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Judge Dyk (00:00):

Before we begin our argument this morning, we have four admissions. I have the pleasure of moving the admission of my four law clerks from this year who have done an excellent job and kept me on the straight and narrow. And I'm very appreciative. They have each one of them been terrific. So in no particular order, I first moved the admission of Anthony Shea, who's a member of the bar and is good standing with the highest court of New York. I have knowledge of his credentials and I'm satisfied that he possesses the necessary qualifications. So, Judge Taranto, I think you and Judge Hughes have to act on the motion.

Judge Taranto (00:50):

Granted.

Judge Dyk (00:54):

Second, I moved the admission of Giovanni S. Sarmon-Gonzalez, who's a member of the bar and is good standing with the highest court of California. I have knowledge of his credentials and am satisfied that he possesses the necessary qualifications.

Judge Taranto (01:09):

Again, granted. We'll see how the rest go. (laughs).

Judge Dyk (01:14):

Two for two [**Inaudible**]. I move the admission of Alexander Ryan Traziak, who's a member of the bar and has good standing with the highest courts of Texas and the District of Columbia. I have knowledge of his credentials and I'm satisfied that he possesses the necessary qualifications.

Judge Taranto (01:31):

Granted once more.

Judge Dyk (01:32):

Okay. And then finally I move the admission of Jimmy Jays Wang, who's a member of the bar and is in good standing with the highest court of Massachusetts. I have knowledge of his credentials and satisfy that he possesses the necessary qualifications.

Judge Taranto (01:47):

I think a clean sweep. Yeah. Hit for the circuit. Granted.

Judge Dyk (01:52):

So the four of you should take the oath of office.

Bailiff (01:55):

Please stand and raise your right hand. Do you solemnly swear or affirm that you will conduct yourself as an attorney and counsel of this court uprightly in a court of law and that you will support the constitution of United States of America?

Attorneys (02:08):

I do.

Bailiff (02:08):

Welcome to the bar of the United States Court of Appeals for the Federal Circuit.

Attorneys: (02:10)

Thank you, sir.

Bailiff (02:12):

You're Welcome. You're Welcome.

Judge Dyk (02:17):

Welcome all of you to the bar and, and again, thank you for all your excellent work. Now, having done the easy part of this morning's work we turn to the cases. The first of these is number 16-1742 - *Netlist Inc. v. Diablo Technologies, Inc.* Mr. Lloyd.

Seth Lloyd (02:57):

Thank you, your honor. And may it please the court.

Seth Lloyd (03:00):

A single claim construction error infected all the board's unpatentability decisions, and those decisions should not stand.

Judge Dyk (03:08):

What exactly is the claim construction that Netlist requested in the board proceedings?

Seth Lloyd (03:14):

We requested that the board construe selectively electrically couple as electrically coupling in response to a selection. We raise that construction at the institution stage during the trial, and that's the construction that we've asked the court here to adopt as well. And on the merits of that, the board's construction is wrong for what, any of several reasons—

Judge Dyk (03:34):

I'm not really seeing that there's any clear difference between that and what the board did. Did the board explained that there was a difference between the two?

Seth Lloyd (03:46):

The board rejected our argument—or our claim construction consistently, Judge Dyk, and the board instead adopted a different construction. And the core of the dispute here is about how the board ultimately understood its construction. The board understood that selectively electrically coupling can be accomplished by simply sending a signal to a memory device to activate or deactivate that memory device.

And we consistently at the board challenged that interpretation and told the board that selectively electrically coupling could not be accomplished when you had a memory device that was permanently electrically connected to other parts of your computer system. The board, in adopting its construction, got it wrong because the board focused on different concepts. For example, the board focused on selecting between components. That was the first part of the board's construction, but the claim language doesn't say anything about selecting components. Indeed, the claim language already tells you the relevant components. A single instance of selectively electrically coupling occurs between a memory device data signal line and a common signal line. Those are the relevant components, and the circuit isn't selecting between those components. The circuit is electrically coupling those components. The board also got it wrong because the board focused on transferring power or signal information. That's the other part of the board's construction, but the patents use a different term for that. They use the term transmit. That's in claim six and seven of the '150 patent and also in the specification.

Seth Lloyd (05:15):

But—

Judge Taranto (05:15):

Would I be right in understanding your position that the difference between what the board did and what you're doing is something like you think that the act of coupling is creating a path along which certain things can happen, like transmitting signals or transmitting power. And the board took the view that it's not creating the path, but it's actually the transmission over a path.

Seth Lloyd (05:39):

I think that's mostly right, Judge Toronto, with the caveat that the word "path" can be a little bit loose, right? It—you can have electrical coupling, even if there isn't necessarily current transfer across a wire, but that's right. An electrical coupling is about creating the electrical connection through which signals might be transmitted, but the board got it wrong, because the board focused on that end result of transmitting. But an electrical connection exists, even if nothing is ever transmitted. And you know that because that's not only the way that claims use the language of coupling, but that's what the specification shows at columns six and seven of the '150patent. So this is at appendix 166. And the board's misunderstanding—

Judge Dyk (06:22):

There doesn't have to be a switch, you said, so I'm not sure apart from a switch, what it is that in your view would satisfy your construction.

Seth Lloyd (06:36):

That's right. Our position is not that a switch is required, but our position is that you can't have selective electric coupling, Judge Dyk, when the signal lines—remember, the claims focus on the signal lines. Electrical coupling is about coupling the signal lines. If those signal lines are permanently connected, you cannot selectively electrically couple them because you already have a connection. There's always a connection. That's what the board thought, that that was enough. If I'm simply at the end of those lines, you have these memory devices. And I simply say, "This memory device, your turn to transmit, and other memory device, don't transmit." The board focused on that—

Judge Dyk (07:09):

What would be an example of something that would satisfy you that's not a switch?

Seth Lloyd (07:13):

So the one example that the specification gives is a multiplexer. A multiplexer is an electrical component where you might have four signal lines coming in. There's a control line. And then the multiplexer will

electrically couple one of those four signal lines, say, to the output. That's one example.

Judge Taranto (07:30):

And one would not call that multiplexer a switch?

Seth Lloyd (07:34):

I don't know that there's anything in the record either way, whether a person of skill in the art would think of that as a switch. But part of the problem here is that the word switch is—there's no construction. It's been—it's a loosely defined term. But the core concept is about coupling, electrically connecting these lines. And this goes—it's not just—this isn't just a semantic difference between the board and us—

Judge Dyk (07:56):

Did you suggest to them that a switch or a multiplexer was what was required?

Seth Lloyd (08:03):

No. What we suggested is what is required is electrically coupling in response to a selection. And when the board adopted at petition stage a construction that said, "You can have electrical coupling when you have permanent hardwired signal lines," we can—we consistently attack that and said, "That's not right." And the—

Judge Dyk (08:20):

I don't understand how they're supposed to understand your position if you didn't tell them that you're talking about a switch or a multiplexer or something like that, why—you seem to have given them a somewhat vague claim construction, and now on appeal, your suggesting that you're refining it to say it has to be a switch or a multiplexer, but you didn't tell that to the board. Right?

Seth Lloyd (08:47):

So, Judge Dyk, I disagree in at least two ways with that. First, there was no confusion at the board about what our position was. You can read what the board said at appendix 29, where the board recognized that we were saying the exact same thing that we're saying now: that you can't have selective electric coupling when you have permanent connections. So appendix 29, that's in volume one of the appendix where it's the back of the blue brief.

Seth Lloyd (09:15):

Right at the top of the page, the board responds to this issue that we're discussing now. They say, "Additionally, we are unpersuaded by patent owner's argument that hardwired data signal lines, such as that taught by Amidi, cannot be electrically coupled in a selective fashion." And we did, Judge Dyk, the other way I disagree with what you said is we did offer a switch as one example of selective electrically coupling. The point is simply that we're not trying to say that a switch is the only way to selective electrically couple. And there's nothing—there's no requirement that we disclose all potential embodiments in our patent. We simply need to disclose enough to satisfy the written description enablement requirements.

Judge Taranto (09:53):

Can you say something about the reference in column eight to the data buffer? Is that consistent with your view right at the bottom of column A and certain embodiments, the memory about module operates as having a data path rank buffer, which advantageously isolates the ranks of memory devices or modules or—that sounds like it's doing coupling—is that—not much is made, maybe nothing is made in the red brief of that. And I think you have a footnote in your reply brief pointing that not much is made of it, but

I—

Seth Lloyd (10:31):

That's right.

Judge Taranto (10:32):

I want to understand it better.

Seth Lloyd (10:34):

So again, the—I think the fundamental dispute is that electrical coupling can't be accomplished when you have permanent electrical connections. So a buffer may that—again, there hasn't been a lot of development on this, Judge Taranto. And so to the extent that were an issue, the other side thought were important. It was their burden to focus on that. A buffer could be one way to isolate things, but again, here, the claim language is more particular than simply isolating, and it's more particular than simply coupling. It's selectively isolating a load in the load cases, so it would come down to is a buffer actually configured in a way within a circuit to selectively isolate a load? And is it configured in a way that it's selectively electrically coupling the relevant data signal line? So, buffers may be a part of that, but I think it would depend on the circumstances of how the circuit is configured.

Seth Lloyd (11:27):

And, Judge Dyk, this—the dispute that we raised, it is the same dispute at the board. And it goes to the core of what the invention is about. What the board said was selectively electrically coupling is what the prior art did. If the board had looked at the specification, it would've understood that. But the board's analysis on the claims—it bypassed the specification. It said, well, the specification doesn't expressly define selectively electrically coupling, and it went straight to technical dictionary definitions. But the claims are the single—or the specification is the single best guide to understanding the claims and here—and we walk through this in the blue brief, if you look at the prior art memory device in figure two, it operates in the same way that the board thought was selectively electrically coupling. You have permanent electrical connections. We reproduce this on page 19 of our gray brief, side by side. In the prior art, you had a memory device and it was permanently electrically connected to the rest of the system.

Seth Lloyd (12:19):

And the problem with that type of connection, the specification details this at column six, is that the system is always exposed to the loads when there's—when there is no selective electric coupling, the system will always be exposed to the loads of both memory devices. That was okay with the prior art, because the computer system knew how many memory devices to expect on a module. The computer system was designed to handle, say, eight memory devices on a module. So if all of the devices are being coupled, the system can handle that load. But our invention was about doubling or quadrupling the number of memory devices on a module beyond what the system was designed to handle. And if you configured it in the way that the board thought in the way that prior art shows—

Judge Dyk (12:59):

Didn't Kline do that? Didn't Kline do that in the prior art?

Seth Lloyd (13:02):

So Kline did—Kline did disclose putting more memory devices on the module, but Kline did not disclose this aspect of the invention, which was about—which was about selectively coupling or isolating loads. In fact, what Kline did was the same as the prior art.

Judge Dyk (13:20):

I thought it did. I thought it showed switches where—while you could turn it on and off.

Seth Lloyd (13:24):

That's right. So I was actually thinking of [**inaudible**] on Kline. Kline does show switches, but switches are neither here nor there. Our claims don't require switches and simply—

Judge Dyk (13:35):

Wait, wait, wait. You said they don't require switches, but they do cover switches.

Seth Lloyd (13:40):

They cover switches configured in the specific way that the claims detail. The claims here are very specific. There has to be electric—selective electric coupling between a device data signal line and a common signal line. There are switches in Kline. We don't dispute that, but look at what the switches do in Kline. That's at appendix 1630.

Seth Lloyd (14:09):

This is for one embodiment of Kline. But if you look at the description—

Judge Dyk (14:13):

Wait, wait, wait.

Seth Lloyd (14:13):

Yeah. It's volume two, Judge Tar—Judge Dyk.

Judge Dyk (14:19):

What page?

Seth Lloyd (14:20):

One-six-three-zero. It's about maybe a fifth of the way through volume two. They're big.

Judge Dyk (14:29):

Okay.

Seth Lloyd (14:31):

So this is showing one embodiment in Kline, but if you read the description, it applies to all. Yes, there are switches here, but if you look at what—how the switches are configured, the switches are configured to couple or decouple an entire memory module. That block that says memory on the right? That's an entire memory module. That's not an individual memory device, and that's not what our claims require. And it's—it also wouldn't work for our invention.

Judge Dyk (14:55):

I thought there was testimony that the switches in Kline were disclosed to apply to individual memory devices and not just the module.

Seth Lloyd (15:11):

The—I think there was testimony that the switches could be put on a memory module and in some instances, the switches could actually be built into the memory devices, but the way the switches are all

configured, which that's what the circuit—the claims are about is how the circuit is configured goes to they—it couples or decouples the entire module.

Judge Dyk (15:29):

Yeah. But I mean, we have to deal not with your argument as to what Kline discloses, but with—since this is really complicated stuff—but with what the testimony and expert declaration said about this, and I thought the petitioner had expert testimony that Kline disclosed using the switches to apply to the individual devices, as well as to the module. Am I wrong about that?

Seth Lloyd (15:57):

I'd have to look. I didn't see that in the red brief, Judge Dyk, but we also have expert testimony saying the same: appendix 22—or 24-90. And I agree that this is complicated stuff, which is why this issue of whether Kline would disclose under our construction isn't properly before the court, right? The board made all of its findings based on its construction, and it consistently rejected our expert testimony as based on our construction and not the board's. So to the extent that there's factual disputes about what client discloses and whether it discloses under our construction, that's an issue the board needs to resolve in the first instance. I—if I may, I like to reserve the remainder of my time, but I'm—

Judge Dyk (16:35):

Well, I guess, I'm—my question is whether there's conflicting testimony as to what client shows in this respect.

Seth Lloyd (16:43):

Yeah. So at Appendix 24-90. That's our expert.

Judge Dyk (16:57):

Okay. So where am I supposed to look here?

Seth Lloyd (17:03):

So in paragraph 63.

Judge Taranto (17:09):

Is this?

Seth Lloyd (17:12):

I'm sorry. I gave you is the wrong cite, Judge Dyk. It is at appendix 21. Let's see. Yes. Appendix 21, 22. I'm sorry.

Judge Dyk (17:26):

Okay.

Seth Lloyd (17:29):

So this starting at the bottom of the page, Judge Dyk, this is our expert in his deposition. He says, "Well, actually, in all the shown embodiments that can selectively decouple or sort of decouple a whole memory module, that is the granularity." And then at the bottom of appendix 21, 23, about line 19, he reconfirms that position—that testimony. So that is why I'm going to say that it decouples or couples an entire memory module, because that embodiment meets the objective of the summary of the invention in Kline—in talking about Kline.

Judge Dyk (18:02):

Okay. Any other questions?

Judge Hughes (18:05):

Well—can—I mean—am I misreading the next sentence that says “one could to argue, I suppose, if you went to figure 10, there’s a possibility of decoupling a memory device?”

Seth Lloyd (18:14):

So that is what he says. And if you look at the figure 10, it shows switches being built into the memory devices themselves. That’s a—that’s not consistent with our claims for two reasons. One, this—it has to be the circuit that selectively electrically couples and the claims are written in a way that’s clear the memory devices are different from the circuit, but also even when it’s built into the chip, it’s still coupling all of the devices at the same time.

Seth Lloyd (18:42):

Thank you.

Judge Dyk (18:44):

Okay. We’ll give you two minutes for rebuttal.

Seth Lloyd (18:45):

Thank you, Judge.

Judge Dyk (18:52):

Mr. Marino.

Fabio Marino (18:55):

Good morning, your honors, and may it please the court. Happily ask this court to affirm the board’s rejections of all three IPRs on three separate grounds. The first and most important one that, as we just heard from Netlist, the board actually made determinations on what was the prior art that was being used to invalidate. And those determinations went beyond just applying the board’s own construction. And in fact, as your honor asked during Netlist’s part of the argument, they did specifically address whether the combination of prior art in fact included the switch, and the board had to do that because there were two dependent claims, 17 and 33 in the ’150 patent that expressly required the switch. And the board determined factually that in fact, the switch was the present element of that combination. And I’m going to focus on the combination of Amidi client just to keep things simple. So in Amidi, Kline, regardless of what—whether their Netlist arguments are correct on claim contraction, there is the complete circle that’s required by the claims, including the critical switch element that Netlist admitted is not necessarily required, but it would meet the claim limitation of selective electrically coupling and selectively isolating the other in the rest of the claim.

Judge Dyk (20:20):

But their argument appears to be that while Kline discloses switches, it’s a switch which acts on the module as a whole and not the individual.

Fabio Marino (20:30):

First of all, I don’t know that the argument was preserved on appeal, but let’s assume it was preserved because I want to answer it factually. They pointed to the wrong figure in Kline. That’s not the figure that the board relied upon. The figure relied on figure six of Kline, which is at appendix page 1632.

Fabio Marino (20:53):

Which I actually think was part of what Dr. Session was deposed about. And on figure six, you can clearly see that there are transfer gates 64. Each one of which is connected from memory device, which are labeled 62 in that figure. And then there is a dash box around all of those solid line boxes, and that's memory module in that figure. So in figure six, clearly, there are individual switches for each memory device on and multiple memory devices on this—on a single memory module.

Judge Hughes (21:29):

I'm sorry. Where does it show there are individual switches. I mean, this is the—

Fabio Marino (21:33):

So the transfer gate 64 or—

Judge Hughes (21:35):

Are they—are those the switches?

Fabio Marino (21:37):

Those are the switches. You see the memory module 62. And if you read the specification, it actually makes it clear that those are separate switches for each of the memory module, memory expert—

Judge Dyk (21:50):

Did your—did your expert explain that?

Fabio Marino (21:51):

Yes. He explained that in his declaration—

Judge Dyk (21:54):

Where did he do that?

Fabio Marino (21:54):

Page nine. Supplemental declaration. It's in the appendix at 8525, paragraph 41.

Judge Dyk (22:11):

8525.

Judge Hughes (22:11):

[**Inaudible**].

Fabio Marino (22:11):

And I will also refer to paragraph 42—

Judge Hughes (22:11):

85 what?

Fabio Marino (22:11):

So, it's 8525.

Judge Hughes (22:11):

I got that.

Fabio Marino (22:40):

Paragraphs 41 and 42 address this particular aspect of Kline. And you will see that in paragraph 42, there's an express reference to figure six and is the first—the memory device, and it says that client teaches that control signals for controlling a switch may be generally the role module in figure six. And there's other portions of this declaration, but—

Judge Taranto (23:05):

Where did the board make findings about this specific issue?

Fabio Marino (23:09):

Thank you, your honor. That's exactly my next point. So if we look back at X three, the very same page in the board's decision, the council referred to page 29 of the appendix.

Fabio Marino (23:22):

And I'm also going to be referring in a moment to page 32 of the appendix, but let's start at 29. Counsel refers to the first half of the page where the board addressed this issue of what Amidi teaches and rejected Netlist argument that hardwire lines aren't covered. But then, in the very last sentence, they said, furthermore, patent owners' declarant, Dr. Session, testified the client discloses the use of MOED switches, data bus switches, for decoupling select memory circuits from the data bus. So if Netlist argument were correct, the work was just applying its own construction—

Judge Taranto (24:03):

Right, but that sentence doesn't specifically address the distinction between decoupling individual devices within a module and decoupling the entire module. And as at least as I look at column—there aren't columns, I guess, in Kline, but page three of Kline where the transfer gate 64 discussed in figure six, I can't quite tell whether all the transfer gates are decoupled, thereby decoupling the entire module. There's at least one sentence that says that and—

Fabio Marino (24:31):

That is correct, your honor, this paragraph doesn't address that issue. My argument is slightly different. Let me just completely—I'm gonna go back to that point, which I honestly don't think was raised on appeal. That's why I am focusing on the early point. So first, the board clearly was cognizant of Netlist argument that a switch might be required, and they made an express finding that a switch was disclosed in the combination. But if you then go back to page 32, which is actually the finding of the board where they say they find these claims obvious in light of the combination of Amidi client—this on page 32, it's the first full paragraph. They set forth that conclusion. Then they tell you exactly what the combination is. They say that they're—that they're persuaded that Amidi teaches a circuit to the logic element, a register, and PLL.

Fabio Marino (25:18):

Those are the structure element of the circuit. We are also persuaded that the teachings of Amidi could have been implemented using the common data signal line and switch system disclosed in Kline. So that selective electric coupling a first data signal line to the common data signal. And that's the dispute element. So they are relying not on Amidi alone, but on the—on the circuit of Amidi, which is multiple memory devices on a single board with all the required circle elements modified to include the transfer gates of Kline, for example, in figure six. So the actual combination that the board applied was in Amidi and Kline in separate—in separately was the combination.

Judge Taranto (26:03):

But how do we know to read it that way, given that two pages earlier, the board said pretty clearly that hardwired data signal lines meet the selective electrical coupling?

Fabio Marino (26:16):

Because I think they're making a further findings of in the—in the very sentence that you just referred to, they then say, furthermore, Dr. Session actually second admits the Kline secondary reference expressing disclosing switches. And then when they do the combination, they point to Kline—

Judge Taranto (26:34):

Again, it didn't admit that it did it at the device level.

Judge Hughes (26:39):

Which reference do we get the fact that they're selecting—you know, coupling devices rather than whole modules? Is it Amidi or is it Kline.

Fabio Marino (26:50):

It's both. So figure six of Kline—

Judge Hughes (26:52):

If Kline is what you just walked us through, let's assume that I find that a little unclear. Is it in Amidi too?

Fabio Marino (27:00):

Yes. So there are separate. So Netlist argument is in Amidi. There are data lines that go to each individual memory module—memory circuit within the memory module. And there is—there are no switches. So Kline is supplying the teaching the—

Judge Hughes (27:16):

The switch, and Amidi gets you to the devices. Where's your testimony on the fact that Amidi has that STR structure?

Fabio Marino (27:24):

I want to understand what structure your honor is referring to?

Judge Hughes (27:27):

The device that they coupled devices, not the entire memory. I'm trying to get the terms right here. I don't—I forget what the patent used, but there's the bigger memory module on this individual devices—

Fabio Marino (27:40):

Yeah, I understand the question. So there is testimony throughout Dr. [Inaudible] declaration and in the board's description where they address what Amidi teaches. So for example, Amidi, if you look at page—at appendix page 21 and 20, those are the board's findings on the Amidi reference. Okay, so the first walk through the elements of the claim, and as we—as the court might recall, the circuit requires a register, a CPLD, and a PLL. Those are shown in figure four A and page 20 of the determination. Then they go onto the next page—on page 21, they show you figure six A of Amidi that has the connections between the CPLD and the module connect, which then goes to the memory controller. And by the way, in figure on the previous figure and figure four A—

Judge Hughes (28:46):

I—this is—I mean—this is very difficult, and it seems like at this point, we're trying to figure out whether even under their construction, the board would've affirmed, but it's very unclear to me, this language you're pointing to, whether it's specifying the difference between devices or modules. The last sentence of that paragraph, right before two overview of clients as Amidi explains it, system chip selects, signal control, the ranks of individual memory modules. Do you understand that word module to be different than device? When they're talking about—

Fabio Marino (29:19):

The word module is different than device. There is a single module shown in Amidi, and that's the one in figure four A. There are not multiple modules, so everything in Amidi that the board relied on is depicted on figure four A, which is a single module, which is this box labeled 400. So all of these memory devices, 404 that you see on the top line of that circuit, those are all memory—individual memory devices on the same memory module. And the connections that are discussed throughout Amidi are always referring to the same module. Now, if you go back—if we go back to the board's decision on fee on pages, 22 and 23, that's when the address figure six of Kline, right? And that's the same figure I referred you to. And in that figure again, you see that all those memory devices labeled 62 are connected to the transfer gates 14, and board relies expressly on that figure, give six—not the figure that counsel sided to in its arguments, that that figure applies all the environments. No, it is Kline and expressed embodiment figure six that has multiple memory devices connected through transfer gates to the common data bus. So that's what the board was looking at when he made its determination of obviousness of the Amidi plus Kline combination. I would also submit that—

Judge Taranto (30:48):

Can I just double check—is there something in this passage describing Kline that says there are—there clearly are multiple memory devices in the stack. Is that 62 something?

Fabio Marino (31:03):

Correct.

Judge Taranto (31:04):

Yeah, but that the transfer gates basically turned them on and off individually, as opposed to simply making a disconnect between the whole group of them on the module and the rest and the data line. I'm not seeing anything that I think—at least not in a way I can understand get the device specific issue—

Fabio Marino (31:33):

Sorry your honor, if you look on page 23.

Judge Taranto (31:36):

Yeah.

Fabio Marino (31:36):

The very last part before the section title three analysis, as according to Kline, integrated circle and front transfer gate output are connected to data buffer registers, which I think in that case, they're referring—well, that's the other side. So you're right. This section doesn't expressly address that issue.

Judge Taranto (31:54):

Can I just ask—that's sort of at the global level. I mean, why doesn't it make sense if we set aside the board's construction to send it back for the board to sort out what seems like a fairly complicated set of

issues, not so much about Amidi, but about some of the other references and not just Kline?

Fabio Marino (32:14):

Well, in the first instance, because quite honest, your honor, that wasn't raised on appeal. The only issue that Netlist raised on appeal is that claim construction. The end dispute, I know the board's findings.

Judge Hughes (32:26):

But I mean, I think what we're talking about now is presuming that the board's claim construction is wrong and still trying to see whether it still comes out the same way. And if we can't figure out that it comes out the same way, then shouldn't we send it back?

Fabio Marino (32:45):

I would—

Judge Hughes (32:46):

You're arguing lots of complicated stuff to us about what Amidi and Kline teaches based upon the board's opinions, which it seems to me vague, and your explanations of the drawings, but you don't have specific—or you haven't pointed to specific expert testimony that—particularly discussing this figure from Kline we've been talking about. Is there anything more on that?

Fabio Marino (33:11):

No, there is actual in the supplemental declaration of Dr. [**Inaudible**] and he goes into—through this in detail.

Judge Hughes (33:17):

And it says that that figure in Kline teaches that the transferred gates can—

Fabio Marino (33:22):

Can go to individual memory devices as well.

Judge (33:23):

Where, could you show us then?

Fabio Marino (33:24):

Yeah.

Fabio Marino (33:25):

Looking for that your honor, cause that was one of the issues that quite frankly came up during the trial before the PTAB, so I'm confident that that was presented. But in any—while we're looking for that citation, let me get my second argument, which is, and I think there's a point that might have come up in the argument already. I think the dispute that's Netlist raised while it's being characterized as a dispute of claim construction appeal was really a dispute on whether the claim—the claim, meaning construction they proposed, and the boards construction can actually apply to the references. That is not a claim construction dispute. That is a factual finding for the board to make. And that is not reviewed, no. That is reviewed for clear error. And I think Netlist sites the [inaudible] case—

Judge Hughes (34:16):

Well, it depends on how you view the constructions, don't you? If you view the board's construction as

your friend does, then the board's construction concentrates on selecting the memory device, not electrically coupling or decoupling from that memory device. And it seems that there is a distinction there in the patent. I mean, one—maybe the pull point of electric selectively coupling or decoupling electrically is to activate that device, but it has the additional purpose, at least it—from their arguments and their patent and specification of reducing load and things like that. Whereas if the line is always electrically connected, but you just use the selection from the prior art to go in and get data from it, it's different than being electrically isolated.

Fabio Marino (35:10):

I would like put a couple of points on that, your honor, first—

Judge Hughes (35:12):

If I've got the science wrong, I'm sorry, this is—

Fabio Marino (35:14):

That's okay.

Judge Hughes (35:14):

This is why we need testimony on this—

Fabio Marino (35:16):

You think your past arguments correctly. There's—there are two problems with that. And I think there was a question asked during counsel's argument, whether coupling simply creates the electric—the path, and then the transmission of the signal happens thereafter. The answer is no, because the claim requires electrical coupling, not just coupling, and it's [**Inaudible**] well known, covering is very broad term. Electrically, as the word construction says, actually requires transfer of electrons of electricity. That's the electrical cover. It's like a switch that the switch actually admits is the primary embodiment described in the pot. If we turn the switch on, there is electrical flow. Turn the switch off, there is no electrical flow. So it's operation of the circuit, it's not just creating the path or not. And how do we know that we that? Look at the structure of the claim in claim 15, we have a circuit with three required elements, the logic element, the register, and the PLL.

Fabio Marino (36:14):

And it says where in the circuit is configurable, too. And one of the things that's configurable to do is selective electrically coupling or selective isolating. So, the phrase that we're construing here is part of the operation of the circuit. It's not part of the structure of the circuit. And what Netlist is arguing is really—they want to add a structural requirement, either the switch or some other type of device being required to perform that function. But the inventors knew how to set forth structural limitations in the claim, and they knew how to set forth functional limitations, and they chose to include this sentence in the functional limitations.

Judge Dyk (36:56):

Do you have the reference to the testimony?

Fabio Marino (37:07):

Yeah. I think the best one, your honor, is on appendix 1285.

Judge Dyk (37:12):

1285. Which volume is that?

Fabio Marino (37:13):

It's in volume one, I believe.

Judge Dyk (37:31):

Okay.

Fabio Marino (37:32):

And that's the very beginning of paragraph 86. That's Dr. [**Inaudible**] testimony. The switch was stopped by Kline electrically coupled the data signals from a selected memory element, not a memory module, to the common data signal bus, and do it in response to the input signals received. So he is actually testifying—

Judge Hughes (37:53):

How do we know memory element means memory device and not memory module? Because in the paragraph before, when it's talking about memory device, it says memory device. And it—the sentence before that—it uses memory element presumably to mean something different.

Fabio Marino (38:23):

Well, so you also says in that same—it doesn't address it squarely, that—the answer, but in the same paragraph, it says one ordinary skill would understand the decoder as a logic element. Element as its ordinary meaning means one thing. So I think in this—in circuit, you about—

Judge Hughes (38:40):

Well that could mean—

Fabio Marino (38:40):

[Inaudible], you talking about one of the things in the figure.

Judge Hughes (38:42):

But it could mean one module or one device within the module.

Fabio Marino (38:47):

I wouldn't read it that way to be honest. I don't know that there is a connection—

Judge Dyk (38:50):

This is construed in section three C, paragraph 15 and 16, where is that?

Fabio Marino (38:58):

I'm sorry, your honor. I didn't catch that.

Judge Dyk (39:00):

It says on page 1285. So one ordinary in the skill in the art would understand the decoder is a logic element as construed in Section three C.

Fabio Marino (39:09):

Paragraph 15 and 16—

Judge Taranto (39:11):

This page 1230 and 1231.

Fabio Marino (39:28):

Yeah. So there is on page 1231, there is a definition logic element, and having to perform some kind of logic function or an element that comprises the logic circuit. So it's suggesting the word element usually is used to refer to an individual component, not to a whole memory module. So I agree that—

Speaker (39:51):

[Inaudible whispers] memory element is 62 as defined in these figures.

Fabio Marino (39:57):

I know, but how does it relate to the testimony?

Speaker (39:59):

Because this is, this is from Kline. Kline.

Fabio Marino (40:02):

What does he say in the testimony in this—in the actual body of the patent for Kline. Is that the patent for Kline?

Speaker (40:16):

Yes.

Fabio Marino (40:17):

They actually—they use the word element to describe the memory device at 62. And that is at—in paragraph 33, page 1637 of the appendix.

Fabio Marino (40:37):

And I think that makes—that makes that point clear. So the memory elements are 62, which are individual, which are the blocks in figure six I was referring to. So now we know that those transfer gates, plural, are each one for controlling a specific memory element or memory device, 62 figure six of Kline. That's part of the testimony that the board had available to it when it made the determination in the A two [Inaudible] review that in fact, the combination of a meeting, one memory module with multiple memory devices that has all the elements of the circuit, but for what Netlist argues is a requirement potentially for a switch or some other kind of device to decouple and couple the line selectively. The board took the teaching of Kline of MOED switches to modify the Amidi figure in the middle of the data lines to provide a switch for each memory device. And that is the determination the board made—

Judge Dyk (41:38):

I think we're about out of time. Thank you.

Fabio Marino (41:39):

Thank your honor.

Judge Dyk (41:40):

Thank you, Mr. Marino.

Judge Dyk (41:51):

So, Mr. Lloyd.

Seth Lloyd (41:52):

Yes, Judge Dyk.

Judge Dyk (41:53):

If the petitioner's expert said that Kline showed control of the individual devices and not just the module, was there a testimony to the contrary by your expert. That testimony that we looked at earlier didn't seem to contradict that?

Seth Lloyd (42:16):

It—I think it does contradict it, Judge Dyk, because again, the testimony that was just presented here went to is the switch connected to the memory devices. But again, our claims are more specific, right? Our claims require selectively electrically coupling a device data signal line to a common signal line. That's what Kline shows, even when the switches—even if switches are connected to individual memory devices, there's no disclosure of operating those switches in a way to selectively electrically couple the individual devices. On the figure six, for example, this is the paragraph—

Judge Dyk (42:51):

Where is your—where is your expert contradict this? Say, what you just said.

Seth Lloyd (42:56):

The—so one is the testimony we read before where he talked—where what he said is that that Kline operates the module—operates the switches at the module level, right? Not necessarily—

Seth Lloyd (43:06):

But your experts seem to concede that maybe it also shows operating with respect to individual devices.

Seth Lloyd (43:15):

No, I don't think that's right, Judge Dyk.

Judge Dyk (43:17):

What page were we at?

Seth Lloyd (43:18):

Let me pull it up.

Seth Lloyd (43:25):

Sorry. My notes are over here.

Seth Lloyd (43:30):

Appendix 21, 22.

Judge Dyk (43:32):

21, 22.

Judge Dyk (43:41):

Okay.

Seth Lloyd (43:45):

Well, it—actually, in all the shown embodiments that can selectively decouple, it's decoupling a whole memory module. That is the granularity. So he's not talking about necessarily whether the switches are connected to individual memory devices. He's talking about how the coupling or decoupling operates, and it's operating at the whole mod memory module level.

Judge Dyk (44:05):

But then on the next page, in the—in the sense that Judge Hughes referred to, "He says, well, yeah, one could argue, I suppose, if you want to figure 10, there's a possibility of decoupling memory device."

Seth Lloyd (44:17):

That's right. So there is an embodiment where the switches are built into the memory devices, and that certainly creates the possibility, as he admits, of coupling or decoupling the devices. But then he continues on—at the end of the day, it decouples, or—or couples an entire memory module because that the embodiment that meets the objectives of the summary of the invention.

Judge Hughes (44:37):

Is what you're saying that the difference from what he's describing here in your invention is the switch in Kline is in the memory module itself to the extent to control—can control devices. And therefore, it's not shutting off the power from the controller level, which is where you're shutting off the power from?

Seth Lloyd (44:59):

I think maybe slightly differently from that, Judge Hughes. I—it's not necessarily about where the switches are located or even what they're connected to, but it's about whether the switches selectively couple a signal line from the memory device to a common signal line. And the reason that matters—I mean, here's the takeaway of—

Judge Hughes (45:17):

So wait, let me just make sure I've got this. So in—under that explanation, even if Kline selects a memory device, your view is it's not uncoupling or coupling to the common signal line. The common signal line is still either is all on.

Seth Lloyd (45:38):

Even if Kline has switches connected to individual memory devices, I think that's the only part of what you said that I'm not sure about, even if it has switches connected to individual memory devices, it's coupling or decoupling all of the devices at the same time. That's what our expert said in the paragraph, Judge Taranto, that you pointed to. Paragraph 35 in Kline. It's not particularly clear that—

Judge Dyk (46:03):

Well that's not really—that's not what he says on line 13. He says you could argue, I suppose, there's a possibility of decoupling a memory device.

Seth Lloyd (46:12):

Agreed, Judge Dyk. When you have—because of where the devices are or the switches are placed, it—there is a possibility, but he doesn't say that that's how Kline was configured to operate. And again, all of this, everything we're talking about—these are factual issues that the board simply never reached. All of its

findings were under its construction, and on appendix 32—the page that my counsel on the other side focused on, the very next page, appendix 33, the board discredits our expert for relying on our construction and not the boards. These are issues that the board should reach in the first instance. There are factual disputes on this, and so we ask that the court vacate and remand.

Judge Dyk (46:51):

Okay.

Judge Dyk (46:51):

All right. I think were out of time. Thank you both, counsel. The case is submitted.