

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MASIMO CORPORATION
Petitioner,

v.

APPLE INC.,
Patent Owner.

IPR2023-00745
Patent 10,076,257 B2

Record of Oral Hearing
Held: August 12, 2024

Before KEN B. BARRETT, JOSIAH C. COCKS, and
ROBERT L. KINDER, *Administrative Patent Judges*.

APPEARANCES:

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The above-entitled matter came on for hearing on Monday, August 12, 2024, commencing at 1:00 p.m., via video teleconference.

1 PROCEEDINGS

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3 JUDGE KINDER: Thank you and good afternoon, everyone. Or
4 good morning, if you happen to be on the west coast. This is Judge Robert
5 Kinder, and with me on the Panel today are Judges Barrett and Cocks. And I
6 believe I'm looking, it looks like we have parties on the call as well, so we'll
7 go ahead. Today's proceeding is for a case titled Masimo Corporation
8 Petitioner versus Apple, Inc. It is IPR 2023-00745 involving US Patent
9 10,076,257. And we'll do a quick roll call to find, make sure everyone's on
10 the call and to find out who will be speaking today. So, we'll first go with
11 Petitioner Masimo.

12 MR. EVERTON: Good morning, I'm Ben Everton of Knobbe
13 Marten, and I'll be presenting for Petitioner Masimo today. With me in the
14 room, I have backup counsel, Ted Cannon, Irfan Lateef and Paul Spiel.

15 JUDGE KINDER: All right, Mr. Everton, thank you. We'll call on
16 Patent Owner. If you could please introduce yourself and who will be
17 speaking today and who's present?

18 MR. RENNER: Good afternoon, this is Karl Renner from Fish and
19 Richardson. I'm joined by Andrew Patrick, Patrick Bisenius and Grace Kim.
20 I will speak as well as Rick and Grace. Thank you.

21 JUDGE KINDER: All right, thank you. So, today's hearing, starting
22 around 01:00 p.m. eastern time, Petitioner will have a total of 60 minutes to
23 present their case in chief, and Patent Owner will also have a total of 60
24 minutes to respond. The Petitioner will open the hearing by presenting its
25 case regarding the challenged claims for which the Board instituted trial, and

1 also Patent Owners proposed substitute claims addressing them. Thereafter,
2 the Patent Owner will respond to Petitioner's arguments. Mr. Everton,
3 Petitioner will have rebuttal time to respond to arguments made by Patent
4 Owner. How long would you like?

5 MR. EVERTON: I plan to reserve 15 minutes.

6 JUDGE KINDER: All right. And then Patent Owner may also
7 request time to reserve for a brief sur rebuttal. So, Mr. Renner, how much
8 time would you all like to reserve?

9 MR. RENNER: Thank you. 20 minutes, please.

10 JUDGE KINDER: All right, 20 minutes. Just to go through a few
11 things really quick. I know we've had a few hearings with these parties in
12 the last few months, so I think everyone's familiar with our rules. If you
13 have any questions at the end, feel free to ask. Parties may present their
14 demonstratives today, either by referencing the demonstratives and letting us
15 flip to it, or you can take control of the screen and actually flip through them
16 for us if you'd like to do that. As a reminder, demonstratives are not a
17 mechanism for making new arguments, and they are also not evidence and
18 will not be relied upon as evidence. So as a courtesy, when you're not
19 speaking, please be sure to mute your mic and unmute only when speaking.
20 As I mentioned, the Panel has access to all the papers filed with the Board,
21 including the demonstratives. During the hearing, if you could give us just a
22 brief moment to flip to a paper or a piece of evidence that you're referencing,
23 that would be helpful.

24 And also, reminder to identify clearly which piece of evidence or
25 demonstrative you're referring to during your presentation. So, the record is

1 clear on that. If we have any technical issues with conductivity during the
2 hearing, please let us know in any way you can. Either telephone call to the
3 Board or email real quick. If something happens and we lose connectivity
4 again, we'll pause the hearing at that point and we can -- if we can't get
5 reconnected, we have backup means where we can do it via telephone. And
6 I think that is all I had. Are there any questions? We will start with Mr.
7 Everton; do you have any questions?

8 MR. EVERTON: No, Your Honor. No questions.

9 JUDGE KINDER: All right, Mr. Renner, do you have any questions?

10 MR. RENNER: No, Your Honor. Thank you.

11 JUDGE KINDER: All right, we'll go ahead. Mr. Everton, I'll turn it
12 over to you and whenever you're ready, we'll start the clock on your initial
13 45 minutes of presentation time.

14 MR. EVERTON: Thank you, Your Honor. And good morning, Your
15 Honors. I will actually not share my screen, but I will refer to the different
16 slide numbers. If you would like to follow along with your own set. I'll be
17 starting with Masimo, slide 2. So here in slide 2, in this IPR, we presented
18 two grounds. The first is anticipation based on Mills. The second ground is
19 obviousness over Markle in view of Mills.

20 Now, if we go to slide 3, I'm going to focus on the claims that were
21 actually disputed here and argued in Apple's POR and that we replied to in
22 our reply. Now if we can turn to slide 4, this shows the language of Claim 1
23 of the '257 Patent which has these limitations. And I highlighted some of
24 them, and highlighted in yellow, you'll see that most of the arguments relate
25 to a first lead comprising a first pad that is embedded in a first portion of the

1 enclosure. Now in this IPR, the parties don't really dispute this structure
2 that's disclosed in the prior art. Instead, the main disputes relate to claim
3 construction. But Masimo has shown that the prior art invalidates the claims
4 under any of the party's constructions. So, Apple has resorted to arguing
5 that Masimo's grounds and theories are new arguments. But these attempts
6 to create confusion and mischaracterize the Petition should be rejected by
7 the Board.

8 Now, the first topic I will address is claim construction and the only
9 terms construed here are embedded and embedded in and also the enclosure.
10 If you turn to slide 6, this shows Masimo's construction for embedded. Now
11 this construction is consistent with the '257 Patent and the focus of
12 integrating leads into the device enclosure. Apple does not dispute that the
13 lead pads relied on in the grounds are embedded under this construction of
14 Masimo's. Now if we turn to slide 7, Apple on the other hand, construed,
15 embedded in and that construction is at least partially set in or partially
16 surrounded by a material. Under this construction, the pad need only be
17 partially surrounded by material. This is very broad. It only requires a
18 partial or minimum amount of surrounding and there is nothing in the
19 construction to suggest otherwise. The word partially is interesting because
20 it makes clear that this construction does not require complete surrounding,
21 but it also doesn't provide a threshold for how little surrounding there can be.
22 So, under Apple's construction, the pad can be surrounded on all sides, or it
23 could be surrounded on a few sides or even surrounded on one side.

24 Apple tries to differentiate partially surrounded from being adjacent to
25 or pressed up against or parallel surfaces, but those arguments are not

1 excluded in Apple's construction. The words of Apple's construction which
2 require partially surrounded biomaterial. Masimo has shown that Mills pads
3 are at least partially surrounded by the first portion of the enclosure under
4 this broad construction. If we go now to slide 8, this includes testimony
5 from Apple's experts regarding Apple's construction of embedded in.
6 According to their expert, under Apple's construction, the pad doesn't even
7 need to contact or touch the enclosure to be embedded in it. He said in his
8 deposition that a book levitating in a drawer would be embedded in the desk.
9 But Apple is trying to have it both ways. They want a very broad
10 construction for asserting the patent, but they need a narrower construction
11 to try to avoid the prior art.

12 We now go to slide 14. In arguing against the prior art, Apple applies
13 a curvature requirement that's not in their construction. Apple seems to be
14 arguing that if the inner surface of the enclosure is curved, then the pad is
15 embedded in that curved surface. But if the inner surface is flat, then the pad
16 is not embedded. Here, in slide 14, Apple's expert explained that the
17 difference between the embodiment of the '257 Patent and the prior art is
18 that the lead pad is positioned inside a curved surface versus being inside a
19 flat surface. In Apple's sur reply on the left there at the bottom, they also
20 argue that this embedded in limitation requires the enclosure to have a
21 groove or an indent or other physical configuration that receives the pad.
22 You can see there in the sur reply they're arguing that Markle's enclosure
23 does not have a groove indent or other physical configuration for a seating
24 Mills leaf spring pad. But this curvature or groove requirement is not part of

1 the claims and it's not present in Apple's construction, which only requires at
2 least partially surrounded by a material.

3 Apple's arguments seem to be reading in a limitation from a single
4 embodiment in the '257 Patent that had a curved inner surface and Apple's
5 curvature requirement is also unclear and arbitrary. It seems ridiculous that
6 if you have a pad positioned against a flat surface, it is not embedded in, but
7 if you position the same pad against a very slightly curved surface on the
8 inside, then it's somehow embedded in and invented. For example, if the
9 underside of Mills electrode were slightly warped or bowed, then a pad
10 placed up against it then would be embedded in. This doesn't seem
11 inventive. This doesn't seem right.

12 We now go to slide 10. When asked in this deposition, Apple's expert
13 could not explain the type of curvature or the amount of curvature that's
14 required and finally gave up stating that you sort of know it when you see it.
15 This ambiguity around the curvature, this additional curvature requirement
16 that Apple's introduced to our view of very broad coverage for infringement
17 and yet try to avoid specific prior art in this IPR. But even if we accept this
18 curvature, this additional curvature limitation, curvature requirement, which
19 we don't believe it is in the claims or in the construction, under both of
20 Masimo's theories, the first portion of the enclosure includes at least a part
21 of the housing that is curved around the pad. So even under Apple's
22 curvature requirement, the theories presented by Masimo satisfy that
23 requirement and the priority invalidates the claims.

1 JUDGE KINDER: Could I ask, I have two questions really. Can you
2 point to where they make the specific curvature argument in there? I think
3 it's sur reply or response?

4 MR. EVERTON: Yes, the curvature argument is in expert
5 declaration. Apple's expert declaration. Let me see if I can find that here.

6 JUDGE KINDER: Was it made in their briefing in the Patent Owner
7 response?

8 MR. EVERTON: Yes, we believe it was also made in the Patent
9 Owner response. So let me turn to right. So here it is. And this is a slide we
10 already went over in slide 14. If you go to Masimo slide 14. So, on the
11 right-hand side you see from the expert declaration this curvature
12 requirement and differentiation. And then on the left-hand side down there
13 at the bottom from the sur reply actually, is this idea of requiring a groove an
14 indent or other physical configuration.

15 JUDGE KINDER: Are they arguing that as part of the claim
16 construction, or are they arguing it factually that the Mills leaf spring top
17 doesn't have anything except a flat surface and there's no evidence of a
18 groove, indent or other physical configuration?

19 MR. EVERTON: Yeah, it doesn't seem like Apple is arguing it as a
20 claim construction. They have their claim construction, which is partially
21 surrounded. But then once you get into analyzing the prior art, that's when
22 this has come up where they're saying that the prior art doesn't include these
23 types of grooves or indents. There are experts saying that it's not curved and
24 that's how they differentiate it from embodiments that are in the '257 Patent.

25 JUDGE KINDER: Okay, I think I understand.

1 MR. EVERTON: So now turning back to slide 10, so I've explained a
2 little bit about this ambiguity around the curvature and requiring a groove,
3 but this shows how Apple is trying to use partially surrounded to argue very
4 broad coverage for infringement right in their claim construction. But then,
5 yet try to avoid the specific prior art in this IPR. Once you get to the
6 analysis of the prior art, they bring in these additional requirements. So now
7 if we turn to slide 15, this provides a summary table of the party's
8 construction for the embedded and embedded in limitations. And note that
9 Apple has gone all in with their construction and does not dispute the
10 grounds under Masimo's embedded construction in this IPR, but instead
11 argues that the prior art paths are not partially surrounded under Apple's
12 construction. On the other hand, Masimo has shown that the prior art
13 invalidates the claims under any of these constructions. And I'll show you
14 more on that as we get into the later slides of how that is.

15 JUDGE COCKS: Counsel?

16 MR. EVERTON: Yes.

17 JUDGE COCKS: Judge Cocks, I know you have emphasized one
18 construction is for the term embedded and one construction is for the term
19 embedded in. In your view, do those two terms have different meaning?

20 MR. EVERTON: Yes. So, we have here I'm showing on slide 15 the
21 different constructions from the parties. And as you can see, the
22 constructions for embedded and embedded in are different.

23 JUDGE COCKS: Has Masimo provided a -- I'm sorry. Do you have
24 a construction for both "embedded" and "embedded in," in the proceeding?

1 MR. EVERTON: No, in this proceeding, Masimo provided a
2 construction for “embedded,” and you’ll see that in the upper row there.
3 And that’s what we provided in the Petition. It was Apple who ended up
4 bringing in and discussing Masimo’s construction from the District Court.
5 But in this IPR proceeding, we’re relying on our construction of embedded.

6 JUDGE COCKS: Thank you.

7 MR. EVERTON: Now, if we move to slide 17, I’ll address the
8 construction of enclosure, which is the second term that we’ve construed in
9 this IPR. As Masimo explained in its briefs, the plain and ordinary meaning
10 here for enclosure is something that encloses. The ‘257 Patent doesn’t
11 provide any special definition of enclosure or require limitations for that
12 word. And this ordinary meaning is consistent with previous Federal Circuit
13 cases. We provide an example here, the *Pazandeh* case, where that same
14 plain and ordinary meaning of enclosure was used. And then we also
15 provided various dictionary definitions that also confirm this ordinary
16 meaning as something that encloses.

17 JUDGE KINDER: You say, this is Judge Kinder, that the term
18 encompasses any structure. What would be a structure that would fall under
19 encloses that’s capable of enclosing?

20 MR. EVERTON: So, for example, a structure like a housing could be
21 part of an enclosure that would enclose other parts of the device.

22 JUDGE KINDER: How much rigidity and how much support does
23 the enclosure have to provide?

24 MR. EVERTON: So, the claims here don’t have any requirement for
25 structural rigidity or any thickness or any other specifics as to the structure

1 of the enclosure, only that it is an enclosure. And that could be -- that could
2 vary greatly.

3 JUDGE KINDER: Okay,

4 MR. EVERTON: Now, turning to slide 18, the '257 Patent
5 specification supports its ordinary meaning as well. So, I provided here an
6 excerpt from the '257 Patent. It explains that the enclosure, for example, a
7 portion of a bezel or housing, can serve as a lead for the heart sensor. So,
8 the enclosure can include multiple parts and can include multiple claim
9 features. For example, the lead can be part of the enclosure. This is
10 important because Apple argues that a part of Mills electrode cannot be part
11 of the enclosure. And here in slide 18, we also list some case law that
12 confirms this concept, that a single component can satisfy two limitations, if
13 that's consistent with the intrinsic evidence.

14 Now, if we turn to slide 19, despite the Board's request that the parties
15 provide explanation and construction for the word enclosure, Apple did not.
16 Instead, Apple argues that Mills plating 14b cannot be part of the enclosure
17 based on some made up requirements that do not come from the claims or
18 from any construction. And I have those listed here. For example, Apple
19 asserts that the enclosure must be separate from the electrode pad, that all
20 portions of the enclosure must stand alone and have some unspecified
21 thickness. But the claim only requires an enclosure and the first portion of
22 the enclosure that the pad is embedded in it. The claims don't include
23 anything about being separate or having a standalone thickness, a special
24 thickness, or any of these additional requirements. Apple inserts these

1 additional requirements and uses them in an attempt to avoid this specific
2 prior art in this IPR.

3 We move now to slide 20 on the right-hand side there. This is
4 testimony from Apple's expert. He admitted that there's no requirement that
5 the enclosure be separate from the electrode penniless, contrary to the
6 arguments in the briefs. Now moving to slide 21. This provides a summary
7 of the constructions for enclosure. And you can see there that on the bottom
8 left, Masimo, that's the ordinary meaning. And then these additional
9 requirements from Apple. And note that Apple chose not to provide a
10 construction. Now, if the Board determines that this is the plain and
11 ordinary meaning and the correct construction of enclosure, then all of
12 Apple's arguments fall away and none of Apple's additional requirements are
13 part of the ordinary meaning of enclosure.

14 Now I'd like to turn to, if you have them available, to Apple's slides,
15 demonstrative slides. We're going to turn to slide 59 of Apple's slides. So
16 here Apple made a new argument in its sur reply that introduces yet another
17 improper limitation into the claims. And slide 59 shows this. Apple tries to
18 use these portions of Claim 1 to argue that the entire first portion of the
19 enclosure must be conductive. And they do this to try to exclude in the prior
20 art the housing or other parts of the prior art and say, well, that can't be part
21 of this first portion of the enclosure. But if you look at the actual claim
22 language closely, Apple's argument misreads the claim. The claim requires
23 an exterior surface of the enclosure, and that exterior surface of the
24 enclosure comprises an exterior surface of the first portion. The first pad is
25 positioned underneath that exterior surface of the first portion. Then the first

1 pad is configured to detect a first electrical signal via the user's skin contact
2 with the exterior surface of the first portion. So really, what it's saying here
3 in the claim is that the first portion is simply any exterior surface of the pad.
4 Any exterior surface that the pad is positioned underneath, it is an exterior
5 surface of the first portion, not the entire surface of the first portion.

6 Nothing in this claim suggests that the entire exterior surface of the
7 first portion must be coextensive with an exterior surface of the first portion
8 as claimed. There's nothing here that suggests that the entire first portion
9 must be conductive, as Apple suggests. Now, if we turn to slide 60, Apple
10 slide 60. This includes testimony from their expert Kenny, arguing that
11 Mills housing 12 is not conductive. So, this concept and argument that Mills
12 housing 12 is not conductive, even if it were true, is irrelevant because Mills
13 plating 14b is conductive. No one disputes that, and it provides an exterior
14 surface of the first portion through which the signal can pass to the pad 14a.
15 Yeah, go ahead, Your Honor.

16 JUDGE KINDER: This is Judge Kinder, and I'm kind of confused
17 about, you know, what's in the Petition. What are you saying the first
18 portion is? You say it's a portion of the housing along with pad 14?

19 MR. EVERTON: That's right. In the Petition and throughout this
20 proceeding.

21 JUDGE KINDER: So, Patent Owners arguing that that in itself is a
22 new argument. Can you show us in the Petition where you argue that a
23 portion of the housing is also part of that structure?

24 MR. EVERTON: Yes. So why don't we go to, let's go back to
25 Masimo's slide and if we go to slide 31. So, Apple did argue that Masimo's

1 theories are new arguments, and specifically this theory that Your Honor just
2 mentioned. This is the first theory under the Petition's grounds. And in this
3 argument, Apple cherry picks figures and statements from the Petition,
4 trying to create confusion about Petition theories. But if you look at the
5 entirety of the analysis for the relative limitations, Masimo's two theories are
6 clear and consistent. And I'll show you here in slide 31. This slide shows
7 language from the relevant section of the Petition. So, this is the Petition's
8 analysis of the key limitation embedded in a first portion of the enclosure.
9 You see here heading c. This is where a first portion of the enclosure is first
10 introduced in the Petition. And the Petition says electrode 14 in parentheses,
11 first pad. And that includes the base metal portion of, or is the base metal
12 portion of 14, is integrally molded, i.e., is embedded into the housing. Then
13 later in that same section, the Petition further explains that with the next
14 sentence below. Not only is each of the electrodes 14 and 16 embedded into
15 the housing 12 by being integrally molded into the housing 12, but each
16 electrode 14 and 16 also has base material embedded underneath the outer
17 surface coating, and that would be the plating 14b.

18 So, in this section that focuses on and describes what the first portion
19 is, the Petition clearly explains Masimo's first theory. Mills first pad is
20 embedded into the housing 12 by being integrally molded into the housing.
21 And the first pad is also embedded in the outer coating, which is plating 14b.
22 So, both that upper part of the housing and the plating 14b, those are the first
23 portion of the enclosure. An Apple pointing to other portions of the Petition
24 or other limitations to create confusion cannot change this description of the
25 first theory that's in the relevant section in the Petition for this limitation.

1 Then if we go to slide 34, we have some more examples here. This slide
2 shows several examples from Petition's detailed analysis under this first
3 theory. In each one, the plating 14b is identified as part of the first portion
4 of the enclosure. Then if we go to slide 35, this slide shows several
5 examples from the Petition explaining how the upper part of the housing 12
6 is also part of the first portion of the enclosure. The electro pad is embedded
7 in both the housing 12 and the plating. And see here on the right-hand side
8 that figure there are two arrows there, one pointing to the electrode itself,
9 and then also that upper portion of the housing 12.

10 Then if we also go to slide 40. Here in this slide, we've included some
11 excerpts from the POR and sur reply, and this slide shows that Apple
12 acknowledged that the Petition did include both Mills, housing 12 and
13 plating 14b as part of the claimed enclosure. The POR said that the Petition
14 appeared to map both the housing 12 and outer plating 14b of the electorate
15 14 to the claimed housing. That's probably a typo there. It should say
16 claimed enclosure. There's no housing claimed in the claims. So Masimo's
17 theory was in the Petition, and it renders the challenge claims unpatentable.
18 And this shows that Apple did recognize that theory of having both the
19 housing 12 and the plating 14b as part of the first portion. Now you'll hear
20 in Apple's presentation arguments that Masimo's theories are new and
21 improper. Instead of addressing the Petition's clear analysis of the two
22 theories that I just showed you, Apple continues to ignore it and goes back to
23 Apple's own mapping. Masimo, again, pointed out the Petition's theories in
24 its reply, but Apple chose to ignore that and instead turned to their own
25 mappings, as if they could rewrite the Petition.

1 Now if we could go back to slide 24, I'll address the actual grounds
2 and these theories in more detail now that we've gone through the claim
3 construction. So, slide 24, Ground 1 is anticipation and view of Mills. We
4 go to slide 25. This slide just illustrates the undisputed claim limitations that
5 Mills discloses. Mills is the device for detecting cardiac signals. It includes
6 an enclosure, heart sensor, processor. Each of these limitations, and the
7 main dispute here is like we talked about, the first pad being embedded in
8 the first portion of the enclosure. And as I mentioned, Apple has created
9 their own mappings. And there's three different mappings. And this was a
10 strategic theme by Apple because they used the three mappings as straw men
11 that are more easily attacked than the actual theories that are in the Petition.
12 But I'll show you that Masimo's theories are clearly presented as we've gone
13 through those slideshows, and as I go through these grounds as well.

14 So, if we move to slide 26, this is the first theory that we've just been
15 discussing with the pad, which is electrode 14a, and the base metal, or the
16 base metal is the pad 14a, and the plating 14b is part of the first portion of
17 the enclosure. Now, if we go to slide 27, Apple argues that this first theory
18 is new. But we just went through some of the examples of how the Petition
19 is clear that the pad corresponds to base metal 14a, and here are some of
20 those under this first theory. So, at 21, for example, in the upper left shows
21 the pad, and then in parentheses, base metal 14a. Again, these are from the
22 relevant sections in the Petition, and then on the lower right, the base metal
23 portion 14a, which is a pad. So clearly from the Petition, at least in this
24 theory, we're pointing to the pad as 14a, which is under the plating 14b in
25 Mills.

1 If we can turn to slide 29. In the Petition's first theory, Mills first
2 portion includes the two parts, and this is what we went through in some of
3 the other slides, the plating 14b of the electrode 14 and the upper part of the
4 housing 12. We already read this excerpt from the Petition, but this goes
5 through in detail, stating that the pad is embedded in both the plating and the
6 upper portion of the housing. Now, if we turn to slide 30, Apple's expert
7 admitted that the first pad, which is part of electrode 14, is embedded in the
8 identified first portion of the enclosure, which includes part of the housing
9 12. The annotated figure on the left side here illustrates how the electrode
10 pad is embedded on all sides by that upper part of housing 12 and also by the
11 outer plating over the pad. Apple does not dispute Mills structure or that
12 Mills pad is embedded. Instead, Apple argues two things. First, that Mills
13 plating cannot be part of the enclosure. And second, as I've already
14 addressed, that including plating 14b as part of the first portion is a new
15 argument.

16 So, if we go to slide 32, I'll address quickly that first argument by
17 Apple that the plating 14b cannot be part of an enclosure. So here in slide
18 32, we have some excerpts from the Mills reference, and Mills explains that
19 its plating 14b protects and can greatly extend the life of the electrode. It
20 also provides an extremely hard exterior skin contactable surface. So, Mills
21 plating 14b encloses the base metal 14a and other parts of the device.

22 JUDGE KINDER: This is Judge Kinder; can I ask a question?

23 MR. EVERTON: Yes.

24 JUDGE KINDER: Could the layer 14b stand alone if the base metal
25 14a was removed?

1 MR. EVERTON: I think Apple's expert has made an argument about
2 that and has argued that it could not stand alone. But I don't think there is
3 any evidence or any testing or anything that would show that that's true, that
4 it couldn't stand alone. I don't think it's relevant here because the claims
5 don't require that the enclosure, that any parts of the enclosure can't be
6 something that's unable to stand alone or needs support underneath, support
7 from what it's enclosing. So, I really don't think that argument is relevant to
8 the claims here and is really just the standalone argument is just something
9 that's being read into the claim to try to distinguish from this prior art.
10 Because as we looked at previously, the construction, the only proposed
11 construction here for enclosure just doesn't require any structural rigidity or
12 being able to stand alone or support features.

13 JUDGE KINDER: So, I guess it's your position that any layer, any
14 coating on any material could serve as an enclosure?

15 MR. EVERTON: Yeah, yeah, any layer or coating, especially here
16 with Mills, where it's, you know, made to protect and it's hard and it does
17 have some rigidity, then that would be. So, anything that encloses along
18 with the housing. Remember that Mills also does have a housing, but then it
19 does have this plating that's integral with the housing. So, the housing, you
20 know, is there and supports and can stand alone. But this plating is just an
21 integral part of the enclosure along with that housing.

22 JUDGE KINDER: So, are you saying that the plating alone wouldn't
23 be enough? You also have to have the housing 12 as part of the enclosure?

24 MR. EVERTON: No, as I've explained, under Apple's embedded in
25 construction, all that's required is being surrounded on one side. So even if

1 our theories are misinterpreted to be limited just to the plating as the first
2 portion of the enclosure, the electrode pad would still be embedded in that
3 first portion, even if it was just the plating alone, because it would be inside,
4 it would be surrounded at least on one side.

5 JUDGE KINDER: I think I understand. Go ahead.

6 JUDGE COCKS: Counsel, this is Judge Cocks, just one follow up on
7 that. I realize I'm stepping back a little bit, but are you asking us to adopt
8 Apple's construction of "embedded in"?

9 MR. EVERTON: No, we're not asking you to adopt that construction.
10 We provided our own construction for the term "embedded," and that's the
11 construction that we're standing by. But we are addressing Apple's
12 construction because that's really the only construction under which they
13 dispute as a prior art.

14 JUDGE COCKS: Well, you previously said that "embedded" and
15 "embedded in" have different meanings. And the claim term, the claim at
16 issue, the clause says "embedded in." So, doesn't that mean we need to have
17 an understanding of what the term "embedded in" is apart from just
18 embedded?

19 MR. EVERTON: We did not think so. And when we filed the
20 Petition, that's why we chose to construe "embedded." But that was enough
21 that if we construe the term "embedded," even though it has in after it, that
22 would provide sufficient understanding for the claims. But it was Apple
23 who then construed "embedded in." So, we have now addressed that
24 construction along with the other constructions that Apple has raised,
25 including Masimo's District Court construction.

1 JUDGE COCKS: So, are we going to need to construe “embedded
2 in” to resolve this case?

3 MR. EVERTON: I don't think so. And that's, I don't think that's
4 necessary to construe it. As long as you have a construction of “embedded.”

5 JUDGE COCKS: I don't want to belabor this, but you have already
6 said that “embedded” and “embedded in” have different meanings since the
7 claim term at issue, the claim term is “embedded in.” I don't see how we
8 cannot be construing “embedded in” apart from “embedded,” or tell me
9 where I'm wrong.

10 MR. EVERTON: Yeah. So instead of providing a construction for
11 “embedded in,” Masimo had shown that under all of the construction, the
12 claims would be invalid under view of the prior art. But if the Board wants
13 to construe “embedded in,” then we're fine with whichever of the
14 constructions the Board chooses. Then choose Apple's construction or our
15 District Court construction. That's fine because we have covered that. We
16 have shown that this prior art invalidates under those constructions.

17 JUDGE COCKS: Thank you. You can continue.

18 MR. EVERTON: Now if we can turn to slide 33. This includes
19 various excerpts from Mills specifications. Here, Mills consistently
20 describes electrode 14, which includes plating 14b as being integral part of
21 the housing. This confirms that the plating 14b and the housing are integral
22 and both part of the device enclosure. Now, I'd like to turn to the second
23 theory. So, we've been talking about the first theory, right, where you have
24 14a as the pad and then the plating as part of the first portion of the
25 enclosure. Now, under the second theory, if we go to slide 36, in this second

1 theory, the top of Mills leaf spring 62 is the first pad. And here it's
2 highlighted in red in the Petition. Now, if we go to slide 37, the first pad of
3 the leaf spring is embedded in the first portion of the enclosure, which
4 includes, again both electrode 14, the entire thing, electrode 14, and an upper
5 part of the housing 12.

6 JUDGE KINDER: This is Judge Kinder. Just to clarify, this
7 particular embodiment, where the pad of leaf spring 62 is pressed against the
8 inner wall of the electrode, would require us to adopt your claim
9 construction from “embedded,” isn't that right?

10 MR. EVERTON: No. So, in this theory, so you have the top of the
11 leaf spring, and that is the pad, and then it would be underneath the first
12 electrode 14. And so, and part of the first portion, again in this theory, is not
13 only electrode 14, but also the top portion of the housing, just like we said in
14 the first theory. And Apple's construction only requires partially
15 surrounded. In our view, partially surrounded could be on one side. So, if
16 this top of the leaf spring is underneath that first electrode 14 and part of the
17 upper housing, then it would be at least partially surrounded under Apple's
18 construction.

19 JUDGE KINDER: And by partially surrounded, you mean essentially
20 just abutting faces? Face-to-face?

21 MR. EVERTON: Yes. So, it's partially surrounded because it is
22 pressed up against the inside so that you'd have face-to-face. But also
23 remember, part of that first portion of the enclosure, that includes the upper
24 part of the housing 12, which does have curvature. So even if you accept

1 this requirement for some curvature that curves down around other sides of
2 that pad at the top of the leaf spring. Did that answer your question?

3 JUDGE KINDER: Yes, it did. Thank you.

4 MR. EVERTON: Thank you, Your Honor. Now I'll move to slide
5 38. And in Apple's POR, they argue that the top of the leaf spring is not
6 embedded because it is positioned behind, parallel and adjacent to the
7 electrode 14. So, this is addressing just what we were talking about. But
8 Apple's argument ignores the fact that in Masimo's second theory, the first
9 portion of the enclosure includes both electrode 14 and the upper part of the
10 housing. This is what I just explained. So, throughout this IPR, Apple has
11 disregarded this upper part of the housing 12, and has not argued validity
12 under that correct theory. Apple's arguments are also undermined by
13 Apple's own claim construction, which only requires partially surrounded.
14 And then lastly, Apple's arguments contradict Apple's infringement
15 allegations that a pad is merely positioned. If we look here on the right-hand
16 side, you have a pad that's just positioned within a device, not contacting any
17 of the housing, but somehow that's embedded in a first portion. Now, I'd
18 like to turn to ground two. So, ground two, if we go to slide 51. This is
19 obviousness based on Markle and view of Mills in slide 53. We have
20 another slide here, just showing all of the undisputed limitations that are
21 disclosed by Markle. And this ground combines the devices of Markle with
22 the specific electrode configurations of Mills.

23 JUDGE KINDER: Mr. Everton, you have about two minutes in your
24 opening time, and you're welcome to use as much of your rebuttal as you'd
25 like. Okay?

1 MR. EVERTON: Okay. Okay. So, specific to this ground, two, if
2 we go to slide 56, Apple argues that Mills leaf spring pad would not be
3 embedded in the first portion of Markle's enclosure because the first portion
4 only includes the black electrode areas of Markle. But as I've discussed
5 previously, Apple's construction of embedded in does not require
6 surrounding the pad on more than one side. So, the pad placed against the
7 inside of the electrode area of Markle there would be sufficient to be
8 embedded in. However, you know. Moreover, Apple's argument ignores
9 the fact that Markle's first portion, similar to how I explained with Mills,
10 Markle's first portion of the enclosure includes more than just the black
11 electrode areas. And you can see here with the language I provided from the
12 Petition on slide 56. It says the leaf spring 62 of Mills would be embedded
13 in the housing of Markle because its top pad portion is placed underneath an
14 exterior surface metal and against an interior wall of the exterior surface
15 material. And Apple does not dispute that the leaf spring pad would be
16 embedded in a first portion that includes both the electrode areas and the
17 surrounding part of the housing.

18 Now, if we turn to slide 65, I'd like to address the motivation to
19 combine in slide 65. In the Petition, we provided motivations to combine
20 Markle and Mills and use leaf spring, and provided evidence of an
21 expectation of success. So, this slide shows some of the motivation analysis
22 by Masimo's expert, Oslan. Now in the institution decision, the Board asked
23 for additional information regarding this motivation to combine a leaf spring
24 with like Mills with the devices of Markle. So, in addition to Mr. Olan's
25 previous explanation for motivations to use a leaf spring, he also provided

1 additional evidence. If you turn to slide 66, Mr. Oslan relied on these
2 exhibits, exhibits 1059, 1060, 1061, which include journal articles and
3 technical literature. And as shown in these exhibits, leaf springs have many
4 benefits, including they ensure reliable connections, they avoid soldering,
5 they reduce movement, they're resilient and compact, and they're self-
6 adjusting. It's important to note that all of these benefits and motivations
7 stand unrebutted by Apple.

8 Now, on top of this evidence, we go to slide 67. Apple's expert
9 agreed that a leaf spring would be a reasonable choice in this context, and
10 motivation to combine doesn't require that it be the best option. A suitable
11 alternative would be enough. And that's all I have for my opening. I'll
12 reserve the rest of the time.

13 JUDGE KINDER: Thank you. Mr. Everton, it looks like you have
14 about -- you went over two minutes, if I'm correct, so you should have about
15 13 minutes left.

16 MR. EVERTON: Thank you, Your Honor.

17 JUDGE KINDER: We'll go ahead and transition to the Patent Owners
18 case and I think, Mr. Renner, were you beginning the presentation?

19 MR. RENNER: Yes, Your Honor. Thank you.

20 JUDGE KINDER: All right, whenever you're ready, we'll go ahead
21 and start. And I believe you have 40 minutes of opening time.

22 MR. RENNER: That's correct. Well, good afternoon, Your Honors.
23 I'm Karl Renner. I'll begin with just a few opening remarks before my
24 colleague Rick Bisenius. He'll begin our presentation in principle, and he'll
25 address the original claims of the '257 Patent. Time permitting Grace Kim

1 will prepare, she's prepared to address the claim amendments that were
2 introduced by the revised motion to amend or questions you may have.

3 Those introductory remarks are four strong. First, just to be clear,
4 unlike a lot of our cases that we do together, and this case does not involve
5 patent or preliminary remarks that have evolved into other arguments that
6 are refined and otherwise represented here, these arguments that are
7 developed newly after the institution decision. I make the comment only to
8 remark that they were not before, Your Honors, at the time of institution,
9 neither the arguments or the evidence that we'll be discussing. Secondly,
10 central to dispute is a combination of several claimed elements, and they
11 relate to the pad configurations within the heart sensor of the electronic
12 device. To this point, the independent Claim 1, it requires the pad to be
13 positioned underneath of a conductive to touch exterior surface of an
14 enclosure within which that pad is embedded. Rick is going to explain that
15 this combination of features is not only not disclosed by either of the Mills
16 or the Markle prior references advanced by Masimo, but it's also not said to
17 be rendered obvious by the proposed combination of them, in that pieces of
18 Mills are still relied upon without any number are evidence that there's an
19 extension of them.

20 And to this point, I'd ask that when you listen to Rick's presentation,
21 to remain mindful of the fact that Masimo advanced two, and only two
22 grounds, and that is the Mills alone anticipatory ground, and then the Markle
23 plus Mills ground. And unsurprisingly, in that first ground of being,
24 anticipation, Masimo relies exclusively on the specific teachings within
25 Mills for the claim, not looking to any sort of obviousness there. More

1 interestingly, the point of the comment though, is that despite Masimo's
2 contention of obviousness based on Markle, in view of Mills in its second
3 ground, here too, in addressing the claimed pad configuration, which sees
4 that Markle relies on the feature of Mills that incorporates specifically the
5 integration of its trapezoidal leaf spring, it doesn't change that leaf spring. It
6 doesn't change the orientation that's disclosed by Mills. And the point being
7 that Masimo tethers, it's 103 combinations, much as it did it's 102 to the
8 specific teachings of Mills leaf spring. And we'll look at that together
9 through Rick. And in essence, despite the Ground 1 being cast as a 102 and
10 ground two as a 103, the features that are central to this dispute, they both
11 look to the actual teachings of Mills. And so, we don't think this is centered
12 completely in claim construction. We think that it has a lot to do with how
13 Mills, and frankly, when incorporated into Markle, how the combination is
14 presented against the claims.

15 Third, a quick comment about housekeeping, if you will. It's a
16 naming convention. It is our contention, you, I'm sure, saw that we thought
17 they have three different arguments and mappings. That is, in Ground 1 and
18 Ground 2. We stay with the naming convention, therefore of a first, a
19 second and a third mapping on that Claim 1, Ground 1. We see that what
20 they did, in our view, is to morph the first and second mappings of that
21 Ground 1 together most closely resembles the second of the mapping. So,
22 we continue to refer to that as a second mapping. Masimo refers to that as a
23 first and second mapping altogether. So, what we're calling a second and a
24 third, they're calling first and second. I found that a little confusing as we
25 were trying to keep it straight. As we went through, and I just wanted to

1 make the comment. So, when you're hearing us referring to the second
2 mapping. We're really talking about their calling the 1st.

3 Fourth, and finally, we plan to leave Claim 15 arguments to the
4 papers. We think that they're set forth well there. We think that the
5 arguments that were presented by the, by Masimo's reply didn't deal well
6 with them, particularly combination arguments. But we're going to leave
7 those in the papers. I have some questions specifically from you, and with
8 that, I would invite Rick to begin our presentation on the original claims.
9 Any questions before I do?

10 JUDGE KINDER: It appears we do not have any questions. Thank
11 you.

12 MR. RENNER: Thank you very much.

13 MR. BISENIUS: Good afternoon, Your Honors. I'd like to begin by
14 talking about a few statements that opposing counsel made during their
15 portion of the presentation. So, if you would, could you please turn to
16 Petitioners demonstrative slide 31 of the Petitioners demonstrative slides.
17 As my colleague, Mr. Renner, just indicated in the Petition, there are three
18 different mappings of Mills to the claims. And so, looking at slide 31, we
19 see here that in this first excerpted portion that opposing counsel discussed,
20 this is really talking about the first mapping. Here we see that they've
21 identified electrode 14, not a part of electrode 14, not the underlying base
22 metal 14a, but electrode 14 as a first pad. They could not have been more
23 clear in this discussion. And here they're saying that in that first mapping,
24 electrode 14 is integrally molded into the housing. We identified in the
25 Patent Owners response why that first mapping is deficient because the

1 electrode 14 is exposed to the outside device and doesn't meet all
2 requirements of plane one. But today Petitioner is attempting to read this
3 discussion into their second mapping in which the first they've identified the
4 first portion of the enclosure as being the outer layer 14b of the electrode.

5 Then turning to the second excerpt they have here on slide 31. Here
6 they're addressing separately their first mapping and their second mapping.
7 In the first part of the sentence, they say not only is each of electrodes 14
8 and 16 embedded in the housing 12 by being intricately molded into the
9 housing 12, that's them addressing their first mapping. What they've
10 identified as the electrode 14, the first pad and the first mapping is molded in
11 the housing 12. Now we move on to their second mapping. Each electrode
12 14/16 has also base material embedded underneath an outer surface coating.
13 That's their second mapping. The base material is really the pad. That outer
14 surface coating is the first portion of the enclosure.

15 I'd like to move ahead a few slides to Petitioners slide 35, and address
16 the statements made here. So, on the upper left, this is the section that we
17 were just talking about. So, I'm not going to address that part of the Petition
18 again. Turning to their second quote here from page 34 of the Petition here,
19 once again they're talking about a first portion of housing having an
20 integrated electrode 14. Once again, they're referring to their first mapping
21 on the last excerpt from page 39 of the Petition. Once again, they're saying
22 the first portion of housing 12. So here they're identifying only the housing
23 12 as the first portion, and then they say it contains electrode 14. So once
24 again they're talking about the first mapping in which the entire electrode 14
25 is the pad and only some portion of the housing 12 is the claimed first

1 portion of the enclosure. Turning to the right side of this slide, on the top
2 here we have an excerpt of a portion of the Petition, and I'll note that this
3 figure and its annotations have been cropped in this slide. I'm going to talk
4 about that in a second. What I really want to talk about is the figure on the
5 lower right. You'll note that this is cited as being on page 45 of the Petition.
6 This comes from Ground 2 of the Petition. So, if the Petition had really been
7 clear about what their mappings in Ground 1 were, why would the Petitioner
8 need to grab this figure from Ground 2, which actually is the only place in
9 the Petition where they have a different color and a different arrow pointing
10 at, arguably, the housing, to say that they've identified it as the first portion
11 of the enclosure.

12 So, this excerpt on slide 35 should be irrelevant to the discussion of
13 Ground 1 because it doesn't appear in the Petition, Ground 1. All right, so I
14 want to go back to this figure on the upper right side. During Petitioner's
15 presentation, you had asked him to show you in the Petition where the
16 particular mapping occurred. And rather than go back to the Petition, the
17 Petitioner went to their slides. I'd like to go back to the Petition, please. So,
18 if we could, let's start at page 23 of the Petition cited from this slide. So, I'm
19 now turning to the Petition at page 23. So, on page 23 of the Petition, on the
20 top of the page, we now see the full annotated version of that figure that
21 appeared in Petitioner slide 35. And yes, it's got two arrows, and they
22 appear to be pointing both to the electrode 14 and only the electrode 14.
23 What indicates that is that all the text is in blue, the arrows are in blue and
24 the electrodes in blue. And this is informed by what they cropped out in
25 slide 35. If you look at the bottom, it's got the second electrode 16 in blue,

1 calling it the second portion in blue with two arrows clearly pointing only,
2 once again only to the electrode 16. The second arrow is not pointing to
3 some part of the housing. Therefore, the full figure in context really
4 indicates that once they had originally identified as the upper first portion of
5 the enclosure, was the electrode 14 alone. This is also informed by the
6 language that they use. So, note here that it refers to as the upper
7 parenthesis, first portion.

8 Turning back to page 21, a couple pages earlier in the Petition, we see
9 this upper portion and lower portion language appear again. And here
10 they're showing part of an exploded view of the same device from figure 3a.
11 And here we see that the electrode 14 is separate from the housing, and
12 they've identified the electrode 14 and only the electrode 14 as the upper
13 portion. So, when you read this on page 21, where they very clearly label
14 the electrode 14 as the upper portion, and then we keep reading to page 23,
15 the coloring, the language, calling it the upper portion, it is very clear what
16 the Petitioner meant in the Petition. They were identifying the electrode 14
17 and only the electrode 14, not some combination of electrode 14 and housing
18 as the upper first portion. Now, Petitioners also identified some vague
19 language from the Petition showing where they say that the trapezoid leaf
20 spring is embedded somewhere in the housing, or that the underlying layer
21 14a is enclosed somewhere in the housing. But it's not sufficient for the
22 claimed first pad to be embedded in the enclosure in general. It needs to be
23 embedded in the first portion of the enclosure. I'm going to talk a little while
24 later about why the first portion of the enclosure is different because it has
25 specific properties residing the claim.

1 But for now, I just want to point out that when they're being vague,
2 they're not really pinning themselves down to a particular theory. If we look
3 at the bottom of page 23 here, they loosely alleged that the electrode 14, that
4 the pad is pressed against the inner wall of electrode 14 in Mills and
5 surrounded by the housing 12 of Mills and is therefore embedded in the
6 device of Mills. We address this head on in the Patent Owner's response
7 that it's not sufficient for the claimed first pad to be embedded in the device
8 in general. It needs to be embedded in the first portion of the enclosure
9 having specific properties. And when we turn to the next page, page 24, we
10 can see that when the Petition is being specific, they're identifying the
11 electrode 14, not some combination of electrode 14 and the housing 12, but
12 only the electrode 14 at the first portion of the enclosure. If we look under
13 their analysis of limitation 1(b)(iii). The second sentence here could not be
14 more clear. Further electrode 14, parentheses, first portion, end parentheses,
15 has an exterior surface 14b shown in figure 3b.

16 So, when we look at the entire Petition in context, it becomes very
17 clear what the Petitioner's original mappings were. But we're not just
18 complaining about the fact that their arguments are new. We've also
19 identified how even their new mappings do not satisfy the claim language.
20 So, with that, I'd like to turn to Patent Owners slides and start out at slide 5
21 of Patent Owners slides. So, on slide 5 we have Claim 1, and we have
22 highlighted the relevant claim terms that are most at issue in this case. There
23 are several requirements here for the relationship between the claimed first
24 pad and the claimed first portion of the enclosure. So, it starts out by
25 describing that the first lead comprises a first pad that is embedded in a first

1 portion of the enclosure. So, turning to slide 6, the next slide, we see some
2 figures from the '257 Patent. And these are giving examples of pads that are
3 embedded in the enclosure. On the right side, we have the pad 472 that's
4 surrounded by this curved portion of the bezel 460, which is part of the
5 enclosure.

6 Opposing counsel has argued that our construction for embedded in is
7 not specific enough because we haven't given you a degree of curvature.
8 But this here is clearly showing that an example of where the pad is
9 embedded and it's surrounded by this portion of the housing. And another
10 example is given in the text right above this. This is from column nine,
11 where the '257 Patent states, alternatively, lead 472 can be placed within the
12 thickness of bezel 460, e.g., in a pocket within the bezel wall, but underneath
13 the outer surface of the bezel. So, this is giving yet another example where
14 something more than just being placed in parallel contact with each other is
15 required.

16 JUDGE KINDER: This is Judge Kinder; I just want to clarify. So,
17 you're saying embodiment 4B that that would be an example of embedded in
18 as well?

19 MR. BISENIUS: Correct. I would just point out that in we don't
20 necessarily need to turn there, but in exhibit 2004 submitted by Apple, this is
21 the claim construction contentions from the district court litigation in that
22 proceeding in which Masimo construed the relevant term embedded in
23 which actually appears in the claim rather than the different term embedded.
24 The broader term embedded. Masimo was clear that the term embedded in
25 it's not sufficient for a first material to be merely behind or embedded along

1 or adjacent to the second material. Masimo stated, quote, leads that are
2 embedded along the bezel are distinguished from leads are embedded in the
3 bezel housing. This is on page 61 of exhibit 2004. Going back to Patent
4 Owner slides, slide 5, specifically, I'd like to continue discussing the claim
5 terms here.

6 So, following this, there's a recitation of wherein an exterior surface of
7 the enclosure comprises an exterior surface of the first portion. This is
8 telling us a couple of things. First, it's telling us that the first portion of the
9 enclosure is not some interior portion that needs to be exposed to the
10 outside. It's also differentiating the exterior surface of the first portion from
11 the rest of the exterior surface of the enclosure. And the reason it's doing
12 this is because a few lines later, it's giving functional requirements for the
13 exterior surface of the first portion. The claim goes on to recite wherein the
14 first pad is positioned underneath the exterior surface of the first portion.
15 Just briefly going to slide 6, we see that that's what's happening in the
16 embodiment on the right side. The pad 472 is underneath the exterior
17 surface 460 differentiating it from the embodiment on the left side in which
18 the pad is on the exterior surface of the enclosure.

19 Backing up again to slide 5. This portion Claim 1 finishes reciting
20 wherein the first pad is configured to detect a first electrical signal of the
21 user's cardiac signal via the user's skin contact with the exterior surface of
22 the first portion of the enclosure. What this is telling us is that there is a
23 function to that exterior surface of the first portion of the enclosure when a
24 user contacts that portion which the claim has separated out from the rest of
25 the exterior surface of the enclosure. When a user contacts that portion of

1 the enclosure, it needs to convey the user's cardiac signal to the underlying
2 pad. So, I'd now like to move ahead to slide 48 of Patent Owners slides. So,
3 I talked a bit earlier about Masimo's original theory of the case. Why do we
4 believe it's new? We've gone into more detail in that, ignoring for now
5 whether or not their argument is new, their argument is still faulty. So, I
6 want to talk about Masimo's current theory of the case on slide 48 here.

7 In their Petitioner's reply, they're identifying that the claimed first
8 portion is now a combination of the upper portion of the housing 12 and the
9 plating 14b. Turning to slide 49 here on the right side, I've identified they're
10 identifying the base metal layer 14a as the first pad in this second reading.
11 Masimo has maintained consistency on this. They've always identified the
12 base metal layer 14a as the first pad in their second reading. Skipping ahead
13 a couple slides to slide 51. This is Masimo's current theory of the case with
14 respect to third mapping. Here they've identified an upper part of the
15 housing 12 in combination with the entire electrode of 14 as the claimed first
16 portion. This is recited in the Petitioner's reply. Moving ahead to slide 51.
17 In this, Masimo's third mapping, on the left, we can see the trapezoid leaf
18 spring. And Masimo has maintained through all their papers that in their
19 third mapping, if this rectangle at the top of the trapezoid leaf spring that
20 they believe reads on the claimed first pad, what they have not maintained is
21 what they're reading on the first portion of the enclosure. They're now
22 reading parts of the housing 12 in combination with parts of the electrode 14
23 on the claimed first portion of the enclosure.

24 Now I'd like to jump ahead to slide 59 and I want to discuss why
25 Masimo's current theory fails and it's because the claims require this exterior

1 surface of the first portion of the enclosure to be conductive, to relay that
2 signal from the user through the first portion to the underlying pad. So, we
3 can see here that the claim language states wherein the first pad is
4 configured to detect a first electrical signal of the user's cardiac signal via
5 the user skin's contact with the exterior surface of the first portion of the
6 enclosure. So, the claim here, several lines earlier, as I already discussed,
7 has differentiated this exterior surface of the first portion of the enclosure
8 from the rest of the exterior surface of the device. And here they're
9 assigning a specific functionality to that exterior surface of the first portion
10 of the enclosure. When a user touches that, it needs to be able to convey
11 their cardiac signal to the underlying path. Now, I'll note here that the
12 claimant in this section of the claim, in other sections of Claim 1, and
13 throughout the claims, when the claimant wanted to distinguish one part of
14 the device from another part of the device, they used clear language to do
15 this.

16 Here, they have distinguished the exterior surface of the first portion
17 from the rest of the exterior surface of the enclosure. Other places
18 throughout Claim 1, they distinguished the first portion of the enclosure
19 from a second portion of the enclosure. Later on, in dependent claims,
20 dependent Claim 4, specifically, the claims recite a third portion of the
21 enclosure. The claimant had the language to specify when they're only
22 talking about a part of something or a sub portion of something, and yet
23 looking at this language in Claim 1 showed you slide 59. They didn't say
24 contact with a sub portion of the first portion of the enclosure, or contact
25 with a part of the exterior surface of the first portion of the enclosure. They

1 gave you the functionality the first portion of the enclosure needs to have
2 when you contact the exterior surface of the first portion of the enclosure, it
3 needs to be able to convey the user's cardiac signal to the underlying pad.
4 Frankly, under the Petitioner's mappings, it stretches the claim beyond a
5 reasonable interpretation to allow Masimo to identify one portion of the
6 device that has this conductivity function when touched, and then take that
7 part of the prior art device and combine it with a whole bunch of other parts.
8 Any other part of the prior device that doesn't have this conductivity
9 function saying, yes, all of that together is the first of the enclosure. Even
10 though the claim clearly recites a requirement for the first portion of the
11 enclosure, when you touch the exterior surface of the first portion, it needs to
12 be able to conduct the user's cardiac signal.

13 Turning briefly to slide 60 I'm not going to read these. These are in
14 the record. We cited these in the record, but a few paragraphs from Dr.
15 Kenny's declarations in which he's talking about the requirement from Claim
16 1 that a POSITA would have known that it requires the first portion of the
17 enclosure to be conductive. Turning to slide 61, these are some excerpts
18 from the '257 Patent. I believe these are important because they
19 demonstrate that under the, you know, within the context of the '257
20 specification, it becomes even more clear that what the claimant intended
21 was that the first portion of the enclosure in the claim needed to be
22 conducted. And that is consistent with every example in the '257 Patent in
23 which a pad is positioned under the exterior surface of the device. There are
24 other embodiments in the '257 Patent that have pads positioned on the
25 exterior, but clearly with the perspective of the first pad, the claim is

1 claiming those embodiments in which the pad is located underneath the
2 exterior of the device.

3 So here we have a few examples. On the upper left, it says that the
4 first lead can be coupled to an electrically conductive portion of the device
5 enclosure, e.g., a metallic bezel or housing form of the exterior of the device.
6 So here is referring to the conductive exterior. The next excerpt, this is from
7 column nine, is even more specific. It's describing that the short thickness of
8 bezel 460 can allow electrical signals to propagate from the user to the outer
9 surface of bezel 460 through the bezel 460 and into lead 472. On the right
10 side, we have some excerpts from columns two and three of the '257 Patent
11 and describing that leads can be positioned underneath the exterior surface
12 of the enclosure that while the electronic device enclosure can be
13 constructed from steel and aluminum, such that electronic signals can be
14 transmitted through the steel or aluminum enclosure to a silver-based lead
15 underneath the enclosure. Once again, this all gives color to the proper
16 claim interpretation. The first portion of the enclosure needs to be
17 conductive to allow contact with its exterior surface to propagate the user's
18 cardiac signal.

19 So, I now like to jump ahead to slide 68 because I believe that
20 dependent Claim 3 and 4 give additional color to this. Specifically, looking
21 at dependent Claim 3, it's fairly short it recites, wherein the first portion is
22 electrically isolated from the second portion. So, this gives an additional
23 requirement that you're electrically isolating the first portion from the second
24 portion. But why would the first portion need to be isolated from the second
25 portion if the first portion wasn't required to be conductive? So here we

1 once again see what the claimant intended all along, the first portion of
2 enclosure is conductive. That's why in Claim 3, you would need to
3 electrically isolate it from the second portion of the enclosure. Claim 4 is a
4 bit longer, but has similar recitations. It discusses a third portion of the
5 enclosure that has a conductivity insufficient to allow transmission to signal
6 between the different pads. So once again, it's differentiating nonconductive
7 or less conductive partials in the enclosure from the first portion, which is
8 required to be conducted.

9 I'd now like to talk about the right side of this slide. This is taken
10 from a Petition, and this is in the discussion of Claim 3. And here we see
11 Masimo's original theory of the case. It's identified the electrode 14 as the
12 first portion of the enclosure, and the electrode 16 as the second portion of
13 the enclosure. This at least indicates that Masimo is being consistent with
14 the correct interpretation of the claim electrode 14 or sorry that the first
15 portion of the enclosure needs to be conductive. And we believe that's why
16 here they identified only the electrode 14 as being the first portion of the
17 enclosure. And as you can see, they've identified the housing 12, the entire
18 housing 12 as the third portion. And I'd actually like to turn to this section
19 of the Petition, if we could turn to page 34 of the Petition. I think looking at
20 Masimo's entire analysis of Claim 3 is important because it not only
21 demonstrates that the electrode 14 or sorry that the claimed first portion of
22 the enclosure needs to be conducted, it also shows internal inconsistencies
23 between Masimo's theories. To the extent where if Masimo's new theories
24 in the Petitioners reply are adopted, they're wholly inconsistent with

1 Masimo's theories. Well, we believe with the entire Petition, but certainly
2 with extent to their theories of Claim 3 and Claim 4.

3 So, turning to Claim 3 here, when talking about an isolating portion of
4 the enclosure, Masimo is clearly talking about the housing 12 and the entire
5 housing 12. They say Mills disclosed as a housing 12, which separates the
6 two electrodes 14/15. We believe this is clearly a typo, it meant electrodes
7 14 and 16. Masimo goes on to state Mills discloses its housing 12 may be
8 molded plastic, such as ABS. Plastics in general are well known electrical
9 insulators. And ABS plastic is an electrical insulator. On the page 35, they
10 say, accordingly, Mills teaches that the first and second portions are
11 electrically isolated. Masimo could not have been more clear in their
12 mapping of Claim 3, they're identifying electrode 14 is the first portion.
13 Electrode 16 is the second portion. And they're saying that what electrically
14 isolates them as required by Claim 3, is this entire plastic housing 12. So at
15 least with respect to Claims 12, or, sorry, with respect to Claims 3 and 4
16 having a similar limitation and a similar analysis by Masimo, we see the
17 distinction between their new mappings Petitioner reply and their original
18 theory.

19 Now I want to briefly go into why this original mapping fails. And
20 that is because here, where they've identified only the electrode 14 as the
21 claimed first portion of the enclosure, in both their second mapping and third
22 mapping, it fails to identify that the first pad is embedded in the claimed first
23 portion of the enclosure. And that's because in their second mapping, in
24 which they've identified the base material in the electrode 14 as the pad and
25 the upper portion of electrode 14, that three-micron thick layer 14b as the

1 first portion of the enclosure, there's no embedding in. There're two parallel
2 surfaces that in parallel contact with each other, that are adjacent with
3 neither surface being embedded in the other. Similarly, for their theory, in
4 which the entire electrode 14 provides the first portion of the enclosure, and
5 that upper rectangular part of the trapezoid leaf spring provides the claim
6 first pad. Once again, we have two flat surfaces in parallel contact with each
7 other, with neither being embedded in the other. Even if the Patent Owners
8 proposed construction under the plan in ordinary meaning of embedded in is
9 not adopted. There's no reasonable construction wherever the top of that
10 trapezoid leaf spring is embedded in the electrode 14, which is what Masimo
11 has identified as the first portion of the claimed first portion of the enclosure.

12 I'd now like to briefly talk about Ground 2. If we turn to pages 56 and
13 57 of the enclosure, we see Ground 2's treatment of Claims 3. Now, the
14 Petitioner, in their demonstration, when they were talking about Ground 2,
15 he showed you some portions of the Petition in which they were identifying
16 these electrode sections. And now, through his words, but not through any
17 demonstration of Petition, he alleged that while we were really identifying
18 this electrode and some portion of the housing as being the first portion of
19 the enclosure, if we look at pages 56 and 57 once again, there's a clear figure
20 here in which Masimo has identified that electrode pad and only the
21 electrode pad colored in blue at the first portion of the enclosure. And
22 notably, they have not changed this theory in their Petitioner's reply, they
23 make some vague assertions when their Petitioner's reply, we don't
24 necessarily need to turn there. But on page 23, other Petitioners reply, they
25 make some vague assertions that the trapezoid leaf spring thumbnails in the

1 combination would be embedded in the device as a whole. But it's not
2 sufficient for the first claim first pad to be embedded in the device as a
3 whole. The claim first pad needs to be embedded in the conductive first
4 portion of the enclosure. Here, with respect to Claim 3 in Ground 2,
5 Masimo has identified the claimed first portion of the enclosure as being the
6 electrode 410b and the electrode 410b below.

7 And so, when we review this combination once again, that trapezoid
8 leaf spring just being flatly pressed against the flat inner surface of the
9 electrode 410b does not provide that the first pad is embedded in the first
10 portion of the enclosure. Here, as in their analysis of Claim 3 and Ground 1,
11 you can see colored in red, is the rest of the housing of Markle's device, once
12 again distinguishing the rest of the enclosure from what they originally
13 identified from the first and second portions of the enclosure. The
14 conductive electrodes. I'd like to briefly talk about, go back to the Petitioner
15 slides and talk about slide 38. So, in slide 38, when addressing slide 38
16 specifically Apple's infringement allegations on the right side, Petitioner has
17 alleged that we're being inconsistent about our construction of embedded in.
18 And they referred to this, what we've identified in the first portion of the
19 enclosure in our infringement contentions as the device. But what's being
20 shown here is not the entire device that's being accused. What's being
21 shown here is only the conductive bezel of the accused device. This is fully
22 consistent with Apple's validity positions in this proceeding.

23 Apple has identified that the claimed first portion of the enclosure
24 needs to be conductive. Here, this bezel that we've identified as the first
25 portion of the District Court is entirely conductive. Apple has alleged that

1 the term embedded in requires to be at least partially surrounded or partially
2 sorry, partially set in or partially surrounded by material. And here, what
3 we've identified as the first pad, the flat pad portion, is partially surrounded
4 and actually on three sides, so very surrounded by this conductive first
5 portion of the enclosure. So, Apple's theories here are completely consistent
6 with Apple's theories in the District Court, which I can't say from Oslan,
7 because, as he discussed earlier, they provided two different constructions
8 for the terms embedded and what they identify as the narrower term
9 embedded in in the District Court. So, I'd just very briefly like to talk about
10 the term enclosure.

11 So, Petitioner has presented a construction for the term enclosure.
12 And I will point out that during that discussion of their construction for the
13 term enclosure, all of their slides were citing to their opposition to the
14 revised motion to amend. So, this is really an argument about the proposed
15 substitute claims. And yet now Masimo is trying to wedge this discussion of
16 construction for an enclosure into their main theory of the case, Ground 1
17 and 2 in the Petition. They are correct that the Petitioner did not, or sorry
18 that the Patent Owner did not propose an alternative construction to the term
19 enclosure. We simply demonstrated in our briefing regarding the motion to
20 amend that even under Masimo's construction of something that encloses the
21 prior art still did not meet that claim language. Patent Owner believes that
22 an express interpretation is not needed because under the plain, ordinary
23 meaning of the term enclosure, as Dr. Kenny testified, no placebo would
24 reasonably consider the three-micron thick layer 14b of Mills electrode to be
25 a portion of the enclosure that is separate from and encloses the base metal

1 layer 14a. This testimony occurs in paragraphs 66 and 101 to 107 of Dr.
2 Kenny's first declaration, which is Exhibit 2003. I'm not going to read those
3 portions for you, but it is all cited in the record.

4 And we actually believe that the Board got it right when they
5 articulated this issue in the preliminary guidance that was issued in response
6 to the original contingent motion to amend. So, if you would, I'd like to turn
7 to Paper 23. This is the preliminary guidance that was issued in this
8 proceeding. And I'll give you a minute because I know you probably weren't
9 expecting that one. We're going to go to page 32 of Paper 23. So, at the
10 bottom of page 32, the very last three lines, we have an initial determination
11 by the Board stating that at this stage, Petitioner has not sufficiently
12 explained why an outer layer, e.g., 14b in Mills figure 3b of such a
13 multilayer electrode could be considered an exterior surface of an enclosure.
14 Skipping ahead, the Board stated that the Petitioner has also not sufficiently
15 explained why an inner layer, e.g., 14a Mills of such a multi-layer electrode
16 could be considered to be positioned underneath an exterior surface of an
17 enclosure as required by proposed substitute Claim 27. The Mills actually
18 discloses that the multi-layer electrode 14 is in fact exposed to the outside
19 for directly contacting the skin of the user.

20 The Petitioner has done nothing to move a needle on this issue since
21 this original finding by the Board. And at this point, we believe that the
22 Petitioner simply reiterated the same arguments made in the Petition with
23 respect to this point. And we agree with the Board's initial determination on
24 this issue. And the reason that we agree is due to the way that Mills
25 describes and depicts the construction of electrode 14 and its arrangement

1 with respect to the housing 12. So, with that, I'd like to turn to the Mills
2 records itself. This is Exhibit 1006 in the proceeding. And specifically, I
3 want to --

4 JUDGE KINDER: Just as a reminder, you have about two minutes in
5 your opening time, but you're welcome to go into your rebuttal time as well.

6 MR. BISENIUS: I'm just going to very briefly talk about figure 3a.
7 Thank you for the reminder, though. So, we've talked in the papers about
8 the fact that this outer plating is only three microns thick. It's plated on the
9 base metal layer 14a. And then we see this exploded view in figure 3 of
10 Mills of how the device is constructed. Now we see the electrode 14, and
11 it's shown having two layers in the specification rule it is very clear that it's
12 not drawn to scale, because it's nearly impossible to show something that
13 would be three microns thick. We see that it's separate from the housing,
14 and then it's embedded into the housing, but on an exterior surface of the
15 housing. So what Mills is showing you here is that it's creating this
16 electrode. First, it's not creating a part of the enclosure, and then another
17 under pad that embedded in the enclosure, it's creating the electrode, and
18 then that becomes the outer surface of the house. Mills' electrode plating
19 forking is exactly what Mills describes it as. It's simply a two layered
20 electrode. It's a dual layered electrode. It's not a portion of the enclosure,
21 and a separate underlying pad that's embedded in that portion of the
22 enclosure.

23 I already discussed earlier, why, even if you were to believe that the
24 exterior surface, 14b, were an enclosure, a first portion of the enclosure and
25 the underlying base metal layer is a pad, they're still not embedded in each

1 other, because they're nearly in parallel contact with neither surface being
2 embedded in the other. So, with that, if there are no questions, I will rest at
3 this time and reserve the rest of our time for rebuttal.

4 JUDGE KINDER: Thank you, Mr. Bisenius. It looks like there are
5 no questions. I believe you're -- believe you have about 20 minutes left. It
6 might be a little bit under. It looks like it's about 19 minutes or so. Thank
7 you. All right, we'll turn it back over to Petitioner's counsel. So, Mr.
8 Everton, whenever you're ready, I believe you have about 13 minutes
9 remaining.

10 MR. EVERTON: Thank you, Your Honor. So first, I just want to
11 point out that Apple's emphasis in making arguments about how the theories
12 provided by Masimo in the Petition are new arguments, just confirms that
13 they know they can't win on the grounds that are in the Petition and are
14 resorting to these arguments that the theories are new. And if we go to slide
15 Masimo slide 31, which was discussed by Apple, this slide provides again
16 the relevant portion and analysis for this limitation. First portion of the
17 enclosure in the Petition, and now this entire section here that we provided is
18 the first theory. It starts out with the very first sentence that integrally
19 molded that is embedded into the housing. Talking about the first being
20 embedded into the housing. And then in the same theory gets even more
21 specific in the second paragraph there at the bottom, saying that not only is
22 each of the electrodes embedded in the housing, but each electrode 14 and
23 16 has a base material embedded underneath the outer surface coating.

24 This is the same theory, it's the same sentence, it's the same section in
25 the same theory. These are not alternatives. It doesn't say alternatively. It's

1 just explaining how the pad is both embedded in the housing and under the
2 plating. Now, if we go to Masimo slide 37, so in the Petition at 23, it says
3 that the pad, this pad, which is the top of the leaf spring, they're outlined in
4 red, is surrounded by the housing 12 of Mills. Then the next sentence, not
5 here in the slide, but if you go to the Petition at 24, the next sentence after
6 this says, accordingly, leaf spring 62 is a pad that is embedded in the
7 enclosure of the device of Mills. So, we provided in this second theory how
8 that pad 62 is embedded in the device and specifically embedded in the first
9 portion. And looking at the left-hand side, you see both arrows pointing to
10 one, to the upper part of the housing as part of the first portion, and then also
11 the electrode 14 as the other part of the first portion of the enclosure.

12 Now, if we go to slide, Apple slide 6. This is the one that shows the
13 embodiments from the '257 Patent. And we'll specifically be looking at the
14 one on the right-hand side. So, this was argued at length in Apple's
15 argument. And he said something more than parallel contact is required.
16 And that's exactly what Apple has been arguing here, pointing to figures like
17 this in this embodiment and saying that something more than parallel contact
18 is required. But again, this is not in their construction. Their construction
19 just requires partially surrounded by material. But here they're doubling
20 down on the argument of the curvature, and there's some sort of curvature
21 required. And there's a problem here because, and when we talked to
22 Apple's expert, it became very clear that, well, how much curvature. How
23 can what is shown there on the right-hand side be embedded in, wherein if
24 it's flatter or flat, then it's not embedded in the interior surface there. But if
25 there is some curvature, then that gets you past the threshold of somehow

1 being embedded in, especially when the construction doesn't say anything
2 about curvature or even anything about how many sides need to be
3 surrounded or covered.

4 Now, if we go to slide 59. Apple slide 59. Oh, right. And I also
5 wanted to go back and we talked a little bit about the curvature and where it
6 is, and I think Your Honor asked me where curvature was mentioned. So,
7 for the record in Exhibit 2003, which is the for declaration of Kenny in
8 paragraph 34, that's where he distinguishes curved from flat. And then in
9 the POR at page six, that's where it cites to those paragraphs from Kenny,
10 paragraphs 33 through 35, to distinguish embedded in from positioned
11 against, or in parallel contact with. So, there's no surprise what these
12 arguments are. And it seems like they're still maintaining this argument that
13 there has to be some sort of curvature in order to be embedded in. But if
14 they're abandoning that and there is no argument that there has to be
15 curvature, that's fine with us as well. And the prior art would invalidate
16 regardless.

17 Okay, so now if we could move to Apple slide 59. So here and I
18 addressed this slide in my opening, and explained how there's nothing in this
19 claim that requires that the entire first portion of the enclosure is conducted.
20 It just requires an exterior surface of the first portion. It doesn't have to be
21 the entire. And Apple tries to rewrite this claim to ignore that the exterior
22 surface is just part of the first portion. Also, it's not the whole thing. It's just
23 an exterior surface of that first portion. They want to rewrite this and say
24 that no, because there's conductivity here or that there has to be some

1 transmission of a signal. The entire first portion does. But this is only
2 talking about an exterior surface, and it doesn't have to be the entire surface.

3 JUDGE KINDER: So, this is Judge Kinder. So, do you agree, I
4 guess, that the exterior surface of the first portion itself has to be
5 conductive?

6 MR. EVERTON: No. It says here in the claim that an exterior
7 surface has to allow detection of this first electrical signal not necessarily be
8 conductive. It could happen in other ways. It could be thin or something
9 else. The claim doesn't say necessarily conductive, but it just says that an,
10 not the whole thing, but an exterior surface needs to allow the pad to receive
11 the first electrical signal of the user's cardiac signal. Then we heard Apple
12 also argue about enclosure, and Apple argued that it talked about the Board's
13 preliminary guidance requiring clarification of enclosure. And we go to
14 Masimo slide 19. Apple said that we have not done anything to move the
15 needle or address this. Masimo is the only party who provided a
16 construction for enclosure and an explanation of how that construction
17 would be applied to prior art. Instead, Apple just provided these other
18 requirements and arguments specific to the prior art, but not based on any
19 construction. These requirements are separate. Their expert admitted that
20 the claims don't require any requirement of being separate from the pad.

21 Also, there's no requirement for standalone or thickness or any of
22 those things. So Masimo has addressed even more than Apple the request
23 for what an enclosure is and whether, specifically whether Mills electrode
24 14, which has two parts, 14a and 14b, how 14b could be part of the
25 enclosure. And I believe I addressed that in my opening. And Apple's

1 expert agreed that the two parts, 14a and b, are made of distinct material.
2 They're separated by a line in the figures. They're identified as two distinct
3 parts. They're not the same thing. They may be part of an assembly of an
4 entire electrode, but they are not the same. And certainly, the part 14b, the
5 plating, can be part of the enclosure, while the lower part, 14a, can be the
6 identified path.

7 Now, if we go to Apple. Sorry, I'm going between the two different
8 party slides. We go to Apple slide 68, Apple is using this slide to argue that
9 Masimo did not identify an upper portion of the housing 12 as part of the
10 first portion of the enclosure. But as he explained, Claims 3 and 4 really
11 relate to an isolating portion of the device that's in the housing between the
12 first portion and the second portion. And now the upper part of housing 12
13 that would be part of the first portion of the enclosure that embeds the pad,
14 would be a small area of that housing. And now this claim is not talking
15 about that part. This claim is emphasizing, well, what is the third portion
16 and where would the isolating part be? So, the purpose was to emphasize
17 the isolating housing and not identifying other small features that are not
18 relevant to this claim. They're trying to pull figures and arguments from the
19 dependent claims to insinuate that we are now departing from our theories.

20 JUDGE KINDER: This is Judge Kinder. How do we know, then,
21 where the upper first portion of the housing begins and ends versus the third
22 portion, which is creating the electrical isolation?

23 MR. EVERTON: Right. And the claims themselves do not require
24 any specific delineation between the first portion, the third portion, and then
25 the second portion. We haven't provided that an exact delineation either.

1 But as we've explained and shown, there is a very upper portion, that of the
2 housing that surrounds and goes around the edge of that electrode 14. And
3 that would be part of that upper part of the housing that is part of the first
4 portion of the enclosure. And as far as the third portion, the insulating part,
5 really, that just needs to be enough to prevent the interference. It doesn't
6 necessarily need to be that entire housing. We've identified the housing here
7 as an example and to emphasize that that housing there is insulating, but it
8 doesn't have to be that whole housing. It could just be a middle portion of
9 that, that would still be in between the electrode 14 and electrode 16 on the
10 bottom.

11 JUDGE KINDER: This is Judge Kinder. I believe you have about
12 two minutes remaining to finish up.

13 MR. EVERTON: Well, that's all I had to present on rebuttal, so I'll
14 end there.

15 JUDGE KINDER: All right, let me see if the Panel has any questions
16 before you step away. All right, Mr. Everton, I don't think we have any
17 questions, so we appreciate your presentation.

18 MR. EVERTON: Thank you, Your Honor.

19 JUDGE KINDER: And I'll turn it over to Patent Owner. And I'm not
20 for sure who's going to be leading off and presenting, but I believe you have
21 almost 20 minutes. I think it was 19 minutes left.

22 MR. BISENIUS: Thank you, Your Honors. I'd like to start out by
23 talking about pages 23 and 24 of the Petition that was just addressed by
24 counsel for Petitioner. So, looking at page 23, as I discussed earlier, the
25 figures make Masimo's case in chief clear. They've identified the electrode

1 14 as the first portion of the enclosure. And as I discussed this last sentence
2 on page 23, they're merely alleging that the electrode 14, or, sorry, they're
3 merely alleging that the trapezoidal leaf spring is embedded in the device of
4 Mills in general. But this is insufficient because they haven't. What they
5 haven't identified here is how that trapezoid leaf spring is embedded in what
6 they have identified on this page as the first portion of the enclosure, the
7 electrode 14.

8 Turning to slide 24. Petitioner addressed this paragraph at the top, but
9 this was really just a conclusory statement. It says accordingly, leaf spring
10 62 is a pad that's embedded in the enclosure of the device Mills. Once
11 again, this is a conclusory statement, alleging broadly that it's embedded in
12 the device, but not identifying how it's embedded in what they have clearly
13 identified as the first portion of the enclosure. And then the fact that they're
14 talking about the first portion of the enclosure and identifying electrode 14 is
15 laid out very clearly in the rest of this page. The next sentence at the top of
16 page 24, they say the pad is underneath the exterior surface and the pad is
17 configured to detect an ECG signal of the user via its contact electrode 14
18 located on the exterior surface. This lays out clearly what their original
19 mapping was. They're mapping the electrode 14 to the claimed first portion
20 of the enclosure because they knew that the claimed first portion of the
21 enclosure required electrical connectivity such that contact with the exterior
22 surface of the first portion in the enclosure would allow for detection of the
23 user's cardiac signal.

24 And here they've alleged that this pad, the top of the trapezoid leaf
25 spring, is embedded in that first portion simply by being pressed against the

1 inner surface of it. That only works if you adopt Masimo's proposed
2 construction for the broader term "embedded," not the narrow term
3 "embedded in" that both experts have agreed is narrower, and you adopt the
4 very end of their proposed instruction that simply being placed underneath
5 and in parallel contact is sufficient for embedding. Nothing in this portion
6 of the Petition indicates any theory that what they were identifying as the
7 first portion of the enclosure was a combination of the electrode 14 and then
8 some unidentified part of the housing 12. This becomes clear again in the
9 next section where I discuss figure 1 of those below left is 1012 with
10 electrode 14, which is the first portion, which is a first portion forming part
11 of the exterior surface of Mills.

12 So once again, if identify the electrode 14 as the first portion, and just
13 so they can be absolutely clear the next sentence, they state further, electrode
14 14, parentheses first portion. For Masimo to now come after the Patent
15 Owner has filed their Patent Owner's response and only the Petitioner's reply
16 insist like, oh, don't believe what we said in the Petition. It's not the
17 electrode 14 alone that's the first portion of the enclosure. It's the electrode
18 14 and some unspecified part of the housing 12. So, they still don't actually
19 identify which part of the housing 12 in the Petitioner's Reply. Petitioners
20 should be held to their original theory.

21 I'd like to briefly discuss Claims 3 and 4 which were raised by
22 Petitioner during the rebuttal time. As we discussed in their analysis of
23 Claim 3, they did not separate out some part of the housing 12 as being
24 included in the first portion of the enclosure. They did not separate some
25 part of the housing 12 as being included in the second portion of the

1 enclosure. They were very clear. They color coded it for us on page 35 in
2 red. They've identified the entire plastic housing 12 as the insulating third
3 portion and only the electrode 14 as the claimed conductive first portion of
4 the enclosure, once again indicating not only Masimo's original theory, but
5 that Masimo understood from the plain claim language that the first portion
6 of the enclosure needed to be conductive.

7 So, I'd like to briefly turn back to Patent Owners slides, slide 5, and
8 talk about the language of Claim 1. We believe that Claim 1 is being clear.
9 It's separating out the entire exterior surface of the enclosure from the
10 exterior surface of the first portion of the enclosure. Petitioners now trying
11 to play games with words and say like, well, the claim really only says an
12 exterior surface of the first portion. So, it seems now that Petitioner is
13 arguing that the first portion would have multiple different exterior surfaces,
14 but only one exterior surface needs to be conductive. That's simply not
15 what's recited in the claim. That's not what's described the '257 Patent. And
16 it broadens out the interpretation of Claim 1 of the '257 Patent beyond any
17 reasonable construction. Claim 1 is clear. It's identifying this first portion
18 of the enclosure distinct from other portions of the enclosure. It's identifying
19 that as an exterior surface which is distinct from other portions of the
20 exterior surface. And it's told you the functionality that needs to be
21 possessed by that exterior surface. It needs to be able to convey the user
22 signal via contact to the underlying first pad.

23 I now like to turn to Petitioner slides, specifically slide 15. Here we
24 have laid out the various constructions across the different cases involving
25 the '257 Patent. And as I discussed earlier, "embedded in" is a narrower

1 term than the term “embedded,” and “embedded in” is the term that appears
2 in Claim 1. And actually, as we discussed in the POR, there's other uses of
3 the word embedded later on the claim. Claim 9 talks about embedded with.
4 So perhaps Masimo’s construction of embedded alone is relevant to Claim 9.
5 But when it comes to Claim 1, we're dealing with the term embedded in.
6 Masimo’s expert has agreed that it's narrower than the term embedded. And
7 in this report, Masimo has stated that it requires set firmly into and
8 surrounded by material. So, Masimo's complaints, now that the Patent
9 Owner has not identified a specific curvature that's required by the claim
10 language, is beside the point. The Patent Owner has not argued that
11 embedded in requires curvature. We simply discussed one example in the
12 ‘257 Patent in which curvature of the exterior portion, the first portion of the
13 exterior surface of the enclosure is curved around the pad. And that's one
14 example of embedded in.

15 I talked earlier with respect to slide 6 of our demonstratives about
16 another example in the ‘257 Patent where it says that the first pad could be
17 set with the thickness, but underneath the exterior surface of the first portion
18 of the enclosure. These are all just examples. Petitioner’s discussion now
19 about a requirement for a specific degree of curvature ignores that those are
20 merely examples. And it also ignores that in all of their prior art and their
21 original theories, all they've shown are flat surfaces in contact with another
22 flat surface. So, it doesn't matter what the degree of curvature would be.
23 What matters is that under the plain and ordinary meaning of the term
24 embedded in, it has meaning. It's describing a relationship between these
25 two components. One, the first pad needs to be embedded in the first

1 portion of the enclosure. All Masimo has shown us in the Petition is a flat
2 surface in parallel contact with another flat surface in any of its mappings.

3 Now I'd like to turn to slide 31 of Petitioner slides. As I discussed
4 earlier, this is, these excerpts from the Petition are totally in keeping with
5 what Patent Owner identified as the various different mappings of the
6 Petitioner and the Petition of Mills to Claim 1. And as we identified in the
7 Patent Owner's response, the Petition is very inconsistent and unclear. It
8 jumps between these various different mappings and doesn't use clear
9 language to tell you what it's referring to. And so, when we look at it in the
10 context of what the Petition has identified, and there's various different
11 mappings that gives color to the way we interpret these taken out of context
12 sentences. So, as I discussed earlier, look at this first excerpt. We're talking
13 about electrode 14 being intricately molded into the housing. Now the
14 Petitioner is saying, like, look, we told you the first portion of the enclosure
15 is a combination of the electrode 14 and some part of the housing 12. That's
16 kind of what they say here. Right here. This is their first mapping. They're
17 calling electrode 14 the first pad. And then they're saying that it's integrally
18 molded into the housing. This could mean a number of different things. But
19 we believe that what they're pointing out here is that the electrode 14 is
20 embedded in the plastic portion of the housing. They don't identify that as
21 being the first portion. And --

22 JUDGE KINDER: I believe we have a freeze. We can stop the clock
23 at 2:58. Panel, the rest of the Panel, can you still hear me? Okay, sounds
24 like we just had a loss of contact. So, we'll go ahead and freeze the record
25 for a minute and see if we can get a reconnection.

1 MR. TOROSSIAN: This is Charlie from the VTC team. If you can
2 hear us, you can disconnect and reconnect to Webex. That would help.

3 MR. BISENIUS: Probably log in from your computer and see if we
4 can get in. Or just use that for the end of it.

5 JUDGE KINDER: Oh, we can hear you now.

6 MR. BISENIUS: Okay.

7 JUDGE KINDER: We do not have video, though.

8 MR. BISENIUS: We can hear you, but not see you. I'd be fine going
9 over audio if we think it'll last. Oh, there we go. Now I can see everybody.
10 We're back on. I don't know when I cut out.

11 JUDGE KINDER: You cut off 2:58. So it's been about a minute and
12 a little over a minute.

13 MR. BISENIUS: How much time do I have left in the rebuttal time?

14 JUDGE KINDER: I believe you have about 3:07. So, you've got
15 about nine minutes left.

16 MR. BISENIUS: Okay.

17 JUDGE KINDER: So, you ready to go back?

18 MR. BISENIUS: Yes.

19 JUDGE KINDER: So, we're going to start the clock again. Thank
20 you.

21 MR. BISENIUS: So, I had been discussing slide 31 and how we
22 believe the first excerpt is really referring to the first mapping. And you can
23 see here that it's identifying the housing, but it's not really identifying any
24 portions of housing as being the first portion of the enclosure. And looking
25 at the second excerpt, as I discussed earlier, we believe this is talking about

1 separate embodiments or separate mappings. The first mapping of Mills to
2 Claim 1 and the second mapping Mills to Claim 1. But even if we give
3 Petitioners the benefit of doubt, and we say these are referring to mappings
4 together, it still hasn't discussed this. Hasn't alleged that there's a
5 combination of the outer plating of the electrode 14 and the housing 12 that
6 together meet all requirements of the claimed first portion of the enclosure.
7 Another reading of this would just be indicating that they believe, which
8 they've alleged, that outer plating, electrode 14, the outer plating 14b is part
9 of the enclosure because it's embedded in the housing.

10 What they have not done, any lines of addition, is clearly articulate
11 that they are identifying some combination of the housing 12 and the
12 electrode 14 or the outer plating of the electrode 14 together as that first
13 portion of the enclosure. And we believe that the analysis on pages 34, 35,
14 36 of the Petition and 37 with respect to Claims 3 and Claim 4 demonstrate
15 that is what Masimo's original theory was. The housing 12 is part of the
16 enclosure, but it's a nonconductive part of the enclosure. And they were
17 really arguing that this electrode 14 is also part of the enclosure and could
18 form the first portion of the claimed first portion of the enclosure. I briefly
19 like to talk about Claim 4.

20 I meant to earlier and realized that I addressed Claim 3, but not Claim
21 4. If we turn to page 37, this image at the top here, under the discussion of
22 Claim 4, Petitioner had briefly been discussing during their rebuttal time that
23 there isn't a requirement in Claim 4 that any portion of the housing be
24 completely nonconductive. That's beside the point in the Petition's mapping.
25 What they've identified as this third portion is the nonconductive portion of

1 the housing 12. And what they've identified as the claimed first portion of
2 the enclosure is only the electrode 14. So, this not only indicates Masimo's
3 original theory of the case, but also indicates that only that the arguments in
4 the POR and the Patent Owner's response are the only relevant arguments,
5 because at least with respect to Claim 3 and Claim 4, the Patent Owner
6 cannot, sorry. The Petitioner cannot now claim that they're referring to the
7 housing 12. If both is insulating third portion and also providing some part
8 of the first portion of the enclosure and some part of the second portion of
9 the enclosure.

10 We're really just pointing out the distinctions here and how they have
11 a narrower, not only a narrower mapping here than what they've indicated
12 that in the Petitioners reply, but also showing Petitioners original theory and
13 showing what we believe to be a Petitioner's original understanding, so that
14 the first portion of the enclosure, the entire exterior surface of the first
15 portion of the enclosure, needs to be conductive. With that, if there are no
16 questions, I believe we'll cede the rest of our time.

17 JUDGE KINDER: This is Judge Kinder. Thank you. Let me give
18 the Panel a minute to see if we have anything. We do not have any
19 additional questions. So, with that, I want to thank both of the parties and
20 counsel for your time today and working hard to try to clarify the issues in
21 the case for us. After we go off the record, I would ask counsel to stay for
22 about a few minutes to see if our court reporter has any questions about any
23 spellings or any, any other thing. With that, if there are no further questions,
24 thank you both again, and we'll go off the record.

25 (Whereupon, the proceedings at 3:03 p.m. were concluded.)

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