

confirming this was “without waiving [Tennant’s] ability to make any argument at summary judgment, trial, or in post-trial briefing....” (Dkt. 64 at 3 n. 1, 7.)

Tennant served its Opening Claim Construction Brief on June 10, 2021. (*See generally* Dkt. 76.) Tennant argued that under OWT’s constructions for “water” and “conductivity produced by the presence of dissolved solids such that the water supports plant or animal life,” claim 13 of the ’415 patent, claims 13 and 27 of the ’092 patent, and claim 13 of the ’665 patent would be indefinite, and that other OWT-proposed constructions lacked support in the specification. (*See, e.g.*, Dkt. 76, at 15-16, *id.* at 27, 34-35.) As claim construction briefing continued and OWT further explained its proposed constructions, Tennant identified other potential § 112 defects in the claims that would exist if the Court adopted OWT’s or other non-Tennant constructions for various terms, including for each and every claim that includes the following terms: “water”, “conductivity . . . supports plant or animal life”, “power source” and “electrical power source”, and “first anode electrode portion” and “second anode electrode portion.” (Dkt. 76 at 15; Dkt. 143 at 3, 8, 10, 11, 12, 23, 25, 31.)

The Court held the Claim Construction Hearing on August 5, 2021. (Dkt. 159.) Counsel for OWT expressly acknowledged that if the Court adopted OWT’s claim construction positions, Tennant would be free to address the § 112 invalidity issues created by those constructions later in this case. For example, Counsel for Tennant stated that “there’s a written description support problem . . . [and] an indefiniteness problem” with the term “water,” and absent Tennant’s proposed construction being adopted, Tennant would be filing “at least a summary judgment [motion on this] Section 112 issue.” (Dkt.

159, at 54:7-13.) Counsel for OWT explicitly agreed, stating that, “we would be fine with that,” and that,

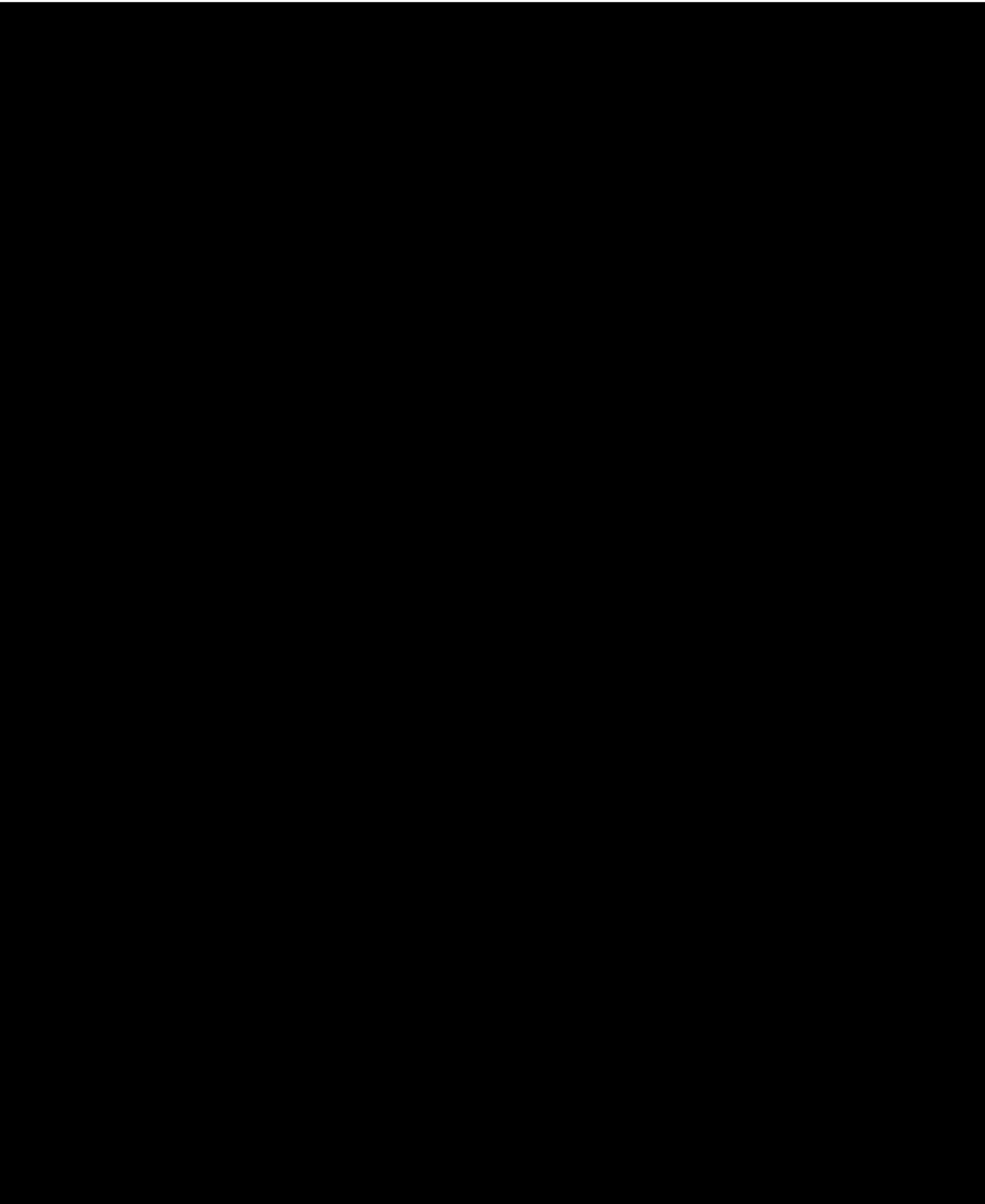
We did discuss ahead of time that Tennant was not going to at this point bring its indefiniteness arguments. If it thinks the term is indefinite and wants to bring it to the Court, [summary judgment] would provide an opportunity for the Court to further make sure that this phrase can be understood.

(Dkt. 159, at 54:14-21.) OWT made similar statements throughout the hearing, arguing the Court should reject Tennant’s proposed construction and address any § 112 issues later in the case:

And finally, a number of Mr. Steinert’s arguments today appear to boil down to, well, if this is wrong, if his construction is not adopted, then the patent is invalid under 112... If Mr. Steinert thinks that the patents are invalid under 112 under a construction, the Court can adopt those constructions and deal with the 112 issue then.

(*See, e.g.*, Dkt. 159, at 115:3-11.)

On August 18, 2021, the Court issued a Claim Construction Order. (*See generally* Dkt. 162.) Relevant here, the Court adopted OWT’s proposed constructions (or lack of construction) related to “water”, “conductivity . . . supports plant or animal life”, “a first anode electrode portion that is non parallel to a second anode electrode portion”, and “flowing water . . . through an electrolysis emitter,” but drafted its own construction for “power source” and “electrical power source.” (*See id.* at 3-5, 20, 27-30, 44-45, 52-54.) The Court acknowledged that Tennant had reserved the rights to assert its § 112 theories and that “Tennant is free to pursue its [§ 112] invalidity arguments later in the litigation if it elects to do so.” (*See, e.g.*, Dkt. 162 at 54 n. 13; *id.* at 53, 27 n. 8.)



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