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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

OMNI MEDSCI, INC.		DOCKET 2:18CV134
		FEBRUARY 6, 2019
VS.		10:04 A.M.
		TEXARKANA, TEXAS
APPLE INC.		

VOLUME 1 OF 1, PAGES 1 THROUGH 66

REPORTER'S TRANSCRIPT OF CLAIM CONSTRUCTION HEARING

BEFORE THE HONORABLE ROBERT W. SCHROEDER, III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: THOMAS A. LEWRY
 CHRISTOPHER C. SMITH
 BROOKS & KUSHMAN PC - SOUTHFIELD
 1000 TOWN CENTER, 22ND FLOOR
 SOUTHFIELD, MI 48075

FOR THE DEFENDANT: JEFFREY P. KUSHAN
 SHARON LEE
 SIDLEY AUSTIN - WASHINGTON
 1501 K STREET NW
 WASHINGTON, DC 20005

 KELLEY ANNE CONATY
 CORY D. SZCZEPANIK
 SIDLEY AUSTIN LLP - DALLAS
 2021 MCKINNEY AVENUE, SUITE 2000
 DALLAS, TX 75201

BOBBY LAMB
GILLAM & SMITH, LLP
303 SOUTH WASHINGTON AVENUE
MARSHALL, TX 75670

1 COURT REPORTER: CHRISTINA L. BICKHAM, CRR, RMR
2 FEDERAL OFFICIAL REPORTER
3 300 WILLOW, SUITE 221
4 BEAUMONT, TX 77701

5 PROCEEDINGS RECORDED USING MECHANICAL STENOGRAPHY;
6 TRANSCRIPT PRODUCED VIA COMPUTER-AIDED TRANSCRIPTION.
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1 the frequency, the pulsing of the LED; whereas, varies
2 the light intensity dealt with other claim language.

3 If you could go over to Slide 7, please.

4 This is a similar -- this is Claim 1 of the
5 '040 patent. You'll see a similar approach here where up
6 in one part of the claim, you see "the measurement device
7 being configured to generate" -- a beam -- "by modulating
8 at least one of the LEDs having an initial light
9 intensity." And then down later in the claim, it's got a
10 different clause for a different part of that apparatus
11 that says "increasing the light intensity relative to the
12 initial light intensity."

13 THE COURT: So, Apple's proposed construction
14 on this term was "varying the frequency of the light";
15 so, what is the construction you're proposing now?

16 MR. KUSHAN: So, we would just take your
17 construction and remove the word "amplitude" from it.
18 So, what that would make clear is it's varying the
19 frequency. And I think "phase" isn't really addressed in
20 the patent, but what the patent does is differentiate
21 varying the frequency. That's what they attribute to
22 modulating. And they call varying the amplitude or the
23 intensity something else, which is why we think that's
24 what the claim is doing here. So, that's a modification
25 that we had proposed to your construction; and that would

1 get us there.

2 I just want to flag two things. There is a
3 lot of case law that holds that when a patent claim uses
4 different words to define different aspects of a device,
5 you presume that those things have different meanings.
6 And, so, parsing these claims -- and the case I'll give
7 you is *CAE Screenplates versus Heinrich*. This is from
8 the Federal Circuit, 224 F.3d 1308 from 2000. And the
9 court basically said, "In the absence of any evidence to
10 the contrary, we must presume that the use of these
11 different terms in the claims connotes different
12 meanings." When you look at those claims I just walked
13 through, you can see that it's doing that exactly. It's
14 using one phrase to talk about varying the intensity or
15 amplitude and a different phrase to refer to modifying --
16 or modulating the light.

17 The next thing I want to just flag, there is a
18 little bit of confusion, I think, about pulsing and
19 modulation, how that connects. We think that pulsing is
20 pretty simple. That's just turning the light on and off.
21 If it's an LED, just turn it on; turn it off. That's a
22 pulse.

23 If you can go to Slide 8, please.

24 What the patent does in its specification --
25 these are a number of specifications -- but the patents