

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA
3

4 X-1 AUDIO, INCORPORATED,)
5)
6 PLAINTIFF,) CASE NO. 13CV2021-CAB
7)
8 VS.)
9)
10 OTTER PRODUCTS, LLC AND TREEFROG)
11 DEVELOPMENTS, INC., D/B/A LIFEPROOF,)
12)
13 DEFENDANTS.)
14)
15)
16)
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13 TRANSCRIPT OF PROCEEDINGS
14 CLAIMS CONSTRUCTION AND MARKMAN HEARING
15 BEFORE THE HONORABLE CATHY ANN BENCIVENGO
16 THURSDAY, JULY 10, 2014, 9:30 A.M.
17 SAN DIEGO, CALIFORNIA
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20 PROCEEDINGS RECORDED BY STENOGRAPHY, TRANSCRIPT PRODUCED BY
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22 MAURALEE RAMIREZ, RPR, CSR NO. 11674
23 FEDERAL OFFICIAL COURT REPORTER
24 333 WEST BROADWAY, SUITE 420
25 SAN DIEGO, CALIFORNIA 92101
ORDERTRANSCRIPT@GMAIL.COM

1 FOR THE PLAINTIFF:

2 LAURA KENNEALLY
KARA SZPONDOWSKI
3 NIRO SCAVONE HALLER & NIRO
181 WEST MADISON STREET, SUITE 4600
4 CHICAGO, ILLINOIS 60602

5 ALLISON GODDARD
PATTERSON LAW GROUP
6 402 W. BROADWAY, 29TH FLOOR
SAN DIEGO, CALIFORNIA 92101

7

FOR THE DEFENDANTS:

8 GARRET A. LEACH
KIRKLAND & ELLIS LLP
9 300 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60654

10

RACHAEL LAMKIN
11 JENNIFER BECKER
BLUE OCEAN ENTERPRISES
12 401 W. MOUNTAIN AVENUE, SUITE 200
FORT COLLINS, COLORADO 80521

13

ANDREW D. SKALE
14 MINTZ LEVIN COHN FERRIS GLOVSKY AND POPEO PC
3580 CARMEL MOUNTAIN ROAD, SUITE 300
15 SAN DIEGO, CALIFORNIA 92130

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1 SAN DIEGO, CALIFORNIA; THURSDAY, JULY 10, 2014; 9:30 A.M.

2 THE CLERK: WE ARE ON THE RECORD THIS MORNING ON CASE
3 13CV2021-CAB-NLS, X-1 AUDIO INCORPORATED VERSUS OTTER PRODUCTS,
4 LLC, ET AL., ON CALENDAR FOR CLAIM CONSTRUCTION AS WELL AS
5 MARKMAN HEARING.

6 MS. GODDARD: GOOD MORNING, YOUR HONOR. ALLISON
7 GODDARD ON BEHALF OF THE PLAINTIFF. WITH ME TODAY IS LAURA
8 KENNEALLY, AND ALSO KARA SZPONDOWSKI, WHO WILL BE HERE SHORTLY,
9 AND OUR CLIENTS WHO ARE HERE TO OBSERVE.

10 THE COURT: THANK YOU.

11 MR. LEACH: GOOD MORNING, YOUR HONOR. GARRET LEACH
12 FROM KIRKLAND & ELLIS ON BEHALF OF THE DEFENDANTS, OTTER
13 PRODUCTS. WITH ME, IS RACHAEL LAMKIN, WHO IS ASSOCIATE COUNSEL
14 WHO WILL ALSO BE ARGUING SOME OF THE POINTS WITH ME TODAY. WE
15 ALSO HAVE JENNIFER BECKER FOR LIFE GROUP, OTTERBOX, AND ANDREW
16 SKALE FROM MINTZ, LEVIN, HERE IN SAN DIEGO.

17 THE COURT: ALL RIGHT. THANK YOU. WE ARE HERE TODAY
18 TO DO AT LEAST AN INITIAL ROUND OF CLAIM CONSTRUCTION IN UNITED
19 STATES PATENT 7263032, A SYSTEM FOR HOUSING AN AUDIO SYSTEM IN
20 AN AQUATIC ENVIRONMENT. I HAVE DISTRIBUTED TO COUNSEL JUST
21 PRIOR TO THE START OF THE HEARING SOME OF MY THOUGHTS ON SOME
22 TENTATIVES OF CONSTRUCTION BASED ON MY REVIEW OF THE PATENT AND
23 THE MATERIALS THAT THE PARTIES HAVE PROVIDED. AND SO IN TERMS
24 OF ADDRESSING THE ARGUMENTS, I WOULD LIKE YOU TO CERTAINLY
25 CONSIDER THE COURT'S POSITION AS IT IS ARTICULATED AND WHETHER

1 OR NOT WE CAN WORK FROM THAT, PERHAPS IF IT NEEDS FURTHER
2 REFINEMENT OR IF YOU THINK I'M COMPLETELY OFF THE PAGE, THEN
3 WHY.

4 ONE OF THE THINGS THAT IS NEVER ADDRESSED AND
5 PRESUMABLY SHOULD BE KIND OF FRONT AND CENTER IN A CLAIM
6 CONSTRUCTION HEARING, AND I THINK WILL BE PARTICULARLY RELEVANT
7 IF WE COME BACK ON THE INDEFINITENESS ARGUMENT, IS WHO IS A
8 PERSON OF ORDINARY SKILL IN THE ART THAT THIS PATENT IS
9 DIRECTED AT IN TERMS OF THE COURT INTERPRETING THAT THAT PERSON
10 WOULD UNDERSTAND THESE TERMS WHERE THERE IS DISPUTE TO THE
11 MEANING. AND NEITHER PARTY PRESENTED -- AND THEY NEVER DO, SO
12 I'M NOT FAULTING YOU -- A DESCRIPTION OF, IS IT A PRODUCT
13 ENGINEER, AN INDUSTRIAL ENGINEER, THE PERSON WHO WOULD BE
14 PRESENTED WITH THIS PROBLEM, I HAVE AN IPHONE AND THEY WANT TO
15 TAKE IT IN THE WATER, HOW DO I KNOW IF IT'S WATERPROOF.

16 MR. LEACH: YOUR HONOR, MAY I?

17 THE COURT: YES.

18 MR. LEACH: WE ACTUALLY DISCUSSED THIS.

19 THE COURT: GOOD.

20 MR. LEACH: AND WE'RE GOING TO FILE A STIPULATION, BUT
21 THE PARTIES HAVE AGREED AS TO WHAT A PERSON OF ORDINARY SKILL
22 IN THE ART IS, AND I'M SURE THE COURT WOULD LIKE TO BE
23 INFORMED. WHAT WE AGREE TO IS, A PERSON WITH A MECHANICAL
24 ENGINEERING DEGREE OR SOMEONE WITH EQUAL WORK EXPERIENCE, OR
25 SOMETHING ALONG THOSE LINES.

1 MS. KENNEALLY: OR EQUAL TRAINING OR EXPERIENCE, YOUR
2 HONOR.

3 MR. LEACH: AND YOU ARE CORRECT, WE WILL BE ADDRESSING
4 THAT IN THE INDEFINITENESS.

5 THE COURT: BECAUSE IN CONJUNCTION WITH THAT, THERE IS
6 NOTHING THAT I SAW, AND IF I MISSED IT, YOU CAN LET ME KNOW
7 WHERE ANY OF THE TERMS THAT WE'RE GOING TO DISCUSS ANYONE
8 PRESENTED EVIDENCE THAT AT THE TIME THE PATENT WAS FILED A
9 PERSON OF SKILL IN THE ART HAD A SPECIFIC UNIQUE UNDERSTANDING
10 OF WHAT THAT WORD MEANT BEYOND THE ORDINARY MEANING OF THE
11 WORD, AND THESE ARE NOT PARTICULARLY HIGHLY TECHNICAL TERMS IN
12 THIS PATENT, OR THE WAY IT'S EITHER CIRCUMSCRIBED BY THE
13 DESCRIPTION OF THE PATENT WITH REGARD TO A PROBLEM IT'S SOLVING
14 AND THAT IT WOULD MEAN SOMETHING ELSE ENTIRELY DIFFERENT FROM
15 THAT. SO I HAVEN'T SEEN THAT, BUT IF THERE IS EVIDENCE OF
16 THAT, I WOULD WANT TO SEE THAT.

17 I KNOW YOU HAD A PLAN ON HOW YOU WANTED TO PROCEED,
18 AND I'M NOT QUITE SURE HOW THAT PLUGS IN NOW WITH MY TENTATIVE,
19 SO PATENT HOLDER, HOW DO YOU WANT TO START? IT'S YOUR PATENT.

20 MS. KENNEALLY: YOUR HONOR, THE PARTIES HAD AGREED
21 THAT WE WOULD PROCEED ON A TERM-BY-TERM BASIS WITH THE PARTY
22 WHO INITIALLY PROPOSED THE TERM GOING FIRST AND THEN KIND OF
23 TAKING ARGUMENT FROM THERE, JUST GOING DOWN TERM BY TERM.

24 I THINK THAT STILL MAKES SENSE, GARRET, IF YOU'RE
25 COMFORTABLE WITH THAT.

1 MR. LEACH: ABSOLUTELY. WE HAVE THE FLOOR ON THE
2 FIRST TERM, YOUR HONOR.

3 THE COURT: OKAY. WE'RE STARTING WITH "RIGID."

4 MR. LEACH: WE ARE.

5 THE COURT: WHILE I UNDERSTAND THE DEFENDANT IS
6 PROPOSING THAT RIGID REQUIRE IT HAVE "A FLEXIBLE MEMBRANE OR
7 COVER," I'M NOT SURE IT'S USEFUL TO SOMEONE TO SAY WHAT IT
8 CAN'T BE OR WHAT IT COULD BE BUT RATHER WHAT THE CHARACTERISTIC
9 OF RIGID IN THE CONTEXT OF THIS PATENT IS SUPPOSED TO
10 ENCOMPASS. AND RIGID, AS YOU KNOW I POINTED OUT IN MY
11 TENTATIVE, THE ORDINARY MEANING WOULD BE STIFF OR UNYIELDING,
12 NOT FLEXIBLE OR PLIANT, ALTHOUGH THE SPECIFICATION IN TALKING
13 ABOUT APPROPRIATE MATERIALS, TALKS ABOUT RUBBER OR PLASTIC
14 COMPOSITIONS THAT COULD HAVE SOME DEGREE OF FLEXIBILITY TO
15 THEM.

16 AND IT'S THE COURT'S BELIEF THAT THE PATENT ACTUALLY
17 DEFINES RIGID AS A VERY SPECIFIC CHARACTERISTIC TO SOLVE A VERY
18 SPECIFIC PROBLEM AND THAT IT WILL JUST RETAIN ITS SHAPE UNDER
19 AQUATIC PRESSURE AND NOT ALTER, DEFORM, OR COMPRESS. AND IT
20 REALLY DOESN'T MATTER SO MUCH WHAT IT'S MADE OF AS LONG AS IT
21 WILL HAVE THAT CHARACTERISTIC WHEN IT'S EXPOSED TO AQUATIC
22 PRESSURE.

23 SO GO AHEAD.

24 MR. LEACH: WITH THAT, YOUR HONOR, THANK YOU. AND
25 THERE'S REALLY TWO ISSUES HERE. I DON'T DISAGREE WITH THE

1 COURT'S CONSTRUCTION THAT THEY PROPOSED WOULD MAKE SENSE IN A
2 VACUUM, AND IF YOU LOOK AT THE SPECIFICATION, CERTAIN ASPECTS
3 OF IT, THERE ARE REALLY TWO ISSUES THAT I THINK WE NEED TO
4 ADDRESS WITH THIS CONSTRUCTION THE WAY IT IS NOW.

5 THE FIRST IS, IT FAILS TO EXPRESSLY RECOGNIZE THE
6 EXPRESS DISCLAIMER THAT THEY MADE AT THE PTO, AND WHILE THE
7 ARGUMENT I THINK THAT THEY'VE MADE, AND MAYBE THE COURT HAS
8 PICKED UP ON A LITTLE BIT, IS WELL, IF WE EXCLUDE FLEXIBLE
9 MEMBRANE, WHAT IS A FLEXIBLE MEMBRANE? HOW DO WE KNOW WHAT
10 THAT IS?

11 THE PROBLEM WE HAVE, YOUR HONOR, THAT'S NOT THE WORD I
12 CHOSE. THAT'S THE WORD THEY CHOSE AT THE PATENT OFFICE TO
13 OVERCOME THE PRIOR ART OBJECTION. IT WAS VERY SPECIFIC. THEY
14 DIDN'T SAY, A FLEXIBLE MEMBRANE DOES NOT RETAIN SHAPE AND IS
15 NOT ULTRA-COMPRESSED UNDER AQUATIC PRESSURE, IT SAID TO
16 OVERCOME THE PRIOR ART, AND I'M GOING TO GET INTO THIS IN MORE
17 DETAIL IN A SECOND, THE FULL REFERENCE THEY SAID, 4, WHICH WAS
18 A RIGID BOX, THE CLAIM SAYS "HAS A FLEXIBLE MEMBRANE OR
19 FLEXIBLE COVER." THAT IS DIFFERENT THAN OUR "RIGID CONTAINER."

20 SO WHAT THE FEDERAL CIRCUIT HAS CLEARLY TOLD US WHEN
21 YOU HAVE DISAVOWED SOMETHING THAT CLEARLY IN THE PROSECUTION
22 HISTORY YOU ARE NOT ENTITLED TO THAT SCOPE. NOW I THINK WHAT
23 WE'RE TRYING TO DO HERE IS ALMOST GET TO THE INFRINGEMENT
24 QUESTION AND SAY, HOW DO WE KNOW WHAT IS FLEXIBLE, AND IS THEIR
25 PRODUCT FLEXIBLE? THAT IS NOT FOR CLAIM CONSTRUCTION THOUGH.

1 THE COURT: THAT'S THE PROBLEM, THOUGH, THAT I HAVE
2 WITH YOUR DEFINITION. YOUR CONSTRUCTION SAYS THAT RIGID IS NOT
3 A FLEXIBLE MEMBRANE. DOES THAT HAVE A DEFINED MEANING TO A
4 MECHANICAL ENGINEER, OR IS THAT JUST A LABEL THAT YOU'RE GOING
5 TO PUT ON THE MATERIAL AND SAY, WELL, THIS MATERIAL IS A
6 FLEXIBLE MEMBRANE, AND, THEREFORE, IT DOESN'T COME WITHIN THE
7 SCOPE OF THE CLAIM? I DON'T KNOW THAT THAT REALLY INFORMS
8 ANYBODY, BECAUSE THAT'S JUST LABELING.

9 MR. LEACH: WELL, THEN THEY SHOULDN'T HAVE USED THAT
10 WORD AT THE PATENT OFFICE. THAT'S THE PROBLEM. THEY CAN'T
11 DISTINGUISH SOMETHING, GET A PATENT ALLOWED BASED ON THAT
12 LABEL, AND THEN COME TO THE COURT AND SAY, WELL, WE DON'T KNOW
13 WHAT THAT MEANS, YOU SHOULDN'T HOLD US TO THAT, LET'S COME UP
14 WITH SOME OTHER WORD AND TRY TO GET AROUND THAT.

15 IT'S, IN FACT, THE WORD THEY USED WITH THE PATENT
16 OFFICE, AND THE PATENT OFFICE READ AND UNDERSTOOD AND SAID,
17 YES, THAT'S NOT A FLEXIBLE MEMBRANE. IF THAT'S NOT GOOD
18 ENOUGH, THEN MAYBE IT'S AN INDEFINITENESS ISSUE AFTER CLAIM
19 CONSTRUCTION. BUT WHAT WE'RE DOING HERE, I THINK, IS ALMOST
20 INFLATING THE INFRINGEMENT INVALIDITY ANALYSIS AND CLAIM
21 CONSTRUCTION.

22 WHAT THE FEDERAL CIRCUIT TELLS US TO DO AT CLAIM
23 CONSTRUCTION IS LOOK AT THE INTRINSIC RECORD, LET'S NOT LOOK AT
24 THE PRODUCT. AND I CAN SHOW YOU RIGHT NOW, YOUR HONOR. I
25 DON'T THINK IT'S GOING TO TAKE AN EXPERT TO TELL ME WHETHER OR

1 NOT THIS IS FLEXIBLE. IF YOU LOOK AT THIS, WE HAVE FLEXIBLE
2 MEMBRANES.

3 BUT THE PROBLEM WE HAVE IF WE GO WITH SOMETHING LIKE
4 THIS IS, THIS -- AND THIS IS THE SECOND POINT, WHICH MY
5 COLLEAGUE IS GOING TO ADDRESS, IS YOU GET TO COMPRESS UNDER
6 AQUATIC PRESSURE EVEN EXCEEDING ONE ATMOSPHERE. THE USE OF THE
7 WORD ATMOSPHERIC PRESSURE IS ALL OVER THE PLACE IN THIS PATENT,
8 AND IT'S GOING TO BE PART OF THE INDEFINITENESS ARGUMENT THAT
9 WE'RE GOING TO BE MAKING HERE IN A FEW WEEKS WHEN WE TALK ABOUT
10 UNDERWATER PRESSURE, UNDERWATER PRESSURE, SUBMERSIBLE
11 CONDITIONS. WHAT ARE ALL THESE THINGS? BECAUSE THE PATENT IS
12 NOT CLEAR ON THAT. AND I THINK WHAT THIS PROPOSED
13 CONSTRUCTION, WHILE I APPRECIATE THE COURT'S EFFORTS TO WORK
14 SOMETHING WITH THE PATENT IN MIND, I THINK IT JUST ADDS MORE
15 COMPLEXITY.

16 BUT WITH THAT, I THINK IT WOULD BE HELPFUL IF I COULD
17 ACTUALLY USE SOME OF THE QUOTES FROM THE PARTIES AND FROM THE
18 INTRINSIC RECORD. THE FIRST THING, YOUR HONOR, I THINK IT'S
19 PRETTY CLEAR IN READING THEIR BRIEFS, THERE IS NO DISAGREEMENT
20 THAT THEY, IN FACT, DID DISCLAIM FLEXIBLE MEMBRANE. THESE ARE
21 QUOTES FROM THEIR BRIEF, NOT MINE. AND I DIDN'T EVEN HIGHLIGHT
22 IT. THAT'S THEIR EMPHASIS.

23 THERE IS NO DISPUTE IN THIS CASE THAT RIGID CONTAINER
24 DOES NOT INCLUDE A FLEXIBLE MEMBRANE. THEY ACKNOWLEDGED IT.
25 THEY HAD TO ACKNOWLEDGE IT BECAUSE THAT'S WHAT THEY TOLD THE

1 PATENT OFFICE.

2 THE NEXT QUOTE, "X-ONE REPEATEDLY AND CONSISTENTLY
3 DISTINGUISHED FLEXIBLE MEMBRANE FROM THE CLAIMED INVENTION FROM
4 THE PROSECUTION OF THE '032 PATENT." THEY DIDN'T SAY X-1
5 REPEATEDLY AND CONSISTENTLY DISTINGUISHED SOMETHING THAT
6 RETAINED SHAPE AND DOES NOT ALTER OR COMPRESS UNDER AQUATIC
7 PRESSURE EVEN EXCEEDING ONE ATMOSPHERE. THEY DISTINGUISHED
8 FLEXIBLE MEMBRANE. NOW HAD THEY DONE SOMETHING MORE SPECIFIC
9 LIKE YOUR HONOR PROPOSES HERE, I THINK THAT WOULD BE
10 APPROPRIATE IN A WAY TO READ IN WHAT THEY, IN FACT, DISCLAIMED
11 AT THE PATENT OFFICE. THAT'S NOT WHAT THEY DID.

12 AND FINALLY, "X-1 HAS ALWAYS AND CONTINUES TO CONTEND
13 THAT THE CLAIMED RIGID CONTAINER DOES NOT INCLUDE FLEXIBLE
14 MEMBRANE."

15 THE COURT: LET'S JUST IN TERMS OF THAT LAST
16 RESPONSIVE CLAIM CONSTRUCTION STATEMENT BY THE PLAINTIFF, BY
17 X-1, ACCEPT THAT IF THAT IS A JUDICIAL ADMISSION OR SOMEHOW
18 STOPS THEM FROM GOING FORWARD AND ACCUSING A FLEXIBLE MEMBRANE,
19 WHAT'S A FLEXIBLE MEMBRANE?

20 MR. LEACH: WELL, AGAIN, SOMEONE OF SKILL IN THE ART
21 THAT'S A PART OF THE INFRINGEMENT ANALYSIS. I THINK IT'S GOING
22 TO BE PRETTY EASY TO SHOW WE HAVE FLEXIBLE MEMBRANE. I DON'T
23 THINK WE NEED AN EXPERT. I THINK YOUR HONOR CAN PICK THAT UP
24 AND SAY, THAT'S A FLEXIBLE MEMBRANE. THERE ARE A NUMBER OF
25 OTHER ONES. THIS IS JUST ONE.

1 THE COURT: I DON'T KNOW WHAT A MEMBRANE IS. THAT MAY
2 BE AN EXAMPLE OR NOT OF A FLEXIBLE MEMBRANE. WHEN THEY
3 DISTINGUISHED FLEXIBLE MEMBRANE IS A MEMBRANE OF PLASTIC
4 COMPOSITION, OF RUBBER COMPOSITION, SILICON COMPOSITION. I
5 DON'T KNOW WHAT IT IS. A MEMBRANE, IF IT'S AN ANIMAL PRODUCT,
6 IT'S COMPLETELY DIFFERENT. OBVIOUSLY THAT WOULDN'T APPLY HERE,
7 BUT WHAT I'M SAYING IS, IT HAS NO MEANING TO ME. NOW CLEARLY I
8 ASSUME IT WOULD HAVE MEANING TO A MECHANICAL ENGINEER. IS IT A
9 DEFINED COMPOSITION? A DEFINED PRODUCT?

10 MR. LEACH: IT DOESN'T HAVE TO BE MADE OF ANY
11 PARTICULAR MATERIAL. NOW INTERESTINGLY, THE PARTIES HAVE BOTH
12 RECEIVED A NUMBER OF PATENTS IN THIS AREA, AND BOTH PARTIES
13 HAVE DEFINED WHAT THE WORD "FLEXIBLE MEMBRANE" MEANS.

14 THE COURT: OKAY. THAT'S HELPFUL.

15 MR. LEACH: LET ME SHOW YOU. BECAUSE I THINK THEY
16 BROUGHT THIS UP IN THEIR BRIEFS, AND SAID, WELL, YOU HAVE THIS
17 PATENT THAT'S A '976 PATENT, AND IN THAT PATENT -- AND IF IT
18 WOULD HELP -- YOUR HONOR, CAN I APPROACH? I CAN GIVE YOU A
19 COPY.

20 THE COURT: YES. THE SCREEN IS NICE, BUT ...

21 MR. LEACH: SO WHAT BOTH PARTIES HAVE SAID IN THE PAST
22 AS TO WHAT A FLEXIBLE MEMBRANE IS, THE FIRST QUOTE WE HAVE IS
23 FROM X-1'S PATENT. ADMITTEDLY IT'S NOT IN THIS SAME PATENT
24 FIELD OR THE SAME PATENT FAMILY, BUT IT'S TO UNDERWATER
25 PROTECTIVE CASES. AND WHAT THEY SAY IS, THE FLEXIBLE PARTS CAN

1 BE MADE FROM ANY MATERIAL -- WE AGREE WITH THAT -- FLEXIBLE
2 ENOUGH TO ALLOW THE USER TO INTERACT WITH THE DEVICE THROUGH
3 THE MATERIAL. IF THAT'S WHAT THE COURT WANTS TO CONSTRUE THE
4 TERM, WE'RE FINE WITH THAT.

5 SIMILARLY WITH OTTERBOX'S PATENT, THE '976 PATENT,
6 WHICH THEY REFER TO IN THE BRIEFING, A FLEXIBLE MEMBRANE IS
7 EXPOSED OVER THE TOUCHSCREEN SO THAT TACTICAL INPUTS ON THE
8 FRONT SIDE OF THE FLEXIBLE MEMBRANE ARE COMMUNICATED TO THE
9 TOUCHSCREEN THROUGH THE FLEXIBLE MEMBRANE. IT'S SOMETHING THAT
10 ALLOWS TO YOU INTERACT WITH YOUR PHONE JUST TOUCHING THROUGH
11 THE FLEXIBLE MEMBRANE. THAT'S WHAT A FLEXIBLE MEMBRANE IS.

12 IT'S VERY CLEAR TO EVERYONE WHAT THAT MEANT. THEY
13 DIDN'T HAVE TO EXPLAIN TO THE PATENT OFFICE WHAT THAT MEANT
14 BECAUSE THE EXAMINER HAS ALL KINDS OF PATENTS IN THIS FIELD.
15 THE EXAMINER UNDERSTOOD WHAT A FLEXIBLE MEMBRANE IS. THE
16 EXAMINER IN THIS AREA WAS LIKELY A MECHANICAL ENGINEER, AND
17 THEY UNDERSTOOD WHAT A FLEXIBLE MEMBRANE IS.

18 SO FOR THEM TO COME IN HERE AND SAY, WELL, YOUR HONOR,
19 YOU SHOULD IGNORE OR DISAVOW THE FLEXIBLE MEMBRANE, YOU SHOULD
20 KIND OF READ SOMETHING MORE INTO IT, I BELIEVE WOULD BE A
21 VIOLATION OF THE FEDERAL CIRCUIT LAW THAT SAYS WE HAVE TO HOLD
22 THEM TO WHAT THEY TOLD THE PATENT OFFICE.

23 AND LET'S JUST LOOK CLEARLY, IF I CAN -- I'M ON THE
24 WRONG THING. TOO MUCH TECHNOLOGY, YOUR HONOR. I KNOW THIS IS
25 IN THE BRIEFING, BUT I THINK IT'S IMPORTANT THAT WE GO THROUGH

1 IT.

2 DURING THE PROSECUTION, PART OF THE PROSECUTION
3 HISTORY OF THE PATENT, THEIR CLAIMS WERE REJECTED BECAUSE OF
4 THE FULLER REFERENCE. THE FULLER REFERENCE, WHICH IS SHOWN UP
5 HERE, AND THIS IS CLAIM 3 FROM THE FULLER REFERENCE "IT'S
6 COMPRISED OF A RIGID BOX." THAT'S WHAT THE CLAIM SAYS. THAT
7 THING THAT YOU SEE THERE WITH ALL THOSE FIVE SIDES IS A RIGID
8 BOX. AND A FLEXIBLE MEMBRANE, THAT'S OVER THE TOP. THE PATENT
9 OFFICE SAID, WE'RE NOT GOING TO GIVE YOU A PATENT BECAUSE
10 YOU'RE TOO MUCH LIKE FULLER.

11 ONE OF THE THINGS THEY DID WAS ADD "RIGID" BEFORE
12 "CONTAINER," AS YOU CAN SEE, AND THEN THEY WENT AND EXPLAINED
13 TO THE PATENT OFFICE, "APPLICANT SUBMITS THAT FULLER DISCLOSES
14 HAVING THE FLEXIBLE COVER." PUT IT IN QUOTES. NOWHERE DOES
15 FULLER DISCLOSE OR SUGGEST A RIGID CONTAINER AND RIGID LID.

16 THOSE THINGS I SUBMIT, YOUR HONOR, GO HAND IN HAND.
17 THERE'S OTHER WORDS IN THERE, BUT THAT'S THE DISTINCTION, THE
18 "RIGID" AND THE "FLEXIBLE" THEY WERE TRYING TO MAKE. AND WHAT
19 HAPPENED? WELL, THEY GOT THE PATENT ISSUED. AND THEY GOT THE
20 CLAIMS ALLOWED.

21 AND SO NOW WHAT THE COURT'S JOB IS UNDER FEDERAL
22 CIRCUIT LAW IS TO HOLD THEM TO WHAT THEY TOLD THE PATENT
23 OFFICE. YOU HAVE TO HOLD THEM TO WHAT THOSE CLAIMS ALLOW.
24 THINK A MECHANICAL ENGINEER IS GOING TO UNDERSTAND WHAT A
25 FLEXIBLE MEMBRANE IS. MAYBE THEY HAVE AN EXPERT, MAYBE THEY

1 CAN FIND SOMEBODY THEY CAN CONVINCE THAT THAT IS NOT FLEXIBLE.
2 AND IF SO, THAT'S PART OF THE INFRINGEMENT ANALYSIS. IT'S NOT
3 FOR CLAIM CONSTRUCTION. WHAT THE COURT NEEDS TO DO ON CLAIM
4 CONSTRUCTION IS TAKE THE WORDS THEY CHOSE, THEY USED IN THEIR
5 DISCLAIMER, AND HOLD THEM TO THOSE WORDS.

6 THE COURT: WELL, I DON'T WANT TO GET TOO FAR AWAY
7 FROM WHAT RIGID IS BY DEFINING WHAT IT'S NOT AND --

8 MR. LEACH: AND COURTS SEE THAT ALL THE TIME, YOUR
9 HONOR. THAT'S WHAT PROSECUTION DISAVOWAL IS.

10 THE COURT: RIGHT. NO, SO I UNDERSTAND THAT THEY
11 CAN'T LOOK BACK AND ENCOMPASS A FLEXIBLE MEMBRANE, AND I'M NOT
12 QUITE SURE OF THE LEVEL OF FLEXIBILITY AS OPPOSED TO MAYBE THE
13 MEMBRANE QUALITY THAT IT WOULD ALLOW IT BE TO INTERACTIVE WITH
14 THE DEVICE THROUGH THE MATERIAL, THE POINT BEING WHEN IT
15 DISCUSSES IN THE PRIOR ART IN THE SPECIFICATION THAT THAT SORT
16 OF MEMBRANE IS GOING TO BE INCLINED TO COMPRESS UNDER PRESSURE,
17 SO THAT'S WHY IT CAN'T BE PART OF THIS RIGID STRUCTURE BECAUSE
18 IT'S GOING TO HAVE THAT CHARACTERISTIC.

19 MR. LEACH: AND IF THAT'S HOW THEY WANTED TO LIMIT IT,
20 THAT'S WHAT THEY SHOULD HAVE SAID TO THE PATENT OFFICE. BUT
21 THAT'S NOT WHAT THEY SAID TO THE PATENT OFFICE. THIS IS WHAT
22 WE HAVE. THIS IS WHAT THE CLAIM ISSUED OVER, SO THIS IS WHAT
23 THEY'RE HELD TO. TRYING TO READ IN A MORE LIMITING EXCLUSION
24 AT THIS POINT IS UNFAIR TO THE PUBLIC BECAUSE THE PUBLIC READS
25 THIS DISCLOSURE, READS WHAT THEY SAID, AND IS ENTITLED TO RELY

1 ON THAT. THAT'S WHAT THE LAW TELLS US.

2 THE COURT: BUT YOU'RE JUST PICKING OUT ONE PART.

3 IT'S A FLEXIBLE COVER THAT ALLOWS A USER TO MANIPULATE THE

4 CONTROL KNOBS OF THE DEVICE. SO IT'S NOT REALLY THE POINT

5 NECESSARILY THAT IT'S FLEXIBLE, ITS THE POINT THAT YOU CAN

6 MANIPULATE THE KNOBS THROUGH IT BECAUSE IT'S THIN ENOUGH. I

7 DON'T KNOW.

8 MR. LEACH: YOUR HONOR, AND, AGAIN, I SHOWED YOU THE

9 DEFINITIONS, I'LL PUT THEM UP AGAIN, FROM THE PATENTS. I THINK

10 THAT'S THE SAME ARGUMENT. SO IF I DEFINE, I'M NOT ADDING

11 ENOUGH TO THIS, I THINK WE'RE FINE WITH IT. IT HAS TO BE

12 FLEXIBLE. IT CANNOT BE A FLEXIBLE COVER WHICH ALLOWS THE USER

13 TO MANIPULATE THE CONTROLS.

14 THE COURT: WELL, THE PROBLEM WITH JUST SAYING IT'S

15 FLEXIBLE FLIES RIGHT IN THE FACE OF MATERIALS THAT THE PATENT

16 DISCLOSES THAT ARE FLEXIBLE. IT SAYS YOU CAN MAKE IT OUT OF

17 RUBBER, YOU CAN MAKE IT OUT OF PLASTIC --

18 MR. LEACH: ANY MATERIAL --

19 THE COURT: -- AND THEY CAN BE FLEXIBLE.

20 MR. LEACH: ANY MATERIAL CAN BE FLEXIBLE, ANY MATERIAL

21 CAN BE RIGID. I CAN GIVE YOU ALUMINUM FOIL, I CAN GIVE YOU AN

22 ALUMINUM BASEBALL BAT, I THINK YOU'D AGREE ONE IS RIGID, ONE IS

23 FLEXIBLE.

24 THE COURT: RIGHT. DEPENDING ON ITS THICKNESS.

25 MR. LEACH: YES. THE ISSUE COMES DOWN TO EVEN IN THE

1 MATERIAL USED IN THE THICKNESS AND COMPOSITION, IS THAT, IN
2 FACT, FLEXIBLE. THAT'S NOT SOMETHING FOR YOU AND I TO DECIDE.
3 THAT'S SOMETHING FOR A PERSON OF SKILL IN THE ART TO DECIDE
4 BASED ON THE THICKNESS, MAKEUP, ALL THOSE ISSUES.

5 SO I'M NOT TRYING TO TIE IT TO A SPECIFIC MATERIAL.
6 I'M NOT SAYING RUBBER IS OUT OR PLASTIC IS OUT OR ANYTHING IS
7 OUT, BUT IT CANNOT BE A FLEXIBLE COVER. THAT'S WHAT THEY TOLD
8 THE PATENT OFFICE. IF YOU THINK YOU NEED TO ADD THE "ALLOWS
9 THE USER TO MANIPULATE THE CONTROLS," THEN I DON'T THINK I
10 WOULD ARGUE WITH THAT.

11 THE COURT: THE REASON I THINK YOU NEED TO GO THERE IS
12 THAT THEN EXCLUDES A CERTAIN LEVEL OF THINNESS. BECAUSE IF YOU
13 HAVE A FLEXIBLE COVER THAT CAN BE BENT, I MEAN, THEN WE'RE
14 GOING TO GET INTO WHAT IS FLEXIBLE, WHAT DEGREE CONSTITUTES
15 FLEXIBILITY. BUT WHETHER IT CAN BE BENT OR NOT, IF I CAN'T
16 MANIPULATE THE CONTROLS THROUGH IT, IT'S TOO THICK FOR THAT,
17 THEN CLEARLY, IT IS GOING TO FALL WITHIN THE FULLER DISCLOSURE
18 AND BE OUTSIDE OF THAT AS OPPOSED TO IF IT'S THIN ENOUGH, I CAN
19 WORK THROUGH IT, THEN IT'S MORE OF A MEMBRANE QUALITY THAT
20 SAYS, THIS IS JUST A COVER THAT PROTECTS FROM WHO KNOWS WHAT,
21 SCRATCHING OR ANYTHING ELSE, BUT I CAN WORK THROUGH IT. IT'S
22 MORE OF A LIMITATION ON THE THICKNESS AS OPPOSED TO THE
23 FLEXIBILITY.

24 MR. LEACH: I THINK IT'S A COMBINATION OF THE
25 THICKNESS, THE MATERIAL MAKEUP, AND EVERYTHING. BUT I THINK

1 YOU'RE RIGHT, YOUR HONOR, IF THE CONSTRUCTION WAS ... AND
2 THAT'S WHAT THEY SAID, WE'RE TRYING TO MAKE IT SOMEWHAT SIMPLE.
3 BUT IF YOU WANT A LITTLE LONGER CONSTRUCTION, THAT IT'S A
4 CONTAINER THAT DOES NOT UTILIZE A FLEXIBLE MEMBRANE WHICH
5 ALLOWS THE USER TO MANIPULATE THE KNOBS OR CONTROLS, I THINK
6 THAT'S ACCEPTABLE, AND I THINK THAT'S FAIR WITH THE BARGAIN
7 THEY MADE WITH THE PATENT OFFICE.

8 THE COURT: ALL RIGHT.

9 MR. LEACH: DO YOU WANT TO ADDRESS THE ONE ATMOSPHERE?
10 WE HAVE SOME CONFUSION OVER WHAT ONE ATMOSPHERE IS AND
11 EXCEEDING ONE ATMOSPHERE.

12 THE COURT: I HAVE A LOT OF CONFUSION AS TO WHAT THE
13 END ZONE OF THAT WOULD BE BECAUSE THAT'S WHAT IT SAYS IN THE
14 PATENT.

15 MR. LEACH: AND WE DO TOO, YOUR HONOR.

16 THE COURT: THE PROBLEM YOU'RE SOLVING IS THIS
17 MATERIAL ISN'T GOING TO DEFORM AT ATMOSPHERES EXCEEDING ONE
18 ATMOSPHERE. AND IF SOMEONE OF SKILL IN THE ART KNOWS WHAT AN
19 ATMOSPHERE IS, I DON'T, BUT ...

20 MR. LEACH: THERE'S DIFFERENT LEVELS, DEPENDING ON HOW
21 YOU READ IT.

22 THE COURT: BUT THE CONCEPT FROM WHAT I GOT FROM THAT
23 IS THIS ISN'T JUST, I SPILLED COFFEE ON IT AND IT WON'T GO IN,
24 OR EVEN, I WAS SWIMMING IN THE POOL ON THE SURFACE. BUT THE
25 PATENT IS ADDRESSING TAKING THIS DEVICE --

1 MR. LEACH: DEEP DOWN.

2 THE COURT: IT HAS TO BE CABLE OF DOING THAT EVEN IF
3 YOU'RE NOT USING IT IN THAT CAPACITY, BUT IT HAS TO BE CAPABLE
4 OF DOING SOME SORT OF DEEPER WHERE THERE'S ACTUAL PRESSURE --

5 MR. LEACH: RIGHT.

6 THE COURT: -- THAT'S GOING TO RESULT IN --

7 MR. LEACH: EXCEEDING THE LEVEL IN A SWIMMING POOL FOR
8 INSTANCE.

9 THE COURT: I DON'T KNOW.

10 MR. LEACH: THAT'S THE PROBLEM.

11 THE COURT: RIGHT. SO TO SOME EXTENT, MY PROPOSED
12 CONSTRUCTION MAY INVOLVE MORE CONSTRUCTION.

13 MR. LEACH: WELL.

14 THE COURT: BUT I WAS TRYING TO LOOK AT THE
15 CHARACTERISTIC OF RIGID AS OPPOSED TO SAYING, WELL, IT'S THIS
16 MATERIAL BUT IT'S NOT THAT MATERIAL BECAUSE THEN WE'RE JUST A
17 LABELING MATERIALS. BUT I THINK AS YOU POINTED OUT, BASED ON
18 THESE ADMISSIONS IN THE PATENT OFFICE AND IN THEIR BRIEFS TO
19 THE COURT, THEY'VE ACKNOWLEDGED THAT IF THE MATERIAL, CALL IT A
20 FLEXIBLE MEMBRANE, JUST CALL IT A MATERIAL, WOULD ALLOW THE
21 USER TO MANIPULATE THE CONTROL BUTTONS THROUGH IT, IT WOULD
22 CONSTITUTE A FLEXIBLE MEMBRANE AND WOULD BE EXCLUDED.

23 MR. LEACH: I THINK I HAVE NOTHING FURTHER, YOUR
24 HONOR.

25 THE COURT: OKAY.

1 MR. LEACH: ON THAT POINT.

2 (ATTORNEY DISCUSSION OFF THE RECORD.)

3 MR. LEACH: MY CLIENT IS TELLING ME, SO I HAVE TO
4 LISTEN TO THAT, SHE MAY HAVE SOMETHING.

5 THE COURT: SURE. NO, GO AHEAD, IF WE'RE STAYING IN
6 THE SAME REALM OF CONSTRUCTION.

7 MS. LAMKIN: GOOD MORNING, YOUR HONOR. JUST BY WAY OF
8 CLARIFICATION, AND MAYBE THIS WOULD REQUIRE SOME ADDITIONAL
9 BRIEFING, BUT WE WOULD LIKE TO KNOW WHETHER IT'S ONE ATMOSPHERE
10 ABSOLUTE OR ONE ATMOSPHERE GAUGE BECAUSE --

11 THE COURT: I HAVE NO IDEA. I JUST COPIED WHAT IT
12 SAID IN THE PATENT.

13 MS. LAMKIN: YOU'LL NOTICE, YOUR HONOR, IN DI 30-2,
14 WE'VE SELECTED IN THE PATENT IN THE PROSECUTION, 30-2. YOU
15 DON'T HAVE TO LOOK AT IT NOW, BUT SOMETIMES THE PATENTEE USES
16 ATMOSPHERE AND SOMETIMES THE PATENTEE USES ATMOSPHERE ABSOLUTE.
17 THE PRIOR ART USES ATMOSPHERE TO MEAN ATMOSPHERE GAUGE, AND SO
18 THIS COURT IS CONFUSED ABOUT THE END POINT, BUT THE CONFUSION
19 WITH THOSE IS, WHERE IS THE STARTING POINT, RIGHT? PRESSURE
20 ABSOLUTE IS SURFACE LEVEL. WE THINK THAT THAT CAN'T POSSIBLY
21 MEAN. PRESSURE GAUGE STARTS AT 14 FEET. IT MIGHT MEAN THAT.
22 BUT AGAIN, MAYBE WE NEED ADDITIONAL BRIEFING HERE, BUT WE THINK
23 WE CAN'T STOP AT ONE ATMOSPHERE.

24 THE COURT: WELL, NO, ACTUALLY IT HAS TO BE ABLE TO
25 EXCEED, BASED ON THE DESCRIPTION OF THE PATENT, EVEN ONE

1 ATMOSPHERE. AND I DON'T KNOW IF IT HAS TO EXCEED IT BY, YOU
2 KNOW, 1.1, OR I DON'T KNOW HOW YOU DO ATMOSPHERES BEYOND 1, 2,
3 AND I GUESS TO THE EXTENT A HUMAN BEING COULD SWIM BEFORE THEY
4 WOULD IMplode. SO THERE HAS TO BE SOME RATIONAL END POINT, I
5 SUSPECT, WHERE YOU HAVE TO BE IN A DIVING MODE OR SOMETHING
6 INSTEAD OF JUST IN THE WATER. BUT IT DOESN'T REALLY HAVE AN
7 END POINT.

8 THE PATENT ITSELF TALKS ABOUT EVEN EXCEEDING, AND SO
9 IT WAS MY UNDERSTANDING THAT THE RIGIDNESS OF THIS CONTAINER
10 HAS TO MAINTAIN ITS SHAPE EVEN IF YOU GO BEYOND ONE ATMOSPHERE.
11 I DON'T KNOW HOW MUCH MORE BEYOND THAT, BUT BEYOND IT. BUT WE
12 DIGRESS BACK TO MY CONSTRUCTION. LET'S WORK WITH YOUR
13 CONSTRUCTION AND LET ME HEAR WHAT THE PLAINTIFFS HAVE TO SAY.
14 THANK YOU.

15 MS. KENNEALLY: GOOD MORNING, YOUR HONOR.

16 MS. GODDARD: YOUR HONOR, MAY I APPROACH? I HAVE A
17 HARD COPY.

18 THE COURT: YES. THANK YOU.

19 MS. KENNEALLY: YOUR HONOR, WE HAD A CHANCE TO REVIEW
20 THE COURT'S TENTATIVE AND PROPOSED CONSTRUCTION AND APPRECIATE
21 THE EFFORT THAT THE COURT PUT FORWARD. WE DON'T HAVE -- JUST
22 JUMPING RIGHT IN WITH "RIGID" AND "RIGID CONTAINER." WE DON'T
23 HAVE A -- WE WOULD PROPOSE TWEAKING THE COURT'S CONSTRUCTION
24 SLIGHTLY, AND WE WOULD SAY SOMETHING LIKE, RETAINS SHAPE AND
25 DOES NOT ALTER OR COMPRESS UNDER AQUATIC PRESSURE ENCOUNTERED

1 WHILE SUBMERGED IN AN AQUATIC ENVIRONMENT.

2 THE COURT: I'M SORRY, I DIDN'T GET THE LAST PART.

3 MS. KENNEALLY: SO IT WOULD BE THE COURT'S
4 CONSTRUCTION, RETAINS SHAPE AND DOES NOT ALTER OR COMPRESS
5 UNDER AQUATIC PRESSURE, AND THEN WE WOULD ADD IN ENCOUNTERED
6 WHILE SUBMERGED INTO AN AQUATIC ENVIRONMENT.

7 SO I'M GOING TO ADDRESS THE TWO CONCERNS THAT
8 MR. LEACH RAISED, BUT I THINK OUR CONCERNS WITH THE DEFENDANTS'
9 PROPOSED CONSTRUCTION ARE ALIGNED WITH THE COURT'S CONCERNS
10 WITH THAT CONSTRUCTION. NOW LOOKING AT OUR PROPOSAL "MADE FROM
11 ANY MATERIAL CAPABLE OF WITHSTANDING PRESSURE" AND I HAVE THIS
12 PARENTHETICAL IN THERE WHICH WASN'T WHAT WE HAD ORIGINALLY
13 PROPOSED, BUT I THINK THAT'S THAT CLARIFYING THE PRESSURES THAT
14 ARE ENCOUNTERED THERE. BUT "ENCOUNTERED WHILE SUBMERGED IN AN
15 AQUATIC ENVIRONMENT, INCLUDED BUT NOT LIMITED TO METAL,
16 CERAMIC" --

17 (COURT REPORTER INTERRUPTION.)

18 MS. KENNEALLY: SURE. METAL, CERAMIC --

19 THE COURT: I DON'T FIND IT USEFUL AT CLAIM
20 CONSTRUCTION TO PUT IN THINGS THAT IT COULD BE BUT AREN'T
21 LIMITED TO. IF IT'S SOMETHING SPECIFICALLY EXCLUDED, THAT'S
22 ONE THING, BUT A LAUNDRY LIST OF IT COULD BE -- I THINK THAT
23 WOULD ONLY LEAD TO PROBLEMS OF PEOPLE GOING, WELL, LET'S SEE,
24 THIS ISN'T METAL, CERAMIC, GLASS, OR PLASTIC, SO IT CAN'T BE
25 THIS.

1 MS. KENNEALLY: SURE.

2 THE COURT: AND NOT RECOGNIZE THAT "INCLUDED BUT NOT
3 LIMITED TO" IS ONE OF THOSE WONDERFUL LEGAL SORT OF ...

4 MS. KENNEALLY: AND THAT'S -- I MEAN, WE'RE
5 COMFORTABLE REMOVING THAT. THE POINT IN INCLUDING THOSE WAS
6 THAT THOSE ARE RIGHT OUT OF THE SPECIFICATION, AND ALSO THE
7 REAL KEY IS THAT IT'S CAPABLE OF WITHSTANDING PRESSURE WHILE
8 SUBMERGED IN AN AQUATIC ENVIRONMENT. AND THAT THOSE MATERIALS
9 IF THEY HAVE THAT QUALITY ARE -- WOULD BE -- YOU KNOW, WOULD BE
10 SOMETHING THAT THE CONTAINER COULD BE MADE OF. SO IT WOULD
11 ASSIST IN SOME WAYS THE JURY IN HELPING. BUT I UNDERSTAND THE
12 COURT'S CONCERN THERE, AND WE DON'T HAVE A PROBLEM REMOVING
13 THAT.

14 THE COURT: THE PROBLEM THAT I ANTICIPATE THEY'RE
15 GOING TO HAVE WITH THAT AND THAT I HAVE WITH THAT IS, WHAT DOES
16 THAT MEAN, "ENCOUNTERED WHILE SUBMERGED IN AQUATIC
17 ENVIRONMENT"? WELL, IF I PUT IT UNDER WATER IN THE KITCHEN
18 SINK, IS IT WITHSTANDING PRESSURE BECAUSE IT'S UNDERWATER? I
19 THINK SUBMERGED MEANS UNDERWATER. I'M NOT QUITE SURE THERE'S A
20 REAL ISSUE THERE.

21 BUT SUBMERGED IN AN AQUATIC ENVIRONMENT MEANS YOU'RE
22 PUTTING IT IN THE WATER SUBMERGED, COVERED BY WATER, BUT HOW
23 FAR DOWN? AND I DON'T THINK THIS PATENT HAS ADDRESSED AT ALL
24 AND, IN FACT, IT DISTINGUISHES QUITE A BIT OF ART THAT TALKS
25 ABOUT PROTECTIVE CASES THAT MAKE SOMETHING WATERPROOF AT

1 SURFACE LEVEL, AND IT'S NOT TO SAY YOU CAN'T USE IT THERE, BUT
2 IT'S GOT TO DO SOMETHING MORE THAN THAT.

3 AND SO I DON'T THINK THAT LIMITATION AS PART OF THE
4 CLAIM CONSTRUCTION IS HELPFUL BECAUSE I THINK IT'S OVER
5 INCLUSIVE TO SAY, IF YOU SIMPLY CAN PUT THIS -- PUT A PRODUCT
6 ON AN IPHONE AND DROP IT IN THE SINK, IT MEETS THE SCOPE OF THE
7 PATENT IF THE IPHONE DOESN'T GET WET.

8 MS. KENNEALLY: WELL, YOUR HONOR, I WOULD DISPUTE
9 THAT. I DO BELIEVE THAT THIS PATENT COVERS MERE SURFACE
10 ACTIVITIES, AND THERE ARE CERTAIN CALL-OUTS FROM THE
11 SPECIFICATION WHICH I CAN POINT THE COURT TO WHERE IT'S NOT
12 ONLY DEEP LEVEL USE, BUT IT'S CERTAINLY, THE PATENT THROUGH THE
13 HISTORY OF THESE PATENTS AND THE CHAIN OF THESE PATENTS HAVE
14 EVOLVED TO INCLUDE MERE SURFACE ACTIVITIES.

15 THE COURT: I THINK YOU'RE MISSING MY POINT BECAUSE
16 I'M NOT SAYING THAT IF YOU BUY THIS CASE AND YOU ONLY USE IT TO
17 SWIM LAPS IN THE POOL, IT WOULDN'T BE INFRINGING. THE
18 STRUCTURE OF THE HOUSING, THE RIGID STRUCTURE OF THE HOUSING IS
19 SPECIFICALLY INTENDED TO BE MORE THAN JUST USED FOR INCIDENTAL
20 ACTIVITIES WHERE THINGS MIGHT GET WEIGHT. SURE, YOU CAN USE IT
21 FOR THAT.

22 I CAN BUY A WATCH THAT IS WATER RESISTENT DOWN TO THE
23 FLOOR OF THE OCEAN AND NEVER GO IN THE OCEAN AND JUST TAKE IT
24 IN THE POOL, BUT IF THE PATENT THAT COVERS THE HOUSING FOR THAT
25 WATCH SPECIFICALLY SAYS IT'S MADE OF A MATERIAL THAT MUST BE

1 RESISTENT TO THAT LEVEL, THE FACT THAT IT CAN BE USED -- I CAN
2 ALSO MAKE A WATCH THAT IS WATER RESISTENT AT LESSOR LEVELS
3 DOESN'T MAKE IT COVERED BY THAT PATENT. THIS PATENT WAS VERY
4 SPECIFICALLY INTENDED TO DEAL WITH A RIGID STRUCTURE THAT WAS
5 GOING TO GO BEYOND JUST SURFACE USE.

6 MS. KENNEALLY: AND I DON'T KNOW THAT THAT IS
7 NECESSARILY TRUE WITH THIS PARTICULAR PATENT. I THINK IN THE
8 EARLY PATENT, THE '769 PATENT, WHICH WAS THE FIRST PATENT, THAT
9 WAS CERTAINLY TRUE. I DON'T THINK -- WE'RE NOT RUNNING FROM
10 THE FACT THAT WE HAVE CERTAINLY DESCRIBED "RIGID CONTAINER" IN
11 VERY SPECIFIC TERMS, AND WE HAVE DONE THAT. I THINK WHAT GIVES
12 GUIDANCE TO THIS CONSTRUCTION IS HOW WE HAVE DISTINGUISHED THE
13 PRIOR ART, AND THAT IS SOMETHING THAT I WOULD LIKE TO GET IN TO
14 WHICH IS SOMETHING MR. LEACH HAD ALSO RAISED.

15 THE COURT: GO AHEAD.

16 MS. KENNEALLY: BUT THIS JUST POINTS TO -- YOU KNOW,
17 THIS COLUMN 7 OF THE PATENT CLEARLY DESCRIBES, YOU KNOW, THE
18 RIGID CONTAINER, BUT WHAT I WOULD LIKE TO MOVE QUICKLY HERE TO
19 IS THE DISCUSSION OF, YOU KNOW, THAT THERE'S SOMEHOW X-1 OR THE
20 APPLICANT IS TRYING TO RUN FROM DISCLOSURES THAT WERE MADE TO
21 THE PATENT OFFICE IS JUST NOT THE CASE HERE. X-1 DOES NOT SEEK
22 TO CONSTRUE "RIGID CONTAINER" IN A MANNER THAT INCLUDES A
23 FLEXIBLE MEMBRANE.

24 NOW AND WHAT WE SAID IN OUR BRIEF IS AT LEAST AS X-1
25 UNDERSTANDS THAT TERM. SO WE MADE VARIOUS DISTINCTIONS, AND WE

1 CERTAINLY DID THAT IN THE SPECIFICATION OF THE '032 PATENT, AND
2 WE DID THAT BEFORE THE PATENT OFFICE. AND A COUPLE OF THINGS
3 THAT WE SAID WAS, WE DISTINGUISHED FULLER, SILVERMAN, AND OLSEN
4 BY SAYING, YOU KNOW, "A FLEXIBLE MEMBRANE WILL COMPRESS AROUND
5 THE DEVICE CAUSING ALL BUTTONS TO BE PRESSED." SO THAT GIVES
6 SOME IDEA OF YOU KNOW THE RIGIDITY THAT IS REQUIRED BY THE
7 '032.

8 AND WE ALSO DISTINGUISHED GOLDFARB. "THE STRUCTURAL
9 DESIGN DESCRIBES A FLEXIBLE MEMBRANE THAT CANNOT WITHSTAND
10 PHOTOSTATIC PRESSURE."

11 WE ALSO DESCRIBED -- OR WE ALSO DISTINGUISHED THE GELL
12 PATENT WHICH IS "IT'S HIGHLY SUSCEPTIBLE TO FAILURE BECAUSE OF
13 THE POTENTIAL FOR PERFORATION OF THE FLEXIBLE MEMBRANE."

14 THOSE ARE RIGHT IN THE BODY OF THE SPECIFICATION.
15 THERE IS NO SECRET HERE THAT WE HAD DISTINGUISHED "FLEXIBLE
16 MEMBRANE." NOW AS WE UNDERSTAND WHAT FLEXIBLE MEMBRANE IS, THE
17 PRIOR ART WAS SOMETHING DIFFERENT THAN THE RIGIDITY THAT'S
18 REQUIRED BY THE '032.

19 SO DEFENDANTS' PROPOSED CONSTRUCTION REFERS TO
20 FLEXIBLE MEMBRANE AS WAS DISTINGUISHED BY THE PRIOR ART, AND
21 THEY SAY, IT'S, IN FACT, X-1 WHO PROPOSED THESE TERMS AND
22 INITIATED THESE TERMS EVEN INTO THE DISCUSSION HERE, BUT WE
23 DIDN'T JUST REFER TO -- AS YOUR HONOR POINTED OUT EARLIER WITH
24 RESPECT TO WHAT MR. LEACH WAS SAYING, WE DIDN'T JUST SAY
25 "FLEXIBLE MEMBRANE." THAT WASN'T THE ONLY DISTINGUISHING

1 QUALIFICATION. WE SAID, AND I'LL TELL YOU WHAT WE HAD SAID,
2 CERTAIN THINGS AS FAR AS IT'S FLEXIBLE, YOU KNOW, IT ALLOWS THE
3 USER TO MANIPULATE THE CONTROLS, IT'S EASILY DEFORMABLE.

4 WHAT I WOULD LIKE TO DO IS LOOK AT HOW -- WHAT
5 "FLEXIBLE MEMBRANE" MEANS IN THE PRIOR ART THAT WAS
6 DISTINGUISHED, FOR EXAMPLE, IN THE FULLER REFERENCE. SO BEFORE
7 WE GET INTO WHAT THIS SAYS HERE, OUR BELIEF IS THAT ADOPTING A
8 CONSTRUCTION THAT JUST MERELY SAYS DOESN'T INCLUDE A FLEXIBLE
9 MEMBRANE ONLY KICKS THE CAN DOWN THE ROAD WITH RESPECT TO
10 RESOLVING THIS DISPUTE. YOU KNOW, IT'S CERTAINLY GOING TO
11 RAISE ADDITIONAL QUESTIONS ABOUT WHAT FLEXIBLE MEANS.

12 NOW IN FULLER, AS YOU SEE HERE, THE SPECIFICATION IN
13 FULLER SAYS "THE WATERPROOF ENCLOSURE FOR PORTABLE RADIOS
14 ACCORDING TO THE PRESENT INVENTION IS COMPRISED OF A WATERPROOF
15 HOUSING SIZED AND SHAPED TO CONTAIN A PORTABLE RADIO THEREIN,
16 WHEREIN A PORTION OF THE WATERPROOF ENCLOSURE ADJACENT TO THE
17 RADIO CONTROL KNOBS IS A FLEXIBLE, WATER-IMPERMEABLE MEMBRANE
18 THAT IS EASILY DEFORMABLE BY AN OPERATOR'S FINGER AND IS
19 ADAPTED TO ENGAGE AND ALLOW THE USER TO OPERATE THE CONTROL
20 KNOBS OF THE RADIO OR TAPE PLAYER FROM THE EXTERIOR OF THE
21 ENCLOSURE WITHOUT BREAKING THE WATERPROOF SEAL."

22 IN FULLER, YOU CAN SEE THIS IS THE DISCLOSURE, THIS IS
23 ONE OF THE DISCLOSURES. THAT TOP PART, WHICH IS THE FLEXIBLE
24 MEMBRANE COVER, 30, YOU'RE SUPPOSED BE ABLE TO PUT YOUR FINGER
25 IN THERE AND MANIPULATE THE BUTTONS. SO IT'S A SPECIFIC

1 FLEXIBLE MEMBRANE THAT WAS DISTINGUISHED BY THE APPLICANT IN
2 FRONT OF THE PATENT OFFICE.

3 THE COURT: WELL, GO BACK TO YOUR SLIDE BEFORE. THE
4 PART YOU HIGHLIGHTED IS THE PART THAT THE DEFENSE ATTORNEY IS
5 SAYING IS EXCLUDED BY THE DEFINITION OF "RIGID" IN THIS PATENT.
6 IT CAN'T BE A MATERIAL THAT WOULD ALLOW THE USER TO OPERATE THE
7 CONTROL KNOBS FROM THE EXTERIOR OF THE ENCLOSURE.

8 MS. KENNEALLY: AND I THINK IF THEY WERE SAYING HAVING
9 A FLEXIBLE MEMBRANE THAT'S EASILY DEFORMABLE BY AN OPERATOR'S
10 FINGER AND ADAPTED TO EXACTLY WHAT WAS SAID THERE, WHAT WAS
11 DESCRIBED IN FULLER, I MEAN, THAT'S SOMETHING THAT WE
12 DISTINGUISHED. LIKE I SAID, WE DON'T CONSIDER THAT PART OF A
13 RIGID CONTAINER. SO I THINK THE COURT'S PROPOSED
14 CONSTRUCTION--

15 THE COURT: FORGET MY PROPOSED CONSTRUCTION. LET'S GO
16 WITH THE ONE THAT THEY'RE OFFERING SAYING THAT "RIGID" -- IF WE
17 STICK WITH "RIGID" AS DEFINED IN THE PATENT AT COLUMN 7 WHERE
18 IT TALKS ABOUT A RIGID CONTAINER CAPABLE OF WITHSTANDING
19 PRESSURE.

20 MS. KENNEALLY: UM-HMM.

21 THE COURT: AND NOT ALLOWING A USER TO OPERATE THE
22 CONTROL KNOBS FROM THE EXTERIOR OF THE ENCLOSURE, THAT THE
23 MATERIAL TO BE RIGID, IT HAS MET THOSE CHARACTERISTICS, THEN
24 ARE WE IN AGREEMENT?

25 MS. KENNEALLY: I THINK IT WOULD BE NOT EASILY

1 DEFORMABLE BY THE OPERATOR'S FINGER.

2 THE COURT: OKAY. THAT'S THERE, THAT'S FINE. IT'S
3 NOT DEFORMABLE, IT DOESN'T ALLOW THE OPERATOR TO OPERATE THE
4 CONTROL KNOBS. THAT'S ONE EXAMPLE. GO ON TO YOUR OTHER
5 EXAMPLES WITH WHAT A FLEXIBLE MEMBRANE WAS UNDERSTOOD TO MEAN
6 WHEN IT WAS DISTINGUISHED BY THE PATENTEE AS NOT COVERED BY
7 THIS PATENT.

8 MS. KENNEALLY: AND I WOULD SAY FULLER IS THE BEST
9 EXAMPLE. THAT PROVIDES THE MOST GUIDANCE AND HAS THE MOST
10 SIGNIFICANT IMPACT, I THINK, ON THIS TERM. ONE OF THE OTHER
11 THINGS THAT THEY HAD TRIED TO INCLUDE, AND I DON'T KNOW IF YOUR
12 HONOR WANTS TO HEAR ARGUMENT ON IT, IS WHETHER "COVER" SHOULD
13 BE INCORPORATED INTO THIS CONSTRUCTION. THAT IS ALSO SOMETHING
14 THAT IS USED IN THE FULLER PATENT. IT'S "FLEXIBLE MEMBRANE"
15 AND "FLEXIBLE COVER" ARE USED ALMOST INTERCHANGEABLY.

16 THE COURT: YOU HAVE "CONTAINER" AS A TERM IN THE
17 PATENT HERE THAT'S BEFORE THE COURT AND THE CONTAINER HAS TO BE
18 FLEXIBLE AND WATERPROOF. SO FROM MY POINT OF VIEW, THAT MEANS
19 THE COVER IS NOT SEPARATE FROM THE CONTAINER BECAUSE OTHERWISE,
20 TO SAY -- A CONTAINER IS A CONTAINER, OKAY. IF I BUY GROCERIES
21 AND I PUT THEM IN A PAPER BAG, THE PAPER BAG IS A CONTAINER OF
22 THOSE GROCERIES. IT IS HOLDING. IT IS CONTAINING. IT'S A
23 TAUTOLOGY, A CONTAINER CONTAINS, BUT IT IS CONTAINING THE
24 GROCERIES.

25 IT IS ALSO NOT COVERED ON THE TOP. THAT WOULD NOT

1 SATISFY THE PLAIN LANGUAGE OF THIS CLAIM WHICH WOULD REQUIRE
2 THAT SAID CONTAINER IS WATERPROOF. IT HAS TO BE COMPLETELY
3 CLOSED, WHICH MEANS IT HAS TO HAVE ALL SIDES, AND IT DOESN'T
4 HAVE TO BE A PARTICULAR GEOMETRIC SHAPE. I MEAN, YOU SAID
5 SQUARE, THE BOX, WHATEVER. I THINK THAT'S WAY TOO LIMITING.

6 YOU HAVE THE ONLY EXAMPLE IN THE PATENT OF CIRCULAR
7 ONE FOR CD'S, WHICH HAVE BECOME SORT OF AN ANACHRONISM, BUT
8 THAT'S WHEN THE PATENT WAS WRITTEN. BUT THERE IS NO LIMITATION
9 IN THE PATENT AS TO THE SHAPE OF THE CONTAINER. IF TOMORROW,
10 PEOPLE CAME OUT WITH AN EGG-SHAPED I-SOMETHING AND YOU WANTED
11 TO PUT IT IN A CONTAINER AND IT WAS A HATCH THAT OPENS,
12 UNSCREWED IN THE MIDDLE AND ONLY HAS TWO PARTS, IT STILL COULD
13 BE A CONTAINER UNDER THE TERMS OF THIS PATENT, BUT IT HAS TO
14 HAVE ALL THE PARTS.

15 I DON'T THINK THE LID IS A SEPARATE ASPECT. THE LID
16 COULD HAVE DESIGN ISSUES THAT ARE SPECIFIC, BUT IT'S NOT --
17 THERE IS A CONTAINER AND A LID. IT'S A CONTAINER WITH A LID.
18 THE LID IS PART OF IT.

19 MS. KENNEALLY: AND THE LID IS SOMETHING DIFFERENT,
20 YOUR HONOR, THAN WHAT I UNDERSTAND DEFENDANTS ARE REFERRING TO
21 BY TRYING TO INCORPORATE "COVER" INTO THIS PARTICULAR
22 CONSTRUCTION. SO I THINK LID IS SOMETHING WE'LL ADDRESS ON
23 "WATERPROOF."

24 THE COURT: I DON'T THINK WE NEED TO GO TO "COVER."

25 MS. KENNEALLY: OKAY. I AGREE WITH YOU, YOUR HONOR.

1 I DON'T THINK THERE WAS ANY BASIS TO INCORPORATE THAT, BUT IT
2 WAS PART OF THEIR PROPOSED CONSTRUCTION, SO I WAS JUST SEEING
3 IF YOU HAD ANY QUESTIONS ON THAT.

4 SO I THINK YOU'RE RIGHT, THE KEY HERE IS WHETHER THIS
5 CONTAINER IS GOING TO BE CAPABLE OF WITHSTANDING PRESSURE IN AN
6 AQUATIC PRESSURE ENVIRONMENT AND WHETHER WE CAN ALSO INCLUDE,
7 YOU KNOW, NOT A -- YOU KNOW, THIS IS HAVING NO FLEXIBLE
8 MEMBRANE THAT IS EASILY DEFORMABLE BY THE OPERATOR'S FINGER, I
9 THINK THAT'S SOMETHING THAT -- THAT, YOU KNOW, WOULD BE -- WE
10 WOULD BE COMFORTABLE WITH. BUT THE PROPOSED CONSTRUCTION BASED
11 ON WHAT THE COURT HAS OFFERED WOULD TO BE ADD AFTER AQUATIC
12 PRESSURES "ENCOUNTERED WHILE SUBMERGED IN AN AQUATIC
13 ENVIRONMENT," AND LEAVE IT AT THAT.

14 THE COURT: ALL RIGHT. THEY'VE TAKEN THE DEFINITION
15 NOW FROM THE FULLER PATENT, BUT I THINK THAT MAY BE NARROWER
16 THEN WHAT THEY DISAVOWED.

17 MR. LEACH: YEAH. LET'S LOOK AT WHAT THEY DID IN THE
18 ACTUAL FILE HISTORY AND PATENT OFFICE, BECAUSE I THINK THAT'S
19 REALLY WHAT'S IMPORTANT HERE. AND I DON'T THINK WE'RE TOO FAR
20 OFF HERE, BUT WHAT I THINK -- JUST FOR CLARIFICATION, WHAT I'M
21 HEARING THE COURT SAY IS, WE MAY RETAIN AT LEAST PART OF THE
22 DEFINITION THAT THEY HAD PROPOSED, THAT IT HAS TO BE ABLE TO
23 WITHSTAND UNDERWATER PRESSURE OR AQUATIC PRESSURE, WHICH AGAIN,
24 I DON'T KNOW WHAT THAT MEANS, SO THAT WILL JUST BE A BATTLE, I
25 GUESS, WE'LL DEAL WITH ON INFRINGEMENT.

1 BUT MORE IMPORTANTLY, AND MY POINT, I THINK IT'S
2 IMPORTANT, AND I THINK THE COURT IS IN SOMEWHAT AGREEMENT, WE
3 HOLD THEM TO THEIR PROSECUTION DISCLAIMER. AND IF WE'RE GOING
4 ON THAT I THINK WE SHOULD HOLD THEM TO WHAT THEY SAID IN THE
5 ACTUAL PROSECUTION, WHICH IS -- WHICH IS -- I'M LOSING IT.
6 "DOES NOT HAVE A FLEXIBLE COVER." IF YOU WANT TO SAY MEMBRANE,
7 COVER, I DON'T CARE. I THINK THEY SAY COVER HERE. I THINK
8 THEY SAY MEMBRANE THROUGHOUT THE PATENT. I DON'T THINK THERE
9 IS A DISTINCTION TO ONE SKILLED IN THE ART. WE CAN GO WITH
10 EITHER OR BOTH, WHICH IS WHAT WE'VE SUGGESTED.

11 AND THEN IF THE COURT WANTS TO ALLOW, IS ALLOW THE
12 USER TO MANIPULATE THE CONTROLS. AND I WOULD SAY CONTROLS.
13 CONTROL KNOBS, IT'S NOT A SPECIFIC EMBODIMENT. I DON'T THINK
14 WE WANT TO TIE IT TO KNOBS. THERE ARE DIFFERENT TYPES OF
15 CONTROLS. SO CONTROLS, I THINK WE'RE FINE WITH THAT, YOUR
16 HONOR. I THINK IT'S THE PROPER CONSTRUCTION OF THIS TERM.

17 THE COURT: RIGID IS DESCRIBING THE MATERIAL, CORRECT?

18 MR. LEACH: RIGID.

19 THE COURT: DESCRIBES THE MATERIAL THAT MAKES UP THE
20 HOUSING.

21 MR. LEACH: CORRECT.

22 THE COURT: IT'S A CHARACTERISTIC OF THAT MATERIAL.

23 MR. LEACH: CORRECT.

24 THE COURT: THE PATENT SAYS IT'S CAPABLE OF
25 WITHSTANDING PRESSURE. WE'LL SET ASIDE FOR A LITTLE BIT WHAT

1 PRESSURE MEANS.

2 MR. LEACH: RIGHT.

3 THE COURT: AND ACCORDING TO YOU, BASED ON DISCLAIMERS
4 IN THE FILE HISTORY TO GET BEYOND PRIOR ART, IT ALSO CANNOT BE
5 A MATERIAL THAT ALLOWS THE USER TO MANIPULATE THE CONTROLS.

6 MR. LEACH: I THINK WE JUST HAVE A LITTLE DISCONNECT,
7 YOUR HONOR. IT'S NOT "RIGID" BY ITSELF THAT THEY DISCLAIM, IT
8 WAS "RIGID CONTAINER." SO THAT'S WHERE WE SAY THAT IT'S A
9 CONTAINER THAT DOES NOT ALLOW.

10 THE COURT: YOU GUYS HAVE LUMPED RIGID CONTAINER IN TO
11 ONE WORD. IT'S A CONTAINER AND IT HAS TO BE RIGID, AND SO ARE
12 WE TALKING --

13 MR. LEACH: THAT'S HOW --

14 THE COURT: -- THE MATERIAL OF THE CONTAINER IS WHAT
15 HAS TO WITHSTAND THE PRESSURE.

16 MR. LEACH: THAT'S TRUE. BUT THE CONTAINER IS MADE OF
17 A LOT OF MATERIALS, SO THERE ARE GOING TO BE MATERIALS --

18 THE WITNESS: RIGHT. BUT THE WORD "RIGID" APPEARS
19 THROUGHOUT THE PATENT, JUST NOT SPECIFIC TO "CONTAINER."

20 MR. LEACH: CORRECT.

21 THE COURT: I DON'T THINK IT HAS A DIFFERENT
22 DEFINITION WHEN IT APPLIES TO DIFFERENT THINGS.

23 MR. LEACH: THE DIFFICULTY HERE, YOUR HONOR, IS THE
24 DISCLAIMER THEY MADE WAS TO THE WORD "RIGID CONTAINER." THEY
25 DIDN'T SAY FULLER WAS DIFFERENT BECAUSE IT'S FLEXIBLE AND OUR

1 THING IS RIGID. THEY SAID FULLER HAS A FLEXIBLE COVER.

2 REMEMBER, FULLER IS THAT RIGID BOX.

3 SO FULLER IS RIGID, BUT IT'S GOT THIS FLEXIBLE COVER
4 OVER IT. SO THEY'RE SAYING THAT'S NOT OUR RIGID CONTAINER
5 BECAUSE OUR RIGID CONTAINER DOESN'T HAVE THAT FLEXIBLE MEMBRANE
6 AT THE TOP. REALLY THE ARGUMENT THEY MADE, AND WERE SUCCESSFUL
7 AT THE PATENT OFFICE, RIGID CAN'T BE FLEXIBLE. I THINK THAT IS
8 WHERE YOUR HONOR IS SEEING THIS.

9 WHAT THEY SAID AT THE PATENT OFFICE WAS, OUR RIGID
10 CONTAINER WHICH HAS ALL SIX SIDES HARPED IS DIFFERENT THAN
11 FULLER BECAUSE FULLER HAS ONE OF THE SIX SIDES THAT IS A
12 FLEXIBLE COVER. SO YOU CAN'T NOW IN THE SCOPE OF THEIR PATENT
13 COME BACK AND SAY SOMETHING THAT'S RIGID ON FIVE OF THE SIX
14 SIDES OR EVEN THE ENTIRE THING EXCEPT FOR ONE SPOT WHERE YOU
15 CAN INTERACT WITH IT IS NOW A RIGID CONTAINER AS THE WAY THEY
16 DESCRIBE IT, BECAUSE THAT'S THE DISTINCTION THEY MADE.

17 THE COURT: I FEEL LIKE WE'RE TALKING PAST EACH OTHER.

18 MR. LEACH: MAYBE WE ARE.

19 THE COURT: THE CONTAINER HAS TO BE RIGID. I THINK
20 THE ENTIRE CONTAINER HAS TO BE RIGID.

21 MR. LEACH: THEN WE'RE NOT TALKING PAST EACH OTHER.

22 THE COURT: I DON'T SEE WHERE THAT, THERE IS ANY OTHER
23 WAY YOU CAN READ IT. IT'S A RIGID CONTAINER. IT'S NOT
24 PARTIALLY RIGID. IT'S A RIGID CONTAINER, AND CONTAINED WITHIN
25 THE DEFINITION OF THE CONSTRUCTION OF RIGID IS THAT IT CAN'T

1 USE A MATERIAL THAT WOULD ALLOW THE USER TO MANIPULATE THE
2 CONTROLS THROUGH THE MATERIAL.

3 MR. LEACH: COMPLETELY IN AGREEMENT, YOUR HONOR.
4 MAYBE WE ARE TALKING PAST EACH OTHER. I THINK THEIR ARGUMENT
5 IS, WELL, PART OF THE CONTAINER IS RIGID, SO, THEREFORE, IT'S A
6 RIGID CONTAINER. BUT IF WHAT YOUR HONOR JUST SAID --

7 THE COURT: IF THEY WANT TO ARGUE THAT, I WANT TO HEAR
8 IT BECAUSE I DON'T THINK THERE IS ANY SUPPORT FOR THAT IN THE
9 SPECIFICATION THAT IT'S PARTIALLY RIGID.

10 MR. LEACH: I HAVE NOTHING FURTHER.

11 THE COURT: SO IF WE TAKE IT AS A RIGID CONTAINER
12 INSTEAD OF JUST THE WORD RIGID, THEN WE'VE GOT A STRUCTURE THAT
13 IS CAPABLE OF WITHSTANDING PRESSURE AND DOESN'T INCLUDE A
14 MATERIAL THAT WOULD ALLOW THE USER TO MANIPULATE THE CONTROLS
15 THROUGH THE MATERIAL OF THE CONTAINER.

16 MS. KENNEALLY: YOUR HONOR, THE ONLY CONCERN WE HAVE
17 THERE IS THAT WHAT WE DISTINGUISHED IN FULLER WAS SOMETHING
18 THAT WAS DEFORMABLE, A MEMBRANE THAT WAS DEFORMABLE, SO I THINK
19 THAT HAS TO BE INCORPORATED INTO THE CONSTRUCTION.

20 THE COURT: THAT'S NOT THE POSITION YOU TOOK IN YOUR
21 BRIEF.

22 MS. KENNEALLY: WELL, WE DISCLOSED, WE SAID --

23 THE COURT: IN YOUR BRIEF -- IN YOUR RESPONSE BRIEF,
24 YOU JUST SAID, YEAH, WE ARE NOT CLAIMING THESE MEMBRANES.

25 MS. KENNEALLY: YOUR HONOR, BUT WE SAID "AS WE

1 UNDERSTAND HOW THAT TERM IS USED IN FULLER." SO THAT WAS THE
2 LANGUAGE WE USED. AND HOW WE UNDERSTAND THAT TERM IS THE
3 PORTION FROM OF THE SPECIFICATION THAT WE PULLED UP FOR YOUR
4 HONOR FROM FULLER, WHICH IS SLIDE 10.

5 SO OTHER THAN THAT, WE DON'T HAVE A PROBLEM WITH IT.
6 WE JUST BELIEVE YOU SHOULD INCORPORATE "DEFORMABLE" INTO THE
7 CONSTRUCTION IF YOU'RE BASING IT ON FULLER.

8 MR. LEACH: MY POINT IS THAT THIS IS WHAT THEY TOLD
9 THE PATENT OFFICE. THEY DIDN'T SAY ANYTHING ABOUT DEFORMABLE.
10 THEY ARE GOING BACK TO THE REFERENCE TRYING TO READ OTHER STUFF
11 IN. THIS IS WHAT THEY SAID. THIS IS WHAT THEY SHOULD BE HELD
12 WITH.

13 THE COURT: ALL RIGHT. I BISECTED THAT RIGID
14 CONTAINER. I LOOKED AT IT AS TWO SEPARATE WORDS THAT YOU THEN
15 MERGED TOGETHER INTO THE SENTENCE, BUT IF A RIGID CONTAINER AS
16 DISCLOSED IN THE CLAIMS IS -- DOES THE WORD "FLEXIBLE" HAVE TO
17 BE IN THIS? IF A RIGID CONTAINER IS A STRUCTURE CAPABLE OF
18 WITHSTANDING PRESSURE AND DOESN'T INCLUDE A MATERIAL THAT
19 ALLOWS A USER TO MANIPULATE THE CONTROLS THROUGH THE MATERIAL,
20 DOES IT HAVE TO BE A FLEXIBLE MATERIAL?

21 MR. LEACH: I THINK THAT'S PROBABLY MORE APPROPRIATE
22 WITH THE ACTUAL LANGUAGE THAT THEY USED AND THE DISPARAGEMENT
23 THEY MADE AND EVERYTHING ELSE, BUT I DON'T THINK IT'S GOING TO
24 MAKE A BIG DIFFERENCE AS FAR AS THE LATER ARGUMENTS IN THIS
25 CASE.

1 THE COURT: IT WOULDN'T EXCLUDE THE USE OF A FLEXIBLE
2 MATERIAL AS LONG AS YOU COULD MANIPULATE THROUGH IT.

3 MR. LEACH: AS LONG AS YOU COULDN'T --

4 THE COURT: AND, AGAIN, IT GETS BACK TO THE QUESTION I
5 WAS RAISING THAT IT'S NOT SO MUCH THE FLEXIBILITY ASPECT AS THE
6 THICKNESS. IF THAT THING YOU WERE SQUISHING, THE FLEXIBLE
7 MEMBRANE, WAS THREE TIMES THICKER, IT MIGHT NOT BE QUITE AS
8 FLEXIBLE, BUT IT ALSO MIGHT NOT LET YOU HAVE THAT ABILITY TO
9 INTERACT.

10 MR. LEACH: YES. I THINK FLEXIBLE WITH THE CAVEAT AND
11 THE EXPLANATION THAT IT HAS TO ALLOW TO INTERACT.

12 THE COURT: WELL, YOU GAVE ME, AND I THINK IT WAS FROM
13 THEIR BRIEF, THAT IT DOESN'T ALLOW INTERACTION WITH THE DEVICE
14 THROUGH THE MATERIAL, WAS THAT --

15 MR. LEACH: THAT WAS FROM --

16 THE COURT: -- WAS THAT FROM A STATEMENT THAT THEY
17 MADE IN RESPONSE?

18 MR. LEACH: WAS THAT THE SLIDE I GAVE YOU, THE ONE
19 PAGE FROM THE OTHER PATENTS THAT YOU'RE TALKING ABOUT?

20 THE COURT: YES. I'M SORRY. THAT'S FROM THE OTHER
21 PATENT.

22 MR. LEACH: I DO HAVE COPIES OF ALL OUR SLIDES, YOUR
23 HONOR.

24 THE COURT: IT'S HELPFUL FOR MY COURT REPORTER.

25 MS. KENNEALLY: AND, YOUR HONOR, I'LL JUST POINT OUT

1 THAT FLEXIBLE WITH RESPECT TO THIS SLIDE THAT GARRET JUST
2 REFERENCED, I MEAN, THAT TERM WAS NEVER CONSTRUED WITH RESPECT
3 TO EITHER OF THOSE PATENTS. I THINK IF WE'RE FOCUSING ON
4 FULLER, WHICH IS THE ONLY PIECE OF PRIOR ART THAT WAS DISCUSSED
5 HERE BEFORE THE PATENT OFFICE, THAT'S TALKING ABOUT
6 MANIPULATING CONTROL KNOBS, AND SO I THINK THAT'S A SLIGHTLY
7 DIFFERENT ISSUE. BUT THE DISCLOSURE IN FULLER IS VERY CLEAR
8 THAT IT'S DEFORMABLE, AND SO WE WOULD SUBMIT THAT THAT SHOULD
9 BE INCORPORATED INTO THE PROPOSED CONSTRUCTION.

10 MR. LEACH: YOUR HONOR, I'M NOT GOING TO RESPOND
11 UNLESS YOU ASK ME TO.

12 THE COURT: JUST GIVE ME A SECOND, BECAUSE I JUST
13 WANTED TO ... HERE'S THE PROBLEM I HAVE WITH THE POSITION THAT
14 THE PLAINTIFFS ARE TAKING THAT REQUIRES THAT IT HAS TO BE
15 DEFORMABLE, IS IN YOUR REPLY BRIEF, YOU VERY EXPLICITLY SAID
16 THERE IS NO DISPUTE IN THIS CASE THAT A RIGID CONTAINER DOES
17 NOT INCLUDE A FLEXIBLE MEMBRANE AND THAT YOU HAVE ALWAYS
18 CONTINUED TO TAKE THE POSITION THAT IT DOESN'T INCLUDE A
19 FLEXIBLE MEMBRANE, BUT WE NEVER REALLY GOT TO A DEFINITION.

20 WELL, YOUR DEFINITION IS THEN A PARTIAL. YOU THEN
21 TALK ABOUT FULLER AS TO WHAT A FLEXIBLE MEMBRANE MIGHT MEAN AND
22 CITE THAT IT'S A FLEXIBLE WATER-PERMEABLE MEMBRANE THAT IS
23 EASILY DEFORMABLE BY AN OPERATOR'S FINGER, BUT YOU LEAVE OUT
24 AND ALLOW THE USER TO OPERATE CONTROL KNOBS.

25 IS IT YOUR POSITION THAT AT THE TIME THIS PATENT WAS

1 FILED, THE STATE OF THE ART WAS THAT A FLEXIBLE MEMBRANE WOULD
2 HAVE BEEN UNDERSTOOD TO MEAN SOMETHING THAT WOULD HAVE BEEN
3 EASILY DEFORMABLE AS OPPOSED TO SOMETHING THAT YOU COULD JUST
4 INTERACT THROUGH?

5 MS. KENNEALLY: I THINK THAT'S CORRECT, YOUR HONOR. I
6 MEAN, AND WE SPECIFICALLY REFERRED TO THIS WASN'T THE PRIOR ART
7 GENERALLY. I MEAN, IT WAS THE SPECIFIC REFERENCE TO FULLER AND
8 THE MEMBRANE THAT IS DISCLOSED IN FULLER, WHICH IS BOTH
9 DEFORMABLE, AND I FORGET THE SPECIFIC LANGUAGE, BUT BOTH
10 DEFORMABLE BY THE OPERATOR'S FINGER AND ADAPTED TO ENGAGE AND
11 ALLOW THE USER TO OPERATE THE CONTROL KNOBS OF THE RADIO OR
12 TAPE PLAYER.

13 SO THIS IS NOT -- I MEAN, IF YOU CAN ENVISION A TAPE
14 PLAYER AT THE TIME WHERE YOU HAVE TO PUSH THE BUTTON IN, THIS
15 IS NOT JUST A TOUCH OF THE TOUCHSCREEN. THIS IS NOT A FLAT
16 SURFACE. THIS IS BEING ABLE TO REACH YOUR FINGER IN AND
17 ACTUALLY ENGAGE A TAPE RECORDER THAT HAS A PUSH BUTTON. SO
18 THAT'S A DIFFERENT -- I MEAN, THAT'S A DIFFERENT FLEXIBILITY.
19 THAT'S WHERE THE DEFORMABLE COMES IN AND THAT'S WHERE IF YOU'RE
20 ALLOWING THE OPERATOR TO OPERATE CONTROL KNOBS, AND THE EXAMPLE
21 IS THE RADIO OR TAPE PLAYER, THE ABILITY TO CREATE, TO OPERATE
22 THOSE BUTTONS REQUIRES DEFORMABILITY IN THE MEMBRANE.

23 THE COURT: YES, GO AHEAD.

24 MR. LEACH: I HATE TO KEEP COMING BACK.

25 THE COURT: NO, I'M TRYING TO GET TO --

1 MR. LEACH: IT'S JUST NOW WE'RE TRYING TO FIGURE OUT
2 WHAT EASILY DEFORMABLE IS, SO I HAVE TO GET AN EXPERT, I GUESS,
3 TO DETERMINE WHAT THAT MEANS IN SOME PATENT, WHICH IF THEY
4 WANTED THAT TO BE THE DISTINCTION, THEY COULD HAVE SAID THAT.
5 THAT'S WHAT THEY COULD HAVE TOLD THE PATENT OFFICE.

6 THE COURT: ISN'T THAT WHAT THEY TOLD THE PATENT
7 OFFICE?

8 MR. LEACH: THAT ISN'T WHAT THEY TOLD THE PATENT
9 OFFICE.

10 THE COURT: THEY LOOKED AT FULLER AND FULLER HAD A
11 COVER THAT WOULD ALLOW YOU TO -- BASICALLY WAS SUFFICIENT
12 ENOUGH OR FLEXIBLE ENOUGH OR THIN ENOUGH THAT YOU COULD OPERATE
13 THROUGH IT SO YOU WOULDN'T HAVE TO BREAK THE SEAL TO PUSH THE
14 BUTTONS. AND SO THIS IS FROM THE PROSECUTION HISTORY OF THE
15 '722. AND I KNOW I HAVE THAT.

16 MR. LEACH: YOU SHOULD HAVE THAT AS AN EXHIBIT, YOUR
17 HONOR.

18 THE COURT: YES.

19 MR. LEACH: SO, YOUR HONOR, I THINK I CAN
20 SHORT-CIRCUIT THIS AND MAKE IT PRETTY EASY.

21 THE COURT: YES, GO AHEAD.

22 MR. LEACH: SO IN THE PATENT OFFICE WHEN THEY SAY
23 FULLER HAS A FLEXIBLE COVER, THEY POINT TO FULLER AT COLUMN 3,
24 LINES 34 THROUGH 36. IF I SHOW YOU LINES COLUMN 3, LINES 34
25 THROUGH 36 OF THE FULLER PATENT.

1 THE COURT: I HAVE IT.

2 MR. LEACH: OKAY. LET ME JUST READ WHAT IT SAYS. I
3 CAN LET THE COURT READ FOR HERSELF, BUT IT DOESN'T SAY ANYTHING
4 ABOUT EASILY DEFORMABLE IN THERE. SO WHEN THEY'RE -- AGAIN,
5 WHEN WE'RE LOOKING AT IF YOU'RE GOING TO TRY TO EXTRAPOLATE
6 SOMETHING FROM FULLER, I THINK THE BETTER PRACTICE IS TO USE
7 WHAT THEY SAID FULLER MEANT. BUT THEN TO TRY TO USE ANOTHER
8 SECTION OF FULLER WHICH THEY DIDN'T EVEN CITE THROUGH EASILY
9 DEFORMABLE DOESN'T SEEM TO ME TO MAKE SENSE.

10 THE COURT: THIS IS, I THINK, ONE OF THOSE ISSUES
11 WHERE TECHNOLOGY, DESPITE THE FACT THAT THESE AREN'T THAT OLD,
12 BUT FULLER IS OLD, WILL ADVANCE PRETTY QUICKLY.

13 MR. LEACH: YES.

14 THE COURT: AND IN FULLER WHEN THEY TALK ABOUT THE
15 FLEXIBILITY REQUIRED TO MANIPULATE CONTROL KNOBS, IT'S A VERY
16 MECHANICAL PUSH-BUTTON KIND OF THING, AND THIS PATENT WOULD
17 EXCLUDE MATERIAL THAT HAS THAT LEVEL OF FLEXIBILITY WHERE YOU
18 CAN PUSH A BUTTON. OF COURSE IN TODAY'S TECHNOLOGY, THAT SORT
19 OF MECHANICAL PUSHING A BUTTON THING HAS BECOME ALMOST PASSE
20 AND YOU'RE NOW JUST TOUCHING STUFF WITHOUT REALLY EVEN HAVING
21 TO, MAYBE NOT PUT ANY PRESSURE ON, IT'S JUST HEAT OR WHATEVER.

22 AND SO THE MATERIAL THAT WOULD ALLOW YOU TO INTERACT
23 THROUGH IT MAY NOT HAVE ANY FLEXIBILITY. IT DOESN'T REALLY
24 CORRESPOND, AND I THINK WE'RE KIND OF GETTING BEYOND IT IN THE
25 INFRINGEMENT ANALYSIS. BUT IN TERMS OF SAYING A DEFINITION

1 THAT WOULDN'T ALLOW THE USER TO INTERACT WITH THE DEVICE IS
2 BROADER, I THINK, THAN THAT WHAT THEY DISCLAIMED IN FULLER,
3 WHICH IS, YOU CAN'T MANIPULATE THE DEVICE THROUGH THE MATERIAL.

4 IT HAS TO HAVE FLEXIBILITY REQUIRED TO MANIPULATE,
5 EVEN IN THE SECTION OF THE PATENT THAT YOU POINTED ME TO. SO
6 IF YOU CAN MANIPULATE -- NOW WE'RE DOWN TO WHAT DOES MANIPULATE
7 MEAN. I MEAN, TURN SOMETHING ON AND OFF BACK IN 1983 WAS
8 PROBABLY A MECHANICAL ACT OF PUSHING A BUTTON AS OPPOSED TO NOW
9 YOU GET IN YOUR CAR AND SAY, START.

10 SO I UNDERSTAND THE DISCLAIMER THAT YOU WANT TO HAVE,
11 AND I THINK IT'S APPROPRIATE IN DEFINING RIGID TO SAY THAT
12 RIGID, WHILE IT HAS TO HAVE THIS ATTRIBUTE OF WITHSTANDING
13 PRESSURE.

14 MR. LEACH: ON ALL SIX SIDES.

15 THE COURT: IT CAN'T INCLUDE A MATERIAL THAT ALLOWS
16 THE USER TO MANIPULATE THE DEVICE. WHAT DOES MANIPULATE MEAN?
17 DOES IT ACTUALLY REQUIRE THAT YOU CAN BE ABLE TO PHYSICALLY,
18 AND AS THEY SAY, IT IS DEFORMABLE, SO CAN YOU PUSH IT. AND IF
19 THAT'S THE LIMITATION, THAT'S FINE, BUT I'M NOT SURE THAT GETS
20 US WHERE YOU WANT TO BE.

21 MR. LEACH: WELL, I THINK --

22 THE COURT: NOT THAT MATTERS TO ME, BUT ...

23 MR. LEACH: I UNDERSTAND, YOUR HONOR. I THINK THE
24 FIRST PLACE WE ARE IS, THEY DISCLAIMED FLEXIBLE COVERS OR
25 FLEXIBLE MEMBRANE. THAT'S WHAT THEY TOLD THE PATENT OFFICE.

1 WE'RE NOW GETTING INTO AN AREA THAT I DIDN'T CREATE. AGAIN
2 THEY CREATED THIS BY USING THESE TERMS.

3 WE'RE NOW TRYING TO DIG BACK INTO PRIOR ART TO FIGURE
4 OUT WHAT THEY MEANT WHEN THEY TOLD THE OFFICE, AND SUCCESSFULLY
5 TOLD THE PATENT OFFICE, THAT WE'RE DIFFERENT THAN RIGID
6 CONTAINER, OR RIGID CONTAINER IS DIFFERENT THAN SOMETHING WITH
7 A FLEXIBLE COVER. TO ME, THAT SHOULD BE THE END OF IT, I
8 SHOULD BE ABLE TO ARGUE AND GET SOMEBODY UP HERE TO SAY, WE
9 DON'T HAVE A FLEXIBLE COVER CASE.

10 WHAT I'M HEARING THE COURT SAY IS, WELL, THAT DOESN'T
11 GIVE US QUITE ENOUGH DIRECTION, AND I PREFER WHICH ALLOWS A
12 USER MANIPULATE CONTROLS, WHICH IS WHAT THEY SAID, SO I CAN'T
13 CONTEST THAT. BUT THEN TO TRY TO, AGAIN, TAKE ANOTHER STEP AND
14 TRY TO REDEFINE MANIPULATE, WE GO DOWN THIS RABBIT HOLE.

15 THE COURT: MY PROBLEM IS THAT IT'S THE RABBIT HOLE
16 THAT WE'RE GOING TO GET INTO AND DEFINE THINGS AND LATER BE
17 TOLD WE HAVE TO COME BACK AND DEFINE THINGS. BUT AT THE TIME
18 THE PATENT WAS FILED, THIS CONVERSATION WAS HAD ABOUT THE '722,
19 AND THE STATE OF THE PRIOR ART WAS THEY WERE TALKING ABOUT
20 MANIPULATING ACTUAL MECHANICAL PUSHING AND THE FLEXIBILITY OF
21 THE MATERIAL TO ACTUALLY BE ABLE TO PRESS THROUGH THAT MATERIAL
22 SO THAT COULD YOU CONTROL THE KNOBS OR CONTROL THE DEVICE.
23 LET'S BE A LITTLE BROADER.

24 MR. LEACH: RIGHT.

25 THE COURT: AND I DON'T HAVE A PROBLEM WITH SAYING

1 THAT THAT'S WHAT THEY DISCLAIMED. THEY DISCLAIMED A FLEXIBLE
2 MATERIAL THAT WOULD ALLOW THE USER TO MANIPULATE THE CONTROLS
3 THROUGH THE MATERIAL.

4 MR. LEACH: OKAY. I THINK WE'RE FINE THERE. AND THEN
5 ALSO DISCLAIMED, THE FLEXIBLE MATERIAL THAT WOULD NOT ALLOW YOU
6 TO GO TO CERTAIN DEPTHS WITHOUT ANY FAILURE WITHOUT DEPRESSING
7 THE DEVICE. BECAUSE YOU CAN STILL HAVE A FLEXIBLE MATERIAL.
8 AS YOU POINT OUT, IT COULD BE A CAPACITY THING. SO YOU'RE NOT
9 ACTUALLY PUSHING INTO A PHYSICAL BUTTON, BUT THAT MATERIAL MAY
10 BE THIN ENOUGH IF YOU GO DOWN BELOW 10 FEET.

11 ALL OF A SUDDEN YOU DON'T HAVE --

12 THE COURT: YES, I DON'T THINK YOU CAN WALK AWAY FROM
13 THAT ASPECT OF IT.

14 MR. LEACH: SO IF WE HAVE BOTH THOSE, I THINK WE'RE
15 FINE, YOUR HONOR. THE ONLY CONCERN I HAVE WITH THE SECOND PART
16 OF THAT IS, WHAT IS OUR DISTANCE. IT'S AGAIN THIS KIND OF
17 AMBIGUOUS AQUATIC PRESSURE. IS IT 10 FEET? IS IT 20 FEET? IS
18 IT 30 FEET? IS IT 400 FEET? I WILL SUGGEST THAT I BELIEVE
19 THEY'RE TRYING TO ARGUE THAT IT CAN BE AS SHALLOW AS A SWIMMING
20 POOL.

21 THE COURT: WE'RE GOING TO TALK ABOUT PRESSURES
22 ANOTHER TIME, RIGHT?

23 MR. LEACH: WE ARE.

24 THE COURT: I DON'T KNOW THAT WE NEED TO TALK ABOUT
25 THEM TODAY. IF WE LOOK AT COLUMN 7 WHERE THIS RIGIDNESS IS

1 DISCUSSED, IT HAS TO BE CAPABLE OF WITHSTANDING PRESSURE WHILE
2 SUBMERGED IN AN AQUATIC ENVIRONMENT. OKAY. THAT'S WHAT IT
3 SAYS. AND IT CAN'T INCLUDE A FLEXIBLE MATERIAL THAT WOULD
4 ALLOW THE USER TO MANIPULATE THE CONTROLS THROUGH THE MATERIAL
5 OUTSIDE OF THE CONTAINER.

6 MS. KENNEALLY: YOUR HONOR, JUST ONE THING THAT I
7 THINK MAY FURTHER THE DISCUSSION ON MANIPULATE.

8 THE COURT: YES.

9 MS. KENNEALLY: IN THE SAME FULLER REFERENCE, IT'S
10 COLUMN 3, IT'S LINE 42 TO 45, BUT IT SAYS IN THERE "THE
11 RESILIENCY AND FLEXIBILITY OF THE TOP COVER 30, AS ENHANCED BY
12 THE STRUCTURE OF THE RECESSED POCKETS 46, 48, THEREIN ALLOW A
13 PERSON TO EASILY MANIPULATE AND TURN THE CONTROL KNOBS 84, 86
14 OF THE RADIO AS SHOWN IN FIGURE 4." SO MANIPULATE AND TURN AND
15 DEFORMABLE, I THINK THOSE ARE CHARACTERISTICS OF THE
16 FLEXIBILITY REQUIRED BY FULLER, WHICH IS WHAT WE HAD
17 DISTINGUISHED BEFORE THE PATENT OFFICE.

18 THE COURT: WELL, IF WE GO ON AND READ THAT, IT TALKS
19 ABOUT THE PERSON'S FINGER DEPRESSES THE INTERIOR SURFACE OF THE
20 POCKET INTO CONTACT WITH THE CONTROL KNOB AND THEN MOVE
21 Laterally to the position shown broken lines. SO WHEN IT SAYS
22 TURN, IT'S LIKE ON OR OFF. IT'S NOT LIKE, I'M TURNING
23 SOMETHING, LIKE I'M TWISTING A LID OFF SOMETHING.

24 MS. KENNEALLY: RIGHT. AND IF YOU LOOK AT FIGURE 4,
25 YOU CAN SEE THE INDENT, FIGURE 4 OF FULLER, AND COMPARE THAT

1 WITH FIGURE 1. YOU CAN SEE THAT THE DEFORMABILITY THERE.

2 THE COURT: I SUPPOSE I'M PUTTING THAT OFF FOR ANOTHER
3 DAY, BUT I THINK THAT THE DISCLAIMER HERE IS THAT THE COVER
4 CAN'T BE -- THE STRUCTURE CANNOT CONTAIN A MATERIAL WITHIN THE
5 STRUCTURE OF THIS CONTAINER THAT WOULD ALLOW A USER TO
6 MANIPULATE THE KNOBS THROUGH THE MATERIAL. NOW MANIPULATE IN
7 1983 MEANT ONE THING, AND I'M NOT SURE WHETHER MANIPULATE NOW
8 MEANS THE SAME THING AND, THEREFORE, IF YOU CAN SIMPLY JUST
9 SWIPE THROUGH SOMETHING, YES, YOU'RE MANIPULATING, BUT YOU'RE
10 NOT REALLY MANIPULATING AS TO WHAT THEY WERE TALKING ABOUT.

11 MR. LEACH: WELL, THERE'S LAW ON THAT, YOUR HONOR, AND
12 WHEN WE GET TO THE INFRINGEMENT CASE, WE'LL TALK ABOUT MODERN
13 ADVANCES, HOW THEY SHOULD BE READ, AND I THINK THAT'S PART OF
14 THE INFRINGEMENT ANALYSIS.

15 THE COURT: BUT THE TWO PARTS OF THIS IS IF YOUR COVER
16 UNDER PRESSURE WOULD START TO DEFORM, THEN IT ISN'T GOING TO
17 MEET RIGID EITHER.

18 MR. LEACH: RIGHT. IF WE CAN FIGURE OUT WHAT PRESSURE
19 IS.

20 THE COURT: NOW WE HAVE TO FIGURE OUT WHAT PRESSURE
21 IS.

22 MR. LEACH: YEAH. HAVE WE HAD ENOUGH ON THAT ONE,
23 YOUR HONOR?

24 THE COURT: I DON'T KNOW? DID WE? DO YOU HAVE
25 ANYTHING ELSE YOU WANT TO ADD?

1 MS. KENNEALLY: I THINK THAT'S EVERYTHING, BUT SOME OF
2 THESE OTHER ISSUES MAY OVERLAP ON THAT, BUT I THINK FOR NOW,
3 THAT'S GOOD.

4 THE COURT: ALL RIGHT. WITH REGARD TO "CONTAINER," IS
5 THERE ANY DISAGREEMENT BY THE PARTIES THAT IT HAS TO COMPLETELY
6 ENCLOSE THE DEVICE?

7 MR. LEACH: THAT'S FINE WITH THE DEFENDANTS, YOUR
8 HONOR.

9 MS. KENNEALLY: YOUR HONOR, OUR POSITION IS THAT, YOU
10 KNOW, A STRUCTURE THAT ENCLOSURES THE ELECTRONIC DEVICE IS ALL
11 THAT'S REQUIRED BY THE PATENT. I DON'T THINK THERE IS EXPRESS
12 SUPPORT IN THE PATENT FOR "COMPLETELY." I THINK THERE'S A
13 NUMBER OF DIFFERENT, YOU KNOW, EXAMPLES OF CONTAINERS THAT CAN
14 ENCLOSE AN AUDIO DEVICE. AND I MEAN, I THINK IMPORT IS
15 COMPLETELY UNSUPPORTED.

16 THE COURT: HOW CAN IT BE WATERPROOF IF IT DOESN'T
17 COMPLETELY -- IF IT JUST SAYS IT ENCLOSURES IT, THEN THAT WOULD
18 INCLUDE SOMETHING THAT'S OPEN AT SOME END. AND THE VERY
19 LANGUAGE OF THIS CLAIM -- YOU JUST CAN'T PARSE OUT WORDS. IT
20 HAS TO BE A CONTAINER, SAID CONTAINER IS WATERPROOF. AND IT
21 CAN'T BE WATERPROOF IF IT'S OPEN SOMEWHERE.

22 MS. KENNEALLY: AND I THINK OUR POSITION IS THAT THE
23 SEAL IS WHAT CREATES THE WATERPROOF NATURE.

24 THE COURT: THERE'S NOTHING IN THIS CLAIM THAT SAYS IT
25 HAS TO HAVE A SEAL.

1 MS. KENNEALLY: THE CLAIM LANGUAGE -- THE FACT THAT
2 WATERPROOF INCORPORATES A SEAL IS INCLUDED IN EVERY QUOTE IN
3 THE PATENT.

4 THE COURT: NO, IT'S NOT.

5 MS. KENNEALLY: IT'S REPEATEDLY INCLUDED THROUGHOUT.
6 THE DESCRIPTION OF WATERPROOF IS ALWAYS REFERENCED USING A
7 SEAL.

8 THE COURT: LET'S JUMP TO "WATERPROOF," BECAUSE I
9 THINK YOU'RE WRONG. I THINK THAT IF YOU LOOK AT COLUMN 7,
10 STARTING AT LINE 48, IT TALKS ABOUT THE INVENTION EMBODYING A
11 RIGID CONTAINER WITH A REMOVABLE LID FOR EASY REMOVAL OR
12 SERVICE OF THE DEVICE CONTAINED WITHIN. IN A PREFERRED
13 EMBODIMENT, AT LEAST ONE WATERPROOF SEAL IS POSITIONED BETWEEN
14 THE LID AND THE CONTAINER TO PREVENT ENTRY OF WATER INTO THE
15 CLOSED CONTAINER.

16 THERE ARE OTHER EXAMPLES IN THE PATENT THAT WOULD
17 PRESUMABLY NOT INCLUDE A SEAL, WOULD ALLOW WATER TO COME IN AND
18 BE ABSORBED BY MATERIAL SO THAT IT WOULD STILL PREVENT EXPOSURE
19 OF THE ELECTRONIC DEVICE TO WATER. IF EVERY ONE OF THEM HAS TO
20 HAVE A SEAL, THEN WHAT'S THAT FIRST EMBODIMENT YOU'RE
21 DISCUSSING? WHY ARE YOU EVEN ADDING A SEAL?

22 MS. KENNEALLY: I'M JUST LOOKING BACK.

23 THE COURT: COLUMN 7, LINE 48, THE LAST COLUMN, FIRST
24 SENTENCE THAT I STARTED AT WHERE IT INTRODUCES THE CONCEPT OF
25 THE SEAL IN A PREFERRED EMBODIMENT. BUT IT TALKS ABOUT AN

1 EMBODIMENT BEFORE THAT THAT JUST AS HAS A RIGID CONTAINER WITH
2 A REMOVABLE LID THAT CONTAINS THE DEVICE, WHICH WOULD BE IN
3 ACCORDANCE WITH THE FIGURE 7A AND B THAT HAVE THESE LITTLE
4 HILLS AND VALLEYS AND THINGS AND DON'T HAVE ANY REFERENCE TO
5 SEALS.

6 MS. KENNEALLY: THE TERM "CONTAINER WATERPROOF."

7 THE COURT: I DON'T KNOW WHAT THE HELL THAT IS. THAT
8 IS THE MOST TORTURED CONSTRUCTION OF A SENTENCE I'VE EVER SEEN.
9 THE PATENT SAYS IT'S A RIGID CONTAINER ADAPTED TO RECEIVE AN
10 ELECTRONIC AUDIO DEVICE, SAID CONTAINER WATERPROOF. NOT
11 CONTAINER WATERPROOF. I DON'T KNOW WHAT THE HELL A CONTAINER
12 WATERPROOF IS. THE CONTAINER IS WATERPROOF, AND WATERPROOF
13 DOESN'T NECESSARILY, ACCORDING TO THIS PATENT, REQUIRE THERE BE
14 A SEAL.

15 MS. KENNEALLY: YOUR HONOR, THE WATERPROOF -- IT
16 BECOMES WATERPROOF WITH THE LID AND THE SEAL BETWEEN THE
17 CONTAINER AND THE LID. AND THAT'S REPEATEDLY REFERRED TO
18 THROUGHOUT THE PATENT, THAT IT'S THE CONTAINER ITSELF WITH THE
19 LID THAT CREATES THE WATERPROOF NATURE OF IT.

20 NOW WHETHER IT'S REMOVABLE OR IT'S AN ATTACHED LID, I
21 THINK THOSE ARE THINGS THAT ARE DISPUTED. THE CONTAINER
22 BECOMES WATERPROOF -- I MEAN, HOW COULD YOU SAY THE CONTAINER
23 IS WATERPROOF AT ALL TIMES IF YOU HAVE TO OPEN THE CONTAINER TO
24 PUT THE DEVICE INTO THE CONTAINER? WHEN YOU OPEN THE DEVICE,
25 THEN YOU HAVE AN OPENING ON THAT CONTAINER. I MEAN, THAT'S THE

1 CONTAINER THAT IS REFERRED TO.

2 SO OUR UNDERSTANDING AS THIS TERM IS USED THROUGHOUT
3 AND HOW WATERPROOF IS DESCRIBED THROUGHOUT, YOU KNOW, IN THE
4 BACKGROUND OF THE INVENTION, IN THE SUMMARY OF THE INVENTION,
5 REPEATEDLY THROUGHOUT THE SPECIFICATION, AND THOSE ARE THINGS
6 THAT WE PLANNED TO POINT OUT TO YOU.

7 IF YOU WANT TO HEAR "WATERPROOF" RIGHT NOW, THEN, YOU
8 KNOW, I'M HAPPY TO POINT THAT OUT NOW. BUT OUR POSITION IS
9 THAT THE LID WITH THE CONTAINER CREATES THE SEAL. THAT IS WHAT
10 CREATES THE WATERPROOF NATURE OF THE CONTAINER.

11 THE COURT: THE CONTAINER WHICH IS THE STRUCTURE THAT
12 IS HOLDING THE ELECTRONIC AUDIO DEVICE IS ADAPTED TO RECEIVE
13 IT, WHICH MEANS IT HAS TO OPEN SOMEWHERE SO THAT IT CAN RECEIVE
14 IT.

15 MS. KENNEALLY: UM-HMM.

16 THE COURT: AND IT'S WATERPROOF. AND IF WATERPROOF
17 REQUIRES THE SEAL, THEN WHAT HAPPENS WITH THE EMBODIMENTS THAT
18 DON'T HAVE SEALS THAT TALK ABOUT THE HOUSING HAVING A SURFACE
19 THAT HAS A WATER ABSORBING LINING OR HAS SPONGES OR FOAMS OR
20 POWDERS OR OTHER THINGS TO ABSORB WATER SO IF IT GETS INSIDE
21 THE CONTAINER, IT IS STILL PROTECTING THE ELECTRONIC DEVICE
22 BEING EXPOSED TO WATER, WHICH I THINK IS WHAT WE'RE TALKING
23 ABOUT. WATERPROOF MEANS THE ELECTRONIC DEVICE IS NOT GOING TO
24 BE EXPOSED TO WATER WHETHER THE WATER GETS INSIDE THE CONTAINER
25 OR NOT.

1 NOW THE PREFERRED EMBODIMENT WOULD BE TO USE A SEAL,
2 SO NO WATER EVER GETS INSIDE. I THINK THAT MAKES SENSE. BUT
3 IT'S NOT THE ONLY EMBODIMENT DESCRIBED IN THE PATENT. I DON'T
4 THINK THIS CLAIM, BECAUSE IT MAKES NO REFERENCE TO SEALS, IS
5 LIMITED TO JUST CONTAINERS THAT HAVE SEALS.

6 MS. KENNEALLY: YOUR HONOR, THE ADDITIONAL COMPONENTS
7 THAT YOU REFER TO ARE COMPONENTS THAT -- ARE COMPONENTS TO
8 REDUCE DAMAGE TO THE DEVICE IF A LEAK OCCURS. THEY'RE NOT
9 DESCRIBED IN A WAY THAT CREATES THE WATERPROOF NATURE OF THE
10 CONTAINER. THEY'RE ADDITIONAL COMPONENTS. THEY'RE NOT MEANT
11 TO REPLACE THE SEAL. THEY'RE SOMETHING IN ADDITION TO THE
12 SEAL. AND THAT'S AT COLUMN 3, LINE 57.

13 YOUR HONOR, I'LL POINT YOU, IN FACT, TO COLUMN 8
14 FIRST, COLUMN 8, LINE 64.

15 THE COURT: COLUMN 8?

16 MS. KENNEALLY: COLUMN 8, CORRECT, YOUR HONOR. I
17 APOLOGIZE.

18 THE COURT: OKAY.

19 MS. KENNEALLY: COLUMN 8, LINE 64. SOME EMBODIMENTS
20 OF THE DEVICE OF THE PRESENT INVENTION COMPRISE OF ONE OR MORE
21 COMPONENTS THAT PREVENT WATER FROM BREACHING AND DAMAGING THE
22 AUDIO DEVICE. SUCH COMPONENTS MAY ACT AS --

23 THE COURT: YOU CAN'T READ THAT FAST IF YOU WANT TO
24 HAVE A RECORD OF WHAT YOU'RE SAYING.

25 MS. KENNEALLY: OKAY. I'LL SLOW DOWN. "SOME

1 COMPONENTS MAY ACT TO PREVENT LEAKAGE OCCURRING OR TO REDUCE"--
2 NOW I'M MOVING ON TO COLUMN 9, LINE 1 -- "DAMAGE OF WATER
3 SHOULD A LEAK OCCUR. SUCH COMPONENTS MAY INCLUDE EXTERNAL
4 SHOCK ABSORBING STRUCTURES, PRESSURE RELEASE VALVES, SEALS,
5 INTERNAL WALLS CREATING WATERPROOF COMPARTMENTS OR CHAMBERS,
6 AND WATER-ABSORBING MATERIALS WITHIN THE CONTAINER."

7 AND THEN GOING BACK TO COLUMN 3, WHICH IS WHERE I
8 POINTED YOU TO FIRST, I WAS KIND OF JUMPING AROUND A BIT, UNDER
9 THE SUMMARY OF THE INVENTION, WHERE IT TALKS ABOUT IN DIFFERENT
10 PREFERRED EMBODIMENTS, YOU KNOW, ONE REQUIRES A REMOVABLE LID
11 FOR EASY REMOVAL OR SERVICE OF THE DEVICE CONTAINED WITHIN.
12 AND ANOTHER PREFERRED EMBODIMENT, A WATERPROOF SEAL IS
13 POSITIONED BETWEEN THE LID AND THE CONTAINER TO PREVENT ENTRY
14 OF WATER.

15 AND IT GOES ON TO SAY RIGHT ON COLUMN 3, LINE 57, "THE
16 INVENTION FURTHER COMPRISES COMPONENTS WHICH PREVENT WATER FROM
17 REACHING AND DAMAGING THE DEVICE," INCLUDING SOME OF THOSE
18 OTHER COMPONENTS THAT YOUR HONOR WAS REFERRING TO. OUR
19 POSITION AND OUR UNDERSTANDING OF THE PATENT IS THOSE ARE ONLY
20 ADDITIONAL COMPONENTS THAT REDUCE DAMAGE ONCE A LEAK OCCURS,
21 BUT THEY AREN'T WHAT'S CREATING THE WATERPROOF NATURE OF THE
22 CONTAINER.

23 THE COURT: I STILL NEED FOR YOU TO EXPLAIN TO ME WHAT
24 THE FIRST SENTENCE OF COLUMN 7 AT LINE 48 MEANS THEN.

25 MS. KENNEALLY: WELL, THE INVENTION -- I'M READING

1 WHERE YOU POINTED ME TO, YOUR HONOR. THE INVENTION FURTHER
2 EMBODIES "PROVIDING A RIGID CONTAINER WITHIN A REMOVABLE LID
3 FOR EASY REMOVAL OR SERVICE OF THE DEVICE CONTAINED WITHIN." I
4 THINK THAT'S A DESCRIPTION OF THE CONTAINER. AND IT SAYS "IN A
5 PREFERRED EMBODIMENT, AT LEAST ONE SEAL IS POSITIONED BETWEEN
6 THE LID AND THE CONTAINER TO PREVENT ENTRY OF WATER INTO THE
7 CLOSED CONTAINER."

8 THE COURT: RIGHT. SO IN EVERY EMBODIMENT, YOU HAVE
9 TO HAVE A SEAL, EVEN THOUGH IT SAYS "IN A PREFERRED
10 EMBODIMENT"? I'M NOT IMPORTING A LIMITATION IN YOUR OPINION
11 INTO CLAIM 1 BY REQUIRING THAT THE CONTAINER IN CLAIM 1 HAVE A
12 SEAL TO ENABLE IT TO BE WATERPROOF.

13 MS. KENNEALLY: THE PREFERRED EMBODIMENT THERE
14 DISCUSSES WHERE THE SEAL IS POSITIONED BETWEEN THE LID AND THE
15 CONTAINER. THAT'S THE PREFERRED EMBODIMENT. IT DOESN'T REJECT
16 THE IDEA THAT THE SEAL COULD BE PLACED IN OTHER POSITIONS. SO
17 I DON'T THINK THAT EXCLUDES THAT THE SEAL IS WHAT IS CREATING
18 THE WATERPROOF NATURE. I THINK THAT SENTENCE THAT YOU POINTED
19 US TO DESCRIBES THE CONTAINER, AND THEN IT TALKS ABOUT THE
20 WATERPROOF NATURE OF IT AND WHERE THE SEAL CAN BE POSITIONED.

21 THE COURT: WHERE ELSE -- IF YOU DON'T HAVE A SEAL
22 BETWEEN THE LID AND THE TOP, YOU HAVE IT SOMEWHERE ELSE, WHAT
23 GOOD IS IT DOING THEN IF YOUR POSITION IS YOU NEED A SEAL TO
24 MAKE IT WATERPROOF?

25 MS. KENNEALLY: I THINK IN ONE OF THE ACCUSED

1 PRODUCTS, THERE ARE TWO SEALS.

2 THE COURT: I DON'T CARE ABOUT THE ACCUSED PRODUCTS.
3 I'M TALKING ABOUT THE PATENT.

4 MS. KENNEALLY: JUST AN EXAMPLE OF WHERE THE OTHER
5 SEAL COULD BE IS WHY I BROUGHT THAT UP. ONE SEAL COULD BE
6 BETWEEN, YOU KNOW, THE FACE OF THE DEVICE AND THE RIM OF THE
7 LID.

8 THE COURT: WELL, THE LID HERE HAS TO BE -- THE SEAL
9 HAS TO BE BETWEEN THE LID AND THE CONTAINER. AND SO I'M NOT
10 QUITE -- IF YOU'RE DEFINING WATERPROOF, THAT WATERPROOF
11 REQUIRES THAT TO PREVENT EXPOSURE TO WATER, IT HAS TO HAVE A
12 SEAL, AT LEAST ONE WATERPROOF SEAL, THEN I'M STILL A LITTLE
13 CONFUSED THAT NONE OF THESE STRUCTURES COULD EVER MEET THIS.
14 IF SOMEBODY MADE A WHOLE THING OUT OF RUBBER SO THAT WHEN YOU
15 ENCLOSED IT, IT JUST DIDN'T LEAK, IT WOULD HAVE NO SEAL, IT
16 WOULDN'T FALL WITHIN THE SCOPE OF THIS PATENT BECAUSE THAT'S
17 NOT WATERPROOF?

18 MS. KENNEALLY: SAY THAT AGAIN, YOUR HONOR.

19 THE COURT: IF SOMEONE COULD MAKE A STRUCTURE THAT HAD
20 NO SEAL, ONCE IT WAS CLOSED, IT DOESN'T LEAK BECAUSE OF THE
21 MATERIALS THEY USED, THEN IT WOULDN'T FALL WITHIN THE SCOPE OF
22 CLAIM 1 BECAUSE YOU SAY CLAIM 1, THE WORD "WATERPROOF" REQUIRES
23 THAT THE DEVICE HAVE A SEAL.

24 MS. KENNEALLY: I DON'T THINK IT WOULD BECAUSE THERE
25 WOULD BE NO WAY TO GET THE DEVICE INTO THE CONTAINER THAT YOU

1 DESCRIBED.

2 THE COURT: SURE. YOU COULD OPEN IT AND YOU COULD
3 CLOSE IT, AND WHEN IT CLOSES, IT DOESN'T LEEK.

4 MS. KENNEALLY: IN THAT HYPOTHETICAL IN OUR PROPOSED
5 CONSTRUCTION, THAT WOULDN'T INFRINGE.

6 THE COURT: I KNOW YOU OBVIOUSLY DISAGREE THAT A SEAL
7 IS PART OF THE DEFINITION OF WATERPROOF.

8 MR. LEACH: DO YOU WANT A BRIEF ...?

9 THE COURT: YES, GO AHEAD.

10 MR. LEACH: I'LL TRY TO BE MOVE FAIRLY QUICKLY ON
11 THIS, YOUR HONOR. SO FIRST OF ALL, I THINK WE ARE IN AGREEMENT
12 WITH THE COURT'S CONSTRUCTION FOR WATERPROOF. WE WEREN'T SURE
13 IT REALLY NEEDED A CONSTRUCTION. I THINK PEOPLE UNDERSTAND
14 WHAT WATERPROOF IS. BUT TO PREVENT -- I THINK, AS THE COURT
15 SAYS IN ITS EXPLANATION, MAYBE IT'S BETTER TO PREVENT THE
16 ELECTRONIC DEVICE FROM EXPOSURE TO WATER, JUST SO THAT IT'S
17 CLEAR, OR PLAIN AND ORDINARY MEANING.

18 OUR FIRST POINT IS THEY DO USE THE WORD "WATERPROOF"
19 AND "SEAL" SEVERAL PLACES IN THE PATENT. I DON'T THINK THAT
20 SUPPORTS THEIR POSITION. I THINK IT SUPPORTS THE POSITION THAT
21 WATERPROOF IS AN ADJECTIVE DESCRIBING THE NOUN SEAL, JUST LIKE
22 IT ALSO DESCRIBES OTHER NOUNS, SUCH AS A WATERPROOF CABLE, OR A
23 WATERPROOF HOUSING OR A WATERPROOF ENCLOSURE. WATERPROOF WHEN
24 YOU LOOK AT THE WAY IT'S USED THROUGHOUT THIS PATENT, IT'S USED
25 AS AN ADJECTIVE. THINGS CAN BE WATERPROOF, INCLUDING A SEAL.

1 I THINK THE BIGGEST THING WHERE THIS ARGUMENT KIND OF
2 FALLS FLAT FOR THEM, AND THERE IS CASE LAW THAT SAYS WHEN YOU
3 CONSTRUE A TERM, EVEN A NONASSERTED CLAIM, IT BECOMES
4 NONSENSICAL BY THE CONSTRUCTION, THE PRESUMPTION THAT IS NOT
5 THE PRECISE CONSTRUCTION. CLAIM 16 SPECIFICALLY CLAIMS THE
6 PREFERRED EMBODIMENT "WHEREIN A SEAL BETWEEN SAID CONTAINER AND
7 SAID LID IS CONFIGURED TO BE WATERPROOF."

8 NOW LET'S FOLLOW THEIR CONSTRUCTION. NOW YOU HAVE
9 "WHEREIN A SEAL BETWEEN SAID CONTAINER AND SAID LID IS
10 CONFIGURED TO BE HAVING AT LAST ONE SEAL TO PREVENT ENTRY OF
11 WATER." NOW YOU HAVE A SEAL CONFIGURED TO HAVE A SEAL. SO
12 AGAIN, CASE LAWS SAYS YOU SHOULD NOT CONSTRUE TERMS TO MAKE
13 EVEN UNASSERTED CLAIMS NONSENSICAL.

14 FINALLY, I UNDERSTAND THIS IS INTRINSIC EVIDENCE BUT
15 STILL THOUGHT IT WAS TELLING WHEN I HAD THE OPPORTUNITY TO
16 DEPOSE ONE OF THE INVENTORS IN THIS CASE OF THE '032 PATENT,
17 AND I HAD THE BENEFIT OF HAVING THEIR CONSTRUCTION AT THE TIME,
18 AND I ASKED:

19 "DO YOU RECALL, AT THE TIME THAT YOU WERE WORKING AT
20 X-1 AUDIO, HAVING ANY SPECIAL MEANING FOR THE TERM
21 'WATERPROOF'?"

22 "NO, I CAN'T REMEMBER SPECIFICALLY."

23 "WHEN YOU WERE WORKING AT X-1 AUDIO, DID YOU INTEND
24 FOR THE TERM "WATERPROOF" TO MEAN HAVING AT LEAST ONE SEAL TO
25 PREVENT THE ENTRY OF WATER?"

1 "NO, THAT WOULD BE TOO LIMITING. I THINK IT COULD
2 MEAN DIFFERENT THINGS."

3 AND I THINK THAT'S PRETTY OBVIOUS, YOUR HONOR, I MEAN,
4 IN MY HUMBLE OPINION. SO UNLESS THERE ARE ANY QUESTIONS, I
5 HAVE NOTHING FURTHER ON THIS TERM.

6 THE COURT: NO, THANK YOU.

7 MS. KENNEALLY: YOUR HONOR, I JUST HAVE A COUPLE OF
8 THINGS.

9 THE COURT: SURE. GO AHEAD.

10 MS. KENNEALLY: YOUR HONOR, ONE OF THE THINGS THAT
11 MR. LEACH HAS SAID IS THAT, YOU KNOW, THEY'RE FINE WITH THE
12 COURT'S PROPOSED CONSTRUCTION OF "TO PREVENT THE EXPOSURE TO
13 WATER," AND ALSO THAT IT COULD ALSO BE THE PLAIN AND ORDINARY
14 MEANING. NOW THIS -- A LARGE PART OF THIS DISPUTE CAME UP
15 BECAUSE THE POSITION THAT THE DEFENDANTS ARE TAKING IS THAT,
16 YOU KNOW, THEIR PRODUCTS AREN'T WATERPROOF DESPITE EXPRESS
17 ADVERTISING AND MARKETING TO THE CONTRARY.

18 SO THIS CAME UP EARLY ON IN THIS CASE. OUR BELIEF WAS
19 THAT THEY MUST THINK THAT "WATERPROOF" HAS A SPECIAL MEANING IN
20 THE '032 PATENT BECAUSE THEY'RE TAKING THE POSITION THAT EVEN
21 THOUGH THEY'RE CLAIMING THAT THE ACCUSED PRODUCTS ARE ALL
22 WATERPROOF, SOMEHOW THEY AREN'T WATERPROOF IN THE CONTEXT OF
23 THE '032 PATENT. WELL, WHEN GIVEN THE OPPORTUNITY TO COME
24 FORWARD WITH WHAT THEIR PROPOSED CONSTRUCTION FOR THAT TERM
25 WAS, THEY CAME BACK AND SAID, IT'S THE PLAIN AND ORDINARY

1 MEANING.

2 WE WENT AND PROPOSED CONSTRUCTION BASED ON HOW WE
3 UNDERSTOOD WHAT THE TERM MEANS IN THE CONTEXT OF THE PATENT. I
4 ARTICULATED SOME OF THIS, BUT THE BACKGROUND OF THE INVENTION
5 DESCRIBES -- THE DISCLOSURE PROVIDES, AND THIS IS AT COLUMN 1,
6 LINES 35 TO 39. THE DISCLOSURE PROVIDES A SYSTEM THAT
7 FUNCTIONS WHILE BEING SUBMERGED DUE TO THE MAINTENANCE OF A
8 WATERPROOF SEAL AGAINST AQUATIC PRESSURES.

9 THE SUMMARY OF THE INVENTION DESCRIBES, YOU KNOW, IN
10 ANOTHER PREFERRED EMBODIMENT A WATERPROOF SEAL IS POSITIONED
11 BETWEEN THE LID AND THE CONTAINER TO PREVENT ENTRY OF WATER
12 INTO THE CLOSED CONTAINER.

13 AND THE SPECIFICATION OF THE PATENT, YOU KNOW, FURTHER
14 PROVIDES IN THE PREFERRED EMBODIMENT AT LEAST ONE SEAL IS
15 POSITIONED BETWEEN THE LID AND THE CONTAINER TO PREVENT ENTRY
16 OF WATER INTO THE CLOSED CONTAINER AND THAT ONE OF SKILL IN THE
17 ART IS AWARE OF MULTIPLE WAYS OF PROVIDING A WATERPROOF SEAL
18 BETWEEN A LID AND A CONTAINER." YOU KNOW, AND IT GOES ON TO
19 SAY "WITHOUT INTENT TO LIMIT THE SCOPE OF THE INVENTION
20 DISCLOSED HEREIN, SUCH SEALS MAY CONSIST OF ONE OR MORE OF THE
21 FOLLOWING, AN O-RING, RUBBER LINING, OR SILICONE BASED GEL.

22 THE SPECIFICATION FURTHER PROVIDES THAT THE INVENTION
23 EMBODIES THE USE OF COMPONENTS TO SECURE THE LID TO THE
24 CONTAINER AND TO CLOSE THE SEAL BETWEEN THE LID AND THE
25 CONTAINER. AND IT DESCRIBES HOW SUCH SEALS ARE CREATED WITH

1 THE USE OF O-RINGS TO BE COMPRESSED ON THE PERIMETER OF THE TOP
2 OF THE CONTAINER BOX.

3 THE PATENT ALSO POINTS TO OTHER USES OF WATERPROOF
4 THAT ARE CONSISTENT WITH THE USE OF A SEAL THAT AREN'T
5 DESCRIBING THE WATERPROOF CONTAINER. FOR EXAMPLE, COLUMN 11,
6 LINE 40. I'M SORRY, IT'S COLUMN 13, LINE 40. IT TALKS ABOUT A
7 HYDROSTATIC SEAL. AND THIS IS TALKING ABOUT, YOU KNOW, A
8 WATERPROOF JUNCTURE. IT SAYS THAT "THE PHOTOSTATIC SEAL IS
9 ESTABLISHED AND PROVIDES FOR A PRESSURE RESISTENT AND
10 WATERPROOF JUNCTURE BETWEEN THE MALE AND FEMALE ADAPTERS." AND
11 THAT'S COLUMN 13, LINE 43 TO -- OR I GUESS, THAT'S 48 TO 51.

12 AND IT GOES ON TO TALK ABOUT SPEAKERS. AND COLUMN 16,
13 YOU KNOW, THE HOUSING -- THE SPEAKER HOUSING IT'S DISCUSSING.
14 THIS IS COLUMN 16, AND IT SAYS "THE HOUSING MAY ALSO INCLUDE
15 O-RINGS TO ENSURE THAT THE HOUSING REMAINS WATERPROOF." AND
16 O-RINGS WERE A SPECIFIC EXAMPLE OF THE TYPE OF SEALS THAT COULD
17 BE USED.

18 AND LASTLY, IT TALKS ABOUT VARIOUS CABLES THAT ALSO
19 INCORPORATE A SEAL.

20 THE COURT: LET'S TALK ABOUT FIGURE 8. AND IT'S IN
21 THE PATENT AT COLUMN 11, LINES -- WELL, THE SPECIFIC PART I'M
22 CONCERNED ABOUT STARTS AT LINE 36. FIGURE 8 IS YOUR
23 ROUND-SHAPED HOUSING AND THE ROUND CONTAINER MAY HAVE A
24 THREADED SURFACE TO ENGAGE A THREADED SURFACE ON THE LID. SO
25 BASICALLY IT LOOKS LIKE A JAR.

1 THERE IS NO DISCUSSION IN THE EMBODIMENT OF FIGURE 8,
2 WHICH IS A WATERPROOF CONTAINER, ABOUT SEALS. YOU'RE GOING TO
3 SCREW THE COVER ON, AND THAT'S GOING TO CREATE THE WATERPROOF
4 NATURE OF THE EMBODIMENT. KIND OF REVERSE OF A JAR THAT KEEPS
5 WATER IN, THIS IS GOING TO KEEP WATER OUT.

6 MS. KENNEALLY: IT SAYS IN COLUMN 11 "IN SOME
7 EMBODIMENTS THE COMPONENTS ARE WATERPROOF AND ARE CAPABLE OF
8 WITHSTANDING PRESSURE ENCOUNTERED WHILE SCUBA DIVING BASED ON
9 THE PATENT'S OTHER USE.

10 THE COURT: NO, I MEANT WITH FIGURES 8A THROUGH C, AN
11 EMBODIMENT OF THE HOUSING IS SHOWN HAVING A ROUND SHAPE AS
12 OPPOSED TO A RECTANGULAR SHAPE OF THE HOUSING SHOWN IN FIGURE
13 1, WHICH THROWS OUT, BY THE WAY, YOUR CONSTRUCTION OF THE
14 STRUCTURE, BUT WHATEVER. "IN SOME EMBODIMENTS, THE ROUND
15 CONTAINER, 800, MAY HAVE A THREADED SURFACE, 804, TO ENGAGE A
16 THREADED SURFACE, 805, ON THE LID, 802. THIS EMBODIMENT ALLOWS
17 FOR THE STORAGE OF AN AUDIO DEVICE, 806, INSIDE THE CONTAINER,
18 800, AND THE LID, 802, WITHOUT THE NEED FOR EXTERNAL LATCHES
19 AND BUCKLES." NOTHING IN THERE ABOUT SEALS.

20 MS. KENNEALLY: THE NEXT PARAGRAPH RECEIVES TO -- IT
21 DOESN'T EXPRESSLY REFER TO WATERPROOF, BUT BASED ON THE PATENTS
22 OTHER USE AND DESCRIPTION OF WATERPROOF, WE THINK THAT IT
23 INCORPORATES A SEAL.

24 THE COURT: THE NEXT PARAGRAPH HAS NOTHING TO DO WITH
25 FIGURE 8. IT'S GOING ON TO TALK ABOUT SOME EMBODIMENTS. I'M

1 TALKING ABOUT 8. AND I DON'T SEE ANYWHERE IN 8, WHICH IS
2 DISCLOSED IN THIS PATENT AND AS IT'S DESCRIBED, THAT A PERSON
3 OF SKILL IN THE ART WOULD UNDERSTAND THAT TO BE WATERPROOF, THE
4 DEVICE, THE STRUCTURE, THE HOUSING, THE CONTAINER HAS TO HAVE A
5 SEAL. IT COULD HAVE A SCREW TOP, A THREADED SURFACE WHICH
6 WOULD EFFECTIVELY KEEP WATER OUT. AND THEN IN CASE IT LEAKED,
7 YOU MIGHT HAVE THOSE OTHER COMPONENTS INSIDE JUST TO MAKE SURE
8 IN CASE OF LEAKAGE, THE DEVICE WOULD HAVE ADDITIONAL
9 PROTECTION.

10 I THINK YOUR PREFERRED EMBODIMENT, WHICH WOULD BE THE
11 MOST PRACTICAL WAY PEOPLE WOULD APPLY IT, WOULD BE TO HAVE A
12 SEAL. I DON'T CONTEST THAT, BUT IT'S AN UNNECESSARY LIMITATION
13 FOR ME TO IMPORT INTO THE CLAIM TO SAY THAT "WATERPROOF"
14 REQUIRES THAT THERE BE A SEAL BETWEEN THE OPENING AND THE
15 CONTAINER. THERE ARE OTHER WAYS OF DOING IT THAT ARE DISCLOSED
16 IN THE PATENT THAT DON'T INCORPORATE THE USE OF A SEAL.

17 SO THE COURT IS NOT GOING TO IMPORT THAT LIMITATION,
18 UNLESS YOU CAN SHOW ME SOMEWHERE IN THE PATENT, WHEN WE RECESS,
19 WHICH WE'RE GOING TO DO RIGHT NOW, THAT 8 ALSO DISCLOSES THAT
20 THERE HAS TO BE A SEAL, BECAUSE IT DOESN'T SAY THAT. IT SAYS
21 IT'S A THREADED SURFACE. AND I THINK THAT IT IS AN OVERREAD OF
22 "WATERPROOF" TO BE ANYTHING MORE THEN PREVENTING EXPOSURE OF
23 WATER TO THE ELECTRONIC DEVICE.

24 MS. KENNEALLY: THE DESCRIPTION OF 8 HERE, YOUR HONOR,
25 IS DESCRIBING THE SHAPE AND IS NOT NECESSARILY, YOU KNOW,

1 EXPRESSLY REFERRING TO THE WATERPROOF NATURE OF THE CONTAINER
2 AS USED IN THE CLAIMS. I THINK YOUR HONOR CORRECTLY POINTS
3 THAT OUT. OUR UNDERSTANDING IS THAT "WATERPROOF" AS USED
4 THROUGHOUT THE PATENT CONTINUALLY AND REPEATEDLY REFERS TO THE
5 USE OF A SEAL.

6 SO THIS DESCRIPTION, WHICH IS IDENTIFYING AN
7 ALTERNATIVE SHAPE THAT CAN BE USED AND SOME OTHER
8 CHARACTERISTICS OF THE CONTAINER ISN'T FOCUSED ON THE
9 WATERPROOF NATURE OF THAT. BUT YOU'RE CORRECT, RIGHT HERE, IT
10 DOESN'T USE THE WORD "WATERPROOF" IN THIS PARTICULAR PARAGRAPH.

11 THE COURT: WHY DON'T WE TAKE A COUPLE MINUTES. WHILE
12 WE'RE DOING THAT, I'M GOING TO TRY IT GIVE YOU A WRITTEN COPY
13 OF "RIGID CONTAINER" SO THAT WE CAN LEAVE ALL ON THE SAME PAGE.
14 I DON'T NECESSARILY WANT TO GO BACK AND REVISIT IT, BUT I WANT
15 TO COLLECT MY THOUGHTS ON THAT BEFORE WE MOVE ON MUCH FARTHER.

16 "WATERPROOF" WILL BE CONSTRUED AS TO PREVENT THE
17 EXPOSURE TO WATER OF THE ELECTRONIC DEVICE.

18 AND WHEN WE COME BACK, WE'LL TALK ABOUT "ADAPTED TO."
19 I AM PERSUADED BY THE DEFENDANTS' ARGUMENT THAT IN THE CONTEXT
20 OF THIS PATENT, THE NARROW CONSTRUCTION THAT IN THE DRAFTING OF
21 "ADAPTED TO" REQUIRES THAT IT BE AN INTENTIONAL ACT, AN
22 AFFIRMATIVE ACT, IT'S NOT JUST THAT COULD BE CAPABLE OF IT.
23 I'M NOT SURE YOU WERE EVER MAKING THAT ARGUMENT AND WHETHER THE
24 WHOLE THING WAS JUST A STRAW DOG, BUT TO THE EXTENT YOU HAVE A
25 DISAGREEMENT THAT "ADAPTED TO" MEANS CAPABLE OF AS OPPOSED TO

1 MADE OR DESIGNED TO, WE'LL PICK UP WITH THAT. ALL RIGHT.
2 WE'LL TAKE 10 MINUTES.

3 (COURT IN RECESS AT 11:08 A.M.)

4 (CALL TO ORDER OF THE COURT AT 11:20 A.M.)

5 THE COURT: OKAY. WE'RE BACK FROM THE BREAK, AND I
6 HAVE HANDED TO COUNSEL WHAT THE COURT'S NOTES REFLECT WERE THE
7 CONSTRUCTIONS THAT I SETTLED ON FOR "RIGID CONTAINER" AND
8 "WATERPROOF" AND ANTICIPATING "ADAPTED TO" WILL BE AS WE
9 DISCUSSED. BUT OTHER THAN THE FACT THAT YOU MAY DISAGREE WITH
10 THE CONSTRUCTION, DOES ANYONE HAVE ANY ISSUES THAT THAT DOESN'T
11 REFLECT WHAT I SAID?

12 MR. LEACH: NOT FROM THE DEFENDANTS, YOUR HONOR.

13 THE COURT: OKAY. THANK YOU.

14 MS. KENNEALLY: NO, YOUR HONOR.

15 THE COURT: AND IF YOU HAVE AN OBJECTION NOW, PLEASE
16 ON THE RECORD NOW, YOU FORMALLY RESERVE YOUR OBJECTION TO THE
17 CLAIM CONSTRUCTION, SO YOU DON'T WAIVE LIKE YOU ACCEPTED IT,
18 DOES ANYONE HAVE ANY OBJECTION TO THOSE CLAIMS CONSTRUCTIONS
19 FOR THE FIRST TWO?

20 MR. LEACH: NO OBJECTION FROM DEFENDANTS, YOUR HONOR.

21 THE COURT: ANY OBJECTION? I THINK THE PLAINTIFF IS
22 GOING TO OBJECT TO "WATERPROOF."

23 MS. KENNEALLY: CORRECT, YOUR HONOR, FOR MANY OF THE
24 REASONS THAT WERE DISCUSSED EARLIER.

25 THE COURT: YOUR OBJECTION IS NOTED AND RESERVED ON

1 THE COURT'S CONSTRUCTION OF "WATERPROOF."

2 MS. KENNEALLY: THANK YOU.

3 THE COURT: ALL RIGHT. WITH "ADAPTED TO," ARE WE GOOD
4 ON "ADAPTED TO"?

5 MS. SZPONDOWSKI: YOUR HONOR, I JUST WANT TO SAY A
6 COUPLE OF THINGS. WE DO THINK THE CONSTRUCTION YOUR HONOR
7 PROPOSED IS BETTER THAN JUST SIMPLY "DESIGNED TO," BUT I WANT
8 TO POINT OUT "ADAPTED TO" IS USED IN THE CLAIMS IN A FEW
9 DIFFERENT WAYS. IT'S NOT JUST USED WITH RESPECT TO ONE
10 LIMITATION AND THE "DESIGN TO." SO THE ISSUE IS, HOW BROAD IS
11 "ADAPTED TO"? SO WE HAVE A RANGE, WE HAVE "DESIGNED TO," I
12 THINK WE HAVE "ADAPTED TO," AND "CAPABLE OF "IS PROBABLY REALLY
13 THE MOST BROADEST TYPE OF LANGUAGE.

14 AND THE WORDS "DESIGNED TO" ARE USED IN THE PATENT
15 WITH RESPECT TO THE RIGID CONTAINER ADAPTED TO RECEIVE THE
16 ELECTRONIC AUDIO DEVICE. IT'S NOT USED WITH RESPECT TO SOME OF
17 THE OTHER LIMITATIONS. AND I JUST WANT -- SO WITH RESPECT TO
18 THE CONTROL DEVICES, THOSE ARE DESCRIBED AS SUITABLE FOR
19 MANIPULATING THE DEVICE, AND THE SUITABLE FOR LANGUAGE IS
20 CONSISTENT WITH THE DICTIONARY DEFINITION OF "ADAPTED TO," AND
21 THEN THE MORE BROADER EVEN LANGUAGE "CAPABLE OF" IS USED ALSO
22 WITH RESPECT TO SOME OF THESE LIMITATIONS. BUT THEN THE
23 PATENTEE USED THE TERMINOLOGY ADAPTED TO IN THE ACTUAL CLAIM
24 LANGUAGE. WHAT IS KIND OF INTERESTING IS IN THE CLAIMS, THE
25 PATENTEE USED "CONFIGURED TO," "ADAPTED TO," AND "CAPABLE OF"

1 WHICH WOULD INDICATE THAT THEY BELIEVE THAT THOSE HAVE
2 DIFFERENT MEANINGS. AND AS I MENTIONED BEFORE, "DESIGNED TO"
3 IS USED ONLY IN THE SPECIFICATION WITH RESPECT TO THE CONTAINER
4 UNIT FIT OF THE ELECTRONIC DEVICE.

5 SO WE WOULD SUBMIT THAT "DESIGNED TO" IS TOO NARROW
6 WITH RESPECT TO AT LEAST ALL OF THE LIMITATIONS THAT DON'T DEAL
7 WITH THE CONTAINER UNIT. WE DON'T THINK IT'S AS BROAD AS
8 "CAPABLE OF" BECAUSE THAT WASN'T THE LANGUAGE THAT THE PATENTEE
9 CHOSE TO USE FOR THOSE TERMS. CLEARLY THE PATENTEE KNEW HOW
10 USE "CAPABLE OF," BUT WE THINK IT'S SOMEWHERE IN BETWEEN
11 "DESIGNED TO" AND "CAPABLE OF" WHICH IS "ADAPTED TO."

12 THE COURT: "ADAPTED TO" THE WAY I UNDERSTAND IT FROM
13 FEDERAL CIRCUIT CASE LAW HERE IS IT'S A TERM OF ART IN DRAFTING
14 AND SO IT DOESN'T HAVE LIKE A SEPARATE MEANING. IT CAN BE
15 DRAFTED TO MEAN A BROADER "CAPABLE OF," A PAPER CLIP CAN BE
16 CAPABLE OF BEING USED TO OPEN A DOOR IF YOU PROPERLY SQUISH IT.
17 OR IT'S A DELIBERATE ACTION THAT IS MEANT TO ACHIEVE A GOAL.

18 AND IT APPEARS TO THE COURT CONSISTENT THROUGHOUT THIS
19 PATENT THE USE, THE CHOICE TO USE THE DRAFTED LANGUAGE "ADAPTED
20 TO" WAS MEANT TO INCLUDE INTENTIONAL ACTS, NOT THINGS THAT ARE
21 JUST BY HAPPENSTANCE SOMETHING THAT IT CAN DO, BUT IT WILL DO.
22 IT'S MEANT TO DO IT. IT'S AN AFFIRMATIVE ACTION.

23 AND THE COURT USES A VARIETY OF LANGUAGE, NOT JUST
24 "DESIGNED," THEY TALK ABOUT "CONFIGURED," "MADE TO," "MEANT
25 TO," AND "DESIGNED TO." NOW IT'S POSSIBLE THAT IF WE LIMIT IT

1 TO "DESIGNED TO," THAT MIGHT SUGGEST TO THE JURY, IF NOT TO A
2 PERSON OF ORDINARY SKILL IN THE ART, THAT THAT REQUIRES SOME
3 SPECIAL LEVEL OF ENGINEERING AS OPPOSED TO IT WAS MADE TO DO
4 THAT. AND I'M COMFORTABLE WITH IT.

5 THE ONLY THING I WANT TO ACCOMPLISH HERE IS I'M NOT
6 GOING TO HEAR ARGUMENT LATER THAT WELL, THIS WASN'T MADE TO DO
7 THAT, BUT IT CAN. BECAUSE I DON'T THINK THAT IT CAN IS THE
8 APPROPRIATE ANALYSIS FOR "ADAPTED TO" IN THE CONTEXT OF THIS
9 PATENT, UNLESS IT WAS SPECIFICALLY WRITTEN THAT ONE OF THESE
10 CLAIMS HAS THAT BROADER MEANING. AND WHAT I THINK I'M HEARING
11 THE PLAINTIFFS SAY IS THAT NO, IT'S THE NARROWER DRAFTING
12 CONSTRUCTION. IT'S AN INTENTIONAL AFFIRMATIVE "MEANT TO." YOU
13 JUST DON'T LIKE THE WORD "DESIGNED" FOR SOME REASON, AND SO USE
14 "MADE TO," "CONFIGURED TO," "DESIGNED TO," THEY SEEM TO BE
15 SOMEWHAT INTERCHANGEABLE IN THE FEDERAL CIRCUIT'S POINT OF
16 VIEW, BUT WHAT IT IS, IS IT'S NOT SIMPLY CAPABLE OF
17 ACCOMPLISHING IT, BUT THAT IT'S MEANT TO DO THE DESIGNATED
18 FUNCTION.

19 MS. SZPONDOWSKI: I THINK WE PREFER THE "MADE TO"
20 LANGUAGE TO "DESIGNED TO" BECAUSE "DESIGNED TO" THAT FEELS VERY
21 NARROW TO ME. DO I THEN HAVE TO HAVE DESIGN DOCUMENTS AND WHAT
22 DO I -- YOU KNOW, AS SOMEONE IN THE JURY, WHAT ARE THEY GOING
23 TO THINKING "DESIGNED TO" MEANS. BUT I THINK "MADE TO" ...

24 THE COURT: WE CAN SKIP THE SYNONYMS AND SAY "ADAPTED
25 TO" WAS MEANT TO DO THE DESIGNATED FUNCTION.

1 MS. LAMKIN: YOUR HONOR, WE THINK THEY INVOKED A
2 SPECIFIC TERM OF ART THAT HAS A SPECIFIC MEANING, AND
3 THROUGHOUT THE PATENT "ADAPTED TO" MEANS "DESIGNED TO," AND WE
4 WOULD LIKE TO HOLD THE PATENTEE TO THE WORDS THEY CHOSE,
5 "DESIGNED TO." AND I CAN GO THROUGH THOSE EXAMPLES, IF THE
6 COURT WOULD FIND IT HELPFUL, FROM THEIR ORIGINAL CONSTRUCTION.
7 WE AGREE WITH THE COURT'S CONSTRUCTION HERE AND THINK "DESIGNED
8 TO" IS NECESSARY.

9 THE COURT: I DON'T SEE THE FEDERAL CIRCUIT IN *ASPEX*
10 OR ANY OF THE OTHER CASES THAT I BRIEFLY LOOKED AT MAKING THIS
11 SPECIFIC DISTINCTION BETWEEN -- IT REALLY JUST LISTS THEM AS
12 SORT OF INTERCHANGEABLE SYNONYMS FOR SOMETHING THAT IS
13 INTENTIONALLY MADE, CONFIGURED, DESIGNED. SO DO YOU WANT TO
14 USE DESIGNED BECAUSE YOU THINK IT'S SIGNALING SOMETHING MORE
15 SPECIFIC THAN MADE? AND WHERE IS THE SUPPORT FOR THAT OTHER
16 THAN WHEN THEY REFERRED TO "ADAPTED TO," THEY ADOPTED THE
17 TERMINOLOGY THAT WOULD BE NARROWER IN CONSTRUCTION AND IT'S
18 JUST NOT CAPABLE OF.

19 MS. LAMKIN: TWO POINTS, YOUR HONOR. ONE, AGAIN THE
20 PATENT THROUGHOUT USES "DESIGNED TO," AND WE THINK THE PATENTEE
21 SHOULD BE HELD TO THEIR WORDS, BUT I DO THINK "MADE TO" WHICH
22 IS WHAT PLAINTIFF WANTED CREATES SOME FUZZY BOUNDARIES AROUND
23 THE EDGES. WE DON'T THINK THERE SHOULD BE FUZZY BOUNDARIES.
24 DID HE OR DID HE NOT DESIGN ACCORDING TO THESE SPECIFIC
25 FUNCTIONS?

1 THE COURT: I FEEL LIKE WE'RE STEPPING BEYOND A THAN
2 WE'RE GOING TO HAVE TO CONSTRUE "DESIGNED," AND I DON'T THINK
3 THE FEDERAL CIRCUIT HAS GONE THAT FAR IN SUGGESTING THAT
4 "DESIGNED" AND "CONFIGURED TO" OR "MADE TO," WHICH IS THE
5 ULTIMATE CONSTRUCTION THAT THEY USED IN THE *ASPEX* CASE ARE
6 DESIGNATED TO CONNOTATE AN ACTUAL DIFFERENT SORT OF
7 FUNCTIONALITIES, BUT WHAT IT MIGHT AVOID, WHAT I THINK THE
8 PROBLEM YOU'RE RAISING IS THAT IF THERE'S A GRAY AREA, THAT
9 IT'S CAPABLE OF SORT OF --

10 MS. LAMKIN: CREEP.

11 THE COURT: -- CREEP BACK IN WOULD BE TO SAY THAT
12 "ADAPTED TO" IS DESIGNED OR CONFIGURED TO ACCOMPLISH THE
13 SPECIFIC OBJECTIVE, NOT SIMPLY THAT THEY CAN BE MADE TO SERVE
14 THAT PURPOSE, AND USE THAT ENTIRE PORTION OF THE FEDERAL
15 CIRCUIT'S DISTINCTION SO THAT WE CAN'T GET IN TO MADE THAT
16 PURPOSE WHICH IS CAPABLE OF.

17 MS. LAMKIN: THE VERY LANGUAGE.

18 THE COURT: I'LL USE THE LANGUAGE FROM THE FEDERAL
19 CIRCUIT'S GUIDANCE. THE DISTINCTION WHEN YOU USE THIS DRAFTING
20 TERM BETWEEN IT BEING BROADER AND NARROWER, I THINK THE
21 NARROWER APPLICATION IS APPROPRIATE HERE THROUGHOUT THE PATENT.
22 WE'RE NOT GOING TO BOUNCE BACK AND FORTH BETWEEN CLAIMS, AND
23 THE COURT WILL USE THAT ENTIRE SENTENCE THAT IS AT PAGE 1349 OF
24 THE *ASPEX* DECISION 672 F.3D, 1335. SO IT'S DESIGNED OR
25 CONFIGURED TO ACCOMPLISH THE SPECIFIC OBJECTIVE, NOT SIMPLY

1 THAT IT CAN BE MADE TO SERVE THAT PURPOSE.

2 ALL RIGHT. NOW -- SEE, AND I THOUGHT THESE ONES WERE
3 THE EASY ONES. YOU'LL SHOW ME. LET'S TALK ABOUT THE CONTROL
4 DEVICE ON THE EXTERIOR OF SAID RIGID CONTAINER. IT SEEMS THE
5 PARTIES AGREE THAT "ON THE EXTERIOR" AT THE VERY LEAST MEANS ON
6 THE OUTSIDE. GOOD.

7 BUT WE'RE GETTING INTO A DISCUSSION ABOUT WHAT "ON"
8 MEANS. I DON'T THINK "ON" MEANS IN. I MEAN, THAT'S JUST --
9 OH, MY GOD, THAT JUST CONFUSES THE HECK OUT OF ME, AND UNLESS
10 SOMEBODY CAN TELL ME THAT AN ENGINEER ALWAYS EQUATES "ON" AND
11 "IN" AND WOULD UNDERSTAND IT TO MEAN THE SAME THING, I THINK
12 THAT INTRODUCES ALL KINDS OF AMBIGUITY.

13 ON THE OUTSIDE, FROM A NONENGINEERING POINT OF VIEW,
14 YOU KNOW, YOU WOULD JUST SAY, WELL, IT'S ON THE OUTSIDE. SO I
15 KIND OF POSE THE QUESTION, YOU KNOW, WELL, IF THE CONTROL
16 DEVICE WAS WIRELESS, IF IT WAS A REMOTE CONTROL, IT WOULD BE ON
17 THE OUTSIDE OF THE CONTAINER. I DON'T KNOW THAT THE PATENT --
18 YOU KNOW, IF YOU'VE GOT YOUR WHATEVER DEVICE IN THE THING, YOU
19 KNOW, STRAPPED TO YOUR BODY AND IN YOUR HAND YOU'RE HOLDING A
20 LITTLE REMOTE THAT LETS YOU TURN IT ON AND OFF THAT WOULD BE A
21 CONTROL DEVICE ON THE EXTERIOR OF THE CONTAINER. I DON'T THINK
22 THAT WAS ANTICIPATED BY THE PATENT.

23 I DON'T SEE ANY WIRELESS REMOTE DEVICES IN THERE. BUT
24 I'M NOT SURE IT WOULD EXCLUDE THAT. I DON'T KNOW IF I'M ASKING
25 FOR A PROBLEM THAT DOESN'T EXIST HERE. IF EVERYONE AGREES "ON"

1 MEANS IN CONTACT WITH THE SUPPORTING SURFACE, THEN WE'LL JUST
2 GO WITH THAT.

3 MS. SZPONDOWSKI: I JUST WANT TO SAY THAT WE CAME UP
4 WITH OUR -- WE DIDN'T BELIEVE THAT "ON" NEEDED TO BE CONSTRUED,
5 PERIOD, INITIALLY. WE CAME UP WITH THE PROPOSAL "IN OR IN
6 CONTACT"WITH" FROM A DICTIONARY DEFINITION THAT THE DEFENDANTS
7 GAVE US.

8 THE COURT: WELL, IT'S A STUPID ONE. IT'S NOT THE ONE
9 THAT COMES UP WHEN I FIRST LOOK AT A DICTIONARY DEFINITION OF
10 "ON." I DON'T KNOW WHERE IT CAME FROM, BUT ...

11 MS. SZPONDOWSKI: MERRIAM-WEBSTER'S DICTIONARY.

12 THE COURT: WELL, IT'S 1B, WHICH MEANS IT WASN'T THE
13 FIRST ONE.

14 MS. LAMKIN: WE ATTACHED THIS DEFINITION. WE NEVER
15 SOUGHT TO RELY ON IT IN OUR BRIEFING, SO THIS IS NOT
16 DEFENDANTS' CHOICE.

17 THE COURT: AND I JUST DON'T THINK THAT IN ORDINARY
18 PARLANCE, UNLESS THERE IS SOMETHING IN THE PATENT THAT POINTS
19 ME IN THAT DIRECTION TO INTERCHANGE "IN" AND "ON" MAKES ANY
20 SENSE AT ALL. "IN CONTACT WITH" SAYS THAT WHEN IT'S ON, IT'S
21 ON THE SURFACE OF THAT EXTERIOR. IT'S TOUCHING IT, IT'S
22 SUPPORTED BY IT, AND THERE ARE CERTAINLY DICTIONARY DEFINITIONS
23 THAT SUPPORT THAT, AND I'M NOT SEEING ANYWHERE WHERE THE PATENT
24 SAYS OTHERWISE. OTHER THAN THE HYPOTHETICAL I RAISED, WELL,
25 DOES IT ACTUALLY HAVE TO BE IN CONTACT WITH, DOES ANYONE WANT

1 TO ARGUE THAT NO, IT JUST HAS TO BE ON THE OUTSIDE. SO WHAT DO
2 YOU WANT TO PROPOSE?

3 MS. LAMKIN: YOUR HONOR -- FORGIVE ME.

4 MS. SZPONDOWSKI: GO AHEAD.

5 MS. LAMKIN: WE PROPOSED THE TERM, SO MAYBE IT HELPS
6 IF WE GO FIRST PER THE NORMAL ...

7 THE COURT: SURE.

8 MS. LAMKIN: SO, FIRST, FOR "ON," WE WOULD AGREE WITH
9 THE COURT THAT A CONSTRUCTION "IN CONTACT WITH THE SUPPORTED
10 SURFACE."

11 THE COURT: ALL RIGHT. SO WE CAN SORT OF COMPRESS THE
12 TO "IN CONTACT WITH" THE OUTSIDE SUPPORTING SURFACE.

13 MS. LAMKIN: YES. THE COURT ALSO ASKED A QUESTION,
14 AND I THINK WE CAN ADDRESS IT, IT MAY BE ACADEMIC, BUT EVEN ON
15 THAT CONSTRUCTION, YOUR HONOR, WE BELIEVE IT WOULD BE THE
16 EMBODIMENT OF HAVING A REMOTE CONTROL. AS LONG AS THE ACTUAL
17 ACTIVATING DEVICE WAS ON THE EXTERIOR OF THE CONTAINER, YOU
18 COULD STILL HAVE THE REMOTE CONTROL IN YOUR HAND. SO WE EVEN
19 THINK THAT FALLS WITHIN THIS COURT'S CONSTRUCTION.

20 THE COURT: IF THE REMOTE CONTROL DEVICE SIGNALS
21 SOMETHING ON THE EXTERIOR.

22 MS. LAMKIN: RIGHT. SOME SORT OF --

23 THE COURT: I DON'T WANT TO INVITE A PROBLEM THAT
24 DOESN'T EXIST. I WAS READING AND THINKING WELL, IT'S ON THE
25 OUTSIDE.

1 MS. LAMKIN: A JUDGE THAT I CLERKED FOR THAT I RESPECT
2 HIGHLY SAID, ALWAYS ANSWER THE JUDGE'S QUESTIONS FIRST. SO I'M
3 JUST ADDRESSING YOUR QUESTION FIRST, YOUR HONOR.

4 THE COURT: ALL RIGHT. SO YOUR PROPOSAL IN CONTACT
5 WITH THE OUTSIDE SUPPORTING SURFACE. I KNOW YOU HAD THIS
6 SEPARATE COMPONENT. I THOUGHT SEPARATE FROM WHAT?

7 BUT IN THE CONTEXT OF THE CLAIM, I UNDERSTAND THAT
8 YOUR ISSUE IS THAT THE PREAMBLE IS A WATERPROOF HOUSING THAT
9 COMPRISES THE FOLLOWING COMPONENT PARTS, A CONTAINER AND A
10 CONTROL DEVICE ON THE EXTERIOR. I'M NOT SURE, THOUGH, IN TERMS
11 OF WHAT STILL -- I MEAN, YES, IT'S A CONTROL DEVICE, SO IT HAS
12 TO BE A DEVICE, MAYBE THAT'S THE PROBLEM HERE AS OPPOSED TO
13 SEPARATE, BECAUSE SEPARATE THEN GETS ME BACK TO WELL, IS IT
14 SOMETHING THAT IS PHYSICALLY SEPARATE WHEN WE'VE JUST DECIDED
15 IT'S IN CONTACT WITH THE SURFACE.

16 MS. LAMKIN: INTERESTING. IN OTHER WORDS, THE COURT
17 IS SAYING IF IT'S THE CONTROL DEVICE ON THE EXTERIOR, IT'S
18 ALREADY MAKING CLEAR IT'S SEPARATE FROM THE HOUSING AND WE
19 DON'T NEED TO ADD THAT ADDITIONAL WORD.

20 THE COURT: IT'S NOT THE HOUSING.

21 MS. LAMKIN: I'M SORRY, THE CONTAINER.

22 THE COURT: IT'S JUST THE FIRST STRUCTURAL ELEMENT OF
23 THE HOUSING.

24 MS. LAMKIN: CORRECT.

25 THE COURT: IT'S THE CONTROL DEVICE, SO THERE HAS TO

1 BE SOME DEVICE. SO MAYBE THE WORD WE'RE CONSTRUING HERE IS
2 "DEVICE" AS OPPOSED TO IT HAS TO BE SOME SEPARATE UNIT. IT HAS
3 TO EXIST AS SOME STRUCTURAL ELEMENT BECAUSE. IT ALSO HAS TO
4 HAVE -- IT HAS TO BE IN AND OF ITSELF ADAPTED TO WITHSTAND
5 PRESSURES AND ALL THAT OTHER STUFF.

6 SO MY CONCERN, WAS INTRODUCING THE WORD "SEPARATE."
7 WHILE I UNDERSTAND WHY YOU WOULD SUGGESTING IT'S A STRUCTURALLY
8 IDENTIFIABLE SEPARATE HOUSING, SEPARATE IMPLIES, WHICH IS WHAT
9 GOT ME TO THE REMOTE CONTROL ISSUE, IT'S ON THE OUTSIDE AND
10 SEPARATE, SO IT'S PHYSICALLY, YOU KNOW, I'VE GOT THIS AND THIS,
11 AND NOW IT'S SEPARATE AS TO NOW IT'S IN CONTACT AND ON THE
12 OUTSIDE OF THE BOTTLE.

13 MS. LAMKIN: THE REASON FOR IT WAS TO MAKE CLEAR,
14 ESPECIALLY UNDER *BECTON* AND *REGENTS*, THEY WERE NOT JUST
15 FUNCTIONALLY DISTINCT, RIGHT? THEY COULD STILL BE PART OF THE
16 SAME THING BUT FUNCTIONALLY DISTINCT, BUT THEY WERE LITERALLY
17 DIFFERENT. THIS PATENT TAUGHT PHYSICAL SEPARATENESS, AND WE
18 THINK THAT THAT'S IMPORTANT TO CLARIFY UNDER *BECTON* AND SAXTON
19 (PHONETIC) AND *02MICRO*, MAKE IT NECESSARY TO CLARIFY WHAT WE'RE
20 TALKING ABOUT IS THE CONTROL DEVICE THAT IS PHYSICALLY
21 SEPARATE, IN FACT, SEPARATED FROM THE CONTAINER WITH THINGS
22 LIKE O-RINGS AND SCREWS. SO WE THINK THAT'S AN IMPORTANT
23 CLARIFICATION TO MAKE UNDER *BECTON*, AND I'M HAPPY TO WALK
24 THROUGH WHY.

25 THE COURT: YES. AGAIN, BECAUSE I THINK WHAT WE'RE

1 CONSTRUING REALLY ISN'T ON THE EXTERIOR, IT'S DEVICE, IT'S THE
2 CONTROL DEVICE. WHAT IS IT? IS IT SIMPLY AN INDENTATION IN
3 THE CONTAINER? WELL, NO, I DON'T THINK SO. IT HAS TO BE A
4 DEVICE, AND THE DEVICE SUGGESTS, AND IT'S LISTED AS A SEPARATE
5 STRUCTURAL ELEMENT OF THE HOUSING, AND OTHERWISE, IT COULD JUST
6 BE A RIGID CONTAINER THAT'S ADAPTED TO CONTROL, AND THEN YOU
7 COULD HAVE SOMETHING THAT'S PART OF THE CONTAINER. BUT GO
8 AHEAD AND LET'S SEE IF MAYBE I CAN GET THERE FROM THE
9 PRESENTATION.

10 MS. LAMKIN: OKAY. SO OBVIOUSLY THE COURT IS ALREADY
11 FAMILIAR WITH *BECTON*, WAY AHEAD OF US ON THE SEPARATE STRUCTURE
12 PARTS. WHAT I THINK WHAT REALLY MATTERS HERE IS TO GET THE
13 CLAIM LANGUAGE. SO BOTH SIDES AGREE AT THE VERY LEAST THE
14 CONTROL DEVICE IS IN CONTACT WITH THE CONTAINER, AND THAT'S
15 IMPORTANT UNDER *BECTON* AND *REGENTS* AND THEIR PROGENY. ALSO
16 THIS IS CRITICAL, CLAIM 49 SAYS THAT THE CONTROL DEVICE EXTENDS
17 THROUGH THE CONTAINER. SO THE CONTROL DEVICE IS IN CONNECTION
18 TO THE CONTAINER, IT'S CONNECTED TO THE CONTAINER, AND THE
19 CONTROL DEVICE EXTENDS THROUGH. AND THIS EXACT CLAIM LANGUAGE
20 IS WHY *BECTON*, WHY THE FEDERAL CIRCUIT OF *BECTON* FOUND IT
21 NECESSARY TO DISTINGUISH SEPARATENESS BETWEEN THE TWO ELEMENTS
22 IN THAT CASE.

23 IN FACT, YOUR HONOR, IF YOU LOOK BACK AT CLAIM 49, IF
24 THEY'RE NOT PHYSICALLY SEPARATE, ACCORDING TO *BECTON* AND ALSO
25 ACCORDING TO *REGENTS*, IT RENDERS THIS CLAIM FACIALLY

1 NONSENSICAL BECAUSE HOW COULD SOMETHING EXTEND THROUGH ITSELF.
2 IT WOULD ACTUALLY RENDER ALL THE ASSERTED CLAIMS IN THE PATENT
3 FACIALLY NONSENSICAL TO BE CONNECTED TO ITSELF OR EXTEND
4 THROUGH ITSELF. AND THE FEDERAL CIRCUIT IN *BECTON* AND *REGENTS*,
5 THAT'S WHY THEY EMPLOYED THE PHYSICAL SEPARATENESS LANGUAGE.

6 JUST QUICKLY, I DON'T WANT TO TAKE THE COURT'S TIME IF
7 THE COURT IS WITH ME, WHAT THE PATENT TEACHES ABOUT "ON THE
8 EXTERIOR," SO THIS IS FIGURE 19-B, THE BUTTONS ARE NOT PICTURED
9 HERE 1315, 1316, BUT THE BUTTON ON FIGURES 1317 IS THIS
10 HORIZONTAL SHAPE UNDER 1900, RUBBER BUTTON ON TOP OF THE
11 CONTROL, RIGHT? IN BETWEEN THE RUBBER BUTTON AND THE PISTON,
12 THAT'S THE CONTROL DEVICE. SO THIS PATENT TEACHES US OVER AND
13 OVER AGAIN WHAT "ON THE EXTERIOR" MEANS IS OUTSIDE AND
14 PHYSICALLY SEPARATE FROM.

15 AND JUST FINALLY, THERE'S A WHOLE BUNCH OF THESE
16 EXAMPLES, YOUR HONOR. THIS IS REALLY WHAT IS IMPORTANT AND
17 THIS IS WHERE *REGENTS* REALLY PUT THEIR THUMB ON THIS. THIS
18 PATENT TELLS YOU WHAT THE INVENTION IS, THIS PATENT TELLS US
19 WHAT THE CONTROL DEVICES ARE, AND THIS IS THE WHOLE UNIVERSE
20 WE'RE ALLOWED TO GIVE TO PATENTEE BECAUSE HE DEFINED WHAT THE
21 INVENTION WAS.

22 WE HAVE CONTROL DEVICES ON THE OUTSIDE, AND WE HAVE
23 CONTROL DEVICES ON THE INSIDE. WE DON'T HAVE CONTROL DEVICES
24 THAT ARE INTEGRAL OR ONE IN THE SAME AS THE CONTAINER, AND
25 THAT'S WHY THE FEDERAL CIRCUIT IN *REGENTS* AND IN *BECTON* -- AND,

1 IN FACT, IN *BECTON*, IT WAS REVERSIBLE ERROR TO NOT MAKE CLEAR
2 THAT THEY WERE PHYSICALLY SEPARATE. AND WE THINK THE SAME
3 CONSTRUCTION IS WARRANTED HERE. AND I CAN SKIP THE OTHER 40
4 SLIDES, YOUR HONOR, IF YOU JUST HAVE QUESTION.

5 THE COURT: I DON'T DISAGREE WITH YOU THAT THE PLAIN
6 LANGUAGE OF THE CLAIM AND THE SPECIFICATION. I DON'T SEE
7 ANYTHING TO THE CONTRARY THAT WOULD INDICATE THAT THE CONTROL
8 DEVICE IS A SEPARATE COMPONENT OF THIS HOUSING. I'M JUST NOT
9 QUITE SURE WHAT I NEED TO DO TO EXPRESS UNDER CONSTRUCTION
10 WHERE THERE'S A PROBLEM.

11 MS. LAMKIN: THE PROBLEM IS, IF PLAINTIFF COMES BACK,
12 AS THEY DID IN THEIR BRIEFING, AND SAYS, FINE, FINE, WE GET IT,
13 THEY'RE SEPARATE, BUT THEY'RE ONLY SEPARATE IN, YOU KNOW, THE
14 CONTAINER AND THE KNOBBIES ARE YOU CAN SEE THE DIFFERENCE AT IT
15 WHEN YOU LOOK AT THEM THAT THEY'RE DISTINCT IN THAT I CAN SEE
16 THAT'S THE CONTAINER AND THAT'S THE KNOBBIES, AND THAT DOESN'T
17 CLARIFY THE SCOPE OF THESE PATENTS AS THE PATENTEE TAUGHT IT,
18 WHICH IS WHAT WE NEED TO DO.

19 WHAT WE WANT TO DO IS PREVENT THAT SCRAPE COMING
20 LATER. AND THE DISCLOSURES ARE VERY CLEAR HERE. EVERY SINGLE
21 DISCLOSURE TEACHES AN O-RING OR A SCREW CONNECTING THE CONTROL
22 DEVICE, SO WE WANT TO PREVENT IS THE PATENTEE COMING BACK LATER
23 AND BACK AWAY FROM THE INVENTION THAT THIS DISCLOSURE TEACHES.
24 WE'RE NOT UNDER *PHILLIPS* ALLOWED TO GIVE THE PATENTEE MORE THAN
25 THE DISCLOSURE. SO ADDING --

1 THE COURT: IF THE CLAIM WAS INTERPRETED AS COMPONENTS
2 IN CONTACT WITH THE OUTSIDE OF THE SUPPORTING SURFACE, THEN I
3 THINK THE WORD "COMPONENT" DEFINITELY -- WELL, IT SHOULD
4 INCLUDE YOUR ISSUE, WHICH IS IT'S A PART, IT'S SEPARATE, IT'S
5 NOT.

6 MS. LAMKIN: INTEGRAL.

7 THE COURT: WELL, IT CAN BE INTEGRAL.

8 MS. LAMKIN: NECESSARY.

9 THE COURT: BUT IT IS NOT CONTAINED WITHIN THE
10 CONTAINER. IT'S NOT IN THE CONTAINER. IF THE CONTROL DEVICE
11 IS DESCRIBED HERE, THE DEVICE OF THE PRESENT INVENTION
12 COMPRISES COMPONENTS FOR MANUALLY CONTROLLING THE DEVICE WITHIN
13 THE CONTROLLED CONTAINER, THESE ARE COMPONENTS AND, THEREFORE,
14 THEY ARE PHYSICALLY DISTINCT FROM THE CONTAINER. THAT'S YOUR
15 YOU'RE ARGUMENT, RIGHT?

16 MS. LAMKIN: CORRECT.

17 THE COURT: I DON'T THINK THERE IS ANYTHING THAT
18 TEACHES OTHERWISE IN THE PATENT.

19 MS. LAMKIN: IN FACT, IT TEACHES AGAINST A
20 CONSTRUCTION THAT WOULD SAYS THEY WERE APART.

21 THE COURT: I UNDERSTAND THE PROBLEM, AND I GUESS
22 MAYBE, I JUST NEED TO KNOW ARE THE PLAINTIFFS DISAGREEING WITH
23 THAT? AND IF YOU ARE, WHAT'S THE BASIS AND HOW WOULD YOU WANT
24 THIS READ TO AVOID THIS, TO ADDRESS THIS ISSUE?

25 MS. SZPONDOWSKI: SURE, YOUR HONOR. I WANT TO TALK

1 ABOUT *BECTON* BECAUSE I DON'T THINK *BECTON* IS -- I DON'T THINK
2 *BECTON* ACCURATELY DESCRIBES WHAT IS REALLY HAPPENING HERE. WE
3 DON'T DISPUTE THE CONTROL DEVICE IS DIFFERENT FROM THE
4 CONTAINER AND IS A DISTINCT CLAIM LIMITATION. WHAT WE DISPUTE
5 IS, THE CONTROL DEVICE HAS TO BE A COMPLETELY SEPARATE PIECE
6 FROM THE CONTAINER. SO IN *BECTON*, THE CLAIM LANGUAGE AT ISSUE
7 WAS THE SPRING MEANS WAS CONNECTED TO SAID HINGED ARM, AND THE
8 COURT CONSTRUED THE CLAIM THAT THE SPRING MEANS COULD BE THE
9 HINGED ARM. AND IN FACT, IN THE INFRINGEMENT POSITION, THE
10 PATENTEE TOOK THE POSITION THAT THE HINGED ARM IN THE
11 DEFENDANTS' DEVICE WAS ALSO THE SPRING MEANS. SO THE FEDERAL
12 CIRCUIT SAID, WELL, WAIT A MINUTE, ALL THROUGHOUT THE
13 SPECIFICATION, THE SPRING MEANS AND THE HINGED ARM ARE TALKED
14 ABOUT SEPARATELY, THEY'RE SEPARATE CLAIM LIMITATIONS; AND
15 FURTHER, THE HINGED ARM CAN'T BE CONNECTED TO ITSELF, SO IT'S
16 NONSENSICAL.

17 BUT THAT'S NOT WHAT IS HAPPENING HERE. WE AREN'T
18 POINTING TO A CONTAINER AND SAYING IT'S THE CONTROL DEVICE.
19 WE'RE POINTING TO A SPECIFIC PART OF THE CONTAINER AND SAYING,
20 THIS IS THE CONTROL DEVICE PART OF THE CONTAINER. BUT WE
21 AGREE -- I MIGHT HAVE WORDED THAT WRONG.

22 THE COURT: WAIT. THAT'S A MEANS-PLUS-FUNCTION CLAIM.
23 THAT'S LIKE INTRODUCING INSANITY INTO WHAT'S ALREADY CONFUSING.
24 LET'S JUST STICK WITH THIS PATENT AND WHAT IT SAYS. AND IT HAS
25 A PREAMBLE THAT DOES LIMIT THE SCOPE OF THE CLAIM A HOUSING

1 THAT COMPRISES TWO THINGS, A RIGID CONTAINER AND AT LEAST ONE
2 CONTROL DEVICE. SO THE CONTROL DEVICE HAS TO BE SOMETHING
3 OTHER THAN THE RIGID CONTAINER. IT HAS TO BE THE THING THAT IS
4 THERE TO CONTROL THE ELECTRONIC AUDIO DEVICE, AND IT HAS TO BE
5 ON THE OUTSIDE CONNECTED WITH THE CONTAINER.

6 MS. SZPONDOWSKI: I THINK WE AGREE WITH THAT. I THINK
7 WHAT THE DEFENDANTS ARE TRYING TO SAY, THOUGH, IS THAT THE
8 CONTROL DEVICE HAS TO BE COMPLETELY SEPARATE. AND WE DON'T
9 DISAGREE THAT THERE ARE EMBODIMENTS IN THE PATENT THAT SHOW IT
10 BEING COMPLETELY SEPARATE AND APART, LIKE A SEPARATE PIECE YOU
11 CAN PULL OUT, LIKE HERE IS THE CONTROL DEVICE AND HERE'S THE
12 CONTAINER. BUT OUR POSITION IS THAT THE SPECIFICATION DOESN'T
13 REQUIRE IT. IN CERTAIN EMBODIMENTS, IT DOES SHOW THAT, BUT IT
14 DOESN'T SHOW THAT IN ALL EMBODIMENTS.

15 THE COURT: SHOW ME ONE WHERE IT ISN'T SEPARATE, JUST
16 SO I CAN SEE WHERE YOU'RE GOING.

17 MS. SZPONDOWSKI: I'M GOING TO POINT YOU TO FIGURE
18 13B. THE DESCRIPTION OF FIGURE 13B THAT'S IN THE
19 SPECIFICATION, SO THE BUTTONS IN FIGURE 13B ARE 1315, 1316,
20 1317, 1318. THERE IS NOWHERE IN THE SPECIFICATION AS DESCRIBES
21 THOSE BUTTONS WITH RESPECT OF FIGURE 13B AS HAVING TO BE,
22 REQUIRED TO BE SEPARATE FROM THE CONTAINER. WE'RE ENVISIONING
23 A SCENARIO WHERE THE CONTROL DEVICE COULD BE PART OF THE LULL
24 OF THE CONTAINER, IF YOU UNDERSTAND WHAT I'M SAYING. SO LIKE A
25 LEGGO WHERE YOU HAVE A SQUARE BLOCK AND THEN YOU HAVE YOUR

1 LITTLE PIECES ON TOP. THOSE ARE SEPARATE THINGS, BUT THEY'RE
2 ALL MOLDED AS ONE THING TOGETHER.

3 THE COURT: OKAY.

4 MS. SZPONDOWSKI: SO FIGURE 13B AND FIGURE 17, NEITHER
5 OF THOSE TALK ABOUT A REQUIREMENT THAT THE BUTTONS, WHICH
6 BUTTONS ARE DISCLOSED IN THIS PARTICULAR EMBODIMENT, HAVE TO
7 PHYSICALLY BE A SEPARATE PIECE FROM THE CONTAINER.

8 THE COURT: WELL, THIS IS LIKE A MANUFACTURING ISSUE
9 AS OPPOSED TO WHAT'S DISCLOSED --

10 MS. LAMKIN: CAN I EXPRESS THAT, YOUR HONOR?

11 THE COURT: IT'S A DEVICE AND HAS TO BE ON THE OUTSIDE
12 WHETHER IT'S MOLDED ALL AS ONE PART OR IT'S A SEPARATE PART
13 THAT SCREWS IN, DOES THE PATENT LIMIT ONLY TO A PHYSICALLY
14 SEPARATE PIECE, NOT JUST BY PICTURES BUT BY LANGUAGE?

15 MS. LAMKIN: YES, YES.

16 MS. SZPONDOWSKI: WE DISAGREE WITH THAT.

17 THE COURT: WELL, IT'S THEIR POSITION, BECAUSE I
18 UNDERSTAND YOUR POSITION BECAUSE -- BUT SHOW ME WHERE.

19 MS. SZPONDOWSKI: I JUST WANT TO MAKE ONE FINAL POINT.

20 THE COURT: SURE.

21 MS. SZPONDOWSKI: THERE ARE A NUMBER OF DIFFERENT
22 CONTROL DEVICES IN THE PATENT KNOBS, LEVERS, CAMSHAFTS, PUSH
23 PINS, ET CETERA. SO THERE ARE EMBODIMENTS DESCRIBING BUTTONS,
24 LEVERS, AND CONTROL KNOBS, WHICH ARE A FEW OF THOSE, WHICH IS
25 WHAT DEFENDANTS ARE POINTING TO. SO EVEN IF SOME OF THOSE

1 EMBODIMENTS SHOW THAT THERE IS A COMPLETELY SEPARATE PIECE FOR
2 THE CONTROL DEVICE, THE CLAIM SHOULDN'T BE LIMITED FOR ALL THE
3 DIFFERENT CONTROL TYPES THERE COULD BE.

4 THE COURT: THE BIGGER ISSUE I HAVE IS WHEN THE
5 CONTROL DEVICE IS DESCRIBED AS A COMPONENT, IT IMPLIES TO ME,
6 AND I DON'T KNOW WHETHER IT IMPLIES THIS TO A MECHANICAL
7 ENGINEER, THAT IT IS, THEREFORE, SOMETHING SEPARATE, SOMETHING
8 THAT I CAN GO BUY OFF THE SHELF. THIS IS A COMPONENT, AND I
9 CAN SOMEHOW ATTACH IT OR MAKE IT PART OF THIS CONTAINER -- ON
10 THE OUTSIDE OF THIS CONTAINER. I PUT IT ON THE OUTSIDE OF THIS
11 CONTAINER TO OPERATE WHAT IS GOING ON INSIDE. AND SO IT'S
12 REALLY THAT WORD "COMPONENT" THAT MAKES ME MORE CONCERNED ABOUT
13 THE IDEA IF SOMETHING IS ALL MOLDED TOGETHER, THEN IT'S NOT A
14 COMPONENT. THEN IT'S PART OF THE CONTAINER.

15 BUT EVEN IF THE SHAPE OF THE CONTAINER CREATES A
16 LITTLE SORT OF SUBHOUSING, YOU STILL HAVE TO PUT SOMETHING IN
17 THERE, RIGHT? AND THAT'S THE COMPONENT. THERE HAS TO BE SOME
18 PHYSICAL SEPARATE PIECE, WOULDN'T THERE?

19 MS. SZPONDOWSKI: WELL, NOT NECESSARILY. IT COULD ALL
20 BE MOLDED TOGETHER. IT COULD ALL BE ONE MOLDED PIECE.

21 THE COURT: SO HOW IS IT GOING TO OPERATE? HOW IS IT
22 GOING TO CONTROL? IS IT GOING TO TURN? MOVE? DEPRESS?

23 MS. SZPONDOWSKI: IF IT'S PUSHING A BUTTON. FOR
24 EXAMPLE, THE HOUSING MIGHT GO AROUND THE BUTTON AND THEN HAVE A
25 LITTLE PIECE, A LITTLE SHAFT INSIDE OF IT WHICH ENABLES THE

1 BUTTON.

2 THE COURT: AND THAT'S THE COMPONENT PART, THAT'S THE
3 CONTROL. THE HOUSING OF IT, WHAT IT'S SITTING IN, WHETHER IT'S
4 A RAISED SURFACE ON THE CONTAINER OR WHETHER IT'S FLAT AND
5 SOMEHOW THERE IS A HOLE MADE AND IT'S SCREWED IN, IT'S STILL
6 WHATEVER THE CONTROL DEVICE IS, THAT BUTTON, THAT SHAFT, THAT
7 PUSHPIN THAT IS ACTIVATING OR CONTROLLING THE DEVICE. AND
8 THAT'S A SEPARATE COMPONENT. THAT CAN'T BE PART OF THE
9 CONTAINER.

10 MS. SZPONDOWSKI: I DON'T THINK THAT THE PATENT SAYS
11 THAT IT CAN'T BE PART OF THE CONTAINER. I THINK SOME OF THE
12 EMBODIMENTS SHOW IT BEING SEPARATE FROM THE CONTAINER.

13 THE COURT: THEN YOU'RE GOING TO RUN A LITTLE BIT
14 AFOUL OF "RIGID STRUCTURE" BECAUSE IF THE CONTAINER SURFACE CAN
15 BE DEPRESSED WITHOUT THERE BEING SOME OTHER PART, YOU'RE JUST
16 GOING IT PUSH DOWN ON THE SURFACE TO OPERATE WHAT'S GOING ON
17 INSIDE BY PHYSICAL PRESSURE AS OPPOSED TO SOME MECHANICAL PART,
18 THEN YOU'VE DISCLAIMED THAT BECAUSE YOU SAID THE MATERIAL CAN'T
19 BE ACTIVATED BY DEPRESSION.

20 MS. SZPONDOWSKI: WELL, BASED ON HOW WE UNDERSTOOD
21 FULLER, WHICH WAS A DEFORMABLE MEMORY. I THINK WE WENT THROUGH
22 ALL OF THAT. I THINK OUR READING OF FULLER IS DIFFERENT. WE
23 WENT THROUGH THAT THIS MORNING.

24 THE COURT: YOU DISAVOWED IN FULLER THAT IT WOULDN'T
25 ALLOW THE USER TO MANIPULATE CONTROLS THROUGH THE MATERIAL. SO

1 IF WHAT YOU'RE TRYING TO ENCOMPASS BY A DEFINITION HERE THAT
2 DOESN'T MAKE THE CONTROL DEVICE A SEPARATE COMPONENT BUT RATHER
3 IT'S A PORTION OF THE CONTAINER THAT IS THIN ENOUGH, THAT THE
4 USER CAN JUST APPLY PRESSURE TO IT AND ACTIVATE OR DEACTIVATE
5 THE UNIT, THEN I THINK YOU'RE RUNNING RIGHT SMACK INTO WHAT YOU
6 DISAVOWED IN FULLER WHICH IS, NO, THE MATERIAL HAS TO BE
7 THICKER THAN THAT. YOU CAN'T MANIPULATE IT THROUGH THE
8 CONTAINER. YOU CAN PUT THESE COMPONENT PARTS THAT WILL GO
9 THROUGH THE CONTAINER AND DO THE ACTIVATION, BUT IT CAN'T JUST
10 BE A SURFACE THAT I CAN PUT MY THUMB DOWN ON HARD ENOUGH AND
11 IT'S GOING TO MAKE THE THING TURN ON OR OFF.

12 MS. SZPONDOWSKI: I DON'T THINK IT CAN BE A SURFACE
13 EITHER. A SURFACE ISN'T A CONTROL DEVICE AS DISCLOSED IN THE
14 PATENTS.

15 THE COURT: WELL, YOU JUST SAID THOSE ARE JUST
16 EXAMPLES. A CONTROL DEVICE IS A DEVICE THAT CONTROLS. I KNOW
17 THAT'S A TAUTOLOGY, BUT IF THE METHOD OF CONTROLLING, THE
18 DEVICE OF CONTROLLING, TURNING THE THIN -- AS AN EXAMPLE OF
19 CONTROL, TURNING IT ON OR OFF, IS THAT THE SURFACE OF THE
20 CONTAINER IN AREAS IS THIN ENOUGH THAT YOU CAN DEFORM IT BY
21 PRESSING ON IT AND THEREBY TURN ON OR TURN OFF THE AUDIO
22 DEVICE, I THINK WE HAVE GONE RIGHT BACK TO RIGID CONTAINER AND
23 WHAT THE PATENTEE HAS DISCLAIMED TO SAY, NO, THAT SORT OF
24 MEMBRANE COVER SURFACE MATERIAL, TOO THIN, NOT COVERED BY THIS
25 PATENT IF IT CAN BE MANIPULATED TO CONTROL THE MATERIAL.

1 MS. SZPONDOWSKI: I DON'T THINK THE MATERIAL
2 NECESSARILY HAS TO BE THIN THOUGH IN ORDER TO PUSH ON IT. I
3 MEAN, WE DID JUST GO THROUGH ALL OF THIS.

4 THE COURT: IF CAN YOU MANIPULATE THE INTERNAL
5 STRUCTURE THROUGH THE MATERIAL OF THE CONTAINER, YOU HAVE
6 DISCLAIMED IT. YOU HAVE SAID IN RESPONSE TO FULLER, THAT IS
7 NOT WHAT IS COVERED BY THIS PATENT.

8 MS. SZPONDOWSKI: WITH RESPECT TO THE MEMBRANE AS IT
9 WAS DESCRIBED IN FULLER.

10 THE COURT: WHICH SAID THAT IF YOU CAN MANIPULATE IT
11 THROUGH, THEN YOU'VE DISCLAIMED IT. AND SO I FEEL LIKE WE'RE
12 BOOTSTRAPPING HERE TO GO BACK NOW AND SAY, THE CONTROL DEVICE
13 CAN BE PART OF THE CONTAINER THAT YOU CAN MANIPULATE FROM THE
14 OUTSIDE BY PRESSURE, AND IT'S GOING TO DEFORM TO DO -- I MEAN,
15 THE PRESSURE IS GOING TO REQUIRE IT SAYS DEFORM TO DO
16 SOMETHING, AND THAT'S JUST -- NO, THAT'S WHAT FULLER DOES, AND
17 YOU'VE SAID THAT TO THE PATENT OFFICE AND YOU'VE SAID IT TO ME,
18 THAT'S NOT WHAT WE'RE CLAIMING. SO WHERE ARE WE HERE?

19 MS. SZPONDOWSKI: I DON'T BELIEVE THAT THE PATENT
20 EXPLICITLY STATES THE CONTROL DEVICE HAS TO A PHYSICALLY
21 SEPARATE PIECE FROM THE CONTAINER. THAT'S OUR POSITION.

22 THE COURT: OKAY.

23 MS. LAMKIN: SO JUST BRIEFLY, AND AS THE COURT HAS
24 RIGHTLY POINTED OUT, PLAINTIFF WANTS TO READ THE CLAIMS TO SAY
25 THE CONTROL DEVICE CAN BE PHYSICALLY PART OF THE CONTAINER AND

1 YOU'RE GOING TO PUSH ON PART OF THE CONTAINER TO ACTIVATE THE
2 ELECTRONIC DEVICE. NOT ONLY HAVE THEY DISCLAIMED THAT, AS THE
3 COURT RIGHTLY POINT OUT, BUT THE PATENT DOESN'T TEACH THAT, AND
4 THERE'S SOME REALLY IMPORTANT REASONS. WE LOOKED AT, JUST
5 RETURNING QUICKLY, EVERY SINGLE EMBODIMENT IN THIS PATENT --
6 AND I WILL WALK THE COURT THROUGH 13, 17, 19. EVERY SINGLE
7 EMBODIMENT IN THIS PATENT AND NOT JUST THE FIGURES IN THE TEXT
8 DESCRIBING EACH OF THE PATENTS, INCLUDING THE BUTTONS THAT WE
9 WERE TALKING ABOUT. THERE'S A RIGID PISTON AND A O-RING
10 AROUND, AN O-RING IN BETWEEN THE CONTAINER AND THE CONTROL
11 DEVICE.

12 BUT, AGAIN, YOUR HONOR, I WANT TO COME BACK TO
13 *PHILLIPS*, AND I THINK WE'RE FACING THE HARD QUESTION THAT
14 *PHILLIPS* ACKNOWLEDGED. IN *PHILLIPS*, THE FEDERAL CIRCUIT EN
15 BANC SAID, THERE CAN BE A FINE LINE BETWEEN IMPORTING
16 LIMITATIONS FROM THE SPECIFICATION INTO THE CLAIMS OR READING
17 THE CLAIMS IN A LIGHT OF THE SPECIFICATION, AND THE PATENTEE
18 SHOULD BE GRANTED NO MORE THAN THE TEACHING.

19 THIS IS AN INVENTION THAT COMPLETELY DESCRIBES THE
20 UNIVERSE OF THE CONTROL DEVICES, AND THEY ARE COMPONENTS,
21 SEPARATE PIECES, AS THE COURT HAS POINTED OUT. THEY ARE
22 COMPONENTS ON THE OUTSIDE OF THE CONTAINER, THEY ARE COMPONENTS
23 ON THE INSIDE OF CONTAINER, OR THEY ARE COMPONENTS SENT THROUGH
24 THE CONTAINER. THERE IS NO TEACHING IN THIS PATENT, NOT A
25 SINGLE TEACHING IN THIS PATENT THAT ALLOWS US TO EXTEND THE

1 MEANING OF THIS INVENTION TO A COLD MOLDED HOUSING AND CONTROL
2 DEVICE.

3 I JUST WANT TO BRIEFLY ADDRESS A COUPLE OF THINGS
4 ABOUT THE EMBODIMENT THE PARTY HAVE CLAIMED PRIORITY BACK TO
5 THE '722 PATENT, WHICH IS THE ONLY TEACHING IN THE '722 PATENT
6 AROUND THE CONTAINER AND THE CONTROL DEVICE. AND THE FIGURES
7 ARE 1 THROUGH 3 AND 9. AND YOU CAN SEE IN THESE FIGURES 1
8 THROUGH 3, YOUR HONOR, AGAIN THE CONTROL DEVICE IS PLACED
9 THROUGH THE LID.

10 WE WOULD LIKE TO HIGHLIGHT A COUPLE THINGS. 33 YELLOW
11 IS AN O-RING SHOWING PHYSICAL SEPARATENESS. MORE IMPORTANTLY
12 THE LID IS CROSSHATCHED, AND THE CROSSHATCH STOPS AT WHERE WE
13 HIGHLIGHTED LIGHT BLUE. THAT IS AIR IN BETWEEN THE CONTROL
14 DEVICE AND THE LID, LITERALLY AIR, SO YOU CAN TURN THE KNOB.

15 FIGURE 9 SAYS IT HAS THE EXACT SAME ACTIVATION METHODS
16 AS FIGURES 1 THROUGH 3. NO PRIOR TEACHING THERE. THOSE ARE
17 THE ONLY TEACHINGS TO PRIORITY DATE. IF THEY LOSE THEIR
18 PRIORITY DATE, THEN WE HAVE 13, 17, 19.

19 NOW NOTICE, YOUR HONOR, 13 AND 17 USE THE EXACT SAME
20 NUMBERS FOR THE BUTTONS, OKAY, 1315 THROUGH 19, EXACT SAME
21 NUMBERS FOR THE BUTTONS. WHEN WE GO TO THE TEACHINGS OF WHAT
22 THE BUTTONS ARE IN THE PATENT, ONCE AGAIN, WE'VE GOT TO
23 INCORPORATE 1910. THIS IS THE ONLY BUTTON TEACHING IN FIGURES
24 13, 17 AND 19. THERE AN O-RING BETWEEN THEM.

25 FINALLY THE ONLY OTHER CONTROL DEVICE TAUGHT IS THIS

1 LEVER 1360 AND 1362. AND IF YOU LOOK, YOUR HONOR, THE LEVER IS
2 ATTACHED BY SCREWS. THERE'S THE BOTTOM OF THE PHILLIPS SCREWS
3 UNDERNEATH.

4 EVERY EMBODIMENT IN THIS PATENT TEACHES PHYSICAL
5 SEPARATENESS. BUT IT'S MORE THAN THAT. REMEMBER, WE HAVE TO
6 GO BACK TO THE CLAIMS. AND, AGAIN, IF THE CONTROL DEVICE, IF
7 THE COMPONENT CAN BE PHYSICALLY PART OF THE CONTAINER, IT'S
8 EXTENDING THROUGH ITSELF, WHICH *REGENTS* AND *BECTON* SAID WAS A
9 PHYSICAL IMPOSSIBILITY AND CONNECTED TO ITSELF, WHICH BOTH
10 *REGENTS* AND *BECTON* SAID WAS A PHYSICAL IMPOSSIBILITY.

11 QUICKLY, YOUR HONOR, ON *REGENTS*, THERE ARE TWO
12 OPERATING DISKS AND THERE WAS A SOFT MATERIAL IN BETWEEN THOSE
13 TWO DISKS, AND THE FEDERAL CIRCUIT SAID IN *REGENTS*, THE PATENT
14 TEACHES A MATERIAL BETWEEN THE TWO DISCS. THEY CAN'T
15 PHYSICALLY BE PART OF THE SAME DEVICE. AND WE HAVE THE SAME
16 TEACHING HERE AS IN *REGENTS*, SO YOU RENDER THE CLAIMS
17 PHYSICALLY NONSENSIBLE.

18 THE COURT: WAIT. THAT'S 49.

19 MS. LAMKIN: UM-HMM.

20 THE COURT: AND THAT EXTENDING LANGUAGE THROUGH IS
21 SPECIFIC TO 49 AND IS A SEPARATE CLAIM.

22 MS. LAMKIN: 49 AND 50.

23 THE COURT: AND IF WE WENT BACK TO 23.

24 MS. LAMKIN: UM-HMM.

25 THE COURT: THE 23 ON CONTROL DEVICE ON EXTERIOR

1 DOESN'T TALK ABOUT IT EXTENDING THROUGH. IT SAYS IT'S ON THE
2 EXTERIOR AND ADAPTED TO CONTROL THE DEVICE AND ADAPTED TO
3 WITHSTAND ACTIVATION CAUSED BY PRESSURE. SO YOUR ANALYSIS FOR
4 49 THAT IT CAN'T BE PART OF THE HOUSING, THE CONTAINER WOULD
5 CERTAINLY MAKE SENSE BECAUSE HOW DOES IT EXTEND THROUGH WHAT IT
6 IS? THAT SEEMS RIDICULOUS. BUT THAT COULD BE A SEPARATE
7 EMBODIMENT WHERE IT IS A COMPONENT THAT'S A SEPARATE DEVICE.
8 DOES 23 EXCLUDE -- I THINK IT DOES, BUT I WANT TO HEAR IF FROM
9 YOU WHY WOULD THE LANGUAGE OF 23 EXCLUDE THE CONTROL DEVICE IN
10 THAT CONTEXT, IN THE CONTEXT OF THAT CLAIM FROM BEING PART OF
11 THE ACTUAL CONTAINER?

12 MS. LAMKIN: FOR THREE REASONS, YOUR HONOR. FIRST
13 REASON, EVERYONE IN THIS ROOM, PLAINTIFFS, DEFENDANTS, THE
14 COURT, AGREES THAT "ON THE EXTERIOR" MEANS IN CONTACT WITH, AND
15 THAT'S EXACTLY WHAT *BECTON* AND *REGENTS* SAID IT MEANS. THEY
16 CAN'T BE THE SAME THING.

17 THE COURT: OKAY.

18 MS. LAMKIN: THE SECOND REASON IS THE PATENTEE, AGAIN,
19 HAS DEFINED WHAT THE INVENTION IS FOR US, AND "ON THE EXTERIOR"
20 MEANS OUTSIDE. AND FOR THE THIRD REASON, THE PATENTEE USES
21 THIS PHRASE, THE PATENTEE USES THE EXACT PHRASE "ON THE
22 EXTERIOR" SEVERAL PLACES TO MEAN -- THREE PLACES TO MEAN
23 OUTSIDE THIS CONTROL DEVICE ON THE EXTERIOR IS PHYSICALLY
24 SEPARATE. WE CANNOT GIVE THE PATENTEE A GRANT LARGER THAN
25 DISCLOSED. AND NOTHING IN THIS PATENT DISCLOSES A COLD-MOLDED

1 HOUSING AND CONTAINER ARE PHYSICALLY CONNECTED.

2 AND WHEN PLAINTIFF SAID THAT THE CONTROL DEVICE IS
3 PART OF THE CONTAINER, WE'RE HAVING A SERIOUS SCOPE DEBATE HER,
4 AND WE THINK 02 MICRO, AT THE VERY LEAST, 02 MICRO AND *BECTON*
5 COMPEL MAKING SURE THAT ITS COMPONENT IS PHYSICALLY SEPARATE
6 FROM THE CONTAINER.

7 THE COURT: OKAY. AT SOME POINT, THE COURT ALWAYS HAS
8 TO MAKE A DECISION AND LET THE FEDERAL CIRCUIT TELL ME LATER
9 WHETHER I GOT THIS RIGHT OR WRONG. BUT I THINK IN LIGHT OF THE
10 ISSUES WE'VE DISCUSSED AT LENGTH THIS MORNING ON THE RECORD
11 REGARDING THE DISCLAIMER OF DEVICES THAT HAD PREVIOUSLY EXISTED
12 WHERE YOU COULD MANIPULATE THROUGH THE CONTAINER, IT WOULD BE
13 INAPPROPRIATE TO ALLOW A CONSTRUCTION OF CONTROL DEVICE ON THE
14 EXTERIOR TO CAPTURE AN ABILITY TO USE THE CONTAINER SURFACE
15 ITSELF AS A WAY OF CONTROLLING THE AUDIO DEVICE.

16 THE PATENT MAKES REPEATED REFERENCES TO THESE BEING
17 COMPONENTS THAT ARE THEN IN CONTACT WITH THE CONTAINER, AND I
18 THINK THAT THE APPROPRIATE, AND I WOULD HAVE TO EXPAND A LITTLE
19 BIT HERE ON WHAT'S BEING CONSTRUED, BUT CONTROL DEVICE ON THE
20 EXTERIOR, THE COURT CONSTRUES AS A SEPARATE COMPONENT IN
21 CONTACT WITH THE OUTSIDE OF THE SUPPORTING SURFACE. AND WE'RE
22 DONE WITH THAT.

23 NOW LET'S GO ON TO "EXTENDS FROM THE EXTERIOR TO THE
24 INTERIOR." AND THE DEFENDANTS HAVE TAKEN A POSITION THERE
25 CAN'T BE SOMETHING IN BETWEEN THE CONTROLLING OUTSIDE AND THE

1 INTERIOR WHATEVER --

2 MR. LEACH: YOUR HONOR --

3 THE COURT: I THINK YOU LOST ME ON THIS.

4 MR. LEACH: -- IN THE INTEREST OF LUNCH, CAN I SAY
5 WE'VE WITHDRAWN OUR CONSTRUCTION OF THIS AND JUST AGREED WITH
6 THE PLAIN AND ORDINARY MEANING. I THINK THE OTHER
7 CONSTRUCTIONS WE'VE TALKED ABOUT TODAY COVERED WHAT WE NEED FOR
8 THIS. AND WE PUT THIS IN OUR LAST BRIEF, BUT YOU MAY HAVE
9 MISSED THAT.

10 THE COURT: OH, THEN WE'RE DONE.

11 MR. LEACH: DOES THAT MAKE THINGS EASY?

12 THE COURT: YES. SO WE'RE DONE. SO I'VE GIVEN YOU
13 THE CONSTRUCTIONS. I'VE MODIFIED A LITTLE BIT ON THE "ADAPTED
14 TO," BUT HAVE USED THE FEDERAL CIRCUIT LANGUAGE. AND ON
15 "CONTROL DEVICE ON THE EXTERIOR," THE WRITTEN ORDER WILL
16 REFLECT THAT IT IS A SEPARATE COMPONENT IN CONTACT WITH THE
17 OUTSIDE SUPPORTING SURFACE OF SAID RIGID CONTAINER, WHICH IS
18 THE REST OF THE CLAIM LANGUAGE. GREAT.

19 WE DO HAVE SCHEDULED TO COME BACK AND ADDRESS THE
20 WATER PRESSURE AND SUBMERGED ISSUES. IT CAUGHT MY EYE, AND I
21 SUPPOSE THAT MIGHT BE ONE OF THE THINGS WE'LL BE ADDRESSING
22 THEN, THAT IF YOU LOOK AT CLAIM -- LET'S TAKE 23, IT HAPPENS
23 AGAIN IN SOME OF THE OTHER CLAIMS, THE READING OF CLAIM 23, THE
24 LAST PHRASE OF CLAIM 23 ABOUT THIS CONTROL DEVICE HAS THE
25 LANGUAGE "AND SAID CONTROL DEVICE ADAPTED TO WITHSTAND

1 ACTIVATION CAUSED BY UNDERWATER PRESSURE." OKAY.

2 DEPENDENT CLAIM 26 SAYS "A HOUSING OF CLAIM 23 WHEREIN
3 THE CONTROL DEVICE IS ADAPTED TO WITHSTAND ACTIVATION CAUSED BY
4 UNDERWATER PRESSURES," S. THE ONLY DIFFERENCE BETWEEN THE
5 DEPENDENT CLAIM AND THE ACTUAL INDEPENDENT CLAIM IS THAT IT'S A
6 PLURAL, PRESSURES, THERE, AND A SINGULAR PRESSURE IN 23.

7 THE SAME THING HAPPENS IN CLAIM 36 IN CONJUNCTION WITH
8 DEPENDENT CLAIM 39 WHERE CLAIM 36 FINISHES WITH A CONTROL
9 DEVICE ADAPTED TO WITHSTAND ACTIVATION CAUSED BY UNDERWATER
10 PRESSURE, AND DEPENDENT CLAIM CONTROL DEVICE ADAPTED TO
11 WITHSTAND ACTIVATED PRESSURES.

12 SO IF THE ADDITION OF THE PLURAL IS SIGNIFICANT, AND I
13 GUESS THAT'S HOW WE'RE GOING TO DECIDE WHY CLAIMS 26 AND 39
14 GIVE ANY MEANING TO THIS PATENT AND NOT MERELY JUST REDUNDANT
15 AND SHOULD BE STRICKEN, I KIND OF WANT TO HEAR THAT BECAUSE
16 IT'S NOT THE FIRST TIME I SEE A PATENT WITH A DEPENDENT CLAIM
17 WHERE, HUH, IT'S ALREADY IN THE INDEPENDENT CLAIM. IT'S NOT
18 ADDING ANYTHING.

19 SO I HAVE TO ASSUME FROM THAT THE SINGLE UNDERWATER
20 PRESSURE MEANS ONE THING AND UNDERWATER PRESSURES MEANS
21 SOMETHING ELSE, AND I HAVE NO IDEA WHAT THAT DISTINCTION WOULD
22 BE. AND SO TO THE EXTENT THIS IS A PATENT FOR SOMEONE OF
23 ORDINARY SKILL IN THE ART WHO IS A MECHANICAL ENGINEER, IT
24 MIGHT ALSO REQUIRE PEOPLE WHO UNDERSTAND DIVING PRESSURES, I
25 DON'T KNOW, ENGINEERS WHO DO UNDERWATER SOMETHING OR OTHER. I

1 WOULD NOT BE ADVERSE TO SEEING SOME DECLARATIONS THAT COME WITH
2 THE NEXT ROUND OF BRIEFING ON THIS INDEFINITENESS ISSUE FROM
3 PEOPLE OF SKILL IN THE ART AT THE TIME THIS PATENT WAS DRAFTED
4 WHETHER THEY WOULD UNDERSTAND THAT THERE'S A SIGNIFICANT
5 DIFFERENCE BETWEEN UNDERWATER PRESSURE AND UNDERWATER
6 PRESSURES, BECAUSE I DON'T KNOW WHAT THAT MEANS. I DON'T KNOW
7 WHY THAT'S DISTINCT. THE PATENT OFFICE GAVE YOU DEPENDENT
8 CLAIMS THAT PRESUMABLY ADD SOME OTHER DISTINCTION, BUT THE ONLY
9 DISTINCTION I SEE IS PRESSURES PLURAL THERE, AND IF, IN FACT,
10 IT'S NOT A DISTINCTION, THEN THE PLAINTIFFS MIGHT WANT TO SEEK
11 TO, FIRST OF ALL, WITHDRAW THE INFRINGEMENT ALLEGATION BECAUSE
12 THAT WOULD BE BAD FORM, OR JUST MAYBE DISCLAIM THOSE PATENTS,
13 THOSE CLAIMS PUBLICLY BECAUSE THEY'RE JUST REDUNDANT. AND
14 THERE IS CASE THAT SAYS IT COULD AFFECT YOUR ABILITY TO RECOVER
15 THINGS LIKE COST AND STUFF, AND YOU DON'T WANT TO GO THERE.
16 WE'RE DONE FOR TODAY, LADIES AND GENTLEMEN. THANK YOU. THAT
17 WAS REALLY --

18 MS. SZPONDOWSKI: YOUR HONOR, CAN I JUST SAY ONE MORE
19 THING? YOU ASKED US IF THERE WERE ANY OBJECTIONS TO THE
20 CONSTRUCTIONS YOU PROVIDED. AND WE DO OBJECT TO "RIGID
21 CONTAINER" AS WELL AS "WATERPROOF."

22 THE COURT: AND I EXPECT YOU'RE GOING TO OBJECT TO
23 "CONTROL DEVICE TO THE EXTERIOR."

24 MS. SZPONDOWSKI: YES.

25 THE COURT: SO YOUR OBJECTIONS ARE ALL NOTED AND

1 RESERVED FOR ANY POTENTIAL APPELLATE ISSUES. THANK YOU.

2 MS. SZPONDOWSKI: THANK YOU.

3 (COURT IN RECESS AT 12:10 P.M.)

4 *** END OF REQUESTED TRANSCRIPT ***

5 CERTIFICATE OF OFFICIAL REPORTER

6 I, MAURALEE RAMIREZ, FEDERAL OFFICIAL COURT REPORTER,
7 IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL
8 DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO
9 SECTION 753, TITLE 28, UNITED STATES CODE THAT THE FOREGOING IS
10 A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED
11 PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE
12 TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS
13 OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

14 DATED THIS 14TH DAY OF JULY 2014.

15

16 /S/ MAURALEE RAMIREZ
17 MAURALEE RAMIREZ, CSR NO. 11674, RPR
18 FEDERAL OFFICIAL COURT REPORTER
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