

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

THERABODY, INC.,
Petitioner,

v.

HYPERICE IP SUBCO, LLC,
Patent Owner.

PGR2024-00053 (Patent 11,857,482 B1)
PGR2025-00013 (Patent 11,938,082 B1)

Record of Oral Hearing
Held: February 4, 2026

Before JEFFREY N. FREDMAN, RICHARD H. MARSCHALL, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

PGR2024-00053 (Patent 11,857,482 B1)
PGR2025-00013 (Patent 11,938,082 B1)

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The above-entitled matter came on for hearing on February 4, 2026,
commencing at 1:00 p.m.

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

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3 JUDGE FINAMORE: Good afternoon. This is an oral argument
4 in PGR2024-00053 and PGR2025-00013, both titled Therabody, Inc. versus
5 Hyperice Subco, LLC. I am Judge Alyssa Finamore. And I'm joined by
6 Judges Fredman and Marschall.

7 Before we begin today's oral argument, I would like to address a
8 few housekeeping issues. This hearing is open to the public, so please state
9 your name at the beginning of any presentation to assist those listening by
10 phone. Also, we have a court reporter in the room. So to facilitate her
11 preparing the transcript, identify each demonstrative by slide number.

12 There are no speaking objections during today's oral argument. If
13 you need to make an objection, please do so during your oral argument time.
14 We note that both parties filed objections to demonstratives. We've
15 reviewed those objections and do not feel the need to exclude any of the
16 objected-to demonstratives today, given that demonstratives aren't evidence.

17 And lastly, just as a reminder, both parties have 75 minutes of
18 argument time today. I'll ask when you approach the bench if you would
19 like to reserve time for rebuttal and surrebuttal.

20 So with that, I'd like to begin with introductions of the parties.
21 Counsel for Petitioner.

22 MR. BERG: Your Honor, it's Brad Berg for Petitioner Therabody.
23 And with me today is William Fink, also for Therabody.

24 JUDGE FINAMORE: Thank you, Counsel. And for Patent
25 Owner.

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1 MR. KELLAR: Good morning -- good afternoon, Your Honors.

2 This is Kyle Kellar on behalf of Patent Owner. With me in the gallery is

3 Brian Arnold of Hyperice.

4 JUDGE FINAMORE: Thank you, Mr. Kellar. Petitioner, when

5 you're ready, you may approach the podium. Would you like to reserve time

6 for rebuttal?

7 MR. BERG: Yes, Your Honor. Can I reserve 25 minutes, please?

8 JUDGE FINAMORE: Yes. If I did my math correctly, that will

9 leave you 50 minutes for your opening argument. I will do my best to give

10 you a reminder when you have 2 minutes left, but please be mindful of the

11 time behind me.

12 MR. BERG: Okay.

13 JUDGE FINAMORE: So when you're ready, you may begin.

14 MR. BERG: Okay. Thank you, Your Honor. Good morning,

15 Your Honors. Brad Berg for Therabody, Inc., the Petitioner. We're hearing

16 consolidated oral argument for PGR2024-0053 involving the '482 Patent and

17 PGR2025-00013 involving the '082 Patent. I'll present these two PGRs

18 together because the patents are in the same family, share a common

19 Specification, and the claim issues substantially overlap.

20 Turning to Slide 2. Today, I want to talk through a few of the key

21 issues that I believe will most help the Board in resolving the disputes

22 between the parties. Our briefing is comprehensive. I don't plan to touch on

23 every point we make there, though of course I'm happy to address any

24 questions the Board may have.

25 Turning to Slide 3. I'll start with the '482 and '082 Patents. On

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1 Slide 4, I've shown the cover and abstract of the '482 Patent. The '082 Patent
2 has an identical abstract. Both patents are titled Massage Device Having
3 Variable Stroke Length.

4 As indicated by the abstract, both are directed to massaging
5 devices having specific components, including a piston, a massaging head, a
6 motor, a handle, and a drive mechanism for moving the piston and by
7 extension, the massaging head. Notably, neither the abstract nor the title
8 reference a particular type of massager but rather focus on specific
9 components and features such as the variable stroke length.

10 Turning to Slide 5. I've shown the relationship between the two
11 patents at issue. The '482 and '082 Patents are in the same family and are
12 direct continuations of one another. As such, they have an identical
13 Specification. Although for purposes of this proceeding we have assumed a
14 priority date of 2013 for both patents, I do want to point out that neither
15 patent was filed until much later, 2022 for the '482 and 2023 for the '082.

16 On Slide 6, I've shown a passage from the '482 Patent that
17 illustrates the focus of the challenged patents, which is squarely on the
18 elements of a massager. As we saw in the abstract, the detailed description
19 focuses on specific components, such as the housing, motor, drive unit,
20 massaging head, and quick release connector.

21 Slide 7 shows a more detailed discussion of the quick-connect
22 system. The patent explains that the quick-connect system is a way of
23 connecting a massage head to a piston that allows a user to switch massage
24 heads quickly and easily.

25 In the example given by the patent, the quick release connectors

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1 are magnetic, with one magnetic quick release connector being embedded in
2 the piston and the other being embedded in the massage head. This
3 arrangement allows a user to simply grab the head of the massager and apply
4 sufficient force to separate the magnets and replace the massage head easily.

5 On Slide 8, I've displayed the challenged independent claims.
6 Consistent with the description in the patent and the abstract, the challenged
7 claims are again directed to particular components, a housing, a piston, a
8 motor, a drive mechanism, and a quick release connector or quick-connect
9 system.

10 Although there are two independent claims in the '082 Patent, the
11 parties' briefing focuses largely on claim 1 because the limitations of
12 claim 18 are functionally identical to the limitations of claim 1 and were
13 addressed by Petitioner largely through cross-referencing the arguments of
14 claim 1. Patent Owner has not argued that there are any meaningful
15 distinctions between the two claims.

16 Turning to Slide 9. I've summarized the similarities and
17 differences between the elements of the challenged independent claims. As
18 you can see, most of the limitations are nearly identical between the claims.
19 The primary difference between them is in the quick-connect system.

20 In the '482 Patent, the claim describes that the massaging head has
21 a pocket to receive the quick release connector attached to the piston. In the
22 '082, the situation is reversed. Now, it is the piston that has a hollow bore to
23 receive the shank of the massaging head.

24 Slide 10 illustrates the disputed limitations in claim 34 of the '482
25 Patent and claim 1 of the '082 Patent. As you can see, Patent Owner has

1 only challenged Petitioner's mapping with respect to a few limitations. I'll
2 address each of these.

3 Turning to Slide 21. I'll next address the various claim
4 construction issues that the parties dispute. Note that Petitioner initially
5 identified no terms for construction. This is because the prior art matches so
6 closely with the patent claims and even the embodiments in the patent --

7 JUDGE FREDMAN: So let's jump ahead to the word percussive
8 because that seems to be the issue here.

9 MR. BERG: Sure, yeah.

10 JUDGE FREDMAN: I don't know, correct me if I'm wrong, I
11 don't believe the patents, either of them, give a precise definition of
12 percussive. Indeed, I'm a little unclear if they use the word percussive in the
13 body of the Specification. But can you tell me what constitutes a percussive
14 -- because I'm going to ask them the same question so they'll be ready for it,
15 hopefully. Can you tell me what constitutes a percussive massager? What
16 makes it percussive versus just a patter or a different kind of massager?
17 What's that distinction?

18 MR. BERG: Yeah. Your Honor, I think that's a major dispute
19 here. And I do want to flag that, of course, we only get to this issue of what
20 a percussive massager is if we -- if the preamble is actually limiting, which
21 --

22 JUDGE FREDMAN: We understand that.

23 MR. BERG: -- I don't.

24 JUDGE FREDMAN: In the preamble, you can argue is not
25 limiting. We understand that.

1 MR. BERG: Right. And as to your question as to whether or not
2 this percussive massager language appears in the written description, the
3 answer is that it doesn't. This was introduced into the claims for the first
4 time in an amendment in 2023. The words are never used in the written
5 description.

6 Now, let me just jump ahead here to Slide 32. So in Therabody's
7 view, if percussive massager is limited -- is limiting and needs to be
8 construed, it should be construed as a massage device whose piston and head
9 reciprocate back and forth. And I think this is where we get to maybe a
10 distinction between other types of massage.

11 You can imagine massage where you're rubbing or where you're,
12 you know, doing other things. Whereas here, you have a piston and a head
13 that are reciprocating back and forth, right? And I think that's the key aspect
14 of percussive massager and the key thing in Therabody's proposed
15 construction here.

16 JUDGE FREDMAN: And so when it's Patent Owner's
17 construction and they're arguing it's high-speed, long stroke action,
18 presumably they're relying on the knowledge of the ordinary skilled artisan.
19 Why would you say that is incorrect?

20 MR. BERG: Yeah. I would say it's incorrect for a couple of
21 reasons. So Patent Owner's construction brings in what I'd say are three
22 discrete limitations into the claim. Obviously, importing limitations into the
23 claim from the specification is disallowed. But Patent Owner hasn't even
24 done that here. They've brought these limitations in solely from extrinsic
25 evidence.

1 And when we look at what, you know -- in fact, here on this slide,
2 Slide 34, I've shown the only two citations to the Specification that Patent
3 Owner relies on in its claim construction analysis. And one of these is just a
4 use statement and the other I think actually works against Patent Owner's
5 construction because it says that in some instances it may be desirable to
6 adjust the throw or stroke length to target deeper or shallower points of
7 stress or soreness in the muscles.

8 And so to construe this to be only deep muscle tissue kind of goes
9 against this -- the idea of this embodiment. But the bigger problem is that --

10 JUDGE FREDMAN: So that does suggest that the point that
11 you're making is that their construction, one of the elements requires long
12 stroke action. And it's clear that the stroke action is at least variable that can
13 be defined. It's not necessarily a particular value.

14 MR. BERG: Yeah. I think this goes to one potential problem with
15 Patent Owner's construction and that is that there's no real boundary on what
16 long stroke action means. Does long stroke action mean 1 millimeter? Does
17 it mean 10 millimeters? Does it mean 2 inches?

18 So this is a problem, and there's no -- you know, as seen by their
19 lack of intrinsic evidence, there are no guidelines in the Specification for
20 what the stroke length should be. It can be longer. It can be shorter. But
21 there's no guidance. And even when we asked their expert about the long
22 stroke length, you know, I asked him what's required for it to be a long
23 stroke length.

24 And the only thing that he could point back to is that it needs to be
25 long enough to provide the therapeutic benefit of the patents, which is I

1 think he points to relieving, providing the necessary response on the muscle.
2 And so he wasn't able to point to any objective guidelines for what long
3 stroke length is. Basically, the idea that, well, we look at the massager and
4 the benefits it has. If it's having the benefits regardless of how long the
5 stroke length actually is, then it's a long stroke length.

6 JUDGE FREDMAN: Right.

7 MR. BERG: It doesn't have the benefits regardless of how long
8 the stroke length is, it's not a long stroke length. And, you know, I asked
9 him if there was anywhere in the Specification that he could tie that to. And
10 he couldn't point anywhere in the Specification where that was supported.

11 JUDGE FREDMAN: But if he says it's optimizable or something,
12 how would you respond to that? Presumably, the argument they're making
13 that's sort of implicit is, well, the ordinary artisan knows this, they could
14 routinely optimize this. This is not a surprising thing.

15 MR. BERG: Yeah. I guess I would respond to that with the lack
16 of evidence in the record or in the -- even in the extrinsic evidence that
17 shows that a person of skill in the art knows what's meant by a long stroke
18 length of a percussive massager, particularly in 2013, when we have the
19 priority date here. And that gets to one of the problems here is --

20 JUDGE FREDMAN: When percussive massagers were known
21 before 2013, though --

22 MR. BERG: Certainly, percussive massagers were known.

23 JUDGE FREDMAN: Right.

24 MR. BERG: I don't think that there's any evidence in the record
25 that supports in 2013 this construction from the Patent Owner was what

1 would -- what a person of skill in the art would have thought of with a long
2 stroke length, with a high speed, with a deep tissue massage.

3 JUDGE FREDMAN: Okay.

4 MR. BERG: But certainly, Pivaroff, for example, calls its device a
5 percussive massager. Harris calls -- mentions percussive massagers. And
6 we can get into both of those examples which they bring up for the first time
7 in their Sur-reply. Because I think in both cases, we see percussive
8 massager being talked about at a high level of generality like Therabody's
9 construction and not with these limitations of long stroke length, high-stroke
10 speed, deep tissue massage being limiting ideas for what a percussive
11 massager is.

12 JUDGE FREDMAN: Okay. Thank you.

13 MR. BERG: So in the extrinsic evidence that they point to, I
14 mean, there's kind of an incredible technique here. Because they actually
15 point to marketing material for the very Therabody device that they're
16 accusing of infringement in the district court litigation. So the only way that
17 this -- obviously, they're not accusing a prior art device of infringing the
18 patent.

19 And so the only way that this works is that they're pointing to
20 evidence that comes from much later. And the priority date of the '482 and
21 '082 Patents, like I mentioned, is 2013, 2014. This article that they rely on
22 from Therabody is from 2021. Clearly, a person of skill in the art would not
23 have been able to form an opinion in 2013 for what was understood by
24 percussive massager based on this article.

25 And when we look at the other extrinsic evidence that they cite to,

1 it turns out all of the articles cited by Patent Owner for supporting its
2 construction postdate the priority date of the patents, by nearly a decade and
3 in some cases by even more than that. Now, we talked about the long stroke
4 length limitation and their expert's response to my questioning on that. I
5 also wanted to touch on the high-speed limitation in the construction.

6 Because I also asked the expert, you know, what evidence was in
7 the '482 Patent, that supported high-speed, and how he would understand
8 what high-speed means. And you can see that the answer is very similar to
9 what we talked about with long stroke length. He couldn't identify
10 anywhere in the Specification that supported his high-speed addition.

11 And when I asked him how to determine whether something is
12 high-speed, he said, again, it's going to depend on experimentation to see if
13 it actually is providing the response needed for relieving the lactic acid
14 buildup as well as the soreness in the muscles at that speed. To me, this is
15 circular reasoning that doesn't put the public on notice as to the scope of the
16 claim here.

17 Apparently, Hyperice would construe this term. So if it relieves
18 lactic acid buildup, it has a long stroke length and is high-speed. If it
19 doesn't, then it's not high-speed, it's not long stroke length. Regardless of
20 what the prior art says, Mabuchi, which is one of the references I'm sure
21 we'll get into momentarily, uses the word high-speed. Their expert says,
22 well, that's a different context. So it's not high-speed for purposes of this
23 construction.

24 Now, I mentioned a minute ago that in its Sur-reply, Patent Owner
25 turns to the prior art to say, well, you know, even if the extrinsic evidence

1 that we cited before was later, this term percussive massager was known in
2 the prior art. As I mentioned, though -- and they point to specifically
3 Pivaroff and Harris. As I mentioned, I don't think those prior art references
4 actually provide any support for these three limitations that Patent Owner
5 has added into the claim.

6 So this is the Harris reference, and this is a reference that we use as
7 a secondary reference. It's mainly used to bring in the idea of a control panel
8 that can have multiple selectable speeds. And here's the portion of Harris
9 that Patent Owner cites to in its Sur-reply. And what you see is at most this
10 indicates that percussive massagers were known and any linear motion
11 resulting in an impact with the skin would qualify, with a faster motor
12 resulting in greater intensity of the percussive massage, but not a change of
13 type.

14 My read of Harris is that it supports Petitioner's construction.
15 Percussive massage merely requires the piston and massage head
16 reciprocating back and forth to impact the skin.

17 Turning to Slide 42. Pivaroff, the other prior art reference that
18 they have pointed to, similarly stands for the proposition that percussive
19 massagers were known and can provide deep tissue massage. First, it does
20 not say they must provide deep tissue massage and certainly does not define
21 a stroke length or speed required for percussive massage. Instead, it
22 specifies an eighth to a half-inch stroke to provide, quote, "maximum
23 concussion and percussion."

24 Note the Pivaroff says, this stroke length provides maximum
25 percussion, not that it's required to provide percussion at all. And it says

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1 nothing related to the speed requirement in Patent Owner's construction,
2 only that the rotational speed is converted to linear speed.

3 In short, even if the Board determines that the preamble is limiting
4 and that percussive massager needs to be construed, it should reject Patent
5 Owner's construction which finds no support in the intrinsic record or the
6 prior art. Instead, again, if the Board determines it needs to be construed,
7 the Board should adopt Therabody's construction, which is consistent with
8 the limited intrinsic record that exists and with the extrinsic evidence that
9 would have been available to a person of skill in the art in 2013, such as the
10 prior art of Pivaroff and Harris that we've just discussed.

11 JUDGE FREDMAN: And let me just make sure. And you've held
12 this position consistent with your district court position?

13 MR. BERG: Yeah. So in the district court, neither party identified
14 this term as a term that needs to be construed.

15 JUDGE FREDMAN: Okay.

16 MR. BERG: Our position is that the preamble's not limiting in the
17 first place. And our construction that I've just described is consistent with
18 everything that we've said in the district court. This wasn't a term that was
19 briefed in the district court claim construction proceedings at all.

20 JUDGE FREDMAN: Thank you.

21 MR. BERG: So I would like to turn to that argument kind of that's
22 the antecedent to, you know, what the right construction is, and that's
23 whether this needs to be construed at all. Because in our view, the preamble
24 here is clearly not limiting. On Slide 23 --

25 JUDGE FREDMAN: I think we're familiar with the law about it.

1 MR. BERG: Okay.

2 JUDGE FREDMAN: I believe we can skip that at this time.

3 MR. BERG: So turning to Slide 24. Percussive massager, as it's
4 used in the claims of the '482 and '082 Patents, is exactly the kind of
5 preamble that *Catalina* warrants should not be found limiting because it's
6 used only to state a purpose. Patent Owner's own arguments for how to
7 construe percussive massager make it obvious that percussive massager is a
8 purpose rather than a limitation. Indeed, the very Specification language
9 Patent Owner relies on for its construction comes from the background of
10 the invention and is a use statement.

11 Now, on Slide 25, going back to *Catalina Marketing*, the preamble
12 is not limiting here because the claim body itself defines a structurally
13 complete invention. The claim, like the Specification, focuses on key
14 components -- key structural components of a massager, that it has a
15 housing, a piston, a motor, a drive mechanism, a quick release connector.
16 There's no need for the percussive massager preamble to define a
17 structurally complete invention.

18 And then turning to Slide 26. One oddity that we've already
19 touched on of proposing percussive massager to be limiting is it's hard to
20 imagine a term breathing life and meaning into the claim where the term is
21 not even found in the specification at all. Indeed, because the word -- the
22 Specification does not use the word percussive massager, there would be no
23 written description or enablement if the preamble was limiting.

24 In fact, to the extent the preamble is given patentable weight and
25 construed as proposed by the Patent Owner, again, with language found

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1 nowhere in the Specification, the applicant would have violated the
2 prohibition for introducing new matter into the disclosure of the invention
3 through an amendment. It's not surprising there's no written description.
4 Keep in mind that the Specification was drafted in 2014, while the
5 percussive massager language was not added to the claims until 2023.

6 Turning to Slide 27, Patent Owner argues that percussive massager
7 was added to the claim and used to overcome an examiner's objection, and
8 so it must be limiting. This argument distorts the record and does not
9 withstand scrutiny. To set the stage, the examiner had objected to the claims
10 based on various prior art, including the Rhoades reference.

11 In response, the applicant did amend some existing claims.
12 claim 1 was amended to recite percussive massager in both the preamble and
13 the body. Meanwhile, claim 38, which eventually became claim 34 at issue
14 here, was newly added to the claim set. It also included percussive massager
15 in the preamble but did not make any reference to percussive massager in the
16 body of the claim.

17 Turning to Slide 28. Patent Owner focuses its prosecution history
18 argument exclusively on claim 1. But claim 1 is not at issue here, only
19 claim 38. And as we set forth in our briefing, despite having ample
20 opportunity to do so, applicant never relied on the percussive massager
21 language in the context of claim 38.

22 Turning to Slide 29. I've reproduced a section from Patent
23 Owner's Sur-reply where they argued that the claims as a whole were
24 distinguished from Rhoades on the percussive massager basis. However, on
25 Slide 30, I pasted the same quote excerpted by Patent Owner in its full

1 context. What you can see here is that, quote, "as recited in the claims," end
2 quote, relied on by Patent Owner is referring to independent claim 1 and
3 claims depending therefrom.

4 Again, this is an apples-to-oranges situation compared to claim 38
5 because claim 1 recites percussive massager in the body of the claim.

6 Moreover, even if percussive massager were limiting in claim 1, for
7 example, because it's recited in the body of the claim and relied on here, that
8 says nothing about claim 38, which needs to be considered on its own
9 merits. A nearly identical scenario played out in *Catalina Marketing* where
10 a preamble phrase was found not limiting in claim 1 but was limiting in a
11 different claim where it was also used in the body of that claim.

12 JUDGE FINAMORE: Counsel, if I'm looking at what you have
13 highlighted green on this slide, regardless of where the term percussive
14 massager is recited, isn't the applicant here showing a clear intent to
15 distinguish the term percussive massager from a cosmetic instrument?

16 MR. BERG: Yeah. I think in the context of claim 1, they are
17 showing that intent to distinguish it on that basis.

18 JUDGE FINAMORE: Wouldn't that intent apply anytime that
19 term is recited?

20 MR. BERG: I don't think it does. And the reason that I don't is
21 because here, they're making arguments specifically in the context of
22 claim 1, where there's the body limitation to percussive massager that gives
23 it patentable weight. Whereas the applicant made arguments with respect to
24 claim 38. And I've put those up here on, I guess, Slide 31. And you can see
25 there's a new -- another heading that says new claims. New claims 38 to 65

1 are added. And then they go through and make a bunch of arguments.

2 And what you notice as you look at these arguments is that the
3 arguments overlap substantially with the arguments that they made for
4 claim 1. They're repeating a lot of these arguments related to the quick
5 release connector and this kind of thing. But notably absent from these
6 arguments is any reference to percussive massager.

7 And so presumably, if the applicant had intended to rely on that
8 basis for claim 38, it would have spelled it out. I think the only conclusion
9 to draw from this is the applicant did not consider percussive massager
10 limiting in the context of claim 38 and accordingly did not make the same
11 argument that it had for claim 1.

12 JUDGE FINAMORE: Okay.

13 MR. BERG: So all of this evidence taken together points to the
14 conclusion, there's no reason to vary from the default rule that the preamble
15 is not limiting. Percussive massager does not breathe life and meaning into
16 the claim. The body of the claim defines a complete invention. And the
17 applicant did not rely on the preamble to overcome prior art rejections.

18 So there's one other claim construction element that I want to touch
19 on briefly, and that's the massaging head construction. And our position is
20 the massaging head doesn't require construction here.

21 And so I'm turning to Slide 43 where I've reproduced the claim
22 language to show the massaging head in context here. And on Slide 44,
23 Patent Owner's construction should be rejected here. It's pretty clear that it's
24 nothing more than a second attempt to incorporate the same percussive
25 massager limitations that it tries to import using the preamble, or maybe to

1 bolster its argument the preamble should be construed, and see that
2 massaging head, the proposed construction here uses percussive massager or
3 percussive massage in two different places in Patent Owner's construction of
4 this two-word phrase.

5 And Patent Owner's expert admitted that the plain meaning of
6 massaging head is broader than specifically percussive massaging head, said
7 a massage head doesn't necessarily need to be percussive massage only.

8 And I asked him, well, what if this claim, instead of saying a percussive
9 massager in the preamble, said an apparatus in the preamble, which was the
10 original claim.

11 He said if it said an apparatus at that point -- it would no longer be
12 limiting the massaging head to a percussive massage device at that point.
13 Massage head shouldn't be construed here.

14 JUDGE FREDMAN: What is a massage head, you know, and
15 what's the distinction between any type of device? Does it have to be a blunt
16 device, a cylindrical device? Are there any, you know, ways that you -- that
17 he -- you think he's going to argue that it's described that constrain it either
18 in the prior art or the Spec or some other source of evidence?

19 MR. BERG: You know, I think the prior art shows a variety of
20 different end pieces that attach to massagers. And I think that's all that's
21 required here is for it to be an end piece on a massager.

22 So now, I want to turn specifically to the prior art and how these
23 claim limitations -- and we'll start with percussive massager, which is where
24 we've already been spending a bunch of time, but how they specifically
25 relate to the prior art.

1 And just as an introduction, I want to jump back to Slide 14, which
2 shows some of the key aspects of Mabuchi, which is the primary reference
3 in several of the grounds and a secondary reference in other grounds.
4 Mabuchi explains that it's a beauty treatment device with a motor and a drive
5 unit that can cause an actuator to reciprocate, resulting in the head or pater
6 contacting a user's skin. Mabuchi describes embodiments like those shown
7 in Figures 18 and 19 that utilize a magnetic connector for easy connection
8 and removal of the pater assembly.

9 JUDGE FINAMORE: Counsel, if we accept Patent Owner's
10 contention that the preamble is limiting with respect to claim 34, percussive
11 massager includes these three what you call additional limitations about
12 deep tissue massage, stroke length, high-speed, would Mabuchi disclose
13 such a percussive massager?

14 MR. BERG: Yeah. I think there's a couple of things that I want to
15 unpack there, Your Honor. The first is if we're in the world where you've
16 assumed -- where you've decided the preamble is limiting and needs to be
17 construed, the answer to your question depends on how that claim's
18 construed. If you adopt Therabody's construction, Patent Owner hasn't made
19 any arguments that Mabuchi doesn't disclose a percussive massager under
20 Therabody's construction. So it'd only be if we go to Patent Owner's
21 construction with those three additional limitations.

22 Now, I believe -- and we've argued in the -- in response to this
23 argument that came up in the Patent Owner Response that Mabuchi still
24 would be a percussive massager even in light of Patent Owner's
25 construction. But I think this gets to kind of the problem with Patent

1 Owner's construction that it's unclear what is meant by a long stroke length,
2 it's unclear what's meant by high-speed, it's unclear what's meant by deep
3 tissue massage.

4 But I think that a person of skill in the art would recognize that
5 Mabuchi does these things to the extent required. So let me walk through
6 -- I've got some slides that will walk through this question as well. But first
7 on Slide 48, I just wanted to point out that Patent Owner doesn't challenge
8 that Mabuchi includes exactly the components the claim requires, that a
9 percussive massager comprises a housing, a piston, a motor, a drive
10 mechanism, and a quick release connector.

11 The idea that Mabuchi is not a percussive massager despite having
12 all these required components is a little bit difficult to square. In fact,
13 Mabuchi has a striking resemblance as an apparatus to the embodiments
14 described in the '482 Patent with the same elements arranged in similar
15 ways.

16 Turning to Slide 50. Mabuchi describes itself as operating like a
17 percussive massager. It has an actuator that repeatedly reciprocates and a
18 padder that pats skin at a given rate. It refers to this as high-speed
19 reciprocation motion and notes that a purpose of the device is to stimulate
20 muscular tissue.

21 Turning to Slide 51. Patent Owner makes a lot of the fact that
22 Mabuchi is directed to a beauty device and argues that this means it's not a
23 percussive massager. This misreads Mabuchi. Instead, Mabuchi is
24 discussing what it knows is closely-related prior art, a massager that
25 Mabuchi calls a padder for massaging muscular tissues.

1 Mabuchi follows that statement up in the summary of the invention
2 by explaining that his invention is also directed to a patter that, like the prior
3 art, repeatedly pats the skin, causing the patter assembly to impact the skin at
4 a given rate. But Mabuchi's patter will have other objectives as well that are
5 met through additional features including a particular patter assembly and a
6 space guide.

7 On Slide 52, I've shown an excerpt of Patent Owner's Response.
8 You can see here that Patent Owner points to these additional features, the
9 space guide and the complex patter assembly, as reasons why Mabuchi is
10 supposedly not a percussive massager.

11 On Slide 53, I've shown that Patent Owner admits that without
12 these additional features, Mabuchi's device would apply a strong, abrupt
13 pushing force deep into the user's skin. A person of skill in the art reading
14 Mabuchi would understand the same thing.

15 In other words, Mabuchi is describing a percussive massage device
16 with additional features to make it operate as a beauty treatment device. But
17 that by removing those additional features, which would be obvious to do,
18 Mabuchi reverts to being the same type of conventional patting device
19 described in the prior art.

20 JUDGE FINAMORE: So Counsel, does Mabuchi disclose
21 removing the space guide?

22 MR. BERG: So Mabuchi does not have an embodiment where he
23 removes the space guide as part of the operation. Though, what Mabuchi
24 does talk about is replacing the massage head for working on different parts
25 of the body for accomplishing different end goals. And I think a person of

1 skill in the art would understand that to indicate that Mabuchi is a percussive
2 massager, can be used to provide these other types of results.

3 It also talks about, you know, sizing magnets differently for
4 different applications and things like that. All of which would indicate to a
5 person of skill in the art that Mabuchi is not limited to some soft tapping
6 without a long stroke length or without a high speed.

7 I mean, in fact, Mabuchi says that it's operating at high speed, it
8 says it's stimulating muscular tissues. I mean, I guess there's maybe some
9 dispute about whether the muscular tissues are shallow tissues or deep
10 tissues. I don't know that - I mean, certainly, their expert didn't really draw
11 the line as where one starts and the other stops.

12 But Mabuchi is doing this reciprocating motion, is patting the
13 user's skin. And the device could be used for these -- it'd be obvious, which
14 is kind of where we're at here. It'd be obvious to use this device in this
15 fashion.

16 JUDGE FINAMORE: While we're on the subject of Mabuchi, can
17 you explain Petitioner's position as to how a person would remove the patten
18 assembly while it's on? And in particular, I'm curious as to how somebody
19 would get their fingers in there to separate the patten assembly from the
20 space guide.

21 MR. BERG: Yeah. So this is something that, you know,
22 obviously, our expert talked about with respect to Mabuchi. And I think
23 Patent Owner has talked about maybe there's some sort of a pinch risk or
24 something like that for doing that.

25 Patent Owner also talked about how you'd need to remove the

1 space guide to take off the patter assembly, so maybe I'll start there.
2 Because Mabuchi talks about -- you know, has multiple embodiments for
3 different ways of removing the patter assembly. There's some where there's
4 like some sort of an interlocking mechanism that you have to access by
5 removing the space guide.

6 The embodiment that we're focused on is the embodiment of
7 Figures 18 and 19, where you have a magnetic connection to -- let me see if
8 I can -- yeah, so turning to Slide 59, where you have a magnetic connection
9 that connects on the one hand the actuator and on the other hand the massage
10 head. And they slide together, you know, the rounded part of the distal end
11 of that piston slides into the column 15 and connects and there's some
12 magnets there that hold it securely in place.

13 And the patent specifically talks about -- and you can see at the
14 bottom, I'm now on Slide 58 -- that in this embodiment, one of the benefits
15 is that changing the patter assembly can be easily accomplished since the
16 actuator and the patter assembly are automatically disconnected by turning.
17 And it also talks about how the connection is done just by bringing the two
18 sides in close contact with each other.

19 So I think when we're talking about Figures 18 and 19, we're
20 definitely in a spot where we're not anymore removing the space guide in
21 order to make this switch, because that would kind of undermine Mabuchi's
22 purpose of making this easily switchable. So then the question is, you know,
23 if you can grab this massage head while the device is reciprocating to
24 remove it.

25 And the answer is when you look at Mabuchi, when you look at

1 the figures that show the reciprocation of the massage head, Figures, I think,
2 2 through 5 or 2 through 4, you see that when Mabuchi is up against skin,
3 the patter assembly doesn't extend past the end of the space guide.
4 However, when there's no skin on the other side that it's patting against, it
5 shows that the head actually does extend past the end of the space guide,
6 which a person would be able to grab to remove and then replace.

7 And in fact, on the replacement side, you can see that the piston
8 actually has a rounded edge here, which is very similar to what's disclosed in
9 Figure 6 of the '482 Patent and that Figure 6 describes as being part of the
10 design that allows it to be replaced while the massage head is operating.

11 Now, would there be some risk of a pinch when you're trying to
12 grab this, or would there be a place to hold on to? Mabuchi doesn't say.
13 This is kind of speculation by Patent Owner.

14 JUDGE FINAMORE: To be clear, Mabuchi doesn't describe how
15 to remove it while it's moving. Is that accurate to say?

16 MR. BERG: So Mabuchi does describe that the patter assembly
17 -- or that the device can reciprocate without the patter assembly attached,
18 which a person of skill in the art I think would understand, along with the
19 design that's shown in Figure 19, to indicate that you can have the thing
20 moving without the patter assembly and that -- then you would attach the
21 patter assembly. Mabuchi also talks about, you know, the benefits of being
22 able to change out the massage head to do different things.

23 So I think, taken together, it would have been obvious to a person
24 of skill in the art to do that. But does Mabuchi specifically say you can
25 remove this while the device is reciprocating? No. It doesn't say that. But I

1 think taken as a whole, a person of skill in the art would understand that this
2 is contemplated by Mabuchi or at least suggested by Mabuchi.

3 And it'd be just a simple design problem that, you know, a person
4 of skill in the art would be expected to be able to engage in to engineer the
5 head such that it could be easily grasped without pinching the user's fingers
6 or without doing that. And Dr. Pratt, in his expert declaration, sets forth
7 some of those possibilities.

8 JUDGE FINAMORE: Do you propose that in your Petition, to
9 modify the patter head assembly?

10 MR. BERG: You know, we don't think that there's a modification
11 -- I mean, we think that it's -- would be obvious to a person of skill in the art.
12 We don't think that there's a particular modification. We think Mabuchi, as
13 it's described, would suggest to a person of skill in the art how to do this.

14 We don't think there's some particular engineering modification
15 that would have to be done. And in fact, I would say that there's probably
16 many different ways that an engineer could accomplish this, including just
17 based on Mabuchi's Figure 4 alone, which shows the head extending out that
18 a user could grasp.

19 JUDGE FINAMORE: And to just make sure I'm not missing
20 anything, is there any disclosure in Mabuchi that talks about how much
21 further past the space guide 5 the patter assembly extends?

22 MR. BERG: There's not any disclosure that I'm aware of that
23 specifically talks about that. One other thing that I want to point out on this
24 -- and I think this gets a little bit to the configured to language that Patent
25 Owner raises in its Sur-reply, is that Mabuchi's design is nearly identical to

1 what's in Figure 6 of the '482 Patent.

2 And I've put up here on the on Slide 60 an illustration showing
3 Figure 6 on the left and Mabuchi's Figure 18 on the right, where in both
4 instances you have the massage head on the left with these magnets, you've
5 got some pocket that's holding the magnets, you've got the magnets on the
6 actuator side on the right. Those are being connected together. To the
7 extent that the '482 Patent is specifically configured in this way, Mabuchi is
8 disclosing the same configuration.

9 And so even though Mabuchi doesn't specifically say, you can do
10 this while it's reciprocating, it's suggested to a person of skill in the art, and
11 it's disclosed in the sense that the disclosure of how this quick-connect
12 system operates in Mabuchi is nearly identical to Figure 6. And in fact, in
13 Figure 6 you can see the massage head extending out past the end there. But
14 there's still -- I would say having used a lot of these massagers, anytime you
15 try to remove the massage head while the massage device is operating, it's
16 not a particularly pleasant experience.

17 So I did want to touch on this one other issue that's, I guess,
18 claim-construction adjacent that Patent Owner raised for the first time in the
19 Sur-reply. And that's this idea that somehow the construction that
20 Therabody proposed in the district court is not consistent with how we
21 described the prior art reading on the quick release connector here in the
22 patent.

23 And what I've done is I put Therabody's district court proposal on
24 the right-hand side and the Petition on the left-hand side.

25 JUDGE FREDMAN: What slide number is this?

1 MR. BERG: Oh, I'm sorry, Your Honor, this is Slide 62.

2 JUDGE FREDMAN: Okay. Thank you.

3 MR. BERG: And what you can see is even though the district
4 court claim construction actually happened long after the Petition was filed,
5 I think we have a footnote on our Petition, you know, explaining that we
6 haven't done claim construction. We'll update the court as we do claim
7 construction, which we did. The way that we're reading this language, this
8 configured to language, is identical in both cases. And in the district court,
9 we had to construe this because it was clear from the infringement
10 contentions that Patent Owner was reading configured to in a very narrow
11 way to just mean, you know, be able to, basically.

12 Our view is that the plain meaning of configured to, and, you
13 know, the vast weight of the case law talking about configured to, says that
14 configured to has a narrower definition, that it's, you know, specifically
15 designed for a purpose. And so in the district court, we included that
16 language specially designed and adapted that comes from the case law.

17 But in our view, that's what configured to means as you can see in
18 the Petition as we go through this in the next few slides. And I won't, you
19 know, read verbatim what we have here. But I've reproduced several
20 screenshots from that portion of our Petition. You can see that we map
21 exactly to that same language.

22 So on this slide, we're talking about the patten mechanism being at
23 the distal end of the actuator head and that the changing can be easily
24 accomplished. We're also talking on the next slide, on Slide 63, we can
25 focus on how the design allows for easy connection and prevents the two

1 sides from separating.

2 Slide 64, we've explained how Mabuchi indicates that a device can
3 be operated before the patten assembly is connected, thus indicating to a
4 person of skill in the art that it can be connected all the time. And on
5 Slide 65, Therabody explains how the positive connection can be ensured
6 regardless of rotational alignment and that this lack of rotational alignment
7 would lead a POSITA to understand that it's specifically designed to be
8 secured while the piston is reciprocating.

9 On that point, I just want to point out, and this is in our Petition
10 briefing, that during prosecution of the patent, Petitioner -- or Patent Owner
11 specifically pointed to this issue of the lack of need for rotational alignment
12 as supporting their limitation that the piston -- that the massage head can be
13 replaced while the machine is reciprocating. And Mabuchi clearly meets
14 this lack of rotational alignment element.

15 And so again, to the extent that this is what configured to means,
16 that it's specially designed and adapted in this way that doesn't have this
17 rotational alignment element, Mabuchi has the same thing.

18 And, you know, I go into that last point a little bit more here on
19 Slide 66, because Patent Owner does dispute whether or not the magnetic
20 connection system requires alignment. And again, in my view, Patent
21 Owner simply disregards the disclosure of Mabuchi. Mabuchi makes it clear
22 that all that is required for connection is to bring the magnets close to one
23 another, causing them to attract.

24 In case the reader misses the point, Mabuchi follows up in the next
25 paragraph by stating, quote, "positive connection can be ensured without

1 positioning the actuator and the patter assembly," end quote. It's hard to
2 envision how Mabuchi could have been clearer about the fact that no
3 rotational alignment is required for connecting the patter assembly and the
4 actuator.

5 JUDGE FREDMAN: So for our purposes here, I mean, I realize
6 the district court in infringement may be different; does it matter? In other
7 words, if we read capable of as the answer, if we agree with Patent Owner
8 here, it doesn't change the analysis, right? And we should --

9 MR. BERG: That's our view. Our view is that Mabuchi would
10 disclose it under any reading, but certainly under the narrower reading that
11 we proposed in the district court and the --

12 JUDGE FREDMAN: And the narrow reading is inconsistent with
13 that *Blue Buffalo* case that came out in January.

14 MR. BERG: Sorry, say that again.

15 JUDGE FREDMAN: There's a *Blue Buffalo* decision that was on
16 appeal from the Board that discussed configured to and came out differently.

17 MR. BERG: Okay.

18 JUDGE FREDMAN: And -- yeah.

19 MR. BERG: I mean, I think under either reading, Mabuchi would
20 disclose. And I think that the positions that Petitioner has taken have been
21 consistent through the district court and through the proceedings here.

22 JUDGE FREDMAN: Okay.

23 JUDGE FINAMORE: I'm going to jump ahead just because we're
24 at about 4 and a half minutes and it looks like you were about to turn to
25 Pivaroff.

1 MR. BERG: Yeah.

2 JUDGE FINAMORE: But I had two issues that I'd like you to
3 address with respect to Pivaroff.

4 MR. BERG: Sure.

5 JUDGE FINAMORE: The first one is why would a person of
6 ordinary skill in the art modify Pivaroff to include a quick-connect coupling
7 when there's no teaching in Pivaroff that its head is removable from the
8 actuator? And then the second issue is -- I think where you were going to
9 start, but I'd like to move that -- second, is the housing argument that Patent
10 Owner raised in its briefing.

11 MR. BERG: Sure. Let me talk about Pivaroff. Then let me just
12 find the slide I want to be on here. Okay. So talking about Pivaroff and why
13 a person of skill in the art would have been motivated to remove the heads.
14 Now, Pivaroff, when you look at it, it's a very brief disclosure. And it's
15 actually striking how much of the disclosure is taken up with what's on the
16 screen right now, which is a discussion of the various preferred mixtures of
17 granules that go in the head.

18 So basically, to describe Pivaroff, you have the head of this
19 massager is hollow. And you can fill that hollow head with different grains.
20 You can put diamond grains, ruby grains, copper grains, bloodstone, all
21 these different grains of materials into the head of Pivaroff.

22 And then you put that on the massage head, and you massage
23 someone with it, right? And Pivaroff talks through -- well, Pivaroff says it's
24 been found that various mixtures of these granular materials produce
25 improved and superior results and then set forth in tabular form are various

1 preferred mixtures. So then there's this table, and it has ten different
2 preferred mixtures of Pivaroff.

3 Now, later, Pivaroff goes on and says, well, one of these we found
4 exceptional results with. But clearly, spending this much of the specification
5 talking about these ten different combinations would indicate to a person of
6 skill in the art that there's some benefit to these different combinations of
7 materials.

8 So if there is some benefit and a person skill in the art would
9 presumably obtain some benefit by using the first combination and some
10 benefit from using the second combination. If a person wanted -- a
11 massager wanted to obtain both benefits on the same patient, they'd need to
12 switch the massage head -- or that they'd need to switch the combination,
13 which could be done one of two ways.

14 I think one way is that they could unscrew the massage head, they
15 could empty out the grains. They could refill the grains with the right
16 mixture that they want for the different benefit. And then they could
17 reattach the massage head. The other option would be to have multiple
18 massage heads already pre-filled with the right number of grains so they
19 could be swapped in and out.

20 Dr. Pratt testified -- and I think it's pretty clear -- that it'd be
21 preferable to have multiple of these massage heads that could be swapped in
22 and out so you didn't have to take the time -- you know, what would at best
23 be a cumbersome process of emptying and refilling a massage head and at
24 worst require measuring out 50 grains of diamond and 100 grains of ruby
25 and -- you know, to get the right mixture.

1 It'll be a lot simpler, and I think a person skill in the art would be
2 motivated to have these swappable massage heads. And, you know,
3 Mabuchi talks about the benefits of swappable massage heads, and they're
4 pretty similar to what we've discussed.

5 So, you know, a person of skill in the art I think would be
6 motivated to have swappable massage heads. By the time you have
7 swappable massage heads, now, it's a matter of how do you do this? I think
8 Mabuchi explains clearly why magnets are an effective way to do this so that
9 you can achieve the maximum benefit.

10 So just quickly on the housing point that Your Honor raised, I
11 mean, the dispute here boils down to whether Pivaroff's hollow handle
12 constitutes a housing as a POSITA would have understood the time -- at the
13 time of the invention. Patent Owner essentially argues that because Pivaroff
14 discloses a top element or housing that it forecloses the hollow handle within
15 which the motor is mounted from being the claimed housing. Therabody's
16 position is the -- because Pivaroff's motor is contained in the handle, the
17 handle constitutes a housing.

18 Now, I asked Patent Owner's expert, you know, what is meant by a
19 housing? How does a person skill in the art understand a housing? He says,
20 housings, typically, are the outer component that contains the movable parts
21 within it. That's exactly what Pivaroff's handle does here. It contains these
22 movable parts, the motor, you know.

23 And really, I think the '482 Patent is on all fours with this.
24 Because if you look at the piece of the '482 Patent I put up on the screen, it
25 talks just in this paragraph about a main housing, a motor housing, a drive

1 housing, an upper housing. It says these portions may be made up of a
2 single structure or multiple structures.

3 So to me, the '482 Patent is, you know, using housing exactly the
4 same way as Patent Owner's expert. And when you take that understanding
5 of what a housing is, which is the plain ordinary meaning of a housing, and
6 you look at Pivaroff, Pivaroff's handle -- whether it's called a handle or a
7 housing, clearly meets that claim limitation.

8 JUDGE FINAMORE: Counsel, you're at time. Did you want to
9 save the rest of your argument for your rebuttal?

10 MR. BERG: Can I just go into my rebuttal for a couple of
11 minutes? I want to make one point on a written description issue. And then
12 I'll sit down.

13 JUDGE FINAMORE: Sure.

14 MR. BERG: So the one point that I want to make on written
15 description -- we have a couple of written description grounds. I want to
16 focus on I think what's called Ground 1A in our Petition. And that's whether
17 or not there's a written description for the pocket in claim 34 that receives
18 the quick release connector.

19 And as I mentioned at first, these two patents are very similar
20 except for in one, the piston has a hollow bore that receives the shank of the
21 massage head. In the other, the massage head has a pocket that receives the
22 quick release connector of the piston. And the only one of those that's
23 described in the patent is where you have -- what's shown in Figure 6 here,
24 where you've got the piston on the right-hand side that's got a hollow bore
25 and receives the massage head and those quick release connectors connect.

1 Now, what Patent Owner has pointed to -- and I think what the
2 Board preliminarily found in the Institution Decision as well -- there is this
3 pocket on the massage head. If you look at Figure 6 that's labeled as 622
4 and it's holding a quick release connector 624. What I want to point out is
5 that the claim language is very specific about which quick release connector
6 it's talking about when it says the quick release connector.

7 And just you go up to the claim 34, which I put up on Slide 95, you
8 can see that the last limitation says, a quick release connector at the distal
9 end of the piston. So we're talking about a specific quick release connector,
10 the one that's at the distal end of the piston, not the one that's in the massage
11 head. Wherein the quick release connector is configured to secure a first
12 massaging head while the piston reciprocates. And wherein the first
13 massaging head has a substantially cylindrical pocket to receive the quick
14 release connector.

15 So we're still talking about the quick release connector on the distal
16 end of the piston but the pocket is on the massaging head. So our view is
17 that this is talking about, you know, you've got the female portion on the
18 massaging head and the shank of the -- or the piston goes into that portion.
19 What the written description shows, though, is the reverse situation where
20 you've got the hollow bore on the piston, the massaging head goes into it.

21 And the problem with pointing to the pocket the Patent Owner has
22 identified is that it never receives the right quick release connector, never
23 receives the quick release connector on the distal end of the piston. At most,
24 I think there's an argument for that it receives the quick release connector
25 that's on the massage head 624. But I don't see how it squares with the quick

1 release connector on the distal end of the piston.

2 JUDGE FINAMORE: So when the massage head is received in
3 that bore 608 which you seem to agree is at the distal end of the piston, then
4 isn't it receiving 622 into the distal end of the piston?

5 MR. BERG: I would say that's exactly what's happening, it's
6 receiving it into the distal end of the piston. Whereas the claim requires the
7 pocket on the massage head to be receiving the quick release connector on
8 the distal end of the piston.

9 If there are no further questions, I can reserve the remainder of my
10 time for rebuttal.

11 JUDGE FINAMORE: Like, you went 4 minutes on the nose over.
12 So we'll subtract that from your rebuttal time, which will leave you with
13 21 minutes.

14 MR. BERG: Great. Thank you, Your Honor.

15 JUDGE FINAMORE: Patent Owner, before you begin, could you
16 just let me know if you'd like to reserve some time for surrebuttal?

17 MR. KELLAR: Yes, Your Honor. I'd like to reserve 15 minutes
18 for surrebuttal.

19 JUDGE FINAMORE: All right. If I did my math correctly, that
20 leaves you with 60 minutes of your opening argument time. And you may
21 begin when you're ready.

22 MR. KELLAR: That's correct. Thank you, Your Honor. Since
23 these proceedings were instituted nearly a year ago, there's been substantial
24 changes to both PTAB policies and procedures and substantial developments
25 in the factual record of both of these proceedings. I think the 800-pound

1 gorilla in the room is the *Revvo* decision and its impact on this -- both of
2 these proceedings.

3 But briefly, turning to the factual record since institution, Patent
4 Owner discovered Petitioner's 2022-era disclosure regarding a reciprocating
5 therapy device with a magnetically-connected attachment and specifically,
6 Petitioner's characterization of Mabuchi that contradicts many of the
7 characterizations it makes in these proceedings. In addition, on
8 cross-examination, Dr. Pratt revealed that he failed to consider express
9 requirements of the claim. In particular with Mabuchi, he failed to consider
10 if Mabuchi could self-align during reciprocation. And regardless of claim
11 construction, connection or securement during reciprocation is an express
12 claim requirement.

13 Moreover, Dr. Pratt conceded at his first deposition that he never
14 considered the impact -- or import of the loosely-filled granular material in
15 Pivaroff. Again, that's a key aspect of Pivaroff's design that Dr. Pratt
16 omitted.

17 And finally, as to the factual record, we've supplemented the
18 record with Mr. Morrill's expert report that was not before the Board until
19 post institution. Taking the panel's lead, I'll begin with Slide 18, in
20 particular, the proper interpretation of percussive massager.

21 So it's important to recognize that the '482 and the '082 Patents
22 describe and claim improvements to percussive massagers -- percussive
23 massage devices. The '482 and the '082 Patents do not purport to invent
24 percussive massagers.

25 JUDGE FREDMAN: Do they actually use the word percussive

1 massage?

2 MR. KELLAR: So the Specifications do not use the term
3 percussive massage.

4 JUDGE FREDMAN: It did not appear until it was amended into
5 the claim later after filing.

6 MR. KELLAR: That's correct. It was brought into the claims.
7 The first mention of it in the record was made by the examiner in response to
8 one of the office actions.

9 JUDGE FREDMAN: What's the basis for the term at all? I
10 realized they didn't raise a written description issue on this but --

11 MR. KELLAR: So a percussive massager is a colloquial term for
12 a deep muscle-stimulating device. I realize, so the Specification here, we
13 can see on Slide 18 at the top, the invention is described as being more
14 particularly limited to a deep muscle-stimulating device. Those are more --

15 JUDGE FREDMAN: Yes. You're going to probably get to this,
16 but what are the structural implications of that? What does that mean?

17 MR. KELLAR: So a deep muscle-stimulating device, aka, a
18 percussive massager, must have sufficient stroke length and sufficient speed
19 to provide deep muscle massage.

20 JUDGE FREDMAN: What are those things and are they in the
21 spec?

22 MR. KELLAR: So the speed is in the spec. There's an exemplary
23 range of 600 to 3,600 RPMs.

24 JUDGE FREDMAN: Okay.

25 MR. KELLAR: The stroke length is described as being variable in

1 some embodiments, but there're no particular examples given. But again, we
2 come to the disclosure of these patents with what came before. In particular,
3 Pivaroff, the parties agree, describes a percussive massager and that clearly
4 shows speed ranges a little bit higher, 2,000 to 3,600 RPMs. But it does
5 disclose a wide range of known stroke lengths, from one-eighth of an inch to
6 half an inch.

7 So again, a person of ordinary skill in the art comes with --

8 JUDGE FREDMAN: You're bringing that in, right? That's not in
9 your specs. That's nowhere. So you're basically interpreting this in the light
10 of art that isn't of record in your spec, right?

11 MR. KELLAR: So we're not relying on any particular stroke
12 length. There is no express disclosure of particular length values. But we
13 are relying on what came before to provide examples that would have been
14 known to POSITA.

15 JUDGE FREDMAN: Right. I mean, there's so many devices that
16 do reciprocating strokes, right? There are tools in the Home Depot. You
17 can buy a reciprocating device that will push something, right. You can
18 have a jackhammer, that's, I think, a reciprocating device, too. I mean, how
19 do we know which is a percussive massager and which is a padder and which
20 is something -- a jackhammer.

21 MR. KELLAR: Well, again, we can turn to the prosecution
22 history, which gave a helpful example comparing the device of Rhoades as a
23 cosmetic instrument to the claimed percussive massager. So here, we see
24 the applicant was clearly contrasting -- my apologies, I'm on Slide 20, Your
25 Honor. So here, we see that the applicant was clearly contrasting Rhoades

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1 as a cosmetic instrument that provides surface-level treatments as being
2 different from the claimed percussive massager, which is for the -- also
3 known as the deep muscle-stimulating device or a device that has sufficient
4 stroke and speed to massage deep muscle tissue.

5 JUDGE FREDMAN: Rhoades is not a patter (INDISCERNIBLE).

6 MR. KELLAR: Rhoades has different attachments. I believe it's
7 not a reciprocating device. I believe it's a --

8 JUDGE FREDMAN: It's a vibration in a circular motion --

9 MR. KELLAR: Yeah. So one of the examples provided is the
10 motion generator may move the attachment by vibrating, spinning,
11 oscillating, or propagating with sonic waves. But the overall import of the
12 argument is the contrast --

13 JUDGE FREDMAN: So the examiner then wasn't really
14 considering a percussive device at all.

15 MR. KELLAR: I mean --

16 JUDGE FREDMAN: Well, it says Rhoades is not a percussive
17 device, right, because he's not reciprocating. So he can't even be in the same
18 field of endeavor on this.

19 MR. KELLAR: Well, the argument that was made to the examiner
20 is that Rhoades is not a percussive massager. It is instead a -- it's a device
21 for surface-level treatment, a cosmetic instrument. And that was --

22 JUDGE FREDMAN: The reason is partly because it operates in a
23 different way, right?

24 MR. KELLAR: I don't --

25 JUDGE FREDMAN: It operates in a different way; is that

1 correct?

2 MR. KELLAR: Yeah, it does. So it's not a reciprocating device.

3 JUDGE FREDMAN: Okay.

4 MR. KELLAR: But the operation that results from that is a
5 surface-level cosmetic beauty treatment rather than a deep muscle massage
6 that would be understood a percussive massager provides.

7 JUDGE MARSCHALL: Well, I guess the biggest problem I have
8 with your construction is that the Spec itself, as you note in your argument,
9 talks about shallower points of stress, smaller muscle groups. So the idea
10 that this is only for deep tissue massage looks contrary to that portion of the
11 Specification.

12 MR. KELLAR: No. It does not, Your Honor. So that particular
13 disclosure is in regards to what's described as the lost motion mechanism
14 -- so basically, that describes an unclaimed embodiment that has the ability
15 to adjust stroke length. And it describes a few different ways of doing that.

16 There's one way of doing it in the massage head itself, one way of
17 doing it in the piston. Instead, here the claims all recite a predetermined
18 stroke length which, again, pulls it away from the adjustable embodiment
19 and limits the stroke length to something that's been predetermined or not
20 adjustable.

21 And getting back to the example of the adjustable stroke length, at
22 least with the adjustable stroke length embodiments, we see that there's the
23 capability to provide deep muscle massage, as in the stroke length can be
24 adjusted to provide deep muscle massage or something shallower. But the
25 device remains capable of providing both types of treatments.

1 JUDGE FREDMAN: Does it depend at all on how much you
2 press it against the muscle and the location of the muscle? So for example,
3 perhaps deep in your back, you need a longer stroke length and more
4 -- putting more pressure on it. If you're massaging someone's forehead,
5 where the skull's basically right there millimeters away, perhaps a deep
6 massage would simply be almost the same as patting.

7 MR. KELLAR: Well, a deep -- it needs to be capable of providing
8 a deep muscle massage. Now --

9 JUDGE FREDMAN: If the deepest muscle is a fairly surface
10 muscle, what does it mean to be a deep muscle?

11 MR. KELLAR: To be a deep muscle?

12 JUDGE FREDMAN: Yeah.

13 MR. KELLAR: It needs to be something other than a surface-level
14 treatment. So for example -- and again, we can turn to --

15 JUDGE FREDMAN: So those terms aren't defined, right?
16 Certainly, not by the Specification.

17 MR. KELLAR: No. They're not defined in the Specification. But
18 as Mr. Morrill explained in his deposition, you would understand the
19 therapeutic benefit from routine experimentation.

20 So I'm on Slide 22, Your Honors, looking at the construction of
21 percussive massagers, briefly touching on Petitioner's proposal. Petitioner's
22 proposal simply repeats limitations that are already found within the body of
23 the claim. So essentially, Petitioner's proposal just removes the word
24 percussive, removes any import of the term, and just reverts back to the
25 piston and the massage head reciprocating.

1 And again, that's already found, as I've underlined in red, within
2 the body of the claim. So that would render that the preamble simply
3 redundant of what comes within the body of the claim.

4 JUDGE FREDMAN: And you're aware of the case law that talks
5 about preambles being intended use. And in this context, in a product claim
6 perhaps, they are redundant and don't get patentable weight.

7 MR. KELLAR: Yes, Your Honor. So turning to that argument,
8 whether the preamble is limiting, I'll revert back to Slide 19. So *Catalina* is
9 the seminal case on helpful guideposts to determine when the preamble is
10 limiting.

11 There's at least two different reasons why the preamble is limiting.
12 First is the preamble was specifically amended as to some preexisting claims
13 from an apparatus to a percussive massager. And then as we've discussed in
14 the context of Rhoades, that amendment was relied upon to overcome the art
15 of Rhoades. And importantly --

16 JUDGE FREDMAN: Finish the question. Was it relied on with a
17 deep muscle part or simply for the operation of a forward and backward
18 motion, in which case the most you get out of that is that motion which
19 Mabuchi has --

20 MR. KELLAR: So turning to Slide 20, these are the actual
21 arguments that were made by the applicant. We see, as underlined in red
22 halfway through the paragraph, the distinguishing characteristic of Rhoades
23 was that all the treatments were performed on the surface of the skin. The
24 applicant was not contrasting Rhoades based on exactly how it works.
25 Rather, it was --

1 JUDGE FREDMAN: That sentence says Rhoades further
2 describes a motion generator may move the attachments by vibrating,
3 spinning, oscillating, or propagating. That's pretty much distinguishing
4 based on the way it works.

5 MR. KELLAR: And again --

6 JUDGE FREDMAN: I think that statement is entirely accurate.

7 MR. KELLAR: My apologies, Your Honor. But again, even that
8 sentence that you just quoted then follows up with which are for treating the
9 surface of the skin.

10 JUDGE FREDMAN: Sure. But the question is which is the
11 controlling element?

12 MR. KELLAR: All right. Well, it's Patent Owner's position that
13 Rhoades is -- the distinguishing characteristic is surface-level treatment of
14 cosmetic devices and applicant's intent that the claims be differentiated as a
15 whole from this class of surface-level cosmetic devices rather than deep
16 muscle-stimulating devices or percussive massagers.

17 JUDGE MARSCHALL: Getting back to your proposed
18 construction for a minute that talks about this portion of the Specification
19 that talks abouts smaller muscle groups that are shallower points of stress,
20 you said that that was an unclaimed embodiment. But as I read your Patent
21 Owner Response, you're arguing that that portion of the Specification is
22 consistent with the proposed construction. So I'm wondering what I'm
23 missing or where you made this argument in the briefing that that's not a
24 claimed embodiment.

25 MR. KELLAR: We didn't particularly make the argument that it's

1 an unclaimed embodiment. We were citing that embodiment as support for
2 the idea that the percussive massager as claimed must be capable of
3 providing deep muscle massage. And that's consistent with even the
4 embodiments that have the adjustable stroke length in that there still needs to
5 be the capability within that range of adjustment to provide the deep muscle
6 tissue massage and stimulation.

7 JUDGE MARSCHALL: That portion of the Specification also
8 suggests that it is capable of providing shallow (INDISCERNIBLE), so deep
9 muscle massage is not required for that portion of the Specification.

10 MR. KELLAR: So my understanding of that embodiment is an
11 adjustable system -- an adjustable stroke length that varies from shallow to
12 deep. So again, within that range of adjustment, you're ensuring that there's
13 the capability of deep muscle massage. It can be pulled -- the user can then
14 pull that back if they want to massage perhaps a different body part or a
15 shallower massage. But the capability is retained within the scope of being a
16 percussive massager.

17 JUDGE MARSCHALL: It must be capable of both, in your
18 estimation?

19 MR. KELLAR: Again, more so this is about the embodiment with
20 the lost motion system, that would need to be capable of both, yes.

21 JUDGE MARSCHALL: That wouldn't necessarily apply to your
22 proposed construction which just talks about deep massages?

23 MR. KELLAR: Again, yeah. So because we recite in the
24 challenged claims this predetermined stroke length, we've pulled the claims
25 away from that embodiment with the adjustable stroke length and instead are

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1 focusing on a fixed or predetermined stroke length that would be understood
2 to provide the deep muscle massage, which is how the invention as a whole
3 is described.

4 JUDGE MARSCHALL: But what you just said was not in the
5 briefing.

6 MR. KELLAR: I don't know that it was in the briefing in
7 particular. But the point of the matter is that the adjustability embodiment
8 still supports the concept in the construction that there's a requirement for
9 capability of deep muscle massage.

10 From there, I'm going to move on to the Mabuchi reference, and
11 this is relevant to the '482 PGR. My apologies, I seem to be skipping slides.
12 I'm on Slide 32, Your Honors. So turning to Ground 3 of both proceedings,
13 we see -- in the description of the prior art coming from Mabuchi, we see an
14 express contrasting of its device from what it considers conventional patting
15 devices or massagers and what it considers is mainly for the massage of
16 muscular -- or muscular tissues, not for beauty treatment of the skin.

17 So again, Mabuchi expressly pulls itself out of the area or the field
18 of massagers. And as we see in the field of the invention, Mabuchi says this
19 invention relates generally to a beauty treatment device. So again, Mabuchi,
20 within the first three paragraphs of its disclosure, pulls itself out of the field
21 of massagers and into this area of cosmetic devices.

22 And this is the same field of cosmetic devices, and I realize we
23 might disagree on this point, the same field of cosmetic devices, such as
24 Rhoades, that are limited to surface treatment of the skin for cosmetic --

25 JUDGE FREDMAN: I mean, this massager, it's just a soft

1 massage on just the top of your skin. It sounds like --

2 MR. KELLAR: So --

3 JUDGE FREDMAN: Because you don't really want to say it
4 doesn't. Yours isn't a massager either. I mean, if a massager -- if it's a
5 reciprocating motion device that's intended to treat the surface of the skin
6 perhaps is what you're arguing, I think.

7 MR. KELLAR: So Mabuchi does a few things different from
8 massagers. One is that it has the space guide. So essentially, the space
9 guide ensures that there's effectively a zero or near-zero stroke length
10 because it essentially prevents a user from getting the patten assembly too
11 close to the skin and pushing on the skin. Mabuchi explains that there's a
12 desire to pat the skin, but there's a desire to not push the skin because that
13 would stretch it and also -- and would be contrary to the beauty-enhancing
14 effects that Mabuchi provides.

15 First, so we have the space guide. So to the extent Mabuchi is
16 -- began its existence as some sort of massager, the space guide is added to
17 effectively remove the stroke length, to put it in the field of a beauty
18 treatment device and limit it to surface-level treatment of the skin. And then
19 beyond the space guide -- here, I'm on Slide 33 -- we see the example of
20 Mabuchi in operation. The patten assembly itself is a complicated device
21 that further ensures that there's no percussive force applied to the user's body
22 or face because it has this internal spring mechanism that absorbs whatever
23 force exists when the patten assembly contacts the skin at the end of the
24 space guide.

25 So there's two parts to Mabuchi, both of which ensure that it's not

1 operating as a massager and is instead operating as a beauty treatment device
2 as Mabuchi explains. So we see what happens here is, as the patter
3 assembly is advanced, the skin surface is present at the end of the space
4 guide, which is indicated by number 5. Then the patter assembly, rather
5 than pushing into the skin and reaching any sort of deep muscle tissue, stops
6 at the skin surface and the spring compresses within there to absorb the
7 remaining motion of the actuator and prevent any sort of deep muscle
8 massage or deep muscle stimulation.

9 There's effectively no stroke applied. So for example, if somebody
10 was attempting to use Mabuchi for a different purpose, for example, as a
11 massager, they would be very disappointed in its effects because it doesn't
12 do anything beyond just patting the skin. And different from most
13 massagers too, Mabuchi explains that there's a desire to fully disconnect the
14 patter assembly from the user's skin each stroke. And that gets back to how
15 Mabuchi intends to provide the cosmetic treatment. It's a patting type of
16 cosmetic treatment. Apparently, this is a well-known technique in some
17 countries where it's just light tapping of the skin.

18 And Mabuchi explains that to provide that same sensation with a
19 mechanical device, you need the space guide in operation. So the patter
20 assembly is fully removed and then fully connects with the user's skin every
21 stroke, rather than a massage device that lacks any sort of space guide, and
22 the massage head is kept in contact with the user's body through the entire
23 stroke length.

24 Moving to Slide 34. This is just a more-detailed analysis of
25 Mabuchi's patter assembly. Here, we see that there's a cushion member.

1 The resilient member 11 is the spring. Then that's what acts to absorb the
2 remaining motion of the actuator as it completes its stroke and to prevent the
3 pushing or the stretching of the user's skin.

4 And then on the right, we see just how much the padder assembly is
5 compressible. So Figure 3 shows it in uncompressed. We've shown how
6 you can see so much of the slide tube 10. In Figure 5, we see that the slide
7 tube 10 is essentially moved into the padder assembly. And the padder
8 assembly itself has not advanced beyond the end of the space guide. It
9 stayed in one spot to prevent the pushing on the user's skin.

10 And then going back to the prosecution history, and I don't intend
11 to belabor this point, but these are the same reasons why the applicant -- how
12 the applicant differentiated Rhoades. So the applicant's intent on amending
13 the preamble from an apparatus to a percussive massager while
14 simultaneously adding new percussive massager claims was to differentiate
15 the claimed invention from this entire field of cosmetic devices level
16 treatments.

17 And we see that Mabuchi provides the same surface-level
18 treatments that Rhoades does. And it even talks about to the extent you
19 stimulate subcutaneous muscular tissues. Rhoades talks about stimulating
20 muscle tissue, too. But the difference is you're stimulating the muscle that
21 tightens the skin. You're not stimulating any deep muscle tissue. You're just
22 simply not reaching the deep muscle tissue with a lack of effective stroke
23 length.

24 And then getting to Petitioner's 2022 disclosure, we see Petitioner
25 in prosecuting its own patents took a very nuanced approach to what

1 Mabuchi is, what it describes, and how it would be modified to act in
2 different forms. On the other hand, in this proceeding, the Petitioner has just
3 said, well, Mabuchi is a reciprocating device.

4 These are reciprocating devices. We're going to put them together,
5 and they're going to be freely combinable. So we have, for example,
6 Colloca is a chiropractic device that's very similar to Fuhr that Petitioner
7 distinguished from Mabuchi in its own prosecution. And then again, we
8 have Pivaroff, which is a high-speed percussive massager, which is not
9 similar to Mabuchi.

10 So here, we see Petitioner, again, prosecuting its own patents, is
11 very -- has a very nuanced take on Mabuchi disclosing a beauty device that
12 pats the skin with a patten and particularly recognizes that Mabuchi is a
13 particular device for treating the face and it would have been understood to
14 require different specifications from other sorts of reciprocating devices. In
15 other words, Petitioner is drawing, contrasting --

16 JUDGE FREDMAN: But your claim doesn't really create any
17 particular velocity, once again, of reciprocation.

18 MR. KELLAR: That's correct, Your Honor. So that --

19 JUDGE FREDMAN: Really, that's irrelevant because there's no
20 claim limitation. So unless you're reading one in, it doesn't matter.

21 MR. KELLAR: So the relevance to claims 34, 1, and 18 is that
22 when Petitioner is advancing its own patent interests, Mabuchi receives a
23 very nuanced view. And it's not combinable with other sorts of
24 reciprocating devices. But here, when Petitioner is using Mabuchi as an
25 offensive tool, suddenly, Mabuchi is a percussive massager. It can be used

1 for percussive massage. So what we're getting to is the difference in nuance
2 between the arguments. But yeah, so as to particular speed, that's claim 38
3 in the '482 Patent. And I'll get to that claim as time permits.

4 JUDGE FREDMAN: Undoubtedly, the claim is different in this
5 patent anyway, I'm sure, right, (INDISCERNIBLE).

6 MR. KELLAR: Yeah. The claim is not identical. Although, it has
7 some very similar features. And then briefly, Petitioner's arguments as to
8 Mabuchi are all a single reference 103. So Petitioner never argued that
9 Mabuchi disclosed the entirety of any challenged claim in the '482 Patent.
10 We didn't really understand the import of this. And we noted that in our
11 Patent Owner's Response.

12 But on the Reply, it seems that the reason for that was they wanted
13 to leave the door open to argue that Mabuchi could be modified into a
14 percussive massager. So what we see here is arguments that, well, the space
15 guide could be removed and then at that point, Mabuchi would provide deep
16 muscle massage.

17 But again, Mabuchi expressly teaches away from removing the
18 space guide and using the device because that prevents the intensity from
19 being limited and prevents the stroke length from being limited and would
20 then push on the skin and would stretch it out rather than provide the beauty
21 treatment.

22 JUDGE FREDMAN: I mean, and you're familiar with *Guardant*
23 that just came out, right? The case that Federal Circuit just said that you
24 don't need motivation in a one-reference, 103, right?

25 MR. KELLAR: I'm not familiar with that particular case. I --

1 JUDGE FREDMAN: It came out very recently, in the last four
2 weeks, I would say, maybe the last --

3 MR. KELLAR: Yeah. I'm not familiar with that particular --

4 JUDGE FREDMAN: It's a biotech case.

5 MR. KELLAR: Okay.

6 JUDGE FREDMAN: It's the subject matter. But it does say that
7 in a one-reference, 103, motivation isn't really required.

8 MR. KELLAR: But here, Petitioner is arguing that there's still a
9 modification necessary to what Mabuchi teaches. So we're saying that
10 Mabuchi teaches --

11 JUDGE FREDMAN: Well, you're disagreeing whether it's
12 percussive or not, that's a different question, right? If we read percussive
13 into the claim -- I mean, read the limitation as limiting, then yes. If we don't,
14 then that actually doesn't matter at all, right? But yes, we want to move to
15 next argument I think at this point.

16 MR. KELLAR: Yes, Your Honor. So moving to Slide 39. This
17 gets to the quick release connector limitation, quick-connect system
18 limitation, and it brings up the *Revvo* decision, which is relevant here. So
19 the *Revvo* decision came out a month before Petitioner's Reply was due and
20 confirms that, in light of the 2018 rule change confirming the *Phillips* claim
21 construction standard is applicable to PTAB proceedings, just as it is with
22 district court proceedings, petitioners should not be permitted to advance a
23 narrow construction to avoid infringement liability, advance a broader
24 construction at the PTAB to argue invalidity, just because that's a
25 fundamental unfairness.

1 So what we see here is Petitioner advanced a plain and ordinary
2 meaning interpretation of, in particular, the quick-connect limitations. But
3 when it got to the district court, we see a substantially more narrow, nuanced
4 view of what the quick-connect system reads. And in particular, there's two
5 limitations within Petitioner's claim construction. They're specially designed
6 and adapted to.

7 And again, the evidentiary record is entirely silent as to what that
8 means. Petitioner didn't argue that limitation or that interpretation, and
9 neither party had any ability to comment on it.

10 JUDGE FINAMORE: Counsel, I just want to make sure we're
11 speaking the same language here with regards to the *Revvo* decision.
12 Different claim construction between a district court proceeding and a PTAB
13 proceeding is a matter that the Director takes into account when deciding
14 whether or not to exercise discretion. We're well past discretionary
15 considerations at this point. And as you can see, the Director's not on this
16 panel. So can you explain to me why the *Revvo* decision would be
17 applicable to today's proceeding?

18 MR. KELLAR: So the *Revvo* decision has twice now been de-
19 instituted or the decision to institute has been vacated twice.

20 JUDGE FINAMORE: By whom?

21 MR. KELLAR: By Director Squires. So I understand your
22 concern. But then we can look for guidance from the panel in *BOE* versus
23 138 East, and that's IPR2024-00973. That case, the Final Written Decision
24 issued a couple of weeks ago. It was noted in our Sur-reply. There, the
25 panel noted that petitioner had relied on a broader claim construction for a

1 particular mapping of a claim term and found that without sufficient
2 justification that ran afoul of the *Revvo* decision and couldn't support
3 petitioner's burden to prove unpatentability.

4 JUDGE FREDMAN: Right. But I mean, I think the concern for
5 us is we thought if it's going to be de-instituted, it's going to be de-instituted
6 by the Director, not by us. We don't, I think, have the authority to do that.
7 So that seems like something that you might bring up in Director review
8 after you and your opposing party brief it. It doesn't seem like it's really
9 worth your time here because we couldn't do it. We can't really do anything
10 about it unless we, you know, agree with you fully, which we may or may
11 not do.

12 MR. KELLAR: So yeah, reverting back to the BOE versus 138
13 decision, I mean, there, the panel found sufficient cause to deny that --

14 JUDGE FREDMAN: Under their facts, yeah.

15 MR. KELLAR: Under their facts, yeah, that's correct. Here, I
16 think if the panel were to give credence to Petitioner's plain and ordinary
17 meaning for the quick-connect limitations, instead of its narrower district
18 court proceedings, it would leave any final written decision at risk of being
19 potentially vacated depending on how the -- how it turned out.

20 So that's the concern and that's the applicability of *Revvo* is, you
21 know, Petitioner was aware of the same claim construction standard. And
22 the Petitioner has a duty to explain how claim terms are to be construed
23 going back to 42.204(b)(3). And here, essentially under *Revvo* --

24 JUDGE MARSCHALL: Does Patent Owner's position on the
25 meaning of the claim and Petitioner's proposals disagree with either one of

1 that? I'm just wondering what your current position is on that.

2 MR. KELLAR: So my understanding from the district court
3 proceeding is Patent Owner does dispute the Therabody or Petitioner's
4 construction and advances -- and I believe it's more "configured to" in the
5 vein of *In re Blue Buffalo*, as Your Honor mentioned.

6 JUDGE FREDMAN: So they don't do plain and ordinary meaning
7 either.

8 MR. KELLAR: Yeah. Neither party has advocated plain and
9 ordinary meaning of the quick-connect limitation.

10 JUDGE FREDMAN: In the district court.

11 JUDGE MARSCHALL: So it's Patent Owner's position, in district
12 court and presumably here, that it should be read as "capable of;" is that fair?

13 MR. KELLAR: Well, here, it's Petitioner's burden to set forth
14 what they -- how they believe the claim is to be construed.

15 JUDGE MARSCHALL: Is that Patent Owner's position or is it
16 they're just saying we're not going to tell you what we think about the scope
17 of this limitation?

18 MR. KELLAR: Well, we've met Petitioner at what we thought
19 was their interpretation under plain and ordinary meaning and explained
20 why the references don't teach that. And that's consistent with the rules that
21 require Petitioner to set the stage with its Petition. And we followed it
22 through in a responsive role, rather than getting into a protracted claim
23 construction argument.

24 JUDGE FREDMAN: So yeah, I think probably -- we should
25 probably move from this argument. We understand your point. *Revvo* point

1 is definitely relevant. And it may be very relevant if you go to the Director
2 review and they do something. But I think that we understand the point for
3 the panel purposes.

4 MR. KELLAR: All right. Thank you, Your Honor. So moving to
5 Slide 40, we'll get into the nuts and bolts of the quick-connect, quick release
6 limitation in view of Mabuchi. So as Dr. Pratt confirmed during his
7 testimony, Mabuchi is entirely silent as to whether -- or if at all -- if the
8 pater assembly can be changed during reciprocation.

9 So Mabuchi has no express disclosure on changing or securing the
10 pater assembly during reciprocation. And that's fully supported by
11 Dr. Pratt's deposition testimony.

12 And in fact, what we know from Mabuchi is it does require a
13 particular rotational alignment to either be connected or disconnected. So in
14 the Decision on Institution, credence was paid to Mabuchi's reference to the
15 changing of the pater assembly being easily accomplished.

16 JUDGE FREDMAN: So I'm just curious, this is a question that we
17 were thinking about, and I don't -- that it matters directly, but it's kind of an
18 interest. What's the reason that it's being done while it's in operation as
19 versus just stopping it and changing it, like you might do with a drill or
20 something or using a Phillips head or a flathead or something?

21 MR. KELLAR: Well, according to the '482 Specification, there's
22 convenience with the ability and the ability and the operation to change it
23 during use without --

24 JUDGE FREDMAN: The thing's moving back and forth, you sort
25 of have to grab it -- you either pull it, I guess, if it's magnetic, or twist it a

1 little bit to throw the magnets that's no longer connect and then pull, right?

2 MR. KELLAR: Yeah. So in the exemplary embodiment in the
3 '482 Patent, the way the magnets arrange is it's axially -- has axial polarity.
4 So essentially, one face is entirely one polarity, the other face is the other --

5 JUDGE FREDMAN: Twisted.

6 MR. KELLAR: As they come together, there's no rotation. So as
7 you get it close, it will attract every time.

8 JUDGE FREDMAN: Right.

9 MR. KELLAR: So essentially, as you insert it into the bore -- and
10 again, in the '482 Patent, the bore is entirely visible. In Mabuchi, as
11 Mr. Morrill testified, it's -- the entire connection would be hidden by the
12 space guide. So you'd be essentially fishing around in the space guide.

13 JUDGE FREDMAN: You have that projection that would kind of
14 guide you in. So I'm not sure that's actually -- it seems like that actually
15 would not be that hard. But in terms of assembling it -- but -- so you're
16 -- the argument is it's for convenience is the whole reason. Okay. I was just
17 curious.

18 MR. KELLAR: So what we see from Mabuchi's express
19 disclosure is this reference to the changing being easily accomplished is
20 actually described in connection with turning one. So again, that's contrary
21 to Petitioner's arguments where it says, you know, connection and
22 disconnection needs to happen without rotational alignment.

23 Figure 19 of Mabuchi here even shows the double-ended arrow
24 about how the flange 15 must be rotated to disconnect the patten assembly
25 from the actual --

1 JUDGE FREDMAN: Are you actually asserting that that's much
2 more difficult? I mean, other than possibly if you get your fingers caught in
3 the damn thing. I mean, turning it and then the magnet will seat versus the
4 magnet will seat sort of directly.

5 MR. KELLAR: The --

6 JUDGE FREDMAN: They both have magnets that are attracting,
7 right? So in both cases, there will be magnets, you know, pulling on it,
8 depending on how powerful magnets you use, how much it'll pull. And
9 presumably, these are not just refrigerator magnets, these are more powerful
10 magnets.

11 MR. KELLAR: Mm-hm.

12 JUDGE FREDMAN: So if you're using neodymium magnets or
13 whatever, it's going to attract. But, you know, that doesn't seem like that sort
14 of hardest part seems detaching it while it's moving.

15 MR. KELLAR: So yeah, detaching while it's moving would not be
16 possible just due to the necessity to then grasp and turn element 15 while it's
17 hidden within the space guide. With the connection --

18 JUDGE FREDMAN: Not be possible or be difficult?

19 MR. KELLAR: It would be not possible just the way --

20 JUDGE FREDMAN: It projects outside of the body, correct?

21 MR. KELLAR: Yeah. So --

22 JUDGE FREDMAN: And so if you grab it when it's outside of the
23 body and you twist it and then pull, it should come off, right?

24 MR. KELLAR: Yeah. And I've turned to Slide 38 just as a brief
25 example to explain this. So --

1 JUDGE FREDMAN: In Figure 4, it sticks out. When it's sticking
2 out in Figure 4, if you hold and twist it, why could you not remove it?

3 MR. KELLAR: So in Figure 4 -- so 9 is not fixed to 10, 9
4 reciprocates over 10. So there's no reason to believe that rotating the patten
5 head 7, even if you could grasp it, would actually rotate the flange. As
6 Mabuchi explains, you must turn the flange 15. And again, that's hidden
7 within the -- it's hidden within the space guide. And it's unavailable to be
8 reached. So it's our position that there's no ability to reach into and grasp the
9 patten --

10 JUDGE FREDMAN: Which slide is this again? I'm sorry.

11 MR. KELLAR: I'm on Slide 38, Your Honor.

12 JUDGE FREDMAN: Okay. Thank you.

13 MR. KELLAR: Yeah. And then while I'm on the slide, in
14 Petitioner's Reply, they cited this new embodiment where instead of the
15 spring resilient member, basically the cushion member is extended. And this
16 is Figures 6 and 7 of Mabuchi. The issue there is that unlike the spring
17 embodiment of Figures 3 and 4, the cushion embodiment doesn't extend all
18 the way out.

19 It doesn't give a user even the ability to grasp behind the patten
20 head 6 -- or 8A, rather, to rotate and disconnect the device; or alternatively,
21 to connect it. Because you would -- Figure 7 shows the patten in its
22 fully-extended position, no skin being present. There's simply no room for
23 anybody's fingers.

24 And at his deposition, Dr. Pratt kind of equivocated and said, well,
25 depending on how firm the cushion material was, it might be possible. But

1 it's totally different than what Petitioner relied on before, which is grasping
2 around element 7 in Figure 4 to then remove or connect the patter assembly.

3 So I've just turned to Slide 42 for the Board's reference. So this
4 annotated figure comes from Mr. Morrill's Declaration, and it shows how the
5 particular alignment of the magnets needs to be arranged. And then the text
6 comes from Dr. Pratt's initial Declaration in both matters. So Dr. Pratt
7 agrees that to disconnect to them, you need to rotate them 90 degrees to
8 misalign the magnets. So Dr. Pratt agrees that there's this state of
9 misalignment that can exist and indeed needs to exist for the magnets to be
10 disconnected.

11 So for the same reason that there's this state of misalignment that
12 prevents connection or facilitates disconnection, as there's the same state that
13 prevents connection. So --

14 JUDGE MARSCHALL: Clearly, these can be separated because
15 that's the entire point of the device. We're really talking about how difficult
16 it is to do while it's moving.

17 MR. KELLAR: That's correct, Your Honor, yes. It's designed to
18 be removed. But the Mabuchi --

19 JUDGE MARSCHALL: So clearly, even in that Figure 8, it must
20 be possible, at least if we accept the reference as being truthful, to grab it,
21 twist it, and pull it out. Otherwise, it wouldn't be possible, and it would be
22 inconsistent with the goal of the reference.

23 MR. KELLAR: Yeah. So --

24 JUDGE MARSCHALL: So really, the question is really just how
25 hard is that to do? It's a little bit of, like, does it require someone who's a

1 little more facile or could, you know, it let me do it?

2 MR. KELLAR: So it's Patent Owner's position that the space
3 guide must be removed for this -- the changing of the patter assembly to be
4 facilitated. So the Mabuchi reference itself is silent as to whether or not the
5 space guide could be removed. But if you look at not only the magnetic
6 connection embodiment, if you look at the other embodiments they have,
7 some of them have push buttons that need to be pushed to release different
8 elements. And all of this occurs within the body of the space guide.

9 So it's Patent Owner's position that to change the patter assembly
10 in Mabuchi -- Mabuchi is designed to essentially have the space guide
11 removed. Otherwise, separate from the magnetic embodiment and needing
12 to rotate flange 15, the push button embodiments, there'd be no way to reach
13 that push button and actuate it to disconnect the patter assembly.

14 So in view of those limitations, Petitioner's argument was
15 essentially that well, there'd be some self-alignment that would occur. And
16 again, this does not come from Mabuchi itself, this is coming from
17 Petitioner's expert.

18 But during his first deposition, Dr. Pratt referenced some magnet
19 test that was never disclosed. And he said, well, that's actually what
20 convinced him that his testimony was correct. We followed up at his second
21 deposition and come to find out he never considered the effect of
22 reciprocation on the ability of the patter assembly to self-align.

23 So in view of Mabuchi's silence on this matter and Dr. Pratt having
24 never considered it, Petitioner hasn't carried its burden to prove by a
25 preponderance of the evidence that there's even the ability to -- for the

1 magnets to self-align.

2 JUDGE FREDMAN: Self-align in the claim? I forgot.

3 MR. KELLAR: Self-align? No. So self-align comes from -- that's
4 Petitioner's argument about -- it doesn't require rotational alignment. So this
5 is --

6 JUDGE FREDMAN: How is this relevant to the claim?

7 MR. KELLAR: So Petitioner's plain and ordinary meaning, and
8 it's narrower district court proceeding, both required connection without
9 rotational alignment. So essentially, a user doesn't need to particularly align
10 the patter assembly to connect it to the actuator. And the basis of that
11 argument was the magnets -- Petitioner's argument was that the magnets
12 would self-align when they got close to each other.

13 So the issue for Petitioner was at his deposition, Dr. Pratt conceded
14 that he had never considered self-alignment in the context of reciprocation.
15 And again --

16 JUDGE FREDMAN: Again, when it's moving and you're trying to
17 put it on, and you have to twist it slightly as well to get it seated.

18 MR. KELLAR: Or it would need to be in a particular connection
19 alignment. So Mr. Morrill at his deposition -- and the citations are 150 to
20 153 -- roughly explains that what happens is as the actuator is moving back
21 and forth, if you try to connect to the patter assembly while the actuator is
22 moving, if it's not pre-aligned, there's not time -- sufficient time for the
23 self-alignment to occur. Instead, what happens is there's just a quick
24 impulse of repulsive force that would push the patter assembly out.

25 So essentially, there's no ability for the magnets to self-align. And

1 again, that's all in the context of -- and we've copied on Slide 43 here -- the
2 express claim requirements that this connection needs to occur while the
3 piston reciprocates. And again, that's what Dr. Pratt admitted he hadn't
4 analyzed.

5 JUDGE FINAMORE: So Counsel, Patent Owner makes a couple
6 of different arguments as to why Mabuchi doesn't disclose the quick release
7 connector, and one of them is that Mabuchi fails to disclose a massaging
8 head. To me, that argument boils down to the claim construction. And my
9 question is, does the claim -- does Patent Owner's claim construction for
10 massaging head rise and fall with its construction for percussive massager?
11 They do seem very similar.

12 MR. KELLAR: They are similar, Your Honor. So it doesn't rise
13 and fall with whether the preamble is limiting. So the preamble can inform
14 the scope of the claims whether or not it's limiting. The preamble is a part of
15 the claim, whether it limits the scope or not. So regardless of whether the
16 preamble is found to be limiting, the massaging head is still for a percussive
17 massager, it would be understood by a POSITA to be able to or capable of
18 providing that percussive massage.

19 And again, we're not construing it so much as interpreting it by its
20 plain and ordinary meaning. And the relevance of the massaging head in
21 this case is Mabuchi has a very particular patten assembly that's specifically
22 designed to avoid providing that percussive force or to frankly, to avoid
23 massaging it. Mabuchi itself says, this is different than a massager.

24 And one of the ways it provides this beauty treatment device that's
25 different than the conventional patting devices is the patten assembly shown

1 on Slide 44 here that has a spring to absorb all the force. So essentially,
2 Mabuchi's pater assembly is not a massaging head as recited in the claims.

3 JUDGE FREDMAN: Again, that you're sort of importing, as I
4 think Petitioner is going to argue probably, or has already argued the
5 percussive language into the massage head. Because Mabuchi is massaging
6 softly, gently perhaps on the skin. But they're not doing deep body massage
7 is essentially what you're saying.

8 MR. KELLAR: Mabuchi is not doing it. It's not doing deep body
9 massage, and it's not capable or configured to do deep body massage.

10 JUDGE FREDMAN: Right.

11 MR. KELLAR: It's specifically designed to avoid --

12 JUDGE FREDMAN: But it is a head, it's just not a deep body
13 massage head.

14 MR. KELLAR: Yeah. So it's a head in the sense of it's the part of
15 the device that contacts the user's skin.

16 JUDGE FREDMAN: Right.

17 MR. KELLAR: Yeah. But it's not a massaging head within the
18 scope of the claim.

19 JUDGE FREDMAN: Not a massaging head for you would argue
20 for percussive massage --

21 MR. KELLAR: For a deep --

22 JUDGE FREDMAN: I guess we should -- percussive massage as
23 having an issue, for the deep muscle massage versus shallow massage of the
24 skin alone.

25 MR. KELLAR: That's correct, Your Honor. So --

1 JUDGE FREDMAN: It could be a massage head. I mean, because
2 I think to argue with a massage head is a little bit of an overreach. I think to
3 argue with a deep muscle massage head is what you really want to say.

4 MR. KELLAR: Yeah. Within the scope of a percussive massager.
5 It's not a massaging head, unlike what's claimed, which is a massaging head
6 within the scope and context of a percussive massager.

7 Briefly, I'll move to Grounds 4 and 5 of the '482 PGR. So this is in
8 particular claim 38, 38 as we alluded to earlier does introduce the particular
9 stroke speed or strokes per minute reciprocation rate into the claims. It's a
10 dependent claim.

11 Now, Ground 4 is Mabuchi combined with Harris. All Harris was
12 cited for was for the notion that if you give a motor more current or voltage,
13 it'll spin faster. Mabuchi and Harris are both silent as to speed. So there's no
14 reason looking at Mabuchi and Harris to arrive at two speeds greater than or
15 equal to 600 strokes per minute.

16 And in particular, there's differences within Mabuchi and Harris.
17 Mabuchi is a padder device designed to mimic human patting. Harris is,
18 again, a percussive massager, as we discussed. So in addition to the fact that
19 neither of them describes any reciprocation rate, there's no explanation in the
20 record why one of ordinary skill in the art would want to modify Mabuchi to
21 have the speeds of a percussive massager. Because Mabuchi is not intended
22 to act as a percussive massager or a massager at all. It's intended to act as a
23 patting device.

24 And then again, going back to Petitioner's 2022-era disclosure and
25 the related prosecution history, we see that Petitioner argued at length

1 against the combination of Mabuchi and Fuhr. Fuhr is chiropractic device
2 similar to Colloca for two reasons. One, according to Petitioner, when it
3 was advocating for its own patent, you have to look at the purpose of the
4 device.

5 And here, they say Mabuchi is for treating the face. It's going to
6 have different specifications than a chiropractic device or another
7 reciprocating device, for example. And then in addition to that, Petitioner
8 also comments that Fuhr does not disclose a magnetically-secured
9 attachment member, and again, argues that without this idea of a magnetic
10 connection within Fuhr, one of skill in the art wouldn't take the speed from
11 Fuhr and incorporate it into Mabuchi.

12 So for the same reasons Petitioner argued against combining
13 Mabuchi and Fuhr, Petitioner's argument against combining -- argument for
14 combining Mabuchi and Harris doesn't pass muster. And then getting to
15 Ground 5, all the same arguments to Ground 4 apply. But Pivaroff, in
16 particular, is a 2,000 to 3,600 RPM device. So it markets itself as a very
17 particular high-speed device as overcoming issues in the prior art that didn't
18 reciprocate fast enough.

19 And on Slide 48, here on the right side, we see Pivaroff's
20 disclosure. It says the head is quickly reciprocated back and forth. And this
21 is, again, within 2,000 to 3,600 RPMs to provide the deep muscle tissue
22 within the patient's body the kinetic forms of percussion and concussion
23 vibrations.

24 So again, there's no evidence in the record why a POSITA would
25 look at Pivaroff and say Mabuchi should have the speeds of Pivaroff.

1 Mabuchi expressly says we're not in the business of being a massager.
2 We're a patting device. We're a beauty treatment device. So again, the
3 record isn't -- has no basis for combining this, taking the speeds of Pivaroff
4 and applying them to Mabuchi.

5 In Petitioner's Reply on this point, they just relied on hindsight
6 reconstruction. Petitioner just argued a POSITA seeking higher speeds in
7 Mabuchi would look to Pivaroff's speed. But the issue is there's no basis in
8 the record why a POSITA would seek higher speeds than Mabuchi. There's
9 no evidence that Mabuchi is interested in higher speeds or that Mabuchi is
10 interested or that it would benefit Mabuchi in any way.

11 And then we also argued on the same ground that Mabuchi's
12 complex patten assembly that has this internal spring simply couldn't be
13 reciprocated at 2,000 RPMs. You're talking about a double reciprocating
14 system with the actuator reciprocating. And then you have the cushion
15 member and patten face separately reciprocating.

16 So when you start reciprocating them at 2,000 RPMs, which is the
17 bare minimum that Pivaroff teaches, as Mr. Morrill explained in his report,
18 you're going to get vibration where the spring is going to float, as in the
19 spring can't complete its own cycle before the actuator is coming forward
20 again, and it's going to create sort of a slapping effect against the user's face.
21 So these are just additional reasons why there's no motivation to combine the
22 speeds of Pivaroff into Mabuchi. And then we've already discussed
23 Petitioner's new reliance on this cushion embodiment and how it doesn't -- it
24 contradicts their arguments as to element 34E and how the patten assembly
25 could be assembled.

1 Moving to Slide 52, this is the '482 Patent, Ground 6. First, we're
2 going to focus on Pivaroff's lack of disclosure of a motor at least partially
3 within the housing. So on Slide 52, here on the right side --

4 JUDGE FREDMAN: I think the argument on housing is one that
5 you probably maybe -- I mean, if you're going to argue that a housing of a
6 device looks just like a hairdryer or a drill, that handle part is not part of the
7 housing, that's a hard argument to make.

8 MR. KELLAR: So when you look to the Specification, the
9 housing is separately described from the handles in every embodiment. And
10 we also --

11 JUDGE FREDMAN: This is obviousness, right? We're not in
12 anticipation. So to the extent that it isn't shown exactly the same way, to say
13 that you couldn't have a housing encompassing both of these elements seems
14 a little bit special. So --

15 MR. KELLAR: So as to this element, Petitioner is not advancing
16 obviousness argument. Petitioner has just argued that -- and I'll skip ahead
17 to Slide 53. Petitioner just argues that the handle is the housing. Petitioner
18 hasn't argued for moving the motor.

19 JUDGE FREDMAN: Part of the housing.

20 MR. KELLAR: Is it -- is the well --

21 JUDGE FREDMAN: I mean, part of the housing. Housing is the
22 thing.

23 MR. KELLAR: So again --

24 JUDGE FREDMAN: (INDISCERNIBLE).

25 MR. KELLAR: Okay. So when we look at the '482 Patent and its

1 disclosure, it separately describes the housing as being where the piston and
2 the motor is. And I'll revert back to Slide 52. So we see the motor is in red
3 and then the piston is indicated by 230. So those are both together in the
4 housing. And then we have two handles, 108, green on top, 106, green at
5 the bottom.

6 So what we see that the claim requires is we need a piston in the
7 housing, we need the motor in the housing. So the piston and the motor
8 need to be within the housing. Mabuchi talks about the same elements, talks
9 about having a hollow handle 14, a housing 16, and then a hollow head 44.
10 So Mabuchi's disclosure on the separation between the housing and the
11 handle mirrors the '482 Patent's disclosure on the same point.

12 JUDGE FINAMORE: Counsel, I'm not sure it mirrors because
13 Pivaroff also discloses the body 12 that's made up of the housing top
14 element 16 and the handle 14. So if Petitioner maps the recited housing to
15 Pivaroff's body, which includes both the handle and top element of Pivaroff,
16 then aren't we -- do we have an issue?

17 MR. KELLAR: Yeah. So we would still have an issue because
18 what those mappings would do is essentially would render superfluous the
19 fact that the motor is at least partially in the housing. Essentially, if
20 wherever the motor is located is considered the housing, that limitation
21 would always be met. So there needs to --

22 JUDGE FREDMAN: It's not the motor outside of the housing, it's
23 just none of these places it would be. You could have a motor sticking out.
24 I've seen trucks with motors sticking out of the car, that's not in the housing
25 of the car. But it is -- you know, it's there. You could certainly have it

1 outside the housing. It just not normally how people do things.

2 MR. KELLAR: You could. That's not --

3 JUDGE FREDMAN: So I think that this is an argument -- I would
4 skip this.

5 MR. KELLAR: Okay. Moving on to element 34E. So again,
6 Petitioner incorporates Mabuchi's magnetic connection into Pivaroff
7 wholesale. So all the deficiencies that we discussed with Mabuchi's
8 magnetic connection carry over to the Pivaroff-Mabuchi Grounds.

9 But in addition, there's also no motivation to combine. So Pivaroff
10 teaches - and I'm going fast just in view of my time. Let me know if I need
11 to slow down.

12 JUDGE FREDMAN: One thing I think that's interesting sort of
13 about this slide or the next one on your slide is, again, we have this idea of
14 pulling it off, right? That's a requirement. Pivaroff is going really quite fast,
15 right? Would that be troublesome at all given -- if you combine it with
16 Mabuchi's twisting to do that?

17 MR. KELLAR: So the twisting is incompatible with any of
18 Petitioner's interpretations regardless of speed.

19 JUDGE FREDMAN: Okay. Like, that even matters. Okay.

20 MR. KELLAR: Yeah. But with Pivaroff, we focused our
21 arguments on no motivation to combine and no reasonable likelihood of
22 success in view of what Pivaroff teaches. So first, Pivaroff teaches one very
23 particular head made of titanium filled with a very particular mix of grains.

24 JUDGE FREDMAN: Right.

25 MR. KELLAR: And Pivaroff teaches, if you do want to

1 disassemble the head, what you do is you separate 40 -- you separate 46
2 from 48 via threaded connection. At that point, if you so choose -- Pivaroff
3 has no disclosure on this point. But you could change the material within
4 the head and reattach it. And Mabuchi has the same sort of threaded
5 connection to change the cushion member. There's no reason and no reason
6 set forth in the references why -- or even if the head, beginning at 48, would
7 ever be removed from Pivaroff.

8 And then moving back, this is Petitioner's 2022 disclosure. In
9 2022, which is 10 years after the effective filing date, Petitioner was
10 submitting to the Patent Office that magnetically-connected attachments are
11 inherently at risk for disconnection. So what do you need to do? You need
12 to have a lower amplitude or a lower speed.

13 And not only that, Petitioner relied on those very same disclosures.
14 So this wasn't just mere puffery in a patent application. These were then
15 features that were relied on to advance its own patent before the Patent
16 Office. Where in response to this Mabuchi-Fuhr combination, the Patent
17 -- sorry, the Petitioner explained that there's reason for this speed. The
18 speed is basically limited, so the magnets aren't disconnected.

19 On the other hand, Pivaroff is saying, we don't -- prior devices
20 don't vibrate fast enough, they don't have enough force. So based on
21 Petitioner's understanding, as of 2022, there's no reason to combine Pivaroff
22 and Mabuchi. There'd be no reasonable expectation of success. Because not
23 only is Pivaroff a percussive massage device, it's particularly fast, has a
24 particularly long stroke, and the head is particularly high inertia. The loose
25 granular fill prevent -- provides an increased force, as the head approaches

1 the end of its stroke.

2 And again, getting to the loose granular fill, Patent Owner's expert,
3 Mr. Morrill, explained in detail in his expert report how that adds stress at
4 the most vulnerable part of the connection. So basically, when the device is
5 used away from a patient's body, as the head is slowing, as it's coming to its
6 end of its stroke, the loose material slams against the front of the head and
7 provides that extra inertia.

8 So that provides a benefit to Pivaroff as a percussive massager.
9 But it's directly contrary to what Petitioner was saying in 2022 is you need to
10 be careful with magnetically-connected attachments because they're at risk
11 of disconnection. And then at his deposition, Dr. Pratt conceded that he
12 never -- he didn't conduct any analysis of what this loose granular material is
13 doing within Pivaroff.

14 So this is moving into the '082 PGR just with the time I have left.
15 Ground 3 is Mabuchi in view of Colloca. So percussive massager, we've
16 already discussed. We're going to discuss the distal end of the piston having
17 a bore. And then there's some additional arguments as to the quick-connect
18 system.

19 So here, on the left -- and I'm on Slide 63 -- we see Mabuchi's
20 design, which has the actuator for extending through the flange 15 through
21 the slide tube 10 and into the spring. And as Mr. Morrill explained in his
22 report, there's a reason for that. You want the actuator present over top of
23 where the slide body 9 is going to reciprocate back and forth. By having
24 that extra structure connected to the actuator, you're going to provide
25 support. So there's not an issue of vibration and wear of an unsupported

1 pater assembly reciprocating over top of the slide tube 10.

2 Petitioner has modified Mabuchi on the right, just does away with
3 that altogether without any consideration. It's in its Petition. Petitioner sets
4 forth a simple design choice. It doesn't consider the negative impacts that
5 would come from removing the actuator for -- from within the slide tube 10.
6 So instead, in Petitioner's modified Mabuchi, we see that the spring is
7 entirely left empty, and there's no support coming to support the
8 reciprocating pater body 9 over top of the slide tube.

9 And then on this point -- and this is interesting because in our
10 Preliminary Response, we made a similar argument about the lack of
11 motivation to make this modification. And the Board suggested that it was
12 simply attorney argument. So we supplemented the record with
13 Mr. Morrill's testimony.

14 But in finding Petitioner's 2022 disclosure, we see that they also
15 argued against modifying Mabuchi in the same way. So on Slide 64 here,
16 we see that Petitioner characterized Mabuchi as disclosing an actuator that
17 engages with the spring 11 to cause it to move. And essentially, if you move
18 to the coupler 14 to the end of the actuator, which on the right side --

19 JUDGE FREDMAN: Counsel, do you want to run into --

20 MR. KELLAR: I'm going to run through my notes in just a few
21 minutes. So as we see on the right side, that's exactly what Petitioner has
22 argued in the Petition is they move the distal end of the actuator to where
23 -- to even with the open of -- opening to receive this reversed actuator.

24 But in 2022, when Petitioner was prosecuting its own patent, we
25 see that they argued against making that same -- the same modification.

PGR2024-00053 (Patent 11,857,482 B1)

PGR2025-00013 (Patent 11,938,082 B1)

1 And they said it would render the patter assembly inoperable for its intended
2 purpose. So again, we see a contradiction in the evidentiary record between
3 how Petitioner viewed Mabuchi in 2022 in support of its own patent versus
4 in 2025 when it's going after another patent.

5 And then briefly, as we've discussed, Mabuchi's silent as to
6 connection -- disconnection during reciprocation. Colloca teaches away
7 from any connection or disconnection during reciprocation. Colloca has a
8 safety interlock. And that's one of the inventive features of Colloca, which
9 is you want to be careful to not actually activate a device when it's away
10 from a person's body because there can be certain risks involved.

11 So again, we have Mabuchi's entirely silent on connection during
12 reciprocation. Colloca teaching away from it. So putting those disclosures
13 together, we don't end with a patter assembly that can be changed during
14 reciprocation.

15 And I'll reserve the remainder of my time for surrebuttal.

16 JUDGE FINAMORE: Okay. It looks like you're about a minute
17 and a half over, which will be about 19 and a half minutes.

18 MR. BERG: Okay.

19 MR. KELLAR: And 13 and a half.

20 MR. BERG: Yeah. This is Brad Berg again for Petitioner
21 Therabody. So I'd like to address briefly a few points that Patent Owner
22 made in their arguments. And the first one is, again, on the Rhoades -- the
23 issue of the distinguishing Rhoades in the prosecution history. I don't want
24 to spend much time here because I think the Board gets the -- understands
25 the point here.

1 Rhoades was a very different kind of device than Mabuchi. This
2 was a device that was polishing, that was lighting, that was doing
3 oxygenation on the surface of the skin. Mabuchi is reciprocating. And so
4 right there, we're in a very different category of device. And Rhoades pretty
5 clearly in our view wasn't just -- wasn't used to distinguish the entire
6 category of surface treatments of devices. It was used to distinguish a
7 different type of motion, entirely.

8 Now, I'd also like to talk a little bit about Mabuchi. And there's a
9 few things that --

10 JUDGE FREDMAN: Regarding the magnetic connection, I think
11 that's something we're interested in hearing a little more about in terms of
12 really Pivaroff and Mabuchi. But the question of flying off, as it were, right,
13 can you explain how you prevent it from flying off if you're trying to do it
14 using -- when you have to twist it and all that stuff, whether it'd be enough
15 magnetic force to hold it?

16 MR. BERG: Yeah, absolutely, Your Honor. So I think, first of all,
17 in terms of the risk of it flying off, Mabuchi in column 9, 18 to 23, talks
18 about sizing the magnets and how you'd size the magnets depending on the
19 application.

20 Our expert, Dr. Pratt, also talked about how this is kind of a routine
21 problem that an engineer would face in designing a product. They know
22 how to size magnets appropriately. Obviously, magnets can range from
23 everything from --

24 JUDGE MARSCHALL: Do you know where that is in the -- his
25 Declaration?

1 MR. BERG: Yeah. It's in his Reply Declaration. He talks about
2 the sizing of the magnets, you know.

3 JUDGE MARSCHALL: Okay.

4 MR. BERG: Obviously, magnets can be sized from everything
5 for, you know, a refrigerator magnet that will barely hold my kid's
6 homework on the refrigerator to a magnet that can lift up a car. And so
7 there's -- you know, if you size this magnet appropriately, there's no risk of
8 the device disconnecting and flying off.

9 The other point that I wanted to make on Mabuchi is there was a
10 lot of discussion about this on Slides 41 and 42 of Mabuchi and how there's
11 got to be some alignment of the magnets or misalignment. And I just want
12 to be very clear that Mabuchi, when it talks about the alignment and
13 misalignment, it's specifically talking about the misalignment as a way to
14 disconnect the magnets.

15 Now, obviously, that's not a requirement for disconnecting the
16 magnets. If you grab the two magnets and pull apart with sufficient force,
17 whether you twist them or don't twist them, they're going to come apart. But
18 Mabuchi's teaching, well, this is an easy way that you can disconnect them is
19 you can just twist them. And, since they're radially oriented, by twisting
20 them, they'll just pop apart.

21 Mabuchi only talks about this twisting action in the context of
22 disconnecting the magnets, first of all. Claim 34 of the '482 Patent is
23 specifically talking about securing the two parts. And claim 1 of the -- of
24 claim 18 of the '082 Patent is talking about easy removal and securing.

25 Again, I don't read Mabuchi as requiring a twisting, even for

1 removing the magnets. I think Mabuchi -- a person of skill in the art would
2 read Mabuchi as you apply a sufficient force, just like the '082 Patent talks
3 -- and the '482 Patent talk about, you're going to separate the magnets.
4 When we get to the securing piece of Mabuchi, though, I think Patent
5 Owner's argument just -- as I mentioned my opening, just ignores the
6 disclosure of Mabuchi that clearly says that you can secure these two heads
7 in the Figure 18 and Figure 19 embodiment without any concern for the
8 alignment or for the positioning of the patter and the massager.

9 JUDGE MARSCHALL: Right.

10 MR. BERG: And so to me, when -- we're in claim 34 and talking
11 about securing Mabuchi, there's very clear disclosure on this. And even
12 when we're talking about removal, there doesn't need to be any twisting.
13 And so when we're looking at Figure 4 with the massage head extending out
14 beyond the patter assembly, could a user grab it and twist it to disconnect it?
15 Yeah. I think they could do that.

16 But would they need to do that disconnect it? No. They could just
17 grab it. And, you know, since the thing is reciprocating, it's going to kind of
18 provide sufficient force that those things are going to pop apart. And I think
19 that's true in the Pivaroff context as well, which, you know, depending on if
20 we're talking about Pivaroff as a primary reference or secondary reference,
21 may or may not have that space guide issue but where Pivaroff's a primary
22 reference.

23 Again, you size the magnets correctly, you can grab them, you can
24 separate them. And certainly, it's an engineering optimization problem to
25 size those magnets appropriately so that it doesn't fly off when the device is

1 reciprocating. But at the same time, you know, you can separate them
2 without undue effort.

3 Does that answer your question, Your Honor?

4 JUDGE MARSCHALL: I think so. And the declarant does say
5 that. I want to understand your position on Mabuchi and Figure 4. Figure 4
6 shows just a moment in time where that's the previous extent of the patter
7 extended beyond the space connector, correct?

8 MR. BERG: That's true.

9 JUDGE MARSCHALL: So that's moving at hundreds or
10 thousands of RPMs in operation when it's reciprocating, correct?

11 MR. BERG: So I think the claim is -- you know, claim 34 silent to
12 exactly how fast it's going. Some dependent claims specify how fast it's
13 going in.

14 JUDGE MARSCHALL: Right. And that doesn't matter. I'm
15 trying to understand because one of the figures is showing the extent of the
16 patter inside the space guide. So it's kind of moving in and out rapidly,
17 correct? So your swappability theory is based on the idea of a user grabbing
18 it as it's momentarily extending down the space guide and pulling it off
19 before it quickly retracts within the space guide, correct?

20 MR. BERG: Yes. That's correct, Your Honor.

21 JUDGE MARSCHALL: So you got to have some pretty quick
22 hands to do that --

23 MR. BERG: Or be willing to grab it, as -- I guess when I've
24 grabbed these massage heads that are reciprocating, it buzzes against your
25 finger a little bit and then you can kind of grab it. So it's not like you need

1 to, I guess, time it perfectly to snatch it at exactly when it's out.

2 JUDGE MARSCHALL: And it's your position that that structure
3 would meet the limitation whether it's ordinary meaning or whether it's
4 specially designed to do so, correct?

5 MR. BERG: Yes, Your Honor.

6 JUDGE MARSCHALL: Okay.

7 MR. BERG: Now, we talked a little bit about -- and we're talking
8 now about, you know, removing the space guide and what that would look
9 like. And Patent Owner has talked about what would happen if you remove
10 the space guide, that it'd be more -- and also, I think Patent Owner
11 mentioned, if someone tried to get a massage using Mabuchi on their back,
12 for example, they might come away disappointed.

13 Clearly, the space guide is designed to be removed. And Mabuchi
14 may say, you know, it's dangerous to remove the space guide. It doesn't
15 mean that a user couldn't very easily remove the space guide and use that
16 massager in any way they would want to.

17 JUDGE MARSCHALL: They could use a (INDISCERNIBLE),
18 but that's probably --

19 MR. BERG: They could, yes. But I do think that it dovetails with
20 Mabuchi's other disclosures in column 1, 46 to 50 and 9, 18 to 23 that talk
21 about Mabuchi being used for other applications. And so I don't think that
22 Mabuchi is saying, hey, you can't use our device as a massager.

23 I think Mabuchi is saying, you can use different heads, you can use
24 different things, you can modify this to achieve other therapeutic benefits.
25 And in fact, you know -- and we'll get to the Therabody prosecution history

1 in a minute. But when you read that prosecution history, I mean, certainly,
2 Mabuchi was used offensively against Therabody in multiple contexts where
3 it was talking about something beyond what -- just the soft patting that
4 Patent Owner is talking about here.

5 Now, one of the things that Patent Owner raised was whether or
6 not Dr. Pratt had an opinion as to whether this could be secured while it was
7 reciprocating. And again, to get back to your question, Judge Marschall, I
8 do want to make very clear that in claim 34, even though we're talking about
9 removing and reattaching the massage heads, and Mabuchi specifically says
10 this is easily accomplished to switch the massage heads, it is important to
11 keep in mind for claim 34 that we're only talking about securing the massage
12 head.

13 So we could be in a world where we don't have to remove the
14 massage head. The device is operating like Mabuchi says, can operate
15 without a massage head. And for claim 34, we just got to put a massage
16 head in there. We don't even need to worry about its removal. So I just
17 want to make that point clear.

18 And Dr. Pratt absolutely testified in his opening Declaration, you
19 know, paragraphs 109 to 111 in the '482 Declaration, that Mabuchi's head
20 was designed to be attached while the device was reciprocating. And so I
21 just want to -- there was a comment that there was some deposition
22 testimony on the contrary. I just want to make clear that Dr. Pratt did testify
23 to that in his Declaration.

24 And it's also important to look at the '482 Patent and what the '482
25 Patent is talking about in terms of what is required for connecting and

1 disconnecting while the piston is reciprocating. And, you know, the prior art
2 is presumed to be enabled. And Mabuchi is talking about the ease of
3 switching these things in and out.

4 And so there's a lot of arguments about the space guide and
5 whether or not you could remove it or have to remove it in the context of
6 Figure 19. And to me, all of that is, you know, requiring significantly more
7 of the prior art than what is actually disclosed in the patent itself when it
8 gives a written description for these elements.

9 Now, I do want to talk a little bit about the Mabuchi-Harris Ground
10 and claim 38. Because in Ground 4 -- and this is Slide -- let's see which
11 Slide is this in the Petitioner -- oh, there it is, 46. This is Slide 46 of --

12 JUDGE MARSCHALL: I think the Petitioner wouldn't object if
13 we adopted the construction that Petitioner proposed in the district court,
14 especially the "designed to" construction, correct?

15 MR. BERG: No. We wouldn't object to that. And we think that
16 our Petition is on all fours with that construction. So this is Slide 46 of
17 Patent Owner's demonstratives and it's talking about claim 38 and the
18 combination of Harris and Mabuchi. And as Patent Owner referenced,
19 Harris is brought in for this idea of a control panel that allows you to select
20 multiple speeds.

21 And in our view, once you have the multiple speeds, now it's just
22 an optimization problem of figuring out what speeds are appropriate for the
23 therapeutic benefits that you're trying to do. And that's something that's well
24 within the purview of a person of skill in the art. And in our view, the case
25 law supports that, you know, a person of skill in the art can do that kind of

1 optimization to find the right range here.

2 But even if you -- even setting aside the Harris Ground, certainly,
3 Pivaroff discloses specific speeds at these -- you know, within the claimed
4 ranges and discloses specific benefits for having those speeds.

5 JUDGE FINAMORE: Counsel, just making sure I'm tracking,
6 because you just said optimization. But I'm looking at your Petition that
7 says design choice. Where does this notion of optimization come from in
8 the record?

9 MR. BERG: I mean, I think that the optimization is in the design
10 choice in the sense that depending on the therapeutic benefit that a person of
11 skill in the art was looking for, for designing this device, this
12 Mabuchi-Harris device, different stroke speeds would be a design choice for
13 different therapeutic goals. And so I think it collapses into the same idea
14 that a design choice is an optimization depending on what you're designing
15 for -- what use you're designing for in particular.

16 JUDGE FINAMORE: Did Dr. Pratt opine on that or just -- I think
17 you might be spelling it out a little bit more clearly than what I'm looking at
18 the record. So I'm just wondering if you are pointing to a particular part of
19 the record.

20 MR. BERG: Yeah. I think you're right that in the record, Dr. Pratt
21 talks about design choice. I guess I'm trying to respond to your question.
22 But I don't think that -- I think it's fair to say that Dr. Pratt just talked about
23 design choice in the -- in his Declaration.

24 So now, I do want to spend a little bit of time on the Therabody
25 prosecution history that Patent Owner raises in its reply in kind of a limited

1 way and then expounds on in certain ways in the Sur-reply. Because I think
2 there's some important things here. The first thing that I want to point out is
3 this patent covers the, TheraFace PRO, which is a device that, as we've
4 mentioned in the record, is accused of infringement here and the -- is
5 accused particular of being a percussive massager.

6 Turning to Slide 36 of Patent Owner's demonstratives, I'd like to
7 say a few things about this. And so this is where, you know -- and Patent
8 Owner uses this prosecution history for a few different points, but one of
9 them is whether or not Mabuchi is a percussive massager.

10 And the argument the Patent Owner is making is really an
11 apples-to-oranges comparison. Fuhr, which the examiner combined with
12 Mabuchi, was directed to a chiropractic device for adjusting musculoskeletal
13 structures. Obviously, this is a device that's significantly different than
14 Harris, which like Mabuchi, is a massager, significantly different than
15 Pivaroff, which is another reciprocating device.

16 None of these are devices that are used for musculoskeletal
17 adjustments. So right from the start, we're in a very separate world when
18 we're talking about Mabuchi combined with Fuhr and Mabuchi combined
19 with Harris or Pivaroff.

20 Moreover, the limitation at issue there was directly related to the
21 speed of the massage head, which is where a difference like that between a
22 chiropractic tool and a massager might be. And here, Patent Owner hasn't
23 made any argument as to a nexus between the linear velocity of Fuhr and the
24 reciprocation claimed in the '482 Patent.

25 Now, the other point that I'd like to make on this is, you know, if

1 you look at -- I can just pull up Patent Owner's Exhibit 2014 -- oops, instead
2 of pulling it up, I closed it. So let me open that really quickly. I think it's
3 useful to look at the history of this argument and what happened in
4 prosecution. So during prosecution, Therabody, who was the, you know,
5 applicant, made several arguments about Mabuchi and whether it could be
6 combined with Fuhr and what kind of device it was.

7 If we go to the response from the examiner -- and this is on -- let's
8 see here, this is on Exhibit 2014, 1661. And I guess 1660 is where, you
9 know, the examiner indicates it's responding. This is in paragraph 16,
10 applicant's arguments have been fully considered but are not persuasive.

11 It goes on in 21 and says, regarding the argument that a person of
12 skill in the art would not have been motivated to combine the velocity
13 disclosed in Fuhr with a device of Mabuchi -- because Fuhr is a chiropractic
14 device for adjusting musculoskeletal structures and Mabuchi is a beauty
15 device for patting the skin. This argument is not persuasive. Mabuchi is a
16 reciprocating device configured to pat skin and stimulate subcutaneous
17 muscular tissues. Thus, Mabuchi contemplates using the reciprocating
18 device for being used for different body parts or portions and for different
19 treatment purposes.

20 Furthermore, as modified by Mabuchi '128, the motor is freely
21 adjustable by a velocity selecting knob. Fuhr demonstrates that at least a
22 portion of this claimed velocity range would provide the expected benefits of
23 being suitable for chiropractic purposes, and therefore the freely adjustable
24 velocity setting knob of Mabuchi/Mabuchi '128, was modified to include
25 velocity settings that would cover at least the claimed range as taught by

1 Fuhr because these velocities are shown to be suitable in the prior art
2 reciprocating devices and different speed settings.

3 And so what we have is Petitioner did characterize Mabuchi and
4 make certain arguments to the examiner about Mabuchi. But far from taking
5 inconsistent positions here, Petitioner was told that those arguments weren't
6 successful about Mabuchi by the examiner and has recalibrated its
7 description of Mabuchi to be consistent with what the examiner found in that
8 Therabody prosecution. And so to me, there's -- you know, it's important to
9 see, in that context of what the examiner did with the information, the
10 argument that Patent Owner has presented.

11 Now, going back to Patent Owner's demonstratives, there's a
12 couple of other points on this. So this gets to the same point -- and this is
13 Slide 47 -- because this is about modifying Mabuchi's speed in view of a
14 different reciprocating device that lacks magnetic connectors. And again --

15 JUDGE FREDMAN: You're down to one minute, you know.

16 MR. BERG: Oh, thank you. This is an argument that was rejected
17 by the examiner and is an apples-to-oranges comparison. And like we talked
18 about, it's easily dealt with by a person who has skill in the art by
19 appropriately sizing the magnets.

20 The last point that I want to make is on the -- Patent Owner talked
21 about the moving of the distal end and equated that to the adjustment we
22 talked about for the '082 of where you have those magnets. Again, this was
23 an unsuccessful argument. And what Therabody was arguing is that you
24 can't move the part of Mabuchi to the very end of the actuator because that
25 wouldn't provide stability.

1 But that's not what we're doing here. We're switching where the
2 male and female ends are. So there's still an insertion part that would be
3 missing from that actuator and still provides that stability, which is what
4 Dr. Pratt testified to.

5 Interestingly, in the Therabody prosecution, the way that the
6 claims were ultimately allowed was by amending the claim to talk about that
7 connector being on the distal most end of the actuator. And then the
8 examiner allowed the claims. But that was what was required, not any of
9 these arguments about speed or combination or percussion.

10 So with that, I'll -- unless the Board has any questions, I'll --

11 JUDGE FREDMAN: Thank you very much.

12 MR. KELLAR: We need to figure out how to share the right
13 screen.

14 JUDGE FINAMORE: There we go. Maybe. I'm ready.

15 MR. KELLAR: All right. Thank you. So briefly touching on
16 Petitioner's remarks, I'll sort of work backwards here. This is Exhibit 2014.
17 So touching first on the Colloca-related modification we see here at
18 paragraph 19 on page 1661. The examiner didn't take a position as to
19 whether Petitioner was right or wrong. Instead, he just -- the examiner said
20 this argument is not persuasive because such a modification was not relied
21 upon in the 103 rejection.

22 So as to the movement of the actuator and the removal of the
23 actuator from the spring, the examiner never disputed that that is not taught.
24 And the examiner just, you know, was basically saying he had made a
25 separate argument that Petitioner had misapprehended.

1 And then turning to the -- this is page 1662 of Exhibit 2014.

2 Turning to the combination of Mabuchi and Fuhr, the examiner's -- or, you
3 know, the examiner's analysis was quite a bit more nuanced again than what
4 we heard. Mabuchi had been modified by a separate Mabuchi reference. So
5 there's a separate Mabuchi reference '128 that was at issue there, and the
6 '128 reference teaches the speed being freely adjustable. Mabuchi '128 is
7 not in evidence. It's not cited in any of the grounds.

8 And then anyway, the examiner concluded by saying that it was
9 actually just a matter of overlapping ranges. So Fuhr just had an
10 overlapping range with what's claimed. So obviousness was sufficient in the
11 grounds or in the scope of the claim when Fuhr taught at least some overlap.
12 Unless there's any questions, that'll conclude my walk through the
13 prosecution history.

14 And then briefly, I want to touch on Ground 1A, this is the
15 112A Ground about the pocket and the first massaging head receiving the
16 quick release connector. So we see from the figures and the Specification
17 that the pocket 622 receives the magnet 624. Both experts have opined that
18 quick release connectors are two-part connectors, they are male and female.
19 So in the case of magnetic connectors, you have either two magnets, or you
20 have a magnet and a magnetic material or magnetic member.

21 So in this case, we have one half or one part of the magnets
22 received in the pocket. The other half of the quick release connector magnet
23 is in the piston. When they're combined, we see that the quick release
24 connector exists at the distal end of the piston. So Patent Owner's position is
25 that there's express support in the figures and in the Specification for this

1 limitation.

2 And then briefly, getting to Petitioner's arguments about Mabuchi
3 and the sizing of the magnets. So as best understood, Mabuchi discloses
4 teaching different magnets but magnets within the massage head itself. And
5 again, I'm going to do my best to share Mabuchi. So looking at the bottom
6 of column 8 and again, this is what I remember or recall Petitioner's citing,
7 this talks about Figures 22A through 22C show a patten assembly. And it
8 says that a magnet is mounted in place of the cushion member 8. So I'll
9 scroll up briefly and we'll take a look at this.

10 So what we're seeing here is there's this magnet that's within the
11 patten assembly. Mabuchi says that there's some beauty cosmetic benefit to
12 having a magnet there. I believe Mabuchi says it interacts with the iron and
13 the blood or something and has some face-lifting effect. So the sizing of the
14 magnets is not in relation to sizing of the connector connecting magnets, if
15 I'm understanding Petitioner's argument correctly. It's in relation to this
16 magnet within the massage head itself.

17 JUDGE FREDMAN: Right. I mean, there is the declarant does in
18 his Reply Declaration say that an engineer could figure this out, that they do
19 have that statement.

20 MR. KELLAR: So again, that -- so the Petitioner -- you know, we
21 need to look at the time -- the effective date of 2013. So again, then we see
22 in 2022, Petitioner took the different position because -- its 2022 position
23 wasn't that it's a matter of simple sizing. They relied on the limitations of
24 magnetic connectors as, you know, being a patentable feature and instead,
25 you reduce the stroke length or reduce the velocity.

1 And again, there's limitations on the size of the magnet.

2 JUDGE FREDMAN: What different types of magnets are there?

3 MR. KELLAR: But none of this comes from the art itself. And
4 again, with Mabuchi and with Pivaroff, they're both -- they feature
5 particularly complex heads that would be very weighty for high-speed
6 securing retention of the head as it reciprocates. Petitioner briefly
7 mentioned the TheraFace PRO. So that is one of the accused products in the
8 underlying litigation. The TheraFace PRO -- I don't have the exhibit pulled
9 up.

10 We included a screenshot of how that's marketed. It's marketed as
11 a percussive therapy device, and it's a reciprocating device. So to the extent
12 Petitioner argues that it's not a percussive massager, that's something that'll
13 have to be hashed --

14 JUDGE FREDMAN: It's a head that can be removed pretty easily,
15 I suppose.

16 MR. KELLAR: I'm not familiar with that. But to the extent
17 whether or not it's a percussive massager is something I imagine the parties
18 will dispute at the district court. And then again, the -- there's the theme
19 about the ability to essentially misuse Mabuchi. We could remove the space
20 guide. Mabuchi teaches against that. And I know it's a single reference 103.
21 But if you're looking at --

22 JUDGE FREDMAN: And then --

23 MR. KELLAR: Sorry.

24 JUDGE FREDMAN: It does seem problematic, yes. And they
25 can --

1 MR. KELLAR: Mabuchi teaches the concerns about not using
2 -- because as you can get a sense from reading Mabuchi, the invention of
3 Mabuchi is actually including a space guide. So essentially, if you take the
4 space guide away, you're removing what Mabuchi claims to be the inventive
5 feature. So even though it's a 103 reference, there's still a modification that's
6 being proposed that's contrary to the express disclosure of Mabuchi.

7 I briefly want to touch on the Pivaroff and Clark combination. So
8 this wasn't addressed in Petitioner's opening. But understanding that
9 Petitioner is not waving any of its grounds, I just want to close the loop on
10 Ground 5 of the '082 Patent.

11 So Petitioner proposes incorporating the magnet from a
12 screwdriver, a magnetic retention mechanism from Clark, which is a
13 screwdriver, into Pivaroff's design. In the Decision on Institution, the Board
14 agreed with Patent Owner that a screwdriver is not analogous to the '082
15 Patent. But when we dug into this in more detail, we realized a much
16 simpler reason why this wouldn't work.

17 So Pivaroff's head is titanium. Titanium is nonmagnetic. So
18 there's no reason to -- and no reasonable expectation of success in
19 incorporating a magnetic retention mechanism into Pivaroff because it's
20 going to have no effect on the titanium head. The titanium head will -- it'll
21 be like it's not being held by anything at all or --

22 JUDGE FINAMORE: Counsel, doesn't that beg the question if a
23 person of ordinary skill in the art was interested in a quick release and a
24 quick release is a magnetic coupling, wouldn't a person, understanding what
25 the level of ordinary skill in the art is here, just know to make the head a

1 magnetic metal instead of titanium?

2 MR. KELLAR: So there's two steps to that analysis, and I don't
3 think the record supports either of them. In this ground, Clark is, again,
4 low-speed rotational movement. So even if Pivaroff was -- did disclose a
5 magnetic head, something other than titanium, for example, there's still no
6 evidence that one of skill in the art would look at a rotational device like
7 Clark and apply it to a reciprocating device. I mean, I think we've heard a
8 lot today about how reciprocating and rotational devices are to be considered
9 very separate than -- rather than similar.

10 So even if a POSITA was to make this two-step analysis of really
11 wanting to use a magnet, you know, potentially, they could choose a
12 magnetic material. Again, that's not supported by the record. And again,
13 our argument is it still wouldn't be sufficient. Again, you get back to
14 Pivaroff having this very high speed, high impact, high inertia head that's
15 just not going to be suitable for a magnetic connection that comes from a
16 screwdriver.

17 And just to be clear, we're not waiving the non-analogous
18 arguments. We still maintain those. And in particular, the Petitioner's Reply
19 attempted to kind of use some fancier language and reference the secure
20 retention under dynamic loading as being the sort of glue that brings the
21 Clark reference into the realm of the '082 Patent.

22 But at Dr. Pratt's second deposition, he was clear that secure
23 dynamic under -- secure retention under dynamic loading is actually just
24 rotational movement. So they've just replaced rotational movement with
25 secure retention under dynamic loading. But it's the same thing. There's the

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1 same issue that results from you having a low-speed reciprocal device being
2 combined with a high-speed -- or sorry, low-speed rotational device being
3 combined with a high-speed reciprocal device.

4 JUDGE MARSCHALL: I wonder if one of ordinary skill in the art
5 is just able figure out how strong to make the magnet so it worked?

6 MR. KELLAR: So there's two issues with that. One is there's
7 limitations on how strong magnets can be, and there's limitations on how
8 large a magnet can be. So you're often limited in these consumer devices to
9 the overall size. So whether or not you could get a magnet that's stronger
10 -- often, stronger magnets, after a certain point, you get to -- if you get to
11 like neodymium magnets, you need to make them larger.

12 And then you're scaling up the design. And then things get heavier
13 as they get larger. So it's not necessarily true that a POSITA would
14 necessarily just say, make it bigger, make it stronger. There's limitations as
15 to what can be reasonably incorporated into these consumer devices.

16 And unless the Board has any other questions, I'll rest.

17 JUDGE FREDMAN: Well, thank you.

18 JUDGE FINAMORE: Thank you.

19 MR. KELLAR: Thank you.

20 JUDGE FINAMORE: I thank both parties for their presentations
21 today. This hearing is adjourned.

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

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