

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 13-10277-WGY

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BOSE CORPORATION,

Plaintiff,

v.

SDI TECHNOLOGIES, INC.,

Defendant.

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MARKMAN HEARING

BEFORE: The Honorable William G. Young,
District Judge

APPEARANCES:

FISH & RICHARDSON, P.C. (By Mark J. Hebert,
Esq. and Jolynn M. Lussier, Esq.), One Marina Park
Drive, Boston, Massachusetts 02110
- and -

FISH & RICHARDSON, P.C. (By Noah C.
Graubart, Esq.), 1180 Peachtree Street, NE, 21st
Floor, Atlanta, Georgia 30309, on behalf of the
Plaintiff

FOLEY & LARDNER, LLP (By Matthew B. Lowrie,
Esq. and Aaron W. Moore, Esq.), 111 Huntington
Avenue, Boston, Massachusetts 02199, on behalf of
the Defendant

1 Courthouse Way
Boston, Massachusetts

January 15, 2014

1 **THE CLERK:** All rise. The United States District
2 Court is now in session, you may be seated.

3 Now hearing Civil Matter 13-10277, Bose Corporation
4 v. SDI Technologies.

5 **THE COURT:** Good morning. Would counsel identify
6 themselves.

7 **MR. HEBERT:** Good morning, your Honor. Mark Hebert
8 of Fish & Richardson for the plaintiff, Bose.

9 **MS. LUSSIER:** Good morning. Jolynn Lussier also
10 for Bose. And with me here at the table is Noah Graubart
11 from our Atlanta office, and next to him is Maureen Brenner
12 who is an in-house lawyer at Bose Corporation.

13 **MR. LOWRIE:** Matt Lowrie of Foley & Lardner on
14 behalf of the defendant, SDI. With me at counsel table is
15 my partner, Aaron Moore. Also in the courtroom is Marcos
16 Zalta who's the general counsel of SDI.

17 **THE COURT:** Fine. You are all welcome.

18 SDI's filed a motion to stay this matter which
19 seems to me to have some merit. And at a minimum, and I
20 know that Bose hasn't really had a chance to respond, but at
21 a minimum I need some discussion about that, and we'll start
22 by asking SDI some questions here.

23 So, when do we have to get the final answer from
24 the Patent Trademark Appeal Board here?

25 **MR. LOWRIE:** December, your Honor.

1 **THE COURT:** Date? The 3rd?

2 **MR. MOORE:** It would be one -- I'm sorry, your
3 Honor. A year from institution. So they were instituted
4 December 11th and December 13th of last year. The year
5 should be completed December 11th or 13th of this year.

6 **THE COURT:** All right, fine. Unless the director
7 gives them more time?

8 **MR. MOORE:** Correct.

9 **THE COURT:** Okay.

10 **MR. LOWRIE:** Which hasn't happened yet, your Honor.
11 But, I mean, the director has to request it, has to show
12 cause.

13 **THE COURT:** I know. Has it happened in any case,
14 ever?

15 **MR. LOWRIE:** Not yet, your Honor. Although it's a
16 new proceeding.

17 **THE COURT:** I understand it is. Are you willing to
18 put the income from the sales of these allegedly infringing
19 products in escrow?

20 **MR. LOWRIE:** My client is here and I would like to
21 consult. But I would say that, not the revenue because that
22 wouldn't be reflective of the damages, but certainly -- so,
23 Bose in an earlier case had said a reasonable royalty would
24 be actually the same as what Apple charges as a royalty.
25 But that was their argument. I think it's too much. And

1 that was around three dollars a unit. And I think SDI would
2 be willing to escrow --

3 **THE COURT:** Not revenue but profits. All profits.
4 Willing to do that?

5 **MR. LOWRIE:** Profits would be a different number.
6 May I have just one moment, please, your Honor?

7 **THE COURT:** Well, I've got other things.

8 **MR. LOWRIE:** Yes.

9 **THE COURT:** Yes, we'll give you the moment, in a
10 moment.

11 So, all this board does, though they have the final
12 word, is they decide validity. If they rule the patent's
13 invalid, I'm bound by that, the courts are bound by it. If
14 they rule the patent's valid you're stuck with that.
15 Correct?

16 **MR. LOWRIE:** That is correct for the arguments that
17 were submitted or could have been submitted to the Patent
18 Office.

19 **THE COURT:** What, you think you're going to come
20 back here after all of that and say this patent's invalid?

21 **MR. LOWRIE:** That's not something that I expect
22 your Honor would be appreciative of unless there was really
23 something that is --

24 **THE COURT:** It's not appreciative. If I'm going to
25 stay anything you're going to waive that. So that's another

1 thing. So validity's off the table if I stay things.

2 Let's see. What about infringement. They have
3 nothing to say about infringement.

4 **MR. LOWRIE:** That is correct, your Honor.

5 **THE COURT:** Suppose the patent is valid and they
6 say it's valid. Do you agree on infringement? Because then
7 I could just figure out the damages and we'll be done with
8 it.

9 **MR. LOWRIE:** No, your Honor, we do have
10 noninfringement defenses, some or all of which depend on
11 your Honor's claim construction.

12 **THE COURT:** I understand.

13 Okay. Now, before I give you that minute, because
14 I'm going to give you the minute, I know I'm going off on a
15 different, well, I'm not sure I'm going off at all, on a
16 different tack here. But if they take all the profits and
17 put them in escrow, how are you hurt here? And you know I
18 will be chomping at the bit. If you win this case will go
19 to trial no later than March of next year. So that's three
20 months to work out all this business about infringement.
21 The patent technology is not strikingly different than
22 something we've heard before. So I don't really think that
23 Bose is hurt.

24 And to be utterly transparent, it seems to me that
25 since you've sunk your costs in having this hearing, we

1 ought to have this hearing anyway and then I will stay, or
2 administratively close, if they'll agree to these terms. So
3 if I do that and we haven't lost any attorney time and
4 money. My constructions will just, well, we'll have the
5 hearing, we'll see if I make constructions, and then they'll
6 just be there and we'll see where we are.

7 But before I ask you, now I did think of one other
8 thing. Since you really like this patent administrative
9 agency proceeding, you'll agree to the tentative
10 constructions they've made, won't you?

11 **MR. LOWRIE:** Not for purposes of the court case,
12 your Honor. It's a different standard. It's a different
13 standard.

14 **THE COURT:** Oh, I understand. I understand. But
15 you see that's what's so bizarre here. And I mean no
16 disrespect. Because it is arguably a different standard,
17 and I don't say you're judicially estopped, you're clawing
18 your way into the administrative agency. It's forum
19 shopping. You think you have a better shot there than you
20 have before this Court and an American jury. The act gives
21 you that shot and I must respect it and of course I will.
22 But if we're talking about costs to litigants, you want to
23 have argument that it's a different standard and have me
24 consider things afresh and the like. Well, I hear you. And
25 maybe -- I will hear you because I'm not going to waste our

1 time this morning.

2 But now, now Bose. Why don't I just, if I give you
3 the hearing this morning and we can argue these differences
4 and sort it all out so you know, to the extent you can know,
5 to the extent I can get my mind around these things, what my
6 constructions are, why don't we stay this, well, I would
7 administratively close it, until the 13th of December. It's
8 automatically reopened at that point because if the patent's
9 invalid then I will dismiss it, if the patent's valid it
10 will be on the March running trial list.

11 **MS. LUSSIER:** Your Honor, as a practical matter,
12 the principal counsel for Bose is not here today. We've not
13 conferred with them. I would like the opportunity to
14 discuss that with the decision maker and we would get back
15 to you immediately.

16 **THE COURT:** Yes, that's fine. He's available by
17 phone, I'm sure.

18 **MS. LUSSIER:** He's --

19 **MR. HEBERT:** He's out of the country.

20 **MS. LUSSIER:** He's out of the country actually.

21 **THE COURT:** He's beyond the reach of cell phones.

22 **MR. HEBERT:** Well --

23 **MS. LUSSIER:** I don't believe so but --

24 **MR. HEBERT:** He's, he's in China so there's a
25 time --

1 **MS. LUSSIER:** A twelve hour difference.

2 But one of the things that's important to
3 understand is that the Patent Trial and Appeal Board has
4 instituted Inter Parties Review on certain of the claims
5 that have been asserted in this case, not all of them, at
6 this time.

7 **THE COURT:** Right. I understand. I do understand.

8 **MS. LUSSIER:** So -- right.

9 **THE COURT:** But, again, all I'm trying to be is
10 practical.

11 So, here's what we're, here's what we're going to
12 do. I'll give you a day to talk to them and SDI a day to
13 talk to their people. But I haven't heard that you're hurt
14 if they will make these representations -- I'm not going to
15 insist that they agree with the PTAB's construction, and I
16 do intend to hear that. But if they'll agree to these other
17 terms, they will escrow the profits, not some royalty,
18 they'll escrow the entire profits, and they'll -- I'm not
19 going to extend this if the director takes it into his or
20 her mind to extend it. The case becomes activated the 13th
21 of December, 2014. It's on the March running trial list.
22 We can sort out infringement at that time, and I'll do the
23 construction now to save everyone money.

24 I don't hear you tell me you're hurt.

25 **MR. HEBERT:** There's, there's two, two additional

1 points I would like to make, your Honor.

2 **THE COURT:** Go ahead.

3 **MR. HEBERT:** First is regarding the schedule, it's
4 a little uncertain at this time because what SDI has done is
5 they've filed some brand-new Inter Party Requests. These
6 are requests that they could have filed seven months ago.

7 **THE COURT:** No, I'm --

8 **MR. HEBERT:** And there's a --

9 **THE COURT:** I'm, I'm not going for that. You see,
10 they want something. I'm trying to put appropriate limits
11 on what they want if they get where they say they want to
12 go. But I'm transparent. I'm indicating that I'm likely to
13 go there. And their additional ones, you know, if you're
14 still standing or still standing on some sort of infringed
15 thing that hasn't been taken care of by the board you're
16 going to get your trial. You're going to get your trial in
17 March. But I am trying to avoid a system now that has us
18 doing things twice.

19 **MR. HEBERT:** Yes, I understand.

20 **THE COURT:** The easy way and the way -- I was
21 talking to a professor about this. The easy way, of course,
22 now that we've got this, is for courts to say, oh, that's
23 it, go and do the agency process. Oh, look how efficient it
24 is, it's 18 months, and I don't have to deal with it.

25 The other side of that, which I don't think we're

1 weighing enough, is that the patent keeps running all that
2 time and arguably, because they're not saying they're not
3 going to sell off this stock of what they have, arguably
4 infringement goes on during this time. Now, 18 months isn't
5 bad in terms of a dispute resolution time period for a
6 patent dispute. I can try to match that, but I don't think
7 I can beat it. And I don't know people, I don't know a
8 court session that's faster. That's my balance.

9 **MR. HEBERT:** And just to finish in terms of the
10 schedule, we have a call tomorrow afternoon with the PTAB to
11 discuss the schedule and motions and various events in the
12 case. And what's likely to come up will be this new request
13 that they put in and the potential impact it will have on
14 the schedule.

15 So they say it will be completed in December. I
16 have my doubts about that. If we can hold to December no
17 matter what's going on in the PTAB that would be one thing.

18 **THE COURT:** That's what I'm talking about.

19 **MR. HEBERT:** Okay. But we wouldn't want it to
20 extend --

21 **THE COURT:** No, no. When I'm asking you are you
22 going to be injured, I contemplate administratively closing
23 this case until the 13th of December, 2014, and having the
24 parties then report to me on the next date, the 14th, the
25 status, and setting the case on a running trial list for

1 March 2015. That's as far as I'm going. If inefficiencies
2 are built into that then the parties are going to have to
3 bear the costs of those inefficiencies.

4 Now, it's clear that while I -- we're not
5 interested in whether I respect this process, it's matter of
6 law and I follow it. But the truth is I do respect it. And
7 I have no problem conforming the independent work of this
8 Court to the administrative agency that congress has
9 designated to make these determinations. What I do have a
10 problem with is making patent litigation even slower and
11 more expensive than it is today. And contrary to a number
12 of my colleagues, I don't think the way to do that is simply
13 for the courts to sit on their hands until some
14 administrative agency gets done doing whatever it does. So
15 in that sense you have a very sympathetic judge. But their,
16 their brief grabbed me and I'm trying to be practical.

17 Now, they may not go for this. They're listening,
18 too, to the limitations I have. They may have their own
19 strategic maneuvers and good luck to them. But I don't hear
20 any genuine prejudice, if they would agree. And we're going
21 to know whether they agree before they leave here because
22 they have the decision maker.

23 So --

24 **MR. HEBERT:** The one issue of harm that I would
25 like to raise --

1 **THE COURT:** Yes, please.

2 **MR. HEBERT:** -- is the delay on the injunctive
3 relief. Now, the delay we're talking about is not a
4 substantial delay, admittedly. And what has happened is
5 during the pendency of the case they actually have reacted
6 by slowing down their sales of infringing products and
7 changing some of their products in part in respect of our
8 patent. I would be concerned if during, if there is a stay,
9 if during that stay the marketplace suddenly changed and
10 they started flooding the market again with infringing
11 products. And I would wonder if, if there was a change in
12 the marketplace if we could come back and ask to lift the
13 stay based on changed market conditions.

14 **THE COURT:** I have a stock and I think adequate
15 institutional answer. The Court can only deal with cases or
16 controversies. An administrative closure is just that. It
17 isn't a case or controversy, it's just a procedure. The
18 world changes. The doors of the courthouse are open. But
19 I've made my orders and I've made them for prudential
20 reasons.

21 Okay. So, you'll get your chance -- it looks like
22 the way I'm going is, let's hold this hearing, that's what
23 you all came for, we'll see where we stand on that, then
24 I'll recess. I'm not going anywhere. You talk to your
25 people. If you agree to my conditions then I'm going to

1 administratively close it until the 13th of December. All
2 right?

3 **MR. LOWRIE:** Okay. There's one point I wanted to
4 raise with your Honor just while we're on the subject.

5 **THE COURT:** Sure.

6 **MR. LOWRIE:** Your Honor talked about an escrow of
7 profits. It would make meaningful operating difference I
8 would think to a company and no difference to a patent
9 holder if we did a bond as opposed to an escrow which is
10 what one does on appeal in appropriate circumstances as
11 well.

12 **THE COURT:** That's fine.

13 **MR. LOWRIE:** Thank you, your Honor.

14 **THE COURT:** So long as it's an adequate bond. Yes?

15 **MS. LUSSIER:** And just so we're clear, the
16 conditions that you've recited, your Honor, would be the
17 escrow the profits in some manner, or they post a bond, for
18 the sales of all of what Bose has claimed to be the accused
19 products, and that validity is off the table.

20 **THE COURT:** Oh, that's my --

21 **MS. LUSSIER:** That's the --

22 **THE COURT:** At least as to what -- yes, and
23 validity's off the table.

24 **MS. LUSSIER:** So that when if, if and when the stay
25 is then lifted there will be no trial on invalidity --

1 **THE COURT:** That is --

2 **MS. LUSSIER:** -- in this case.

3 **THE COURT:** -- correct. I'm not -- that's correct.
4 We're clear on that.

5 All right. So, now you're here for the Markman
6 hearing. I think a way to proceed is to hear you -- if you
7 don't agree that I will follow what the Patent Trial Appeal
8 Board has done what weight shall I give to it? Let's ask
9 the -- and I've been, I started out with SDI, so let's start
10 with Bose.

11 Do you agree with it?

12 **MS. LUSSIER:** There are a number of constructions
13 the PTAB has --

14 **THE COURT:** Them? Do you agree with them?

15 **MS. LUSSIER:** Not all of those constructions.

16 **THE COURT:** And neither do they.

17 **MS. LUSSIER:** What deference, you've asked what
18 deference should the Court give.

19 **THE COURT:** I have.

20 **MS. LUSSIER:** You need not give the PTAB any
21 deference to the extent that you have --

22 **THE COURT:** Shouldn't I?

23 **MS. LUSSIER:** Our position is that with the
24 exception of one term, which is the term dealing with any
25 one of a plurality of sources -- correct me if I'm wrong --

1 **MR. HEBERT:** That's correct.

2 **MS. LUSSIER:** -- that the PTAB in fact got it
3 exactly right, as to the multiple constructions that they
4 gave.

5 **THE COURT:** Okay. Okay. But you think they got
6 that one wrong?

7 **MS. LUSSIER:** Absolutely.

8 **THE COURT:** Okay. That's helpful as a place to
9 start, because I will tell you coming on the bench that's
10 where I start. I want to hear argument. Only I'm not as
11 firm as the Bose people. It seems to me that their other
12 constructions all make good sense to me. That one I have
13 questions about, though it's arguable is the way I could
14 state it.

15 So now let's, let's turn to Bose. What, as a
16 practical matter, what deference should I give to the outfit
17 that ultimately is going to make the call here, not me.

18 **MR. LOWRIE:** So, I would say, your Honor, that the
19 answer is directly derivable from the principles that are
20 applied. So, the Patent Office applies a broadest
21 reasonable construction. Not a correct construction, that
22 would be a binding court, but broadest reasonable. So, if
23 they were to provide a narrow construction then a Court may
24 look at that and say I shouldn't go broader than that. And
25 if the patentee makes an argument they're actually creating

1 a record that a Court would use, and perhaps the Patent
2 Office won't, with respect to what that claim terms means.
3 You've got estoppels and everything else associated with the
4 prosecution history. But the Patent Office may or may not
5 look at a broadest reasonable. So a deference if it adopts
6 a narrower construction. If it adopts a broad construction,
7 the Court should say, well, okay, at least be that or
8 something narrower in light of the specification of what
9 should it be. So that's the principles.

10 And, your Honor, I have had a case where the
11 International Trade Commission adopted a narrow
12 construction, found no infringement. The board, aware of
13 that, adopted a broad construction and found it invalid and
14 they ended up withdrawing their appeals and everything. So
15 the patent's now both invalid and not infringed.

16 So, it is the case that judicial bodies will reach
17 different decisions, particularly narrower constructions,
18 than what's done in the board and it's driven by the legal
19 standards.

20 **THE COURT:** I understand that as a theoretic
21 matter. I guess now I'm turning to the disputed claims
22 here. And why don't you signal to me -- you think that they
23 got the configured to provide audio information from any of
24 a plurality of sources, you think they got that one right.

25 **MR. LOWRIE:** Yes, your Honor. Or at least that it

1 would -- I think, I think perhaps they got them all right
2 for the standard they were applying. It's just a different
3 standard that your Honor applies.

4 **THE COURT:** Then, then maybe -- I'll put it to you
5 this way. Why shouldn't I, given the standard that I am
6 required to apply, why shouldn't I follow their
7 construction?

8 **MR. LOWRIE:** I think it's not a question of
9 following. I think --

10 **THE COURT:** Adopt their construction.

11 **MR. LOWRIE:** Because it's a different standard,
12 your Honor. And so I think your Honor needs to apply the
13 standard and see if you get, the different standard, and see
14 if you get the same result, your Honor.

15 **THE COURT:** And when I do that wouldn't I come out
16 the same way?

17 **MR. LOWRIE:** For most of them, I think so. We have
18 an argument on computer. And with respect to computer, I
19 view that as, you walk into an Apple store and say I need a
20 computer, they don't send you to the iPod section. And so
21 even with a proposed thing of ordinary meaning, which is I
22 think not applicable, it's a different thing. And, and if
23 what is told to the jury apply ordinary meaning in 2014 if
24 this case were to go to trial then --

25 **THE COURT:** 2015.

1 **MR. LOWRIE:** -- 2015, then, your Honor, we would be
2 looking at what did one mean when they walked into that
3 store and said computer in the year 2000 and not the year
4 2015. And so for that reason the board's not looking at
5 that. The board's not concerned about those things.
6 They're applying broad definition. And when Bose comes in
7 and says, well, audio source could include a CD player and
8 that's not a computer, my reaction is why isn't that a
9 computer, it's got a processor in it just like a cell phone
10 does. So there's a standard because of the context of
11 dealing with the jury and dealing with giving the plaintiffs
12 proper scope rather than going to the Patent Office where it
13 says broadest reasonable and if you meant something
14 different you're going to need to be clear about that.

15 **THE COURT:** All right. Thank you.

16 **MS. LUSSIER:** Your Honor, may I respond to
17 those points?

18 **THE COURT:** You may.

19 **MS. LUSSIER:** The standard that the PTAB applies is
20 the broadest reasonable construction consistent with the
21 specification. The PTAB with respect to the term configured
22 to provide audio information from any one of a plurality of
23 sources, including the two listed sources, did not correctly
24 apply its own standard. So, to simply adopt what the PTAB
25 has done is to adopt a mistake.

1 **THE COURT:** Well, except --

2 **MS. LUSSIER:** And so therefore --

3 **THE COURT:** -- except they --

4 **MS. LUSSIER:** -- no deference should be made.

5 **THE COURT:** -- they did it just right. If we look
6 at the outcome, I heard you say they did it exactly right
7 save as to the phrase configured to provide audio
8 information from any of a plurality of sources.

9 **MS. LUSSIER:** Exactly.

10 **THE COURT:** All right.

11 **MS. LUSSIER:** But in that particular situation the
12 PTAB ignored the claim language.

13 **THE COURT:** We'll, we'll --

14 **MS. LUSSIER:** We'll get to that.

15 **THE COURT:** -- get to that one.

16 **MS. LUSSIER:** Okay.

17 **THE COURT:** But the rest of it, whatever standard
18 they used, the construction they came up with is one with
19 which you agree.

20 **MS. LUSSIER:** That's right.

21 As to computer, the point with respect to
22 computer --

23 **THE COURT:** Well, let me, let me impose some
24 discipline on this so we can get to the matters that really
25 are going to be disputed.

1 I've been very aided by the decision of the Patent
2 Trial Appeal Board. And so we're clear, I'm adopting their
3 construction, using proper standards, of computer, network,
4 and audio information from the network via the computer.
5 Unfortunately -- so that's taken care of.

6 Then you people have really asked to have eleven
7 claims construed. That's a very large number. I don't
8 think we're going to do that much. Some of the
9 constructions are simply the ordinary and customary meanings
10 and I'll take care of those and then where we need argument
11 we will deal with it.

12 First, I've spoken to computer and personal
13 computer. I've spoken -- I have not spoken to the word --
14 yes, I have. I've spoken to the word network and I follow
15 the Patent Trial Appeal Board.

16 The claim receive audio information from the
17 computer corresponding to the digital musical files stored
18 on the computer, the Court is simply going to follow the
19 ordinary and customary meaning of those terms.

20 The audio information from the network via the
21 computer, I adopt the construction of the Patent Trial
22 Appeal Board.

23 The claim, the phrases close proximity and
24 adjacent, your dispute number 9, I'm simply, they're not, I
25 follow the ordinary and customary meaning.

1 All right. And claim, what you denominate as
2 dispute number 11, the sound reproduction device is
3 configured to respond to signals received from the computer,
4 I adopt the ordinary and customary meaning.

5 Now, with those matters taken care of that leaves
6 us plenty to construe and let's get to it.

7 We'll start then with the issue which has been
8 fully vetted before the Patent Trial Appeal Board as to
9 whether any one of a plurality of sources means one source
10 or at least two sources. The Patent Trial Appeal Board
11 adopts the position that SDI adopts here. Bose differs.
12 I'll hear Bose.

13 **MS. LUSSIER:** Your Honor, we do have a set of
14 slides most of which are irrelevant at this point. We would
15 like to hand them up though.

16 **THE COURT:** I'm happy to receive them.

17 **MS. LUSSIER:** The slides that we have, and I'll
18 only point to a few of them, that relate to this particular
19 issue begin on page 19, on slide 19.

20 The PTAB as well as SDI focused on two three-letter
21 words, any one, and the PTAB relied on the dictionary
22 definition for that and went no further.

23 The claim language itself confirms that any, from
24 any one of a plurality of sources, including digital music
25 files stored on a computer and a network accessible via the

1 computer, means that the computer at minimum must be
2 configured to provide audio information from each of those
3 listed sources.

4 The PTAB as well as SDI have put blinders on. They
5 do not want this Court to consider the surrounding language,
6 that's this including phrase that identifies the conjunctive
7 list of sources. It's phrased in the conjunctive form and.
8 And that means that the, that means pursuant to SuperGuide,
9 a Federal Circuit case, the use of the conjunctive form
10 means that the claim must include each element in it.

11 The phrasing is also confirmed by two of the
12 district court cases that we have cited and that the PTAB,
13 that neither the PTAB nor SDI have been able to coherently
14 able to distinguish. That is Zapmedia as well as Kenall.
15 And in both of those cases they construe the exact phrasing
16 that is at issue here, any one of, as each of.

17 **THE COURT:** Each of more than one.

18 **MS. LUSSIER:** Right. The term -- in the claim
19 recall that it says from any one of a plurality of sources,
20 and your Honor has in fact previously construed plurality as
21 meaning at least two. The claim identifies specifically --

22 **THE COURT:** Where have I done that?

23 **MS. LUSSIER:** I'm sorry?

24 **THE COURT:** Where have I done that?

25 **MS. LUSSIER:** In the prior '765 case, the term

1 plurality was the subject of one of the particular claim
2 terms in there and you had construed it as such.

3 **THE COURT:** Right. All right, I think I understand
4 the argument.

5 What does SDI say?

6 **MR. LOWRIE:** Thank you, your Honor.

7 In terms of the plain language, if one were to say
8 plurality is two and it has to be configured to connect to
9 two it eliminates --

10 **THE COURT:** At least two.

11 **MR. LOWRIE:** At least two. -- it eliminates the
12 any one of. It would just read to provide audio information
13 from a plurality of sources. And that language has meaning,
14 which means basically one of plurality, which is what, in
15 other context similar to this one, the cases have said.

16 But if I could step back for a moment, your Honor,
17 just to be clear about what we're talking about.

18 So we're talking about configured to connect to a
19 computer that audio. So what does that mean. If we were
20 looking at a speaker system like -- and, you know, earbuds
21 have these audio connectors, you stick it into a phone or an
22 iPod or whatever, it has this audio connector speaker
23 system. I have a carbon copy of one in my office. It's got
24 that same kind of connector, you can stick it into an iPhone
25 or other things. What is it about that connector, what

1 physical limitation, because this isn't -- you know, this is
2 supposedly covering it when the computer's not connected.
3 Right? So what is the limitation that we're talking about
4 here with that little audio connector, for example, or a 30
5 pin connector on an Apple product, what is it? That's just
6 a physical thing. And it's configured to plug something
7 into it. So, for example, if you say any one of a plurality
8 of sources you can connect five different iPhone 5's in it,
9 is that a plurality of sources because that physical thing
10 allows it to be plugged in? You could do an iPod in it.
11 You could do anything into it. So, really it's going to be
12 confusing.

13 We had this problem in the last case where your
14 Honor construed interface unit and then we went through all
15 the discovery because of an apparent misunderstanding about
16 what your Honor did. And here, if we have this kind of a
17 ruling where we're saying, well, plurality means more than
18 one, and that is a simple way to look at it, I don't dispute
19 that, if we come in with a simple plurality is more than
20 one, it's going to end up with one of these situations where
21 we have a ruling that really in light of what's happening
22 here doesn't make any sense.

23 So, again, what we're talking about here is a
24 limitation about a connector that you can plug into more one
25 of the same thing or more than one of different things.

1 Another problem with kind of what's being proposed
2 here is the deviltry in the details. Because let's suppose
3 I've got my iPod and I've gotten music from one computer
4 site and a different computer site and maybe from a flash
5 drive all into my computer and down into my iPod. Is that
6 from a plurality of sources? And how can you tell just by
7 looking at the speaker system which is what Bose says the
8 claim covers. They say, because your Honor remembers, if it
9 required the computer to be there as well, then it would be
10 in direct infringement because SDI doesn't sell computers
11 with the speaker systems that they have. Okay.

12 So, really here, when they say any one of, to give
13 that meaning it has to say you've got to be able to connect
14 the one. And anything beyond that, I mean additional words
15 or a different way to phrase it could be done, but there
16 would be deviltry in the details if it's any one of more
17 than one different sources and that somehow we're supposed
18 to figure out, looking at infringement and validity, what
19 that means with respect to a connector that gets plugged
20 into something.

21 **THE COURT:** Thank you.

22 Now, I think I've heard enough on that. I find
23 this, this one particularly difficult. So let's pass it for
24 a moment and let's see what we say about the fourth one that
25 is at issue, a connector located at least partially within

1 the housing that is configured to provide a physical and
2 electrical connection exclusively between the sound
3 reproduction device and the computer.

4 And here there are different definitions, and again
5 I'll start with Bose.

6 **MR. GRAUBART:** Your Honor, good morning. Noah
7 Graubart from Fish & Richardson. I'm going to be addressing
8 this term.

9 I would like to quickly just for context, your
10 Honor, point out that this claim term resides in the body of
11 the claim, as you just recited, a connector configured to
12 provide this physical and electrical connection, whereas in
13 contrast the term we were just describing was in the
14 preamble where it's, the system is configured to connect to
15 a computer that's configured to provide audio from plurality
16 of sources. So when Mr. Lowrie was talking about the little
17 connector he was referring to the wrong element. There it
18 was, the system is configured to connect to a computer
19 that's configured. So now we're moving to the term you're
20 asking about, your Honor. So, we are --

21 **THE COURT:** So, if -- I understand that. So, if,
22 if you have your computer that has the music data from these
23 various sources that exactly, you say his example is exactly
24 what this patent addresses.

25 **MR. GRAUBART:** This patent addresses the sound

1 reproduction device that's configured to connect to that
2 separate computer which is in turn configured to be able to
3 receive audio information from different sources.

4 **THE COURT:** From those different sources.

5 **MR. GRAUBART:** Yes.

6 **THE COURT:** All right. All right.

7 **MR. GRAUBART:** And here we're talking about the
8 element that Mr. Lowrie was --

9 **THE COURT:** The connector.

10 **MR. GRAUBART:** The connector. That's right, your
11 Honor.

12 And so here, Bose's construction comes directly
13 from the file history where the patentee, as he's entitled
14 to do, defined the term as his own lexicographer and there's
15 nothing else in the intrinsic record to contradict that.
16 It's dispositive.

17 SDI's construction, on the other hand, has two
18 singular problems. First of all, merely touching, the
19 notion that they've included in their touches only, that's
20 not a physical and electrical connection. My feet are
21 touching the floor through my shoes, your Honor. My shoes
22 are touching the floor. But they're not physically and
23 electrically connected to the floor. So, introducing this
24 notion of touches only, it's completely extraneous, it's
25 completely unmoored to the patent. And, in fact, it

1 actually, with all due respect to SDI, leads to a relatively
2 absurd result. If it can only touch, if the computer and
3 the sound reproduction device can touch each other and
4 nothing else they're floating in midair. That's obviously
5 not what was described in the patent.

6 And so coming back full circle, when the patentee
7 went to the Patent Office in the file history and said
8 here's my definition, the one exactly that Bose is proposing
9 here, they said to the examiner -- and, your Honor, if you
10 look at slide 33. I apologize, I should have put some
11 context before I started talking. Slide 33 here of our
12 presentation is where Bose went to the Patent Office and
13 defined this, they specifically then told the examiner, and
14 go look at the specification, Figures 1 through 3, and the
15 corresponding, the corresponding description which you'll
16 see at slide 34 is the citation to that corresponding
17 description, they said here, look in the specification, this
18 is consistent with what I'm telling you is the definition,
19 here's the support for it, it's this point-to-point
20 exclusive physical and electrical connection between one
21 computer and one sound reproduction device.

22 There's nothing about just touching. There is an
23 example of it in the specification which there the examples,
24 it's cables, just like the speakers are connected to your
25 stereo system physically and electrically by cables, here in

1 this specification the example is cables.

2 And again, in the '765 patent, which is also part
3 of the intrinsic record, because it's the parent, you'll see
4 on slide 35, that's additional intrinsic support because it
5 says, well, let's physically connect it. Well, there's a
6 claim that says physically connected via cable.

7 So, the intrinsic record fully and exactly supports
8 our construction. There's nothing else intrinsically in the
9 record, in the intrinsic evidence that contradicts it or
10 that supports SDI's construction and their result, their
11 construction just cannot stand because touches only is not a
12 physical and electrical connection and it leads to this
13 floating in midair.

14 **THE COURT:** I understand. I'll hear SDI.

15 **MR. GRAUBART:** Thank you, your Honor.

16 **MR. LOWRIE:** Thank you, your Honor.

17 A couple of points. First of all, what happened
18 here is the claims are being written to cover the sound dock
19 where you've got that 30 pin connector that's being plugged
20 in. This has got nothing to do with what's in the
21 specification as described. So, when Mr. Graubart comes out
22 and says here it is in the figures, those figures are block
23 diagrams, they don't actually really show anything in the
24 physical real world, nor is there a description of what it
25 means to be exclusively physically connected.

1 Now, let's go back and talk again about what is it
2 we're talking about here. We have a claim connect
3 limitation about configured to provide a physical and
4 electrical connection. What is it about a connector that
5 actually does that that makes it an exclusive connection.
6 And this was added to distinguish prior art where you've got
7 a connector that's connecting to a network. Well, if you're
8 just looking at what's in the speaker all you've got is, and
9 the connector, you've just got this plug that's getting
10 plugged in. And that's part of the problem with, frankly,
11 all of these claims is they keep trying to put in
12 limitations that they say make it patentable but somehow
13 aren't part of the claim. So we're going to limit it to a
14 computer that does these, gets it from these different
15 sources, but a computer's not part of the claim. And we're
16 going to limit it to a connector that's exclusively
17 physically and electrically connected, but we're not going
18 to say it, but actually, I mean, on the other end of it's
19 exclusively, because all we've got is something that plugs
20 in.

21 **THE COURT:** But that's not improper, is it, under
22 the patent law?

23 **MR. LOWRIE:** Yes, actually it --

24 **THE COURT:** I guess I'm just curious here.

25 **MR. LOWRIE:** Uh-huh.

1 **THE COURT:** The claim, of course, is what is --
2 what my duty is to construe is the claim and I'm not
3 supposed to read in limitations and I'm supposed to give
4 weight to the entire language because it describes the metes
5 and bounds of the right to exclude which the patent has
6 conferred. So, that's the exercise.

7 Now, so long as I can understand the limitation and
8 it makes sense in the patent as a whole, I imagine that I
9 should go with such an interpretation.

10 I have trouble with your touches only. It puts in
11 a different concept here.

12 **MR. LOWRIE:** Well, maybe the touches only isn't
13 quite the proper way to formulate it. But the problem from
14 the patent law perspective is you need to be able to look at
15 the connector and say, okay, that's a connector configured
16 just for a physical connection, for example. And there's
17 no, there's nothing about any connector, certainly not
18 described in the patent, that says how something is
19 configured for an exclusive physical connection. They point
20 to figures but they're block diagrams, they don't even tell
21 you really what's in it. And it's not -- and, for example,
22 if you're looking at a cable does that have a connector on
23 both ends? Most people would say it does. Is that an
24 exclusive connection? I don't know.

25 **THE COURT:** Well, I guess, I guess I don't

1 understand what's wrong with their proposed construction
2 here. A connector that's configured and it has a physical
3 and electrical connection, and then they are specific, that
4 couples, at any one time, a single sound reproduction device
5 to a single computer in point-to-point fashion. That's -- I
6 think I understand that. And that seems, it seems to be
7 borne out by the prosecution history.

8 **MR. LOWRIE:** But it's not borne out by the patent
9 application itself in the year 2000 when it was filed.
10 That's not something that's discussed. That's part of the,
11 part of the problem here. So when they come in ten years
12 later and look to distinguish network by saying exclusive
13 physical connection you can't tell what that actually means.

14 **THE COURT:** I hear you. But at least for the
15 purposes of today's construction, I'm adopting, as to the
16 language denominated 4 here, I'm adopting Bose's proposal.
17 All right.

18 Then we'll go on then, I think I've done 5. I've
19 done 6. Let's look at 7.

20 We've got user function of the sound reproduction
21 device, sound reproduction system/computer. I'll hear Bose.

22 **MS. LUSSIER:** As to this term, our relevant slide
23 starts at page 49. These terms are in this patent. In the
24 course of prosecution there was set out a definition of what
25 each was, as well as correspondingly for each, examples of

1 support in the specification for each one.

2 SDI has not in any of its briefing addressed any of
3 the arguments that we've raised, meaning they haven't
4 objected to what --

5 **THE COURT:** Well, they say it needs no
6 construction.

7 **MS. LUSSIER:** That's right. And their briefing is
8 absolutely silent on anything that we --

9 **THE COURT:** Well, are you okay with that? In other
10 words --

11 **MS. LUSSIER:** We would be okay with no
12 construction.

13 **THE COURT:** All right. And that's their position,
14 so we'll give it no construction. So that takes care of
15 that.

16 Then on 8, we are concerned with the term audio
17 signal processing circuitry.

18 Let me try something out on this. I rather like
19 the phrase circuitry that modifies an audio signal. Their
20 proposal is, it says any circuitry, and then they add
21 including by amplifying it. Suppose I strike those out but
22 just simply say audio signal processing circuitry is
23 circuitry that modifies an audio signal.

24 How do you feel about that, Bose?

25 **MR. GRAUBART:** We're perfectly okay with that, your

1 Honor.

2 **THE COURT:** SDI?

3 **MR. LOWRIE:** Well, I guess we're okay with that in
4 that we believe modifying includes amplifying, and the
5 problem, I mean, if you get something in the --

6 **THE COURT:** I'm not, I'm not disputing it, but I'm
7 expressing no opinion on it, in the sense that I make it a
8 pretty much unalterable principle. I know we've had the
9 prior litigation. So I've got some sense about the accused
10 device. But I'm focusing now on this patent and my duty in
11 this patent.

12 So if I express no opinion on amplifying, but I'm
13 not excluding it, you're okay?

14 **MR. LOWRIE:** Not actually, your Honor, because let
15 me describe what will happen. We'll come in and we'll say
16 it's amplifying, we already have, that it includes
17 amplifying as a form of modification. Bose will say no and
18 that will get dumped as a claim construction issue to the
19 jury. So --

20 **THE COURT:** No, it won't because I may then have to
21 decide it. But I don't have to decide it now. And so for
22 now I'm, I'm simply going to construe it as circuitry that
23 modifies an audio signal.

24 All right. Then we're up to the 10th proposed, and
25 last proposed dispute where we're disputing the phrase an

1 assemblage of music files based on a first type of metadata
2 included in the music files.

3 And let me, on this one, let me make a proposal.
4 It's taken -- well, I think this is SDI's. I rather like to
5 define that as a first group of music files that is based on
6 a first type of metadata that is located in the music file
7 which may be in the file header.

8 How's that? Bose?

9 **MR. GRAUBART:** Your Honor, with respect to the use
10 of the word group as opposed to first group and -- excuse
11 me. The difference between what you just said, your Honor,
12 and Bose's proposal is the institution of the words first.
13 That's okay. We thought that our construction was closer to
14 the intrinsic record. But it doesn't make a big difference.
15 Such as in the file header, may or may not be in the file
16 header, we propose that it's just simply more confusing for
17 the jury to have, well, is the limitation does it have to be
18 in the file header or can it not be, when it's just an
19 embodiment, it doesn't have to be in the file header.
20 That's what I'm saying.

21 **THE COURT:** Well, I'm trying to explain. So, I
22 didn't go along with their -- actually I don't think their
23 proposal is that much different. Which may be in the file
24 header. That's not a limitation that it has to be in the
25 file header. But it may be in the file header. And their

1 proposal is such as in the file header. I don't read that
2 as a limitation either but --

3 **MR. GRAUBART:** Understood, your Honor. And I
4 was --

5 **THE COURT:** So you're okay?

6 **MR. GRAUBART:** We believe that including that is
7 going to be a little more confusing for the jury. But if
8 you could maybe add, your Honor, or elsewhere in the file, I
9 think that would remove any ambiguity for the jury.

10 **THE COURT:** Thank you.

11 How do you like, I go with what I've said, with
12 their amendment?

13 **MR. LOWRIE:** That's fine, your Honor, thank you.

14 **THE COURT:** All right. And so we'll add -- say
15 those last words again.

16 **MR. GRAUBART:** Or elsewhere in the file.

17 **THE COURT:** Or elsewhere. Good.

18 Now, that doesn't end it because you've got concern
19 about, and I'll read it, concern about the phrase, quote, a
20 subset of the assemblage of music files based on a second
21 type of metadata included in the music files, closed quote.

22 And I'll try this. Again, I'm most comfortable
23 with SDI's approach, but I've changed two words. Or two
24 phrases. And I'll read it the way I would do it.

25 A second group of music files that is, A, a subset

1 of the first group, and B, based on a second type of
2 metadata that is located in the music file which may be in
3 the file header. That's the same issue. But I've
4 substituted the word located for the word stored, and if I
5 added the or elsewhere language, simply because the symmetry
6 seems to work, how does Bose feel about that?

7 **MR. GRAUBART:** I think that's fine, your Honor.
8 Just to clarify, in the first term that we just talked
9 about, does the construction still have the word stored or
10 did you change that to located?

11 **THE COURT:** I changed it to located.

12 **MR. GRAUBART:** Okay.

13 **THE COURT:** So we're clear.

14 **MR. GRAUBART:** So, we're fine with the new proposal
15 as well, the second term.

16 **THE COURT:** Thank you. And agreed? It's your
17 proposal. I changed the word stored to located, and instead
18 of saying such as in the file header, I now say which may be
19 in the file header or elsewhere in the file.

20 **MR. LOWRIE:** Yes, the latter part of the change as
21 you have done consistent with before is okay. I hadn't
22 appreciated that stored was changed to located. Both
23 parties had proposed stored. I'm not actually aware of a
24 difference, that it makes a difference. So, I just hadn't
25 thought about it coming in, it's not part of the proposal.

1 **THE COURT:** I think located is a better
2 conceptualization.

3 All right, that concludes the work we came here to
4 do. Now, I'm going to recess. And I appreciate your head
5 man is off in China doing some -- well, I won't characterize
6 it. But they've got a decision maker here. My instinct is
7 if they go for this, as we've carefully worked it out, I am
8 going to administratively close this case until
9 December 13th, 2014, and place the case on the March 2015
10 trial list.

11 So, they'll confer. If they tell me no, we'll talk
12 more. Because it has those limitations. And I'll recite
13 them again. They agree to a bond which covers the cost,
14 covers the profit from the sale of the alleged infringing
15 devices, and they agree that validity will not be part of
16 any ensuing trial if trial there is to be.

17 And we'll recess. I'd like to know this morning.
18 So, I'll have the clerk, I'm going back to chambers, but the
19 clerk will stay close by and you let her know if that's all
20 right, and if it's not I'll come back on the bench.

21 Thank you all. We'll recess.

22 Oh, there's one very important point. And it's
23 this. It's the first one which I said I would duck. Or I
24 said I would take under advisement. And candidly, I'm
25 trying to duck it. I always try to be transparent. For

1 what seems to me appropriate prudential reasons, I will seek
2 to avoid a construction different than the Patent Trial
3 Appeal Board. I came out on the bench and indeed I had
4 thought prior to reading the decision of that body that, to
5 give proper weight, proper interpretation to the word
6 plurality that the conception as described that the computer
7 would have different sources for the data, so the words at
8 least two was appropriate.

9 Counsel have ably argued the issue. And your
10 briefs have ably argued the issue. And now I am aware,
11 which I had not been, this is a new process and this is my
12 first chance actually to look at what this agency does, the
13 short of it is, I would just as soon not take a position
14 opposite to that of the Patent Trial Appeal Board. But I'm
15 not hesitant to do so should I believe that such is the
16 correct construction.

17 Hopefully, we will now stay things, your costs will
18 not be devoted to this Court but rather to proceedings
19 before the agency. If those proceedings eventuate in a
20 situation where there must be a trial, I'm going to advise
21 you, you best have your experts opine to deal with the
22 possible constructions that are on the table here, at least
23 one, or one or at least two. I just think again that's
24 practically appropriate, and I will be looking at it at an
25 appropriate time.

1 This has been, let me say, because we have people
2 from the actual companies here, this has been very well
3 prepared. I have been aided by the briefs and materials
4 coming out on the bench. I've been aided by the Patent
5 Trial Appeal Board. And I have been aided by your oral
6 arguments and I appreciate them.

7 So we'll recess and see how SDI wants to proceed.
8 We'll recess.

9 **MR. HEBERT:** Your Honor, a practical question in
10 terms of the stay provisions that you proposed.

11 In connection with the bond, I presume they would
12 need --

13 **THE COURT:** Submit it to the Court.

14 **MR. HEBERT:** -- an accounting or something to show
15 what, you know, what that is calculated to be.

16 **THE COURT:** You may -- if they're going to come up
17 with a bond they'll give you whatever they give you. You'll
18 say whatever you say. I'll resolve whatever I resolve.

19 **MR. HEBERT:** I understand.

20 **THE COURT:** The case is administratively closed. I
21 don't like the word stay. But other than working out that
22 wrinkle. Because that's, it's fair for them to post an
23 adequate bond. It's in their interest to post an adequate
24 bond. It saves them money. So they'll want to satisfy you
25 on that. I'll resolve it. Other than that, the case is

1 administratively closed. People are not going to notice
2 depositions, demand discovery and the like until the 13th of
3 December, 2014. Then it is restored to the trial list and I
4 will expect the next day to hear from you people and we'll
5 see where we are.

6 If the case were to settle, I can hear from you any
7 time and we'll reopen it for that purpose.

8 I do thank you. We'll recess.

9 **MR. LOWRIE:** Thank you, your Honor.

10 **MS. LUSSIER:** Thank you, your Honor.

11 **THE CLERK:** All rise.

12 (Recess.)

13 **THE CLERK:** All rise. Court is back in session,
14 you may be seated.

15 **THE COURT:** You asked me to come back.

16 **MR. LOWRIE:** Yes, thank you, your Honor.

17 The short answer is we accept. We wanted to raise
18 two quick issues. One isn't opposed. And that's that by
19 posting a bond we're not conceding or even providing
20 evidence that lost damages would be appropriate or what
21 those would be. We're just --

22 **THE COURT:** The Court, quick to put it on the
23 record, surely expresses no such opinion. I'm simply trying
24 to safeguard the rights of the parties, whatever they may
25 be.

1 **MR. HEBERT:** Well, we agree. It's a matter of just
2 preserving the assets and we would still need to prove
3 damages.

4 **THE COURT:** And thank you.

5 **MR. LOWRIE:** And then the second piece, your Honor,
6 was we're not like conditioning or entering into any kind of
7 negotiation or bargaining because, I began with we accept
8 and we're grateful for your Honor's considering what we
9 suggested.

10 But my client asked me to raise one issue for your
11 Honor to consider, which is we've raised before your Honor a
12 couple of written description things about does the patent
13 application in 2000 really support something that covers
14 iPods and MP3 players. We're not permitted to present that
15 to the board and we would like the opportunity to have it
16 considered on remand. We would waive all the prior art
17 validity stuff, whether it could be presented to the board
18 or not. But there is this one little bit of an argument
19 that's been put to your Honor in the context of claim
20 construction. It's a different -- you know, you don't have
21 to get into all this stuff like a regular prior art case,
22 that would all be waived. And as a matter of fairness,
23 because we couldn't present it to the board, we would ask
24 your Honor to consider it either now or say you're at least
25 not foreclosing us requesting it if we should find ourselves

1 before you again.

2 **THE COURT:** No, I am. I mean, I'll clarify it. In
3 a way, this is a compromise situation. There are lots of
4 prudential reasons for making that request of you, to limit
5 further proceedings and the like. You've accepted it.
6 That's the implication. And I thank you, though I'm happy
7 to clarify it.

8 I think this is very wise. Should the case
9 resolve, really, cut your costs, a phone call to Ms. Gaudet
10 is all that's necessary, and you can put whatever else you
11 want, if anything, on the record. Otherwise, the order
12 stands and I'll be in a position to deal with the matter
13 starting on December 14th, with trial on the March 2015
14 running trial list.

15 **MR. HEBERT:** Just a clarification, if I may. I
16 think it's clear, but I don't want there to be any
17 misunderstanding. The preclusion on validity goes to
18 summary judgment as well.

19 **THE COURT:** I'm just not considering validity.

20 **MR. HEBERT:** Yes.

21 **THE COURT:** If this case comes back here and what
22 was before the Patent Trial Appeal Board results in the
23 conclusion of validity as to what was before them, the deal
24 is that I'm not considering validity.

25 **MR. HEBERT:** Thank you.

1 **THE COURT:** Everything else is open. Infringement,
2 damages. It's a trial. But we'll have a truncated time to
3 prepare because it's a narrow trial.

4 **MR. LOWRIE:** And if I may, your Honor. There's
5 something that, we would not have brought summary judgment
6 on the notion that we only waived trial and not summary
7 judgment.

8 The board's claim constructions are preliminary.
9 It's possible Bose could come in and successfully argue for
10 some other construction and let your Honor adopt. I assume
11 we could raise that in front of your Honor at the
12 appropriate time. I mean --

13 **THE COURT:** Well, I've now held this hearing and
14 but for the one source/two source issue, which I really am
15 reserving on. When we went back in the hall the law clerk
16 said to me, well, shall there be an order? And I said yes,
17 but we don't have to put our reasoning, just an order so we
18 know what I've done.

19 But like all Markman constructions, it's not over
20 until it's over. I've always thought of them as law of the
21 case. Sometimes you get into a trial and a proposed
22 construction just won't work. At the same time, it is law
23 of the case. So, to be asked to reconsider cuts against the
24 usual tendency that once something's decided you go forward.
25 I don't think I'm saying anything other than the general

1 approach I take to things.

2 **MR. LOWRIE:** Understood. That's perfect, your
3 Honor.

4 **THE COURT:** Obviously, my mind is not closed. If I
5 have the duty to preside over a resolution of this case, I
6 will preside over it as fairly and impartially as I can.
7 But the deal is, if they're back here with a valid patent
8 from the Patent Trial Appeal Board then I'm not considering
9 any validity issue.

10 **MR. LOWRIE:** Understood, your Honor.

11 **THE COURT:** All right.

12 **MR. HEBERT:** And it should be clear to
13 the defendants but --

14 **THE COURT:** It's like each of you wants the last
15 word. I think we're all agreed.

16 **MR. HEBERT:** Yes.

17 **THE COURT:** But go ahead.

18 **MR. HEBERT:** I just wanted to make a record that we
19 are, of course, going to try to convince the PTAB on the
20 construction of any one of a plurality of sources. And we
21 still have that opportunity.

22 **THE COURT:** That's fine. I'm, I'm coming more to
23 appreciate and understand, as we all are, how this process
24 works. And I am extraordinarily jealous of the rights, I
25 won't say rights, the duties of the nation's courts and the

1 constitutional rights of the nation's juries.

2 Now, that's subject -- well, constitutional issues
3 aren't subject. But congress disposes. Congress has
4 disposed. And I am wrestling with how, as we always do with
5 statutes, how to make the statute work best. In my mind,
6 the resolution we've reached here is for this particular
7 case the best way to coordinate the work of two adjudicatory
8 bodies. So, nothing I've said -- although there's going to
9 be an order without an opinion, it will duck the one and
10 two, but it will give my constructions as to the others and
11 do whatever you want. And anymore would be my typical
12 overspeaking.

13 Go and litigate before the board. And I would be
14 delighted on a personal level to see you back but hope that
15 the matter will be resolved somehow.

16 Thank you for your time this morning.

17 **MR. LOWRIE:** Thank you, your Honor.

18 **MR. HEBERT:** Thank you, your Honor.

19 **THE COURT:** We'll recess.

20 **THE CLERK:** All rise.

21 (Whereupon the matter concluded.)
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C E R T I F I C A T E

I, Donald E. Womack, Official Court Reporter for
the United States District Court for the District of
Massachusetts, do hereby certify that the foregoing pages
are a true and accurate transcription of my shorthand notes
taken in the aforementioned matter to the best of my skill
and ability.

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