing
4 orientations and is configured for a functional view of the
5 wearer in both orientations.

6 On protruding nub, because of the claim language
7 talking about in one case that the protruding nub comprises
8 a stop and in another case that the stop comprises a
9 protruding nub, and not finding words of manifest definition
10 or clear and unmistakable disclaimer, I think that the
11 presumption that different words have different meanings and
12 this kind of genus/species relationship means that the two
13 terms are overlapping in a Venn diagram but not completely
14 overlapping. And neither is one term completely within the
15 other.

16 I think that's how a person of ordinary skill in
17 the art would understand those. I didn't actually hear much
18 dispute about what those words mean, that a person of skill
19 in the art wouldn't know what a nub is or wouldn't know what
20 a stop is. In fact, I think I heard some concessions to the
21 opposite. So I think maybe that will resolve that one.

22 On external slot, there's a lot of agreement, but
23 I actually don't precisely understand where the disagreement
24 is. And so I am probably not going to give you a
25 construction of "external slot" or the "centrally disposed"

1 term until after trial when I better understand what the
2 dispute is.

3 I would encourage you to keep discussing
4 potential constructions for those. If you can come to an
5 agreement, I think it would probably serve you both well in
6 the expert discovery stage, if you had an agreed
7 construction of those terms. And it sounds like you're
8 close, but you differ in ways that are just not clear to me
9 today.

10 Do you all have questions for me?

11 MR. AROVAS: No, Your Honor.

12 MR. WHITE: Your Honor, for the terms other than
13 the ones where you said you'll not likely give us a
14 construction until after trial, do you intend to issue some
15 sort of claim construction order before trial?

16 CHIEF JUDGE CHENEY: To the extent that I am able
17 with my schedule, yes. It is always my preference to do so.

18 MR. WHITE: Got it.

19 CHIEF JUDGE CHENEY: I think it is helpful to me,
20 I think it is helpful to you, so I'm -- I will endeavor in
21 that direction.

22 MR. WHITE: Got it. Perfect, thank you.

23 CHIEF JUDGE CHENEY: It does not always happen.

24 MR. WHITE: Understood.

25 CHIEF JUDGE CHENEY: What else? What other

1 questions might you have for me?

2 Okay. Well, one thing that I want to do then
3 here in closing is congratulate our NEXT advocate,
4 Ms. Greenberg, on her first oral argument. You did an
5 outstanding job. Your client should be very pleased in the
6 way that you represented them today.

7 And I look forward to many more good oral
8 arguments here at the Commission, and I especially
9 appreciated the way that you engaged with questions,
10 including about what to concede. Those are difficult
11 questions from the bench, and you did a great job with that.

12 And to all of you, thank you for engaging with me
13 in good faith today. I can only imagine how awful it is to
14 argue a claim construction hearing in front of me. It must
15 just be terrible, but you did a really great job in helping
16 me understand the issues. You reckoned with very difficult
17 questions. And you did it with professionalism and I really
18 appreciate that.

19 Your clients on both sides should be very pleased
20 with your representation today. I will endeavor to get you
21 an order as soon as possible. And we will see each other
22 again soon, I hope. We're off the record.

23 (Whereupon, at 3:52 p.m., the Markman Hearing
24 concluded.)

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I N D E X

AFTERNOON SESSION: 133

1 CERTIFICATE OF REPORTER

2 TITLE: Certain Glow Fish Tape Systems, Safety Helmet
3 Systems, and Components Thereof

4 INVESTIGATION NO: 337-TA-1442

5 HEARING DATE: July 23, 2025

6 LOCATION: Courtroom B

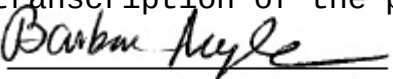
7 NATURE OF HEARING: Markman Hearing

8 I hereby certify that the foregoing/attached
9 transcript is a true, correct and complete record of the
above-referenced proceedings of the U.S. International Trade
Commission. Date: July 24, 2025

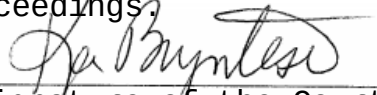
10 SIGNED: 

11 Signature of the Contractor of the
12 Authorized Contractor's Representative
13 1150 Connecticut Avenue, N.W., Suite 305
Washington, D.C. 20036

14 I hereby certify that I am not the Court Reporter
15 and that I have proofread the above-referenced transcript of
the proceedings of the U.S. International Trade Commission,
16 against the aforementioned Court Reporter's notes and
recordings, for accuracy in transcription in the spelling,
hyphenation, punctuation and speaker identification and did
17 not make any changes of a substantive nature. The
foregoing/attached transcript is a true, correct and
18 complete transcription of the proceedings.

19 SIGNED: 
20 Signature of Proofreader

21 I hereby certify that I reported the above-referenced
proceedings of the U.S. International Trade Commission and
caused to be prepared from my tapes and notes of the
22 proceedings a true, correct and complete verbatim recording
of the proceedings.

23 SIGNED: 
24 Signature of the Court Reporter

25