UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COLLEGE PRODUCTIONS, INCORPORATED,
Petitioner,
v.
INTIRION CORPORATION,
Patent Owner.

PGR2024-00003 (Patent 11,674,745)
PGR2024-00004 (Patent 11,674,746)

Record of Oral Hearing
Held: January 10, 2025

Before SCOTT A DANIELS, MATTHEW S. MEYERS, and BRENT M. DOUGAL, Administrative Patent Judges.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

R. SCOTT JOHNSON, ESQ.
THOMAS PATTON, ESQ.
Fredrickson & Byron, P.A.
111 East Grand Avenue, Suite 301
Des Moines, Iowa
(515) 242-8900
rsjohnson@fredlaw.com
tpatton@fredlaw.com

ON BEHALF OF THE PATENT OWNER:

RUSSELL T. WONG, Esquire
DOMINGO LLAGOSTERA, ESQ.
Blank Rome, LLP
717 Texas Avenue, Suite 1400
Houston, Texas 77002
(713) 632-8634
rwong@blankrome.com

The above-entitled matter came on for hearing Friday, January 10, 2025, commencing at 11:01 a.m. M.T., at the UPSTO Regional Office, 1961 Stout Street, Denver, Colorado.

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

11:01 a.m.

THE BAILIFF: All rise. Please be seated.

JUDGE DOUGAL: Okay. We're on record? Good morning.

MR. LLAGOSTERA: Good morning.

MR. JOHNSON: Good morning.

JUDGE DOUGAL: Hi. This is joint hearing for PGR2024-00003 and 04, between Petitioner, College Products, Incorporated, and Patent Owner, Intirion?

MR. JOHNSON: Intirion. That's correct, Your Honor.

JUDGE DOUGAL: Intirion -- Intirion Corporation. All right, concerning U.S. Patents 11674745 and 11674746. So I'm Judge Dougal. On me -- with me on the screen, we have Judges Daniels -- Judge Daniels and Judge Meyers. We're going to start -- we'll start with appearances. Please make sure to turn on the microphone. And, Petitioner.

MR. LLAGOSTERA: Good morning, Your Honor. My name is Domingo Llagostera, and I'm here with my colleague Russell Wong; we represent the petitioners in this action, and we appreciate you all's time.

JUDGE DOUGAL: Thank you. And Patent Owner?

MR. JOHNSON: Good morning, Your Honor. My name's Scott Johnson. I'm here with my colleague, Thomas Patton, and we represent the patent owner, Intirion Corporation.

JUDGE DOUGAL: Great. Thank you.

All right. Well, welcome. Before we begin arguments, I'll go over a few administrative items. So first of all, as -- as a reminder, we have the Judges who are appearing remotely. So we ask you to remember, one, to use

the microphone. If you don't use the microphone, they can't hear you. Two, you may present your -- your slides, you know, on the screens we have, but we also all have the slides at our computers. Make sure to refer to the slide number, or, if you refer to an exhibit in the papers, make sure to clearly state those documents and give us a second to find them. That will help everyone be on the same page, but also we'll have a better transcript of the hearing.

As you know, each party has 60 minutes of total argument time. We'll allow you to reserve some of that for rebuttal. The time will be projected on this clock behind me. So you're responsible for -- for managing your own time. Should be fairly straightforward with that big number flashing. And, you know, it's got a red light that'll start flashing at you if you go over, you know, the time that you've -- you've set aside for your main argument or for your rebuttal.

Objections. We know that -- and we note that Patent Owner has made certain objections to Petitioner's slides. We ask that, for those, or for any other objections, that the party -- parties not interrupt each other. If you think that demonstrative, or an argument that's being made is objectionable, you can raise that in your argument time. Obviously, Petitioner, for example, Petitioner may not address all the slides you've objected to, and so we don't have to address those. Or they -- they may, and we can get to that. Or may just simply note it.

Okay. So with that, Petitioner, would you like to reserve any time for rebuttal?

MR. LLAGOSTERA: Yes, Your Honor. We'd like to reserve 10 minutes.

JUDGE DOUGAL: Okay. And Patent Owner, would you like to reserve some time for rebuttal?

MR. JOHNSON: Yes, Your Honor. We would also like to reserve 10 minutes.

JUDGE DOUGAL: Okay. Okay. With that, are there any questions from either of the parties?

MR. LLAGOSTERA: Not from Petitioner, Your Honors.

MR. JOHNSON: Your Honor, with regard to -- from Patent Owner, with regard to the slides that are objected to, you would prefer that we only address those objections after any slides have been presented, not before; is that correct?

JUDGE DOUGAL: Correct.

MR. JOHNSON: Okay.

JUDGE DOUGAL: Correct.

MR. JOHNSON: Thank you, Your Honor. That was our --

JUDGE DOUGAL: We -- we -- we've read through your -- your objections. We -- we note them. Obviously, Petitioner may not -- not use any of those slides. It is an issue that by not putting certain of those slides, or we can -- we might not have to address them further.

MR. JOHNSON: Thank you, Your Honor. I just wanted to make sure we didn't waive them by not objecting to them before --

JUDGE DOUGAL: No, they're not -- they're not waived.

MR. JOHNSON: Perfect. Thank you.

JUDGE DOUGAL: Okay. With that, Petitioner, begin when you're ready.

JUDGE DANIELS: Mr. Llagostera, this is Judge Daniels. Can you hear me?

MR. LLAGPSTERA: I can, Judge Daniels.

JUDGE DANIELS: Can -- can you -- I know -- I think you have this a little farther down, but could you give us, at least, sort of a cursory update on what happened? And I -- I -- we understand -- we were looking, and I've read through the Judge Williams' decision on claim construction. Can you give us an update on what -- and I know you were objecting to how Patent Owner's Counsel colored some of his -- his claim construction as far as the stay. Can -- can you just give us a little bit of a background of what's going on there?

MR. LLAGOSTERA: Sure. Your Honor, you mean in the District Court proceedings right now?

JUDGE DANIELS: Yes.

MR. LLAGOSTERA: Sure. I was going to address this later in a table that shows the timeline. But after the board's institution decision, which offered a sua sponte claim construction for the terms "level of smoke" and "amount of smoke," about a month-and-a-half later, Judge Williams issued his Markman order finding the terms "dangerous condition," which is in the board's construction, and the underlying terms "level of smoke" and "amount of smoke," found all three of those terms indefinite.

After that institution -- I'm sorry, after the Markman order, Patent Owner, Plaintiffs, Intirion, filed a Motion for Reconsideration and a Motion for Stay, on several points, one of which arguing that Judge Williams got it wrong. But separate from that, that there was this co-pending PGR

proceeding that may impact the fallout from Judge Williams's indefinite decision -- indefiniteness order.

So Judge Williams ultimately decided to stay his decision on whether the claims are invalid. We filed a Motion for Summary Judgment of Invalidity after the indefiniteness claim construction order. And the reasons he stayed the case is -- in the same order as in -- in the -- in the -- in the record, but he decided to put his decision on those two motions on pause because he respects the PTAB's guidance, and he didn't know if there would be inconsistent rulings if he ruled now versus when the PTAB issues its final written decision. Because there's a lot of hypotheticals that the patent owner proposed, including a statutory estoppel, and rather than try to meander through all the potential outcomes that could possibly happen after the PTAB decision, he said, let me just pause this now, let's see what the -- what the board does, and the -- then he'll come back to the motions. So everything is on pause in the District Court proceedings.

JUDGE DANIELS: Got it. Perfect. Thank you.

MR. LLAGOSTERA: Your Honors, can you see the slides? Are they up on your screens?

JUDGE DANIELS: Yeah.

MR. LLAGOSTERA: Okay. So I want to do a quick overview of what Mr. Wong and I plan to present today. There's a lot of grounds to cover in the petitions, and we don't have time to cover every single ground. We're going to really focus today on the indefiniteness issue with respect to Judge Williams's order. And then we're going to focus on the board's institution decision after that, particularly on some of the references. So a

couple of the grounds, not all of them. And that would be our focus today and how we use our time.

So really briefly, I want to talk about the background of these patents. It's still -- there we go. Really -- really briefly, this is the patent family. It's the -- it's we call it the Emma Patent Family. It's the inventor. On the far left, you see the parent application filed in --

JUDGE DOUGAL: Sorry, just -- just a reminder:

in every slide, just say --

MR. LLAGOSTERA: Oh, I'm sorry.

JUDGE DOUGAL: -- this is Slide 3 --

MR. LLAGPSTERA: Yeah. Okay. I'm sorry, Your Honors. On Slide 3, I'm showing the Emma Patent Family. So the Emma parent is prior art, and it is our primary prior art reference. It's undisputed that that is a prior art reference. It was not cited by the examiner or -- or considered by the examiner as a -- as an invalidating reference during the proceedings, but it is in the family, and it is prior art. On the far right are the two challenge patents. In between are several CIPs that were filed.

So I want to quickly talk about what -- what Emma discloses. I'm starting on Slide 5. It discloses the core structures of the claims that are at issue in this proceeding. And that is -- or most of the core structures. And that is a microwave stacked on top of a -- of a refrigerator. The combination appliance is powered by a single power cord; you can see that on the far right in -- in blue circle, that's -- that's number 8, that's that power cord that's fed into the microwave. And then the microwave feeds power to the refrigerator. So you've got microwave, refrigerator, appliance, with a single power cord. And also, two, what they call, "auxiliary outlets"; I call them

the "three-prong outlets." But that's 11 and 12 circled in green on Slide 5. And that is specifically for charging low-power devices, like cell phones.

Also disclosed in Emma is control circuitry for the microwave, and the refrigerator, and -- and the outlets. It's -- it's a -- it's a power distribution-type control circuit. So this is Figure 4 on Slide 6 of the control circuit. And -- and I just duplicated it here to show Your Honors, on the left is the power side of this whole circuitry, and on the right is the control side of the circuitry. So the left, in red, you see how power is distributed from an outlet to various devices, like a light, the refrigerator, the microwave, and the auxiliary outlets. On the right, you've got what's called the "control circuit." And through there, you get control signals, and those signals operate relays to cut power or allow power to the devices. And so this whole system is set up for power modulation under certain conditions.

So on Slide 7, I show an example of this power modulation. On the left, you see power is going to one of the auxiliary outlets, 11. So that would be for a low-power device like a cell phone, you've got a cell phone plugged in there. And the relay, which is circled in yellow -- oops, sorry, switch sides there. The relay, circled in yellow and labeled as 19, I've annotated that "Closed" so Your Honors can see how the closed power circuit gets power to the auxiliary outlet.

On Slide 8 is when power is cut off, and how power is cut off. So the patent describes overload conditions. And -- and you don't want these outlets to overload, because you could potentially short- circuit, and that might cause fires or -- or -- or kill the system. And so what it does is, when the sensors -- and it's -- it's circled in blue over there, labeled 17, by the microwave control. But when those sensors sense an overload condition, a

control signal will get sent to the relay, pop open that relay switch, and then you just cut power. So pretty simple -- simple. And -- and that is for the auxiliary outlets and for the microwave. So one is an example is -- is when the refrigerator is in use, the control circuit will -- I'm sorry. Let me back up. When the microwave is in use, the control circuit will cut power to the -- the refrigerator, turn the compressor off, or cut power to the auxiliary outlets so you don't have this overload condition.

So I'm going back to -- to the Emma patent family here on Slide 9, but what I'm showing here on the left is our primary prior art reference and everything it discloses. This is not disputed. Discloses a microwave with a refrigerator powered by a single power cord, cell phone outlets, a power circuit, and a control circuit, and using that for power modulation. So all of that is in Emma. So let me talk about what's in the patents at issue now. The --

JUDGE DANIELS: Mr. Llagostera?

MR. LLAGPSTERA: Yes, sir?

JUDGE DANIELS: Let me -- let me just ask you if -- am I -- as I'm looking at the claim here -- so is it -- is it -- your point of -- of this background with Emma apparently is that it covers essentially limitations, the -- the preamble, one pre -- we have them listed in, for instance, our DI -- through 1F, and that would include withhold -- the withholding of power to one of the components, like the refrigerator? That's -- that can -- that -- that part of the control system is -- is shown in the original Emma patent; is that correct?

MR. LLAGOSTERA: That's correct. That is shown in the original patent, and -- and the patent owner doesn't dispute that Emma discloses

withholding power from devices. There's a separate dispute about the delivery of power, which -- what I'm going to focus on after this, Your Honor, is I'm going to focus on what the patent owner's disagreements are with our mapping, because there's a lot that we're not disputing, and -- and I don't believe that we're disputing any of this part of it.

JUDGE DOUGAL: Counsel, I apologize. We're going to pause for a minute because Judge Meyers got disconnected.

JUDGE DOUGAL: All right. Sorry about that. Looks like we're back ready to go.

MR. LLAGOSTERA: No problem with that.

JUDGE MEYERS: Yeah. I apologize again.

JUDGE DANIELS: And let's -- can we just make sure that --

Judge Meyers, can you tell us when you kind of got cut off? I don't know if you missed anything.

JUDGE MEYERS: It was just about -- it was about 30 seconds ago, so I think we lost Zoom there. Yeah. Great.

MR. LLAGOSTERA: Thank you, Your Honors. So I'm -- I'm going to transition now pretty quickly into what the patents at issue disclose in addition to Emma. So these are CI -- continuation of part -- in part through a number of applications from Emma. And so, at a high level, they first disclose a smoke sensor, and I'm quoting here, "To turn off the microwave oven upon sensing smoke or polluted air indicative of a dangerous condition." And you can see in Figure 18 -- this is -- this is Slide 10. So Figure 18 is from the 745 patent, and it shows a smoke sensor that's in dark blue, 228, and it's integrated into Emma's control circuitry.

Moving to Slide 11, the second thing it discloses is use of USB ports for charging cell phones. So on that front panel -- and you can see there's auxiliary outlets down there in Figure 15 that are labeled as 111, and -- and then at the top, 232 is a USB port, charging port for charging cell phones, smartphones, iPods, iPads, et cetera.

So final slide on just showing the Emma patent family, just to get a visual of this on Slide 12. Again, everything that's disclosed in Emma is on the left, the prior art, and then it's adding a smoke sensor plus USB charging. And it's underneath that 974 patent, Your Honors -- didn't mean to confuse you there. That's where they first included that disclosure, and so that carries through to the 745 and 746 patents.

So from our perspective, the ultimate invalidity questions for the board are whether the claims are indefinite, as found in Judge Williams's Markman order, whether a PSITA would have found it obvious to add known smoke sensors to Emma's appliance, and/or three, would PSITA have found it obvious to substitute Emma's cell phone auxiliary outlets with well-known USB charging ports. I think that's really ultimately what we're trying to figure out here, and I've presented those on -- on Slide 13. So I'm going to go through the indefiniteness piece of it, and then Mr. Wong is going to come in and talk about the claim mapping disputes that the parties have between them.

And so on Slide 15 -- I'm not going to go through this again, Your Honors, because we just kind of went through the sequence of events. I'll just emphasize here that the institution decision offered a construction that was predetermined level of smoke indicative of a dangerous condition, and then in the institution decision invited the parties to dispute the meeting of

this limitation and address that issue during the trial. So that's what we're doing here today. It was after that institution decision that Judge Williams found indefinite the terms "dangerous condition", which is in the board's construction, and then the underlying terms "level of smoke" and "amount of smoke".

So on Slide 16, I just want to briefly -- the claim construction order is in the record as Exhibit 1025, and the indefiniteness holdings are on Pages 16 to 22, which the board has. But I just want to quickly touch on "dangerous condition", because ultimately, in the Markman proceedings, this is where we -- which occurred after we filed our petition. The focus was on "dangerous condition" and what that means, and through the Markman, we determined that "level of smoke" and "amount of smoke" -- it all collapses down into "dangerous condition".

So Judge Williams found "dangerous condition" indefinite for a number of reasons. First of all, that the specification does -- it -- there's an unknown threshold where smoke goes from normal to dangerous, but the patent says, look, if food is burning or smoking in the microwave, that's okay for some period of time, but then at some point it becomes dangerous. Now, it doesn't tell us what "dangerous" means. "Dangerous" to me could be completely different to what it means to Your Honors or the other people in this room. Any amount of smoke may be dangerous to me. Smoke right before fire may be dangerous. It -- it's really a subjective term.

JUDGE DOUGAL: Counsel, can you remind us, is "dangerous condition" in the claim, or is it just in our claim construction?

MR. LLAGOSTERA: It is not in the claim. So the reason that term was at issue in the District Court proceedings is because the other patents in

the family are asserted, and that term is in those claims. And so with that term, it was front and center as soon as we went into Markman because of the other patents.

JUDGE DOUGAL: Okay.

MR. LLAGOSTERA: So Judge Williams -- excuse me, the patent owner also pointed to the specification disclosure of an example of the smoke point of oil, but Judge Williams correctly found that that's still vague because there are several types of cooking oils, canola, avocado, olive oil, and they all have different boiling points or smoke points. And so -- and the -- and the patent doesn't give a specific example of what type of cooking oil they're talking about also. Even if it did, that still doesn't address what "dangerous" means, because the patent allows for some amount of smoke before it becomes dangerous and you need to shut off the microwave. So it's still an undeterminable threshold there.

Then there was the extrinsic evidence through deposition testimony and -- and documents that showed there is no industry standard that a dangerous condition for one microwave manufacturer could be completely different from another manufacturer, because it depends on the conditions of the microwave, how far the smoke sensor is from the food, where it is in the cavity, the dimensions of the microwave, and -- and then just the subjective preference of the manufacturer of how much tolerance they're willing to allow in an amount of smoke. So all that to say on slide -- there's a little popup, so I can't read the slide number there. Will you -- will you kill that popup on the bottom right?

All that to say, Judge Williams found, based on the intrinsic and the extrinsic evidence, that a person skilled in the art couldn't determine with reasonable certainty the scope of "dangerous condition". Now --

JUDGE DANIELS: Mr. Llagostera?

MR. LLAGOSTERA: Yes, sir.

JUDGE DANIELS: -- let -- let me ask about the issue of breadth versus indefiniteness. And, I think what I heard you say is that there is -- the patent does acknowledge that there is a threshold where -- there is some threshold, and it doesn't say what that threshold is for smoke or for gases or anything, but there is a threshold where some smoke is allowed. So we have -- is it fair to say there is an ambiguous lower threshold in the patent?

MR. LLAGOSTERA: I'm sorry, you just cut -- cut out for me on that last question. I heard everything else. Can you repeat that, Your Honor?

JUDGE DANIELS: Sure. Is it fair to say that there is -- even if it's ambiguous there, the patent does discuss or have some -- some disclosure about a lower boundary, even if we don't know specifically what that is. We -- we have on one hand a lower boundary for smoke. Some smoke is allowed; is that right?

MR. LLAGOSTERA: The pattern discloses some trip point, some threshold, but doesn't give any -- any examples of when that would occur or when you would shift between what is normal to what is dangerous. That's where the ambiguity lies. So it - - it says it, but -- but the issue is where -- where can we even figure out where normal transitions to dangerous? And that really turns out -- it is a very subjective thing based on -- based on the record we have before us, and that's what Judge Williams found.

JUDGE DOUGAL: So -- but I -- I guess I don't understand in this case, for these claims, why that matters, right? Like -- so, like, if it -- if it said it trips at a certain voltage, but it didn't tell us it was five volts or six volts, isn't this the same thing? It's just saying "a level of smoke". It's just giving us -- telling us that the input is a level of smoke, just like input could be voltage, amperage, a push button. You know, like -- like, that doesn't make it indefinite. It just tells us very broadly, I'm only telling you my -- my input; I'm not giving you any more details; you -- you know, it doesn't -- it doesn't matter for this claim. Why -- why does not giving more specificity than the input make it indefinite?

MR. LLAGOSTERA: Right. So it's a good question. So the indefiniteness issue turns first of all on the claim language that they used. It's not just a smoke sensor that's off the shelf. They claim -- in some of the patents, they claim a dangerous condition. In this one, they claim a threshold. And so, from -- from a person of ordinary skill in the art's perspective, there has to be some scope or meaning to what a threshold is, a level of smoke or an amount of smoke. That's a claim limitation. If we just assume that it could be anything, then it's -- let me back up a second. It has to have some meaning, okay? So what is its meaning? That's where we start.

As the board properly found in its institution decision, the specification ties it to a dangerous condition, okay? So what is "dangerous condition"? Well, that's where we get into this very murky area of what -- what is this threshold that they have claimed?

Because I don't know, as -- as a member of the public, when I look at this patent claim, well, a -- it -- it triggers on an amount of smoke. What is

that amount of smoke that -- that defines the boundary of this claim? I can't look at the specification and figure out what that means, because it just tells me it's dangerous. Well, I don't know what "dangerous" means. And so that's the problem, is that these terms, as they've been presented in the patent, and the board properly found, are all about some ambiguous transition from normal to dangerous. And that's just the way they claimed it.

Now, I want to note that the patent owner, the board, the petitioner, and Judge Williams all agree that "level of smoke" and "amount of smoke" in the specification is defined as this normal to dangerous condition transition. So at the end of the day now, we're talking about what a dangerous condition means in the context of what this claim term means. They've said that in Federal Court and they've said that in these institution proceedings, so that's -- that's not the -- there -- there's no debate between the parties on that issue. So --

JUDGE DANIELS: Isn't it -- isn't it a little unfair, though, to hold the whole -- the -- the patent owner here to -- to a specific level of smoke? Because that of course -- that of course would vary. I think you said it would vary depending on -- on -- on what's being -- being heated; is that right?

MR. LLAGOSTERA: No, I don't think it's unfair to hold them to -- to disclosing some -- some interpretable scope for the term "level of smoke" and "amount of smoke". An amount of smoke. They -- they didn't do that in their patent at -- at all, and, you know, ultimately, I want to separate, like, written description enablement issues from this indefiniteness issues, because I -- I think they -- they will try to overlap those things. But what

we're talking about is, do I understand what the scope of level of smoke is, that -- that meaning to that term?

And so I -- I don't think, Your Honor, it's unfair to hold them -- I -- I -- they're going to argue that they can't claim things with mathematical precision. That's not what we're saying either. That's not what Judge Williams said either in his claim construction decision, but there has to be some identifiable scope to the term. And if we all agree that it collapses down to dangerous condition, or "unsafe" is another word used in the patents, well, that's a subjective term. There's clear federal circuit law that says, when you're dealing with terms of degree like that, they're indefinite unless you've got some specific identifiable boundary in those -- in your specifications.

And so that -- that was the basis of our argument during Markman before Judge Williams, and - - and we believe that Judge Williams correctly decided that issue with a pretty well-reasoned decision.

JUDGE DANIELS: He -- he did -- he did write a -- write a very good decision, and -- and that's what we -- we've been talking about -- about this issue, the panel has. And -- and I've read his decision. I think it's very good. My concern does go to some of the federal circuit cases that talk about breadth versus indefiniteness, and I -- I do see that as an issue here for -- for the reasons that -- that JUDGE DOUGAL and I have been asking these questions is -- I -- there is a person of ordinary skill in the yard to be able to determine some level, and -- and -- and maybe the levels are different between different manufacturers. Wouldn't it be fair to say that a person with ordinary skill in the yard manufacturing these -- these type of devices --

wouldn't they be able to do a reasonable level of smoke that would trigger the -- the - the - - the power control circuit being cut off?

MR. LLAGOSTERA: I don't -- I don't think so, Your Honor, because it requires too much -- we -- we put an extensive extrinsic evidence record into the Markman proceedings on both sides, and what -- what you immediate see -- immediately see when it comes down to smoke sensors is they're so condition- dependent. It depends on -- you know, you can imagine if you put a smoke sensor in the back room of your house, the sensitivity of that, the trigger point, and because of the environment conditions that you're putting that in, could be completely different than something that you would put in a small box.

And so they're -- they could not identify any reasonable scope through all of that material of what any threshold was. We never got a threshold from them at all. The only thing they ever pointed to was the smoke point of oil in the statement in their specification. And that was the issue. They didn't come forward with any evidence that says a person of ordinary skill in the yard hears all these pieces of extrinsic evidence, could figure out, yeah, here's a reasonable scope for what "threshold" means in terms of a smoke sensor.

It was impossible to do that because there's no details in the specification about the conditions of the smoke sensor, where it's placed, the size of the cavity, and what kind of parameters you would be working with. All they were able to disclose in their specification is, well, it's from normal to dangerous. And so that -- that's really the problem. It's not a breadth issue. It's what does this term actually mean? When I look at "level of smoke" and "amount of smoke", my only fulcrum point for that is "dangerous

conditions". So what does that mean? And that -- that's where it really falls into.

So I hope that answered your questions, Your Honor. The reason this has really come to -- come to a head in these proceedings is because the board's condition -- I'm sorry, claim construction during institution, as -- as I stated earlier, which we all agree with, the specification talks about those two limitations in terms of dangerous condition. And so, Judge Williams also separately found the terms "level of smoke" and "amount of smoke" indefinite, because all three of those terms went up, but it's the same basis that it's just tied to this unsafe issue or dangerous issue.

So I'm going to move a little faster here because I want to address the sur-reply arguments and get to Mr. Wong's presentation. What they did in their sur-reply -- and this is the first time they raised these arguments -- is they argue that Judge Williams is -- first of all, they say that we can't challenge the board's construction. I think that's pretty -- pretty meritless because we have a sua sponte construction and a -- a subsequent intervening Markman order. Also, Axonics' case very clearly says, "When there's a new construction that comes up during the proceedings under the APA, the petitioner has the right to address it." So that's what we're doing here.

The second waiver argument they make is a little different, and that's whether the board can cancel the claims based on the sua sponte construction. Now, in IPR proceedings, if a claim is found indefinite, then what happens is -- your Honors know this, but the -- the IPR -- the petition is typically declined because the board cannot map the claims to the prior art. We don't think the board needs to do that here because we're in a PGR proceeding, and it has the authority to cancel claims based on indefiniteness.

Also, I just point the Court to the Axonics case, which -- the principles there, I think, apply. So in that case, there was a sua sponte construction, and the petitioner was, according to federal circuit, allowed to raise new grounds of invalidity in combination. So it's not exactly the same here. I think this might be a case of first impression, but the principles still apply, I think, because we have a new claim construction. And I'll say that the petitioner has been able to address that claim construction order through these proceedings.

I just want to make clear -- I -- I said this earlier. Judge Williams -- there -- there's a little insinuation, I think, in the sur-reply that Judge Williams is concerned about his claim construction order or that he's undecided. That is not the case. The -- your Honors can read the stay order. It's about the motions that were filed after and -- and the hypotheticals in the future about how this all would fall out. He wanted to stay the case for those -- stay his decisions on those motions for those reasons.

So the other thing that -- this is where I'll wrap up, Your Honors, and I'll go quickly through this because we're running out of time. But the patent owner's other sur-reply arguments, which we haven't had an opportunity to address, are its disagreements with Judge Williams' claim construction order, and I think this speaks volumes on why these claims are indefinite. Their first argument is that Judge Williams got it wrong because their claim is about smoke sensors detecting now what's called burning food.

That's a total new concept. There's no concept of burning food in the patent, but that term itself also shows why the claims are indefinite and why they still struggle to come up with a reasonable scope and boundary for their claims, because burning food is just another subjective term, like "unsafe" or

"dangerous". What is burning food? Is it -- when the when food starts to smoke? Is it when it's charring, like toast? Is it when it's actually on fire, which -- that would be too late, according to their patent. And -- and ultimately, smoke detectors detect smoke. They don't detect burning food. They're detecting -- detecting a smoke level.

So all that to say that the petitioner is still struggling to come up with any reasonable scope for its claim, these claim terms. They go -- they again argue that the specification discloses the smoke point of oil. Judge Williams rejected that argument. I won't go into that again. They argue that the claims are flexible and not limited to a specific food. We never argued they're limited to a specific food or a microwave configuration. We're arguing that they specifically claim some unidentifiable threshold that's based on a dangerous condition.

These are the last two arguments, then I'll turn it over to Mr. Wong. They say Judge Williams improperly relied on Teva because he's requiring mathematical precision. That's not the basis for his reliance on Teva. In Teva, the term "molecular weight" was in the claim, and there are several different types of molecular weights. So the analogy there was, well, there's some threshold claimed here, but there may be several types of different thresholds out there. Honestly, this one's worse than Teva because in Teva there were three types. Here we have some undeterminable amount of thresholds because the patent owner hasn't come forward with any.

Then they wander through several doctrines, like written description and enablement, but they're just muddling several different issues. This -- this is about whether these claims are amenable to construction, and we

believe here they are not. So that was a little rapid fire there, Your Honors. Happy to take any questions, but I'll turn it over to Mr. Wong now.

JUDGE MEYERS: Mr. Llagostera, before you go, let me -- with that -- and maybe Mr. Wong will address this, and you should tell me that if -- if so. Is it your position that, when you talk about, like, what you were talking about, a smoke sensor, are you talking about a sensor that smoke -- that -- that senses particulate smoke or -- or gases in that -- in -- within that smoke?

MR. LLAGOSTERA: I'm going to let Mr. Wong address that question. You -- you -- I -- let me make sure I -- I understand your question. If -- if it's -- if a smoke sensor just is detecting particulates -- there -- there's -- there's a couple of different types of embodiments in the patent that -- that disclose detecting BOCs or optical density. And so they are sensing -- you know, smoke is something visual that we see, but there's something in there chemically, like particulates, that smoke sensors do detect. Does that answer your question, Your Honor?

JUDGE MEYERS: It does for now. Thank you.

MR. LLAGOSTERA: Okay.

MR. WONG: Morning, Your Honors. Russell Wong here. As Mr. Llagostera, said, I'll be addressing the claim map of disputes, which essentially is the issue of what is disclosed by the prior art. So I'm on Slide 25. I'll advance to Slide 26. Slide 26 is just in table form to show what are the elements that are at issue with respect to the prior art. And we use the claim -- term "descriptors" for shorthand, and these are modeled after what was in the petition and what's been used in the institution proceeding to talk about the various claim limitations. And so you'll see in green are the ones

that -- the elements that are not at issue, and in red are the elements that are at issue.

I'll now advance to Slide 27. Slide 27 really reflects the same thing that's in the table, but just in text form, about what are the fundamental issues that we're addressing with respect to the claim elements that are described in the prior art, and whether those exist in the prior art? We'll go through Emma, we'll go through Smith, and we'll go through the Butt separately.

I'm now at Slide 29. Again, this is the table again, but now focused on the reference Emma and what is at -- at -- in dispute with respect to Emma. The issue here is whether Emma discloses the limitation with respect to withholding power to the refrigerator when the microwave is turned on and then delivering power to the refrigerator when the microwave is turned off. The petition explains that the control circuit Emma opens relays to cut power to the devices, for example the microwave, when it's in use.

And then in -- in the diagram, in the schematic, it shows what occurs. For example, the control circuit opens Relay 20, and you'll see Relay 20 in the -- in the schematic, and it's circled. And it cuts power to the refrigerator and -- which is Receptacle 15, when the microwave demands -- demands power. And it's no -- it was known at the time that relays are used for this purpose, to both enable power to be delivered or disable power by opening the -- the relay.

Slide 31, this is a -- a schematic from Emma that explains how the system works when power -- when power is requested by the refrigerator and the microwave is not in use. And you'll see that in the green -- you start at the green box, and the refrigerator demands power. It -- it then -- the

system then asks, is the microwave on or off? Is -- if the microwave is on, then power cannot be delivered to the refrigerator. It is disabled. If the microwave is off, then the answer is no, and then the second question is, has the time delay expired? There's a time delay built into the system to prevent the refrigerator cycling on and off too rapidly. If the time delay has expired, then power can be delivered to the refrigerator.

JUDGE MEYERS: Mr. Wong, is -- is there any testimony or evidence in this case that you know of indicates that a relay is essentially anything other than a switch?

MR. WONG: Other than -- well, if you look at - - let's see if I have -- there -- there is -- in one of the figures, there are triaxes that are shown, and the triaxes could be used to deliver or to prevent power to flow or not flow. And let me see if I can show which -- which figure it is from --

JUDGE MEYERS: Yeah. I didn't mean that -- you can -- you can -- you don't have to answer it right now if you want to come back to it. I was just -- I was just -- I know part of this is disputed, and I wasn't quite sure why -- and -- and -- and that may be a better -- I agree, it might be a better question for the patent owner.

MR. WONG: But --

JUDGE MEYERS: But these switches seem to be -- to be able to be switched on and off, depending on - - on -- on where the control system is telling the system then to deliver power.

MR. WONG: Right. But I -- I don't think, Your Honor, there's any dispute that use of the relays is one method to turn on and off the power. Because that was -- that was known, disclosed by Emma.

JUDGE MEYERS: Sure. Okay.

MR. WONG: So now we get down to the issue of this withhold and deliver electrical power. The patent owner doesn't dispute that Emma discloses withholding power from the refrigerator when the microwave is in use. They also don't dispute that when the microwave is not used, that electrical power can be distributed to the refrigerator. The only issue that the patent owner raises with respect to this element is that they believe that Petitioner -- Petitioner's mapping of this limitation was improper, because it relied on, and incorporated by reference, Dr. Horenstein's declaration. We don't believe that's the case, Your Honors, just because, for one, institution proceeding has already been instituted. This is a procedural issue. The -- the board already found the mapping was proper. We also -- if you look at the petition, the mapping is in there with respect to this limitation. And then finally, as a matter of, kind of, logic, the fact that it shows that you -- the patent owner does not dispute that Emma shows open (Inaudible) relations withhold -- relays to withhold power, it only stands to reason that you would close the relays to relay - - to deliver power.

JUDGE MEYERS: Yeah. And I think that was my question. I -- I think that -- that maybe my question is better articulated as, you know, if these are a switch that would -- that can withhold power, then is there any reason why, when -- when you close the relay, it doesn't deliver power?

MR. WONG: That -- that it would not deliver power?

JUDGE MEYERS: Right.

MR. WONG: Yeah. There -- there's nothing discussed in the patents about that -- that issue. I think there are systems. And I was looking at -- for the Triax that I mentioned earlier, I believe that's disclosed in -- in Smith. There can be systems where you have other components, other than the

relays themselves, that deliver or not deliver power. But with respect to the schematics that are shown, it's the relays that operate that function, that limitation.

JUDGE MEYERS: Thank you.

MR. WONG: Now we turn to Smith, which is the next reference. And I'm at Slide 36? And then we turn to Slide 35. And we wanted to start off, Your Honors, by showing what's not disputed about what Smith teaches. First off, it teaches a microwave oven, 10, that includes a cooking cavity, 24 -- you'll see that in yellow, and a magnetron of 40. It's pointed out in the drawing, but it is behind the -- basically, it's behind the fan that's in blue. The fan -- it shows a fan, 44, for circulating air in the microwave, colored blue. And then finally, it discloses a gas sensor, 52, which is in the upper left-hand corner of the diagram, it's located inside the microwave and a -- in an airflow channel.

Also undisputed is that the gas -- gas sensor, 52, that's disclosed is connected to a control circuit. And then if the gas concentration is in a certain range, the gas sensor, 52, sends a signal to the control circuit, which causes de-energizing or turning off of the magnetron when it exceeds a certain amount. Not disputed.

Finally, Your Honors, we're -- we're at Slide 37. And this is not disputed, at least with respect to the language that comes from the patent. And if you look, the first quote, "A method and apparatus for anticipating the occurrence of a fire in the cooking cavity of the microwave oven." And I wanted to point out, it says, "anticipating the fire." So ahead of a fire, which would be, potentially, a destructive event, is anticipating the fire, which is -- it is a nondestructive event, because the fire hasn't actually occurred. And

then with respect to the sensor, it is responsive to the concentration of gases in the circulated air, and moderates the gas concentration level. It generates an output signal, represented thereof, to turn off the magnetron as necessary.

JUDGE MEYERS: Mr. Wong?

MR. WONG: Yes.

JUDGE MEYERS: Let me ask you, if you have it in front of you, this just goes right along with this slide. I was looking at Smith's Column 1, in particular, Lines 40 through 48 or '9. And I think some of -- I think your quote may have come from there, but one of my questions is, is that Smith is talking about this gas sensor and anticipating -- anticipates the fire condition, which you just said. But it's -- then it goes on to say these are -- it "anticipates the fire conditions before actual ignition by employing a single sensor." So that's - - that's got to -- if -- if in order to -- is it true that in order to have smoke, you'd have to have ignition?

MR. WONG: Well, Your Honors, that was one of the questions that came up with Patent Owner's expert, Dr. Tanbour. He took the position that you had to have ignition or combustion to have smoke. But I believe the teaching of Smith tells one who's skilled in the art that there can be smoke that smolders prior to the actual ignition. So -- you know, when -- when does the actual ignition occur; is that the -- the visual appearance of a fire? Smith talks about a pre-combustion period, which it says where there's smoldering and there's smoke that's given off. And they call it "pre-combustion," which -- combustion and ignition are different terms, but I believe are -- are related.

JUDGE MEYERS: So my questions here go to the fact that, in your petition and in Dr. Horenstein's declaration, you all equate the term "gas

sensor" -- and then you very often say, "I.E. smoke sensor." Are -- are we just to take it from attorney argument, from you all, that these -- these should be equated in Smith? For instance, I don't see, in Smith, any specific or express disclosure that a gas sensor is a smoke sensor.

MR. WONG: Yeah, I think -- I think -- so a couple of things is, it does talk about a gas sensor, it does talk, in Column 1 -- and I have the Smith reference up on the screen. If you look at Column 1, and it's up above, where it talks about the above reference, and I believe you may have seen the patent owner points this out, it talks about the Butt reference, and it talks about a humidity sensor and a temperature sensor. So it's clear that Smith understands, if he's -- if he's talking about the humidity sensor, he knows what to call it. Okay? If you look at the -- at the written description, nowhere does it say it's limited to a humidity sensor. And he -- he could have done that if he wanted to limit it to the humidity sensor, because he knew what it was called. Okay? That's one point.

The other point is with respect to -- to Column 3 -- would you pull up Column 3? Line 16. And this is talking about what they call an "illustrative example of the sensor" for Sensor 52. You'll see it says, "This sensor is responsible -- responsive to the cumulative concentration of water vapor and various organic gases." So of -- and -- and in -- in the institution decision, and also in the deposition of Dr. Tanbour, it talked about VOC sensors, volatile organic concentration sensors, which are smoke sensors. And so, although it doesn't explicitly refer to a -- a smoke sensor, it refers to a organic sensor, which can be a VOC sensor, which, in turn, is a smoke sensor.

JUDGE MEYERS: Thank you.

MR. WONG: Let me go back to the --

Okay. So now we're at 37. I'll now turn to figure -- or Slide 38. Again, this is the table. We're now focusing on the Smith issues. And the three issues about Smith there, that is -- are in dispute, are whether it discloses the smoke detector -- and we just went over that discussion that -- just now, whether it discloses what's called the "shutdown function," and that's the shutdown of the microwave prior to a set end-time. And really, -- and I'll discuss this in a minute, the issue just revolves around whether the shutdown is prior to a set end-time. And then finally, the reset/enable function, which is whether Smith discloses resetting the microwave after a shutdown.

I'll go through this slide quickly, as we just discussed. Patent Owner's position is that Smith is limited to humidity sensors, and doesn't disclose smoke sensors. For the reasons we just described, we believe that's incorrect. Smith knew, if he wanted to limit his claims to smoke -- humidity sensors, or his description to humidity sensors, he could have done that. He didn't. He refers to sensors generally, and then also discloses sensors that sense organic gases.

Now, at Slide 41, this was -- slide was put in, really, to explain that Emma -- not Emma, but the patents at issue, the 745 and the 746 patents, both disclosed different types of sensors, including VOC sensors. Smith disclosed the smoke sensors. Again, the issue we just talked about, it talks about when the smoke is being monitored, and it's before reaching the ignition point, food begins to char, smoke, or smolder, resulting in a second period of relatively rapidly increase in gas concentration in circulating air. Smith refers to that as the "pre-combustion phase," and that's the phase that's

monitored and triggers the turning off of the magnetron on if smoke is detected.

JUDGE DOUGAL: So Mr. Wong, do we have any other -- any other evidence on this issue? You know, in the -- in the deposition, it looked like Dr. Tanbour was confused, kind of along the lines of -- of what Judge Daniels talked about, about how, you know, it's kind of a chicken and egg thing. Like, combustion, pre-ignition, you know, like, he was confused, because it -- on one level, it doesn't -- Smith doesn't seem to make sense, because it talks about smoke occurring before combustion. But it seems like it happens -- smoke is kind of the process of combustion, you know? So we don't -- do we have any -- you know, does your expert talk about why Smith makes sense, or do we have any other testimony that kind of explains how one skilled in the art would understand Smith? Other than Dr. Tanbour saying, hey, this is confusing, doesn't seem to make sense.

MR. WONG: You know -- yeah, so Dr. Tanbour did -- he basically disagreed with the disclosure of Smith. I don't -- I don't believe there's any other specific testimony or evidence in the record by Dr. Horenstein or Dr. Tanbour about this issue. But I will point out -- can we point -- put up Smith again, please?

MR. LLAGOSTERA: Yep.

MR. WONG: And Smith is very explicit about this pre-combustion period.

MR. LLAGOSTERA: It's up.

MR. WONG: If you look at figure -- if you look at -- yeah, Figure 3 -- if we look at Figure 3. And they -- they describe Figure 3, and they talk about the pre-combustion phase. And that's the phase, as you see, between -

- if you look at the figure, there's the drying-out phase, and then there's a line, and then you'll see there's a rapid decline in the resistance, and then boxing on the other side, where it has the other line, and they call it the "pre-combustion phase." That's the phase Smith says we're talking about, where the smoke occurs. So I believe Smith itself teaches there's this phase before what we -- they refer to as combustion, or they referred to a pre-combustion place. But there is smoke. And I believe --

JUDGE MEYERS: Mr. Wong --

MR. WONG: -- is explosive --

JUDGE MEYERS: -- did --

MR. WONG: Sorry.

JUDGE MEYERS: I believe -- I believe Patent Owner said that this Figure 3, if I'm correct -- I believe Patent Owner said that Figure 3 was a -- a graph of -- it seemed to be a graph of humidity. Did -- do we have -- so, is this humidity here? Or is this other gases, in those seeds?

MR. WONG: Well, so it -- it is measuring what the gas concentration is. It -- it doesn't -- it is not limited to gas. And, again, as the example, the illustrative example says it can be organic gases. So I believe this is for gases that -- other than humidity, that are disclosed.

So that -- now we can go back to the slide -- slides.

So now we're at Slide 30 -- 43. Forty-two. We're at slide 42. We talked about the -- the peak combustion phase. I'm now at 43. We talked about the VOC sensors. And I'm going to run a little bit more rapidly through here, because, again, in the interest of time. Because I want to get to the next limitation, is the shutdown function. It's withdrawing cooking power to a microwave, prior to a set end time of a current cooking session.

Patent Owner contends this function is not disclosed because there's no disclosure of removing the power to the microwave prior to a set end time. And then, according to Patent Owner, it discusses automatic cooking, meaning the system may not have any time.

We believe that Smith does disclose shutting down the microwave, prior to a set -- set end time. And we -- we look at, one, Smith discloses microwaves. And, as Dr. Tanbour testified, and I think we all kind of commonly know, microwaves all have an ability to set a cooking time for cooking items in the microwave. We all see the -- the touch pad, you put in the -- the amount of time you want to cook the item.

Secondly, Smith is -- is focused on the pre-combustion phase. It's not focused, and it doesn't talk about automatic cooking as the focus of the of the -- of the invention -- of the description of the invention.

And as the board pointed out, regardless of why Smith shuts off power to the microwave, it would've been reasonably clear to a person that was ordinarily schooled in the art, from Smith's written description, that during a cooking event, the measurement of the blower of the microwave was turned off before the desired time was set -- cooking time was elapsed.

And I'll go to Slide 46. And when I look -- we looked at Dr. Tanbour's statements, it's telling to point out that Dr. Tanbour himself -- even if you assume that Smith is talking, at least in part, about automatic cooking, he didn't know whether automatic cooking involves setting a time period or not. So arguably, at least with respect to Dr. Tanbour's deposition testimony, it could also -- even automatic cooking might have some set end time associated with it.

I'm going to turn to Slide 47. And this is the reset enable function. So after the microwave has been shut off -- so Smith disclosed resetting it, so that power can be resumed by the microwave. And this is enable a magnetron to receive cooking power in the next subsequent cooking session. Patent Owner contends it is not taught by Smith. We contend it is taught by Smith. One is, Smith discloses opening a relay to root power. It's before fire. In other words, it's not destructive to the microwave. Therefore, it only makes sense that one of schooled in the art would understand; all you do to -- to deliver power, after the shutdown, is to close the relay, which is shown to Slide 49 -- 49, as relay 68. And then power is now re-enabled to the -- to the magnetron of the microwave. I think my time is now up. I was going to go into -- but -- but we're out of time.

JUDGE DOUGAL: You can go into your go time, if you want to. And we've been -- asking a lot of questions as a panel. So we might ask questions in your rebuttaltime. It might go over your rebuttal time, too, so --

MR. WONG: Okay. I'll go through -- but very quickly.

So now, I'm at Slide 50. This is about the reset enable. I won't go through the testimony, but the testimony that was Dr. Horenstein and Dr. Tanbour either confirm our view -- our view that there is the reset enable function, or is not inconsistent with our view that the reset and enable function is present in - - at least one of schooled in the art would understand it to be an obvious feature of Smith.

We now go to Butt. I'm at Slide 52. This is the table that we looked at earlier. It highlights what the issues are of smoke, whether the smoke sensor disclosed a shutdown down function and the reset enable function.

Three disputes. This is Slide 53. I just went through those.

Fifty-four shows what is disclosed by Butt, and it's undisputed. I'll point out that the smoke detector is shown in 14, and that -- and the reset button is shown in 12 -- as 12.

So -- Butt teaches a smoke sensor. I think there's no debate that -- that it does teach a smoke sensor. But Patent Owner argues that Butt's smoke sensor is not physically inside the microwave. That's not a claim limitation. The issue is whether it's an operative -- operative connection with the appliance, for example, a microwave.

I have a slide --

JUDGE MEYERS: Mr. Wong, if I -- if I look at - - if I looked at operative connection, in terms of the structure that's shown in -- in the patent, it's an issue -- it's definitely inside, correct?

MR. WONG: Yes, Your Honor.

JUDGE MEYERS: Do we have any -- is there any testimony -- is there any testimony that -- that Butt's smoke detector, because it's outside, would also be understood as -- as an operable connection with the oven?

MR. WONG: There is. There is -- there are statements in Dr. Horenstein's declaration that indicate he -- in his opinion, it is an operative connection. We can -- we can try to -- well, I know. It might take a while for us to bring up that -- those paragraphs. But -- if you look at Dr. Horenstein's declaration, he believes it is an operative connection. Again, because the claim limitation doesn't say it has to be physically inside the microwave.

JUDGE MEYERS: Okay. Fair enough. Thank you. No, don't -- don't -- don't go looking for those. I don't want to take you time if you need it.

MR. WONG: And now we talk about -- it -- it -- in -- in Petitioner's view, it does teach the shutdown function, because it does show that once the smoke is detected, it will shut down the appliance that's connected to the Circuit box 2026, which is a control of 20 inside. It would shut down power to the appliance.

It's true that Butt does not explicitly disclose a microwave, but it says any appliance. And, of course, microwaves are one of the kitchen -- one appliance that's commonly in the kitchen. And if the microwave is shut down due to a fire, it would have been prior to the set end time, as we discussed earlier.

The reset enable function, if you look at the - - the schematic we looked at earlier, it shows a reset button that's used -- that's pushed, in order to reset and allow power to be -- to be delivered to the appliance that was shut down.

And that's all I have for -- for the prior art. I think we'll rest.

MR. LLAGOSTERA: I'll be quick.

MR. WONG: Mr. Llagostera, is going to talk about motivations to provide.

MR. LLAGOSTERA: I'll be very brief on this, Your Honor, given our time.

I just want to emphasize a couple of things, and everything else, I'll leave on the slides.

But our -- our Ground 2 is Emma plus Smith. The institution decision was Emma plus Smith plus Butt. Now, we agree with the institution decision, and the basis to combine those references. But we think there's

enough in Emma and Smith, with the person skilled in the art, knowledge of a reset enable function, to -- to combine just those references.

And I think the debate in -- well, in the institution decision, Butt was relied on for the reset enabled. So these two references, I think -- we think are enough, and pretty straightforward reasons to combine them. They're both talking about microwaves, optimizing them, safety features, which is also in the institution decision.

And adding a reset function, if the board finds it's not explicit in Smith, would've been very easy to do, given that it's a circuit with relays, and you just open and close them.

I won't talk about the patent owner's disputes with Emma and Smith. Most of it is about whether Smith teaches a humidity sensor versus a smoke sensor. Mr. Wong covered that.

The fourth Ground is the -- what the institution decision was based on. And what I want to emphasize here is that in the combination of these references -- this is a little obfuscated by Patent Owner's comments, but it's Emma's appliance combined with Smith's smoke sensor, and then add Butt's reset enable functionality. So -- several of their arguments about how it doesn't make sense to move Butt's smoke sensor into the microwave. You'd have to cannibalize features, that -- that's not the combination that we have made with these three -- or in the institution.

JUDGE DOUGAL: So -- to be clear, you're not relying on Butt's smoke sensor?

MR. LLAGOSTERA: We're relying on the reset functionality, as taught in Butt, with the smoke sensor and control circuit, but that feature. So we're not saying that we're using Butt's smoke sensor that's outside the

cavity and putting it into Emma. That's -- that's -- that's correct, Your Honor. So -- so you would take Emma's appliance --

JUDGE DOUGAL: But I have a question --

MR. LLAGOSTERA: Of course.

JUDGE DOUGAL: -- if that's the case. So we haven't discussed at all -- and I know we're going to probably going to go over your time, and we're going to -- we're going to give Patent Owner additional time, in view of this.

So in the discussion with Smith, there is this whole other thing about this reference to another company's sensor, and different numbers. And there -- there -- there's all kinds of issues there, right? Which you guys didn't touch, which -- which was smart. But -- to a certain extent -- but if you're -- if you're relying on Smith, one problem I have is it seems like the only testimony we have from your expert is he says it's a smoke sensor, based on what Smith said, and based on these other documents with this other number, which doesn't match up with what's in the Smith reference.

So I'm not sure --

MR. LLAGOSTERA: Happy to address.

JUDGE DOUGAL: -- that we have evidence to Smith, from your expert, anyways, that Smith alone, without relying on the -- was it Figaro, or --

MR. LLAGOSTERA: Figaro.

JUDGE DOUGAL: Figaro.

MR. LLAGOSTERA: Sure.

JUDGE DOUGAL: -- that evidence is a smoke sensor.

MR. LLAGOSTERA: Sure. Happy to address that. So -- so our -- our prior art reference is not the Figaro 816 plus the product data sheet. It's what Smith teaches. And Dr. Horenstein's opinion does not stand and fall on the Figaro sensor. That's an embodiment in Smith. And so what his opinion lays out is Smith discloses this 186 smoke sensor. It talks about anticipating fires, putting in a microwave, the pre-combustion phase.

And then he also separately opines, well, here's also this embodiment. And I went and looked out there, and this is the only one I can find.

And so that's a -- it must -- he thinks it's a typographical error, based on all the evidence he looked at. So the big dispute between Figaro 816, whether that is one -- is actually the 186, is -- is a secondary issue, that Dr. Horenstein relies on. It's not -- it's not his -- his whole opinion stands and falls on that.

We think that that shows it's further evidence that Smith is disclosing the smoke sensor, so we add -- we included that in there. But Smith alone, within the four corners of that document, as -- as Mr. Wong laid out, discloses the smoke sensor, in our view.

Now, they're going to focus a lot on Figaro, and that product data sheet. But we don't even need the Figaro 816, because Smith itself discloses the smoke sensor we need for Emma -- that -- that we combine with Emma.

JUDGE DOUGAL: So you think it's pretty clear, in his declaration, that he's -- he's got two analysis --

MR. LLAGOSTERA: I --

JUDGE DOUGAL: -- one, just based on the Smith itself, not muddied by this other disclosure.

MR. LLAGOSTERA: Yeah.

JUDGE DOUGAL: Okay.

MR. LLAGPSTERA: Yeah. And -- and when we come back and rebuttal, because I know we're running out of time, I can give you the exact citations for that, that show that they are -- they are separate. They're not all intertwined relying on a Figaro propagation. So that's the combination.

Let me just make a couple of other points. The Ground 6, I just want to make a clarification because this is in the institution decision, that Grounds 6 and 8 require the ISDU reference. I -- I think that's incorrect.

So we had two separate grounds. One was Ground 5 and one was Ground 6. And the first one is -- Ground 5 is Emma plus -- I -- I have this at the bottom. It is Emma plus ISDU plus the knowledge of a person of ordinary skill in the art. Ground 6 is Emma plus 6 plus knowledge. This is about the USB port. So sorry, I should have stated that earlier, on Slide 72.

So the institution decision says, ISDU is required by all these grounds. I just wanted to point out that that's not -- that's not correct. We never combined ISDU and Smith, nor would that make sense because they're both microwaves and smoke sensors.

And so those are separate grounds. And I'm not going to go into motivations to combine. Very common knowledge, USB ports were used as charging stations by this time period. Same -- same correction with Ground A. It's not Emma plus ISDU plus Smith plus Quezada. It's -- those are two separate grounds, Ground 7 and 8. ISDU for one, Smith for the other.

And I think with that, I probably need to stop. So hopefully we have some time for rebuttal. Thank you, Your Honor. We appreciate --

JUDGE DOUGAL: Thank you, Counsel.

So just for the benefit of the parties, Petitioner has used up all of its time. We -- we've asked a lot of questions and we may have more additional questions. And so at -- at the outset, we're -- we'll give both parties five additional minutes. And then depending on if we have additional questions in -- in that time period, that may expand and then we will give Patent Owner additional time as well.

MR. LLAGOSTERA: Thank you, Your Honor.

JUDGE DOUGAL: So Patent Owner -- Mr. Patton?

MR. PATTON: Yes, Your Honor.

JUDGE DOUGAL: Okay. So if -- if you want, you know, to -- to change, you know, your -- your main argument time versus your rebuttal time, you know, we can add five more minutes onto this or add 10 more minutes and do five for rebuttal or whatever, just let me know.

MR. PATTON: Okay.

JUDGE DOUGAL: Or we can leave it as it is.

MR. PATTON: We'll leave 10 for rebuttal. And if we need to use the extra five minutes, we'll use them. I know Your Honors won't mind having less argument maybe, if we address all of this.

JUDGE DOUGAL: If you go short, we won't mind that at all.

MR. PATTON: Yeah, exactly.

JUDGE DOUGAL: Whenever you're ready.

MR. PATTON: Thank you, Your Honor.

Thank you, Your Honor. I will be beginning with a brief discussion of the issues. I'll go through that quickly since we've already talked about a lot of this. And then my colleague, Mr. Johnson will handle the

indefiniteness issues. I will handle Grounds 1 through 8, I believe, which are all the prime role references.

So as we've already discussed, the two patents here are the 745 and 746. They share a specification. We've listed and shown representative claims, but I think we're all on the same page as to what those are. They are shown on Slides 3 and 4.

Moving quickly on to ISDU. I won't go into this very much. I'll note that Petitioner didn't really discuss ISDU, so it doesn't seem to be an issue anymore. I think we're fine relying on our papers for that to show that it doesn't qualify as prior art.

The next reference is Emma. As we've talked about, Emma is related to the patents at issue. It's a combination of a refrigerator wave that has a single plug. Disclosure really relates to microwave refrigerators where it's disabling the compressor, you know, to prevent these overload conditions in apartments and dormitories where, you know, you have situations where people like to plug in way too many things into an outlet.

And then we have Smith. Smith is titled, "Automatic Fire Detection in Microwaves". It's issued in 1985. It -- it generally describes a sensor that's normally used for automatic cooking, which it notes is a humidity sensor and says that that's responsive to water vapor and other gases. And it gives an example, and that's the Figaro TGS 186, I believe.

And the next reference is -- is this Butt reference. And this is really -- it's a system designed to be installed in a house. Either during construction initially, or it says later by a user. And it's either hardwired in or it gives an example of where you have some wireless smoke detectors, generic smoke detectors used in a home.

Turning to Slide 9 is Ground 1. I really won't spend time on this. I'm going to just move on to Grounds 2 through 4, which rely on various combinations of Emma, Butt, and Smith. And this starts at Slide 10. Moving to slide -- sorry -- slide 11.

Moving to Slide 12, I'll give an overview of what these grounds are missing in our view. For Ground 2, which is Emma and Smith, it's missing the smoke sensor. And I -- and I'll -- I'll clarify. When we're using the phrases smoke sensor and reset enable, these are the functions and that's the language that Petitioner used.

Just so we're all on the same page, they're not -- it's not simply -- I think you all are very well aware that it's not simply it has a smoke sensor. It -- it is that the microwave includes a smoke sensor. And then it's that this smoke sensor is an operative connection with the internal cooking cavity. And then also, it's an operative connection with at least one power control circuit.

But we say Emma and Smith combination, misses this -- the smoke sensor limitation, misses the set end time and this reset enable. And they also don't have motivation to combine. Similarly, Ground 3, which is Emma and Butt, that doesn't have the smoke sensor. But it's for different reasons. This one, it is that -- it's not an operative connection.

And in fact Dr. Horenstein acknowledged it could not be placed inside of the microwave because of the -- the temperature limitations in these normal smoke detectors, which he acknowledged he didn't consider when offering his initial opinion. Now, he said on redirect, but that didn't change his opinions. But -- but that really clouds any idea that Emma and Butt could have the claim smoke sensor.

Now, it's also missing the shutdown function, the reset enable function and the control circuit. And I'll get into those in a little bit. For Ground 4, this is the combination of Emma, Butt, and Smith. As with those two -- Grounds, 2 and 3, it's also missing the smoke sensor, the shutdown function and the reset enable function.

So I think it's most helpful if we go through these limitation by limitation and show how each one of these limitations is not present rather than going reference by reference, because there is some overlap here.

So as you can see on Slide 16, that -- we'll use the first one, which is Claim 1 of the 745. This smoke sensor limitation, according to Petitioners is -- it includes wherein the microwave oven includes a smoke sensor. So the microwave actually has to include the smoke sensor.

And wherein the smoke sensor is positioned in operative connection with the cooking area inside the microwave oven and is in operative connection with at least one power control circuit. Well, here we all agree, Emma has no smoke sensor.

Petitioner asserts that both Smith and Butt disclose a smoke sensor. However, Smith discloses a smoke sensor for detecting -- it's a smoke sensor used for detecting when food is cooked, it's this humidity sensor. And Butt doesn't disclose, as I said, that the smoke sensor is in operative connection with the cooking area. This issue is dispositive of Grounds 2 through 4. If -- and if neither Smith nor Butt disclose the smoke sensor, all non-ISDU Grounds are resolved.

So let's start with Smith. Smith discloses a humidity sensor. It talks about -- I think the background section of Smith is very helpful for identifying what this is. It's talking about the common problems and how

one commonly used approach to fire detection, as you can see on Slide 17 in the excerpt, which is from Smith, Exhibit 1014.

One commonly used approach was to use this thermal cutout switch. And so once the temperature exceeds that predetermined level, it cuts out the power. Smith says, you know, that was relatively costly, and it has a slow response time. So that's not what we're doing.

It then says, the alternative approach, which is this 995 patent to Buck. And they say in Buck, the arrangement of a humidity sensor and a temperature sensor are employed to monitor relative humidity and temperature. And so then once the temperature reaches a certain level, it says, okay, we've got that box checked and now has the humidity decreased enough? Oh, yep. We have that box checked. We're done.

Well, Smith says, we're using that second sensor. What Smith is talking about is it's detecting the transition from this drying out phase. Drying out, that's humidity. The transition from drying out phase to this pre-combustion phase to put out advanced warning that a combustion condition is imminent.

In the reasons why they're doing that they say that this arrangement -- they're saying in this section how it's different from Buck. They say their arrangement eliminates the need for a relatively costly thermal cutout switch; that was the first option. And they say it also eliminates the need for an in situ temperature sensor of Buck. They're saying, we've cut out the temperature sensor. We just have a humidity sensor.

And in fact, I'm going to exit my slides for a second here because there was an excerpt that came up a little earlier during the petitioner's

section of Smith where he talked about -- and I -- your Honor, you might have actually identified this section. It's Column 3, and this is Exhibit 1014.

And he -- opposing counsel really locked down this water vapor and other gases, and said, this supports that, hey, you know what, this is actually a smoke sensor. Well, if you continue on down, it makes it so clear that this is not a smoke sensor. In fact, this is the humidity sensor of Buck that they're saying used.

They say Sensor 52 is a gas sensor readily available and is this Figaro 186. And they say, this sensor is responsive to cumulative concentration of water vapor and various organic gases. Use of such sensor in a microwave oven for automatic cooking is known in the art. One example of such a control arrangement is -- that's the Buck one.

Actually --

JUDGE MEYERS: Mr. Patton, it -- it also seems to me if -- if -- you know, Petitioner's point is not that farfetched that Smith is talking about not -- not just about it could have used a humidity sensor, but it's the gas sensor. And I believe there is some evidence that gas includes -- here -- here in Smith itself, the gas includes both organic compounds as well as -- and -- and probably we conclude humidity; is that fair?

MR. PATTON: I'm sorry. I think you've cut out a little bit at the end. I didn't catch that?

JUDGE MEYERS: Is -- is it fair that Smith itself talks about a gas sensor, not just the humidity sensor. The gas sensor, as I'm reading -- doing a plain reading of this would encompass things like the VOCs that we've talked about, as well as humidity. So isn't that a fair reading of -- of Smith?

MR. PATTON: Your Honor, I appreciate that question. A gas sensor is not inherently a smoke sensor. I -- I don't -- that is actually what Dr. Tanbour stated in his declaration. And I think that is -- it -- it's relevant to this 8-16 discussion that we had. So Dr. Horenstein does -- I -- I dispute what -- the -- the representation that there's two analyses for Smith, one for a -- what's disclosed in the Smith reference and one for 816. It is all intertwined. He's relying on the 816 in order to get to this as a gas sensor.

But that 816, the -- the spec that he uses is actually very helpful and demonstrative of this not being a smoke sensor. So that 816 sensor, the -- the title is for detection of combustible gases. That's actually not for detecting smoke. What that's used -- in it -- in the specification, it straight up says, "This is meant for natural gas and LP detection." That -- that sensor is not really a smoke sensor. That is for detecting combustible gases, not for smoke.

Now, I understand -- I -- I don't dispute that humidity may be a part of smoke, but detecting humidity does -- just because you detect humidity does not mean that you can detect smoke or that you are detecting smoke. And I think that's the difference here is they're -- they're nearly making an inherency argument without actually trying to make any attempt to meet the inherency obligations. They're trying to skip over that and just say, yes, sensor, smoke sensor, we're done. A gas sensor is not a smoke sensor and, in fact, here it's pretty clear that the gas sensor is actually a humidity sensor that may detect other organic gases, but guess -- as Your Honors are very well aware, not all organic gases are actually VOCs. There are -- are certain organic gases that are not volatile. That's part of the limitation of a VOC and why there's a distinction between those two.

JUDGE MEYERS: Mr. Patton, my concern with -- with your argument and -- and I -- is that -- is that, here's the thing. If -- if we were to take into -- this gas sensor is not a smoke sensor with some of this evidence that we have -- seem to have, that -- that -- that this gas sensor can sense VOCs, my -- my greatest concern is that, if we go with your argument, one of the federal circuit panels reads this and says, "Come on. A -- a -- a -- what's the difference between a gas sensor detecting VOCs and a smoke sensor?" We don't really have that. That argument is not developed in front of us here at the board. And -- and so, I'm afraid they're just going to say, "Hey, there's really no difference. Dr. Horenstein may -- there may be evidence in Dr. Horenstein's declaration that he -- that he says these -- these are potentially interchangeable." Do we have that?

MR. PATTON: No, Your Honor. And I -- I think that your -- your worry about the federal circuit or your, -- the potential issue of the federal circuit saying, hey, well, why is -- why wasn't this developed?" Petitioner didn't offer that evidence. That's where we are. This petitioner didn't come forth and say, VOCs are the same as smoke sensors, because they aren't. And in fact, Smith doesn't disclose a VOC sensor. It says various organic gases. That is not what a VOC is.

Really, what Smith is discussing is a humidity sensor and equating a humidity sensor to a smoke sensor, I think, is a very dangerous path to go down, to say simply because we detect one component that may be in smoke -- it doesn't have to be there. It may be in there. Simply because you detect that, we're going to say no matter what you're a smoke sensor. And Smith underscores that what it's actually detecting is these drying out phases. It is detecting humidity. That is not the same thing as smoke.

I think we're all aware that Dr. Horenstein didn't actually evaluate this -- what was disclosed -- what was disclosed in Smith, which was this Figaro 186. But the reason -- it's fairly apparent why Petitioner had to go down this path. It's because, as you all are -- I think your questions are pointing out, Smith doesn't actually teach a smoke sensor. And so, they went out to try to find another place to bring in evidence to try to substantiate their claim that, hey, you know what? This is actually a smoke sensor. And they went out and he said he looked up and tried to find -- he reviewed a project data sheet for an 861. And he concluded that the 186 was a typographical error that the data sheet for the 816 is actually what was disclosed.

It's actually more problematic than this, because the section of Dr. Horenstein's report actually relies on a Ueda (phonetic) reference and incorporates that. The Ueda reference is not in this case. And that's shown right here that -- this is in the section of Exhibit 1002, which is Dr. Horenstein's IPR expert report. And this is shown on Slide 21. He says that, "As discussed above with respect to this Ueda reference, that's not here, the model TGS number 816 sensor detects a variety of gases found in smoke. It can also detect changes in humidity. This confirms that it's a smoke sensor." So, he's using this 816 in order to get to, "This is a smoke sensor."

Again, the 816, not the -- or the 186, not the 816 is actually disclosed in Smith. And as Dr. Tanbour stated in his declaration, he actually went out and reviewed other Smith patents, other related Smith patents, and found that, there too, this 186 model number was used. So if it's a typographical error, it was across many, many patents.

And when we asked Dr. Horenstein what he actually did to get to this conclusion, he said he ran a Google search. We asked if there was a time

limitation. He said no, he just ran a Google search and it popped up with this 816. He reviewed it and said that's what it is. Didn't contact anyone at Figaro, just assumed it was a typo. And in fact, he didn't even confirm that the 816 was available at the time of Smith.

The -- this is in -- in Appendix C of Exhibit 1002. That's the 816 spec. That was actually published in 1999. He didn't check to see whether it was ever published at the time of Smith and could have been a typographical error. And in fact, the 816 is incompatible with Smith's humidity sensor. And the -- one of the reasons for that, as shown in Slide 25, which is an --

JUDGE DOUGAL: You -- you can continue to talk about this, but -- but --

MR. PATTON: Okay.

JUDGE DOUGAL: I think we -- we get your point. And I mean, it's -- it's a reference from 1999, not 1983. Might be worth your time to move on to the next exhibit.

MR. PATTON: I -- I appreciate that, Your Honor. Thank you.

I will -- won't -- note one thing. Smith itself talks about needing a -- a pre-heater. Its sensor has a pre-heater. And what that's requiring is, it's -- it's a ceramic pre-heater so that it -- the sensor can get up to a certain temperature so that can actually function. The 816, for example, also has one of those, but it required, I believe that spec said, up to seven -- or more than seven days of preheating before it actually functions as it's supposed to. That's important for, if you ever were to pull power away from that, you would have to preheat that sensor again for the required amount of time in order for it to function, which undercuts any idea that there could also be this reset function. But I'll get back to that later.

I think it's helpful to quickly discuss, but it -- it -- it now -- although I don't believe it was apparent on the papers, I was surprised to hear that they're no longer arguing that Butt discloses a smoke sensor for Ground 4.

But for Ground 3, they're still arguing that it discloses that. That I -- I think it's fairly clear that Butt all but discloses it is a typical residential smoke detector. I that's part of the underlying purpose of what Butt was. It's trying to use these standard -- a standard electrical box, a standard either wired or wireless smoke detector in order to create a smart house so that anything could be plugged into it. You didn't have to have these smart functions in the appliances themselves. And instead, you are making this house itself smart.

The exemplary wireless smoke detectors, one of them was this ADEMCO 5806 detector. And Dr. Horenstein attached what he said was the spec for that. However, at his deposition, he acknowledged that he didn't consider most of the second and third pages of that spec. And that spec is shown in Appendix E of Exhibit 1002. And these were on those other pages. It set some limitations on where these smoke detectors are to be used and not used.

One, it says, the temperature limits are 40 to 100 degrees Fahrenheit. And he acknowledged that that would not function inside a microwave. The instructions also blatantly say, "Do not install less than six meters away from places where there's combustion, like kitchens." It's not even supposed to be in a condition -- in a kitchen, let alone an operative connection or inside a microwave. Dr. Horenstein didn't consider these when he initially issued his report.

Now, he said this didn't change his mind based on it -- teaching the smoke detector or a smoke sensor and operative connection. But I think this, frankly, undercuts and kills Ground 3 because Butt's smoke sensor is not in operative connection with the cooking area. So -- for Grounds 2 through 4, Emma, Butt, and Smith all failed to teach the smoke sensor.

Moving down to the -- moving on to the shutdown function, this limitation is wherein at least in part the sense level of the smoke, the power control circuit is operative to cause power to be withdrawn at the end of the cooking session prior to a set end time. Emma doesn't teach this because there's no shutting down based on a sense level of smoke. Petition doesn't rely on Emma for this. Smith doesn't teach this because there's no prior to a set end type taught and Butt doesn't teach this for a number of reasons, including because there's no microwave taught.

So -- I think this has been a -- a dispute. Smith's automatic cooking, it -- teaching automatic cooking or teaching a microwave does not inherently mean that there is a set end time. There's no dispute that there -- it's not expressly disclosed and they did not make an inherency argument. I think this is -- it's informative to look at actually the -- you -- if Your Honors are going to consider the entirety of Exhibit 1002, which was Dr. Horenstein's initial report, his discussion of UATE is actually informative here.

In -- as -- I have included the cite, which is 1002 at Paragraph 147. There's a flow chart. And what it's showing is that it's making a bunch of decisions based on what's the humidity levels in the cooking cavity. Then, once it makes a determinant - - determination of, okay, I need to shut off, it's not shutting off early. What it's doing is setting the time -- the current time to the T of C, which UATE describes as the time of completion. So instead

of shutting off early, it's saying, we're done. We're finished. This is what we were meant to do. This is where we're going. So simply because it's a microwave doesn't mean it has to have a set end time. Now, certainly most microwaves do, but it's not true that all of them do. And Smith does not disclose it.

Now, moving on to Butt, Butt fails to teach or suggest shutting down a microwave. I -- I -- I'll move on from this one. And I think it's most important now to look at the reset enable. This is also dispositive of Grounds 2 through 4 on the independent claims.

Smith does not disclose this reset enable function. De-energizing is not the same as energizing. I think it's fairly clear. Dr. Horenstein admitted that there was not any disclosure of this reset relay. Really, their argument was that, well, you could add one. Well, that's not taught in Smith itself.

JUDGE MEYERS: Mr. Patton, what -- what -- what happens if you de-energize it? How do you use it again?

MR. PATTON: Well, Your Honor, I think that that is -- one, it's -- it's not taught by Smith, but I think a reasonable conclusion is that the microwave is not to be used again. I don't -- I don't know about you all, but I don't typically have that --

JUDGE MEYERS: Wait a minute. That's exactly the kind of thing -- that's what I'm talking about. I am concerned if the federal circuit looks at us and goes, what? Like, that's not logical, and -- and I -- I'm -- I'm -- you know, that is -- that -- it seems to me that -- that your arguments are pushing us towards -- I -- I -- I -- I think they're good arguments, but that argument in particular is pushing this towards someone saying, how did you reach that --

how do you logically reach that conclusion? And those are not the kind of remands we want.

MR. PATTON: I appreciate, Your Honor -- that, Your Honor. Smith doesn't describe any of that. Smith doesn't talk about it. Smith doesn't care about it because they were shutting down. I think there are some possibilities that -- of how you could turn this back on. One, it could be a -- a breaker that has to be flipped or a fuse that is simply turned off, and that is the end of it, and you have to replace the part. Regardless, that's simply just not taught by Smith, so we don't know what they were doing.

For us to determine that it was this specific teaching of the 745 and 746 patents after the fact and say, you know what, it has to be that they were just going to reset it. I don't know that that -- that isn't the only conclusion, and I don't think it's correct to make a decision of invalidity based on that assumption, especially when we're talking about a fire inside a microwave.

That is not something that should be taken lightly. You're talking about a fire, and inside a small -- a very small compartment, and this is an electrical appliance. It is reasonable to say that that appliance should not be turned on after you have a fire inside. And I think a person of skill in the art would come to that same conclusion that, okay, maybe we need to actually have this worked on before we're going to just turn this back on.

Smith also doesn't disclose the reset enable function because there's no microwave. There's no current cooking session because Smith doesn't even - - or excuse me, Butt doesn't care what's happening outside the outlet. All Butt Systems is, it is the smoke detector, it's this reset button, and it's the outlet.

As shown in Slide 37, it's wired into the house. It's this standard circuit box, and what was to happen is that -- what they're trying to do is cut power to any potential accelerant or any potential source for energy of a fire in the house. They're not saying, hey, if it's at this specific appliance. They're just saying, if it's anywhere in the house, we don't want to let any potential accelerant happen.

So not only is the reset not -- this isn't the reset enable function because it's not enabling power to a magnetron. It's not inside a microwave. It has nothing to do with a microwave or a set end time. It also isn't enabling power to a magnetron in the next subsequent cooking session. So for these reasons, Emma, Butt, and Smith also failed to teach the shutdown or the reset enable function.

Now I'm going to quickly talk about the motivations to combine. I think one of the arguments that's been made throughout this is that, well functionality could be added. You -- you could add this. A person could add this. That is not a motivation to combine, simply because you can. And frankly, the argument that safety alone is enough reason to add a limitation, I think it's a dangerous path to go down, because most inventions are made -- not most, a lot of inventions are made because they benefit safety. Simply saying, oh, this benefits safety, so we're going to add other unrelated safety features. I don't think that that is a proper motivation to combine, and I don't think that Petitioner has come forth with case laws stating that that is okay.

I'll start with Emma and Smith. There's no -- no proper motivation to combine Emma and Smith. There's a slight typo here on the second bullet. It should read that, "Smith's sensor does not equal a VOC sensor, which does not equal a smoke sensor. Not all VOC sensors are smoke sensors." That's

what Dr. Tanbour testified to -- put in his declaration. And Smith's sensor is not actually a VOC sensor.

And I think that that's also consistent with Dr. Tanbour's declaration, because contrary to Petitioners and Horenstein's suggestion, a PSITA would not understand that water vapor and various organic gases are synonymous with VOCs. Smith doesn't disclose VOCs at all. A VOC sensor, that -- that's just not what Smith is about. This is essentially another inherency argument that they're attempting to make without actually going through the inherency proofs that are necessary.

The last point, the combination of Emma and Smith actually exceeds the maximum power consumption from microwaves. So that's that pre-heater I was talking about. That pre-heater draws power. And at -- at that time, there were these regulations that were discussed about, we want to create a maximum standby power coil. Well, if you're -- the -- the displays take a certain amount of power, and adding this -- a sensor that has a ceramic pre-heater that has to be heated -- it's constantly drawing power -- as Dr. Horenstein acknowledged for the 816 sensor, that sensor would have exceeded the maximum standby. So these references are actually incompatible.

And to that end, if you then want to also read in this reset enable function, I think this goes to your point of whether Smith really should have been reset. If you're cutting power, removing power from this sensor that has to be preheated, a person skilled in the art would not assume, hey, yeah, we should turn this right back on and let the user use this -- this microwave at a point where this sensor will no longer be operable. And that's what Dr. Tanbour stated in his declaration.

I think the next one I'll -- I'll talk about is this -- the Ground 3. That's the combination of Emma and Butt. There's no proper motivation to combine Emma and Butt. Butt is really a smart outlet, a smart house that an appliance can be plugged into. Emma is a combination appliance for dorm rooms, high capacity places. That's -- it's not a house. Butt gets added to a home. Emma doesn't talk about smoke. It's directed to these places actually that don't have kitchens, and that's part of the purpose of Emma, is you're using a microwave and a fridge in a -- a dormitory. Butt cannot -- explicitly cannot be placed in a microwave. Excuse me. Their goals are incompatible. It would really render both -- render Butt inoperable for its intended purpose to try to combine Emma and Butt.

But I'm going to spend the rest of my time on this Emma, Smith, and Butt combination. In the first bullet point, I -- we -- we're saying that there's no combination of -- or no basis to combine two sensors. We now -- I don't believe that that was apparent in the petition itself, but that's no longer their position. They're relying on Smith's sensor alone. And what their argument now is that they're saying that the reset function of Butt, just the function -- they're not saying any specific components, what else would be added. They're just saying just this function would be added from Butt into the -- the Emma and Smith combination already.

So they're -- they're taking something out of Butt, where its core principle is, hey, I'm to be installed in a house, actually not have any of the smart functionality in the appliances themselves, removing it out so that anything can be plugged into me. That's already, as with the Emma and Butt combination, a departure from the core principle of what Butt is.

But stepping back from that, they're now saying, okay, we want the reset function of Butt. Well, what Butt does is cuts power to the entire appliance. This would render the -- the combination of Emma and Butt inoperable because you're cutting power. It's that pre-heater. It's the sensor. It no longer functions. Turning it back on would mean that the sensor doesn't function. There'd be no preheating. This is not obvious to a person skilled in the art. And for this reason, Grounds 2 through 4 fail.

Now, I -- I'm not going to go into Grounds 5 through 8. They all rely on -- I -- petition now says they don't rely on ISDU. Regardless, they rely on Grounds 1 through 4, so if 1 through 4 fail, Grounds 5 through 8 also fail. And I'm going to turn it over to my colleague. Unless Your Honors have any further questions, I'm going to turn it over to my colleague to discuss the secondary indicia -- secondary indicia of obviousness and the indefiniteness.

MR. JOHNSON: Good afternoon, Your Honors. Scott Johnson on behalf of the patent owner. You've heard from the petitioner that their motivation to combine is, of course, this notion of safety and improving safety. And unfortunately, that's so generic as to be meaningless for a motivation to combine. When looking at whether or not we should combine references -- and all the parties here agree there is no anticipatory reference, so we have to hodgepodge connect things from the prior art to get to this invention, use some hindsight reconstruction. They're doing it under this guise of safety, but we can look at real evidence to show why one skilled in the art wouldn't have done this, and in fact didn't do this.

That real evidence comes to place in the form of objective indicia, secondary consideration, and we know from the federal circuit that this objective indicia is sometimes the most -- the most probative and cogent

evidence in the record of whether or not there is a motivation to combine, where you should combine these references. Here, that evidence all says no. There's evidence in the record, claim construction charts, evidence of patent marking, evidence of lots of bids from the colleges and things, that all show that the patented features were required in these products, that the products embodied the full scope of the patent and their -- the patent claims.

There's a nexus that's clearly established. There's strong evidence of commercial success. There's evidence of long felt need, lots of interesting evidence about failure of others, including failure of the petitioner in this case. There's teaching away, unexpected results, even evidence of Petitioner's own copy. All of this evidence exists in this case, not some of it, not a little bit here, a little bit there. It all exists. That's strong evidence that these references shouldn't be combined now, when they were not combined before.

Here, if we look at the -- the nexus element, there's a presumption of nexus that the evidence is tied to a specific product, and that product embodies the claimed features and is co-extensive with them. The MicroFridge products -- that's the commercial name for the products sold by the patent owner -- they embody the claimed features. They're coextensive with the claims and the claimed features. There's a declaration from Dr. Tanbour that goes through element by element, shows where those elements are found in the commercial embodiments of the products. It is found in Paper 23-1, Paragraph 24, and Appendix B really shows all of that. No other product in the prior art has the claimed combination of features. Again, there is no motivation to combine these references that existed at the time that these patents were filed. We know also from the advertisement of these

products that they embody all of the features. They're promoted features. They're the reasons that the customers want these products. They talk about the first defense smoke sensor, the USB charging station, the patented current limiting technology, all of which are embodied in the products that these customers buy. Not only that they buy, but they demand. We see that we mark our products appropriately through virtual marketing as it's allowed under the law, and we note these two patents at issue cover the Intirion Corporation, MicroFridge, smoke sensor microwaves. It's an entire line of product that is covered by and embodies these two patents at issue. The commercial success evidence here is strong. We've produced extensive evidence of both the volume of sales and the revenue of sales that are based on these patented products.

I would refer you to the Jared Amy declaration, that's Paper number 23-4, Exhibit 2004, Paragraphs 3 and 4 in the record, that shows both graphically and numerically the large volume and large dollar amounts associated with the sales of these products. That large commercial success should be motivation for anyone of skill in the art to try and come up with this patent product. They did not. The academic market, our largest customer base for these products, because again these products are intended not for home kitchens, they're intended for dorms. These dorms don't include kitchens. My dorm used to be, you know, a 10-by-10 space where they thought they could fit three guys, right, so we were lucky to have a refrigerator, lucky to have a microwave. University after university -- and I would refer you to the exhibits listed here, Exhibits 2008, 2010, 2014, 2011, 2009, 2012, 2013, they all show university after university not just demanding that their dorms be required -- or have a certain size refrigerator

or a certain size microwave, those combination appliances are required. They must have the current limiting technology. They must have the smoke sensor technology. They must have the shut off and the reset enable functions.

Why? Because a false smoke alarm in a dorm evacuates 1,000 people, it doesn't evacuate four. They want these requirements so that these false alarms don't go off. So that their students are protected from false alarms, from fires. They want these microwaves to shut off before the fire occurs. They want the patented features. And they want to control the current that's used by these appliances. Evidence of long-felt need and failures of others also demonstrates the non-obviousness here. I would refer you again to Exhibit 2001, Paragraph 252, Dr. Tanbour's declaration. The long-felt need was to improve the safety and reliability of combination appliances and dormitories, offices, and apartments, places where people are concentrated, but kitchens are absent. The failure by others, the teaching away from putting a smoke sensor in the microwave, as we've heard from their Butt reference, because of false alarms, because of the proximity to microwaves, they wanted their sensors away from things, and -- and that's what they taught in the prior art.

The non -- the failure of others, again, this is an open hearing. Those e-mails are fun to read, and I would encourage the board to do so. Read Exhibit 2021 at 233, Exhibit 2022 at 1, Exhibit 2024 at 7. You'll see how the petitioner tried to come up with a competing product that included a smoke sensor and repeatedly failed. Repeatedly failed.

Read those e-mails. Read the content of them. See what they say. You'll see the evidence of a long-felt need from the petitioner himself.

Evidence of teaching away and unexpected results. Here, we have teaching away where smoke alarms and sensors should be outside of the cooking area. We have teaching away that the sensor in the microwaves would give too many false alarms. Again, Exhibit 1002, Annex E at 306. Teaching that the sensor in the microwave would use too much power. Again, Exhibit 2035, Paragraph 9. Evidence of copying by the petitioner in this case. We've submitted substantial evidence of copying and I encourage the board also to look at Exhibits 2015 at 1, 2016 at 2, 2024 at 4, 2027, 2023, 2028, and 2001, which is Dr. Tanbour's declaration that first summarizes all of this in Paragraphs 266 through 68. Look at those, you'll see the copying, the effort that goes into copying, the things that Petitioner did.

Ground 9, the 112 allegations. Before I get into Ground 9 and the 112 -- and grounds -- it's Ground 9 in the -- I believe it's PGR3 and Grounds 9 through 11 in PGR4, they raised some additional indefiniteness arguments and 112 arguments for the 746 patent than they do for the 745 patent.

Before I get into those, though, I do want to address the slides and the argument that we've heard from Petitioner today on the brand new grounds that were never asserted here today, and that's not an accident. Those grounds were not asserted by Petitioner's choice, and I want to say that again, Petitioner chose not to specifically assert the 112 grounds associated with level of smoke, amount of smoke, or dangerous condition. You don't have to take my word for it, Petitioner told us that that's their choice and the choice that they made. And we know it because they made it in a paper that they filed and actually made it in the petition itself. If you -- we look at the petition itself on Page 13 and 14, Page 13, which talks about the level of smoke limitation, notes that patent owner interprets level of smoke and

amount of smoke as merely detecting smoke. But it goes on to have a reservation of rights sentence. In the petition itself, patent -- the petitioner notes that it reserves all rights to contest patent owner's construction in the related litigation proceedings, including that this term, level of smoke or amount of smoke, is indefinite. It chose to address the indefiniteness arguments associated with those limitations in a different forum in the District Court. It chose not to raise those issues here.

And it reaffirmed that decision -- reaffirmed that decision in a paper that it submitted to the District Court. And in that paper, it noted -- this is Petitioner's own words, "It did not challenge level of smoke/amount of smoke as indefinite in the PGR proceedings," the previous proceedings we're here to address today, "Because it decided to pursue that issue in this Court during claim construction." Indefiniteness is not a claim construction issue, but it may be raised at the same time as claim construction. They're trying to intentionally conflate those things because they know that they are barred from raising new grounds of invalidity after the petition is filed. We're not talking about new arguments of claim construction, we're talking about a grand -- a brand-new ground for invalidity, a new ground of indefiniteness.

Notably in the 746 PGR4 here, with regard to the 746 pattern, they raised three separate grounds for indefiniteness. They did that because they know that the trial practice guide requires that we plead our indefinite -- indefiniteness grounds not generally, but specifically. The trial practice guide does that so that everybody's on notice as to what the grounds at issue in these proceedings are. Who gets to choose those grounds? The petitioner gets to choose those grounds. They deliberately chose to present individual indefiniteness grounds in the petition and reserve others for the District

Court, and they should not allow -- be allowed a second bite at that apple under this new theory of theirs, that because the board commented on the claim construction, they can raise a whole new grounds of indefiniteness. That is --

JUDGE MEYERS: Mr. Johnson.

MR. JOHNSON: Yes.

JUDGE MEYERS: One -- one of the concerns I have with this -- with your argument is that we have -- we've got a -- a -- a directive from the director of the -- former director of the USPGO that says we have to consider the -- the -- the District Court's claim construction. How am I supposed to reconcile that in this case with what you're -- you're arguing? Because if I have -- you know, if I have to go consider the -- what the -- what -- what's happened in the District Court, and I understand that -- that you only think this is some gamesmanship on the part of Petitioner, and I don't know if -- I'm not going to opine on whether that's what it is or not, and maybe that's the wrong word. But it -- it -- you know, how am I supposed to ignore what we've been directed to do, to a certain extent, with the District Court's findings there?

MR. JOHNSON: Yes, Your Honor. It's a great question. And the District Court has answered it for us because they have stayed -- the District Court proceedings. They've stayed their own claim construction order, which we've asked to be reconsidered, and they've stated because they're relying on your expertise. The -- the District Court Judge here is relying on the Patent and Trademark Office for these issues and he notes that there is a conflict here between 112 issues, if they're raised here. There are waiver consequences that do affect the District Court but, importantly, the District

Court's claim construction order did not actually give a claim construction for level of smoke or amount of smoke because it ruled on 112 issues that the petitioner had chosen to address there.

That order has been stayed because it's an interlocutory order and the Court has indicated that it's willing to revisit that after it sees the results of these proceedings. So I would encourage the board to adopt the claim construction that it has adopted or that the parties agree to, either one. That's a claim construction issue.

Take the claim construction issues, address them as the board sees fit, but for the invalidity issues, which are separate from claim construction, including indefiniteness, those issues should be addressed based on what the petitioner chose to address here. Those choices have consequences. The consequence is that the District Court may be barred from addressing the 112 issues that were previously addressed before Petitioner's post print review proceedings were instituted. The timing of things is important and if we look at a -- note Petitioner put up a timeline of events, and I believe it's Petitioner's Slide 15 that put up a timeline of events. They filed the petition on October 9, 2023, where they included on Page 13 that notation that they had made a deliberate choice to address indefiniteness issues with regard to level of smoke and amount of smoke in the District Court. They -- the institution decision then came down on April 10th of 2024. In July 8th of 2024, Petitioner confirmed to the District Court, and it's Docket number 156, which is what we just showed you, that they had made a deliberate decision. After the institution decision, they made a deliberate decision, they confirmed it to the District Court, that they had chosen to address the indefiniteness issues with regard to level of smoke, amount of smoke, and

dangerous condition only at the District Court. The District Court relied on that admission and noted in its Stay Order at Page 11, and it's Docket Number 166. On Page 11, the District Court says, and I quote, "College Products conceded that it did not challenge the 745 and 746 patents as invalid for indefiniteness based on the terms, level of smoke, or amount of smoke in the PGRs." And it says, "See Docket 156 at 9," which is what I previously showed to the Court.

Those 112 allegations are not before the board. That is a ground of invalidity that Petitioner has not raised, has not raised properly, and has raised. And they did so deliberately. They acknowledged it before the Institution decision, after the Institution decision, and it was relied on by the District Court. This Board should not address those indefiniteness decisions.

Now, the indefinite decisions that Petitioner has pled with specificity as required by the Trial Practice Guide include the following. If I can get there. For the 745 Petition PGR-3, they challenge Claims 1 through 28, based on the term inoperative connection under written description or indefiniteness grounds.

For the 746 and PGR-4, they adopt -- or they've argued indefiniteness in written description for an operative connection for Claims 1 through 24. And they have two additional Grounds under 112. That is the written description indefiniteness enablement for the claimed term, sensing the level of smoke continuously for a predetermined time. Continuously is emphasized there on slide -- I believe it's Slide 66, because that is the actual term in that phrase that is being contested, for lack of good description or the indefiniteness. Or being indefinite and lacking an enablement.

And in Claim 14 of the 746 patent, they also have a Ground 11 where they challenge, wherein at least one power control circuit can operate to cause electrical power to be unavailable to the -- at least one electrical connector while the magnetron is operative, and for at least, and this is the phrase in that limitation that they challenge, a preset minimum period after the magnetron becomes inoperative. These are the indefiniteness grounds that are properly before the Board.

And I assume my time has expired, Your Honor, so may I have a few more moments to just address these briefly?

JUDGE DOUGAL: Yeah. So I -- I added your extra five minutes already into this time, so --

MR. JOHNSON: Yes.

JUDGE DOUGAL: -- so you have 10 minutes for your rebuttal, so you can keep on going as long as - - as -- as you want.

MR. JOHNSON: Okay. I'll try to wrap this up fairly quickly then.

We would ask, of course, that any testimony in the slides about the non-addressed or non-pled, if you will, indefiniteness ground on level of smoke, amount of smoke to be stricken from the record and not considered by the Board, just so that's clear.

With regard to the indefiniteness arguments there are properly before the Board, of course, these are not technical terms. These are commonly understood terms by Quezada. A reasonable certainty result that's required here. Inoperative connection, that is a well-understood term used by Quezada's where we know that in order for something to work, it has to be an operative connection to something else. That's how it's commonly used.

The claims require here that the smoke sensor be an operative connection with the microwave oven's cooking area. And in the 745 patent, they add in the limitation, inside the microwave. That inside the microwave does not appear in the 746 patent, but the same implication is there because it is still required to be an operative connection with the microwave oven's cooking area. And so I'm going to basically rely on the papers for an operative connection.

Really the same thing with continuously. Continuously is a well-understood term. It is not - - it -- it's something that Quezada would have a -- an understanding of reasonable certainty. It's not a technical term. We're sensing the level of smoke continuously for a predetermined amount of time. That just means, as the Board noted in its Institution decision, "And it appears to phrase sensing the level of smoke continuously for a predetermined time could mean that there is a time domain within some level -- which some level of smoke or gas is sensed that would trigger ending the cooking session."

And -- and the Board notes, combinations of absolute and relative values and rates of change thereof may be detected for purposes of evaluating possible alarm conditions. But that's taught in the specifications of the patents at issue here. Quezada knows what continuously means, or sensing it throughout that time period.

With regard to the last one here on -- on enablement, there's just been no showing by the petitioner of any undue experimentation that's required. There's been no showing that the enablement requirement was not met. So the lack of evidence from Petitioner certainly negates this allegation here.

With regard to the last one here, you know, again, reasonable certainty is all that's required. It's a preset minimum period. The patent talks about preset minimum periods of -- of time. I believe it actually gives an example in the specification of a three-minute period of time. There is adequate written description in the patents for this limitation. With that, I will have some questions from the Board, stop talking now, and allow for rebuttal time to commence.

JUDGE MEYERS: Mr. Johnson, I have one question before you go.

MR. JOHNSON: Yes, Your Honor.

JUDGE MEYERS: Would you -- would you -- would you agree that you -- you read something about the claim language, would you agree the term predetermined time, as is often -- or -- or, you know, we -- often in patents we have, often in claims we have -- you -- you see that term, predetermined time. Is that -- isn't that -- do you agree that that helps in explaining the level of scope? I mean both, of them don't give us a -- neither one of them gives us a definitive answer as to what it is. But it is telling us that there is some boundary to it; is that fair?

MR. JOHNSON: Well, Your Honor, I guess there are -- they are telling me -- me that Quezada can set that, or Quezada knows how to set that. That's what I would say with that. With the predetermined amount of time, of course, that can vary depending on probably the purpose of applying that predetermined amount of time.

Level of smoke, again, Quezada's know how to do that. They've been doing that for years with smoke alarms and fire alarms. And when there's smoke, there's fire. The whole point of these inventions is to prevent fires from occurring. So these are well understood things. And of course, the

rule is that patents may not include written description on elements that are well known and understood in the prior art.

We don't have to reteach. Don't reinvent the wheel, so to speak, every time that you talk about the wheel. That's where we're at, Your Honor.

JUDGE MEYERS: Thank you.

MR. JOHNSON: Appreciate the time.

JUDGE DOUGAL: All right. So both sides, we'll start with five minutes, and if the Judges have additional questions for you, you may -- may or may not have additional time.

MR. LLAGOSTERA: Thank you, Your Honors. I -- I probably will use two and Mr. Wong will use two. I'm going to go real fast.

The first thing I want to do is, Your Honors asked about Dr. Horenstein opinions and the difference between his opinions on Figaro 816 versus his opinions about Smith, generally. So just for the record, I'm going to put it in at Exhibit 1002, his original declaration. Paragraphs 104, 167, 170, and 180 all talk about Smith disclosing the smoke sensor separate from Figaro or talking about Figaro as an exemplary -- quote, "Exemplary embodiment" in Smith.

Same thing in his supplemental declaration at Exhibit 1023 at Paragraphs 205, and 77 through 78, where some of these references don't even -- some of these paragraphs don't even mention Figaro at all. So just putting that -- it was a question Your Honor asked earlier.

I want to talk about this indefiniteness issue really briefly because Mr. Johnson said a lot of things that are just quite frankly wrong. He said indefiniteness is not a claim construction issue. This Board well knows that indefiniteness as a black letter Federal Circuit Law is certainly a claim

construction issue. And if you cannot offer a definite construction for a claim, then that term is indefinite and courts routinely, and the Federal Circuit routinely find as a matter of law in claim construction.

JUDGE DOUGAL: What -- what are we supposed do with your statement? You told the District -- did you tell the District Court that you weren't raising that issue?

MR. LLAGOSTERA: So it -- the -- are -- you're referring to the reference that Mr. Johnson put up there? If you read -- if -- he didn't have this highlighted in the second sentence. We raised to the Judge that dangerous condition was not at issue in this proceeding because it wasn't a claim term that was in the claim. So that was incomplete there with the highlighting.

That -- that is -- that statement is when we were dealing with the motion for previous consideration and the motion to stay. And I understand Mr. Johnson has raised issues about deliberateness. That's a very loaded word. We've been very transparent, I was earlier today, about the sequence of events and why we chose to do things the way we chose.

That -- that -- there's no gamesmanship there. We didn't have dangerous condition here. We adopted the patent owner's interpretation of the terms and focused on 102 and 103 arguments. After that, we went into Markman with a group of patents, including the term dangerous condition, and then everything's -- from there went down and fell with dangerous condition in the Markman order.

And we are where we are, because as Your Honors mentioned during Mr. Johnson's presentation, the Court issued a Markman order and the

PTAB under the regulation -- under the Trial Practice Guide is -- is -- must -- says must.

So I do want to say that Judge Williams did not stay his claim construction order. He stayed his decision on a motion for invalidity. That's different. Even if the motion for invalidity is denied because of some future potential estoppel, there's still an indefiniteness claim construction order on the table, and Judge Williams' claim construction order would still stand and that term, assuming it's indefinite, cannot go to the jury unless he can -- like, unwinds his own indefiniteness decision.

So that -- that is not correct that he stayed his claim construction order. That order exists. The only other point I would --

JUDGE DOUGAL: Is it correct though that -- that the request for reconsideration has not been decided?

MR. LLAGOSTERA: That has not -- that has not been decided yet with some of the arguments I talked about earlier about burning food, new arguments that they raised. We spent several months in Markman dealing with this indefinite, this issue, after we filed the petition so that Judge Williams, we think it's a very well-reasoned decision and he got it right and it's out there, and indefiniteness, ultimately, is this claim construction issue we have to deal with.

I see I'm running out of time. So mister -- Mr. Wong has to get up.

MR. WONG: Again, I'm going to go back to a reference that we spent a lot of time on and that is Smith. I'm going to try to give it up on display. But in any event we can look at -- it's Exhibit 1014, the Smith records. And I want to point out that on -- in Column 1, lines -- beginning at line - - around -- on Line 30, where there's a reference to the Buck reference,

and we've talked extensively about that. I want you to look specifically at the number. It's 4133995, and I'm going to get back to that in just a second.

But I want to make one other point here is, if you look at the next paragraph, which begins at Line 41, it -- it says, "The present invention that improves over both of the foregoing approaches to fire detection." The point is they're not limited to humidity sensors. They said that was in the priority. We're doing something different here. Okay. That's one point.

The second point is, if we go to -- to Column 3, Lines 15 through 21. Patent Owner says, hey, look, they talked about Buck right here. If you look at the -- the reference number, it is 4311895. It's a different reference. If you look at the face of a patent, and that's the first page of Exhibit 1014, you can see there's Buck at the top, dirt down, 4133995. And you can see down below there's Tonabe 4311895. Now Tonabe hasn't been discussed here, but Tonabe did not disclose the humidity sensor. So in fact, the entry on column three confirms that they were not limiting the disclosure to a humidity sensor.

The second point is in -- can -- can you bring up your slides real quick?

In -- in slide -- in Slide 18 of Patent Owners' presentation, you'll see they talked about the detection of the transition from the drawing over -- out phase to the pre-combustion phase. It's true. The reference does talk about that. And then on the right-hand side, if you read it -- it says -- and this is where it talks about where the -- the removing power occurs.

"Thus, by decreasing the rate of change by detecting the rate of change of the gas concentration level characteristic of the pre-combustion phase. Early in the phase. It is possible to anticipate a combustion

condition." And then it goes on and it's not quoted here, it says, by turning off the power to. And that's what they're talking about, is turning it off during the pre-combustion phase.

And if you look at the Smith reference, and that is at Column 4, Lines 59 through 62, which was not included in that quote, it specifically says, "by turning off the power to the magnetron blower at this point, that's the pre-combustion phase. Fire in the cavity may be prevented." Again, the point being, we're talking about smoke in the pre- combustion phase of steam. This being the trigger point for the shutdown. There was discussion about whether there was a --

JUDGE DOUGAL: So let me -- let me ask the judges if they have any questions. Technically, your time is up.

Judge Daniels and Meyers, are there any quick questions you would like to ask the petitioner?

JUDGE MEYERS: I'm okay.

JUDGE DANIELS: Thank you.

JUDGE MEYERS: If -- if you -- if you just wanted to, you know, give him -- give him a minute to wrap up, that would be fine.

MR. WONG: Okay. The -- the only final comment is, there was an issue raised about whether -- Petitioner raised an argument about whether Smith inherently teaches the reset function. And there is an argument that we made at -- in the -- in our -- in our brief that does talk about inherency with respect to that element. And I'm trying to look at my notes, but I can't find where it was.

MR. LLAGOSTERA: It's Page 79 of the petition.

MR. WONG: It's Page 79 of the petition where there's a reference to the inherency argument.

JUDGE DANIELS: Thank you.

MR. WONG: Thank you.

JUDGE DOUGAL: Counsel, you've got eight minutes unless there's additional questions.

MR. PATTON: I do not believe we will use all of that, unless it is with Your Honor's questions.

Oops. There's apparently two screens.

MR. JOHNSON: Oh, you're extending.

MR. PATTON: Yeah. One second. No, I got it, I'll just do it like it this. It won't take long.

MR. LLAGOSTERA: Those are my slides.

MR. PATTON: I'm going to briefly address this timeline that's been set up. Petitioner is now effectively saying that it didn't know it needed to raise this indefiniteness argument because it didn't know that amount of smoke was going to be construed like dangerous condition; that they were going to be the same. I don't think that passes any muster. That has -- that's been Petitioner's argument the whole time. That amount of smoke, level of smoke, meant the same thing as dangerous condition.

When Your Honors issued its preliminary construction, that is exactly what Petitioner has been arguing that claim term meant -- it -- they argued that it meant the same thing as dangerous condition. That was their indefiniteness argument. That was -- they argued amount of smoke, level of smoke, and dangerous condition all together. They group them all together in their indefiniteness argument.

So the idea that, oh, well, now you guys offered a construction that says amount of smoke, level of smoke means the same thing as dangerous condition. Now, we have indefiniteness arguments. That just doesn't pass muster. The other thing that's relevant on -- it's Slide 15, and it was this timeline that they put up, they're leaving out some key facts. So April 10th, they have this institution decision. And then you have the May 31, 2024 Markman order.

The statements that were made about making a decision that they chose to as they said was their right to select where they want to make these arguments. That was right here between May 31, 2024 and July 17th. That was before patent owners got the response. So we, Patent Owners, prepare our response knowing they've chosen to have these 112 positions in District Court, not at -- in front of the USPTO.

That is when that decision was made very clear to us, that we made this choice to do this in District Court. We relied on that, put forth our response. It was only after the fact that they came forward and said, you know what, actually we have indefiniteness arguments now. That is not fair. That is not consistent with the PTAB's rules. And that is weaker.

And I'm going to turn it over to my colleague, if he has anything else.

MR. JOHNSON: I don't have anything else, Your Honor.

MR. PATTON: Your Honors, do you have any questions for me?

JUDGE MEYERS: I do not.

JUDGE DANIELS: All right. Looks like I'll have no further questions. Thank you.

MR. PATTON: Thank you.

JUDGE DOUGAL: So that concludes our hearing. We want to thank you. There are a number of difficult issues in this case. And so we really do appreciate your preparation and your presentation, all your work today. We ask that you stay, in case the court reporter has any further questions. But with that, our hearing is adjourned.

(Whereupon, the above-entitled matter went off the record at 1:27 p.m.)

PETITIONER

Domingo M. Llagostera
Russell T. Wong
Megan R. Wood
Alexander Perry
BLANK ROME LLP
domingo.llagostera@blankrome.com
russell.wong@blankrome.com
megan.wood@blankrome.com
aperry@blankrome.com

PATENT OWNER:

R. Scott Johnson
Thomas M. Patton
FREDRIKSON & BYRON, P.A.
rsjohnson@fredlaw.com
tpatton@fredlaw.com