

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

NIPPON TELEGRAPH AND TELEPHONE
CORPORATION, ESSENTIAL WIFI LLC February 4, 2021

VS.

TEXAS INSTRUMENTS INC. * CIVIL ACTION NO. A-20-CV-583
MEDIATEK INC., ET AL * CIVIL ACTION NO. A-20-CV-632
ACER INC, ET AL * CIVIL ACTION NO. A-20-CV-769

BEFORE THE HONORABLE ALAN D ALBRIGHT
MARKMAN HEARING (via Zoom)

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MediaTek Exhibit 1058
MediaTek v. Nippon
IPR2020-01404

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02:32 1 (February 4, 2021, 2:32 p.m.)

02:32 2 DEPUTY CLERK: Markman hearing in Civil Action

02:32 3 1:20-CV-583, styled Nippon Telegraph and Telephone Corporation
02:32 4 and Essential WiFi LLC versus Texas Instruments Incorporated.

02:32 5 Case No. 1:20-CV-632, styled Nippon Telegraph and
02:32 6 Telephone Corporation and Essential WiFi LLC versus MediaTek
02:32 7 Incorporated and MediaTek USA Incorporated.

02:33 8 And case No. 1:20-CV-769, styled Nippon Telegraph and
02:33 9 Telephone Corporation and Essential WiFi LLC versus Acer
02:33 10 Incorporated and Acer America Incorporated.

02:33 11 THE COURT: Welcome, everyone. If you all could be so
02:33 12 kind as to, starting with the plaintiff -- let me turn the page
02:33 13 here. One second. If you all could announce who's going to be
02:33 14 speaking on behalf of plaintiff and then defendant now, that'd
02:33 15 be great.

02:33 16 MS. LU: Good afternoon, Your Honor.

02:33 17 THE COURT: Yes, ma'am.

02:33 18 MS. LU: I'm Jacqueline Lu of Dickinson Wright and I will
02:33 19 be speaking for plaintiffs today.

02:33 20 THE COURT: Very good. I look forward to -- I don't think
02:33 21 I've had the pleasure of having you in my court before. It's
02:33 22 nice to meet you.

02:33 23 MS. LU: Nice to meet you as well.

02:34 24 THE COURT: Defendants?

02:34 25 MR. MANN: Your Honor, for defendants, for MediaTek, this

02:34 1 is Mark Mann. And my colleagues today with me are Kevin
02:34 2 Johnson, our lead counsel for MediaTek, John McKee, Ogi
02:34 3 Zivojnovic and Eric Huang. And we're ready to proceed, Your
02:34 4 Honor.

02:34 5 MR. JOHNSON: Good afternoon, Your Honor.

02:34 6 THE COURT: Well, yes, sir. Good afternoon. Mr. Johnson,
02:34 7 how are you doing?

02:34 8 MR. JOHNSON: Good. Thanks. Good to see you.

02:34 9 THE COURT: This morning I had a hearing, a Markman, with
02:34 10 the Desmarais firm on one side and the Susman firm on the
02:34 11 other. And now I have these two firms. I feel like I'm
02:34 12 getting to work with nothing but the New York Yankees and the
02:34 13 Red Sox. Every day of my life it's a wonderful experience I
02:34 14 have, so I'm pleased to be here with all of you.

02:34 15 If you all will give me one second, I should have been
02:34 16 better prepared. Let me just pull up my list of the claim
02:35 17 terms. Give me one second.

02:35 18 MR. FINDLAY: Your Honor, while you're doing that, just
02:35 19 for the record, Acer here as well, and in the '769 case and for
02:35 20 Acer, myself, Eric Findlay, and Mr. Jerry Chen, our lead
02:35 21 counsel. Good to be here and ready to proceed, Judge. Thank
02:35 22 you.

02:35 23 THE COURT: Okay. The first claim term -- I'm sorry.

02:35 24 MS. FAIR: For Texas Instruments, Your Honor, Andrea Fair.
02:35 25 And I've got Kevin Wheeler and Amit Makker with me. And we're

02:35 1 with the '583 case for Texas Instruments.

02:35 2 THE COURT: Okay. Anyone else? I'm afraid if I start
02:35 3 talking, someone -- I'll have left someone out. Anyone else?

02:35 4 Okay. The first term we're going to take up is
02:35 5 "interference canceller." I am looking at -- the Court came up
02:35 6 with a preliminary construction that you all have, plain and
02:35 7 ordinary meaning, wherein the plain and ordinary meaning is a
02:35 8 device for reducing interference from unwanted signals or
02:35 9 noise.

02:35 10 And I think I will start, with your permission, with the
02:36 11 plaintiff on this one.

02:36 12 If someone is speaking, I can't hear.

02:36 13 MS. LU: My apologies, Your Honor. I keep looking for the
02:36 14 unmute button, but it doesn't seem to go quite like I think it
02:36 15 will.

02:36 16 THE COURT: If we get through this without Kristie yelling
02:36 17 at me at least three times to unmute my deal, it'll be a first
02:36 18 time. So you don't have to apologize to me.

02:36 19 MS. LU: No problem. If I may, Your Honor, I do have a
02:36 20 point of clarification I'd like to ask you about.

02:36 21 THE COURT: Okay.

02:36 22 MS. LU: So in looking at your preliminary construction,
02:36 23 plaintiffs agree with that and would be happy to accept the
02:36 24 preliminary construction as is.

02:36 25 THE COURT: Okay.

02:36 1 MS. LU: Would you still like us to proceed and walk
02:37 2 through that term or...

02:37 3 THE COURT: I would not. I would prefer to hear -- that
02:37 4 was very rude. I would rather -- it'd be better for me to
02:37 5 start with the other side since they would be challenging it.
02:37 6 So who will be arguing on behalf of the defendants?

02:37 7 MR. McKEE: Thank you, Your Honor. This is John McKee,
02:37 8 Quinn Emanuel. I'll be arguing on behalf of the defendants for
02:37 9 this term.

02:37 10 THE COURT: Okay, Mr. McKee.

02:37 11 MR. McKEE: With your permission I'm going to share a
02:37 12 slide deck that we prepared.

02:37 13 THE COURT: Okay.

02:37 14 MR. McKEE: So you should be seeing those slides now.

02:37 15 THE COURT: I do. Yes, sir.

02:37 16 MR. McKEE: So plaintiffs' slides which you'll see in a
02:37 17 minute, they frame the dispute over this term as "can the
02:37 18 interference canceller include an equalizer."

02:37 19 But, respectfully, that's not the dispute at all. The
02:37 20 dispute between the parties is whether the "interference" word
02:37 21 in "interference canceller" should be construed to exclude a
02:38 22 specific type of interference. And that type of interference
02:38 23 is called "Inter-Symbol Interference," or "ISI" for short.

02:38 24 From defendants' perspective, the tentative construction
02:38 25 is incorrect, because the language at the end, "unwanted

02:38 1 signals or noise," is language that was added to plaintiffs'
02:38 2 construction for the express purpose of excluding ISI.

02:38 3 Ultimately the dispute over the "interference canceller"
02:38 4 term boils down to whether the plain meaning of the term covers
02:38 5 the prior art that MediaTek asserted in its IPR petition, or
02:38 6 whether the claim should be rewritten to preserve the validity
02:38 7 of the claims by excluding a certain type of interference, with
02:38 8 no basis in the intrinsic record.

02:38 9 And for the record, this is Slide 5 that I have on the
02:38 10 screen.

02:38 11 THE COURT: Okay.

02:38 12 MR. McKEE: I'm going to advance to Slide 9 from our
02:38 13 presentation. So what is "Inter-Symbol Interference" and why
02:39 14 does it matter here?

02:39 15 Inter-Symbol Interference is a type of interference that
02:39 16 the plaintiffs, in their briefs, have focused on and said is
02:39 17 outside the scope of the '720 patent. You can see here it's
02:39 18 some language from plaintiffs' opening brief where they say the
02:39 19 '720 patent does not use the term "interference" to include
02:39 20 ISI. But instead, in their view, interference means unwanted
02:39 21 signals or noise.

02:39 22 And that's the core remaining dispute, right? Is this
02:39 23 unwanted signals or noise language.

02:39 24 Plaintiffs have also argued that the interference of the
02:39 25 claims is limited to sources external to the signal itself.

02:39 1 And, respectfully, I think we can show that both of those are
02:39 2 incorrect.

02:39 3 Back a few slides to Slide 6.

02:39 4 Inter-Symbol Interference is a type of interference that
02:39 5 was put at issue in MediaTek's IPR. MediaTek argued -- I have
02:40 6 an excerpt here -- that "interference cancellation using an
02:40 7 inverse channel matrix," which is what the '720 patent claims
02:40 8 are about, "is called Zero-Forcing because it forces
02:40 9 interference to zero by completely eliminating ISI."

02:40 10 What plaintiffs have done with their construction by
02:40 11 limiting the interference of the claims to unwanted signals or
02:40 12 noise is they've attempted to expressly exclude that
02:40 13 Inter-Symbol Interference type of interference in order to
02:40 14 distinguish the prior art. But the law is crystal clear. It's
02:40 15 well-settled that courts should not rewrite claims to preserve
02:40 16 validity. And, respectfully, we don't think --

02:40 17 THE COURT: Mr. McKee, if I can interrupt you for a
02:40 18 second.

02:40 19 MR. McKEE: Please.

02:40 20 THE COURT: Let me help you out here. I understand your
02:40 21 argument. I understand why you're making the argument. But we
02:41 22 are not -- we are expressly not rewriting this with regard to
02:41 23 validity. Let me -- I did this for a long time. I get that
02:41 24 most of the time when a defendant proposes a claim
02:41 25 construction, I'm not naive enough to think it has nothing to

02:41 1 do with infringement and their products.

02:41 2 In this situation I'm not naive enough to think that if a
02:41 3 plaintiff is proposing something, it might have something to do
02:41 4 with validity. I get that.

02:41 5 But when my law clerks and I worked -- and I'll even
02:41 6 put -- I mean, we spent a lot of time on interference
02:41 7 canceller. And I can tell you I have -- you know, Josh worked
02:41 8 on it. He's got a Ph.D. My other law clerk has two masters.
02:42 9 I mean, our goal was to do everything we could to get this
02:42 10 right.

02:42 11 So you're not going to make much progress with an
02:42 12 argument that the Court's trying to preserve the claim. I
02:42 13 understand why you'd make it, but I'm just telling you from
02:42 14 inside baseball that we worked very hard on trying to figure
02:42 15 out what the appropriate construction was.

02:42 16 And you'll notice that it is not -- it's not the same as
02:42 17 what plaintiff proposed. And so we did our very best to come
02:42 18 up with what we thought was the appropriate plain and ordinary
02:42 19 meaning.

02:42 20 MR. McKEE: Thank you for that perspective, Your Honor.

02:42 21 THE COURT: And let me add. I'm not insulted at all. I
02:42 22 mean, I'm not criticizing you. I'm just telling you that maybe
02:42 23 unlike some other courts you are in front of, how they might
02:43 24 handle Markmans, I'm telling you that the way we did it was the
02:43 25 way I've already said. I won't rehash it.

02:43 1 But our goal was to get this as technically correct as
02:43 2 possible, regardless of the impact it had on validity.

02:43 3 MR. McKEE: Perhaps then -- and thank you for that, Your
02:43 4 Honor. Perhaps what we can do is we can just talk about the
02:43 5 tentative --

02:43 6 THE COURT: Okay.

02:43 7 MR. McKEE: The tentative -- it says plain and ordinary
02:43 8 meaning, and then it specifies what the plain meaning is.

02:43 9 We do not have an issue with the first part of that
02:43 10 construction, with a device for reducing interference. The
02:43 11 problem from our perspective is the limitation that it only is
02:43 12 for reducing interference from unwanted signals or noise.

02:43 13 And the reason for that is not that that language by
02:43 14 itself is -- is by itself problematic. The reason that we have
02:43 15 an issue with that language of the construction is that
02:44 16 plaintiffs -- I'll go back to Slide 9.

02:44 17 Plaintiffs expressed in their opening brief that the
02:44 18 reason they introduced that specific language is to exclude
02:44 19 this particular type of interference, this ISI interference.

02:44 20 So from our perspective, if that language were removed
02:44 21 from the tentative construction, the "unwanted signals or
02:44 22 noise" language, then there'd be no problem. But the "unwanted
02:44 23 signals or noise" language is language that was introduced in
02:44 24 order to narrow the claims to exclude a type of interference.

02:44 25 And the reason that we have a problem with that is that

02:44 1 there's nothing in the intrinsic record that says that this
02:44 2 specific type of interference should be excluded. The
02:44 3 plaintiffs point to no lexicography, no disavowal, no
02:44 4 disclaimer, no nothing.

02:44 5 What we're left with is this language in the construction
02:45 6 that unquestionably does narrow the claim limitation, and it
02:45 7 narrows it in a way that plaintiffs have specified what they
02:45 8 think that means.

02:45 9 THE COURT: Would you give me a moment, please?

02:45 10 MR. McKEE: Of course.

02:45 11 THE COURT: I'll be back in just a few seconds.

02:48 12 (Pause in proceedings.)

02:49 13 THE COURT: Let's go back on the record.

02:49 14 I'm sorry to have cut out. I needed to check on
02:49 15 something. You can certainly continue. Thank you.

02:49 16 MR. McKEE: Thank you, Your Honor.

02:49 17 A couple of additional points that I want to make. First
02:49 18 is -- I'm going to move to Slide 11.

02:49 19 First is that the only support for the definition that
02:49 20 plaintiffs have proposed, that interference should be limited
02:49 21 to unwanted signals or noise, is from extrinsic evidence.
02:49 22 There's nothing in the intrinsic record that narrows the
02:49 23 claims, that narrows the written description in this way. The
02:49 24 definition comes entirely from dictionaries and from the
02:49 25 testimony of their expert in his declaration.

02:49 1 In short, there's just no written description support for
02:49 2 this. And this goes back to that prior point that there's no
02:49 3 lexicography here, there's no disavowal, there's no disclaimer.

02:50 4 But I think more important perhaps is what we have on
02:50 5 Slide 12, which is that plaintiffs' expert actually agreed
02:50 6 during deposition that Inter-Symbol Interference is a type
02:50 7 of -- that canceling Inter-Symbol Interference is a type of
02:50 8 interference cancellation.

02:50 9 So on the left we have the reply where plaintiffs
02:50 10 reiterate this point, that interference generally refers to
02:50 11 things from an external source.

02:50 12 But we also have from MediaTek's IPR petition where they
02:50 13 have a quote from the Raleigh reference, which is the primary
02:50 14 reference in the IPR, describing what interference the Raleigh
02:50 15 reference is talking about. It's talking about Inter-Symbol
02:50 16 Interference, and it puts in parens, "antenna correlation."

02:50 17 And then we asked him in his deposition, is eliminating
02:50 18 correlation across different antennae an example of canceling
02:51 19 interference? And he answered in the affirmative. He said it
02:51 20 could be.

02:51 21 So there's no dispute that what Raleigh talks about, this
02:51 22 canceling ISI as a result of antenna correlation, is
02:51 23 interference cancellation. The only issue is whether the claim
02:51 24 should be limited to exclude this specific type of
02:51 25 interference, even though their expert admitted that it's a

02:51 1 type of interference that really should be covered by the
02:51 2 claims.

02:51 3 With that, Your Honor, I'm happy to answer any questions
02:51 4 you have. And I'd like to reserve the opportunity to respond
02:51 5 to any arguments raised by plaintiffs.

02:51 6 THE COURT: I always give everyone an opportunity to
02:51 7 respond. I enjoy the back and forth.

02:51 8 So, Ms. Lu?

02:51 9 MS. LU: Yes, Your Honor. If I may, I apologize for my
02:52 10 general incompetence with technology. Hopefully I can explain
02:52 11 it well even if I can't use it that well. Let's see.

02:52 12 So as an initial matter, I notice that defendants' counsel
02:52 13 have tried to recast the dispute once again in terms of whether
02:52 14 or not "interference," the ordinary meaning of "interference"
02:52 15 excludes ISI as opposed to the distinction between an
02:52 16 interference canceller versus an equalizer.

02:52 17 Well, first of all, the term that we're discussing here
02:52 18 actually is "interference canceller" as opposed to --

02:52 19 THE COURT: Ms. Lu, if I can interrupt you.

02:52 20 MS. LU: Yes.

02:52 21 THE COURT: That wasn't lost on me, just so you know. The
02:52 22 point you just made wasn't lost. That was one of the things I
02:52 23 got off the phone for just -- I got off the call for just a
02:53 24 second to check with my clerks. So I'm up to speed with that
02:53 25 argument.

02:53 1 MS. LU: Of course. Thanks for that clarification.

02:53 2 Of course that's really also a little bit besides the
02:53 3 point because -- all right.

02:53 4 Let me see if I can -- could someone please give me a
02:53 5 quick tip on sharing my screen? I'm very sorry. I just did
02:53 6 one of these hearings by Zoom not that long ago, but it seems
02:53 7 every single time I forget how it works.

02:53 8 (Off-the-record discussion.)

02:54 9 THE COURT: There you go. Very good.

02:54 10 MS. LU: So is everyone seeing the presentation?

02:54 11 THE COURT: I am. Yes.

02:54 12 MS. LU: Okay. Great.

02:54 13 So the fact of the matter is Mr. McKee claimed that there
02:54 14 needs to be some demonstration of lexicography in order for the
02:54 15 tentative construction to be correct, but that's not true
02:54 16 because the ordinary meaning of "interference," the only
02:54 17 evidence of the word -- or the ordinary meaning of interference
02:54 18 is -- in this case is actually consistent with what plaintiffs
02:54 19 are proposing.

02:54 20 So I'm going to turn real quick to Slide 13 right here.

02:54 21 Now, interference is certainly not a new term. It's a
02:54 22 term that's known and used in the art. And consistent with
02:54 23 that, plaintiffs have put forth a definition of what that
02:54 24 ordinary understanding is.

02:54 25 For example, with the Microsoft dictionary, it does indeed

02:54 1 say that interference, as that term is generally used, refers
02:55 2 to noise and other external signals, not something internal to
02:55 3 the signal itself.

02:55 4 By contrast, you look at something like an equalizer,
02:55 5 which is a type of device that is created, invented, designed
02:55 6 and used specifically to target ISI, the way that equalization
02:55 7 and equalizers are understood generally in the art are without
02:55 8 any reference to interference whatsoever. It's about
02:55 9 compensating for physical distortions to a desired signal
02:55 10 itself that occur simply because the signal travels through an
02:55 11 imperfect physical medium.

02:55 12 So there's nothing about the plaintiffs' proposal or the
02:55 13 tentative construction really that deviates from ordinary
02:55 14 meaning. It's perfectly consistent with ordinary meaning.

02:55 15 Now, defendants' counsel has also attempted to suggest
02:55 16 that plaintiffs' expert, Mr. Geier, agreed that eliminating ISI
02:56 17 constitutes a form of interference cancellation, but he did
02:56 18 nothing of the sort.

02:56 19 The question -- and here actually, Mr. McKee, if you
02:56 20 wouldn't mind putting up that slide again, showing the excerpt
02:56 21 from Mr. Geier's deposition.

02:56 22 MR. McKEE: Happy to, but you'll have to stop sharing
02:56 23 first.

02:56 24 MS. LU: Okay.

02:56 25 MR. McKEE: Give me one second.

02:56 1 MS. LU: So here the question that was actually asked is
02:56 2 about correlation across distinct antennas.

02:56 3 Now, that is not the same thing as ISI in the general
02:56 4 sense. ISI in the general sense is --

02:56 5 Actually, Mr. McKee, if you wouldn't mind stopping your
02:56 6 Screen Share.

02:57 7 Okay. So ISI in the general sense refers to what happens
02:57 8 to a signal by itself as it travels through the air, as it
02:57 9 travels through a physical environment. Physical environments
02:57 10 are not perfect. They're not, for example, a screen or
02:57 11 something or a digital display that you can control all the
02:57 12 elements of.

02:57 13 As a signal travels through the air, it's going to
02:57 14 encounter different kinds of physical obstacles, maybe simply
02:57 15 because it travels through different parts of a room. It runs
02:57 16 into a bookshelf on one end, a desk on another. And as a
02:57 17 result of that, portions of that desired signal by itself will
02:57 18 arrive at the receiving antenna at different times, causing a
02:57 19 kind of blurring effect.

02:57 20 Now, this is significant because this is something that
02:57 21 happens in the absence of any other devices in the room sending
02:57 22 a competing signal, in the absence of ambient noise, if you can
02:58 23 imagine such a world.

02:58 24 So this ISI, even though it's called Inter-Symbol
02:58 25 Interference, as you can see by comparing what the technical

understanding of ISI is against the dictionary definition, the ordinary meaning of interference is simply not generally considered interference when that term is normally used.

Now, what does that have to do with Raleigh? Raleigh talks about, for example, canceling interference components, including aspects of it that might result from distortions from traveling through a physical medium, but it describes them with reference to different antennas.

Now, with respect to a particular antenna, the way the '720 patent specification describes that is that a particular receiving antenna is, in fact, designed to receive one particular signal. There is one signal that is destined for it because there is one transmitting antenna that it's supposed to be receiving from.

The problem when you're talking about -- I'm sorry. Let me find the correct slide.

The problem when you're talking about wireless of course is that you can't actually make sure that the desired signal for that particular antenna is all that that antenna receives. It's traveling through the air. If there was a way to make sure that the proper transmitting antenna is the only thing that the receiving antenna sees, then we would really be talking about wired communications as opposed to wireless.

So when Mr. Geier indicated during his deposition that you might consider eliminating a signal from a different antenna

02:59 1 pair destined for a different receiving antenna from a
02:59 2 particular receiving antenna, he's still talking about an
02:59 3 undesired signal, because that undesired signal is undesired
03:00 4 from the point of view of that receiving antenna, and the '720
03:00 5 specification is actually consistent with that.

03:00 6 In the description of the background technology concerning
03:00 7 traditional multi-antenna systems, for example, the '720
03:00 8 teaches that if you look at the series of signal processing
03:00 9 steps for that receiving antenna, it has to equalize the
03:00 10 signal, the whole conglomerate signal of everything that is
03:00 11 received through the air, including signals that were not
03:00 12 originally destined for it, and then pass that through a
03:00 13 decoder, pass that through an interference canceller which
03:00 14 will, among other things, remove signals from the other
03:00 15 antennas. And it has to do this $(N) \times (N)$ times for equalization
03:00 16 and $(N-1) \times (N)$ times for interference canceller, precisely
03:00 17 because with respect to that particular component, that
03:00 18 particular receiving antenna, the signals from other antennas
03:01 19 are considered undesired.

03:01 20 I'll pause there real quick, Your Honor, if you have any
03:01 21 questions.

03:01 22 THE COURT: I do not.

03:01 23 And a response, Mr. McKee?

03:01 24 MR. MCKEE: Yes, Your Honor. If I could have the Screen
03:01 25 Share back. Thank you.

03:01 1 I want to start here on our Slide 12 again.

03:01 2 The point and the bottom line is that the -- Mr. Geier was
03:01 3 asked a question about eliminating correlation across different
03:01 4 antenna. Antenna correlation and eliminating ISI caused by
03:01 5 antenna correlation is exactly what the Raleigh reference is
03:01 6 talking about. There's no wiggle room there. They're talking
03:01 7 about the same thing.

03:01 8 But I'd like to address this equalizer point briefly.
03:02 9 Your Honor mentioned it and it's the focus on plaintiffs'
03:02 10 presentation, so let's talk about it.

03:02 11 So equalizers come into play here in the construction.
03:02 12 The construction doesn't say "excluding equalizers," right?
03:02 13 The construction says -- the construction is -- is limited to a
03:02 14 specific type of interference, and the basis for limiting it to
03:02 15 that specific type of interference and to exclude ISI is
03:02 16 because ISI, according to plaintiffs, is something that is
03:02 17 known to be handled by equalizers as opposed to interference
03:02 18 cancellers.

03:02 19 But if you look at what their basis is for that, there's
03:02 20 nothing in the record, nothing in the intrinsic record that
03:02 21 supports this notion. Everything again comes from extrinsic
03:02 22 evidence to -- you know, the notion of equalizers and
03:02 23 interference cancellers comes from the brief.

03:02 24 But in order to tie it to the prior art, in order to tie
03:02 25 it to the construction, they have to go through several steps,

03:02 1 and each of those steps relies exclusively on extrinsic
03:03 2 evidence. Here's the extrinsic evidence for the equalizer
03:03 3 aspect of it, tying equalizers to ISI.

03:03 4 But also important here is that, again, they're doing this
03:03 5 to distinguish the Raleigh prior art.

03:03 6 So let's take a look at what they said though about the
03:03 7 Raleigh prior art in their reply. They said in the footnote
03:03 8 that Raleigh does not teach that an equalizer accomplishes the
03:03 9 cited effect.

03:03 10 So if Raleigh doesn't teach that it eliminates
03:03 11 interference -- Inter-Symbol Interference with an equalizer,
03:03 12 then why are we talking about this? There's no need to limit
03:03 13 the claims.

03:03 14 Respectfully, you know, we stated our position a couple of
03:03 15 times, but in our view the tentative should be modified to
03:03 16 remove this unwanted signals or noise aspect, because it --
03:04 17 it's unnecessary. It limits the claims in a way that doesn't
03:04 18 need to happen with no basis in the intrinsic record.

03:04 19 And I'll stop here, Your Honor.

03:04 20 THE COURT: Okay. The Court is going to maintain its
03:04 21 construction that it provided as a preliminary construction.

03:04 22 The next claim term -- give me one second, please. And so
03:04 23 you know also, if it's helpful, I have the slides. If there's
03:04 24 a problem going forward, I can get to them pretty quickly.

03:04 25 So give me one second though. Those are more readily

03:04 1 available than the constructions, which keep disappearing on
03:04 2 me.

03:04 3 The next claim term is "mandatory channel." Again, I
03:04 4 think I'll -- Mr. McKee, I think I'll suggest starting with
03:04 5 you, if you think that's appropriate, or whoever's going to
03:05 6 argue on behalf of defendants, or I can turn to Ms. Lu.

03:05 7 MR. JOHNSON: Your Honor, this is Kevin Johnson. I'm
03:05 8 going to handle the term for defendants, but I think we're fine
03:05 9 with the Court's tentative. So I think it's appropriate to
03:05 10 start with Ms. Lu.

03:05 11 THE COURT: Okay. I'll do that then. I haven't gotten
03:05 12 one right yet, so hopefully I'll guess right on the third one.

03:05 13 Ms. Lu?

03:05 14 MS. LU: Yes, Your Honor.

03:05 15 So turning to the '551 patent, Your Honor, I have another
03:05 16 question for you actually.

03:05 17 THE COURT: Okay.

03:05 18 MS. LU: I gather from our proceedings so far that Your
03:05 19 Honor is clearly very well prepared and has a lot of the
03:05 20 materials, especially the briefing, at your fingertips. That
03:05 21 being said, I don't want to waste your time going through
03:05 22 background material, if that would not be helpful.

03:05 23 THE COURT: It would not be helpful.

03:05 24 MS. LU: Okay.

03:06 25 THE COURT: I spent a fair amount of time -- the reason

03:06 1 actually that we pushed back the hearing was it gave me an
03:06 2 opportunity to chat with my clerks and prepare for this
03:06 3 hearing. And I apologize for the last-minute notice of doing
03:06 4 that, but I had a Markman this morning that ran a little bit
03:06 5 long, and then this gave me a couple hours to bone up for this
03:06 6 hearing. So I'm -- I don't need a lot of background on it,
03:06 7 so...

03:06 8 MS. LU: Got it. That sounds good.

03:06 9 So with that being said, I'll go straight to the term
03:06 10 itself then.

03:06 11 If we can turn to Slide 29.

03:06 12 On Slide 29 there's a table showing the parties'
03:06 13 respective proposed constructions, including plaintiffs'
03:06 14 original proposed construction and then a proposed tweak of the
03:06 15 tentative construction down below.

03:06 16 THE COURT: I'm there.

03:06 17 MS. LU: Okay. So basically -- and, Your Honor, feel free
03:07 18 to interrupt and let me know if you want to take a moment to
03:07 19 read that all.

03:07 20 But basically I think what the core of the dispute has
03:07 21 boiled down to on "mandatory channel" is whether or not the
03:07 22 mandatory channel is one out of multiple provided channels,
03:07 23 channels that have been provided for use between, say, a given
03:07 24 pair of communicating stations, or if it could be literally the
03:07 25 only channel that is there.

03:07 1 And it is still plaintiffs' position that it has to be one
03:07 2 among multiple channels, and this is consistent with how the
03:07 3 term "mandatory channel" is used in the intrinsic record and
03:07 4 how it's described in the specification.

03:07 5 Now, as in the initial matter, the term "mandatory
03:07 6 channel" is not a term that is used commonly or exists outside
03:07 7 of the context of the '551 patent. So in that sense it is a
03:07 8 coined term that's been created for this patent, and under
03:08 9 those circumstances it is appropriate to look to the
03:08 10 specification to get a clear idea of what it is. And the
03:08 11 specification does in fact describe what the mandatory channel
03:08 12 is pretty succinctly.

03:08 13 If we turn to Slide 30, on the left-hand side there's a
03:08 14 passage out of the specification describing in essence the
03:08 15 invention and how it works.

03:08 16 The transmission -- this is taking for granted that you've
03:08 17 set a mandatory channel, the specification describes its
03:08 18 operation this way. "Transmission is not performed when the
03:08 19 mandatory channel is not idle."

03:08 20 "When the mandatory channel is busy, transmission is not
03:08 21 performed even if there's another wireless channel." In other
03:08 22 words -- "in other words" -- so signaling here that the
03:08 23 inventors are intending to kind of restate or state in slightly
03:08 24 different terms or kind of capture the ideas that it's
03:08 25 introduced to date.

03:09 1 "In other words, the mandatory channel can be regarded as
03:09 2 a wireless channel having the highest priority among wireless
03:09 3 channels" -- "among wireless channels that have a plurality of
03:09 4 priorities."

03:09 5 So that passage by itself already signals to you that what
03:09 6 makes the mandatory channel mandatory is that it has a special
03:09 7 status in comparison to other channels. But it has to be in
03:09 8 comparison to other channels. In the absence of that
03:09 9 comparison, calling one of those channels mandatory and using
03:09 10 it in a special way really doesn't have much meaning.

03:09 11 Now, in another part of the specification describing the
03:09 12 second aspect of the invention pertaining to a device that's
03:09 13 able to distinguish between transmitting to a destination
03:09 14 station that does have a mandatory channel set, as opposed to
03:09 15 one that does not have a mandatory channel set, transmission to
03:09 16 the station without a mandatory channel is described in this
03:09 17 way.

03:09 18 And this is the underlined text you see from the excerpt
03:10 19 on the right-hand side.

03:10 20 And the specification states, "The Station B for which no
03:10 21 mandatory channel is set is made transmittable even when the
03:10 22 mandatory channel is busy."

03:10 23 So even when the mandatory channel is busy, you can still
03:10 24 transmit because there's nothing special about the channel for
03:10 25 a station that does not have a mandatory channel set.

03:10 1 I think another relevant consideration here is how the
03:10 2 specification describes the prior art, or conventional systems
03:10 3 which this patent has clearly been designed and -- and the
03:10 4 claims are drafted in a way to distinguish away from that.

03:10 5 Now, this is the excerpt you see on Slide 31 here. Comes
03:10 6 from the very first paragraph of the background section
03:10 7 describing conventional 802.11 systems, 802.11 being a
03:11 8 shorthand for WiFi, basically the family of WiFi standards.
03:11 9 Now, at the time of the '551 patent, what the specification is
03:11 10 describing here is the legacy 802.11 system described in the
03:11 11 standard data to 1999.

03:11 12 So the specification states here, "In a conventional
03:11 13 wireless packet communication apparatus, a wireless channel to
03:11 14 be used is determined in advance. Prior to transmission of a
03:11 15 data packet, the wireless packet communication apparatus
03:11 16 performs carrier sense to detect whether or not that wireless
03:11 17 channel is idle. Only when that channel is idle, the wireless
03:11 18 packet communication apparatus transmits one data packet."

03:11 19 Now, there's a couple of things about this description
03:11 20 that I think are particularly relevant here. In legacy 802.11
03:11 21 systems, as has been the case since the inception of 802.11,
03:11 22 basically, federal regulations allowed WiFi to exist because
03:12 23 there are unlicensed bands in the airwaves that are not already
03:12 24 reserved for, like, large-scale broadcast operations, like TV
03:12 25 and radio and the like. The two bands that are most commonly

03:12 1 used for WiFi are the 2.4 gigahertz band and the 5 gigahertz
03:12 2 band.

03:12 3 Now, the fact that federal law allows those bands to be
03:12 4 used is significant here because I think defendants seem to
03:12 5 think that helps fill in some of the inconsistencies in their
03:12 6 argument about the mandatory channel being a single channel.
03:12 7 Because in the 2.4 gigahertz band, for example, it was known
03:12 8 even in the prior art that this band can be broken up into 11
03:12 9 channels of about 20 megahertz width.

03:12 10 Now, what the specification is describing in a
03:12 11 conventional system, wherein one of these channels is selected
03:13 12 for use and then thereafter, only that one channel is available
03:13 13 to that device, is a situation where a device determines the
03:13 14 one channel that it can use and then only has that one channel
03:13 15 provided to it for use.

03:13 16 Now, you might note the way the specification describes
03:13 17 this, it calls that "determining a single channel." It doesn't
03:13 18 call that "setting a mandatory channel," and it does not
03:13 19 describe that channel as mandatory or somehow having a special
03:13 20 status in comparison to other channels.

03:13 21 And the simple intuitive reason for that really is that
03:13 22 once that channel has been determined to be the only channel
03:13 23 provided to that device, there are really no other channels
03:13 24 against which it might be compared. There's no other channel
03:13 25 against which that channel might be considered mandatory,

03:13 1 because as far as that device is concerned, no other channels
03:13 2 exist.

03:13 3 Now, in comparison to that, the specification describes
03:13 4 the mandatory channel very differently. It calls that a
03:14 5 channel that can be regarded as having the highest priority
03:14 6 among wireless channels. And that language is clearly
03:14 7 different from how a conventional system is described. And it
03:14 8 calls that channel a special -- gives it a special name so that
03:14 9 you can identify it from among other channels. It calls it a
03:14 10 mandatory channel.

03:14 11 But the single channel in the prior art that has been
03:14 12 selected and is thereafter the only one available to a device
03:14 13 that's made that selection is not a mandatory channel. There's
03:14 14 nothing special about it.

03:14 15 And we think the claim language actually has also been
03:14 16 drafted in a way to kind of consistently indicate the special
03:14 17 status of a mandatory channel in comparison to other channels
03:14 18 that are, in fact, provided to that device for use. For
03:14 19 example, the qualifier "mandatory" in itself indicates that it
03:14 20 is possible for a channel to not be mandatory.

03:14 21 The language of the claim step itself require that a
03:15 22 mandatory channel be one that is always used, in the case that,
03:15 23 but for this language, it is possible to use other channels.

03:15 24 And also the second claim step of Claim 1, stating that
03:15 25 transmission on the wireless channel or wireless channels can

03:15 1 occur only when the mandatory channel is idle also indicates
03:15 2 that, but for this language, it's possible for transmission to
03:15 3 occur based on the idle state of other channels.

03:15 4 And you can compare, for example, Claim 1 with Claim 2.
03:15 5 Claim 2 generally matches -- or it generally corresponds
03:15 6 conceptually with that second aspect of the invention
03:15 7 pertaining to a device that is able to distinguish between a
03:15 8 station that does -- a destination station that does have a
03:15 9 mandatory channel set as opposed to one that does not.

03:15 10 And here Claim 2 uses the language, saying that
03:15 11 transmission to the station that does not have a mandatory
03:15 12 channel set will simply take place using the idle wireless
03:16 13 channels.

03:16 14 THE COURT: Ms. Lu, may I interrupt you?

03:16 15 MS. LU: Of course.

03:16 16 THE COURT: Could you address the fact that what we
03:16 17 focused on -- what was some of -- are you able to bring up the
03:16 18 preamble? Or Mr. Johnson, or anyone can do it.

03:16 19 MS. LU: I think I do have the entire patent in here
03:16 20 somewhere. Actually I do not. I apologize.

03:16 21 THE COURT: Okay. Well, you probably know this so well
03:16 22 that you can just answer my question. I was going to try and
03:16 23 quote from it, but generally speaking, in the preamble doesn't
03:16 24 it say that you can transmit multiple packets simultaneously?

03:16 25 MS. LU: It says that the method could be used for that.

03:16 1 Yes.

03:16 2 THE COURT: Okay. And also -- and that was -- and it was
03:16 3 being done by using, and then there are ellipses, a single
03:16 4 wireless channel. That's what it says in the preamble,
03:17 5 correct?

03:17 6 MS. LU: Correct.

03:17 7 THE COURT: And it could be multiple wireless channels,
03:17 8 correct? It could be multiple wireless channels, right?

03:17 9 MS. LU: Right.

03:17 10 THE COURT: Could you address how that's consistent with
03:17 11 what you're advocating?

03:17 12 MS. LU: Yes. Your Honor, I believe what the preamble is
03:17 13 describing there -- and this is actually consistent with some
03:17 14 of the examples, I believe, in the specification -- is that at
03:17 15 any given moment, you could elect to use one of the channels
03:17 16 that you've been provided with. Just because you have provided
03:17 17 for you like two or three or even four channels doesn't mean
03:17 18 that you have to use any particular number or all of them.

03:17 19 It's really a function of how many packets you have in
03:17 20 your queue. It's a function of need, right? If you only need
03:17 21 to transmit one packet at a time, you don't have to use more
03:17 22 than one channel. So that's why the option is there.

03:17 23 But then to distinguish that from plaintiffs' position,
03:18 24 Your Honor, it's not our argument at all that you're not
03:18 25 allowed to just use one channel. You can certainly do that.

03:18 1 However, in order for the mandatory channel to have meaning, in
03:18 2 order for setting a mandatory channel and then transmitting
03:18 3 only when that channel is idle, in order for that language to
03:18 4 have meaning, you had to have been provided multiple channels
03:18 5 at the outset. You don't have to use them all, but they are
03:18 6 there. They're available.

03:18 7 THE COURT: Okay. And I interrupted you. You can
03:18 8 certainly resume where you were if you want to.

03:18 9 MS. LU: So, I mean, I think, Your Honor, that's basically
03:18 10 plaintiffs' prima facie case, if you can call it such a thing.

03:18 11 I also have some slides prepared here addressing a number
03:18 12 of counter-arguments that defendants have made. But perhaps it
03:18 13 makes more sense for defendants' counsel to choose which
03:19 14 counter-arguments they want to maintain.

03:19 15 THE COURT: Okay. Can you all hold on one second, please?

03:19 16 MS. LU: Yes.

03:19 17 (Pause in proceedings.)

03:21 18 THE COURT: If we could go back on the record, please.

03:21 19 Mr. Johnson, I don't want to disappoint you, but I may be
03:21 20 disappointing you here. I'm going to -- I don't really need to
03:21 21 hear a rebuttal. I'm going to make final the preliminary claim
03:21 22 construction for mandatory channel and move to the next claim
03:21 23 term "transmitting a plurality of wireless packets
03:21 24 simultaneously."

03:21 25 I'm assuming I'll want to hear from the plaintiff starting

03:21 1 with this as well. We'll see if I guessed right this time.

03:21 2 Ms. Lu?

03:21 3 MS. LU: Yes, Your Honor.

03:21 4 THE COURT: Yes, ma'am.

03:21 5 MS. LU: So this language "transmitting simultaneously" is
03:22 6 something that only appears in the preamble of the '551 patent.
03:22 7 Now, what defendants have argued is that this language,
03:22 8 "transmitting simultaneously," has to constitute a distinct
03:22 9 limitation. And their argument is based primarily on the use
03:22 10 of the word "the" that precedes the phrase "the wireless
03:22 11 packets" in the second claim step.

03:22 12 Now, it is plaintiffs' position, Your Honor, that the word
03:22 13 "the" by itself is not determinative. You really need to look
03:22 14 more closely at context, at what an invention actually is and
03:22 15 whether or not you can understand the steps without recourse to
03:22 16 the preamble. And in this case you can.

03:22 17 The AMS versus Biolitec opinion of the Federal Circuit
03:23 18 issued just last year, we think is particularly instructive on
03:23 19 this point.

03:23 20 In that instance the preamble of a claim step at issue
03:23 21 referred to a method for photoselective vaporization of a
03:23 22 tissue and that the step thereafter referred to "the tissue."
03:23 23 But even though the word "the" is used and "tissue" appears in
03:23 24 the preamble as modified by it being photoselectively
03:23 25 vaporized, the Federal Circuit reasoned that there is no actual

03:23 1 antecedent basis for the tissue in the preamble and there's no
03:23 2 need to incorporate an additional limitation, meaning that this
03:23 3 tissue has to be photoselectively vaporized. Because whether
03:23 4 or not tissue is photoselectively vaporized does not actually
03:23 5 provide necessary context or really define what tissue is, and
03:23 6 you can understand the claim step without having to determine
03:23 7 whether or not a particular type of action is done with that
03:24 8 tissue.

03:24 9 And the preamble in this case is pretty analogous in the
03:24 10 sense that what defendants are basically trying to import is a
03:24 11 specific type of action that is done with wireless packets.
03:24 12 Whether or not transmission is simultaneous or not does not
03:24 13 actually define what packets are, and it's not necessary for
03:24 14 understanding what packets are.

03:24 15 The invention at its core is a way to manage your channel
03:24 16 usage in a way to avoid issues of leakage. You set a mandatory
03:24 17 channel. You transmit only when that channel is idle. You
03:24 18 don't need transmission to be simultaneous in order for that to
03:24 19 make sense.

03:24 20 Now, defendants have also argued that simultaneous
03:24 21 transmission creates the problem to be solved by the '551
03:24 22 patent, then use that as a reason for importing the preamble
03:24 23 basically. But that's actually not correct, and it contradicts
03:24 24 the specification.

03:24 25 The specification teaches that the problem leakage occurs

03:25 1 not only in the case of simultaneous transmission using
03:25 2 multiple channels but also in a case where packets are only
03:25 3 transmitted on one with channel and an adjacent channel is used
03:25 4 to receive. So there's not actually a simultaneous
03:25 5 transmission in that instance, and yet the problem that is
03:25 6 addressed by the '551 patent also exists.

03:25 7 Separately, the defendants' argument as to Claim 2 is a
03:25 8 little bit different. Because Claim 2, unlike Claim 1, does
03:25 9 not use the word "the" or "said" to refer to anything in the
03:25 10 preamble at all. So Claim 2 is already, on its face, by
03:25 11 itself, a structurally complete invention.

03:25 12 The only basis that defendants have asserted for
03:25 13 limiting -- or for why the preamble should also be limiting as
03:25 14 to Claim 2 is that a dependent claim -- a dependent claim --
03:25 15 does use the word "the." And it refers to the plurality of
03:25 16 wireless packets transmitted simultaneously.

03:26 17 However, it's a well-established point of law that just
03:26 18 because a dependent claim may depend on a preamble for
03:26 19 antecedent basis does not necessarily mean that the same could
03:26 20 be said for the independent claim.

03:26 21 Claims are generally evaluated independently. Each claim
03:26 22 outlines a distinct invention. And, therefore, if a dependent
03:26 23 claim is relying on a preamble for dependent basis -- for
03:26 24 antecedent basis, then, well, that might mean that the preamble
03:26 25 is limiting as to that dependent claim but not necessarily for

03:26 1 the independent claim.

03:26 2 Defendants have not been able to distinguish the case that
03:26 3 plaintiffs have cited for that proposition. And nor have they
03:26 4 cited any cases suggesting that there is somehow a bright line
03:26 5 rule, that if you have a dependent claim that refers to the
03:26 6 preamble, that an independent claim must necessarily also rely
03:26 7 on the preamble.

03:26 8 To the contrary, the two cases that they do cite actually
03:27 9 state the opposite. The SEVEN Networks opinion out of the
03:27 10 Eastern District Court of Texas, the Court stated, "As a
03:27 11 general matter, the preamble of an independent claim may not be
03:27 12 found limiting merely because it appears in the body of the
03:27 13 dependent claim," and it collects a number of cases standing
03:27 14 for the same proposition.

03:27 15 The PersonalWeb case out of Northern District of
03:27 16 California, in that case the Court also said: Well, we are not
03:27 17 reading the Federal Circuit jurisprudence as creating a bright
03:27 18 line rule requiring that a preamble be limiting for an
03:27 19 independent claim either.

03:27 20 Now, as for the Federal Circuit case that defendants rely
03:27 21 on for the proposition that antecedent basis in the dependent
03:27 22 claim will also render a preamble limiting for the independent
03:27 23 claim, it's very different from this one.

03:27 24 In that case both the independent claim and the dependent
03:27 25 claims actually do rely on their preamble for antecedent basis.

03:27 1 The independent claim refers to "the user," which is introduced
03:28 2 in the preamble. The same cannot be said of Claim 2 and -- as
03:28 3 to -- in the '551 patent.

03:28 4 Also in the Pacing case the Court found that the
03:28 5 specification made very clear that all of the enumerated
03:28 6 objects of the invention are "accomplished by the repetitive
03:28 7 motion pacing system" that's recited only in the preamble. And
03:28 8 indications of an intent to rely on preamble language to
03:28 9 distinguish the invention or define the invention is certainly
03:28 10 a relevant -- a very relevant consideration based on context in
03:28 11 finding whether or not a preamble is limiting. There's no such
03:28 12 language like that here.

03:28 13 Your Honor, do you have any questions?

03:28 14 THE COURT: I don't at the moment. If you all would hold
03:29 15 on for one second.

03:29 16 (Pause in proceedings.)

03:32 17 THE COURT: Let's go back on the record.

03:32 18 I think the defendants have -- the question I would ask is
03:32 19 exactly what the defendants want me to say in the construction.
03:32 20 So I'm happy to hear from whoever's going to speak on behalf of
03:32 21 the defendants with respect to why at least the quoted portion
03:32 22 of the preamble is limiting and -- in this case.

03:32 23 MR. CHEN: Thank you, Your Honor. This is Jerry Chen from
03:33 24 TechKnowledge. I'll be speaking on behalf of the defendants.

03:33 25 THE COURT: Yes, sir.

03:33 1 MR. CHEN: All right. So this is Slide -- so I'm on
03:33 2 Slide 31 of our slide deck.

03:33 3 So we believe that the Court correctly found that the
03:33 4 language "transmitting a plurality of wireless packets
03:33 5 simultaneously" is limiting for Claims 1, 2, 5 and 6 of the
03:33 6 '551 patent.

03:33 7 The language in the preamble provides antecedent basis for
03:33 8 the wireless packets elements in the claim bodies and also
03:33 9 imparts essential context for understanding the claim, mainly
03:34 10 that the recited transmission of wireless packets is
03:34 11 simultaneous.

03:34 12 Now, in plaintiffs' presentation they try to characterize
03:34 13 the '551 as an invention that is somehow divorced from
03:34 14 simultaneous transmission. That's not correct. Simultaneous
03:34 15 transmission is fundamental to the '551 patent.

03:34 16 If we go to Slide 34, we can see that the patent
03:34 17 identifies the technical field specifically as pertaining to
03:34 18 simultaneous transmission. It frames the problem it addresses
03:34 19 specifically with respect to simultaneous transmission, and it
03:34 20 states its objective as being one to address the issue in the
03:34 21 context of simultaneous transmission. Every aspect of the
03:34 22 invention, every embodiment is discussed in the context of
03:34 23 simultaneous transmission.

03:34 24 Now, plaintiffs rely heavily on the American Medical
03:35 25 Systems case, arguing that AMS somehow shows that the

03:35 1 preamble's recitation of simultaneous transmission does not
03:35 2 provide context for the wireless packets. AMS supports no such
03:35 3 conclusion.

03:35 4 In AMS the preamble language was "photoselective
03:35 5 vaporization of tissue," and the Court's determination that the
03:35 6 language "photoselective vaporization" was not limiting was
03:35 7 because it did not consider the language itself meaningful.

03:35 8 Specifically, the Court said the descriptor,
03:35 9 "photoselective," does not embody an essential component of the
03:35 10 invention. Instead, photoselective vaporization is simply a
03:35 11 descriptive name for the invention.

03:35 12 That's not the case here. In the '551 "transmitting
03:35 13 simultaneously" is not just a descriptive name or window
03:36 14 dressing.

03:36 15 If we go to Slide 32, which is Claim 1 of the '551, we can
03:36 16 see that as shown in the preamble, which says "transmitting a
03:36 17 plurality of wireless packets simultaneously," it defines the
03:36 18 plurality of wireless packets as those that are transmitted
03:36 19 simultaneously. It's the part of the preamble that contributes
03:36 20 the proverbial life, meaning and vitality to the claims.

03:36 21 So when the claim body then references "transmitting the
03:36 22 wireless packets," it's referring to those packets first
03:36 23 mentioned in the preamble as transmitted simultaneously. So
03:36 24 the Court is correct to find the entire phrase limiting.

03:36 25 Now, plaintiffs also then imply that the '551 invention

03:36 1 somehow covers nonsimultaneous transmission. There's nothing
03:37 2 to support that conclusion. It's speculative.

03:37 3 The fact that the patent notes that leakage can also occur
03:37 4 in a conventional case does not lead to the conclusion that the
03:37 5 '551 invention addresses that situation. The '551 invention
03:37 6 doesn't solve the problem of leakage itself. It's specific to
03:37 7 the mitigating effects of the leakage in the context of
03:37 8 simultaneous transmission.

03:37 9 And if we go to the Slide 34, we can see this sentence
03:37 10 here on Column 3, Line 33 through 35, is exact -- well, it's
03:37 11 directly after that mention of this nonconvention- -- the
03:37 12 conventional case.

03:37 13 And the patent specifically says after that, "It's the
03:37 14 object of the present invention to avoid leakage power from
03:37 15 affecting an adjacent channel so as to improve throughput by
03:37 16 simultaneous transmission."

03:38 17 Simultaneous transmission --

03:38 18 THE COURT: Can I -- let me interrupt you there just for a
03:38 19 second. I'd like to hear Ms. Lu respond to that specific quote
03:38 20 that you just gave from the patent at Column 3, Lines 33 to 35,
03:38 21 if she could.

03:38 22 MS. LU: Yes, Your Honor.

03:38 23 So that quote from the patent states -- oh, sorry.
03:38 24 Mr. Chen, would you mind leaving that slide up since we're
03:38 25 talking about that text?

03:38 1 Okay. Thank you.

03:38 2 So as you can see, Your Honor, that sentence out of the
03:38 3 specification states that "it is an object, an object, of the
03:38 4 present invention to avoid leakage from affecting simultaneous
03:38 5 transmission." It's not the only object. It's just one of the
03:38 6 objects that this invention can accomplish.

03:38 7 If anything, that sentence proves that improving the
03:39 8 efficiency of simultaneous transmission is an intended purpose,
03:39 9 which is all the preamble is used for in this case.

03:39 10 THE COURT: Mr. Chen?

03:39 11 MR. CHEN: So obviously -- I'm sorry. Were you finished?

03:39 12 THE COURT: Yes. I'm ready for you to resume, please.

03:39 13 MR. CHEN: Yeah. So obviously we disagree. It's the only
03:39 14 object of the '551 patent. In fact, the '551 patent only talks
03:39 15 about operating within the context of simultaneous
03:39 16 transmission.

03:39 17 The next point that the plaintiffs have argued is that the
03:39 18 preamble of Claim 2 is not relied on for antecedent basis. I
03:39 19 would like to -- let's see. I'll go to Column 37 -- I'm sorry.
03:40 20 This is Slide 37. So I'd like to point out a few things.
03:40 21 So --

03:40 22 (Clarification by the reporter.)

03:40 23 MR. CHEN: So this is Claim 2. And you can see at the top
03:40 24 of Claim 2 it identifies the essential context of the '551,
03:40 25 "transmitting a plurality of wireless packets simultaneously."

03:40 1 Then following along in the rest of the claim body, it
03:40 2 identifies two conditions.

03:40 3 So it's identifying wireless packets that are addressed to
03:40 4 the STA A and addressed the STA B. And in each condition it's
03:40 5 reciting transmitting the wireless packets. So notably the
03:40 6 wireless packets are first mentioned in the preamble.

03:40 7 So here what the preamble is doing, it's importing
03:41 8 important meaning to the claim, that the wireless packets
03:41 9 transmitted simultaneously -- that the wireless packets are
03:41 10 transmitted simultaneously, and we think that's ample reason to
03:41 11 find the preamble limiting.

03:41 12 Now, further, the preamble also unquestionably provides
03:41 13 antecedent basis for Dependent Claim 3. So Dependent Claim 3
03:41 14 is over here on the right.

03:41 15 And Claim 3 is referencing wireless packets that are
03:41 16 subject -- that are the subject of Claim 2, and it recites,
03:41 17 "Wherein, the plurality of wireless packets transmitted
03:41 18 simultaneously are set to have the same or equivalent packet
03:41 19 time length."

03:41 20 So it shows that it's relying on the preamble of Claim 2
03:41 21 for antecedent basis and also providing further confirmation
03:41 22 that the wireless packets recited in Claim 2 are transmitted
03:41 23 simultaneously.

03:41 24 Now, plaintiffs have also argued that the cases we cite
03:42 25 don't support the proposition that the preamble of Claim 2

03:42 1 should be found limiting. Again, that's not correct.

03:42 2 In the Pacing Techs case that we cited, the term
03:42 3 "repetitive motion pacing system" in the preamble of
03:42 4 Independent Claim 25 provided antecedent basis for the term in
03:42 5 the body of Dependent Claim 28. And that was one of the
03:42 6 reasons why that specific element -- why the Court found that
03:42 7 the preamble of Claim 25 was limiting for both the independent
03:42 8 claim and the dependent claim.

03:42 9 Further, in the other two cases that we cited, SEVEN
03:42 10 Networks and PersonalWeb Technologies, in both of those cases
03:42 11 the Court found that where the preamble provided antecedent
03:42 12 basis for a dependent claim, it was, therefore, limiting for
03:42 13 both the independent claim and the dependent claim.

03:43 14 So going back to Claim 2, here the preamble provides
03:43 15 essential context for the step "transmitting the wireless
03:43 16 packets" identified in the claim body, and is undeniably the
03:43 17 antecedent basis for the Dependent Claim 3.

03:43 18 We think for the -- under these circumstances the Court
03:43 19 correctly found the preamble in Claim 2 to be limiting.

03:43 20 And I think that's -- addressed all of plaintiffs'
03:43 21 arguments on this term.

03:43 22 THE COURT: Ms. Lu?

03:43 23 MS. LU: Yes. If -- Mr. Chen, please leave that slide up.

03:43 24 I just want to clear up one thing about the language of
03:43 25 Claim 2. In that second claim step, when wireless packets are

03:43 1 addressed to Station A, wireless packets is actually introduced
03:44 2 there without a definite article. There's no "the" or "said"
03:44 3 preceding wireless packets there.

03:44 4 So when wireless packets are addressed to Station A,
03:44 5 transmitting "the" wireless packets, "the wireless packets"
03:44 6 occurring after the word "transmitting" refers back to wireless
03:44 7 packets introduced in the line right above that.

03:44 8 And the same is true of the third step referring to "when
03:44 9 wireless packets," again introduced without a definite article,
03:44 10 "are addressed to Station B, transmitting 'the' wireless
03:44 11 packets," and that -- again "the wireless packets" there refers
03:44 12 back to wireless packets introduced in the line just above.

03:44 13 MR. CHEN: Right. And we recognize that --

03:44 14 MS. LU: And -- sorry.

03:44 15 MR. CHEN: Go ahead.

03:44 16 MS. LU: Can I -- sorry. Did you -- do you mind if I
03:44 17 continue real quick?

03:44 18 Okay. Actually, Mr. Chen, if you wouldn't mind stopping
03:44 19 your Screen Share.

03:45 20 Now, Your Honor, I just wanted to reiterate that the scope
03:45 21 of the problem addressed by the '551 does actually exceed the
03:45 22 circumstances where simultaneous transmission is occurring
03:45 23 and -- please take no offense. I know you just made final the
03:45 24 tentative construction as to "mandatory channel," but if you'll
03:45 25 forgive me, I would like to point out one more thing about the

03:45 1 specification that would be relevant both to the preamble and
03:45 2 to the mandatory channel issue.

03:46 3 Basically, the statement of the scope of the problem of
03:46 4 leakage that occurs at the '551 patent that it is addressing,
03:46 5 shown here on Slide 26, states that "the problem occurs not
03:46 6 only in the case" -- "not only in the case of simultaneous
03:46 7 transmission using multiple wireless channels, but also in a
03:46 8 conventional case where wireless packets are transmitted using
03:46 9 one channel and adjacent to a channel that is affected by power
03:46 10 leakage."

03:46 11 So that statement right there tells you not only that the
03:46 12 issue of leakage occurs outside the context of when
03:46 13 simultaneous transmission is occurring, but it also tells you
03:46 14 that the problem affects the efficiency of throughput when you
03:46 15 have multiple channels at your disposal.

03:46 16 So here, again, this statement is telling you that even in
03:46 17 the absence of simultaneous transmission, if you have a system
03:46 18 where there are multiple channels and there is leakage onto one
03:47 19 channel from another channel, even though you could have used
03:47 20 one channel to transmit and be simultaneously receiving -- not
03:47 21 transmitting, but receiving -- on the adjacent channel, you're
03:47 22 not able to do that properly because of leakage from the
03:47 23 transmitting channel into the receiving channel.

03:47 24 But the reason why that's a problem is because it
03:47 25 negatively impacts the throughput gains that you would

03:47 1 otherwise have had from that multiple channels.

03:47 2 THE COURT: Anything else, Mr. Chen?

03:47 3 MR. CHEN: Yes. Let me just -- could you return the
03:47 4 control of the screen to me?

03:47 5 Thank you.

03:47 6 So just to address the first point, we recognize that the
03:47 7 way that Claim 2 is drafted is ambiguous with respect to
03:48 8 specifically antecedent or transmitting the wireless packets.
03:48 9 But we do want to emphasize that those wireless packets are
03:48 10 first mentioned in the preamble.

03:48 11 And that preamble still provides and imparts important
03:48 12 context to the discussion that follows in the claim body,
03:48 13 including the discussion of transmitting the wireless packets.
03:48 14 We think that that means that those wireless packets are
03:48 15 transmitted simultaneously. The reference to Dependent Claim 3
03:48 16 only provides further confirmation that that's true and also
03:48 17 confirms the necessity of the preamble for antecedent basis.

03:48 18 Regarding plaintiffs' other point, let me pull up the
03:48 19 patent. One second.

03:48 20 This is the line that plaintiffs were referring to. And
03:49 21 really everything that they were saying about what this
03:49 22 particular line means is speculative. Because all it says --
03:49 23 all this line says is that leakage can occur in a conventional
03:49 24 case where there are two channels. It doesn't say anything
03:49 25 else about that.

03:49 1 And what's important is that for the '551, everything that
03:49 2 it's talking about in terms of what the actual invention is is
03:50 3 addressed towards the specific context of simultaneous
03:50 4 transmission.

03:50 5 That's all I have.

03:50 6 THE COURT: Okay. Thank you very much. I'll be back in a
03:50 7 few seconds.

03:50 8 (Pause in proceedings.)

03:51 9 THE COURT: Thank you very much. The Court is going to
03:51 10 take its preliminary construction and make it its final
03:51 11 construction.

03:51 12 The next claim term is "transmitting a plurality of data
03:51 13 packets simultaneously." I'd like to hear -- I'm not sure
03:51 14 which counsel for defendant will take this, but whoever it is,
03:51 15 I'm happy to hear from him or her.

03:51 16 MR. CHEN: Your Honor, this is Mr. Chen again.

03:51 17 THE COURT: Okay.

03:51 18 MR. CHEN: And I'll be arguing this. This is for the '616
03:51 19 patent, and I'll be arguing this on behalf of defendants.

03:51 20 (Clarification by the reporter.)

03:51 21 MR. CHEN: So two points for this. The first point is one
03:52 22 of clarification. The Court's tentative was "a plurality of
03:52 23 wireless packets" is limiting. We were wondering whether
03:52 24 that -- the Court intended to say "a plurality of data packets"
03:52 25 since the term in the '616 is "data packets."

03:53 1 THE COURT: Yes. It should be -- it should be "a
03:53 2 plurality of data packets."

03:53 3 MR. CHEN: Thank you. Thank you, Your Honor.

03:53 4 THE COURT: No. Thank you for catching that. I'll have
03:53 5 to beat whoever it was that made that typographical error and
03:53 6 make sure they don't do it again. So...

03:53 7 MR. CHEN: Thank you, Your Honor.

03:53 8 So the second point we'd like to make is really with
03:53 9 respect to the portion of the preamble that the Court
03:54 10 determined should be limiting.

03:54 11 We'd ask that the Court consider modifying its tentative
03:54 12 to include not just "a plurality of data packets" but also the
03:54 13 surrounding language of "transmitting simultaneously." We
03:54 14 think that the "transmitting simultaneously" provides important
03:54 15 context and meaning to the claims.

03:54 16 So "transmitting simultaneously" is also fundamental to
03:54 17 the '616 invention. It is also described as part of the
03:54 18 technical field. It is also how the patent frames the problem.
03:54 19 And it is also the context for which the patent discusses its
03:54 20 objective.

03:54 21 If we look at Claim 1 of the '616, we can see that
03:55 22 "transmitting simultaneously" is also integral to the claim
03:55 23 itself. In the preamble it recites "transmitting a plurality
03:55 24 of data packets simultaneously." And this provides the
03:55 25 antecedent basis for the reference to said "plurality of data

03:55 1 packets" that then appears in the claim body.

03:55 2 So when the limitation is referencing those data packets,
03:55 3 it's talking about the data packets that, based on the
03:55 4 preamble, are transmitted simultaneously. Simultaneous
03:55 5 transmission is the meaning that the preamble is imparting to
03:55 6 the claim. And that meaning is tied to the "transmitting
03:55 7 simultaneously" language. That's one reason why we believe it
03:55 8 also should be limiting.

03:55 9 Additionally, the language in the preamble also provides
03:55 10 essential context and clarity to the claim. Because what we
03:56 11 can see is that in the next limitation it recites "received a
03:56 12 plurality of data packets transmitted simultaneously."

03:56 13 For this to make sense, there must be -- in other words,
03:56 14 for the STA to have received a plurality of data packets
03:56 15 transmitted simultaneously, there must have been a
03:56 16 transmission. It's implicit within the limitation.

03:56 17 So this necessary action, "simultaneous transmission," is
03:56 18 only recited in the preamble. So we believe that what's in the
03:56 19 preamble is actually essential to understanding the claim as a
03:56 20 whole. And that's another reason why we believe that
03:56 21 "transmitting simultaneously," that language should also be
03:56 22 considered limiting.

03:56 23 I'm finished.

03:57 24 THE COURT: Ms. Jun?

03:57 25 MS. LU: Sorry, Your Honor. Were you referring to me?

03:57 1 THE COURT: Yeah. Yes, Ms. Lu. I apologize. I was
03:57 2 thinking my law clerk Jun. I apologize. Ms. Lu, please.

03:57 3 MS. LU: No problem.

03:57 4 Mr. Chen, if you wouldn't mind stopping your Screen Share.

03:57 5 So the plaintiffs agree with the Court's tentative
03:58 6 construction, which is that the language, "plurality of data
03:58 7 packets," may properly be read into the claims. But there's
03:58 8 really no reason to read an additional step of "transmitting
03:58 9 simultaneously."

03:58 10 The claim -- for example, if you look at Claim 1 of the
03:58 11 '616 patent, was drafted deliberately to not include a
03:58 12 transmitting step or to specify an action by explicitly
03:58 13 reciting to a transmit-side or transmitting station.

03:58 14 And you can compare that to other claims, for example,
03:58 15 Claim 3 which does explicitly recite a transmitting step by a
03:58 16 transmit-side station. So in the absence of the claim stating
03:58 17 that there is a distinct transmitting step, there's no need to
03:58 18 add one, if only because the inventors clearly had the language
03:58 19 with which to do so if they intended to add a transmitting
03:58 20 step.

03:59 21 And also, simply because the claim later recites
03:59 22 "receiving a plurality of data packets transmitted
03:59 23 simultaneously," well, there's two separate -- there's two
03:59 24 separate points about that language that may be considered
03:59 25 significant.

03:59 1 First of all, to the extent that is defendants' argument
03:59 2 that simultaneity of the packets in some fashion is important,
03:59 3 that's already recited in the claim.

03:59 4 The claim is directed towards actions performed by a
03:59 5 receiving station, and that station has received a plurality of
03:59 6 data packets that were transmitted simultaneously. That's
03:59 7 already there. And where language in the preamble could
03:59 8 reasonably be construed to be generally duplicative of what's
03:59 9 already in the claim, there's no reason to further incorporate
03:59 10 an additional limitation based on language only appearing in
03:59 11 the preamble.

03:59 12 Now, also -- and responding to Mr. Chen's -- sorry. In
04:00 13 responding to Mr. Chen's contention that receiving data packets
04:00 14 that were transmitted simultaneously somehow it means that the
04:00 15 action of transmitting simultaneously also needs to be added,
04:00 16 that's simply not correct.

04:00 17 I don't think I have it on the slide here, but, Your
04:00 18 Honor, in the briefing we cited to a 2011 Federal Circuit
04:00 19 opinion, Uniloc, which involved claims directed toward a method
04:00 20 of receiving e-mail.

04:00 21 Now, it may be that in order for an e-mail to be received,
04:00 22 it must have been transmitted in the first place. But that
04:00 23 doesn't mean the claim itself -- that doesn't mean you can't
04:00 24 draft a claim that's directed only to what happens upon
04:00 25 reception or relating to reception.

04:00 1 And the same is true here. Simply because a plurality of
04:00 2 packets that were transmitted simultaneously have been received
04:00 3 doesn't mean that you need to add a transmitting step when the
04:01 4 claim has been deliberately drafted not to include that
04:01 5 language.

04:01 6 THE COURT: Ms. Lu, were you done?

04:01 7 MS. LU: Yes. Sorry.

04:01 8 THE COURT: I can't -- so you all know, because you're
04:01 9 showing me your screen, I can't see your faces. So I can't
04:01 10 tell for sure when you all are done. Which is fine. I just
04:01 11 wanted you to know why if there was a pause.

04:01 12 Mr. Chen, did you want to respond?

04:01 13 MR. CHEN: Yes. Just very quickly.

04:01 14 So with respect to the other claims that Ms. Lu cited in
04:01 15 the '616 patent, I just want to point out for those independent
04:01 16 transmission steps, it's more than just transmission. They're
04:01 17 a lot narrower than what was recited in the preamble. They
04:01 18 also include additional requirements, like, I believe, the
04:01 19 Claim 3 requires a specific type of simultaneous transmission.

04:02 20 And the other claims also have other requirements. For
04:02 21 example, Claim 2 requires that when the packets are transmitted
04:02 22 that they also transmit an ACK packet at the same time, an
04:02 23 (inaudible) acknowledgement. So those claims include
04:02 24 additional limitations, which is why they require some
04:02 25 additional, you know, language.

04:02 1 With respect to Claim 1 itself, I would just point out
04:02 2 that it's not that the transmission of the data packets isn't
04:02 3 disclosed or described in the claim. It is. It just happens
04:02 4 to be in the preamble. And that preamble is providing that
04:02 5 meaning, that important context to the rest of the claim.

04:02 6 THE COURT: Anything more from plaintiff?

04:03 7 MS. LU: Just one, Your Honor. To be clear, with respect
04:03 8 to comparing Claim 1 with Claim 3, it's not so much our
04:03 9 position that there's a claim differentiation argument so much
04:03 10 as that if the inventors had meant to include a transmitting by
04:03 11 the transmit-side step, they had the language at their
04:03 12 disposal. That language does actually appear and is
04:03 13 deliberately drafted into a number of other claims. That
04:03 14 language has been left out of Claim 1.

04:03 15 I'm done, Your Honor.

04:03 16 THE COURT: I'll be back in just a second.

04:03 17 (Pause in proceedings.)

04:05 18 THE COURT: We'll go back on the record.

04:05 19 The Court is going to maintain its preliminary claim
04:05 20 construction on this claim term.

04:05 21 The next -- do we have two left, I think? Is the next one
04:06 22 "paired wireless channels"?

04:06 23 MR. ZIVOJNOVIC: I believe, Your Honor -- I believe, Your
04:06 24 Honor, on the list next one was "predetermined time Ts," and
04:06 25 then there's two more after that.

04:06 1 THE COURT: Very good. Well, then, let's take that up.

04:06 2 And I'd like to hear from defendant on that.

04:06 3 MR. ZIVOJNOVIC: Good afternoon, Your Honor.

04:06 4 THE COURT: And you jumped in because that was your claim
04:06 5 term, and you didn't want to lose the chance to argue it, and I
04:06 6 would have been the same way.

04:06 7 MR. ZIVOJNOVIC: Exactly.

04:06 8 THE COURT: Very good. So I look forward to hearing --
04:06 9 and I don't know that I've had you in my court before. It's a
04:06 10 pleasure to have you. So...

04:06 11 MR. ZIVOJNOVIC: Nice to meet you as well, Your Honor.

04:06 12 And may I just confirm that only my -- the PDF of the
04:07 13 slide is visible?

04:07 14 Great.

04:07 15 So, Your Honor, we disagree with the Court's tentative
04:07 16 construction for a predetermined time Ts because we believe
04:07 17 that the construction allows any time to be deemed
04:07 18 predetermined which would render the word "predetermined"
04:07 19 superfluous.

04:07 20 When you're calculating numbers, you must necessarily know
04:07 21 the input to your calculations before you use that input to
04:07 22 calculate something. And so all numbers in a calculation are
04:07 23 necessarily determined before that moment in time when the
04:07 24 calculation is performed. The word "predetermined" in Claim 1
04:07 25 of the '781 patent must add something more than that beyond

04:07 1 this truism.

04:07 2 And so looking to the spec, we see that "predetermined
04:07 3 time" must be determined by an earlier received packet. We
04:08 4 contend that this rises to the level of lexicography. But at a
04:08 5 minimum it gives guidance and is the only guidance in the
04:08 6 intrinsic evidence of what it means for a time to be
04:08 7 predetermined.

04:08 8 I do want to address one point from plaintiffs' slide
04:08 9 deck.

04:08 10 On Slide 65 they argued that we're trying to define ice
04:08 11 cream based on the type of truck used to deliver the ice cream.
04:08 12 And I just want to make clear that that is not what is at
04:08 13 dispute here. The parties are not arguing over time Ts. What
04:08 14 we're really trying to define here is to figure out what it
04:08 15 means for time Ts to be predetermined.

04:08 16 So we're not trying to figure out whether or not something
04:08 17 qualifies as ice cream, to go back to their analogy, but in the
04:09 18 case of Ts how was it defined and whether or not that qualifies
04:09 19 as predetermined.

04:09 20 So turning to the constructions that are currently before
04:09 21 the Court, I do want to emphasize that there is a fair amount
04:09 22 that is in common. Both plaintiffs and defendants, as well as
04:09 23 the Court's tentative, reflect that this is the term that
04:09 24 should be construed. We believe that in isolation it doesn't
04:09 25 have meaning and so we must look to the intrinsic evidence to

04:09 1 find how to define it.

04:09 2 And, moreover, all constructions are focused on how this
04:09 3 time T_s is defined. And this word is found across all
04:09 4 constructions. And to try and simplify a dispute, defendants
04:09 5 actually propose starting with the Court's tentative, and based
04:10 6 on the intrinsic evidence, adding that it is -- that the time
04:10 7 T_s is defined by a packet.

04:10 8 And so to try and narrow the issues, we propose that the
04:10 9 tentative be modified to recite "an amount of transmission
04:10 10 inhibition time that is defined by a packet received before
04:10 11 calculation of the total transmission inhibition time."
04:10 12 Because that is really the point where we disagree with Your
04:10 13 Honor's construction. That if you look at this latter part
04:10 14 before "calculation of the total transmission inhibition time,"
04:10 15 that covers any time T_s and in practice provides no limitation
04:10 16 at all.

04:10 17 If we start with Claim 1 and see how the term
04:10 18 "predetermined time T_s " is used in context, we see that it is
04:11 19 used as part of adding predetermined time T_s to the longest
04:11 20 transmission time T_{max} .

04:11 21 So Claim 1 shows how time T_s is used. But as the Court's
04:11 22 tentative recognizes as -- and as reflected in all
04:11 23 constructions under consideration at the moment, we're really
04:11 24 looking for trying to figure out how is -- how and when is time
04:11 25 T_s defined, not just used.

04:11 1 The Court's tentative appears to mirror plaintiffs'
04:11 2 argument from the reply brief. What they said, that the
04:11 3 language of Claim 1 itself shows that T_s is predetermined if it
04:11 4 is known prior to the calculation of $T_{max} + T_s$.

04:11 5 But this is -- this focus on Claim 1, to the exclusion of
04:11 6 the other intrinsic evidence, leads to a truism. Before I can
04:12 7 use a variable, before I can use time T_s to perform any
04:12 8 calculation, I have to know what that number is.

04:12 9 So in that sense, every time T_s must be determined before
04:12 10 used in a calculation. And if we were to adopt that, then the
04:12 11 claim language would have the exact same meaning even if I
04:12 12 strike out the word "predetermined."

04:12 13 In any practical system you would first need to take the
04:12 14 step to calculate time T_s , and that could be a calculation that
04:12 15 is performed as part of this process and argue that it's not
04:12 16 predetermined.

04:12 17 But still, because I need to figure out what T_s is before
04:12 18 I can use it, when I then, in Step 2, add T_{max} to T_s , that
04:12 19 would meet the tentative construction of T_s being determined
04:13 20 before that calculation is performed. So in other words, any
04:13 21 T_s would meet this construction and this would render the word
04:13 22 "predetermined" superfluous.

04:13 23 If we look beyond the claim language and we look at the
04:13 24 specification, however, we see exactly what the '781 patent
04:13 25 means by "predetermined."

04:13 1 When Station 1, which is shown in Figure 2 and described
04:13 2 also in the '781 patent at 16, Lines 7 to 21, when Station 1
04:13 3 wants to transmit its own packet, it calculates the total
04:13 4 inhibition time by adding a predetermined time and the
04:13 5 transmission time for the wireless packet. I highlighted the
04:13 6 predetermined time in yellow and the transmission time in green
04:13 7 in Figure 2 and in the accompanying disclosure. And this
04:14 8 happens in a timing t1 in Figure 2.

04:14 9 So we know the predetermined time is used at time t1, but
04:14 10 so far we've not addressed on when and how it is defined.

04:14 11 Fortunately, the '781 packet explains that part as well.
04:14 12 It says that "the predetermined time corresponds to the
04:14 13 transmission inhibition time that is defined by a received
04:14 14 packet during the transmission of a wireless packet."

04:14 15 In other words, at some earlier point in time -- so before
04:14 16 timing t1 in Figure 2 -- Station A receives a packet that tells
04:14 17 it what to use as this predetermined time. And that is, here,
04:15 18 lexicographical. It doesn't say "can be" or "may." It says
04:15 19 that it corresponds to this transmission inhibition time.

04:15 20 And while plaintiffs dispute that this is in the context
04:15 21 of Figure 2, nothing about this description makes it
04:15 22 inapplicable to the other figures and other disclosure in this
04:15 23 patent.

04:15 24 But even taking a step back, this makes sense. It's not
04:15 25 just that something must be predetermined relative to when it

04:15 1 is used, but when we think about what it means to be
04:15 2 predetermined, it also means that it is not determined as part
04:15 3 of the same process. It is predetermined.

04:15 4 And so here the spec tells us that in the context of the
04:15 5 '781 patent, that means that it is defined by the received
04:15 6 packet during the transmission of the wireless packet.

04:15 7 And for these reasons we propose adding the phrase "by a
04:16 8 packet received" to the Court's tentative to read, "An amount
04:16 9 of transmission inhibition time that is defined by a packet
04:16 10 received before calculation of the total transmission
04:16 11 inhibition time."

04:16 12 With this revised construction we are correctly focusing
04:16 13 on when and how time T_s is defined and not just used. We
04:16 14 ensure -- and we ensure that the word "predetermined" is given
04:16 15 effect. Every time T_s is necessarily defined before you can
04:16 16 possibly use it in calculation, that is just the basic reality
04:16 17 of how we calculate numbers.

04:16 18 But a predetermined time T_s must mean something more. In
04:16 19 light of the intrinsic evidence, it means that it must be
04:16 20 defined by a packet received before calculation of the total
04:16 21 transmission inhibition time.

04:17 22 And with that, Your Honor, I'm happy to answer any
04:17 23 questions you may have.

04:17 24 THE COURT: Let's hear from Ms. Lu, and then if she raises
04:17 25 anything, I'll have you address that.

04:17 1 Ms. Lu, if you would be sure -- I know you're going to,
04:17 2 but if you would be sure to address why the addition of the
04:17 3 words "by a packet received" would be incorrect.

04:17 4 MS. LU: Sure, Your Honor.

04:17 5 Well, just a point of clarification, I had originally been
04:17 6 planning to first address defendants' counsel's first point,
04:17 7 which is that --

04:17 8 THE COURT: You can do whatever you want.

04:17 9 MS. LU: Okay. Sure.

04:17 10 THE COURT: I just want to make sure that you address --
04:17 11 they've proffered an alternative, and I just want to make sure
04:17 12 you address that. But you do -- whatever you've prepared to do
04:17 13 is fine with me.

04:17 14 MS. LU: Right. Will do.

04:17 15 Okay. So okay.

04:18 16 So defendants' first point just now was that the Court's
04:18 17 tentative construction gives no guidance to what it means for a
04:18 18 time T_s to be predetermined, but that is not correct.

04:18 19 Now, what the claim language tells you is that you first
04:18 20 obtain a time T_{max} , which is the duration of the longest packet
04:18 21 being transmitted, and then you add to that a predetermined
04:18 22 time T_s .

04:18 23 Now, just the ordinary language of the claim there tells
04:18 24 you that there's something in here that is variable, that's
04:18 25 going to change from situation to situation, and that is T_{max}

04:18 1 itself. You don't necessarily know what Tmax is going to be
04:18 2 until you know what the transmission is.

04:18 3 But in comparison to that, predetermined Ts is
04:18 4 predetermined. You already know what Ts is going to be without
04:19 5 regard to what's being transmitted at any given moment. And
04:19 6 that is what about -- that is the predetermined aspect of Ts.

04:19 7 Now, you can state this in slightly different language,
04:19 8 which is basically that before you know what the sum of Tmax
04:19 9 plus Ts will be, you already know what Ts is because Ts has
04:19 10 been predetermined. So that in itself does give guidance to
04:19 11 what is predetermined about Ts. The claim language supports
04:19 12 that, and the specification supports that as well.

04:19 13 There are several examples. And here on Slide 64, I
04:19 14 think, we just pulled out one wherein Tmax is determined by a
04:19 15 comparison by a transmit-side station, for example, that has
04:19 16 multiple packets in its queue that are due to be transmitted.
04:19 17 It compares the durations of those packets and is able to
04:19 18 figure out what Tmax is.

04:19 19 But even without doing that comparison, without knowing
04:19 20 what you're transmitting at a given moment, you already know
04:19 21 what Ts is. And so, therefore, the value of Ts is known before
04:20 22 you would have known preemptively what the sum -- what the
04:20 23 value of the sum of Tmax plus Ts is. So there's plenty of
04:20 24 guidance there.

04:20 25 Now, second, as to -- actually -- Ogi, I hope you don't

04:20 1 mind that I'm just using your first name because it's easier.

04:20 2 If you wouldn't mind putting up that slide with the -- that

04:20 3 shows Figure 2.

04:20 4 MR. ZIVOJNOVIC: Slide that shows Figure 2 -- oh, one

04:20 5 second.

04:20 6 MS. LU: Right. Yes. That one.

04:20 7 So here I actually have a question for you, because here

04:20 8 you're tweaking the construction, and this is the first time

04:20 9 really that we're seeing it.

04:20 10 When you say that T_s is defined by a received packet, can

04:21 11 you point to the packet that's being received that defines it?

04:21 12 MR. ZIVOJNOVIC: Which -- yeah. I mean, it's -- as I

04:21 13 alluded to in -- when I was explaining Figure 2, the -- this

04:21 14 packet is not shown in Figure 2. It's not limited to a

04:21 15 specific embodiment of what is shown in Figure 2. It is just

04:21 16 more generally talking about the predetermined time being

04:21 17 defined by a received packet, and so it is not limited --

04:21 18 MS. LU: But is it a packet that's being received by

04:21 19 Station 1 that's doing the setting of inhibition time? Is it

04:21 20 something being transmitted by Station 1? Because there are

04:21 21 packets being shown here that's a packet transmitted by

04:21 22 Station 1 in time t_1 .

04:21 23 I'm just not really sure what you mean, because I

04:21 24 thought -- I could have sworn I heard you say when you first

04:21 25 went through this slide that there's a packet received by some

04:22 1 station. I just am not sure I recall which station you said it
04:22 2 was or which packet you're referring to.

04:22 3 MR. ZIVOJNOVIC: So I'm referring to -- it is -- this
04:22 4 description is from the perspective of Station 1. And so when
04:22 5 it talks about the predetermined time, which corresponds to the
04:22 6 transmission inhibition time that is defined by a received
04:22 7 packet during the transmission of the wireless packet, it is
04:22 8 talking about a packet that is received by that station.

04:22 9 MS. LU: Okay. Is that a packet received on Channel 1 or
04:22 10 Channel 2? There's two channels shown next to Station 1.

04:22 11 MR. ZIVOJNOVIC: I mean, I believe that this line -- that
04:22 12 these questions are not really relevant, and I don't think
04:22 13 that -- I'm not trying to limit the scope to any --

04:22 14 MS. LU: Well, it's relevant, you know. Please don't take
04:22 15 offense. I'm really just trying to understand what your
04:23 16 proposal is.

04:23 17 THE COURT: Ms. Lu, I've let this go on for awhile just
04:23 18 because I found it informative, but it really is best if you
04:23 19 talk to me and if I ask questions to the lawyers. So if you
04:23 20 would move on and just do the best you can.

04:23 21 MS. LU: No problem. Understood.

04:23 22 Okay. So part of the reason I'm asking these questions,
04:23 23 Your Honor, is that the introduction of some unspecified packet
04:23 24 that was received at some unspecified point in time is actually
04:23 25 more vague than not.

04:23 1 As we just discussed, the specification and the claims
04:23 2 themselves gives ample support for the tentative construction
04:23 3 and for explaining why, under that interpretation, time T_s is
04:23 4 in fact predetermined, but a received packet doesn't have a
04:23 5 whole lot of meaning.

04:23 6 Now, what's strange about Figure 2 is that the reason why
04:23 7 a time, a predetermined time T_s is being added to a longest
04:24 8 transmission time T_{max} and using that entire -- using that sum
04:24 9 as an inhibition time is because on Channel 2 -- from the
04:24 10 perspective of Station 1 on Channel 2, Station 1 is not
04:24 11 actually able to receive a packet because of power leakage.

04:24 12 So it begs the question a little bit of what exactly is
04:24 13 being received on what channel and how it could be that that
04:24 14 received packet could determine T_s , because, in fact, because
04:24 15 of power leakage, Station 1 is unable to receive a packet on
04:24 16 Channel 2. It's just a little bit confusing and introduces
04:24 17 needless ambiguity.

04:24 18 I'm done, Your Honor.

04:24 19 THE COURT: Okay.

04:24 20 MR. ZIVOJNOVIC: If I may just briefly address a couple of
04:24 21 things.

04:24 22 THE COURT: Sure.

04:24 23 MR. ZIVOJNOVIC: So in Ms. Lu's description of guidance
04:24 24 supposedly given by -- on the time T_s , I do want to emphasize
04:24 25 that she did not address the core point, that from a practical

04:25 1 perspective every number must be determined before it can be
04:25 2 used, and that for -- yes. We do not dispute that that also
04:25 3 applies to the disclosure in the claims in the specification.

04:25 4 It's just a truism, though. Before you can use a number,
04:25 5 you have to know what it is. And so if that's the
04:25 6 construction, it would erase any significance to the meaning of
04:25 7 the word "predetermined."

04:25 8 In relation to the supposed ambiguity as to the received
04:25 9 packet, we disagree that there is any ambiguity there. This,
04:25 10 if anything, further highlights that this is the
04:25 11 lexicographical definition. That -- this is not the patentee
04:25 12 talking for this specific embodiment in this specific Figure 2,
04:25 13 in a specific channel, "here's what happens."

04:26 14 We're talking here about a more general description of
04:26 15 what is a predetermined time. And so we're not trying to limit
04:26 16 it to, you know, Channel 1, STA 1. We're talking about a
04:26 17 definitional phrase. And so of course it's broad, but that
04:26 18 actually supports a finding that it controls across all
04:26 19 embodiments, that it is not limited to a specific scenario.

04:26 20 And as to injecting ambiguity, again, we disagree.
04:26 21 It's -- especially when viewed in the context of the entire
04:26 22 proposed construction as shown here on Slide 90 in the bottom
04:26 23 right -- this is our revised proposed construction -- we're
04:26 24 very clear that before you start calculating total transmission
04:26 25 time, you have -- there is a packet, it is received, and that

04:26 1 packet defines time Ts.

04:26 2 So the totality of the intrinsic evidence here gives ample
04:27 3 guidance. And, again, to the extent that this isn't -- the
04:27 4 language in the spec isn't pinpointing one individual scenario,
04:27 5 the reason for that is because it's definitional.

04:27 6 And just to -- I do not want to belabor one last point,
04:27 7 but I do want to again kind of briefly emphasize that we still
04:27 8 maintain that to the extent our construction is not adopted,
04:27 9 that this term, "absent further guidance from the intrinsic
04:27 10 evidence," is indefinite.

04:27 11 THE COURT: Okay. I'll be back in just a couple of
04:27 12 seconds.

04:27 13 (Pause in proceedings.)

04:28 14 THE COURT: If we can go back on the record.

04:28 15 The Court is going to make its preliminary construction
04:29 16 the final construction. It's going to reject defendants'
04:29 17 argument that the claim is indefinite. And the Court also
04:29 18 finds it would not be appropriate to add the words proposed,
04:29 19 which are "by a packet received."

04:29 20 The next claim term is "paired wireless channels." Is the
04:29 21 defendant going to take the first stab at this?

04:29 22 MR. WHEELER: Your Honor, Kevin Wheeler here of
04:29 23 Latham & Watkins. And yeah. We'll take the first swing at
04:29 24 this for defendants here.

04:29 25 THE COURT: Mr. Wheeler, I think this is the first time

04:29 1 I've had you in my court, I believe. Welcome, virtually, to
04:29 2 Waco.

04:29 3 MR. WHEELER: Thank you, Your Honor, and it's a privilege.

04:29 4 And, Your Honor, I appreciate that your preliminary
04:29 5 construction for this term, "paired wireless channel," is plain
04:29 6 and ordinary meaning.

04:29 7 I'm going to spend just a few minutes right now to see if
04:29 8 I can't change your mind. Because there is a Federal Circuit
04:29 9 case that we think is on all fours here, and candidly, I think
04:30 10 we could have done a little bit better job of explaining it in
04:30 11 the briefing.

04:30 12 So to briefly orient us, I'm going to pull up a slide.

04:30 13 Now, defendants submit that the specification defines this
04:30 14 term in at least two different places as a channel that would
04:30 15 be affected by leakage from the transmitting wireless channel.

04:30 16 And we see those two instances on the screen here in front
04:30 17 of us. And in both instances the term in dispute "paired
04:30 18 wireless channel" is set off by quotation marks. And in the
04:30 19 instance shown on the left side of the screen, the definition
04:31 20 includes the key language, "here referred to as," all the
04:31 21 statements, all the hallmarks, I should say, of an express
04:31 22 definition.

04:31 23 And plaintiffs' primary argument here against lexicography
04:31 24 is that the definitional language is inconsistent with the
04:31 25 specification as a whole and would exclude certain embodiments

04:31 1 or aspects of the invention.

04:31 2 Now, as laid out in our briefing, we disagree. But
04:31 3 whether this definition is consistent with the remainder of the
04:31 4 specification is beside the point.

04:31 5 And that brings us to the Sinorgchem case, the case we
04:31 6 believe is on all fours here. Now, in Sinorgchem there was a
04:31 7 similar definitional statement, also set off by quotation
04:31 8 marks, but the International Trade Commission found that part
04:31 9 of the statement was not definitional because it was
04:31 10 inconsistent with certain language in the specification and a
04:32 11 preferred embodiment.

04:32 12 On appeal, the Federal Circuit reversed, finding the full
04:32 13 statement was definitional and made two important holdings
04:32 14 relevant here.

04:32 15 In the first, we see here on Slide 79, the Court said,
04:32 16 "When the specification explains and defines a term used in the
04:32 17 claims, without ambiguity or incompleteness, there is no need
04:32 18 to search further for the meaning of the term."

04:32 19 Here, we have a clear definition, twice actually, set off
04:32 20 by quotation marks. And the key language of "here referred to
04:32 21 as." There is no need to go further. And plaintiffs cite no
04:32 22 cases to the contrary.

04:32 23 Sinorgchem goes on to tell us that even if we do look
04:32 24 further and even if the definition was inconsistent with
04:33 25 certain embodiments -- we of course submit it's not, but even

04:33 1 if it was, the definition still controls.

04:33 2 Specifically, the Federal Circuit tells us, "Where," as
04:33 3 here, "multiple embodiments are disclosed, we have previously
04:33 4 interpreted claims to exclude embodiments where those
04:33 5 embodiments are inconsistent with unambiguous language in the
04:33 6 patent specification for prosecution history."

04:33 7 Your Honor, we submit such unambiguous definitional
04:33 8 language exists in the specification here multiple times. And
04:33 9 just as in *Sinorgchem*, the definitional language should
04:33 10 control. And we respectfully request, Your Honor, that you
04:33 11 adopt defendants' proposed construction.

04:33 12 And I'll stop there pending any questions.

04:33 13 THE COURT: Thank you.

04:33 14 Ms. Lu?

04:33 15 MS. LU: Yes, Your Honor.

04:34 16 Mr. Wheeler, would you mind stopping your Screen Share?

04:34 17 Thank you.

04:34 18 MR. WHEELER: There you go.

04:34 19 MS. LU: Thank you.

04:34 20 So since we ended just now with a discussion of that
04:34 21 *Sinorgchem* opinion, we may as well start there.

04:34 22 Now, first of all, *Sinorgchem* does not lay down any bright
04:34 23 line rule stating that the presence of quotation marks
04:34 24 necessarily means that this is definitional language. It
04:34 25 states simply, as many other cases have before it, that the

04:34 1 presence of quotation marks is just one of many indicators that
04:35 2 can exist. But what's more important in determining the
04:35 3 presence of lexicography is the specific context.

04:35 4 Now, also, the Sinorgchem case does not suggest that if
04:35 5 there is allegedly definitional language because quotation
04:35 6 marks are present, that that means you can ignore things that
04:35 7 are stated or set forth in descriptions of other embodiments.

04:35 8 Rather, it's pretty important, I think, in keeping in mind
04:35 9 that it's context that controls. That in the context of the
04:35 10 patent, or specifically the allegedly excluded embodiments in
04:35 11 Sinorgchem, those allegedly excluded embodiments, the Court
04:35 12 found those embodiments did not actually -- were not actually
04:35 13 directed toward the meaning of the disputed term at all, those
04:35 14 embodiments that illustrated completely different aspects of
04:35 15 the invention.

04:35 16 But that's not what we have here. The other aspects of
04:35 17 the invention that plaintiffs have pointed to in the context of
04:36 18 the '781 patent -- and here I am turning to Slide No. 52 in the
04:36 19 background section on the '781.

04:36 20 Here's just a sampling of some of those contexts in which
04:36 21 the term "paired wireless channel" is used. Every single
04:36 22 occurrence here is relevant to the meaning of the disputed
04:36 23 term.

04:36 24 So it's not that you can exclude some apparently
04:36 25 inconsistent language. Since that language is said in the

04:36 1 context, it's not directed to the term at all. Every single
04:36 2 occurrence of the usage of "paired wireless channel" in each of
04:36 3 these aspects of the invention do speak to what it means. And
04:36 4 they illustrate that you can apply an inhibition time to a
04:36 5 paired wireless channel, which is affected by leakage, to a
04:36 6 paired wireless channel other than a wireless channel that
04:36 7 requires the longest transmission time, and also to a wireless
04:37 8 channel that you've actually determined to be suffering from
04:37 9 leakage.

04:37 10 So clearly the aspects of the invention and the
04:37 11 embodiments themselves will tell you pretty clearly that
04:37 12 "paired wireless channel" is designed to encompass a wide array
04:37 13 of situations, and that very breadth is what demonstrates that
04:37 14 "paired" is being used here in its ordinary sense.

04:37 15 And as another point, actually now that we're going
04:37 16 through this live, if we look at the language describing -- the
04:37 17 language from which defendants pulled their proposed
04:37 18 construction.

04:37 19 Actually, Mr. Wheeler, if you can pull up your slide. I
04:37 20 don't remember what number it was, but it was the one that had
04:37 21 the language that you're using for the construction "which is
04:37 22 affected by leakage."

04:38 23 I think that's right. Okay. Thank you.

04:38 24 So actually, now that we're going through this live, if
04:38 25 you look at this language here, it's not even definitional.

04:38 1 Quotation marks are used here, but if you read that sentence in
04:38 2 its entirety, this is what it's stating: Then the process
04:38 3 that's the NAV of a wireless channel -- here referred to as a
04:38 4 paired wireless channel -- comma, which would be affected by
04:38 5 leakage.

04:38 6 So it's not defining the paired wireless channel. It's
04:38 7 further modifying paired wireless channel.

04:38 8 So you're setting it -- setting inhibition time by a means
04:38 9 of NAV in this instance, in this particular embodiment, to a
04:38 10 paired wireless channel, which as it happens is actually
04:38 11 affected by leakage.

04:38 12 So it's picking a channel that is affected by leakage from
04:38 13 within the subset of paired wireless channels. That's not
04:39 14 definitional language. That's language that further narrows
04:39 15 and modifies what channel is being referred to in this
04:39 16 particular embodiment.

04:39 17 Now, Mr. Wheeler, if you wouldn't mind stopping your
04:39 18 Screen Share. Thank you.

04:39 19 Now, Your Honor, we don't believe that there should be any
04:39 20 embodiment that would be excluded by a construction, a correct
04:39 21 construction of "paired wireless channel," as the tentative
04:39 22 construction is. But to the extent that anyone might want to
04:39 23 consider any of the embodiments more relevant than the others,
04:39 24 that embodiment should probably be the second embodiment rather
04:39 25 than the first or twenty-fifth embodiments that defendants are

04:40 1 pulling their proposed constructions from.

04:40 2 THE COURT: Ms. Lu, I'll save you time on this one. I
04:40 3 agree with your original position. I don't think you need to
04:40 4 argue your alternate position.

04:40 5 MS. LU: Oh, okay. Well, the alternate position is
04:40 6 actually also agreeing with the first, but thank you, Your
04:40 7 Honor.

04:40 8 THE COURT: Anything else? Any rebuttal?

04:40 9 MR. WHEELER: Your Honor, I'll just end with the point of,
04:40 10 you know, the quotation marks and "here referred to as." I
04:40 11 know plaintiff brushes those to the side, but there's not a
04:40 12 single case that they've cited where quotation marks were used
04:40 13 in the definition and "here referred to as" where lexicography
04:40 14 was not found.

04:40 15 That's it, Your Honor.

04:40 16 THE COURT: The Court is going to maintain its
04:40 17 construction of plain and ordinary meaning.

04:40 18 The final claim term is "data packet."

04:41 19 And we'll wrap up with Ms. Lu trying to persuade me why --
04:41 20 on the one hand why I need to construe "data packet," which
04:41 21 I'll tell you I'm very skeptical about. But I would be
04:41 22 interested in hearing from Ms. Lu as to why she believes I need
04:41 23 to say it's a unit of data that is transmitted over a wireless
04:41 24 medium.

04:41 25 That being said, I will probably be at least slightly

04:41 1 interested in hearing someone from the defendants say why a
04:41 2 data packet is not a unit of data that is transmitted over a
04:41 3 wireless medium, because I need to understand why, if I'm
04:41 4 rejecting the plaintiffs' proposal, what problems the
04:41 5 defendants see in it now to hold off on fights later.

04:41 6 So I'll start with Ms. Lu, and then I'll hear from defense
04:41 7 counsel. But let me make clear, I'm very skeptical it needs to
04:42 8 be construed. I think plain and ordinary meaning is the
04:42 9 correct construction.

04:42 10 MS. LU: Yes, Your Honor. So the reason that plaintiffs
04:42 11 proposed a construction at all is because we know from the
04:42 12 pleadings and discovery pleadings exchanged in this case from
04:42 13 MediaTek's IPR filing that defendants are already intending to
04:42 14 read "data packets" in a way that is not consistent with the
04:42 15 ordinary meaning.

04:42 16 So in short, Your Honor --

04:42 17 THE COURT: Well, Ms. Lu --

04:42 18 MS. LU: -- what we're trying to do --

04:42 19 THE COURT: Ms. Lu, let me interrupt you and say this
04:42 20 happens, I think, in 100 percent of my Markmans.

04:42 21 If someone comes in and takes -- this is a perfect
04:42 22 example. I'm going to use this one from now on -- takes a term
04:42 23 like "data packet," which there's no question when this patent
04:42 24 was being drafted, whoever drafted this patent thought: Of all
04:42 25 the words I put in this, no matter what, no one will have a

04:43 1 fight over what a data packet is, because everyone on this call
04:43 2 knows what a data packet is, other than me. I'm the only one
04:43 3 who's not technical.

04:43 4 So I'm safe when I put down "data packet" that there will
04:43 5 not be a fight over this, because I can go Google it. Everyone
04:43 6 knows what it is.

04:43 7 Then a lawyer comes in and says: Judge, you have to
04:43 8 construe it because I'm worried the other side is going to say
04:43 9 something about it that's incorrect or limiting or whatever.

04:43 10 I don't do that at this stage. If something deserves
04:43 11 plain and ordinary meaning, I give it its plain and ordinary
04:43 12 meaning. If, in this case, given the direction this is
04:43 13 flowing -- and I really don't -- I guess I need to hear from
04:43 14 the defendant. In this case when you get the defendants'
04:43 15 expert's invalidity report, if you believe that the expert for
04:44 16 the defendant has taken a position to establish invalidity that
04:44 17 is so strained that it is not the plain and ordinary meaning of
04:44 18 "data packet," you will have two choices.

04:44 19 One is -- now that we know what the position is, and the
04:44 20 defendant is locked in -- one is to contact us and say: We
04:44 21 need a mini-Markman to find out whether or not the position
04:44 22 that what he's saying data packet is is correct or not.

04:44 23 If the defendants get greedy -- I'm not predicting they
04:44 24 will, but if they get greedy and take a position to prove
04:44 25 invalidity that I were to find at that Markman --

04:44 1 mini-Markman -- is not correct, is not the plain and ordinary
04:44 2 meaning, well, then they're in bad shape. Because they -- I'm
04:44 3 going to say -- essentially, it'll be like a mini-summary
04:45 4 judgment as well.

04:45 5 Or you can wait for a summary judgment when we have those
04:45 6 again, if they file -- if they take a position with their
04:45 7 experts on invalidity that you believe is not what a data
04:45 8 packet is, then you can file a motion for summary judgment.
04:45 9 And I take those up.

04:45 10 In the Intel trial I have in a week, two weeks, whatever,
04:45 11 there used to be three patents. There are two patents now,
04:45 12 because I granted a motion for summary judgment of
04:45 13 noninfringement. We take summary judgments very seriously, if
04:45 14 you have that concern.

04:45 15 But I don't construe things -- I want this word to get
04:45 16 out. I don't construe things because someone says: I'm
04:45 17 worried they're going to do this.

04:45 18 And you may be right, they're going to do that because
04:45 19 you've fought with them in other jurisdictions. But I'm going
04:45 20 to wait and see what they do in my case. And then we'll take
04:46 21 it up.

04:46 22 So I'm just going to go with this one with plain and
04:46 23 ordinary meaning.

04:46 24 Now, we've gone quite a while today and I've enjoyed it
04:46 25 greatly. I have the best job in the world to be honored to get

04:46 1 to work with lawyers as capable as you all are. No one would
04:46 2 have ever thought when I was in high school I would be sitting
04:46 3 here, I can promise you that. No one three years ago might
04:46 4 have thought I'd be here either.

04:46 5 But I certainly appreciate the very good briefing, the
04:46 6 very good arguments. I should know this, but I don't. I'll
04:46 7 ask you, since your face is right in front of me, Ms. Lu, have
04:46 8 I set a trial date in this case?

04:46 9 MS. LU: Yes. I believe you have.

04:46 10 THE COURT: Okay.

04:46 11 MS. LU: My memory is not what it used to be either, but I
04:46 12 want to say it's January 2022.

04:46 13 THE COURT: Okay. Whenever it is, I just want to let
04:46 14 everyone know -- I do this typically before I go. I want to
04:46 15 remind everyone that whatever the trial date is, the voir dire
04:47 16 will happen on the Thursday or Friday before the trial starts.

04:47 17 I'm praying that by January of next year we will be far
04:47 18 enough past COVID that we are doing voir dires in the way we
04:47 19 traditionally have my whole life.

04:47 20 In the Intel case I'm about to start, we're going to do
04:47 21 the voir dire one person at a time on the witness stand. And I
04:47 22 hope we don't have to be doing that a year from now to keep
04:47 23 people safe.

04:47 24 Assuming it's back to normal, you all should plan on
04:47 25 having my magistrate, who's wonderful, go for about an hour

04:47 1 asking questions. He does a very thorough job on voir dire.
04:47 2 And then whoever's in the case, whichever case we start with,
04:47 3 counsel for the plaintiff will get 30 to 45 minutes to do a
04:47 4 voir dire. Counsel for defendant will get 30 to 45 minutes to
04:47 5 do a voir dire.

04:48 6 There'll be 15 people on the venire panel. You each will
04:48 7 get four strikes. We will have a jury comprised of seven
04:48 8 people. If they all get through the end of the trial, the
04:48 9 verdict has to be unanimous.

04:48 10 So just -- that's a forewarning of don't make ritzy plans
04:48 11 that Thursday before trial starts, thinking you won't be
04:48 12 working.

04:48 13 So now, having said all that, Ms. Lu, is there anything
04:48 14 else that we need take up today?

04:48 15 MS. LU: No, Your Honor.

04:48 16 THE COURT: Thank you very much. You did a wonderful job.

04:48 17 I'm not sure who to ask on the defense side. Anyone is
04:48 18 welcome to jump in and tell me if there's anything that I need
04:48 19 to take up, I'm happy to do it.

04:48 20 MR. JOHNSON: Nothing from the defense side, Your Honor.
04:48 21 I had to get my words out one way or the other just to say I
04:48 22 was here. So thank you.

04:48 23 THE COURT: Now, I've got to ask you this because we go so
04:48 24 far back. How often is it that you actually wear a tie?

04:48 25 MR. JOHNSON: I've worn the same tie since COVID started

04:49 1 in the same room, I think, in front of you.

04:49 2 THE COURT: I have -- as have I. I was going to say, it's
04:49 3 the same tie. I don't even know -- I don't even undo it. I
04:49 4 just have it ready to go.

04:49 5 So thank you all. It was a wonderful afternoon with you.
04:49 6 And I look forward hopefully to seeing one or more of you in
04:49 7 person, soon I hope. But in the meantime, please be safe and
04:49 8 have a great weekend when it gets here. Take care.

04:49 9 (Hearing adjourned at 4:49 p.m.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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