

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

BLACKBIRD TECH LLC d/b/a : CIVIL ACTION
BLACKBIRD TECHNOLOGIES, :

Plaintiffs, :

vs. :

ELB ELECTRONICS, INC., :

Defendant : NO. 15-56 (RGA)

----- :
BLACKBIRD TECH LLC d/b/a : CIVIL ACTION
BLACKBIRD TECHNOLOGIES, :

Plaintiffs, :

vs. :

ETI SOLID STATE LIGHTING, :
INC., :

Defendant. : NO. 15-057 (RGA)

----- :
BLACKBIRD TECH LLC d/b/a : CIVIL ACTION
BLACKBIRD TECHNOLOGIES, :

Plaintiffs, :

vs. :

FEIT ELECTRIC COMPANY, INC. :

Defendant. : NO. 15-058 (RGA)

Wilmington, Delaware
Friday, December 9, 2016
9:02 o'clock, a.m.

- - -

BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.

Valerie J. Gunning
Official Court Reporter

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

BLACKBIRD TECH LLC d/b/a : CIVIL ACTION
BLACKBIRD TECHNOLOGIES, :
Plaintiffs, :
vs. :
LEDWHOLESALERS.COM, INC., :
Defendant. : NO. 15-060 (RGA)

BLACKBIRD TECH LLC d/b/a : CIVIL ACTION
BLACKBIRD TECHNOLOGIES, :
Plaintiffs, :
vs. :
PLUSRITE USA, CORP., :
Defendant. : NO. 15-062 (RGA)

APPEARANCES (Continued):

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MORRIS, NICHOLS, ARSHT & TUNNELL LLP
BY: MICHAEL J. FLYNN, ESQ.

-and-

PROCEEDINGS

(Proceedings commenced in the courtroom,
beginning at 9:02 a.m.)

THE COURT: Good morning, everyone. Please be
seated. This is Blackbird Tech versus ELB Electronics and
others, Civil Action No. 15-56 and others.

Mr. Stamoulis, good morning.

MR. STAMOULIS: Good morning, your Honor. Good
to be here.

With me on behalf of Blackbird is Wendy
Verlander and Sean Thompson.

THE COURT: All right. Good morning to you all.

MR. STAMOULIS: Thank you, your Honor.

THE COURT: Thank you, Mr. Stamoulis.

Mr. Rovner?

MR. ROVNER: Good morning, your Honor.
Representing defendant plus right, my co-counsel, David
Radulescu and Robin Davis, I'm sorry, from the Radulescu you
firm, and also representing ETi is myself and my colleagues,
Jonathan Choa and Alan Silverstein.

MR. SILVERSTEIN: Good morning.

THE COURT: All right. Good morning to all of
you.

1 Mr. Flynn?

2 MR. FLYNN: Good morning, your Honor. I'm here

3 on behalf of ELB Electronics and Feit Electric Company, and

4 with me today is John Hintz from Maynard, Cooper & Gale.

5 THE COURT: All right. Thank you very much.

6 So are we going to do this more or less term by

7 term?

8 MR. STAMOULIS: Yes, your Honor. The parties

9 have coordinated beforehand and we're set to go that way.

10 THE COURT: All right. Well, then, let's go.

11 MR. THOMPSON: Good morning your Honor. Sean

12 Thompson for Blackbird Technologies.

13 THE COURT: Good morning.

14 MR. THOMPSON: I've prepared some slides. If I

15 could hand them up?

16 THE COURT: Sure. That would be great.

17 (Mr. Thompson handed slides to the Court.)

18 MR. THOMPSON: Are you ready, your Honor?

19 THE COURT: Yes.

20 MR. THOMPSON: So given the nature of the

21 technology at issue, we've not prepared a separate technical

22 tutorial. However, we think just a very brief overview of

23 the patent and the asserted claims would be helpful just to

24 set the stage for the Court today.

25 The '747 patent discloses various apparatus for

1 retrofitting light fixtures with more energy efficient

2 lighting. In particular, LED lighting.

3 LED lighting has become a preferred type of

4 lighting because it offers more energy efficiency than

5 traditional incandescent or fluorescent bulbs. The '747

6 patent is directed in particular to retrofitting light

7 fixtures that have a ballast and a ballast cover, and a

8 ballast is the thing in a fixture that regulates voltage

9 that goes to a fluorescent light.

10 So practically what we're talking about here is

11 retrofitting fixtures that are designed for use with

12 traditional fluorescent bulbs, which are often in a tube

13 form factor, much like I believe the bulbs in this

14 courtroom, with LED bulbs that are in the same or similar

15 form factor.

16 Blackbird has narrowed its case to a single

17 apparatus claim, claim 12. This was done after the opening

18 briefs were exchanged, so there are --

19 THE COURT: Yes.

20 MR. THOMPSON: I caught that.

21 THE COURT: That's okay.

22 MR. THOMPSON: And there was a reference to

23 claim 29 being asserted in the opening positions, but it is

24 no longer, and it is now down to simply claim 12. And we've

25 produced the claim here with the disputed terms highlighted

1 and emphasized.

2 Claim 12 recites an energy efficient lighting

3 apparatus for retrofitting an existing light fixture having

4 a ballast cover comprising a housing having an attachment

5 surface and an illumination surface. A plurality of

6 illumination surface holes in the illumination surface. A

7 circuit board with LEDs on it, and the LEDs protrude through

8 holes in the illumination surface, and a fastening mechanism

9 for securing the two surfaces of the housing, the attachment

10 surface and the illumination surface together.

11 And Figure 5 of the patent is an exemplary

12 embodiment which illustrates certain of the terms today in a

13 particular configuration. You can see the illumination

14 surface in red at the top, LEDs protruding through that.

15 Below the illumination surface, circuit board to which the

16 LEDs are electrically coupled. And at bottom, the

17 attachment surface, which is in green. On the screen it

18 comes out a bit yellowish. There are five terms in dispute.

19 We're happy to go in order, or if you would like to focus

20 on a particular term first, we're happy to do that as

21 well.

22 THE COURT: Why don't you use your judgment.

23 MR. THOMPSON: Okay. We'll turn to housing

24 then. So the claim recites an energy-efficient lighting

25 apparatus comprising a housing having an attachment surface

1 and an illumination surface.

2 We believe this term should be construed as a

3 portion of a lighting apparatus that covers or protects

4 other components.

5 THE COURT: Even though I saw in your briefing

6 you also kind of agreed that it could be in effect a portion

7 of a lighting apparatus that encloses other components?

8 MR. THOMPSON: That's correct, your Honor, and

9 just getting to that. In that regard we proposed a

10 compromised construction which we think resolves a large

11 portion of this dispute and will construe this term as an

12 enclosure that covers or protects other components. And

13 this would get at the enclosure concept of defendants'

14 proposed construction and the covering and protecting

15 concept of our proposed construction.

16 The defendants did not agree to this

17 construction on the grounds that it did not resolve the

18 dispute regarding structure and we think that's the key

19 dispute remaining between the parties.

20 Defendants' construction would limit this term

21 to a structure, and their briefing suggests that it would be

22 a structure that is separate from the lighting apparatus.

23 We submit that the structure of the device

24 claimed in claim 12 is the apparatus itself and the housing

25 is a part of it.

1 Further, we think in the context of this
2 invention and the claim asserted, construing this term to
3 require a structure incorrectly connotes that the housing
4 provides structural support for the components when in our
5 view it's simply covering, protecting or enclosing those
6 components. And we think that these are the two key points
7 at issue with respect to structure.

8 Now, the claim makes clear that the housing is
9 simply something that has two surfaces, an attachment
10 surface and an illumination surface. It does not specify
11 that it is a structure. It does not specify that it is
12 separate from the lighting apparatus. In fact, it's clear
13 that the lighting apparatus comprises this structure. And
14 the claim does not set forth any requirements for the
15 housing as to what it must do other than have these two
16 surfaces.

17 Now, to be clear, this is a comprising claim,
18 and we're not saying the housing must be made up only of
19 these two surfaces and nothing else. Obviously, it can be
20 other things. But all the claim requires is that it has
21 these two surfaces and that it not be structural or do
22 anything else. And we think construing it as either our
23 proposed construction or our compromised construction
24 reflects the requirements that are actually set forth in the
25 claim, and we also think that those proposed constructions

1 relevant to the construction of this term, or at least not
2 relevant to the construction of this term as defendants have
3 suggested it is. So accordingly, your Honor, we'd request
4 either our proposed compromised construction or original
5 construction be entered.

6 THE COURT: So if I think that it is a structure
7 as the defendants suggest in view of what you said about
8 compromised construction and such, other than the structure
9 part, do you think there's anything objectionable about a
10 structure that encloses other components?

11 MR. THOMPSON: I think as long as it's clear
12 that the structure is not a separate and distinct structure
13 from the lighting apparatus.

14 THE COURT: Yes, yes, yes. So I'm saying you've
15 got your objection to structure.

16 MR. THOMPSON: Yes.

17 THE COURT: What I'm interested is that that
18 encloses other components. Do you object to that portion?

19 MR. THOMPSON: No, no.

20 THE COURT: Okay. Thank you.

21 MR. THOMPSON: You're welcome.

22 THE COURT: You're Mr. Radulescu?

23 MR. RADULESCU: I am, your Honor. Good morning.
24 We, too, have some slides, if I may hand them up?

25 THE COURT: Yes, sure.

1 are consistent with what is set forth in the specification.
2 The specification never specifies the housing as a separate
3 structure and it never specifies anything about the housing
4 other than it has these two surfaces. So we think that's
5 reflected in our construction and not defendants'.

6 Now, defendants point to claim 29, the language
7 of claim 29, which they contend is still relevant to the
8 construction of this term in claim 12. And their specific
9 argument seems to be that claim 29 indicates that the
10 housing is a separate structure that is incorporated into
11 the light fixture, but we don't think that's an accurate
12 reading of claim 29.

13 First off, just as a general matter, the
14 language of claim 29 with respect to housing is the same as
15 it appears in claim 12, the housing having an attachment
16 surface and an illumination surface, and it's not the case
17 that claim 29 suggests that the housing is this separate
18 thing that is retrofit into the fixture being retrofitted
19 one at a time with all the other components. The claim is
20 clear, there are components that are positioned to make up
21 the lighting apparatus and then the lighting apparatus as a
22 whole is what is retrofit into the light fixture, and it
23 really does not make sense in any other way even with
24 respect to claim 29.

25 So we would suggest that claim 29 is not

1 (Mr. Radulescu handed slides to the Court.)

2 MR. RADULESCU: So before I jump into the first
3 term, we do have a couple slides just on the background of
4 the patent and, to some extent, I think a slide on sort of
5 like tech tutorial on LEDs.

6 THE COURT: All right. And so we're going to
7 start with the overview. Of course, slide 5 shows a
8 fluorescent light bulb that we're all familiar with. At the
9 bottom of the screen there's a certain type of fixture that
10 an sort of see here that the bulb goes into. That's more
11 like a shop light. It's another type of fluorescent
12 lighting apparatus.

13 And more importantly, on slide 6 we show the
14 more common type of fluorescent light fixture where we have
15 a person actually changing our light bulb and there's four
16 light bulbs in this fixture. One is being held between his
17 or her hands. The other three are in here, and in between
18 those light bulbs you can actually see this piece of metal.
19 That piece of metal is actually a ballast cover. It holds
20 the electronics, the transformer, the ballast and the wires,
21 and that ballast cover is removable. And that's the
22 background on fluorescent lighting apparatuses that I wanted
23 to give you because when we go to the patent, I just want to
24 draw the analogy between what's labeled the ballast cover in
25 the patent and this picture.

1 When you are looking up at this light, you see
 2 fewer light bulbs, and in between two of the light bulbs you
 3 see the metal cover. That's just a piece of sheet metal
 4 that you can remove by removing some connectors or screws.
 5 That is a fluorescent lamp, sometimes called a troffer
 6 light. Okay?

7 One slide on LEDs. The top half of this slide 7
 8 shows various types of LEDs that is based on a design that
 9 has been around since the seventies, eighties and nineties,
 10 where you have generally two metal connectors, a positive
 11 and a negative wire, and on the end of it is this bulb, very
 12 miniature LED bulb. And inside of that bulb -- the bulb is
 13 generally plastic -- is some LEDs, a light emitting device.
 14 It's a semiconductor device that's connected by two wires,
 15 the plus and the minus.

16 This is the old-fashioned type of bulb that has
 17 been around for decades. In the past ten years, a new type
 18 has come out of LED and they're called surface mount LEDs.
 19 And these are the type of LEDs that actually exist in
 20 cellphones. They exist in some lighting fixtures now. And
 21 they're different in the sense that they're small little
 22 square flat chips.

23 As you can see here on the left, the yellow is
 24 where the light comes out of. The top surface is phosphor
 25 combined with actually blue light in these things. That

1 actually generate white light. And if you flip this thing
 2 over, you see two bonding pads. Two metal pads that are now
 3 flat that are sitting down on that chip eliminating the long
 4 wires that used to exist for the old-fashioned types of
 5 LEDs, because we have low profile devices. We want to put
 6 this into a camera or a cellphone, and in a small chip it's
 7 pretty flat, and they're bonded based on these metal pads on
 8 the bottom that are integrated into the package. They don't
 9 stick out.

10 And on the right-hand side we show a general
 11 sort of cross-section. It's illustrative to show, here's
 12 the LED and underneath it are these two metal flat pads that
 13 allow this, this type of surface mount LED to be plopped
 14 down onto the surface and soldered that way as opposed to
 15 having these two wires in the old days coming down, going
 16 into a circuit board and soldering separate individual
 17 wires.

18 That's the extent of the Tech tutorial that I
 19 wanted to do on LEDs to start. And from here I want to
 20 briefly go through the patent. There are two figures in it
 21 that I think are important.

22 THE COURT: Just before you do that, the patent
 23 itself is indifferent as to what kind of LED. It doesn't
 24 describe the LED as being surface mounted or the 1970s
 25 version. Right?

1 MR. RADULESCU: The patent describes the use of
 2 using the old LEDs given that they protrude through the
 3 elimination surface. They're clearly describing the old
 4 type. And, in fact, the patent was filed --

5 THE COURT: And so that would be something that,
 6 to the extent it says protrudes through and it means kind of
 7 what you were saying about the old LEDs, that might limit
 8 what kind of LED is involved, but when it's discussing LEDs
 9 generally, it's not trying to limit --

10 MR. RADULESCU: There's no dispute that LED
 11 here, you know, has to be a certain type or can be any type.
 12 There's no dispute. We are disputing the other mechanical,
 13 the other structural features of the claims.

14 THE COURT: Right. I got that.

15 MR. RADULESCU: And I want to give you that
 16 background because the accused products have all of the
 17 surface mounted LEDs that are installed and made
 18 differently, and you'll see as I get to it how it plays into
 19 the disputes between the parties.

20 So the patent, and just very briefly, you know,
 21 you can go to the technical field here, and it's talking
 22 about an apparatus that provides illumination for certain
 23 situations, and it uses three phrases, after-hours lighting,
 24 emergency lighting, and low light requirements, and that's
 25 throughout the patent. This patent is directed to an

1 apparatus to provide this.

2 THE COURT: But the fact that that is what it
 3 provides, in the end that doesn't play much importance
 4 because it describes an apparatus in the claims. Is that
 5 right?

6 MR. RADULESCU: The claim is not limited to a
 7 particular type of lighting apparatus at --

8 THE COURT: Or a particular use.

9 MR. RADULESCU: That is correct. And I'm going
 10 through this to give you the context of, there is Figure 1
 11 in here.

12 THE COURT: Okay.

13 MR. RADULESCU: Again, the alleged benefits are
 14 also in the background. It's the same idea of after hours
 15 lighting, emergency lighting and low level requirements.
 16 I'm giving you that background because I just want to
 17 briefly talk about Figure 1 and then jump to Figure 5.

18 Figure 1 is not relevant to this particular
 19 claim 12, but the question is, what is this thing showing,
 20 and then what is Figure 5 showing? And I actually wanted to
 21 walk you through what these components are so that you have
 22 the full spec in mind as to what the spec is directed to,
 23 because when we go to the claims, we go to claim fights,
 24 then we can actually do it in light of the real spec here.
 25 And I say real spec in the sense of what is actually

1 disclosed. Okay?

2 So I have one slide on Figure 1, and keep in
3 mind the troffer light that I previously showed a picture
4 of, this is looking up into the light, and what you see is
5 you see one fluorescent tube here (indicating). You see a
6 second fluorescent tube on the bottom of the screen of slide
7 12. And in the middle highlighted in blue is that ballast
8 cover that I showed you on the previous slide that you can,
9 in fact, remove by taking off these connector clips, these
10 things that jet out or they can be screws. There are six of
11 them. Those six things, once they're removed, the ballast
12 cover drops out, and you'll see all the wires in here
13 (indicating) and the ballast, and you'll see the line from
14 the -- the building wire line with the hot, you know, a
15 black, a red, a white line. That's the wiring from the
16 switch or from the building that gets wired into this
17 apparatus.

18 So we have a ballast cover and then we see, we
19 have these LEDs, these one of four -- there's 24 of them.
20 And my point about the emergency lighting and low level
21 lighting is, what this figure and what the spec is
22 describing is a situation where you put 24 holes in the
23 ballast cover and you put a circuit board with the LEDs
24 inside so that the LEDs protrude through that ballast cover
25 and connect these LEDs to a battery. That's the disclosure

1 agrees is directed to or claim 12 is directed to this
2 embodiment, and what is this? I wanted to spend a minute
3 describing what, in fact, it is. And here, again, you have
4 to keep in mind the troffer light, and you have to keep in
5 mind that we want low level illumination with 24 LEDs. And
6 instead of taking off that ballast cover and putting the
7 circuit board and the LEDs inside and then putting the
8 ballast cover back on, this embodiment is one where it says,
9 I have a strip of, I have a housing with a strip of LEDs
10 that protrude through the housing. That's what Figure 6
11 shows.

12 So it's a strip that now has my, you know, 20 or
13 24 LEDs. And now how do I integrate this into or retrofit
14 my fluorescent lamp? I take this and I, in fact, just tape
15 it to the ballast cover, double-sided tape. Put a piece of
16 tape on the back side of this, put a piece of tape on the
17 ballast cover, stick it up there.

18 And you may ask, well, what about the wires,
19 what about the wires? How do you get power to this thing?
20 And I will just go back to this figure, because this figure
21 describes a connector here, 535, that describes drilling a
22 hole in the ballast cover and then sticking the wires
23 through that hole and connecting it to a battery 512.

24 And now we've got double-sided tape, this
25 fastening mechanism with an attachment surface. The other

1 in the spec. And its purpose is for if the power goes out,
2 it would be nice to have a little amount of light, a little
3 amount so you can walk around, so you can go to the exit,
4 and that's low level lighting or emergency lighting or, you
5 know, standby lighting.

6 The purpose of these LEDs is to give low level
7 illumination. You may ask, why 24 of them? Because back in
8 the old days these LEDs didn't emit much light. You needed
9 24 of them to get a low level of illumination power. The
10 LED in your camera or in your cellphone for the flash is
11 emitting more light than all 24 of these things, you know,
12 today. These surface mount, new technology LEDs are super
13 bright and now, in fact, they can be used for general
14 illumination. Back in those days, when the patent
15 application was filed, not conceivable to use these LEDs for
16 general illumination.

17 We heard a reference to this patent being
18 directed to an LED tube. The word the tube that was used by
19 Blackbird, and my point on this slide is no, no, no. This
20 patent is not directed to an LED tube. These things aren't
21 tubes. These are the tubes. This patent is not directed to
22 replacing the fluorescent tubes with an LED tube. That's
23 embodiment one. That's Figure 1 in terms of what's
24 disclosed.

25 Very briefly, Figure 5 is the one that everyone

1 point of Figure 5 for reference purposes is this
2 double-sided tape is still protected by the protective
3 cover, so this is not, in fact, how it's installed. This is
4 not a cross-section of the installation of that ballast
5 cover with the illumination surface. It shows a separate
6 strip of housing, separate housing. It shows LEDs
7 protruding from the illumination surface of this housing,
8 and on the back side it shows the attachment surface, that's
9 in green, and then it shows the double-sided tape that is
10 still covered, so it's not sticky.

11 And the intent is to convey that we're going to
12 rip off the tape on the bottom to make it sticky. We're
13 going to rip off the tape on the top to allow the housing to
14 attach at the attachment surface to the fastening mechanism,
15 the tape. And then this tape is described in the spec to
16 then push it up against the ballast cover. The ballast
17 cover, in fact, is down here, underneath. It's not
18 illustrated in here. But that's what this conveys.

19 So now I'm done with going through the two
20 figures and, you know, we have claim 12. They're
21 highlighted on slide 16. There's five disputes starting
22 with housing, going to attachment surface, illumination
23 surface, protrude through and then the fastening mechanism.
24 And these terms are briefed in almost the exact order
25 that they appear in the claim except attachment surface

1 and illumination surface are flipped in briefing. All
2 right.

3 So now we start with housing. Mr. Hintz will do
4 illumination surface, attachment surface. I will come back
5 and do protrude through and then he'll wrap it up with the
6 means-plus-function issue, the fastening mechanism last.

7 We have claim 29, very analogous in terms of its
8 structural requirements about housing an attachment surface,
9 illumination surface, protrude through. We only see it in
10 our slides because it is the requirement that these terms in
11 both claims need to be construed the same. So when you are
12 trying to interpret claim 12, we want to use claim 29 to
13 make sure we're consistent.

14 Okay. So housing. The only dispute is
15 structure, as you know, and our point is let's first go to
16 the claims to see how this term should be interpreted. We
17 go to claim 12 and we start out with, it says it's a housing
18 that has two surfaces, attachment surface and an
19 illumination surface, and that's structure.

20 A housing that is read onto a layer of paint
21 would not fit within this type of concept of having a
22 housing with attachment surface and illumination surface.
23 We think that even the claim itself is conveying structure.
24 We can also look at the circuit board limitation of this
25 claim where it, in fact, says this board is positioned

1 about protective layer of paint on metal. Even though that
2 paint protects the metal and keeps it from rusting, it's not
3 the top of housing that the spec is referring to.

4 Here's an example from column 9. The housing is
5 dimensioned so that it may be installed to an existing
6 ballast cover. Of course, that strip needs to be thin
7 enough and long enough so that it fits on the ballast cover.
8 Sometimes ballast covers are very small, and actually in
9 this courtroom, the ballast cover is hidden underneath the
10 single fluorescent lamp. These are single strip lamps and
11 the ballast cover, in fact, is underneath that lamp.
12 You've got to remove the lamp and then remove the ballast
13 cover.

14 So that's the support in the spec. And, again,
15 we can go to the figure and, in fact, this patent does show
16 what the housing is. It's, in fact, separate from the
17 circuit board. The circuit board is inside the housing.
18 It's separate from the tape, and, in fact, this housing has
19 an upper illumination surface that clearly, the LEDs
20 protrude up through that illumination surface or that
21 surface of the housing to allow them to illuminate.

22 And we cite the Kenall Manufacturing case simply
23 for the proposition that when you are interpreting the word
24 "housing," using the word "structure" is pretty typical.
25 It's expected, and that's what happened in the Northern

1 adjacent to housing, so that the plurality of LEDs protrude
2 through.

3 You're positioning this thing adjacent to
4 housing, next to the housing to allow the LEDs to protrude
5 through. That describes the concept of a circuit board
6 being moved or positioned adjacent the cover or the housing,
7 to allow the LEDs to protrude through. This supports the
8 interpretation again that there's a structural requirement
9 in this claim. It does not make sense to talk about paint
10 being positioned or a circuit board being positioned
11 adjacent some paint. That's claim 12. And the issue of
12 claim 29 is relevant because this is actually a method
13 claim, where we have a step of positioning the circuit board
14 adjacent the housing.

15 So we have the step of positioning or moving the
16 circuit board adjacent the housing, close to the housing, so
17 that these LEDs protrude. Again, not describing some thin
18 layer of paint on the surface of a circuit board. That
19 is consistent with defendants' construction requiring a
20 structural aspect to this, and we have the cite to
21 Southwall that says claim 29 must be interpreted, construed
22 the same as claim 12 and we can use it in support of our
23 position.

24 We also can go to the spec, and here's just
25 another example where it's pretty clear we're not talking

1 District of Illinois in the Kenall case. That term used the
2 word "structure" to define housing.

3 And I think that's all I want to say with one
4 last exception. The dictionary that Blackbird relies on in
5 our view is truncated. They use the first part of it,
6 referring to something that covers, protects or supports.
7 That describes a layer of paint. A layer of paint protects
8 metal.

9 We think that if we go on in the dictionary,
10 there are a couple of examples of what they mean, that it's
11 a frame, a bracket or box for holding or protecting a
12 mechanical part. Again, they're structure to this term.

13 And with that, unless you have any questions, we
14 can move on to the next term.

15 THE COURT: Let's move back to the other side.

16 MR. RADULESCU: Thank you.

17 So, Mr. Thompson, I guess one thing that's in
18 the brief, I expect you to back off of paint, but you can't.
19 Would you care to tell me why you think paint would be part
20 of the housing here?

21 MR. THOMPSON: I think it would be part of the
22 housing in the sense that the illumination surface, for
23 example, could be paint. The illumination surface is just a
24 layer, and the parties agree that that is an agreed portion
25 of the construction, a layer. And clearly a layer of a

1 housing could be paint. Houses are painted, and that
2 surface of the housing could, in fact, be paint.

3 THE COURT: Do you think that makes any sense in
4 the context of this patent?

5 MR. THOMPSON: I do, because what we're housing,
6 particularly in the embodiments that Mr. Radulescu was
7 focusing on, was a circuit board. So we're talking about,
8 you know, housing an electronic device, something that just
9 needs to be, you know, housed for aesthetic reasons,
10 possibly other reasons. But we're not talking about
11 housing, you know, a mechanical device that needs to be
12 protected from the elements. I mean, in the context of
13 this patent, the housing could very easily only be
14 aesthetic. You know, it is in the apparatus in the ceiling.
15 You don't want to be looking at a circuit board. You would
16 rather be looking at a clean surface and a housing
17 accomplishes that.

18 Now, could the entire housing be paint? No, I
19 don't think so, you know. But it's a surprising claim. So
20 I think to the extent the surface layers, the surfaces
21 recited in the claim were paint, the rest of the would be
22 more substantial.

23 THE COURT: All right. Do you have anything
24 else?

25 MR. THOMPSON: Just briefly on the tutorial

1 point. Mr. Radulescu points, you know, discussed in depth
2 the purpose, general discussion of the purpose set forth in
3 the patent. We don't think that's relevant to this claim
4 term or really any of the claim terms at issue. The claims
5 define the scope of the -- the scope of the invention, and
6 we don't think they're informed by what the patent was
7 generally talking about as the purpose for the lighting
8 apparatus at that time. And I think it's important to
9 understand, and Mr. Radulescu made this point, that at the
10 time of the patent, LEDs were certainly relatively dim.
11 That's what they are now. It probably would be unlikely for
12 you to be able to rely on them as a primary light source at
13 that time because they were dim.

14 And that's, we would submit, why the patent was
15 talking about them in terms of being a secondary light
16 source. But, again, that is not reflected in the claim.
17 The claim is simply directed to an apparatus that has a
18 particular configuration.

19 I agree the claim does not specify that
20 configuration isn't a tube. Again, it's a comprising claim,
21 and that configuration could be placed into a tube as is
22 often the case or almost universally the case with lighting
23 apparatus. It's not that you just have an exposed bulb in
24 the ceiling with nothing covering it in this type of
25 configuration.

1 Unless you have anything further, your Honor?

2 THE COURT: No. Why don't you go onto the next
3 one.

4 MR. THOMPSON: The next term, your Honor, is
5 attachment surface.

6 Now, the claim recites an apparatus having an
7 attachment surface and an illumination surface, and it
8 further specifies that there's a fastening mechanism for
9 securing the attachment surface to the illumination surface.
10 And exemplary embodiment 5 sets forth an example of an
11 embodiment that includes an attachment surface and an
12 illumination surface, again here in red and in green.

13 We brief the attachment surface should be
14 construed as a layer of the housing to which the
15 illumination surface is secured. Now, as you can see in
16 defendants' proposed construction, at least that much of the
17 construction is agreed.

18 The key dispute --

19 THE COURT: Isn't part of the reason why it's
20 agreed is that's already in the claim?

21 MR. THOMPSON: Yes. Yes, your Honor. I would
22 submit that's precisely why. That's correct.

23 THE COURT: And so doesn't the Federal Circuit
24 as recently as a few days ago say it's kind of pointless to
25 be -- maybe they are saying something stronger than that, to

1 be construing something to include other things that are
2 in the claim, which is the whole point of construction, to
3 add some meaning, not just to repeat what else is in the
4 claim?

5 MR. THOMPSON: No. I think that is correct,
6 your Honor, but in this case I think there's a dispute as to
7 what the attachment surface is actually secured to, and I
8 think adopting one of these constructions would resolve the
9 claim.

10 I think --

11 THE COURT: No. So I'm not saying there isn't a
12 dispute here. I'm just saying that the part about to which
13 the illumination surface is secure, which you say we both
14 agree on that, that shouldn't be part of this construction.
15 That's already in the claim.

16 So the part that you disagree about is really
17 you want to call the attachment surface a layer of the
18 housing, and they want to call it a layer of the housing
19 that is secured to the ballast cover.

20 MR. THOMPSON: Well, I think we both want to
21 call it a layer of the housing. They want to call it a
22 layer of the housing that is secured to the ballast cover.

23 THE COURT: And that's fair.

24 MR. THOMPSON: So --

25 THE COURT: I mean, that's what the dispute is,

1 whether or not it needs to be secure to the ballast cover.
 2 MR. THOMPSON: Yes. I agree, your Honor. That
 3 is the dispute.
 4 THE COURT: All right.
 5 MR. THOMPSON: So I think in the context of this
 6 patent, leaving attachment surface un-construed would
 7 potentially be confusing.
 8 THE COURT: Well, I'm not going to leave it
 9 un-construed. I'm going to construe it. I'm just saying,
 10 you know, I am not going to construe it -- you know,
 11 construe it to say the surface of something is secured to
 12 the illumination surface. What I am saying is, in my
 13 opinion, that's stupid, so I'm not going to do that. What
 14 we are really talking about it is, I'm not going to construe
 15 it as a layer of the housing, or am I going to construe it
 16 as a layer of the housing that is secured to the ballast
 17 cover, or something like that.
 18 MR. THOMPSON: I understand, your Honor. I
 19 don't think we have any objection to just construing it to a
 20 layer of the housing.
 21 THE COURT: Yes. Right.
 22 MR. THOMPSON: Okay.
 23 THE COURT: So tell me why I should not construe
 24 it as a layer of the housing that is secure to the ballast
 25 cover.

1 MR. THOMPSON: All right. We think it should
 2 not be construed in that way because neither the claims, the
 3 specification, nor the prosecution history suggest that that
 4 securing, securing the attachment surface to the ballast
 5 cover is required and should not be required in this claim.
 6 I think if you look first at the claim language,
 7 it's undisputed that claim 12 does not require that the
 8 attachment surface be secured to the ballast cover. And
 9 there's an important point that I don't think defendants
 10 dispute. The claim sets forth a fastening mechanism for
 11 securing the attachment surface to the illumination surface,
 12 but it says nothing, and there's no language in the claim
 13 that would give rise to the requirement of the attachment
 14 surface being secured to the ballast cover.
 15 THE COURT: Well, so, I mean, that is I think
 16 essentially the dispute here, and so one of the things I'm
 17 supposed to be dealing with is looking at this in an overall
 18 context of the patent, and it's called the attachment
 19 surface.
 20 And isn't the whole picture more or less what
 21 Mr. Radulescu was saying, that you're developing this
 22 apparatus so you can attach it to some existing surface?
 23 MR. THOMPSON: I think you're developing the
 24 apparatus so you can retrofit it into a light fixture. I
 25 don't think you are developing it necessarily so it has to

1 be attached to a ballast cover.
 2 And I think if you look --
 3 THE COURT: Maybe it's not attached to a ballast
 4 cover, or maybe it is, but doesn't it have to be attached to
 5 something?
 6 MR. THOMPSON: It does, but I think it has to be
 7 attached to the illumination surface, because that's what
 8 the claim specifies.
 9 THE COURT: But that's kind of a silly thing
 10 because if it's just attached to the illumination surface,
 11 it's the case if I build, or somebody builds a housing that
 12 does all of this stuff, but it has no use in retrofitting,
 13 it's outside the claim. Right?
 14 MR. THOMPSON: Yes. Used for an apparatus but
 15 not used in retrofitting, I think it would be outside the
 16 claim.
 17 THE COURT: And so the whole retrofitting
 18 involves attaching it to something. Right? Isn't that what
 19 is meant by the retrofit?
 20 MR. THOMPSON: I think the retrofit was meant
 21 by -- I wouldn't use the word "attached" because I think it
 22 has a particular meaning in the claim. I think it would
 23 mean to retrofit it into a lighting apparatus and how you
 24 place it into that lighting apparatus --
 25 THE COURT: A hover there, kind of like a ghost

1 into a movie?
 2 MR. THOMPSON: No. I think it would be secured
 3 into the apparatus, but it is not necessarily going to be
 4 secured via the attachment surface of that apparatus.
 5 That's why I resisted using the word "attached." I think if
 6 you say I'm attaching it to this light fixture, that implies
 7 that it's necessarily attached to the light fixture via the
 8 surface, which I don't think is the case.
 9 THE COURT: Okay. All right.
 10 MR. THOMPSON: Well, I think it's important to
 11 next turn to Figure 5, which Mr. Radulescu spent a good deal
 12 of time on. And defendants, I think, ultimately, their
 13 argument is that in light of the specification, the, quote,
 14 "only embodiment of the retrofit apparatus of claim 12
 15 disclosed requires that the attachment surface be secured to
 16 the ballast cover." But if you look at the specification,
 17 it's simply not the case. And that was an initial matter.
 18 We don't believe it's proper under well settled Federal
 19 Circuit law to limit claim 12 based on a disclosed
 20 embodiment, particularly because that embodiment is
 21 explicitly labeled as exemplary.
 22 But if you look at the discussion of that
 23 embodiment in the specification, it makes clear that far
 24 from being required that this attachment surface be secured
 25 to a ballast cover, it says effectively the opposite: That

1 it's only in typical operation that the attachment surface
2 is secured to the ballast cover. And if something is merely
3 typical, you know, by definition, it's not required. So we
4 think it would be error to read a requirement from the
5 specification that the attachment surface be secured to the
6 ballast cover into the claim in light of this disclosure,
7 which makes clear that it is not required.

8 Defendants also make a broader point that where
9 the specification describes the feature as part of the
10 invention, the feature describes as part of the claim.
11 Apparently from our reading, this is effectively a disavowal
12 of claim scope argument. Although defendants, and I think
13 tellingly, do not actually come out and say that, but that's
14 what they're saying in their brief. Because this feature is
15 described as part of the invention, it must be in the
16 claims.

17 THE COURT: No, I don't think that's necessarily
18 a disavowal-type claim. I mean, you know, there are Federal
19 Circuit cases that say -- of course, there are Federal
20 Circuit cases that say other things, too. But there are
21 Federal Circuit cases that say sort of you have to construe
22 the claims in the context of the invention that's described,
23 and I think that's what they are saying, and they are
24 saying, you know, we've got the typically thing. You've got
25 some description of embodiment, and you've got the name

1 attachment surface, which certainly -- in the context of a
2 retrofitting apparatus, sounds like that is how you would do
3 the retrofit.

4 MR. THOMPSON: Well, two points in response to
5 your point. The one case they cite in support of their
6 argument, PolyAmerica, is a disclaimer case, which leads us
7 to believe this is a disclaimer argument by them.

8 But to your point as to it's an attachment
9 surface, so it has to be the same as attached as a reference
10 and apparatus, I think if you look at the language of the
11 claim, there's a fastening mechanism for securing the
12 attachment surface to the illumination surface. So the
13 attachment surface, you know, by virtue of this claim
14 language does need to be attached to the illumination
15 surface and not the ballast cover.

16 THE COURT: It actually needs to be secured.

17 MR. THOMPSON: Correct. It needs to be secured.

18 THE COURT: And so doesn't that suggest, because
19 if what attachment surface is what you and the other side
20 wanted to say, you know, part of it in the definition is
21 something that an illumination surface is attached to,
22 secured to, then it's kind of redundant to have it called
23 the attachment surface.

24 MR. THOMPSON: I think what cuts against that
25 argument definitively is the examiner's amendment, which was

1 addressed in the papers, but I think it's important.

2 THE COURT: So you did mention the examiner,
3 both sides mentioned the examiner's amendment.

4 MR. THOMPSON: Yes.

5 THE COURT: One thing I don't remember seeing
6 and, you know, there could be a lot of reasons for that,
7 maybe I just missed it, is what happened that led to this
8 examiner's amendment?

9 MR. THOMPSON: Well, the prosecution history is
10 a little sparse on this point. The examiner wrote in his
11 detailed summary of the amendment that he proposed this
12 amendment to resolve 112 issues. He did not specify what
13 112 issues he was proposing to resolve exactly. And the
14 prosecution history itself does not give much more
15 indication about what gave rise to the amendment.

16 THE COURT: So basically the prosecution history
17 is summarized by you. They're going along with the usual
18 prosecution history stuff, and kind of with no explanation
19 other than what is in this amendment, the examiner says,
20 there's a 112 issue here, not further defined, and so I'm
21 going to propose that this language be added. That's it?

22 MR. THOMPSON: That is what I recall at the
23 moment. To be honest, I would have to go back to see if
24 there was a prior 112 rejection giving rise to this.

25 THE COURT: But isn't that kind of important in

1 terms of interpreting what this prosecution history means?

2 MR. THOMPSON: It's important, but I think the
3 most important is the actual text of the amendment, which I
4 think speaks to exactly the point you're discussing.

5 THE COURT: Well, does it or doesn't it, because
6 one of the things that I was thinking about, and it's not
7 clear to me -- it wasn't clear to me for a long time, it's
8 never clear, is the way that -- if you took out the language
9 about the attachment surface is secured to the illumination
10 surface, I'm not sure whether it's clear that the claim
11 would put the various pieces all together. That's my
12 impression as to what maybe the examiner was doing, was
13 saying, gee, you've got an attachment surface, an
14 illumination surface, a circuit board, some LEDs, and you
15 described some, you know, this is adjacent to that. But
16 you've got to make an apparatus here, so tie it all
17 together. I mean, that seemed to me the best I could do
18 without actually trying to figure out whether there was more
19 prosecution history.

20 MR. THOMPSON: Right. But the only thing that
21 this part of, or that the amendment speaks to being tied
22 together is the attachment surface and the illumination
23 surface.

24 THE COURT: But based on the fact that you've
25 got, you know, circuit board adjacent to the one and to

1 the other, I don't know. It seems to me that all of a
2 sudden were actually making one whole thing by securing, in
3 essence, the top to the bottom.

4 MR. THOMPSON: No. And that could be, but I
5 think that would speak to exactly the issue here today,
6 whether the attachment surface would need to also be secured
7 to the ballast cover in addition to being secured or
8 attached to the other surface.

9 THE COURT: All right. Do you have anything
10 further on this?

11 MR. THOMPSON: Well, I just want to be clear on
12 this point that the claim originally required this fastening
13 mechanism to secure the attachment surface to the ballast
14 cover, and that was changed to read, to be secured to the
15 illumination surface.

16 So we would submit that it's impossible to
17 reconcile the inventors consenting to this amendment with
18 the view that they wanted the attachment surface to be
19 secured to the ballast cover.

20 THE COURT: Even though -- actually, I mean,
21 isn't it at best kind of an ambiguous argument, because
22 clearly what the inventors imagined was the attachment
23 surface would be attached to the ballast cover. And
24 doesn't their consent to this amendment indicate that,
25 oh, yes, gee, we called it an attachment surface. Okay.

1 We're covered.

2 MR. THOMPSON: I don't think there's anything
3 in the spec that would give rise to the view that they did
4 view the attachment surface --

5 THE COURT: That's why I say it's kind of
6 ambiguous, is you could argue this either way.

7 MR. THOMPSON: But if it's ambiguous, I would
8 suggest there can't possibly be a disavowal of claim scope
9 that requires this limitation to be read into claim 12
10 because of the relevant standard requires, you know, a clear
11 and unambiguous disclaimer. And I don't think -- to the
12 extent it is ambiguous, I don't think that standard would be
13 met.

14 THE COURT: All right. Do you have anything
15 more?

16 MR. THOMPSON: Not at this time, your Honor.

17 THE COURT: All right. Thank you, Mr. Thompson.
18 Mr. Hintz?

19 MR. HINTZ: Yes, your Honor. The Court, as one
20 would expect, has focused on the issues. I will try to go
21 through briefly on this, but we have our slides. If you
22 will indulge me for a few minutes.

23 The parties' dispute comes down to whether the
24 Court needs to look at the specification, and what we have
25 to all focus on, of course, is initially the claim. And as

1 your Honor pointed out, this is the language that's in the
2 claim. That's where both sides have this agreement. But
3 the problem is, there's no description of this in the
4 specification whatsoever.

5 The Court obviously knows and has mentioned that
6 one must look to the written description in order to
7 determine what the claims mean. There's nothing in the
8 specification that supports this language.

9 As far as the examiner's amendment, it requires
10 all of us to look into a crystal ball or read tea leaves or
11 try to understand what the examiner was thinking.

12 THE COURT: Do you know the question
13 Mr. Thompson wasn't sure of, and I appreciate his candor.
14 In terms of background in the prosecution history to this
15 112 from the examiner, is there any foreshadowing of it?

16 MR. HINTZ: I don't believe so. I've looked to
17 my colleagues to see if any of them recall anything from the
18 prosecution history.

19 MR. RADULESCU: I do have a couple minutes to
20 say about what you've been pondering, your Honor. I'm going
21 to let him sort of do the argument, and I think maybe at the
22 end of the day I will sort of shed light on my view or our
23 view.

24 THE COURT: Well, I wouldn't wait until the end
25 of the day because it's not exactly fair to Blackbird.

1 MR. RADULESCU: I will say just one minute's
2 worth.

3 MR. HINTZ: Right. While we're here, we'll try
4 not to battle, but I think this illustrates the point
5 precisely because we have discussed this.

6 I believe the examiner did not see that ballast
7 cover was in the preamble and saw ballast cover, the ballast
8 cover in the body of the claim and said, there's no
9 antecedent basis for this and switched it to be something
10 else. That's my personal belief.

11 MR. RADULESCU: Yes. And your suggestion that
12 there are these various parts, you have to figure out how
13 they go together, that element of the claim refers to the
14 ballast cover, but it's only in the preamble, not caught.
15 Therefore, let's now give it some meaning as to what it's
16 referring to, and we can all sort of imagine, you know, why
17 this substitution of words, why substitute, you know,
18 illumination surface for ballast cover? There's nothing in
19 the prosecution history that will tell you that, but there
20 is an explanation that one could surmise, and it would be as
21 simple as instead of looking at Figure 5 when this amendment
22 was made, the examiner was looking at Figure 1. In Figure
23 1, the ballast cover is, in fact, the illumination surface.
24 Hence, very simple flipping of words, put it into claim 12,
25 not realizing it's actually supposed to be directed to

1 Figure 5, not Figure 1. Hence, our written description
2 argument that this claim is actually invalid because it's
3 not described in the specification in the way that the claim
4 is described. That's for another day, and at least at this
5 point I think that doesn't have to be addressed by the
6 Court. And as you caught it right away, we don't need to
7 read that language into the attachment surface at this point
8 because we just simply have to interpret it.

9 THE COURT: All right. Thank you. Sorry, Mr.
10 Hintz.

11 MR. HINTZ: That's fine, your Honor. We're here
12 to serve.

13 The typical operation language that Blackbird
14 points to I think needs to be looked at in context as always
15 of the specification itself. Blackbird points to that
16 sentence in column 9. I think it's roughly lines 18 to 20.
17 But if one reads farther down from 20 to 25, there's a
18 description of what securing and --

19 THE COURT: Which column are you on?

20 MR. HINTZ: Column 9.

21 THE COURT: Thank you.

22 MR. HINTZ: They point to line 17, in typical
23 operation.

24 THE COURT: Right.

25 MR. HINTZ: And they come to a full stop. Then

1 trying to say. Typically, they envisioned what your Honor
2 has described earlier, this, and Mr. Radulescu had
3 described.

4 If you have a double-sided tape, you're going to
5 stick this apparatus onto an existing ballast cover inside
6 the troffer of a fluorescent light fixture, and that
7 typically would be a direct contact, direct securing. But
8 what the patent was trying to say is, maybe somebody could
9 hang it off a bolt that extends down or a clip that extends
10 down or a magnet that might, some people might not say is
11 direct because the magnet is between the ballast cover and
12 the lighting fixture.

13 THE COURT: But all of those things would be
14 securing the attachment surface to the ballast cover,
15 wouldn't it?

16 MR. HINTZ: Yes.

17 THE COURT: So I guess what I'm wondering, and
18 maybe I should ask Mr. Thompson, is: What kind of
19 retrofitting would you have where the attachment surface is
20 not secured to the ballast cover?

21 MR. HINTZ: That is a very good question, your
22 Honor, one that we have looked in the specification to find
23 an answer to and there is none. There is no description in
24 the specification what that means. Your Honor's allusion to
25 a ghost, does it just hang in the air by itself? No. It

1 the next sentence, the illumination surface, 532, is
2 opposite the attachment surface, 530. And, again, that's
3 context. We're not saying anywhere in our briefing they
4 have to be opposite each other, but that's context. That
5 informs what this claimed invention is. And then IT says,
6 as used herein, the terms securing and secured do not
7 require direct contact. In other words, and it goes on.
8 Sometimes it's direct. Sometimes it's indirect.

9 I would submit to the Court that that
10 description of securing also informs the typical operation
11 statement that typically is going to be secured directly,
12 but it does not have to be directly. I think the typical
13 operation, and then the definition of secured, shows that
14 typically, it's going to be one way, but it could be
15 another.

16 But --

17 THE COURT: How about the way that it sort of
18 defines securing is secured afterwards? That's both covered
19 in the sentence, the typical operation, attachment operation
20 is secured to the ballast cover. Essentially, the next
21 couple sentences are just saying, securing could be directly
22 or indirectly. It still does not really address the typical
23 operation language, does it?

24 MR. HINTZ: It doesn't directly address the
25 typical operation, but that is my belief of what they are

1 has to be attached. It has to be secured somehow.

2 THE COURT: Well, I mean, one of the things --
3 you know, it could be secured in the fluorescent -- you
4 know, in Mr. Radulescu's original technology tutorial, which
5 just happens, I have a lot of experience looking at lights
6 because they're in my basement. You know, the fluorescent
7 tubes have two little prongs on each end or how it's
8 secured, and you can presumably actually have something --
9 you could secure a retrofit device the same way, couldn't
10 you? I mean, by at the end?

11 MR. HINTZ: I think there are many ways that one
12 could secure, but I don't think it's really our purposes as
13 lawyers to try to come up with those. The question is:
14 What's described in this patent? And in this patent, what's
15 described is a means of securing the fastening mechanism are
16 double-sided tape, screws, clips, magnets.

17 THE COURT: All right. So you could have
18 magnetic ends?

19 MR. HINTZ: I suppose so, yes.

20 So, your Honor, I don't want to belabor the
21 point because the Court is aware of our arguments that we've
22 talked about retrofit a lot, that we've got the retrofit
23 description. Figure 5 is the only embodiment of what is
24 claimed in claim 12. It clearly says, it's configured to be
25 secured to the ballast cover. That much is clear.

1 What is the claim? What is being claimed? The
2 lighting apparatus. That's Figure 5. The whole construct,
3 everything that's shown there.

4 What does it consist of? Well, it has a
5 housing. We've talked about that. That has an attachment
6 surface, an illumination surface. We've talked about that.
7 It has got a surface board, it has LEDs, it has a fastening
8 mechanism. All of that is shown in Figure 5.

9 And how is Figure 5 described? The fastening
10 mechanism, 534, performs the function of securing the
11 attachment surface, 530, of the housing, 528, to the ballast
12 cover. Plain, clear, simple description. Never a
13 description of securing the attachment surface, 530, to the
14 illumination surface. Never described anywhere.

15 The only place where one gets that description
16 or anything that would look like it supports is Blackbird's
17 drawing of Figure 5, the annotated version.

18 And if I could approach, your Honor, I just have
19 a simple --

20 THE COURT: Sure.

21 MR. HINTZ: -- demonstrative (handing a
22 demonstrative to the Court).

23 So, your Honor, what I've handed the Court is
24 the top figure is plaintiffs' Figure 5 where they have the
25 fastening mechanism shown, and it's difficult to see on the

1 and stay true to the specification? And that is why we make
2 the proposed construction. But both constructions, your
3 Honor, lead us down the path of some day being faced with a
4 written description requirement problem, but that's for
5 another day.

6 Now, what Blackbird does say -- let me
7 anticipate what Mr. Thompson is going to say because they
8 said it in their briefs, or their brief is -- well, Figure 5
9 shows this fastening mechanism. However, a skilled artisan
10 reviewing the figure would understand the disclosure is not
11 so limited.

12 Well, a skilled artisan would understand the
13 disclosure is not so limited that a fastening mechanism has
14 to be double-sided tape. We would agree with that because
15 the specification talks about clips, a magnet, and so forth.
16 But what a skilled artisan cannot do is say, okay. 534 is
17 the fastening mechanism. I think it's something else. I
18 think it's the ends of the housing. I'm going to ignore the
19 specification and just make that up on my own. You can't
20 just color what you want. This is color by number. 534 is
21 the fastening mechanism. 534 is what needs to be covered as
22 the fastening mechanism. This is paint by number. And 534
23 doesn't have to be an adhesive strip, but that is where it
24 belongs in the context of the claimed invention.

25 Now, there are lots of descriptions and

1 overhead, which is one of the reasons why I wanted to use
2 the handout.

3 The fastening mechanism is shown as the end of
4 the housing, but as the Court knows, and as we've seen, the
5 specification describes the fastening mechanism as item
6 534. And that's clearly shown at the bottom of not only
7 plaintiffs' annotated figure, but our annotated figure that
8 we've colored in blue. The fastening mechanism is not
9 where plaintiffs pointed in this figure. The fastening
10 mechanism, as the specification says, is 534, and that's on
11 the bottom.

12 So you've got the attachment surface properly
13 illustrated in plaintiffs' annotated figure. You have the
14 attachment surface and illumination surface both properly
15 illustrated. What you don't have is the fastening mechanism
16 illustrated in the correct place.

17 So this figure shows the relationship between
18 the two, and it shows that there is nothing, no fastening
19 mechanism, which is what the claim requires. The fastening
20 mechanism is the thing that connects or secures or attaches
21 the illumination surface to the attachment surface.

22 So where does that leave us? Well, it leaves us
23 in the position that your Honor has clearly seen that we're
24 in. We are all, quote, "stuck with what the examiner did,"
25 and the question is, how do we make this claim make sense

1 statements by Blackbird not only about this claim
2 limitation, but others, what a person of ordinary skill in
3 the art would understand. And that person isn't here,
4 either in person or by declaration. The Court has nothing
5 to go on of what a person of ordinary skill in the art would
6 or would not understand this to mean other than the Court's
7 own experience in dealing with claim construction hearings
8 where lawyers come up and say, what would or wouldn't
9 happen.

10 The fact is, we believe that, and said it many
11 times, and I will stop saying it, is that we have to be
12 grounded in the written description, and that is where we
13 go.

14 And with that, I will let Mr. Thompson, I guess,
15 respond.

16 THE COURT: All right. Thank you, Mr. Hintz.

17 MR. HINTZ: Thank you.

18 MR. THOMPSON: Three points in response, your
19 Honor. I think my colleague somewhat loses sight of the
20 actual dispute here, is whether the attachment surface must
21 necessarily be secured, secured to the ballast cover, not
22 whether it need to be secured to the fastening mechanism or
23 anything else. But that is the key point of dispute between
24 the parties here. And the claim -- and I would note that
25 they focus very heavily on the specification, particular

1 embodiment in the specification, does not support in any way
2 the notion that the attachment surface need be secured to
3 the ballast cover.

4 Now, this is a -- this claim, claim 12, is
5 directed to a lighting apparatus with a particular --

6 THE COURT: And so just tell me, how else would
7 this thing be used other than having the attachment surface
8 secured to the ballast cover?

9 MR. THOMPSON: So I think this claim is directed
10 to a lighting apparatus for retrofit with a light fixture
11 having this particular core configuration. I don't think it
12 specifies how it is actually inserted and secured into the
13 light fixture. I just don't think that's present in the
14 claim. And it does not have to be present in the claim,
15 because the claim is only directed to this particular
16 structure, the illumination surface, attachment surface and
17 circuit board and LED is protruding through. I agree the
18 claim does not specify how it's actually secured into the
19 fixture, but it doesn't matter. And defendants' attempt to
20 read that into the claim is a pure read of an embodiment, an
21 exemplary embodiment into a claim with no justification for
22 it.

23 Now, as to the prosecution history, to the
24 extent -- from what my colleague said, they just have
25 speculation as to what the reasoning was, but I think it's

1 sorry, I've gone too far.

2 The language that defendants are pointing to in
3 the spec in their brief establishing that this attachment
4 has to be made is the exact language that was changed in
5 the examiner's amendment. In their brief they point to the
6 statement that the lighting apparatus also includes a
7 fastening mechanism for securing the attachment surface to
8 the ballast cover. That's their primary support in their
9 brief for reading this limitation into the claim.

10 So then if you look at the examiner's amendment,
11 that's precisely what was changed. So to the extent they're
12 right, that the specification, this language in the
13 specification is what is giving rise to this requirement in
14 the claim, that the attachment surface be secured to the
15 ballast cover, it cannot be reconciled with that precise
16 language being altered in the claim by the examiner and the
17 inventors consenting to that change. And they very easily,
18 had they disagreed, could have said, no, that surface needs
19 to be secured to both.

20 Now, as to Mr. Hintz's demonstrative, I would
21 point out that the additions made to Figure 5 were made in
22 response to their written description argument, which I
23 think even defendants concede is not at issue here today.

24 THE COURT: No. It's definitely not an issue
25 here today.

1 inescapable that the inventors --

2 THE COURT: And, I take it, through you.

3 MR. THOMPSON: But we think the language, the
4 amendment and the implications to the amendment are clear
5 simply based on the language that was changed. If the
6 inventors believed that the attachment surface needed to be
7 secured to the ballast cover, they simply could have
8 rejected the examiner's amendment and said, no. The
9 fastening mechanism is for securing that.

10 THE COURT: I mean, in fact, doesn't it seem
11 clear, in fact, that the examiner's amendment -- you know,
12 it's not like this was an obviousness sort of thing where
13 somebody said, here's a piece of art where the attachment
14 surface is secured to the ballast cover. You rejected it.
15 Okay. Well, it changes to secured to the illumination
16 surface. Then you understand why the substitution is being
17 made.

18 Here, the substitution is being made, it seems
19 to have nothing to do with whether or not it's supposed to
20 be secured to the ballast cover.

21 MR. THOMPSON: I disagree. I think regardless
22 of why its substitution was made, if you look at the
23 language substituted, it's precisely the language from the
24 specification that they are pointing to.

25 I mean, the language that defendants -- I'm

1 MR. THOMPSON: So I will only very briefly
2 address it. A skilled artisan who is looking at a figure
3 need not limit it to what the specification explicitly
4 describes as being disclosed in that figure. And as I
5 believe your Honor pointed it out, the fastening mechanism
6 and the attachment surface could be secured being on
7 opposite sides of the housing. And I think, you know, given
8 the simplicity of that limitation, a skilled artisan looking
9 at that could recognize those two surfaces as being secured.
10 Again, this is not relevant to claim construction. I think
11 it's particularly not relevant given that defendants in
12 their proposed construction concede that the illumination
13 surface and the attachment surface should be secured
14 together.

15 So in conclusion, your Honor, we think this is
16 an attempt by defendants to read in a limitation from the
17 specification. We think their papers reflect that this is
18 ultimately a disavowal argument, that they do not have
19 adequate disclosure in the specification to support.

20 THE COURT: Okay. Thank you.

21 MR. THOMPSON: Thank you.

22 MR. HINTZ: Your Honor, if I may briefly address
23 the prosecution history just so we can close that loop. I
24 wanted to address the Court's question. I direct the Court
25 to Joint Appendix A71 to 89. Obviously not right now the

1 Court doesn't need to see it, but that is the first office
2 action where a rejection was made on 102 and 103 grounds.
3 There was no rejection on 112.

4 And then, your Honor, there is the examiner's
5 amendment itself, A37 through 40. On A38 is where the
6 examiner says, the application has been amended as follows
7 in order to resolve 112 issues. Then it lists A, B, C and
8 D, amendments to claim 12, 23, 23 and 29, where ballast
9 cover is replaced with illumination surface.

10 So there's no description of what the 112 issues
11 were, but I believe your Court, the Court asked earlier, was
12 there a 112 issue elsewhere in the prosecution, and I don't
13 think there was. It was just a statement made by the
14 examiner.

15 THE COURT: All right. Thank you. That's
16 helpful.

17 So the next one is illumination surface. Let me
18 propose this. I don't actually think there's any
19 construction that's necessary. I think the plaintiffs'
20 proposed construction is unhelpful, which assist in
21 lighting, and, you know, changed to circuit board is
22 otherwise established that defendants' construction is just
23 repeating something else that's in the claim. So I'm
24 proposing that I just don't construe that. I don't think
25 that's where these issues are going to be resolved.

1 What do you think, Mr. Thompson?

2 MR. THOMPSON: We have no objection to that,
3 your Honor.

4 MR. HINTZ: No objection from defendants, your
5 Honor.

6 THE COURT: All right. Well, thank you very
7 much.

8 Let's go onto the next one, which is protrude
9 through. And, Mr. Thompson, on this one do you agree that
10 the LED has to be at least partly in the hole?

11 MR. THOMPSON: Yes. Well, yes. The LED --
12 something has to connect through the hole, because it's
13 connected to a circuit board underneath the hole.

14 THE COURT: And so whatever is meant by the
15 LED -- is that the what the argument is, is there's a hole
16 of some amount and the defendants want the LED, whatever
17 that is, to go all the way through the hole, and whereas you
18 want it only to go at least part way into the hole?

19 MR. THOMPSON: No. Well. We have a slide I
20 think that has different LEDs, which might be helpful in
21 discussing this.

22 So we think, and just to set this slide up,
23 three LEDs which are obviously in yellow. The illumination
24 surface is in blue. Surface, I realize, connotes sort of a
25 2D structure, but the parties agree it's a layer, so it has

1 some thickness.

2 The LEDs are coupled to the circuit boards in
3 green and they're actually attached to the circuit board via
4 a contact pad, which is the point on the board that the LEDs
5 actually connect, and that can be raised off the board, the
6 board turn on a mathematical plane.

7 We think, all parties agree that the LED in the
8 configuration on the left protrudes through the illumination
9 surface. We also think all the parties agree the LED on the
10 right does not protrude through the illumination surface.

11 THE COURT: I imagine that's true.

12 MR. THOMPSON: I would hope. And then we think
13 the disputed configuration is the one in the middle, which
14 we've blown up on this next slide.

15 So it wasn't entirely clear to us, frankly, what
16 passing from the needs in defendants' construction requires.
17 It wasn't clear to us if it required literal movement of the
18 LEDs beneath the surface through the illumination surface or
19 if it meant that they had to also extend, both rise above
20 the surface and extend below the surface and perhaps they
21 could clarify that. But we think under our construction and
22 generally a skilled artisan would understand that the LED in
23 this configuration, where it rises above the illumination
24 surface but connects to the circuit board within the
25 illumination surface hole protrudes through that surface

1 because it rises above that surface.

2 THE COURT: And in your little, I don't mean
3 this disparagingly, animation --

4 MR. THOMPSON: Yes.

5 THE COURT: I was going to say cartoon, but
6 animation, the little black thing there, the little
7 rectangle that you are pointing, your arrow is pointing at,
8 is that part of the LED or is that something else?

9 MR. THOMPSON: I think hear it is part of the
10 circuit board. It's the contact point on the circuit board.
11 The LEDs have a contact point.

12 THE COURT: When you say contact point, is this
13 like a battery connecting to something where you've got a
14 surface on the battery and then you've got a conductive
15 surface on the --

16 MR. THOMPSON: Yes. It's like a pad that the
17 solder would be placed on. Then the thing would be coupled
18 onto. But it's above the board. So the board, while being
19 below the surface, can have an element that is above.

20 THE COURT: And, all right. Go ahead.

21 MR. THOMPSON: So in our view we think this LED
22 protrudes through. We believe that -- it's defendants' view
23 that this does not pass from beneath, whatever that might
24 mean. To be clear, to the extent their construction
25 requires physical movement of the LED through, we think

1 that's inappropriate in an apparatus claim.

2 THE COURT: But just to make sure I understand
3 your position, yours is, and some of this may be based in
4 science, but yours is the LED has to be connected --
5 whatever the LED is, it has to be at least partly beneath
6 the surface of the hole and it has to be connected to the
7 circuit board through the hole?

8 MR. THOMPSON: Yes. I think it definitely has
9 to be connected, indisputably must be connected to the
10 circuit board through the hole. I think if the LED were
11 entirely above the surface, the illumination surface, I
12 don't think that would it literally protrude through.

13 THE COURT: Right. Right. All right. And so
14 in terms of the animation, animation implies movement.

15 MR. THOMPSON: Graphic?

16 THE COURT: The drawing you have there,
17 basically a construction that captures what you have there,
18 you would be fine with that. Right?

19 MR. THOMPSON: We would.

20 THE COURT: And basically your argument in
21 support of that is, you know, some combination of common
22 sense and sort of what you think the plain meaning of
23 protrude through is, particularly in the context of this
24 patent?

25 MR. THOMPSON: Yes. Particularly in the context

1 of this patent, it matters a lot whether the LEDs are
2 actually protruding through, i.e., rising above the
3 illumination surface.

4 THE COURT: I don't think it's the rising above
5 part that you disagree. I think it's the sinking below
6 part.

7 MR. THOMPSON: Right. But in terms of the
8 functionality of this apparatus, it is a lighting apparatus
9 that illuminates the area. It doesn't really matter at all
10 how they're disposed below the illumination surface, and
11 whether they connect in the way we've shown in this diagram
12 or connected underneath the illumination surface, it just
13 doesn't matter.

14 THE COURT: Is there anything else in particular
15 you want to say that's important to your argument, because I
16 think your argument is a reasonable one, so I'd kind of like
17 to hear what defendants have to say, particularly about the
18 drawing that you have.

19 MR. THOMPSON: No, your Honor. I will reserve
20 for a response.

21 THE COURT: Good. Okay. Thank you.

22 All right. So Mr. Radulescu, I'm giving you a
23 hint here that I don't see what's wrong with plaintiffs'
24 argument here, so do you want to tell me what's wrong?

25 MR. RADULESCU: I'm going to keep this slide up

1 because, call it a cartoon, call it not really reflecting
2 what these devices actually look like. It is a cartoon and
3 that's what I will start with and then I will go to our
4 slides, and there's two disputes.

5 The first is: Should you construe the term?
6 Right? We believe you should because we have a dispute as
7 to whether this claim covers the design where the LEDs are
8 placed on top.

9 THE COURT: I get that argument.

10 MR. RADULESCU: That's 02 Micro.

11 The second issue is, when you construe it, how
12 should it be construed? And the dispute is really boiling
13 down to whether or not these LEDs need to be passing from
14 below the surface to the other side of the surface as
15 opposed to placed on top of.

16 And, you know, we --

17 THE COURT: Well, so placed on top of, I
18 understand from what Mr. Thompson said, and it sounded like
19 what you just said, that if you had a surface and the LED,
20 you know, juttet out, but it did not jut down at all,
21 both sides agree that would not be protruding through.
22 Right?

23 MR. THOMPSON: Correct, your Honor.

24 MR. RADULESCU: Repeat that again.

25 THE COURT: That if you have -- if you imagine

1 the illumination and there's some holes here. The thing,
2 like your initial technology, if you had something where you
3 just stuck the LED or the LED sat on top of the surface and
4 whatever, however it got connected to the circuit board, you
5 know, that might be go through the hole. But the entire LED
6 was at surface level or above, I think both sides agree,
7 that's not protruding through.

8 MR. RADULESCU: No. That's maybe half of the
9 accused products. That's one of the problems with the
10 cartoons, is that, in fact, the LEDs are bigger than this
11 alleged illumination surface. And if I can draw your
12 attention to slide 63, I will explain why.

13 THE COURT: Okay.

14 MR. RADULESCU: This diagram shows this flat
15 LED. That's the surface mount device that has these two
16 connected, two pads on the bottom of it. I showed an
17 illustration of it earlier. It's just a really flat
18 surface. These are the surface mounts that are just plopped
19 down on top of this board.

20 THE COURT: Well, when you say -- so there was
21 some hint of this in the briefing. You know, presumably, we
22 don't actually care how it's made, so when you say plopped
23 down, you're just trying to talk about how it's actually put
24 together?

25 MR. RADULESCU: I will tell you with respect to

1 claim 29, these things aren't positioned where, you know,
2 the claim requires positioning. You know, the circuit board
3 enters the housing. That means, you know, moving. But, in
4 any event, they're placed down. And let's ignore how they
5 get there.

6 THE COURT: Right.

7 MR. RADULESCU: The point is, these are
8 cartoons. And this is intended -- this cartoon shows a line
9 up where the size of the LED matches the opening of that
10 hole.

11 THE COURT: All right.

12 MR. RADULESCU: There are cases where it's
13 bigger than the alleged opening. There are cases where it
14 is smaller. That's a fact.

15 THE COURT: But neither one of you is saying, or
16 at least I didn't get it from your proposed construction,
17 but, you know, they are not saying and you weren't saying it
18 has to match the size of a hole?

19 MR. RADULESCU: No, because we have a patent
20 that requires positioning, and it says the word "through the
21 illumination surface," which means from one side to the
22 other. So it has to be smaller than if that makes any
23 sense. But -- okay?

24 THE COURT: All right. Keep going.

25 MR. RADULESCU: So that's one issue, is, I think

1 straw man?

2 MR. RADULESCU: No. If in the devices where the
3 blue, where the chip is bigger than the hole, these products
4 are in the case. We have infringement contentions arguing
5 that an LED sitting on top of protrudes through.

6 THE COURT: But it's not necessarily a question
7 of whether -- something could protrude through a hole even
8 under your definition and still be bigger on top than the
9 size of the hole?

10 MR. RADULESCU: No. It has to pass through.
11 The word in the claim is through. It has to pass through
12 the elimination surface.

13 THE COURT: But we're talking about motion.
14 We're talking about a fixed thing.

15 MR. RADULESCU: And it has to go from --

16 THE COURT: It's like if you had a hole inside
17 of your house and a little animal went through it, it could
18 be -- it would protrude through it when it came out the
19 other side even though it's bigger than the hole.

20 MR. RADULESCU: So you've got to look at the
21 LED. This is what the patent describes. It shows an LED
22 protruding through the illumination surface from one side to
23 the other. That's what the patent is directed to.

24 With respect to the accused devices, this is a
25 cartoon because it's complicated. The other thing to

1 probably half the products in our case have this alleged
2 illumination surface smaller than the LED and therefore the
3 LED, which includes that yellow --

4 THE COURT: When you say smaller, you mean not
5 the surface. The hole?

6 MR. RADULESCU: I'm saying this width of this
7 chip is, in fact, bigger than the blue, bigger than the
8 hole.

9 THE COURT: Right.

10 MR. RADULESCU: This LED doesn't fit in the
11 hole. Our position is it should be outside the scope of
12 this claim, and my additional sort of tech tutorial point
13 is, this is the LED. These balls are the solder. Solder
14 plopped down on the circuit board. This thing is then
15 placed down on top. This thing in many of the products is
16 larger than the alleged hole.

17 THE COURT: But I think actually, I know you've
18 just got a cartoon and Mr. Thompson was standing up a minute
19 ago and I told him not to. But based on what Mr. Thompson's
20 construction protrudes through, your cartoon on the right,
21 there's no protruding through.

22 MR. RADULESCU: There's no protruding through.
23 It protrudes from.

24 THE COURT: Well, whatever it is, you both
25 agree it's protruding through. So that's kind of a

1 realize is that this blue is, in fact, the circuit board.

2 They're reading this blue on the layer, very thin layer --

3 THE COURT: Well, I mean, we're not doing
4 summary judgment right now, but that's part of your --

5 MR. RADULESCU: Our argument is --

6 THE COURT: When the patent talks about protrude
7 through a hole, your construction is the thing that
8 protrudes through the hole, looking at it from top to
9 bottom, cannot be wider than the hole?

10 MR. RADULESCU: It needs to pass through or pass
11 from beneath -- we're looking at the LED. It needs to pass
12 from beneath the surface to the other side of that surface.
13 So we've got to find the LED from beneath --

14 THE COURT: So where are you getting support for
15 this?

16 MR. RADULESCU: For our construction?

17 THE COURT: Yes.

18 MR. RADULESCU: The phrase is protruding
19 through. And we can go to the specification. We can look
20 how the specification describes protruding through, and it's
21 pretty basic in terms of the support that we have because we
22 can look at every embodiment. We can look at all of the
23 descriptions. And what happens is, you have the circuit
24 board that's positioned adjacent the housing so that the
25 LEDs can protrude through a plurality of holes in the

1 surface. That's the written description.

2 You look at the figure, Figure 5, and what you
3 see is LEDs on top, circuit board below, and inside the
4 housing the illumination surface.

5 How do you get the LEDs to go to the top without
6 coming from the bottom? They --

7 THE COURT: So in your 1970s LED with a little
8 bulb and then two long --

9 MR. RADULESCU: Wires.

10 THE COURT: -- wires, wouldn't that be pretty
11 much -- you know, the whole bulb is not going to go
12 through --

13 MR. RADULESCU: The bulb, in fact, is placed on
14 the circuit board. It sits on the circuit board. The flat
15 part of the bulb is coming down. Their problem is a small
16 gap and the patent describes now positioning that circuit
17 board with the LEDs that are sticking up -- little bulbs,
18 positioning it through so they project, protrude --

19 THE COURT: Show me that in the patent. Show me
20 that in the patent.

21 MR. RADULESCU: That's how the spec describes --

22 THE COURT: Well, show me.

23 MR. RADULESCU: We'll go back to this
24 description where it says, the circuit board 511 is
25 positioned adjacent the housing, so that the LEDs 504

1 The protrude through language is important in
2 the sense that it also uses the word "through," which is the
3 same word that is used in claim 12. And our position is the
4 word "through" has to be given some meaning. And support
5 for that, we can go to something like S.C. Johnson, where
6 there was a distinction between the word "from" and
7 "through," because we believe that Blackbird is
8 reinterpreting this word, this phrase, to be read as instead
9 of, you know, protrude through, they're interpreting it to
10 mean protrude from as opposed to protrude through.

11 We have one last animation. I will call it a
12 cartoon given that it's a bolt sitting on top of a surface,
13 and the dispute is in connection with, you know, this type
14 of design, right. Obviously on the right, this bolt
15 protrudes through this surface. If I take this bolt and
16 simply set it on top of this surface, I don't believe in
17 plain English one would call that protruding through the
18 surface.

19 THE COURT: Right. Right. I mean, you know,
20 you've got Mr. Thompson's -- he had three cartoons. You
21 have two. What you don't have is his middle one.

22 MR. RADULESCU: Yes. I have two others, so I've
23 got one that's actually what the patent is directed to,
24 where the LED bulb protrudes through this surface as you
25 position it.

1 protrude through a plurality of holes in the illumination
2 surface of the housing.

3 THE COURT: That's like tautological there. All
4 it's doing is, yes, for the thing that worked, they do have
5 to protrude through. That's the claim. So you have to
6 position parts of that happened. That doesn't mean that the
7 LED necessarily goes all the way through to the circuit
8 board.

9 MR. RADULESCU: Well, they start on the circuits
10 board. The LEDs are mounted to circuit boards. This, in
11 fact, is a spec describing, how do we put it in the housing?
12 We position it adjacent the housing.

13 THE COURT: All right.

14 MR. RADULESCU: And so this is consistent. We
15 can go to the other claim 29 that is directed to a user
16 using a wall switch to flip it on and off. And one of the
17 steps for the using is to position the circuit board
18 adjacent the housing so that the plurality of LED dials
19 proceed true through the illumination holes. So this is
20 describing the act of retrofitting and the act of
21 positioning this circuit board, which has the LEDs on it
22 already, because that's a prior step. We need to provide a
23 circuit board, including a plurality of LEDs, and then we
24 physically have to position this circuit board adjacent so
25 that the diodes protrude through.

1 And in connection with this accused design, keep
2 in mind that the LED is just placed down on top of that
3 circuit board.

4 THE COURT: All right.

5 MR. RADULESCU: Okay. And I think that's all I
6 had. Thank you, your Honor, for your patience.

7 THE COURT: All right. Well, thank you.

8 So, Mr. Thompson, you can pick whatever argument
9 you want, but one of the things that I'm wondering about
10 is, to capture what you have on your drawing, the middle
11 one --

12 MR. THOMPSON: Yes?

13 THE COURT: -- I don't think the plain meaning
14 or the project through, neither one of them actually capture
15 what your position is.

16 Do you have some other suggestion as to what I
17 would say to capture what your position is?

18 MR. THOMPSON: We -- can I have a moment to
19 confer?

20 THE COURT: Yes, yes.

21 (Pause while counsel conferred.)

22 MR. THOMPSON: We think rise above and extend
23 into the illumination surface would cover that.

24 THE COURT: All right. I will think about that.
25 But if I said something like protrude through, you know,

1 means that the light emitting diodes protrude through means
2 that the light emitting diodes are at least are partially in
3 the hole and are also at least partially out of the hole,
4 that's what you said it means. Right?

5 MR. THOMPSON: Yes.

6 THE COURT: All right. Well, that's something I
7 can think about.

8 What else would you like to say?

9 MR. THOMPSON: Just three brief points, your
10 Honor.

11 As to whether configuration that had a larger
12 top could still protrude through, we think the answer is
13 clearly yes. Because this is an apparatus claim, you cannot
14 read a requirement into it regardless of what claim 29 says,
15 that the LEDs be physically passed from below. That's
16 simply important, and --

17 THE COURT: I tend to think that claim 29
18 terms are useful for various things, but they're not using
19 what a method claim says to figure out what an apparatus
20 claim -- I agree, I don't think that particular portion is
21 relevant.

22 MR. THOMPSON: And we don't think the spec
23 equally requires or has any disclosure about how the LEDs
24 need to be positioned below the surface.

25 I would -- you know, Mr. Radulescu talked about

1 Figure 5 and in their brief also talks about Figure 6.
2 These simply can't see how the LEDs are disposable in the
3 surface in either figure, one being a top view, one being a
4 side view. But I have nothing further.

5 THE COURT: All right. All right. Shall we go
6 onto the last one?

7 MR. THOMPSON: Yes.

8 THE COURT: Oh, so let me just -- Mr. Thompson,
9 let me just ask one other question.

10 MR. THOMPSON: Yes.

11 THE COURT: In terms of that construction, what
12 protrude through means, what do you think of, quote, "is in
13 and just out of," unquote?

14 MR. THOMPSON: It is in and just out? That
15 would -- we think that works.

16 THE COURT: All right. Okay. So let's do the
17 last one, which is the means-plus-function perhaps.

18 MR. THOMPSON: So for this one, your Honor, the
19 claim recites, a fastening mechanism for securing the
20 attachment surface of the lighting apparatus to the
21 illumination surface, and there are two disputes among the
22 parties regarding this term.

23 The first is whether it's subject to, it's a
24 construction under 112, 6. The second is, if it is subject
25 to construction under 112, 6, what the appropriate

1 corresponding structure is.

2 I would note just preliminarily the claims do
3 not use means. There's still a rebuttable presumption under
4 112, 6. And defendants bear the burden here to respond,
5 establishing by a preponderance of the evidence that the
6 claims are governed by 112, 6.

7 And just to clarify one part of our briefing, we
8 cited the preponderance of the evidence standard, and in our
9 reply referred to as clear and convincing, but that's a
10 mistake. It's well settled that the standard is
11 preponderance. I just wanted the record clear on that
12 point.

13 THE COURT: You know, I actually -- yes, yes.
14 Go ahead.

15 MR. THOMPSON: Our apologies for that mistake.

16 THE COURT: That's all right.

17 MR. THOMPSON: But the implication here is, in
18 ADDITION to the generalities, a particular one with respect
19 to experts, because defendants in particular complain that
20 we failed to offer an expert declaration regarding how a
21 skilled artisan would understand the term. But here
22 unusually for claim construction, defendants are the ones
23 that bear the evidentiary burden. So to the extent that
24 expert testimony or expert declarations are required, that
25 alone can be dispositive in plaintiffs' favor since it is

1 defendants' burden to come forward with that evidence if it
2 is so required. We don't believe it is, but it's
3 defendants' contention that it apparently is, and if so,
4 that's dispositive of this issue.

5 THE COURT: You know, I have to say, trying to
6 think about the cases, I had come up with this issue. I
7 think a lot of times nobody has an expert declaration.

8 MR. THOMPSON: And we did not submit one. We
9 were prepared to if they did, but, you know, they are the
10 ones who raised our failure to submit it, and we think to
11 the extent that it is required, that is more defendants'
12 failure since it is their burden than ours.

13 Be that as it may, we think the claim language
14 here is simple and a skilled artisan would understand that
15 fastening mechanism refers to a class of physical things
16 that fasten. This is not a purely functional claim. It is
17 not any means to connect these two surfaces.

18 Obviously, in this art, you would not connect
19 them by a string or some mechanism of that type. It is a
20 specific --

21 THE COURT: Why wouldn't a string count?

22 MR. THOMPSON: I don't think in this art a
23 string would fasten two surfaces together. And a person of
24 skill would not understand a piece of string to be a
25 fastened mechanism within the meaning of this art.

1 THE COURT: So a piece of string could secure,
2 but not fasten?
3 MR. THOMPSON: I think a piece of string as a
4 general matter could secure. I don't think you would secure
5 electrical components in this type of apparatus with a
6 string.
7 THE COURT: Well, I would hope not.
8 MR. THOMPSON: Right. So we think there is --
9 you know, it is clearly referencing a class of structures,
10 but it is not an unlimited class of fastening structures,
11 and I think this is particularly apparent when you look at
12 the dictionary definitions of fastening and fasten.
13 THE COURT: So, you know, if the language of the
14 claim, instead of saying a fastening mechanism for securing
15 the attachment surface, blah, blah, blah, if it said a means
16 for securing the attachment surface, blah, blah, blah, it
17 would a hundred percent clearly be a means-plus-function
18 claim.
19 MR. THOMPSON: If it did not recite fastening,
20 just a means for securing, yes.
21 THE COURT: And if it said instead of a means, a
22 mechanism for securing the attached to the surface, that
23 would likely be means-plus-function?
24 MR. THOMPSON: I think that would likely be
25 means-plus-function, yes.

1 can't consider the specification in making an initial 112, 6
2 analysis. That is not correct as a matter of law. The
3 Federal Circuit has considered and rejected specifically
4 that argument.
5 Now, it's true you can't look to the
6 specification to get corresponding structure, but as in all
7 claim construction issues, you have to look to the
8 specification to understand how a skilled artisan would
9 understand the term at issue. So you are not importing that
10 structure, but the structural example set forth in the
11 specification would further inform a skilled artisan that
12 the term fastening mechanism refers to a category of
13 structures. And you can see the Federal Circuit apply
14 precisely this analysis in Flo Healthcare, which examined
15 whether height adjustment mechanism was subject to
16 construction under 112, 6. They found it was not and as
17 part of that analysis, looked to the specification, which
18 taught various height adjustment mechanisms, gas spring
19 mechanism, rack and pinion mechanism, cable and pulley and
20 so forth. And the spec here is very similar. Specifies
21 that a fastening mechanism is an adhesive strip and provides
22 other examples, et cetera.
23 And the Federal Circuit considered a very
24 parallel situation, Flo Healthcare, and found that weighed
25 against the application of 1126, and I think precisely the

1 THE COURT: And so basically -- on the other
2 hand, if it said a fastener for securing the attachment
3 surface, then that would clearly not be means-plus-function.
4 Right?
5 MR. THOMPSON: That's correct, and I think
6 defendants concede that point. And I think that's the key
7 point.
8 I think a person of skill would understand that
9 a fastening mechanism is the same thing as a fastener. The
10 fact that it uses a more generic term like mechanism does
11 not convert it to a means-plus-function claim.
12 And I think if you look at the other terms the
13 Federal Circuit has found to connote structure, they are in
14 many ways far more abstract and far more generic than
15 fastening mechanism and particularly far more complicated
16 than fastening mechanism, which most people would understand
17 what that class of structures is.
18 THE COURT: So the fact that the specification
19 has a number of examples of a fastening mechanism, in terms
20 of whether or not this is a means-plus-function term, what
21 impact does that have?
22 MR. THOMPSON: Yes. I am glad you brought that
23 up. That's my next point or a point later.
24 It's an critically important to the
25 specification to look at here. Now, defendants contend you

1 same is true here.
2 Briefly on the --
3 THE COURT: So basically, I mean, that's kind of
4 your -- you tell me. Is kind of your lead argument the
5 specifications, description of well-known fastening
6 mechanisms helps you construe what fastening mechanism
7 means, how it should be construed, and so that -- and so it
8 should be basically construed as a fastener?
9 MR. THOMPSON: I think we'd accept that
10 construction. I wouldn't say the spec, the specification is
11 our lead argument. I think the term itself, fastening
12 mechanism itself connotes structure, particularly when you
13 look at the definitions of fastening and to fasten,
14 fastener. But I think the spec makes it very clear that the
15 burden cannot be overcome here given the highly structural
16 nature of the term. So I think the spec is extremely
17 important, but I wouldn't necessarily characterize it as our
18 lead argument.
19 THE COURT: Okay.
20 MR. THOMPSON: And briefly, I just wanted to
21 address this grammar point. We addressed it in our papers.
22 We think it's a misunderstanding of the relevant Federal
23 Circuit law, which defendants, some walked back in their
24 surreply. But the reality is the Federal Circuit has never
25 found that the underlying part of speech of the modifying

1 word is determinative or even relevant in assessing whether
2 the term meaning structure.

3 THE COURT: You know, it's probably not going to
4 be something I write down here, but in a way, it strikes me
5 that whether something is an adjective or noun, and we think
6 about the fact that the people that are supposed to be
7 reading this patent are supposed to be -- supposed to be
8 read from the point of view of a person of ordinary skill in
9 the art. Right?

10 MR. THOMPSON: Right.

11 THE COURT: And so whatever the person of
12 ordinary skill in the art is there, let's assume it's an
13 electrical engineer or something, some of these are grammar,
14 are not part of the qualifications to be an electrical
15 engineer, so I can't actually imagine that fine distinctions
16 of whether something is an adjective or a noun would be very
17 important to figuring out what a person would understand
18 from it. I agree with you.

19 MR. THOMPSON: We agree, your Honor. I would
20 only leave with this point: That fastening, in fact, can be
21 a noun, so even to the extent this is a relevant
22 consideration, we think this would also way against the
23 application of 112, 6.

24 THE COURT: Even though I think -- I don't even
25 want to talk grammar with you.

1 can say et cetera. I think you've got to like say what the
2 structure is, so I don't think you're going to win that one
3 if we get there.

4 MR. THOMPSON: Understood, your Honor. And if
5 you have no further questions, I have nothing further on
6 this issue.

7 THE COURT: All right.

8 MR. HINTZ: Last one. John Hints again, your
9 Honor.

10 Whether this --

11 THE COURT: You do agree, Mr. Hintz, that
12 instead of saying a fastening mechanism, instead a fastener,
13 that I clearly could have done that and that would give them
14 a broad reason as to how the things are connected to each
15 other and you would be done. Right?

16 MR. HINTZ: I don't know if we'd be done, but it
17 would not be a means-plus-function clause if it said a
18 fastener. I do agree. But what we have is something that
19 is written in classic means-plus-function format. We have a
20 means, a fastening mechanism.

21 THE COURT: Even though at the time when this
22 was written, whoever drafted it could rely on the fact that
23 they didn't use the word "means," so nobody would be
24 thinking this was a means-plus-function term. Right?

25 MR. HINTZ: I would have to consider the timing

1 Okay. Was that it?

2 MR. THOMPSON: On this. Would you also like me
3 to address corresponding structure?

4 THE COURT: Wait. Remind me. The corresponding
5 structure, one part was et cetera. Was that the only thing
6 that was in dispute?

7 MR. THOMPSON: No. I think the bigger dispute
8 is likely the structure depicted in Figure 5, which we've
9 seen a lot today, and I think that is the key dispute here.
10 There's a difference with adhesive strips and double-sided
11 adhesive strips.

12 THE COURT: I think we've resolved that because
13 I thought in the briefing you said, somebody said, adhesive
14 strips includes double-sided, tripled-sided, whatever.

15 MR. THOMPSON: We did. I think the issue is
16 whether Figure 5 is corresponding structure, but we think it
17 is. We think a skilled artisan looking at Figure 5 would
18 understand that the surfaces are secured, and I believe you
19 described that structure with a housing with other surfaces.

20 THE COURT: It seems to me based on the
21 arguments being made that Figure 5 is clearly linked to what
22 we're talking about here, so, yes, it would be hard for me
23 to understand that if you got that far, that it wouldn't be
24 part of the structure. On the other hand, I don't think
25 you, when you get the means-plus-function, I don't think you

1 of when this was drafted versus --

2 THE COURT: Well, let's say ten years ago, seems
3 like when it was drafted.

4 MR. HINTZ: It was probably before the Federal
5 Circuit's guidance about nonce words. I had to look up what
6 a nonce word was, frankly.

7 THE COURT: Yes, yes. So did I.

8 MR. HINTZ: But that happens all the time. I
9 mean, I hate to be glib about it, but the law evolves and
10 people tried to get software patents several years ago and
11 finding that's not such a great thing anymore. People have
12 gone back and forth on a means-plus-function claiming, and
13 this is precisely why, because it has been an evolving
14 situation. But the fact is, they could have said fastener.

15 THE COURT: So, you know, Mr. Thompson brought
16 up an interesting example, this string. You would agree
17 that you could secure something, a lighting fixture,
18 something with a string. Right?

19 MR. HINTZ: I agree you could. I'm sorry. Go
20 ahead.

21 THE COURT: No, no, no. On the other hand, a
22 fastening mechanism as talked about here in the context of a
23 patent would not include a string. Right?

24 MR. HINTZ: In the context of the patent, what
25 it includes is double adhesive strip. Not just any adhesive

1 strip. I mean, they tried to say that a single sided strip
2 includes double, or an adhesive strip includes double.

3 THE COURT: What they said was an adhesive strip
4 includes -- you know, single-sided adhesive strips,
5 double-sided adhesive strips. They're all adhesive strips.

6 MR. HINTZ: Right. And a single-sided adhesive
7 strip I submit would not work.

8 THE COURT: It depends how -- it would have to
9 have some attachment to the other.

10 MR. HINTZ: The two components need to be
11 attached, so it needs to be a double-sided adhesive, and
12 that's what's disclosed in the specification, a double-sided
13 adhesive tape. Not a single-sided, a double-sided. So
14 double-sided adhesive tape, magnet, clips. I'm forgetting,
15 there's -- screws. Screws. Those are the ones disclosed.
16 So to your Honor's point, could a string be used? Maybe.
17 Would it? I doubt it. What about a cable tie, a zip tie.
18 Electricians use them all the time.

19 THE COURT: I guess when we were talking about
20 would anybody who had any knowledge at all of the art
21 reading it think that a fastening mechanism for securing the
22 attachment surface, lighting apparatus, illumination
23 surface, would any person of modest skill in the art think
24 that includes string?

25 MR. HINTZ: I think it's highly unlikely, but I

1 equivalents or whether it's doctrine of equivalence kind of
2 equivalence, we have certain things disclosed in the
3 specification that inform the person of skill in the art
4 what types of fasteners could be used.

5 And so if I'm hearing the Court suggesting that
6 perhaps the construction of this term should be fastener,
7 we're still left with, well, what kind of fastener? But it
8 clearly has to be something that is used to connect two
9 things together, some screw, clip, magnet, double-sided
10 tape. Now, does string count as that? Probably not. Does
11 a zip tie? I submit it wouldn't. Does epoxy, adhesive? Is
12 that a fastener? It could be.

13 So we believe, defendants believe that either
14 way we go, we are, quote, "stuck with trying to figure out
15 what fastening mechanism means or what fastener means."
16 What are the meaning of those terms? And it drives us back
17 to the specification, of course, which is the recurring
18 theme, and that, of course, should be the recurring theme
19 because that's what the Federal Circuit tells us to do, to
20 look at the specification.

21 But whether this is a means-plus-function claim,
22 we believe that it is written in the classic format, that
23 mechanism is a nonce word, the same as means, and that
24 fastening is an action.

25 So Blackbird puts up a slide --

1 think they could think that it included a zip tie, a cable
2 tie. Electricians use them all the time to connect wires,
3 to keep them bundled together. One could envision strapping
4 one of those around the ballast cover, zipping it, and you
5 are done. One could envision glue, epoxy. But none of
6 those are disclosed in the specification, and so we're left
7 wandering, trying to figure out fastening means.

8 If it's not a means-plus-function, what does
9 it mean? The parties offer the Court, well, it's a
10 definition of mechanism. Well, what does that mean? We're
11 still stuck with, what does it mean to have a mechanism for
12 securing?

13 THE COURT: Well, and that's, you know, one of
14 the things that I noted was, or I think it's the case the
15 way the argument is set up in the briefing here, there's the
16 argument, is it a means-plus-function term, but there's no
17 actual argument as to if it's not a means-plus-function
18 term, what does that actually include. What is the scope?

19 And, you know, I think it's entirely possible
20 that assuming that fastening mechanism means roughly a
21 fastener, as it excludes glue and some other things.
22 Right?

23 MR. HINTZ: I don't know, your Honor, because
24 I'm back to saying what does the specification disclose and
25 what would those equivalents be? Whether it's 112, 6

1 THE COURT: And I'm sorry to interrupt, Mr.
2 Hintz, but, you know, one of the things that I -- it is
3 a recurring thing, something that I'm keeping with this
4 issue.

5 So, okay. So mechanism is a nonce word. I
6 think that's right, and yet as pointed out by Mr. Thompson,
7 there's a bunch of times where, you know, a something
8 mechanism for doing something has been found by the Federal
9 Circuit not to be means-plus-function, and I don't really
10 think that adjectives or nouns as modifiers is what the
11 difference is between those that fall on one side of the
12 line and those that fall on the other side of the line.

13 Is there some general way to really figure it
14 out, or is it just something else?

15 MR. HINTZ: Well, I agree with the Court, that a
16 person of skill in the art is probably not going to go back
17 to English language and parse the words. However, in order
18 to understand the Federal Circuit's different decisions, we
19 believe it is a factor, and as we said in our brief, it's
20 not something the Court should run to and say it's a noun,
21 it's in. It's an adjective, it's out. That's not what
22 we're suggesting.

23 We're suggesting doing this analytical process,
24 because admittedly, this process is somewhat philosophical,
25 what we're doing in claim construction. Trying to figure

1 out what these things means to somebody who is not present
2 in the courtroom and is who is a fictional -- a person of
3 ordinary skill in the art is a fictional person.

4 So I believe, we believe, defendants, that if
5 you look at these cases, all five of those cases that
6 defendants put up, those were nouns. Detent is an actual
7 thing. Fastening, yes, they have one definition that says
8 it's a hook. But a hook is not part of any of the
9 specification. So I don't think that definition applies.

10 THE COURT: Yes. I don't actually think a
11 fastening mechanism here, that the fact there may be a
12 dictionary definition of that as a hook, if they have ten
13 arguments, that's their tenth argument.

14 MR. HINTZ: Fair enough, your Honor. But my
15 point simply is, let's focus on this concept as what is a
16 person going to look at when they see fastening mechanism?
17 They're going to think of that as what the Williamson case
18 called -- sorry not Williamson. The Phillips called purely
19 a functional placeholder.

20 The question in Phillips is a bit in reverse.
21 The claim limitation, it said baffle. It didn't say means.
22 And the Court said, well, no that's not a functional place
23 holder. That is a real thing. A baffle is a real thing.

24 So Phillips said that's not a purely functional
25 placeholder. Well, contrast baffle to the functioning

1 mechanism. It's an action. It's a nonce word. It's just a
2 placeholder for this functional activity, which is described
3 as for securing the illumination surface.

4 THE COURT: If that's where the argument about,
5 for claim construction and the patent, doesn't that kind of
6 take it away from being a purely functional placeholder,
7 because I don't think anything in the world that fastens,
8 such as a string, is actually within the construction of
9 what a fastening mechanism for securing, whatever the
10 language is -- you know, it's not an unlimited functional
11 class. Doing claim construction, one would narrow it down.

12 MR. HINTZ: I believe that's correct, and while
13 Blackbird gave a mea culpa, I will give a mea culpa for
14 defendants, that we have agreed to a construction. That if
15 your Honor finds it's not means-plus-function, and I don't
16 have a slide for this, but I believe the wording is
17 something like, a mechanism for securing the attachment
18 surface to the illumination surface.

19 THE COURT: I see that. You're right. I missed
20 that.

21 MR. HINTZ: Well, and I think that puts us right
22 back into the same problem, because I think your Honor has
23 correctly gotten to the issue of, the claim construction
24 here that needs to be made, whether it's means-plus-function
25 or not means-plus-function is, what is the scope of the

1 fastening mechanism? And just calling it a mechanism in the
2 joint proposed construction doesn't make much sense because
3 it doesn't inform the jury, what is a mechanism? Then we're
4 back to, is it a string? Is it glue? Is it screws? Is it
5 nails? And so I think we need to do a better job of helping
6 the Court on that. If it's not a means-plus-function, I
7 think we need to do a better job of coming up with a term.

8 The Court asked Blackbird earlier, what if I
9 construed it as a fastener? And I think that could be a
10 better proposal, but I would have to talk to my colleagues,
11 of course, but I think that could be a better proposal than
12 just calling it a mechanism. That does not help the jury at
13 all in my opinion.

14 THE COURT: I mean, I have to say reading this,
15 and I didn't see it I guess when I was reading the brief,
16 but I guess I forgot about it. To some extent, I do tend to
17 think that as an agreed-upon construction, that's a
18 construction that -- you know, if I thought that was
19 actually what it meant, then it really is a pretty purely
20 functional term.

21 So it's interesting. It's very broad, so I
22 guess that's the reason why plaintiff likes it. On the
23 other hand, I think if that's the construction, that kind of
24 fits into your argument that there are no limits.

25 MR. HINTZ: I think you're right, your Honor.

1 That's -- preparing for today, I think that's what we
2 realized, is that although we were trying to reach agreement
3 with plaintiff, and we both, both sides, I think, have
4 something that they can do with that and use down the road,
5 I think we'll be back having the same kind of discussion.
6 What does mechanism mean?

7 THE COURT: Well, so let's do this on that,
8 which is I'm not promising anyone that I'm going to say that
9 this is not a means-plus-function term, but I would like you
10 all to operate on the assumption that I am going to say it's
11 not a means-plus-function term. And maybe when we're
12 through here today, you can talk to each other for a little
13 while and see what you think about fastener or see what you
14 think about something else, but I have to say that I don't
15 much like what you proposed.

16 And maybe giving you time to talk to clients and
17 all of that kind of stuff, you know, maybe by, say, I don't
18 know, Tuesday or Wednesday of next week we could agree that
19 you would either submit something just saying whether you
20 have any change in position or whether you agreed to
21 anything, or something. If you disagree, then you both can
22 submit something saying whatever it is you want, but on this
23 particular little narrow issue.

24 MR. HINTZ: That sounds good, your Honor. Thank
25 you.

1 MR. THOMPSON: All right.
2 THE COURT: Thank you. So do you want it to be
3 Tuesday or do you want it to be Wednesday?
4 MR. HINTZ: I have no preference.
5 MR. THOMPSON: Either way is fine.
6 MR. HINTZ: Wednesday.
7 THE COURT: Wednesday. Okay. Thank you.
8 MR. HINTZ: And I hate to suggest a limit, but,
9 you know, lawyers, we need -- very short. I assume it would
10 be very short.
11 THE COURT: I actually think this is something
12 where if somebody exceeds a limit that I would give, then I
13 won't hold it against them, so I'm not too worried about
14 that.
15 MR. HINTZ: All right. Thank you, your Honor.
16 I think that what I would like to focus on is
17 the actual two disputes that your Honor highlighted before.
18 One is Blackbird's construction, where they try to add, the
19 structure depicted in Figure 5.
20 THE COURT: Has that gone --
21 MR. HINTZ: Well, nothing, because the structure
22 depicted in Figure 5 is item 34, which is a double adhesive
23 strip, so it's already in our construction.
24 THE COURT: So you're objecting to that as
25 redundant?

1 I think we would agree to that, because saying the structure
2 does not cut it. Not only is it redundant if you read it as
3 534, but it's unhelpful if you don't say which structure.
4 You can't just say a structure.
5 THE COURT: I get what you are saying, that, or
6 I think I get what you are saying, which is that the
7 structure depicted in Figure 5 actually can't be the
8 fastening mechanism, because literally the whole thing that
9 you've got on the screen.
10 MR. HINTZ: Correct. In fact, one could read
11 that the structure is Item 500, which is the whole thing,
12 and that's what's being claimed in claim 12, is 51. That is
13 not -- 500 is not the fastening --
14 THE COURT: I get your point. It seems pretty
15 good, but I will give Mr. Thompson a chance to respond.
16 MR. HINTZ: All right. One final then,
17 question, your Honor. I mean issue. The last dispute is
18 the word "et cetera."
19 THE COURT: Yes. You're going to win on that.
20 MR. HINTZ: Then I will sit down.
21 Oh, there is one more mea culpa. There was a
22 slide put up and a mention made how on page 77 of the brief
23 we said the Court cannot look to the specification. I
24 looked at page 77 and I can't find that. If we said it, we
25 should not have said that.

1 MR. HINTZ: Redundant. What they are trying to
2 bring in --
3 THE COURT: So an objection is something to
4 redundant, I take it there's no actual harm if I agree with
5 them?
6 MR. HINTZ: I'm sorry, your Honor?
7 THE COURT: When somebody says I object that
8 it's redundant, I mean, I can say that, but when you say it,
9 then what you are saying is, it's harmless if you actually
10 do it?
11 MR. HINTZ: No, it's not harmless, because this
12 again is the annotated slide --
13 THE COURT: Right. Right.
14 MR. HINTZ: And remember the one I handed up
15 earlier that shows the contrast.
16 THE COURT: Yes.
17 MR. HINTZ: This is the one that Blackbird is
18 saying, if they say the definition should include the
19 structure, singular, disclosed in Figure 5, what structure?
20 528, 534, 536, 514, 530? You get my point. There are ten
21 structures shown there.
22 THE COURT: So it's not so much that it's Figure
23 5, but it's, in your view, 534 of Figure 5?
24 MR. HINTZ: Yes. If Blackbird had a proposed
25 construction that said, the structure 534 shown in Figure 5,

1 The Court in looking at the construction of a
2 means-plus-function claim can look to the specification as
3 part of the claim construction process. I don't remember
4 which slide it was.
5 THE COURT: Okay. That's all right.
6 MR. HINTZ: But like I said, they cleared the
7 record up about one thing. I wanted to make sure if we said
8 it, that's not what we meant. I couldn't find it in our
9 brief. I'm not saying we didn't say it. It could have been
10 a different page.
11 THE COURT: All right.
12 MR. HINTZ: But that's where we are.
13 THE COURT: All right. Thank you, Mr. Hintz.
14 MR. HINTZ: Thank you, your Honor.
15 THE COURT: Mr. Thompson, what about this
16 Figure 5, because I understand defendants' point better than
17 I did when I was talking to you before.
18 MR. THOMPSON: Yes. Frankly, I didn't
19 understand that to be their objection from the briefing.
20 We think the relevant fastening mechanism --
21 defendants' fundamental point today, Figure 5 embodies claim
22 12, and that claim 12 requires an attachment surface and
23 illumination surface to be secured, and Figure 5 reflects
24 that securing by the sidewalls on the side of the housing.
25 THE COURT: But you are talking about 528?

1 MR. THOMPSON: 528 points to the housing. The
 2 securing structure here we would say is the sidewalls of
 3 that housing. That is what is securing.
 4 THE COURT: 528 is the side wall?
 5 MR. THOMPSON: I think 528 is pointing to the
 6 housing as a whole, so we would want -- you know, we would
 7 be comfortable limiting it to sidewalls or some phrase like
 8 that.
 9 THE COURT: So basically there's no particular
 10 number here that corresponds to your argument. It's
 11 essentially the drawing shows a line at the side and we
 12 infer, perhaps not unreasonably, that that is a sidewall?
 13 MR. THOMPSON: Or the sides of. Yes.
 14 THE COURT: So isn't the law something like the
 15 structure has to be clearly linked to the function?
 16 MR. THOMPSON: It is, and I think a skilled
 17 artisan would understand that to be clearly linked to the
 18 function of securing structure these services together.
 19 THE COURT: I forget. What is 528 in the
 20 specification?
 21 MR. THOMPSON: I believe it is the housing.
 22 THE COURT: So kind of pointing to the whole
 23 thing?
 24 MR. THOMPSON: Yes.
 25 THE COURT: All right. You know, drawings have

1 specification, the housing is identified as 528.
 2 THE COURT: Right.
 3 MR. HINTZ: That is that box.
 4 THE COURT: Yes.
 5 MR. HINTZ: The specification talks about the
 6 circuit board being enclosed within it. It is its own
 7 structure. There's something else the specification calls
 8 the fastening mechanism and that's 534. That's the only
 9 description about what the fastening mechanism is and it
 10 doesn't have to be the double-sided tape, but it is not on
 11 the ends of the housing. And if it's construed that way,
 12 then the Court would be taking a separate claim element,
 13 fastening mechanism, and overlapping it with a different
 14 claim element, ignoring that the two words are different.
 15 And each element has to stand on its own and be construed
 16 separate and apart.
 17 That would be all, your Honor. Thank you.
 18 THE COURT: Okay. All right. Well, thank you
 19 for your time this morning. I will take it under
 20 advisement, and I will -- did we say Wednesday? Yes. So I
 21 will expect to get something on behalf of both parties or
 22 separately on Wednesday, and otherwise, have a nice holiday.
 23 I will see you down the road.
 24 (Counsel respond, "Thank you, your Honor.")
 25 (Hearing concluded at 11:11 a.m.)

1 a limited utility because they're generally, among other
 2 things, not drawn to scale, and they're generally -- they
 3 are often illustrative. There's nothing here than the fact
 4 that there's a line at the end that purports to say from
 5 what you can draw a conclusion, this could be a way of
 6 fastening.
 7 MR. THOMPSON: Right. It's true that there's
 8 not a corresponding statement, written words in the
 9 specification saying that, but the Federal Circuit has found
 10 that corresponding structure can be drawn just from figures
 11 even to the extent that they are, the corresponding
 12 structure is reflected only pictorially and not in words.
 13 THE COURT: Okay.
 14 MR. THOMPSON: And we cite such a case in our
 15 brief.
 16 THE COURT: All right. Anything else?
 17 MR. THOMPSON: We would agree -- I mean, we will
 18 obviously confer with defendants, but we would preview the
 19 Court, we would agree with fastener, a construction for
 20 fastening mechanism.
 21 THE COURT: That's promising.
 22 All right. Is there anything else? Yes, Mr.
 23 Hintz?
 24 MR. HINTZ: Your Honor, famous last words, very
 25 briefly. This issue about what the housing is, in the

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