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Judge Lourie (00:00):

First case is BASF Corporation versus Johnson Matthey. 2016, 1770, Ms. Maynard.

Deanne Maynard (00:17):

May it please the court, Deanne Maynard on behalf of BASF. The limitations at issue here should be given their plain and ordinary meaning. A material is effective if a person of skill in the art would consider it one to perform the recited catalytic functions.

Judge Taranto (00:34):

So you just said one to perform. In your brief, you seem to go back and forth between "does perform" and "can perform." Are there any material differences in those variations?

Deanne Maynard (00:44):

I think it needs to be able to be "able to perform," "can perform," your honor. So—

Judge Taranto (00:48):

What circumstances?

Deanne Maynard (00:49):

Well, if a person of skill in the art would consider it to be an SCR catalyst or an Amox catalyst in the art of exhaust systems. So it needs to be in the art of exhaust systems. Then, then it is within the scope of these particular limitations. And there's—

Judge O'Malley (01:06):

Why,—why didn't the claims just recite SCR and Amox catalyst?

Deanne Maynard (01:11):

Well, I think they could have your honor. And it would mean exactly the same thing as it does here. And I think the specification makes that clear, because the specificity specification essentially defines SCR composition and Amox composition as the word that claim a material effective to catalyze the respective functions. And on appeal, I don't take JMI to be disputing that that is both the ordinary meaning of the claim language here. And they don't dispute that a person who is skilled in the art knows what are SCR catalysts and what are Amox catalysts in the art of exhaust systems. Instead, their argument to this court is that this patent has given those terms as special meaning. And they're wrong about that for two reasons.

Judge Lourie (01:53):

Ms. Maynard, it doesn't look so special. Virtually every element in the periodic table is generically recited by group.

Deanne Maynard (02:01):

I disagree with that, Judge Lourie. The patent gives a lot of guidance as your honor notes as to what can be the various catalysts, which—

Judge Lourie (02:14):

Groups, five B, five B, six B, seven B, eight B, one B, or two B.

Deanne Maynard (02:24):

That's right. I believe your honor is reading from the bottom of column six, which is listed out. That provides a lot of detail and information. That makes it more definite your honor, not less. There's a lot of information in here from which a person's skill in the art could—

Judge Lourie (02:37):

In terms of effectiveness for oxidation reduction, that's rather vague.

Deanne Maynard (02:43):

Well, these are terms of art, your honor, that persons of skill in the art know. These are well-known capitalists. And what this invention claims is not these well-known catalysts. It's arrangements of these well-known catalysts in a per-specific architecture, and a person of skill in the art knows what SCR catalysts are and which are effective and—

Judge O'Malley (03:04):

When we're construing claims, are we supposed to say which words are important to create limitations, and which ones aren't really that important to the novelty of the invention?

Deanne Maynard (03:16):

No, your honor—

Judge O'Malley (03:16):

That seems inconsistent with our case law.

Deanne Maynard (03:20):

My point is I think slightly different than that. So my point is that persons of skill in the art know what materials fall within SCR catalysts and Amox catalysts in the context of exhaust systems, and the intrinsic evidence in this patent makes it clear that these are—this is a well-known field and those are well-known catalysts. Indeed, JMI's own patent claims a catalyst with almost precisely the same words. At appendix 1253, there's a JMI patent that claimed a first catalyst effective to oxidize knocks. These are well-known terms. This is how one of skill in the art claims a catalyst, and a person of skill in the art—a catalyst is something that does take its name from what it does. It catalyzes, and a person of skill in the art would say an SCR catalyst is one that can catalyze in the context of exhaust system, the SCR of knocks. That's how person—and their patent shows that that's how they know it means that's what it means. And also, the intrinsic record shows that there are well-known substances, Judge Lourie, that do it, that perform this function. The patent gives a lot of information about the crystalline structure that would be required, the types of metals that can be used. Both for the SCR catalyst as well as for the Amox catalyst.

Judge O'Malley (04:36):

Are you asking us to conclude that—at that—this is what the claim means, or are you asking us to conclude that there is at least additional analysis that needs to occur to determine whether one of skill in the art would have understood that. In other words, you want a reversal on this question or a vacate and read?

Deanne Maynard (04:57):

We, we think this court can reverse on this record and enter a claim construction. Like, both parties agree if it's not indefinite to the claim, construction means any material that is effective to catalyze these reactions. If this—

Judge Taranto (05:12):

I thought there was some dispute about whether assuming it's not indefinite, the right construction was what a relevant, skilled artisan would understand it to mean full-stop or a relevant skills artisan in the exhaust system field would mean it? I—you seem to have been very careful throughout your brief to always attach the exhaust system field. Is there—is that, in fact, a dispute between the parties?

Deanne Maynard (05:42):

That is a dispute between the parties, Judge Taranto. We think that regardless of whether that term is expressly read in, it would be implicit, but we do think the better construction and the more informative construction would be a catalyst that a person would—of skill in the art would consider to be an SCR catalyst in the art of exhaust systems, for two reasons. One, the context of the claim makes clear that that's what we're talking about, an exhaust system. That's the preamble to the claim—makes that clear that's the use and the field of the invention in the patent makes clear that's the field. And as this court interprets terms of art generally as to the relevant field, we think that is the better—that are proffered construction is the better one. To your question, Judge O'Malley, whether you enter that construction or you remand for the district court to enter that construction, we think it would be more efficient to go ahead and enter that because we believe that's the correct construction under this court's case law.

Deanne Maynard (06:36):

And then the case can move on to the other issues on remand. Again, I would point out, JMI doesn't dispute that if the claim terms are given their ordinary meaning, a person of skill in the art knows what is an SCR catalyst and what is an Amox catalyst in the relevant art of exhaust systems. Their expert's declaration to the contrary is based on the notion that this patent creates some special meaning, and JMI is wrong about that for two reasons. First, nothing in the patent expressly redefines effective, or expressly disavows the full functional limit of these limitations. So, given that under this court's case law, these claims are interpreted to mean any material that a person's skill in the art considers can perform the recited function. That's Hill-Rom, that's how this court reads words like data link, clamp, container. Catalyst is a word like that. It's a word that takes meaning from what it does. And this is a perfectly fine way to claim something, especially one like this that's so well understood in the art.

Judge O'Malley (07:42):

There's also a lot of discussion in these briefs about the material compositions language. Would that be appropriate for us even to consider if we agreed with you and we're sending it back? Shouldn't that be something that the courts should—the lower court should review in the first instance?

Deanne Maynard (08:01):

I'm not sure I understand what your honor means by "the material composition."

Judge O'Malley (08:06):

Well, there was discussion about the construction of the material compositions limitation.

Deanne Maynard (08:10):

Right, and that, that is this, this limitation, the effective limitation. I think the material composition limitation should be construed to mean: any material that a person of skill in the art of exhaust systems would consider to be an SCR catalyst or an Amox catalyst.

Judge O'Malley (08:28):

But should that set, or should our construction be a limiting one? In other words, could there be other aspects of the material compositions limitation that are still in dispute?

Deanne Maynard (08:38):

I don't think that they've argued any other limitations to material, then it just that—I don't think there's a dispute between the parties about material. The only dispute about the claim construction is the one that Judge Taranto identified, which is whether we should make clear that it's an SCR catalyst in the art of exhaust systems or not.

Judge Lourie (08:55):

I guess you would emphasize what the claim says, looking at material effective of catalyzing rather than ineffective amount. This doesn't say effective amount, does it?

Deanne Maynard (09:08):

It doesn't your honor, it's just describing a performance quality. Can—would a person of skill in the art consider this to be an SCR catalyst and the terms, as Judge O'Malley pointed out, the patent does use this phrase interchangeably with the terms SCR catalyst and Amox catalyst, and it defines SCR composition, your honor, and Amox composition. So in column five at line 47, it defines—so SCR composition is defined higher at line 39. SCR composition refers to a material composition affected to catalyze the SCR function. And then at line 46, column five, ammonia oxidation compensation refers to a material composition effective to catalyze the ammonia oxidation function. The background section of the invention makes clear that these are well-known in the art in—yes—

Judge Taranto (10:02):

As Johnson, Maddie says something or other like the same material at very, very different temperatures either will or will not catalyze nitrous oxide or something. What do you do with that variation in property as to the very same material?

Deanne Maynard (10:24):

I think this court's case law makes clear, like in Geneva, that if a person of skill in the art would consider it to be an SCR catalyst under any conditions in an exhaust system, then it's covered by this limitation. Now, again, of course it would have to be organized in the architecture claimed for it to infringe. And no—just to be clear, this isn't going to be an issue actually at infringement of these—in this case. I mean, what they're using is are—our materials that are listed in the specifications. So these are—

Judge O'Malley (10:53):

That's what I wanted to ask you. How does this play out? Cause tethering the language of a claim construction to the understanding of what of skill in the art, it's pretty unusual. Usually we're supposed to look at what a one of skill in the art would assume and then come up with a construction that they would assume.

Judge O'Malley (11:10):

So having the jury say, what does one have skill in the art understand it to be, doesn't that mean you have to have expert testimony on the scope of the claim construction?

Deanne Maynard (11:18):

Well, so your honor, I don't think there is any dispute here about what is an SCR catalyst or what is an Amox catalyst and what the person—I don't think there will be any dispute about that. This is not going to

be an issue at any trial. If there were a dispute about—at some point, hypothetically, in a case like this at around the edges of whether something really was a catalyst or not, then I think that would be an infringement question, not a claim construction question. But there's not going to be any dispute like that here. This—we're like right in the middle of this, this is—they've just relied on this for their indefiniteness claim.

Judge Taranto (11:50):

Although it—there might have been essentially an extrinsic evidentiary and therefore factual dispute about whether relevant, skilled artisans sufficiently understand what is an effective catalyst. As I understand it, your position is that in this case, there is no such dispute, because even their expert, either explicitly or implicitly, recognized that somebody would know what an effective catalyst was. And instead drew his opinion by saying, as you said, that this patent requires a certain minimum level.

Deanne Maynard (12:27):

That's right, your honor. Exactly. There is no dispute here and I'm happy to—I'm into my rebuttal time, but I'm happy to address why I think the reading of the patent is wrong if you'd like, or I'll save the rest of my time for rebuttal.

Judge Lourie (12:38):

Well, we'll let you save it. We wouldn't want you to exhaust your time.

Deanne Maynard (12:46):

Thank you, Judge Lourie.

Judge Lourie (12:46):

Mr. McCann.

Douglas McCann (13:00):

May it please the court, Doug McCann from Fish and Richardson on behalf of Johnson Matthey. The court has seen from the papers that key issue in the case is this issue of functional claiming. And we certainly agree there's nothing per se, improper with functional claiming, but we direct the court's attention to Halliburton, which says fine. But when you have functional claiming, there is often some ambiguity. And so you look to the specification to try to determine what is within the reasonably certain boundaries—

Judge Lourie (13:30):

Well my question in Halliburton, which of course was overwritten by statute, relates to a disclosure of materials. There were plenty of materials disclosed in this patent.

Douglas McCann (13:41):

Well, they're all your honor. But so the claim term that's at issue, the one that the court, the district court construed was material composition A, effective for catalyzing NH three and the corresponding. So we are talking about materials and what their identity is. And I think, your honor, if you look at the pharmaceutical cases in this area that were also cited heavily in the briefs, one thing you see is you're always told, I think in every case, what is it that is going to perform the function. Aspirin, in an effective amount to grow animals, for example. Not any substance that will be effective in growing animals.

Judge O'Malley (14:15):

What's your response to the argument that your own patents use the same terminology?

Douglas McCann (14:18):

Your honor. I, all I can say to that is every patent in terms of reasonably certain boundaries would have to—you'd look to the specification to see if the boundaries were provided.

Judge O'Malley (14:28):

But it does certainly seem to indicate that that's the way one of skill in the art would do this.

Douglas McCann (14:32):

Well your honor, you can draft a claim in this way, provided that you give the appropriate boundaries. So one of the things, for example, here that we pointed the court to is this catalyst cue and this 6.3% effectiveness. The patent says that catalyst Q will catalyze both SCR and Amox, but it uses the terminology specifically. And this is at column 18, line six. It uses the terminology specifically that it's an SCR-only catalyst. First, those words are words of function and not architecture. And second—

Judge O'Malley (15:12):

So this is your argument about figure six ultimately?

Douglas McCann (15:14):

Yes, your honor, example six.

Judge O'Malley (15:17):

This this—you put a lot of reliance on—if we disagree with your interpretation of figure six, what does that do to your argument?

Douglas McCann (15:24):

Well, I have a second argument, your honor.

Judge O'Malley (15:27):

(Laughs)

Douglas McCann (15:27):

It's always a good thing for a lawyer. So, with your honor's permission, I'll just finish the part about example six, and then I'll discuss the second part. So it does indicate 6.3%, and I noticed in the reply brief BSF says, "and this is the first time we've seen this argument. That's just shorthand, SCR-only catalyst for the architecture."

Judge O'Malley (15:47):

Well, when you say it's the first time you've seen this argument, I mean, there was testimony from their expert on it, wasn't it?

Douglas McCann (15:52):

There was your honor, and his testimony was consistent with our position. So in the claim construction proceeding, before the district court, in his reply declaration, he said specifically in this paragraph—35 of his reply declaration, he said, specifically—

Judge Taranto (16:09):

Do you happen to have that [**inaudible**] cited?

Douglas McCann (16:09):

I do, your honor. It is pages 1324 and 1325, and it's paragraph five. And he's specifically addressing the words from column 18 SCR only catalyst. And he does not talk in terms of architecture. He talks in terms of catalyst function. And he says, "well, I think that the patent used the word SCR only catalyst there, because that particular material copper Chavis site doesn't work with the words you used, I believe below 300 degrees. And so a person would not consider that to be optimal as an SCR catalyst." And that's why as an Amox catalyst, excuse me—and so that's why those words were used. Johnson Matthey's expert had the same view that SCR only catalyst there is talking about the function. And so the person of skill looking at this claim and trying to decide what goes downstream underneath and what is upstream on top is going to look to that language and is going to take the conclusion. There's some minimum level of function here, but I'm not told what it is.

Judge O'Malley (17:15):

You don't really respond at all to appellants or at least maybe a little bit, but not in full developed argument to the appellant's point that the real purpose of the claims and the purpose of the patent or what the patent's all about is the structure of the catalyst, not the makeup of the catalyst. Does that matter?

Douglas McCann (17:38):

What does your honor. I certainly agree that what the inventors were focused on was the architecture, but of course, one has to know what is A and what is B in order—put them in the right orientation to practice the patent claims or to avoid it. I thought, your honor, perhaps one example that might answer your question there is, imagine catalysts queue, which we can see the data in the specification shows that it will function as the SCR catalyst and it will function as the Amox catalyst, but the temperature for example, can have an impact. So the first question—I have two that relate to that. The first question I'd have is for the person of skill is if I'm driving down the road and I hit a certain temperature, and my SCR catalyst is now suddenly catalyzing Amox, where does that put me in terms of whether I infringe this patent or not?

Douglas McCann (18:26):

And the second is—let's say, I'm trying to avoid this entirely. And I have an SCR catalyst on one substrate and the AMAX catalyst completely separate on a different substrate. That's my goal to avoid having a problem with BASF. As the specification makes clear, you often coat and dry and coat and dry these catalysts to get the right loading. So imagine catalyst queue on what I thought was my SCR only substrate has a bit of a heavier coding on the downstream end. Is BASF going to say, well, that same catalyst Q is performing the functions of both A and B. I really wouldn't know. I would think maybe, well, it says A and B in the claim. Are they supposed to be different or not? I can't tell in—this specification doesn't provide the guidance that one would need to know.

Judge O'Malley (19:13):

Well, your friends on the other side would respond that that's really you complaining about the breadth of the claim and not necessarily about how to define the scope of the claim.

Douglas McCann (19:23):

Your honor, I certainly agree that breadth does not equal indefiniteness and you could have a very broad claim drafted that can also be quite definite in the chemical arts. We often see [**inaudible**] groups with billions of compounds, but I can draw every single one of them. I do think when you have a broad claim, though, perhaps you should be a little bit more sensitive to making sure that your boundaries are clear, and I don't think that that's happened here. Now, your honor asked me a question earlier about if you don't agree about the 6.3%, where does that leave me? And I was—I do have an answer for that, and it actually is related to what Judge Toronto asked when we began the discussion with BASF. The issue is it can

perform, it does perform. I think even under the broadest reading of the construction that BASF is proposing where any amount, no matter how small, is efficient. That does mean, though, it has to actually work.

Douglas McCann (20:21):

And first, if you look at the specification, you can see you're not given one particular test to run. And I think we all agree that the temperature and the gas flow, for example, can affect whether you see performance or not. The HEC reference, which is in the specification BASF has argued that it's intrinsic. If you look at that reference, it has data—it's figures eight and 12, I believe, where you can see, for example, the zeolite does not work at all at 200 degrees Celsius to catalyze knocks, but it does work at 300. There are experts starting to those figures, says they're operating ranges for these catalysts. And so even if you're talking about any amount of function, the person of skill should be told, what is the test that I should use to determine what will be satisfactory to be material composition A or material composition B.

Judge O'Malley (21:14):

Do you—

Judge Taranto (21:15):

Oh, I don't remember—in one of the points that the district court made and based on an argument of yours, that—about one of the three things missing from these claims, identification materials, and one of them is measurement method. Does the concept of measurement method here include the conditions under which the amount is, or the functionality is measured, or just techniques for measuring levels?

Douglas McCann (21:50):

I think the conditions matter, your honor, to determining whether it functions or not.

Judge Taranto (21:53):

Well, what was the argument that was made was? Was part of the argument that you'd made about the absence of a measurement method and argument about lack of specifications of the conditions under which the functionality was being noticed to be present or not.

Douglas McCann (22:09):

We were arguing, your honor, that you should have been told a particular temperature and Glick gas flow rate that you could have used. In other words, if the specification had a single test, 300 degrees Celsius and, you know, 200,000 units per hour, and this is how every single catalyst and the specification is, I would have a much harder argument when we're talking about the claim at its broadest, where any amount is sufficient.

Judge O'Malley (22:36):

But, if the claim is drafted to say that any amount is sufficient, and that's in fact what your opponents, argue, do you agree with Ms. Maynard's characterization that what you're trying to do is to say that we need to take this outside of its normal and ordinary meaning, which would be able to, and would cover any catalyst known to a skilled artisan, and instead, that you think we need to give it a specialized, narrower meaning?

Douglas McCann (23:05):

Your honor, to that, I would say this: I think when Ms. Maynard makes her argument, she's very focused on the word effective by itself and says there are plain—there is plain meaning in the cases, especially the pharmaceutical cases. It's our view that the term that Judge Robinson was construing was the entire limitation, material composition, any effective to catalyze. And there is no plain meaning in this art from

that, and so when you—so I'm not trying to—I'm not asking this court to vary from the established plain meaning of effective, in other cases. I am saying that we are construing this entire limitation and there isn't a plain meaning to it that—from other cases or from the art that would put me in the position of having to show you a clear and unmistakable disavowal, for example.

Judge Taranto (23:50):

I took it, I guess, from the other side's argument is, and I guess it seemed to me to be right when reading in particular, your expert's testimony, declaration, that even your experts seem to recognize that a person of skill in the art would recognize what a material effective catalyze was. But his problem was that when he read the patent, kind of doing a lawyers job, not an expert's job, he was seeing a requirement for some threshold level of effectiveness and that he couldn't figure out how to identify without more than within the specification, but not, I think what you just said, which is that the term doesn't have an ordinary meaning.

Douglas McCann (24:43):

Perhaps I'm being confusing, your honor. I mean, I do think that the equations are well-known and I do think one could—you know—when something is causing the equation to happen, when knocks is actually being catalyzed. It is that when you're construing this entire claim and looking for the specification for guidance—you—there is indication specification you—I mean, you are supposed to understand plain meaning in light of the specification of the patent. There is this indication of a threshold, but you're not told what it is. Or as I say, even if you were to say, no—

Judge O'Malley (25:16):

But that's exactly—the answer then to my earlier question was yes, that your expert acknowledges that there are lots of well-known catalysts that people skilled in the art would know. But you're saying that somehow this patent has defined the word effective to require something more that he can't figure out what it is. I mean, as Judge Taranto pointed out. So when I asked you if you agreed that she said, you're asking that—you're suggesting that the patent has some kind of lexicography here that your answer to that then would be yes. Right?

Douglas McCann (25:53):

I really don't think that there's a lexicographer, your honor. I think it's that just plain meeting us—

Judge O'Malley (26:00):

I'll define lexicography on your—in your view, obviously—

Douglas McCann (26:03):

I'm sorry, your honor.

Judge O'Malley (26:04):

—ill-defined one in your view, but a lexicography nonetheless.

Douglas McCann (26:09):

I mean, perhaps we're saying the same thing in different words, your honor. I have—we have not argued this case in the sense that we must point to a clear and unmistakable disavowal or lexicography under the Thorner rubric that—the way we saw this was you have a plain meaning that means understood within the context of the specification. So yes, this—the expert does understand what SCR [**inaudible**] is, but when he reads the specification, he sees the threshold. That's not explained, or as I was saying earlier, the other aspect could be even if you go as broad as possible and it's any, it has to at least work as opposed to not work. What test do I use when I see that some catalysts will work on a certain conditions, but do not under

others, and that's undisputed.

Judge O'Malley (26:55):

Do you agree that my concerns about looking down the road to how this would play out in front of a jury are not well founded. In other words, that my concern that we might be having testimony about one of skill in the art would understand, which is arguably bleeding into claim construction are not realistic ones, because there's not going to be any dispute about whether or not if—that one of skill in the art would understand that what you're doing falls within that bounds.

Douglas McCann (27:27):

I think the court well knows that it's amazing what lawyers can do with words—are concerned about that tag online is understood in the art of exhaust systems, is that would become the refuge for all inconvenient facts. When the experts were opining as to what I understand infringement and validity here. And that's the reason why you saw our alternative construction was very similar to what there's—but we didn't want that extra—

Judge O'Malley (27:51):

What's the tag line do though? Why does that make a difference?

Douglas McCann (27:55):

Well, so for example, if we were arguing that—

Judge O'Malley (27:58):

We talk about skill in the art. What—it's got to be in the art, right?

Douglas McCann (28:02):

Yes. It was really, your honor, at the district court says that extra tag line, when the party, you know, is faced with, for example, a prior art, if we were arguing, well, you have the same catalyst top and bottom. And this is—you know, catalyzing, both SCR and AMOX under this broad reading if they—then the expert comes along and says, well, as the district court said, though, as understood in the—I wanted the skill in the art. And so you wouldn't think the same substance was—could possibly catalyze both. You'd do something different. That was our concern for that tagline.

Judge Lourie (28:37):

Thank you counsel, your time has been expired.

Douglas McCann (28:39):

Thank you, your honor.

Judge Lourie (28:40):

Ms. Maynard has a little rebuttal time, two and a half minutes.

Judge O'Malley (28:43):

Okay. I think you need to answer that last point first, and that is—is this, you're trying to slip something in the claim construction. So as to narrow any scope of prior art that could be applicable for purposes of 102 or 103.

Deanne Maynard (28:58):

We're just trying to interpret the claims in the appropriate art, your honor, which I think is what this court always does. The conduct of these claims is in the art of exhaust systems. That's what the claim—that's the preamble of the claim and the technical field of the claim. And so whether this court, as I was saying to Judge Taranto, whether the court actually were to tack that onto claim construction or not, I think it's implicitly there.

Judge Taranto (29:19):

This isn't—so is there something in the meaning of the claim and your understanding that requires somebody applying it to look at—ask whether this is in fact going to act as a catalyst one or the other under normal operating conditions in exhaust systems, or is there any reference to the conditions under which the exhaust system will operate? 'Cause I gathered there's at least some evidence like the evidence about the 200 versus 300 degrees Celsius difference that the same material may either not do it or do it.

Deanne Maynard (29:59):

Well. So I think at a high level, to respond to your question, Judge Toronto, functional claiming is not a use limitation. You're claiming if—so if the person is skilled the art considers the material to be an Amox catalyst or an SCR catalyst in the art of exhaust systems, then it is, regardless, as long as there are some conditions when it would function that way in the art. And as to the claim itself, to the extent you're asking about the claim language itself, claim one, for example, which is the prominent independent claim at appendix 29, line 40, a catalyst system for treating an exhaust gas stream containing knocks the system comprising. And then, material composition be effective to catalyze selective catalytic reduction of knocks. So I think it is in the term, in the context this art, that it should be construed. I do want to just quickly, before I run out of time—this is not the first time that we made the argument, at appendix 1497 below, at the hearing below, my partner explained it exactly like we're explaining here, PMQ at appendix 1497 line 15, my partner said the other sample queue is not an embodiment of the invention. It only has one layer. It only has the SCR layer. That's why it's called an SCR only catalyst. So although we didn't say it's a shorthand, it's the same argument.

Judge Taranto (31:20):

Let me just ask this one more time.

Deanne Maynard (31:22):

Yes, your honor.

Judge Taranto (31:25):

Does this language—a system with ABC, one of which is a material composition effective to catalyze the—to catalyze SCR of knocks require proof that it is in fact in the—that it is going to capitalize SCR in the—in a and accused exhaust system?

Judge Lourie (31:56):

Is your answer that there isn't a proof of utility?

Deanne Maynard (31:59):

Yes. It's not about the use, your honor. It's if this is—this language is how a person of skill in the art would describe an SCR catalyst in the context of an exhaust system. So if a person of skill in the art would consider a catalyst to be an SCR catalyst in the art of exhaust systems, then it's covered by this limitation.

Judge Lourie (32:19):
It's an indefiniteness question, not inoperativeness.

Deanne Maynard (32:25):
And a person of skill in the art would know what those things are, and their expert doesn't dispute them.

Judge Lourie (32:30):
Thank you, Ms. Maynard. We'll take the case under the [**inaudible**].