

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

OSSEO IMAGING, LLC,

Plaintiff,

v

PLANMECA USA, INC.,

Defendant.

: CIVIL ACTION

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: NO. 17-1386-LPS

Wilmington, Delaware
Wednesday, January 8, 2020
Oral Argument Hearing

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

APPEARANCES:

BAYARD, P.A.

BY: STEPHEN B. BRAUERMAN, ESQ.

and

MEISTER SEELIG & FEIN, LLP

BY: SETH H. OSTROW, ESQ.,

SARAH PFEIFFER, ESQ., and

ANTONIO PAPAGEORGIOU, ESQ.

(New York, New York)

Counsel for Osseo Imaging, LLC

MORRIS NICHOLS ARSHT & TUNNELL, LLP

BY: MICHAEL J. FLYNN, ESQ.

and

Brian P. Gaffigan
Official Court Reporter

1 APPEARANCES: (Continued)

2 JACKSON WALKER, LLP

3 BY: LEISA T. PESCHEL, ESQ., and

4 WASIF QURESHI, ESQ.

(New York, New York)

Counsel for Planmeca USA, Inc.

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

24 (REPORTER'S NOTE: The following oral hearing
25 was held in open court, beginning at 10:37 a.m.)

1 THE COURT: Good morning.

2 (The attorneys respond, "Good morning, Your
3 Honor.")

4 THE COURT: I'll have you put your appearances
5 on the record for us, please.

6 MR. BRAUERMAN: Good morning, Your Honor. Steve
7 Brauerman from Bayard on behalf of the plaintiff. I'm
8 joined at counsel table by Seth Ostrow, Antonio Papageorgiou
9 and Sarah Pfeiffer from Meister Seelig & Fein. All three
10 have been pro hac'd in and will be addressing various
11 motions with the Court today.

12 THE COURT: Okay. Thank you.

13 MR. BRAUERMAN: Thank you.

14 THE COURT: Good morning to all of you.
15 Good morning.

16 MR. FLYNN: Good morning, Your Honor. Michael
17 Flynn from Morris Nichols on behalf of the defendant,
18 Planmeca USA. With me at counsel table is Leisa Peschel and
19 Wasif Qureshi from Jackson Walker.

20 THE COURT: Good morning to you as well.

21 So we're here for argument on the many motions
22 that you all have filed. Did you talk about how you might
23 like to proceed through those motions given my limited time?
24 And if not, what do you propose?

25 MS. PESCHEL: We would propose to start with the

1 summary judgment motions, Your Honor.

2 THE COURT: Summary judgment motions?

3 MS. PESCHEL: (Nodding yes.)

4 THE COURT: Is there any objection to that?

5 MR. OSTROW: No, that makes sense to us.

6 THE COURT: We'll start with summary judgment
7 and we'll see where we are once we get through that.

8 MS. PESCHEL: Thank you, Your Honor. Do you
9 have a preference for which summary judgment motion you
10 would like to start with?

11 THE COURT: I do not have a preference.

12 MS. PESCHEL: Okay. Then I believe we'll start
13 with the summary judgment motion for invalidity due to lack
14 of written description and enablement.

15 In particular, we have moved on four grounds:

16 That there is no written description enablement
17 support for comparing the claimed models.

18 Single energy densitometry.

19 Use of an electron beam source, or

20 Generating 3D models.

21 So beginning with the "comparing" issue, the
22 comparing claims are a subset of the accused claims. It's
23 claim 6, 12 to 24 of the '374 patent and claims 1 through 4
24 and 6 of the '262 patent.

25 Each of these claims requires that the

1 controller or computer compare the claimed models.

2 In the claim construction hearing in this case,
3 Osseo's counsel argued that comparing was one of the points
4 of novelty of the invention to the able to make this
5 comparison between these models.

6 Now, the problem is that there is no
7 identification in the specification of how you describe --
8 where is the description for how to actually compare these
9 models.

10 We know in the claim construction hearing, we
11 have had an issue with respect to one of the means plus
12 function claims that the Court ended up finding indefinite
13 because there was no structure recited for how to perform
14 that comparison.

15 When we took the deposition of the inventor in
16 this case, Mr. Massie/Dr. Massie, we asked him, okay, well
17 comparing is important to your invention. How does your
18 invention describe looking for those changes? And he says
19 he couldn't tell us.

20 Now, there are references in the specification
21 that state the word "compare" but there is only one
22 reference that mentions comparing models and all it says is
23 the prior art could compare B and D models.

24 The other uses of the word "compare" in the
25 specification have to do with comparing a model to

1 predetermined parameters or to a baseline, but none of it
2 describes how to actually do the comparing.

3 So, of course, our expert in this case, Dr. Pelc
4 issued an invalidity report that said there was lack of
5 written description and enablement and described the
6 reasons why for this comparing limitation. And in response,
7 Osseo's expert, Dr. Kia cites three different portions of
8 the specification. He cited the portion of the summary
9 of the invention which merely says compare the model to
10 predetermined parameters and then he cites two portions of
11 the '262 patent specification.

12 Now, in this case, all the asserted claims are
13 being claimed to have a priority back to the original
14 specification. And so those two additional citations don't
15 go back to the original specification here.

16 Even if you look at those citations, they don't
17 describe how to actually use the invention in a way in which
18 they're comparing these models.

19 Just for the Court's reference, on slide 10 we
20 have Figures 6A and 6B from the '262 patent, and really all
21 it says is compared to baseline in 6A and compared to the
22 current patient modeled in 6B, but it doesn't give you a
23 flow diagram of what you are actually comparing, what is it
24 about the models you are comparing? What are you doing?
25 How is the software and the controller supposed to be

1 programmed to do this?

2 So if the Court has any questions on the
3 "comparing" issue, I'm happy to address those.

4 THE COURT: Well, I'm not quite sure if it is
5 "comparing" focused, but you are arguing both indefiniteness
6 and lack of enablement; correct?

7 MS. PESCHEL: Lack of written description and
8 enablement. The Court has already found the comparing means
9 plus function.

10 THE COURT: Thank you for that. So it is
11 unclear from the briefing whether you have a different basis
12 for those two defenses and if your expert does because, of
13 course, they're not the same defense.

14 MS. PESCHEL: Right.

15 THE COURT: So help me on that.

16 MS. PESCHEL: Well, so on written description,
17 the four corners of the specification don't describe the
18 invention, the comparing; right? It just says the word
19 compare. It just repeats that word. It doesn't say what
20 that means to the invention.

21 On enablement, it doesn't describe how to use
22 the invention in the comparison because it doesn't even
23 describe how to do the comparison.

24 THE COURT: All right. So we know as a matter
25 of law, written description, enablement don't always rise

1 and fall together, but you would say in this case they do
2 because if there is not written description for how to
3 compare, then there can't be enablement for how to compare.
4 Is that the argument?

5 MS. PESCHEL: Correct, Your Honor.

6 THE COURT: Okay. You can move on if you want.

7 MS. PESCHEL: The next issue on written
8 description, enablement I want to address is densitometry.
9 This affects all asserted claims of the patents-in-suit and
10 we know that the Court construed the "tomographic model"
11 terms which include tomographic densitometry model and
12 tomographic model.

13 The patents require that the models be generated
14 using densitometry, which the Court construed to mean
15 "quantitatively calculated bone density."

16 So during the claim construction hearing and the
17 briefing in response, Planmeca argued that, well, the
18 patent-in-suit describe dual energy densitometry, but they
19 don't describe single energy densitometry and that shouldn't
20 be included within the scope of the claims.

21 Osseo argued the opposite, and the Court held
22 that while the specification was emphasizing dual energy
23 method, it is not limiting the claims to that method.

24 So under *Trustees of Boston University*, because
25 they argued for the broader scope, it is now imperative that

1 Osseo be able to show that those written description support
2 and enablement for that broader scope.

3 Our expert in this case, Dr. Pelc explained the
4 lack of disclosure regarding the densitometry models but in
5 specific use for the use of single energy densitometry.

6 But in response again, Osseo's expert Dr. Kia
7 presented no evidence that they described or enabled single
8 energy densitometry. Instead, what Dr. Kia said, and I
9 quoted from his report on slide 16, the claims in the
10 patents-in-suit are not limited to only a single energy
11 level and this inquiry is therefore irrelevant.

12 Therefore, he made no attempt to identify any
13 disclosures in the patents-in-suit or describe knowledge of
14 one of ordinary skill in the art that would enable the full
15 scope of the claims using single energy densitometry in
16 order to generate the claimed model.

17 Would you like me to go on?

18 THE COURT: Sure.

19 MS. PESCHEL: So the third issue with respect
20 to the summary judgment motion on 112 issues is the energy
21 source claims. This affects all claims of the '262 patent.
22 So I'm on slide 18.

23 So unlike the claims of the other patents which
24 require an x-ray source, the '262 patent is a continuation
25 in part. It does have additional disclosures and its claims

1 require an energy source.

2 When you look at the additional disclosures in
3 the '262 patent, it suggests using an electron beam source.
4 Therefore, an electron beam source would be in the scope of
5 the broader energy source of these claims.

6 The problem is that the '262 patent doesn't
7 describe or enable actually using the electron beam source.
8 It is more about you could use it but it doesn't describe
9 how to use it.

10 Indeed, what Dr. Pelc opined on was that in
11 reality, a person of ordinary skill in the art wouldn't
12 understand how to use an electron beam source because there
13 is no disclosure of the energy levels that are necessary to
14 penetrate the objects that would have been imaged using an
15 electron beam source unless you start adding very high doses
16 of radiation to the patient and magnets and various other
17 things that would take it outside of the scope of what
18 appears to be anticipated by the patent.

19 Then again, this is another instance where Osseo's
20 expert, Dr. Kia doesn't directly challenge Dr. Pelc's opinion
21 regarding an electron source. He simply says they're not
22 limited, the claims are not limited to using electron beam
23 source and the inquiry is therefore irrelevant.

24 Indeed, I'm showing a portion of the transcript
25 of Dr. Kia from, on slide 22.

1 I asked him in his deposition: If you are using
2 electron beam source, is there disclosure of what energy
3 that source needs to be used in order to penetrate the
4 dental structure?

5 And he said: I'm not -- I'm not -- I didn't
6 analyze that in my study here.

7 Then I asked: Were electron beam sources
8 routinely used in dental imaging?

9 And his answer was: No.

10 So it's not something, is not routine knowledge
11 that one of ordinary skill in the art would know how to
12 substitute in an electron beam source from x-ray source in
13 these systems.

14 THE COURT: But to the extent you are arguing
15 what you are, lack of enablement, right?, for this one as
16 well?

17 MS. PESCHEL: Yes.

18 THE COURT: I need to be able to say that any
19 reasonable juror taking all the evidence in a light most
20 favorable to the plaintiff, that all such reasonable jurors
21 would find by clear and convincing evidence that it is
22 not enabled, that we would need undue experimentation, et
23 cetera.

24 You have shown me stuff that suggests you have a
25 decent enablement argument, but how do I go a step further

1 and write a persuasive opinion that says this is unique in
2 front of the jury?

3 MS. PESCHEL: So, Your Honor, a couple of
4 things.

5 No. 1, Dr. Pelc provided an extensive analysis,
6 an extensive expert opinion that went unrebutted because
7 Osseo's expert simply thought that the inquiry was irrelevant.

8 In his explanation, Dr. Pelc describes what was
9 known in the art and what was not known in the art and it
10 was simply unreasonable to think that anyone could use an
11 electron beam source in these types of systems. So I don't
12 think there is any evidence to rebut, there will be no
13 evidence for a jury to find that there was written
14 description or was enablement for these electrons.

15 THE COURT: Didn't Dr. Kia say things like it
16 would be complicated to do this but he didn't necessarily
17 acknowledge one of skill in the art wouldn't be able to do
18 it, I don't think.

19 MS. PESCHEL: Well, in his report, Your Honor,
20 I'm showing on slide 21 the sole response to Dr. Pelc's
21 opinion.

22 He quotes from Dr. Pelc's opinion, and then he
23 says the asserted claims are not limited to using electron
24 beam source and the inquiry is irrelevant.

25 THE COURT: And in his deposition, he doesn't

1 deny lack of enablement?

2 MS. PESCHEL: Just conclusory. I mean he just,
3 he says, he repeats what is in his report, that there is no
4 -- that he believes that there is not a lack of enablement.

5 THE COURT: Okay.

6 MS. PESCHEL: Okay. Moving on to the three
7 dimensional claims.

8 Again, this is a subset of the claims. It does
9 affect all of the claims of the '262 patent and then select
10 claims of the '374 patent as shown on slide 24.

11 Again, we go back to all of the patent-in-suits
12 claim priority to the '301 patent; and in that common
13 specification, there is no mention of the word 3D or three
14 dimensional.

15 There is, therefore, no enablement for how to
16 process this radiation data to generate a 3D densitometry
17 modeled.

18 Dr. Kia makes some citations to the patents,
19 none of which mention 3D or three dimensional or describe
20 how the computer controller would be processing the x-ray
21 data in order to take what are 2D slices and formulate a 3D
22 model.

23 When asked in his deposition, Osseo's expert, we
24 asked on slide 28: Is there any disclosure in this patent
25 of the way in which you would do the back projections to get

1 to a three dimensional model?

2 He agreed: I don't think the actual algorithm,
3 the back projection algorithm has been described in any of
4 these patents.

5 Nor can you find in any of these patents any
6 flow diagram of how it could be done or any explanation.

7 THE COURT: Okay. Thank you.

8 MS. PESCHEL: So.

9 THE COURT: Yes, let's hold on on invalidity.
10 We'll hear the response on this.

11 MS. PESCHEL: Sure.

12 THE COURT: Thank you. Or the rest of the
13 invalidity, I should say.

14 MR. OSTROW: Good morning, Your Honor.

15 In our slides which we handed up to the Court,
16 we had intended to argue this motion second, so I'm skipping
17 now to slide 75 just for the record.

18 THE COURT: Okay.

19 MR. OSTROW: And I'm probably going to skip
20 through some of the slides to save time for the other
21 arguments.

22 The Court has touched on, Your Honor has touched
23 on an important issue. Let me sort of start with that. Let
24 me get that cleared up right away.

25 Planmeca's motion does conflate the issues of

1 written description and enablement. We pointed this out in
2 our opposition. They don't really distinguish the standards
3 required to prove each of those.

4 On the issue of written description, the briefs
5 are clear, given theirs that each of the four things that
6 are alleged not to be described are in fact explicitly
7 stated to be in the specification. They're there. So it
8 just doesn't seem to be any meeting of a standard of a
9 lack of written description. There is clearly written
10 description. The issue really I think they are trying to
11 argue, and I think Your Honor touched on this, is whether
12 the description is enabling to one of ordinary skill in
13 art but there is an adequate description.

14 In each of the four instances, we have facts
15 including expert testimony that one of ordinary skill in
16 the art would find it adequate, would find the description
17 adequate so that in our view right there just precludes
18 summary judgment on any of these issues. I offer you a
19 little bit of this but my intention is to try to save more
20 of my time on some of the other issues but I'm certainly
21 happy to go into it.

22 THE COURT: Well, certainly it would be helpful
23 to point out exactly where your expert is contradicting
24 Dr. Pelc because the contention is he has not done that.

25 MR. OSTROW: Okay. Let's start with the

1 "comparing" terms.

2 There is an issue which counsel for Planmeca
3 discussed which we have a number of slides, I don't think
4 it's worth going through at this point, that has to do with
5 a little bit of confusion between the arguments made with
6 respect to the means-plus-function element that Your Honor
7 found indefinite because if it didn't meet the standard for
8 112, paragraph 6 of having the structure, which in the case
9 of a software would be an algorithm. So to that extent,
10 that is a standard that was used in deciding the 112,
11 paragraph 6 issue which Your Honor has already decided.

12 On the issue of merely written description and
13 enablement, it's a different standard. The standard would
14 be what one of ordinary skill in the art would have
15 understood.

16 Here, on slide 77, we have some pages or para-
17 graphs from Dr. Kia, Osseo's technical expert. His validity
18 report, which includes a discussion of their sufficient
19 written description, the issues raised by Dr. Pelc and
20 includes down here that regarding enablement on the issue of
21 comparing, cites to the specification and says that there
22 is sufficient enablement by the following, at least the
23 following, which is it says the computer also includes
24 comparison software (118) which is adapted for digitally
25 comparing baseline and patient's specific dental and

1 orthopedic densitometry models.

2 So stepping back on this for a moment.

3 The patents describe the fact that there are
4 these densitometry or tomographic models as Your Honor will
5 remember.

6 And these are datasets, they're digital
7 information, and what the patent is saying is that there is
8 software which compares two sets of digital information.

9 Dr. Kia is saying that one of skill in the art
10 would understand how to do that. It may not be one way. A
11 simple subtraction of the values between the two models
12 could be a way.

13 There is certainly other ways that one of skill
14 in the art knows how to compare two datasets in a computer,
15 but certainly there is, Dr. Kia has provided that testimony
16 in the end. We're not here today to prove that this is in
17 fact the case, just simply there are sufficient facts that a
18 jury can make this decision.

19 THE COURT: Is he saying a person of skill in
20 the art would know where to go purchase comparing software?

21 MR. OSTROW: That is, could be one way. It's
22 not saying here.

23 THE COURT: The argument is the patent itself
24 doesn't tell you how to compare. Are you saying that's
25 true, it just says, but there is software out there that

1 knows how to do it and that is adequate?

2 MR. OSTROW: I'm meaning to say one of ordinary
3 skill in the art, at the time of this invention, would know
4 how to do that, so it meets the standard, yes.

5 THE COURT: Even if the way they know how to do
6 that is to purchase software that is not disclosed in the
7 patent.

8 MR. OSTROW: Yes. Again, that is not the only
9 way but that is a way.

10 THE COURT: What other way does your expert say
11 is the way a person of skill in the art would know how to do
12 it?

13 MR. OSTROW: What he is saying is that one of
14 skill in the art would know how to compare two sets of data
15 in a computer.

16 THE COURT: When he talks about how they would
17 know how to do that, other than by software?

18 MR. OSTROW: This is the basis for his opinion.
19 There may be additional testimony in his deposition which I
20 am just not thinking of off the top of my head, but this is
21 at least found in his report.

22 THE COURT: All right.

23 MR. OSTROW: Let me skip ahead to some of the
24 other issues.

25 The densitometry.

1 We have explained and that Dr. Kia mentioned
2 this as well. That the patents incorporate by reference
3 other references, other patents. One of them is this
4 Gershman patent, on slide 88 from our slides. And that
5 is cited specifically in the patent for disclosing the
6 known use of single energy level measurements. So by
7 incorporating it by reference, one of ordinary skill in the
8 art would have been enabled how to do the claimed
9 methodology using single energy level measurements.

10 To the extent that Planmeca is arguing that
11 the densitometry couldn't be achieved using single energy,
12 energy level measurements other than Dr. Pelc saying so,
13 there is no evidence to that effect; and I believe it
14 is based on their misperception of the requirements of
15 densitometry which affects some of their other motions as
16 well.

17 I mean to say that densitometry, getting bone
18 density values can be done through single energy level
19 measurements and the Gershman patent incorporated by
20 reference contained that disclosure.

21 THE COURT: Does Dr. Kia identify anything other
22 than this other patent incorporated by reference in support
23 in the patent itself for written description or enablement?

24 MR. OSTROW: I don't believe so.

25 THE COURT: So it's all dependent on this

1 incorporating by reference?

2 MR. OSTROW: Yes, for the disclosure of the
3 single energy level scanning.

4 The disclosure of the dual energy level is
5 obviously disclosed in the patent itself which enables also
6 the claim which is not limited to one or the other.

7 THE COURT: Okay.

8 MR. OSTROW: Let's see here.

9 On the other two issues that they have raised,
10 the electron beam source, it's disclosed in the
11 specification so, again, there is an issue between written
12 description and enablement. There is clearly a written
13 description of it, and I don't think Dr. Pelc would disagree
14 with that.

15 But as the Court mentioned a moment ago, and as
16 we cited in our brief, in our opposition brief on page 11,
17 in his deposition testimony, Dr. Kia did say that while it
18 might be difficult or complicated to use an electron beam
19 source, that it is certainly doable.

20 As such, there is not enough evidence, certainly
21 at this stage, we think at all, but certainly at this stage
22 to show that there are insufficient facts to preclude -- to
23 provide summary judgment on this issue.

24 THE COURT: So Dr. Kia did testify that a person
25 of skill in the art would know how to do it.

1 MR. OSTROW: Yes.

2 THE COURT: Does he explain at all how they
3 would know how to do it?

4 MR. OSTROW: Again, I don't recall off the top
5 of my head. So I'll say that at the moment not that I'm
6 aware of.

7 THE COURT: If he has not in his expert report
8 or in his deposition explained how it is that one of skill
9 in the art would now how to do it, why wouldn't that just
10 be a conclusory statement that really doesn't merit being
11 credited?

12 MR. OSTROW: Well, that is up to Your Honor. I
13 think he is providing his expert opinion based on his
14 knowledge base. One of ordinary skill in the art would know
15 how to do it. The patent does say using electron beam
16 sources it is possible. It may not have been common at
17 the time in use by dentists, it may not have been in dental
18 imaging machines and the like, but there is no evidence even
19 by Dr. Pelc that it couldn't be done.

20 THE COURT: Okay.

21 MR. OSTROW: The same thing with the 3D models.
22 There is disclosure, specific disclosure of the use of 3D
23 models. And Dr. Kia again testified that one of ordinary
24 skill in the art would know, at the time of the invention,
25 how to take datasets and make 3D models out of them. It

1 was known. We're not professing that that's the invention.
2 It was known at the time, fairly well known by those of
3 ordinary skill in the art how to make 3D models out of image
4 datasets.

5 The other thing that I think is worth pointing
6 out is that to the extent that Planmeca's arguments are
7 really based on lack of enablement, in order for them to
8 have made the showing, they would have had to show that
9 these things could not be done without undue experimentation.
10 There is actually no discussion in their briefing or even
11 today about any factual basis for how much experimentation
12 would be needed, whether that is due, you know, a due amount
13 or undue amount. There is just nothing. That is completely
14 missing that element from the enablement case.

15 THE COURT: I thought their expert said 3D,
16 three dimensional isn't even mentioned in the specification.

17 MR. OSTROW: So it's not mentioned, these
18 patents were, one's a continuation or part of the other. It
19 may not have been mentioned in the earlier patent, but it
20 was mentioned in the later one which has the claims talking
21 about 3D.

22 THE COURT: The claims that are at issue in this
23 case.

24 MR. OSTROW: That's my guess.

25 THE COURT: Okay.

1 MR. OSTROW: Another issue, just to quickly
2 address it, counsel raised it in their briefing as well.
3 This issue of the priority date, I don't want to spend a lot
4 of time on this, but if there is, if they want to make a
5 case that the earlier specification doesn't have the
6 disclosure to support claims from the later specification,
7 the remedy for that is essentially that their priority date
8 fails and that, therefore, for example, we couldn't use
9 that priority date to overcome prior art. As far as I know,
10 we're not doing that in any of the prior art that is being
11 asserted.

12 The remedy for that is not that the later claims
13 are not supported because the earlier specification didn't
14 have certain disclosure.

15 THE COURT: Okay. Is there anything else you
16 want to say on these issues that have been argued to this
17 point?

18 MR. OSTROW: I'm sorry?

19 THE COURT: Is there anything else you want to
20 say on this?

21 MR. OSTROW: No, not on this one.

22 THE COURT: We'll turn it back to the plaintiff.

23 MS. PESCHEL: Your Honor, would you like me to
24 address any of those issues?

25 THE COURT: I'm sorry?

1 MS. PESCHEL: Would you like me to address any
2 of the remaining?

3 THE COURT: Now would be the time for rebuttal,
4 if you want to. It's up to you.

5 MS. PESCHEL: Very quickly. I want to use my
6 time efficiently.

7 Counsel put up slide 77 and he quoted language
8 that was not from the common specification. So what Dr. Kia
9 quoted from is from 564 to 69 of the '262 patent, and even
10 just a reference to comparison software still doesn't tell
11 you how to do it. There is not a description that describes
12 to one of ordinary skill in the art how to make and use the
13 invention when it comes to the comparison limitation.

14 THE COURT: If it were the case, if they could
15 prove that one of skill in the art would go to the store and
16 buy software, and they knew how to go to the store and buy
17 software, wouldn't that be enabling?

18 MS. PESCHEL: Only if that was what was known.
19 And there is no evidence in this record that that was the
20 case.

21 That because what we're -- we're not talking --
22 allegedly we're not talking about just tomographic images
23 which were known in the art, we're talking about very
24 specific tomographic densitometry models, and the idea that
25 you could go to the store and pick up software that would

1 compare those models seems to me -- and again this is a
2 theme we'll get to -- would render the claims invalid over
3 the prior art because if you could just go to the store and
4 be able to compare them, that means that the software would
5 have to anticipate that those things existed in the art
6 anyway.

7 THE COURT: Okay. Is there anything else you
8 want to say on these issues?

9 MS. PESCHEL: With respect to densitometry.
10 Dr. Kia did not identified the Gershman disclosures that
11 allegedly support the single use, single energy level
12 densitometry, nor did he describe them or explain how one
13 of ordinary skill in the art would understand from a very
14 small reference in the Gershman patent how do single
15 entering densitometry in the context of the invention that
16 they're claiming.

17 THE COURT: It is incorporated by reference, but
18 Dr. Kia doesn't explain what difference that makes.

19 MS. PESCHEL: Yes. And then with respect to
20 the other two issues, Dr. Kia's testimony and reports are
21 merely conclusory. They merely say that there is written
22 description and there is no lack of enablement without any
23 supporting explanation.

24 THE COURT: And that includes his deposition
25 testimony, merely conclusory.

1 MS. PESCHEL: Yes.

2 THE COURT: All right. Do you want to move on?

3 MS. PESCHEL: Yes, Your Honor. Moving on to the
4 motion for summary judgment of no infringement.

5 This motion contains a couple of aspects. In
6 particular, focusing in on the tomographic modeled
7 limitations which require the use of densitometry to make
8 the models. We do not meet that limitation.

9 There is no viable theory under the Doctrine of
10 Equivalents and the asserted claims are invalid over the
11 prior art.

12 I want to orient the Court just a little bit
13 now that we have reached the stage where we're in summary
14 judgment.

15 I want to orient the Court as to how the accused
16 systems function.

17 So on slide 32, there is a picture on the left
18 of the x-ray unit of the system. And in that system, the
19 patient would put their head into, on top of that blue chin
20 rest and their forehead against the top rest, and then there
21 is a C arm and the C arm rotates around the patient's head.

22 What it does is it collects information. So
23 there is an x-ray source on one side and there is a detector
24 on the other side and it detects how much radiation has been
25 attenuated by sending three units here, and I only get one

1 out here because there is some object in the middle of the
2 x-ray beam which is causing a continuation of that x-ray
3 beam.

4 That data goes from the x-ray unit, it's
5 represented as pixel voxel values in 2D so you think of it
6 as slices it's collecting data on planes.

7 That data is then sent to a reconstruction
8 server so specific computer. It runs a particular algorithm
9 that uses the back projections of the 2D image data to
10 recreate a 3D volume data set.

11 So for every 2D reading, that 2D reading is
12 impacted by the surrounding structure.

13 So this is a very complicated mathematical
14 algorithm to resolve those issues so that you can generate a
15 3D data set.

16 Those 3D gray scale values are then, they're
17 scaled and they're represented as Hounsfield unit values in
18 the 3D volume data set. That data set is sent from the
19 reconstruction server to a computer running Romexis which is
20 where the user would see the images.

21 So what you see on slide 33 on the left is a
22 picture of what images you might see.

23 So you see on the bottom right quadrant there is
24 a 3D image and the other images are just 2D images.

25 So Osseo's theory of infringement, so we went

1 through claim construction and we determined that gray scale
2 values were not enough. That it had to be quantitatively
3 calculated bone density. And so what Osseo's theory of
4 infringement has been was that scaling to Hounsfield unit
5 values is infringement.

6 I'd like to show you why that is not the case.
7 So pardon the diversion into a little bit of math, but this
8 is how Hounsfield values are scaled.

9 So new in this equation on slide 35 represents
10 the linear attenuation of x-ray beams through an object. So
11 this is what is being measured as you are going through the
12 patient.

13 And it is corrected for that linear attenuation
14 of air and water for the machine, so it's scaled.

15 Now we know that Dr. Kia has admitted, okay, the
16 x-ray data, that hasn't been scaled so just the gray scale
17 is not enough. It doesn't have density information.

18 So then the question is, well, do Hounsfield
19 units, are those quantitatively calculated bone density?
20 And the answer is no.

21 Hounsfield units that measure linear attenuation
22 coefficient depends on a number of things.

23 It depends on the mass attenuation co-efficient
24 of the material and the material's density.

25 There is no allegation that Planmeca's accused

1 systems take the step to solve for density. The allegation
2 is merely that the Hounsfield units suffice, and we believe
3 that to be wrong.

4 Now, I said it's the product of the mass
5 attenuation co-efficient of the material and density.

6 The mass attenuation co-efficient depends on a
7 number of things, including the x-ray photon energy of the
8 system and then the materials elemental composition, so
9 diffraction by weight of each, how much calcium is there,
10 how much carbon, how much oxygen? That all impact these
11 calculations.

12 Now, when we deposed Dr. Kia, he admitted that,
13 yes, there may be some things that affect the linear
14 attenuation co-efficient but he hadn't really studied how it
15 impacts the Hounsfield unit values.

16 He admits in paragraph 50 of his expert report
17 that Hounsfield units are not absolute measurements of
18 material density and they simply haven't shown any evidence
19 that the accused systems perform any of the additional
20 calculations that would be necessary to get to density.

21 On slide 30, I have a couple places of Dr. Kia's
22 deposition transcript where he admits that the Hounsfield
23 unit equation is not specific for bone. And that he doesn't
24 view it -- it doesn't change any part of his opinion that
25 the Court included the word "bone density" instead of just

1 saying "quantitatively calculated density."

2 I'll move on to the DOE issue, Your Honor,
3 unless you have questions.

4 THE COURT: That's fine.

5 MS. PESCHEL: So there is no literal
6 infringement because we don't meet the densitometry
7 requirements of the tomographic modeled limitations.

8 There also should be summary judgment that
9 there is no infringement under the Doctrine of Equivalents.
10 Dr. Kia's sole paragraph on infringement under the Doctrine
11 of Equivalents is paragraph 63 of his report which is
12 shown on slide 42. It is conclusory, doesn't have the
13 particularized testimony and linking argument required.
14 There is no explanation for why one of skilled in the art
15 would consider HU values equivalent to quantitative
16 calculated bone density.

17 And when we took his deposition, his testimony
18 confirmed the circular logic of his analysis.

19 I asked him: Can you explain your opinion as
20 to how the gray scale or HU values calculated by the accused
21 product meet the densitometry model limitations under a
22 Doctrine of Equivalents theory?

23 And he says: No, I mean it's all in that
24 paragraph.

25 Then on slide 43 on the right, I asked: Well,

1 if they don't literally meet the densitometry model
2 limitation, how can they be said to achieve that same
3 result?

4 He said: Well, I have to point you to the first
5 statement in the paragraph. If the gray scale issue values
6 calculated by an accused product are not found to literally
7 meet the densitometry model limitation.

8 So it is a very chicken or eggs argument or
9 heads I win/tails you lose.

10 His argument is if I lose on literal
11 infringement, then they must infringe under the Doctrine of
12 Equivalents, without any explanation of why one of ordinary
13 skill in the art would consider those two things in
14 insubstantially different.

15 Your Honor, we briefed this issue, but to the
16 extent that their Doctrine of Equivalents theory would
17 cover Hounsfield units, it would ensnare the prior art. In
18 particular, Cann 1980. Hounsfield units have been around
19 since the 1970s. Dr. Hounsfield won a Nobel prize for them
20 back in that time period. And in Cann 1980 on slide 44, you
21 see that Hounsfield units were being used to create
22 tomographic images.

23 THE COURT: Let's hold off on the invalidity.

24 MS. PESCHEL: Sure.

25 THE COURT: Let's hear the plaintiff's response

1 on these infringement arguments.

2 MR. OSTROW: Okay. The issue that we would have
3 to prove to establish infringement of these patents is not
4 whether anything calculated in Hounsfield units represent
5 bone density because it is clearly not the case. Hounsfield
6 units are a generic calculation for any material, not just
7 bone, and they're related to many different applications.

8 What we have to prove is whether Planmeca's
9 machines, the accused products of the -- let's see, I've got
10 this listed -- the Pro-Max device which counsel for Planmeca
11 has described its operation with the Romexis software which
12 we're going to get into in a little bit. Whether those
13 products do a calculation that in effect represents the
14 density of the bone. In this case, the bone at issue is
15 teeth.

16 Whether those Hounsfield units represent, for
17 example, the density of someone's tongue is irrelevant for
18 the cheek or other soft tissue that might have been in the
19 range of the image. That has nothing to do with this
20 defense. These patents as Your Honor has construed them are
21 talking about doing a calculation, quantitative calculation
22 that represent bone density.

23 What we're going to show is that there is
24 more than sufficient evidence that that is exactly what
25 these machines do. That Planmeca knows it. It tells its

1 customers that. That it's 30(b)(6) witness says that.
2 There is plenty of evidence to that effect.

3 But just to remind the Court, we've got these
4 three patents.

5 Another issue that I believe is sort of a
6 central fallacy of Planmeca's argument is what the computer
7 system, what the accused system has to actually operate on.
8 It's not densitometry data, it's the resulting model.

9 So, for example, in slide 4, we've got the '301
10 patent, claim 1, one of the asserted independent claims
11 which talks about the storing, for example, in the first
12 element of a pre-existing tomographic dental densitometry
13 model or an output device which outputs the densitometry
14 model, not densitometry or densitometry data but the model.

15 The reason why that is important is the Court
16 has already gone through this in the claim construction
17 process.

18 "Densitometry" is defined as "quantitatively
19 calculating bone density" which again is some of the
20 evidence in a moment, but turning to what the claims
21 actually process, what they store, what they compare, that
22 is the model.

23 So the Court has construed the tomographic
24 model, similarly the densitometry model ended up being the
25 same in the Court's construction as "merging information or

1 the merged information from multiple tomographic scans of an
2 object to produce a representation of the subject/said
3 representation depicting quantitative density differences"
4 -- not values, differences. And there is tons of evidence
5 that this is exactly what their product does. It depicts
6 quantitative density differences.

7 I'm going to walk through some of that evidence
8 now. I'll skip through. I have the other claims as well
9 to support the idea that what is being operated on is the
10 models, not just densitometry, but let me get to some of the
11 evidence here.

12 So one of the components, for example, just to
13 make the case in their Romexis software is called an
14 implant verification tool. So this is a tool that the
15 dental professional, dentist, uses and after taking the
16 images, in determining whether there is an implant in
17 someone's tooth compared to the tooth itself. All right?

18 So this is, for example, a screenshot from the
19 Romexis manual which shows the image. And this is what they
20 call a verification dialog which displays information,
21 including scans of the patient's bone along with density of
22 the bone, quantitatively calculated by their products, and
23 represented in the HU units of measure, which in the case of
24 this application effectively are representing density, bone
25 density.

1 So, for example, and I'll come back to this in
2 a moment, the Court may note that this is one of their
3 screenshots. They refer to these density colors, but I will
4 come back to that later. They, themselves refer to what is
5 being shown, the data as density values.

6 But what is shown here is this is an implant.
7 This is I guess some sort of metal device which obviously
8 has different density than the surrounding bone or tooth.
9 And they show, these are obviously quantitative. I don't
10 know that this is a big issue in dispute, but, for example,
11 their product that has this portion of the screen, which we
12 have mean values outside and inside the implant are shown.
13 So inside the implant is this orange and outside is this
14 purple line. These are based on values. These are based on
15 what are effectively density values of the bone and compare
16 it to the implant, so the dentist can see the difference.

17 Similarly here, this is another portion of that
18 verification dialog is a screen where the user can move the
19 mouse curser on top of the images. The Hounsfield unit, the
20 HU value will show at the bottom, so there is quantitative
21 value. That is what I'm trying to show here. And as the
22 user moves around, the value presumably changes depending on
23 what the curser is on.

24 As I pointed out before, I'll get back to that
25 in a moment.

1 So how do these represent? What is the evidence
2 they represent bone density?

3 Let me see what is the best way to pull this up?

4 Counsel for Planmeca went through and they got
5 it here as well, that the value of the Hounsfield unit value
6 depends on effectively three things:

7 One is the density. So that's part of how the
8 value is calculated. And the other thing is the linear
9 attenuation, the mass attenuation co-efficient which depends
10 on the materials elemental composition, and the x-ray photon
11 energy.

12 So there is plenty of evidence that with respect
13 to the teeth being imaged, which is what the issue is here,
14 again not generally in all the physics, how this works, but
15 for teeth, bone teeth being imaged by the accused systems,
16 that the material's elemental composition, meaning the teeth
17 is effectively the same, across all teeth. Again, the goal
18 here is to have a model which shows the differences, the
19 density differences.

20 So the material elemental composition of teeth
21 is effectively the same, within a range, acceptable range.

22 Similarly, the photon energy of the scan that's
23 used would be the same within a range. There is testimony
24 from Dr. Pelc that because the quantum effects and things of
25 that sort, there may be some variation in the energy level

1 even within a given scan that creates certain inaccuracies.
2 I'm talking through some things for which there are many
3 slides just for the interest of time. So those inaccuracies
4 may create differences in bone density values between teeth
5 being scanned in the same image, but not sufficiently that
6 it's not useful.

7 So Dr. Pelc testified, Dr. Kia as well, that the
8 issue is whether the machine is sufficiently accurate. So I
9 would suggest the facts, one factual issue is whether the
10 machine's measurements are sufficiently accurate to reflect
11 the differences in bone density across teeth. We believe
12 that it is but for purposes of today there is plenty of
13 evidence that it is.

14 All right. So Dr. Kia, Osseo's expert
15 explained that the images consist of pixels and they have
16 quantitative -- the value of the pixels are a quantitative
17 measure of the radiodensity of the bone based on the
18 Hounsfield, and they cited evidence from the documentation
19 and also from Planmeca's 30(b)(6) witness, Timo -- I
20 forget whether it is pronounced Muller or Mueller, I'll say
21 Mueller. I may be wrong about that. It has been awhile
22 since I took his deposition. Again, Planmeca showed this
23 equation. But when we go to Planmeca documents, they refer
24 to what is being shown as bone density.

25 So, for example, this is from the Romexis

1 manual. They say, they discuss click on a point of high
2 bone density in the 2D views. Click inside the 3D
3 measurement you made in the first step on the density that
4 you want to measure. So they are telling dentists we've got
5 many sources for this.

6 This is from the Romexis manual, I've got a page
7 here which says. These are just samples. I can't possibly
8 go through all the evidence. These are samples of the
9 evidence.

10 Planmeca tells its customers that when
11 performing intensity measurements, it should be noted
12 that after certain image processing operations, relative
13 intensities of the objects may be affected by the
14 neighboring objects which may affect the reliability of,
15 e.g., bone density measurements with the help of the
16 calibration step wedge.

17 What this is saying is if the dentist used
18 fairly common device multi-calibration step wedge, that
19 neighboring object may affect the bone density measurement,
20 but it's taking a bone density measurement. That is what
21 dentists are using this for. These machines, the values
22 that are calculated are bone density measurement values.

23 Similarly, when they talk about removing
24 artifacts from images, again, it talks about settings in
25 the software that allow the selection of artifact removal

1 applied to an image. Higher settings should be used with
2 patients who have more high density materials.

3 Then coming back to this implant verification
4 tool dialog. And I apologize, I'm trying to rush through it
5 quickly. There is a lot of evidence.

6 But this is what I had shown before. In their
7 Romexis manual, when they described to the customer what
8 is going on on the screen, it's down here, I just enlarged
9 it. This density color option is described as colors
10 corresponding to HU values and dialog to adjust them.

11 And you can adjust color of implant or HU
12 measurement layers using the density color. Change the
13 colors of the densities in the image. That is what they're
14 saying that is what the HU values are representing.

15 Again, that doesn't mean that in all of imaging
16 or all of physics, HU always represent that. There are many
17 applications for which the variation of material composition
18 is so variable that the density is just one factor. Here,
19 it is the primary factor.

20 THE COURT: So their argument seems to boil down
21 to they don't take the HU values to solve for density. And
22 you are saying all of this directly contradicts that?

23 MR. OSTROW: Well, I'm saying that I'm not sure
24 that that matters, but the calculations that they're doing
25 result in what they confer to as bone density.

1 THE COURT: All right. There is a factual
2 dispute about whether they take the HU values to solve for
3 density?

4 MR. OSTROW: No.

5 THE COURT: No, okay. So your argument is it
6 doesn't matter?

7 MR. OSTROW: Right. The calculation that
8 they're doing is a bone density. For purposes of this
9 application, these accused products, this calculation, the
10 bone density calculation.

11 THE COURT: And you say you just have to show
12 that they're calculating bone density. It doesn't matter
13 that they're, by your own admission, not using the HU to
14 solve for density.

15 MR. OSTROW: Right. Because the HU value in
16 this case shows the density differences which is what the
17 claims require in the tomographic models.

18 THE COURT: So they do use the HU but they don't
19 use it to solve for the density.

20 MR. OSTROW: Right, a mathematical point of
21 view, but it is a quantitative calculation that represents
22 bone density. That's what the facts show.

23 Again, similarly, after this I'm fine from
24 this, from the documents, but again describing that implant
25 verification tool, they wrote: Use the density color

1 options to enable pseudocoloring of the data to enhance
2 differentiation between different anatomy densities. So
3 now they're talking about anatomy densities, not even just
4 densities in general.

5 All right. I'll skip the rest of those.

6 Again, I mentioned the deposition of their
7 30(b)(6) witness, Mr. Timo Muller, their technical witness
8 as well.

9 We've got a bunch of testimony that we included
10 that we referenced in the brief we included here. Let me
11 just see in the interest of time which we're talking about
12 here.

13 I asked him about differences in mass.

14 THE COURT: (Sneezing.) Excuse me.

15 MR. OSTROW: Gesundheit, Your Honor.

16 Which one would be lighter in terms of the
17 attenuation when there is more or less mass? He said, if,
18 for example, the material is thicker with the same material,
19 then the end result would be lighter. If the mass is
20 higher of the same volume material, then the image would be
21 lighter. This is him testifying his recognition that the
22 factors that affect the value that they are calculating are
23 mass and volume. Mass and volume for the same material.
24 Teeth are the same material so that part of it is taken out
25 of the equation.

1 Then, of course, I asked if his density equals
2 mass per volume. And after a little bit of false starts, he
3 admitted after just physics, he said, yes, that is a
4 physical fact. If you have mass of a particular -- of
5 the particle and you divide it with the volume, you get the
6 density. That is a physical fact.

7 So having said that, what affects the value
8 they're calculating, mass and volume, he acknowledges that
9 that is density.

10 There is more of the same here, you see.

11 Let me turn to, there is a bunch here.

12 Again, I asked him many of the same, within the
13 same vein.

14 When I asked him about the documents, and I read
15 that sentence that I just read to the Court, where it says
16 use the density colors to distinguish between the different
17 anatomy densities, his answer was the sentence was correct
18 if the word "density" is changed for gray scale values.

19 THE COURT: Is changed to gray scale values?

20 MR. OSTROW: It says for, but I guess that is
21 what he meant.

22 THE COURT: So I did want to understand your
23 view. We had talked previously about gray scale values;
24 right?

25 MR. OSTROW: Yes.

1 THE COURT: And so how does that all fit into
2 this? Are you relying on gray scale values or are you not?

3 MR. OSTROW: Gray scale is sort of an analog
4 concept. It is the differences between shading and an old
5 time x-ray. The image you would see of a broken hand is a
6 gray scale. What their software does is digitizes it and
7 runs it through something called a phellercam algorithm to
8 generate these HU values.

9 So they're doing calculations off of that. It
10 is not just merely gray scale values. Then they're
11 generating the 3D model based on that.

12 THE COURT: If you were accusing just gray scale
13 values, could you show infringement?

14 MR. OSTROW: In the analog sense, no.

15 THE COURT: Hold on.

16 MR. OSTROW: In the analog sense, no. In the
17 digital sense, if it's just digital gray scale values, then
18 they're probably not -- that is not the only thing required
19 by the claim. So there probably would be other problems.
20 For example, you couldn't show the merging of tomographic
21 scans to create a tomographic model because the data
22 wouldn't have been merged.

23 THE COURT: If the only thing you were pointing
24 to was gray scale values under the Court construction of
25 these claims, could you show infringement?

1 MR. OSTROW: I believe the Court construction
2 precluded that.

3 THE COURT: Okay. Are you relying in part on
4 the gray scale values as to show infringement?

5 MR. OSTROW: It's part of their process. So
6 I'm relying on it only to the extent that part of how they
7 get to the data at the end if that is their starting point.

8 THE COURT: Do you agree that you have to show
9 that there is a quantitative calculated bone density in
10 order to show infringement?

11 MR. OSTROW: That is how the Court construed the
12 term, yes.

13 THE COURT: But you are not contending it's the
14 gray scale by itself because you can't; right?

15 MR. OSTROW: Right.

16 THE COURT: And you are not contending it's the
17 HU value because you acknowledge that they're not using that
18 to solve for bone density.

19 MR. OSTROW: I'm contending in this application
20 that is a representation of bone density. That is clearly
21 something that was quantitatively calculated, and it
22 represents, according to them and their own witness, bone
23 density.

24 THE COURT: You are saying that something that
25 is a representation of bone density has been itself

1 quantitatively calculated?

2 MR. OSTROW: Right.

3 THE COURT: Where are you pointing to in
4 quantitatively calculated bone density?

5 MR. OSTROW: That is what we're relying on.

6 THE COURT: A representation that itself was
7 calculated.

8 MR. OSTROW: Yes.

9 THE COURT: Or quantitatively calculated.

10 MR. OSTROW: Yes.

11 All right. Since we didn't get into the -- oh.
12 On the issue of the Doctrine of Equivalents, this paragraph
13 which Planmeca cites, and we discussed this in the
14 briefs so not worth taking the time, links together the
15 function-way-result test, how each of those will be
16 satisfied be what the accused system does, but it's not the
17 only discussion that Dr. Kia has. He has other paragraphs
18 which describe the background to those things, and what the
19 functionality and what it does that he is in effect relying
20 on when it came to the linking.

21 So this is paragraph 63 and our slide 53, and
22 Planmeca cited it as well, provides the linkage for each of
23 the function-way-result tests, but the discussion of what
24 these things mean appears elsewhere in his declaration and
25 in his deposition testimony. So I cited some things here.

1 THE COURT: Does he talk about substantial or
2 insubstantial differences?

3 MR. OSTROW: That would be here (indicating).

4 THE COURT: In that same paragraph 63?

5 MR. OSTROW: Yes.

6 THE COURT: Is this particularized linking
7 testimony?

8 MR. OSTROW: I don't understand the question,
9 Your Honor.

10 THE COURT: Is this something other than just a
11 summary paragraph saying, hey, if I don't persuade you on
12 literal infringement, is there my equivalence?

13 MR. OSTROW: No, this is things that have been
14 discussed elsewhere in his declaration. He is showing that
15 they have the same function, way, and result. It links each
16 of the specific functions, ways, and results.

17 THE COURT: Does he respond to the ensnarement
18 point?

19 MR. OSTROW: I would say, Your Honor, maybe
20 not explicitly so, but implicitly because he addresses all
21 the prior art and how they're distinguished in other ways.

22 THE COURT: Including the prior art that
23 supposedly is ensnared by the DOE theory?

24 MR. OSTROW: Yes.

25 THE COURT: Okay.

1 MR. OSTROW: I can get into that now, but it is
2 more responsive to their prior art argument than this one.

3 THE COURT: All right. We'll go back to
4 defendants on infringement points first, if you have
5 anything you want to add.

6 MS. PESCHEL: Just a couple of things, Your
7 Honor. I don't want the Court to be confused.

8 There are citations to the Planmeca product
9 manual. Those really need to be looked at in context.

10 I have on slide 40 two of the citations. The
11 first one is the one that is talking about that calibration
12 step wedge; and, again, that is not sold with the accused
13 systems. That is just something that a user might look at
14 to be able to tell between two different images. Maybe they
15 were taking it different.

16 You would think of -- in x-rays, you would
17 think of a slightly different exposure. One x-ray might be
18 slightly darker than the other. How do I compare before and
19 after with my patient? But it is all qualitative, and it is
20 all that gray scale qualitative analysis.

21 What we heard from plaintiff's counsel is that
22 they're not accusing the Planmeca accused systems of actual
23 quantitatively calculating bone density. The accusation is
24 that HU units substitute, and that is not true on the
25 undisputed facts.

1 Again, so on the right of slide 40, there is
2 another reference that they have cited with respect to using
3 the word "density." And, again, that is -- so this one has
4 to do with a region growing tool which is a functionality
5 allowing the user to pick a particular area and determine
6 what size it is.

7 And it's telling the user, okay, pick a
8 region of pretty uniform density. And, again, that is a
9 qualitative analysis. They're looking at it and saying,
10 okay, this is the area I want to measure. I want to draw my
11 box here, and that has to do with the grade scale values and
12 HU values which are not bone density.

13 I also wanted to dispel the myth that simply
14 because you're measuring teeth, the bone density is going to
15 be the same.

16 The whole point of these accused systems is that
17 the dentist is able to look at the teeth and see where the
18 density has changed, where things have gone wrong.

19 It is not true and you can see in the images
20 that it is not true, that there is differences across these
21 images.

22 Again, that's still qualitative from our
23 perspective.

24 Then I want to address the accuracy point. The
25 accuracy citations that plaintiff's counsel has pointed to

1 come from one of two places: either the deposition of Dr.
2 Pelc or parts of his report where he is responding to
3 Dr. Kia's use of certain articles in a way that he thinks
4 was not correct, and so it's a rebuttal to those.

5 But in all those situations, his mention of
6 accuracy is addressing the idea that HU units substitute for
7 quantitative calculated bone density, which everybody admits
8 they do not substitute. Okay? Mathematically, they do not
9 substitute for quantitatively calculated bone density.

10 So in this particular exchange in this
11 transcript at 1123, 7 to 18, he was asked some hypothetical.

12 And he answered: Well, what is required to
13 be measured is bone density. And under the questions
14 assumption that that is what you are actually measuring,
15 you know, that measurement would have to be sufficiently
16 accurate to be useful in order to meet the densitometry
17 requirement.

18 It is simply not adding an accuracy requirement
19 to the Court's construction. It is saying when you look at
20 the Court's construction what it requires is a quantitative
21 calculation of bone density, and that is not present in the
22 accused systems.

23 THE COURT: So by accuracy, it just means there
24 needs to be some quantitative calculation?

25 MS. PESCHEL: Right, Your Honor. It doesn't

1 have to be -- for instance, from a purely scientific
2 perspective, it doesn't have to be plus or minus .05,
3 right?, on an average basis to reach some sort of scientific
4 reliability. If we're talking about "I calculated bones
5 density" and whatever the margin of error would be for the
6 dentist would be acceptable, that would be fine. That would
7 be a calculation. If you calculated bone density, you
8 calculated bone density.

9 THE COURT: Because you acknowledge there is no
10 express accuracy requirement in the claim construction?

11 MS. PESCHEL: Correct, Your Honor, but there is
12 a requirement for the bone density.

13 THE COURT: It needs to be bone density, it
14 needs to be quantitatively calculated; right?

15 MS. PESCHEL: Yes.

16 THE COURT: Okay. Is there anything else on
17 infringement?

18 MS. PESCHEL: No, Your Honor.

19 THE COURT: Do you want to move on to your
20 invalidity?

21 MS. PESCHEL: Yes, Your Honor.

22 So, again, with respect to invalidity, I want
23 to emphasize the point that the majority of conflict in
24 the briefing over whether or not the asserted claims are
25 invalidated by the prior art has to do with the tomographic

1 model limitations.

2 There are admissions, and we cite those on slide
3 46. I have given where those citations are.

4 Dr. Massie, the listed inventor, and Dr. Kia
5 agreed that the majority of the claim limitations were well
6 known as of the priority date. And we have discussed those
7 extensively in hearings before the court, but x-ray sources,
8 x-ray detectors, those is types of things are known in the
9 art, and there is not a dispute as to that.

10 Now, when Dr. Pelc provided an extensive
11 invalidity report that addressed five primary references,
12 only three of those references we brought in our summary
13 judgment motion, and then we added in, of course, the Cann
14 1980 reference which is the reference that shows HU units
15 were known in the art. It's simply their position on
16 validity can't be reconciled with their position on
17 infringement.

18 If tomographic models is what is novel to this
19 invention and HU values suffice, then we know that Cann 1980
20 was showing those.

21 So let me separate two things. Cann 1980 shows
22 the use of HU values to generate images of bone structure,
23 and so under their theory that would invalidate the asserted
24 claims.

25 In addition, Cann 1980 discloses further methods

1 that specifically calculate bone density. So I've got HU
2 values and now I go further and I do some different things
3 or use some different methods which would enable me to get
4 to a quantitatively calculated bone density. That is the
5 way that Dr. Pelc relied on Cann 1980 in his affirmative
6 opinion.

7 In the briefing -- I do want to make this clear
8 for the Court. In the briefing, Osseo cites portions of
9 Dr. Kia's report that relate to the analysis of the Webber
10 '686 reference. That reference is not part of our summary
11 judgment motion.

12 So Osseo is claiming Dr. Kia disagreed with Dr.
13 Pelc regarding in particular the part of the construction
14 for tomographic models regarding merging and the reasons to
15 combine in these paragraphs 59 to 85 of his report.

16 If you look at those paragraphs, they are either
17 specifically addressing Webber and providing conclusory
18 opinions about, well, the other references also don't show
19 this or they're just simply conclusory on their face.

20 So on slide 49, I have given some specific
21 examples of that.

22 For example, paragraph 72, he is talking about
23 whether or not -- and this is Dr. Kia. He is talking about
24 whether or not Weber '686 discusses merging tomographic
25 scans, and then he simply says I don't think any of the

1 other references teach a merging of a plurality of
2 tomographic scans, and he doesn't specifically address the
3 disclosures that Dr. Pelc provided.

4 I also want to clarify that Dr. Pelc did not
5 add information to his declaration. Because we removed
6 references from the invalidity report explanations from
7 what we were presenting in summary judgment, we presented a
8 declaration that removed paragraphs. There is a citation at
9 the end of every paragraph in the declaration that says
10 where that language came from in his invalidity report.

11 There is an issue in the briefing about
12 paragraph 150 of his declaration. That is identical to
13 paragraph 266 in his invalidity report, so I wanted to
14 clarify that.

15 THE COURT: You didn't add anything, you
16 subtracted things.

17 MS. PESCHEL: Yes.

18 I also want to respond briefly to a point with
19 respect to Cann 1980 as being the "comparing" limitation.

20 Dr. Pelc pointed out to Cann 1980, and the way
21 he does this in his invalidity report, which I believe was
22 attached to the response at Docket Entry 105, Exhibit A, I
23 believe, the entire invalidity report is attached.

24 What he did was he took the primary references
25 and then for the limitations that were not met by the

1 primary reference, he provide reasons to combine and he
2 provided other analysis. And he did so with respect to Cann
3 1980, particularly for me, the "comparing" limitations of
4 the certain comparing claim.

5 What Dr. Kia responded with is a quotation of
6 what the opening invalidity report says and a conclusory
7 statement that it fails to disclose the "comparing the
8 tomographic model" claim limitation.

9 So, again, that is not evidence in opposition
10 to Dr. Pelc's opinion. It is merely conclusory expert
11 testimony that should be excluded pursuant to our motion to
12 exclude.

13 THE COURT: Does your brief explain where your
14 expert explained the motivation to combine or do I have to
15 go hunting through his report to find that?

16 MS. PESCHEL: The brief does have some very
17 specific citations to the motivations to combine, but his
18 declaration does say for each paragraph that addresses a new
19 prior art reference, that paragraph and potentially the
20 paragraph subsequent to that describe why one would be
21 motivated to combine. And what is he says in his
22 declaration is in each of these situations, we're talking
23 about x-ray systems that were commonly known and known to
24 being used in different applications, and that it would have
25 been -- there would have been a motivation to combine a new

1 technique, a new software, a new analysis of the data with
2 that same equipment.

3 THE COURT: All right. Is there anything else?

4 MS. PESCHEL: No.

5 THE COURT: Okay. We'll hear from plaintiffs.

6 MR. OSTROW: I just want to come back to one
7 issue on measurements.

8 Counsel for Planmeca just indicated -- that she
9 may have misspoken, but she indicated in showing the image
10 of the x-ray images of the patient's mouth that the dentist
11 needs to know the difference in density, she said, between
12 different portions of the tooth so they know maybe there is
13 a cavity.

14 That is exactly our point. Their machines will
15 show the dentist the difference in the density because the
16 material, all the other factors in that HU calculation are
17 the same. The material is the same, the scanning, using
18 the same energy source within a range of accuracy, but the
19 density is different. That is exactly what we're saying.
20 That is what the machine is being used for.

21 THE COURT: If the density difference is just
22 simply a qualitative or gray scale view, that does not
23 infringe; correct?

24 MR. OSTROW: Correct, but it is not. They run
25 calculations and then they can show those. We walked through

1 that in the first round showing where the calculations are
2 shown.

3 In addition, and I skipped over this before but
4 it is a little bit more relevant now. In Dr. Kia's report,
5 he cites an article where there is some research was done on
6 these issues by Pauwels.

7 So this it slide 33, paragraph 50 of Dr. Kia's
8 infringement report, and this is a quote from the article.
9 This is not even Dr. Kia standing behind it but he is
10 quoting the article.

11 It says: Materials or tissues that absorb
12 more x-rays such as bone have a higher Hounsfield unit
13 value. Although Hounsfield unit values are not absolute
14 measurements of material density, they can be used for
15 clinical purposes to quantify bone material density.

16 And that confirms that is what we're saying.
17 That is the support for what we're saying. This
18 application, these values quantify bone density. This is
19 from the Pauwels paper that Dr. Kia cited.

20 On the issue of the prior art. And I recognize
21 we're sort of running short on time, and I am compelled to
22 ask the Court, I believe the Court has something at noon.

23 THE COURT: You have 11 minutes.

24 MR. OSTROW: All right. For the rest of the
25 motions?

1 THE COURT: Yes.

2 MR. OSTROW: Well, we briefed the issue of the
3 prior art. I do point out that they're arguing for summary
4 judgment combining four references, and they're obviously
5 issues of material fact. Dr. Kia has disputed that these
6 references disclose all the elements. It's not enough they
7 disclose calculating HU units. That is not the invention.

8 THE COURT: You are saying he is disputing?

9 MR. OSTROW: Yes.

10 THE COURT: I don't think you mean -- it was an
11 ambiguous statement. He is not disputing many of the
12 elements are in fact disclosed in one or more of those four
13 references. I had a "not" in there. But tell me, are you
14 contending that your expert has said none of the elements
15 are disclosed in any of these four references?

16 MR. OSTROW: If I stated that, I misspoke.

17 THE COURT: No, I think it was ambiguous.

18 MR. OSTROW: I apologize.

19 THE COURT: Does it turn on the tomographic
20 model limitations or does it not?

21 MR. OSTROW: It largely does. It turns
22 basically on two things. I have slides here but it is in
23 our briefing. The tomographic model requires merging of the
24 scans. That Cann 1980 reference does not disclose that.
25 Also, Pelc did not say it disclosed it in his original

1 report. This is a new disclosure, and we have some slides
2 showing everything he said about Cann 1980 does not include
3 the merging step.

4 But Dr. Kia nevertheless in his report here, we
5 show everything Dr. Pelc said about it.

6 THE COURT: I've got to focus on the merging
7 stop, and what is the other one?

8 MR. OSTROW: And the comparing of the models.

9 So we've got a bunch of slides. It's probably
10 not a good use of time to go through all of them.

11 THE COURT: All right. Then on the motivation
12 to combine, at least by the time we finish reading the reply
13 brief, and now I have the argument, haven't they in fact
14 identified where their expert says there would have been a
15 motivation to combine?

16 MR. OSTROW: They may have, and we have our
17 expert who says there would not have been motivation to
18 combine because these technical fields were different, so it
19 is a battle of experts.

20 THE COURT: Fact.

21 MR. OSTROW: Yes.

22 THE COURT: Is there anything else you want to
23 add?

24 MR. OSTROW: No. Thank you, Your Honor.

25 THE COURT: Okay. Anything further on this

1 motion?

2 MS. PESCHEL: Just one thing, Your Honor.

3 On the Pauwels article that Dr. Kia cites in
4 paragraph 50 of his report, I'm showing on slide 60.

5 Dr. Kia cites, quotes the sentence that is right
6 before the second highlighting on the bottom. He quotes:
7 "Although Hounsfield unit values are not absolute measures
8 of material density, they can be used for clinical purposes
9 to quantify bone material density."

10 Then this reference describes what that means.
11 You can convert Hounsfield units to bone material density or
12 you can do these other methods that allow you to calculate
13 density without doing Hounsfield units.

14 THE COURT: Okay.

15 MS. PESCHEL: I just wanted to be clear about
16 that. I think at this point, given the time, it would be a
17 good idea to switch to the damages issues.

18 THE COURT: Right. That was next on my sense of
19 priority. Each sides has about eight minutes, eight to nine
20 minutes left. How would you propose jumping into the
21 damages issues?

22 MR. QURESHI: Your Honor, I'll discuss those for
23 Planmeca.

24 I think I can fold in once Planmeca's motion to
25 strike Justin Blok's opinions, our motion to strike the

1 apportionment opinions of Dr. Kia, and then also to go ahead
2 and rebut their *Daubert* motion on bone. I think I can do it.

3 THE COURT: Why don't you do all of this, and
4 then obviously plaintiff will have a chance to address all
5 of that.

6 MR. QURESHI: So, Your Honor, our motion to
7 strike the plaintiff's apportionment and damages opinions I
8 think are pretty straightforward; and frankly I think our
9 argument that Osseo's damages opinions are unreliable are
10 supported by what their own damages expert did when I sat
11 down with him during deposition, as to Mr. Blok.

12 The entirety of Osseo's damages model relies on
13 Dr. Kia's feature analysis table which is spoken often in
14 the briefing, and that is shown here on the left on slide
15 95.

16 Mr. Blok, their damages expert, testified that
17 his damages opinion solely rested on Dr. Kia's feature
18 analysis table. There is no other basis Mr. Blok was able
19 to identify by which he arrived at a reasonable royalty. It
20 is all limited to this feature analysis table.

21 The way to read this feature analysis table that
22 Dr. Kia provided in paragraph 64 of his infringement report
23 is that in the first -- in the middle column, what he is saying
24 is that 55 percent of the features in the accused systems
25 relate to what he has identified here as 3D CBCT/model scan.

1 Then in the last column, what Dr. Kia is
2 saying, that 55 percent of the features in the accused
3 products, 100 percent is attributable to what the patents
4 allegedly invented, and he arrives at an 85 percent
5 apportionment to the patents. So he is basically saying of
6 all the features in the accused products, 85 percent are
7 directly attributable to what was invented in these patents.

8 This is the entirety of what Dr. Kia said about
9 this feature analysis table, this being what I have here
10 on slide 96. And I won't read it to the Court, but it's
11 conclusory. It's simply says, in summary form, that I arrived
12 at 85 percent based on looking at these features, but he
13 doesn't talk about how these features are specifically tied to
14 the accused products and how he came to this last column where
15 he is saying 100 percent of several of these feature sets are
16 attributable to the asserted patents.

17 Again, slide 97, this is just Mr. Blok
18 confirming that he, himself did not do any apportionment
19 analysis. He solely relied on that table that Dr. Kia
20 supplied.

21 On slide 98, it contains some pricing
22 information for Planmeca's accused systems, so I won't put
23 it up on the screen because I see there are some individuals
24 who aren't under the protective order, but I will refer to
25 slide 98, and Mr. Blok's damages model is taking the average

1 selling price, multiplying it by 25 percent to gross profit
2 margin, and then that is where his 85 percent apportionment
3 factors comes in. He multiplies the resulting number after
4 taking the profit margin and multiplying it by 85 percent,
5 and then he says that, in the hypothetical negotiation, each
6 side would have agreed to a 50/50 split. Although we take
7 issue with that model, our *Daubert* motion is focused on the
8 reliability of the apportionment factor.

9 Here is how Osseo basically undercut their
10 reliance on the Kia feature. When I sat down with Mr.
11 Blok at the beginning of his deposition, he said he had a
12 correction to the 85 percent number that he relied on the
13 damages report, and that correction stemmed from the
14 testimony Dr. Kia gave a few weeks before Dr. Blok's
15 deposition where he said that this second feature, this
16 volume stitching/SmartPan is not fully accused. And
17 specifically he was referring to SmartPan and he said, well,
18 SmartPan is about half of that 20 percent, and then in
19 testimony he said SmartPan doesn't infringe.

20 So what Mr. Blok did is he said, okay, well,
21 I'll change that 20 percent in the second feature set to
22 10 percent and so that changes the apportionment to 75 percent.

23 That is an admission that by Dr. Kia's testimony
24 of certain things not being accused or in the prior art that
25 his apportionment factors should have been adjusted, that

1 that should have been equally applied for other features
2 that aren't accused, don't infringe admittedly by Dr. Kia or
3 are in the prior art.

4 This is again slide 100. This is where he
5 applied the 75 percent apportionment factor.

6 And this is detailed. What you see on slide
7 101 in the following two slides, all the citations to these
8 bullet points are detailed in the citations provided in
9 the bottom of the slides. But when Dr. Kia sat down for
10 deposition, and this was months after he provided his
11 feature analysis table, he admitted that various aspects of
12 what he listed in the feature set are either not accused in
13 the prior art, and then the same with the named inventor.
14 Dr. Massie admitted he didn't invent tomographic scanning
15 or densitometry. But neither Mr. Kia, nor Dr. Blok made
16 any adjustment for these admissions that various aspects
17 of these feature sets were known in the prior art, not
18 infringed or not accused.

19 And this is true for, on slide 102, for volume
20 stitching/SmartPan. Although Mr. Blok do not make an
21 adjustment for SmartPan as I discussed, he did make
22 adjustment for volume stitching which Dr. Kia talked about
23 only applied to a subset of the accused products. There was
24 no adjustment.

25 Similarly, for open patient positioning, the

1 fact is the prior art, you had to have an opening in order
2 to put a patient into the scan. But he made no adjustment
3 and, instead, Dr. Kia said 100 percent of open patient
4 positioning is attributable to the patent-in-suit and Mr.
5 Blok didn't adjust for that after Dr. Kia later on in
6 deposition testified people knew how to do that.

7 Same for the SCARA robotic arm. There was no
8 adjustment.

9 So by failing to adjust the apportionment
10 numbers of Dr. Kia's main feature analysis table, Dr. Blok
11 -- Mr. Blok failed to appropriately apportion based on case
12 law that the Court is quite familiar with.

13 Similarly -- well, not similarly, moving on to a
14 different point. The accused functionalities rest in this
15 optional Romexis software package, an optional 3D upgrade
16 kit.

17 That should have been the starting point for Mr.
18 Blok in terms of for apportionment. Instead, he relies on
19 the average selling price of the entire device. Much of it
20 is for Tuti, which isn't accused, and much of it includes
21 features that Planmeca openly markets that aren't related to
22 any of the features that Osseo said these patents touch.

23 THE COURT: You are nearly out of time.
24 Touch briefly, if you would, on your expert's alternative
25 apportionment analysis.

1 MR. QURESHI: Right. So his affirmative
2 alternative apportionment analysis is simply that these
3 features I just mentioned are part of the Romexis software
4 package and so what he did for his affirmative apportionment
5 analysis is he took the pricing of that, which includes the
6 optional set and the standard set, and subtracted out the
7 standard set which doesn't include any of the accused
8 functionalities, and the math on that was about \$200, and
9 that is what he says should be the affirmative royalty rate.

10 Osseo is claiming their *Daubert* motion against
11 Mr. Bone is Mr. Bone didn't apportion far enough, and I'll
12 just leave the Court with this since my time is out.

13 On the one hand, they're saying that a reasonable
14 royalty is, you saw the numbers, several thousand dollars a
15 unit. But on the other hand, they're saying Mr. Bone's
16 testimony on apportionment is unreliable because his \$200
17 rate isn't apportioned down far enough.

18 So to the extent that this Court is at all
19 inclined to say that Mr. Bone's apportionment analysis is
20 unreliable, that clearly should also have the result of Mr.
21 Blok's damages opinions being struck.

22 THE COURT: All right.

23 MR. QURESHI: Thank you, Your Honor.

24 THE COURT: And we will give the plaintiff the
25 rest of their time. About nine minutes, it looks like.

1 MS. PFEIFFER: Good afternoon, Your Honor. I'll
2 try to be brief, and also try not to speak too quickly.

3 THE COURT: All right.

4 MS. PFEIFFER: So, first, I just want to kind
5 of focus on the main difference between Osseo's motion to
6 strike Mr. Bone's report and on Planmeca's motion to strike
7 Mr. Blok's report because it comes down to fundamentally
8 whether you are challenging the underlying methodology or
9 the facts and conclusions that they reach.

10 Osseo has challenged the methodologies that
11 Mr. Bone has used while Planmeca has only raised issues that
12 are appropriate for cross-examination.

13 As was set forth in the *Active Video* case,
14 it's not appropriate to -- where disagreements are with
15 conclusions and factual assumptions and considerations
16 underlying those conclusions, that is not appropriate for
17 exclusion. And that is exactly what Planmeca is doing when
18 challenging Mr. Blok's report.

19 I have just pulled up this slide so that I am
20 not flashing between too many slides.

21 What we can see is Mr. Blok spoke with Mr. Kia
22 which is permitted under the *Artic Cat v Bombardier* case.
23 That is entirely allowable for one expert to refer to
24 another, and he does refer to Dr. Kia to provide his
25 technical background to identify a number of important

1 features, along with their technical weight to the product,
2 and then the value that those values derive from the patent.

3 Planmeca doesn't challenge this methodology,
4 they challenge the conclusions that were reached. This is
5 not appropriate for exclusion.

6 But, importantly, Mr. Blok's opinion doesn't
7 rely only on Dr. Kia. Mr. Blok relied on 14 *Georgia-Pacific*
8 factors, all of which served as a check on his ultimate
9 conclusion regarding the appropriate royalty in this case.

10 THE COURT: All right. Hold on a second.

11 So if part of the criticism is your expert
12 assigned any nonzero weight to things that are not novel in
13 the patent, and I take it that is part of the criticism, why
14 shouldn't I view that as a methodology criticism and not
15 just a conclusion criticism?

16 MS. PFEIFFER: Because his method is appropriate.
17 He is still looking to the -- it's basically a criticism of
18 whether or not he believes those are attributable to the
19 patents-in-suit and a direct relationship with the prior
20 art. And as we all know, these are combination patents. A
21 lot of times, the value of a patent comes from the
22 combination itself, not just from any one element. So just
23 because an element was taught in the prior art doesn't mean
24 that it derives no value. It's a more complex look, and
25 that is exactly what cross-examination is for.

1 THE COURT: What if it is a feature that is not
2 even accused of infringement?

3 MS. PFEIFFER: I believe Dr. Kia adjusted his
4 analysis on that, so I don't know whether it's pertinent.

5 THE COURT: You would concede he can't properly
6 give value to a feature that is not accused of infringement?

7 MS. PFEIFFER: Yes, that would be accurate. But
8 again, and this is detailed more in the briefing, Planmeca
9 only provided revenue data for products accused of
10 infringement. So to the extent any features are not accused
11 of infringement, they weren't captured in the revenue data
12 so it is not really a pertinent consideration.

13 But I do want to turn quickly to Mr. Bones'
14 report to make sure to discuss the primary issues.

15 THE COURT: I guess one other question.

16 MS. PFEIFFER: Sure.

17 THE COURT: On essentially the smallest saleable
18 unit type criticism of your expert, could you respond to
19 that?

20 MS. PFEIFFER: Sure. The best approach to that
21 is really the *Exmark* case cited in our brief. That is where
22 the claims are directed to an entire system or product, it's
23 appropriate to look to the entire system or product, and
24 there is more than one way to conduct a reasonable royalty
25 analysis.

1 Mr. Blok chose one way, and he followed
2 through on appropriate methodology in relying on technical
3 information.

4 The *Exmark* case dealt with a lawnmower patent
5 and note the parties did not dispute that the true novelty
6 lies in one element, but the Court -- the Federal Circuit
7 still held it was proper to look to the entire lawnmower as
8 the starting point as long as the expert went through the
9 necessary steps to apportion the value, which is exactly
10 what Mr. Blok did throughout his analysis.

11 He started with the average sales price. Then
12 he applied the gross profit margin. Then he applied the
13 apportionment factor. Then he looked to all of the specific
14 *Georgia-Pacific* factors and applied profits to it.

15 So Mr. Blok didn't start at the average sales
16 price and randomly assign a three percent royalty rate, he
17 engaged in analysis to reach his final conclusion.

18 THE COURT: Is it true that all of the accused
19 features are in the optional software?

20 MS. PFEIFFER: Your Honor, again, the problem
21 with this is that the elements of the claim require many
22 features, and that is why the average sale price is the
23 appropriate starting point. I apologize for this but I just
24 want to take a look at the claims.

25 The claims are for the whole system and include

1 controllers, microprocessors, input device. You can't just
2 infringe with the software or the upgrade. You need all the
3 hardware components and all these parts working together to
4 get infringement; and that is why the best starting point is
5 the average sales price, and then we move from there to get
6 down to a lower value that is more reasonable and reflects
7 the status of the parties at the time of the hypothetical
8 negotiation.

9 THE COURT: Okay. You can move on to Mr. Bone.

10 MS. PFEIFFER: The main problems with Mr. Bone's
11 affirmative theory is that he decided to use the smallest
12 saleable unit; and while we disagree that that is the
13 appropriate small saleable unit as we discuss in the
14 briefing, even if it were, the Federal Circuit has
15 explicitly stated in the *VirnetX* case that it doesn't stop
16 there. Mr. Bone has testimony throughout his report that
17 claims that there are features unrelated to infringement.
18 In fact, he claims, he assigns a zero percent value to a
19 number of them during his comparison to Mr. Blok's opinion,
20 but he makes no attempt to apportion those out.

21 The thing here is a damages number isn't more
22 reasonable because it is lower, it is more reasonable when
23 it follows an acceptable methodology, and Mr. Bone
24 completely failed to do that. He took absolutely no steps
25 to apportion out features that he repeatedly says are

1 unrelated to infringement. So that is the problem with his
2 affirmative theory.

3 His adjustment, which I have put up here,
4 suffers from a problem in that he engaged in no methodology.
5 The problem isn't that he used Mr. Blok's methodology as a
6 starting point, it was that when he was adjusting it, he
7 didn't tie it to the facts of the case.

8 For example, Dr. Kia had assigned these weights on
9 the left here to various features in the accused products.
10 Excuse me.

11 Planmeca then provided a list of 27 additional
12 features, and Mr. Blok -- or Mr. Bone, excuse me, randomly
13 added three with very little explanation and no reliance on a
14 technical expert to support that.

15 Then Mr. Bone modified all of the five percents
16 down to four percent, 20 percent down to 17 percent, 55 to
17 48, with no explanation or independent evaluation. He did
18 it because mathematically he needed to get to 100 percent.

19 This absolutely is not tied to any facts in
20 the case, and it is not a reliable methodology that can be
21 sent to the jury. It is not up to the jury to decide what
22 portion. It's his job to conduct the apportionment and tied
23 it to the incremental value of the patent and he didn't.
24 He wanted to get to 100 percent without tying this to the
25 actual facts of the case or a technical expert. Mr. Bone

1 can't offer that opinion, and he repeatedly testified he is
2 not a technical expert, he is not trained to do that.

3 In his report, he only cited to the discussions
4 with Dr. Pelc that were not put in his report, only
5 discussions. And then when Dr. Pelc was asked about this at
6 his deposition, he said that he told the lawyers he was not
7 trained to do an apportionment and didn't provide that input.

8 Mr. Bone is not qualified to offer the technical
9 analysis, and it's clear that he did this so randomly. So
10 even the alternative theory fails because it's not based in
11 any methodology. It's a random number assignment that has
12 nothing to do with actual facts in this case.

13 Do you have any more questions?

14 THE COURT: I don't.

15 MS. PFEIFFER: All right. I will defer to
16 briefing on that.

17 THE COURT: All right. I will give you an extra
18 minute on that.

19 MR. QURESHI: Yes. Your Honor, I would just ask
20 that the Court to apply the logic of their *Daubert* motion on
21 Bone to Mr. Blok's damages analysis.

22 THE COURT: Okay. Thank you. Do you want to
23 briefly respond to that? You can survive that analysis.

24 MS. PFEIFFER: I can survive that.

25 THE COURT: All right. Well, thank you. I know

1 we had to move pretty quickly. If I need further assistance
2 on any of the other many motions that we did not get to, I
3 will let you know. But for now, I will take everything
4 under advisement, and we will be in recess.

5 (Oral argument hearing ends at 12:10 p.m.)

6
7 I hereby certify the foregoing is a true and accurate
8 transcript from my stenographic notes in the proceeding.

9 /s/ Brian P. Gaffigan
10 Official Court Reporter
U.S. District Court
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