

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SIEMENS MOBILITY, INC.,
GROUND TRANSPORTATION SYSTEMS USA INC.,
HUMATICS CORP., and PIPER NETWORKS, INC.,
Petitioner,

v.

METROM RAIL, LLC,
Patent Owner.

IPR2023-00468 (Patent 9,043,131 B2)
IPR2023-00470 (Patent 8,812,227 B2)

Record of Oral Argument
Held: March 28, 2024

Before NEIL T. POWELL, STACEY G. WHITE, and IFTIKHAR AHMED,
Administrative Patent Judges.

IPR2023-00468 (Patent 9,043,131 B2)

IPR2023-00470 (Patent 8,812,227 B2)

APPEARANCES:

ON BEHALF OF THE PETITIONER:

JOSHUA JAMES, ESQ.
Crowell & Moring, LLP
544 N. Cityfront Plaza Drive
Suite 3600
Chicago, IL 60611
(312) 840-3270
jjames@crowell.com

MARK SUPKO, ESQ.
Crowell & Moring, LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2734
msupko@crowell.com

HOWARD WISNIA, ESQ.
Wisnia, PC
12636 High Bluff Drive
Suite 400
San Diego, CA 92130
(858) 461-0989
howard@wisnialaw.com

THATCHER RAHMEIER, ESQ.
Faegre Drinker Biddle & Reath, LLP
222 Delaware Avenue
Suite 1410
Wilmington, DE 19801
(302) 467-4211
Thatcher.rahmeier@faegredrinker.com

IPR2023-00468 (Patent 9,043,131 B2)

IPR2023-00470 (Patent 8,812,227 B2)

ON BEHALF OF THE PATENT OWNER:

GREGORY C. SCHODDE, ESQ.
PHILIPP RUBEN, ESQ.
RAJENDRA A. CHIPLUNKAR, ESQ.
McAndrews, Held & Malloy, Ltd.
500 West Madison Street
34th Floor
Chicago, IL 60661
(312) 775-8000 (Schodde)
(312) 775-8235 (Ruben)
(312) 775-8203 (Chiplunkar)
gschodde@mcandrews-ip.com
pruben@mcandrews-ip.com
rchiplunkar@mcandrews-ip.com

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Library, Southern University, 2 Roosevelt Steptoe Drive, Baton Rouge,
Louisiana.

P-R-O-C-E-E-D-I-N-G-S

(3:23 p.m.)

THE USHER: All rise.

JUDGE AHMED: Please be seated. Good afternoon, I am Judge Iftikhar Ahmed and with me today are Judge Stacey White and Judge Neil Powell. This is a hearing in IPR 2023-00468 and IPR 2023-00470. The Petitioners in these cases are Siemens Mobility, Inc., Ground Transportation Systems, USA, Inc., Humatics Corp., and Piper Networks, Inc. versus Patent Owner who is Metrom Rail, LLC. The patents at issue in these two proceedings are Patent No. 9,043,131, and Patent No. 8,812,227.

To begin we'd like to thank the parties for agreeing to be part of our stadium tour and for being here for this oral hearing. We feel very honored and privileged to be here today. With that, we would like to go ahead and start the proceeding by taking appearances. Petitioner, would you please enter your appearance.

MR. JAMES: Thank you, Your Honor. I'm Joshua James of Crowell & Moring. And I'm joined by Mark Supko, also of Crowell & Moring and Howard Wisnia of Wisnia, P.C.

JUDGE AHMED: Thank you, Mr. James. How about Patent Owner?

MR. SCHODDE: Good afternoon, Judges of the Panel, I'm Greg Schodde for Patent Owner Metrom Rail, LLC. With me today, and if they'll stand as I call their names, Mr. Rajendra Chiplunkar and Mr. Phil Ruben. And we will be dividing the argument and talking about time when Your Honor's ready to talk about that.

JUDGE AHMED: Okay, thank you.

1 MR. RAHMEIER: Your Honor, also for Ground Transportation, my
2 name's Thatcher Rahmeier, one of the Petitioners.

3 JUDGE AHMED: Thank you. I would like to thank both parties for
4 participating in our LEAP program, which is our Legal Experience and
5 Advancement Program which encourages junior attorneys, who not have too
6 much argument before a tribunal, to argue before the Board. Today we have
7 two LEAP attorneys, Mr. James and Mr. Ruben, who will be arguing under
8 our LEAP program.

9 And as part of the program, what we do is in addition to the normal
10 argument time, we assign another 15 minutes per side, so for today's
11 argument, each side will have an additional 15 minutes.

12 We outlined how we are going to conduct this proceeding in our oral
13 argument order. Each one of you will have 75 minutes today. Obviously,
14 you don't have to use all of that time. We will begin with the Petitioner who
15 may present their case with regards to the challenged claims and grounds.

16 And then Patent Owner will have a chance to respond to those,
17 Petitioner can come back with a rebuttal, and Patent Owner again has a
18 surrebuttal at the end. Couple of housekeeping issues, as you all are aware,
19 we have a public audience today.

20 The Panel is under the impression that there is no confidential
21 information in these proceedings, we've looked through the docket and
22 nothing has been filed under seal. If there is some confidential information
23 that comes up, please let us know right away. Second, please be as clear as
24 possible during your argument regarding what slide or what exhibit you may
25 be referring to.

1 We have all the electronic versions of all the demonstratives and all
2 the exhibits and we can follow. With that, we'd like to first turn to some
3 preliminary matters. We've received Petitioner's Objections to Patent
4 Owner's Demonstratives and quite a few of those relate to the use of Patent
5 Owner's Exhibits 2030 to 2036, which are the subject of Patent Owner's
6 Motion to Submit Supplemental Information.

7 The Panel thinks that it might be a good idea to try and resolve that
8 motion now before we get started so that we can resolve Petitioner's
9 objections. And we noticed that both of you have submitted demonstratives
10 on that motion. So, Patent Owner, would you like to go ahead and briefly
11 argue the motion to us?

12 MR. SCHODDE: Yes. And with your permission, Mr. Ruben, our
13 LEAP practitioner, will be handling all of our motions for us today.

14 JUDGE AHMED: Go ahead, Mr. Ruben.

15 MR. RUBEN: Yes, if you can, that would be helpful. Okay. Just get
16 the slides pulled up here, again, sorry. Thank you, Judges, may it please the
17 Panel, my name's Philipp Ruben. I'm speaking today on behalf of Patent
18 Owner, Metrom. First, I want to talk about the motion to supplement, as you
19 mentioned. And to do so, I think it's helpful to talk about some background
20 context for the motion.

21 In 2018, David Garcia, while working at Parsons, was embedded with
22 Metrom, was given complete access to Metrom's facility and technology and
23 presented on behalf of Metrom with Metrom, at the NextGen Train Control
24 Conference to a room of industry professionals about Metrom's novel train
25 collision avoidance technology.

1 It was subsequent to that, that Mr. Garcia left Parsons and joined
2 Petitioner Piper, where he eventually became their vice-president. Now
3 Patent Owner introduced evidence to show that it was after Mr. Garcia
4 joining Piper, that Piper developed the Helix System, and which Patent
5 Owner alleges is a copy of its patented AURA System.

6 We supported this with evidence, or this evidence of copying with an
7 expert declaration, with declarations from Mr. Gunther and Mr. Marchi in
8 our POR. Now Petitioner had the right to depose those witnesses, and they
9 did. And it was during Mr. Gunther's deposition, that it became clear what
10 they were talking it was going to be. Mainly that they were challenging
11 whether or not Mr. Garcia actually had access to the technology at issue.

12 And it was at that point, as soon as Metrom became aware what
13 Petitioner's challenge was going to be, that we moved to supplement. We
14 moved to supplement to provide corroborating evidence that Mr. Garcia did
15 have access to Metrom's facilities and technology. And in fact, Patent
16 Owner did this well in advance of Petitioner's reply date, during the
17 discovery period, to afford them notice and an opportunity to respond if they
18 need to.

19 JUDGE WHITE: So just to keep the record clear, when was this
20 motion supplement filed?

21 MR. RUBEN: The motion supplement was filed on December 12,
22 2023.

23 JUDGE WHITE: And the date of Petitioner's reply was?

24 MR. RUBEN: I believe it was December 15th.

25 JUDGE AHMED: So, there is no doubt that he had access to these
26 exhibits beforehand, right?

1 MR. RUBEN: Correct.

2 JUDGE AHMED: And why was it a surprise that you'd have to show
3 access to this information when you were alleging copying by Mr. Garcia?

4 MR. RUBEN: Respectfully, I don't think it was a surprise that we had
5 to allege that, I think that it was, Petitioner did not know what counter, I'm
6 sorry, Patent Owner did not know what counter Petitioner was going to
7 make. Patent Owner made its prima facie case with the showing of
8 declarations supported with evidence, and then to supplement the challenge
9 to that, we moved to supplement.

10 And I think the Board has been lenient on these types of situations.
11 For example, in the *Hyperbranch* case, articulating that when there's this
12 intervening event that raises the importance of, and this would be on Slide 5,
13 for example, that raises the importance of a particular piece of evidence, that
14 it's sufficient, that qualifies as the reason why he could not have been
15 attained to earlier standard under Rule 123. And the Board has further
16 talked about that, it's reasonable that patent owners should not have to
17 deduce petitioner's challenges and all of its supporting arguments before
18 they develop in the course of the proceedings without a chance to respond in
19 some fashion. That's from the *General Electric* case, which Patent Owner
20 cited in its paper. And that's exactly what we want to do here.

21 If we can go back one slide, I just want to briefly address Rule 123,
22 which is what Petitioner has challenged here. So Rule 123 states that the
23 submission of supplemental information, that in order to do so one has to
24 show two things.

25 First, the information could not reasonably have been obtained earlier,
26 and second, that the supplemental information will be in the interests of

1 justice. If we go to the next slide, Slide 5. And we just talked about the
2 evidence related to Mr. Garcia's access to Metrom, and how part of this was
3 an intervening event, the importance of which was not really clear until Mr.
4 Gunther was deposed.

5 Regarding Exhibits 2030 and 2031, those were actually obtained after
6 Patent Owner filed its POR, those were obtained in October '23. In fact,
7 they are Petitioner's own sales collateral, that they handed out at the
8 NextGen conference to the public. And now they're challenging us of being,
9 to introduce it into the record here.

10 And then, next slide, please. The second prong is the interest of
11 justice. And we think that it's fairly clear here that there's an interest
12 of justice, it's in the interest of justice for the Board, the fact finder, to have a
13 complete record.

14 And secondly, that Petitioner is not prejudiced with this supplemental
15 information and there's PTAB decisions on that one as well, for example, the
16 *General Electric* case that we cited. The Board has a duty as a fact finder to
17 consider the evidence and to make a factual determination on the objective
18 indicia of non-obviousness, and it should not have to do that blindfolded.

19 And second, there is no prejudice to Petitioner here. Petitioner had
20 time to respond, it had two weeks before filing the Reply. But most
21 importantly, the single most important witness in this case, Mr. Garcia, is
22 Petitioner's own employee. They could easily have filed a counter-
23 declaration from Mr. Garcia stating that he in fact did not have access, but
24 chose not to do so.

25 JUDGE AHMED: How do you respond to Petitioner's argument that
26 they'd already done, they were already done with the depositions and so they

1 could not have asked any of your witnesses about this new evidence that you
2 introduced after the depositions?

3 MR. RUBEN: Well, at the time that the motion was served, it was
4 still within Petitioner's reply or discovery period. I know that there's been
5 several cases from the Board that have provided very limited opportunities
6 to respond. For example, I believe it is in the *Hyperbranch* case where they
7 granted the supplemental information or the motion to supplement. So to the
8 extent that Petitioners feel they need to be able to respond substantively, I
9 suppose that's an option here.

10 JUDGE AHMED: All right. Let's hear from the Petitioner, thank
11 you.

12 MR. JAMES: And before we get started, Your Honor, I have physical
13 copies of the slides that I would like to hand out, if that's okay. Thank you,
14 Your Honors, Joshua James on behalf of Petitioners. I will briefly rebut
15 with respect to Patent Owner's Motion to Submit Supplemental Evidence. If
16 we can go to Slide 69, please.

17 There are two requirements for a patent owner to submit the
18 supplemental information. One is they have to show why the information
19 could not have been obtained earlier. And two, show that consideration of
20 that information would be in the interest of justice. For Exhibits 2032
21 through 2036 specifically, Patent Owner has had those exhibits since 2018,
22 which is well before the filing date of the IPR petitions here.

23 And so, they have had it well before the time that this case started. I
24 heard Patent Owner refer to cross-examination as a potential intervening
25 event that would exempt them from the fact that they had it since 2018. But

1 that argument could eliminate this requirement for all the submissions for
2 supplemental information.

3 IPRs are adversarial proceedings. The parties are well aware that
4 cross-examination is something that is likely to happen on any declaration
5 that's provided in the case. Additionally, these exhibits go to Patent Owner's
6 burden of production with respect to the copying allegations they made in
7 their response. So if Patent Owner thought that these exhibits supported
8 their copying allegations, they should have provided it at the time that they
9 made those allegations with their Patent Owner Response.

10 JUDGE POWELL: How do you distinguish the prior PTAB decision
11 that Patent Owner is relying on?

12 MR. JAMES: Yes. I believe I heard Patent Owner refer to the
13 *Hyperbranch* and the *General Electric* case. With respect to *Hyperbranch*,
14 in that case there was a filing of an expert report in the district court that
15 happened as the intervening event and then information in that expert report
16 brought to light whether a certain reference was relevant or mattered to a
17 particular issue.

18 And so that was an intervening event. That's something that isn't, is
19 not going to happen in every IPR, it's not something that you may be aware
20 of until it actually takes place in that district court, which is not going to be
21 on the schedule or under the procedures laid out for the IPRs. So that's the
22 difference in that case.

23 And then the *General Electric* case, the Board found that the positions
24 of the parties, and the position of the petitioner didn't crystallize until for the
25 first time on reply. Whereas here, again, this is Patent Owner's allegations

1 of copying that they're making, that they made in the response so it
2 crystallized as of that time.

3 Additionally, in the *General Electric* case, a supplemental reply was
4 provided for petitioners. We're very late in the game here, so I'm not sure if
5 that's going to be something that would be available for Petitioners here. If
6 we move on to Slide 70.

7 JUDGE WHITE: Would you be looking for a supplemental reply?

8 MR. JAMES: We're not requesting one. With respect to Exhibits
9 2030 and 2031, those two exhibits fail the second requirements, they are not
10 in the interest of justice. These are sales collateral for a Helix System from
11 Piper.

12 And the Board has already found that these Helix Systems comprised
13 more than the vehicle mounted modules required by Claim 1 of both the
14 '131 and '227 patents. They include other non-claimed features, and so
15 there's no nexus between these systems. And commercial success is some of
16 the other secondary considerations.

17 Additionally, prejudice is a factor of the interest of justice and there
18 would be significant prejudice here, it's already been referred to, Petitioners
19 didn't have a chance to depose on these particular exhibits, particularly Dr.
20 Cooklev who made nexus arguments, as well as there's no opportunity for
21 Petitioners to respond to Patent Owner's arguments on sur-reply.

22 JUDGE AHMED: But it was filed well before your reply right, you
23 did have time to respond in your reply?

24 MR. JAMES: Yes, it was filed eight days before our reply was filed.
25 So obviously we wouldn't have been able to include any cross-examination

1 from a deposition in that reply. Additionally, Petitioners would have been in
2 a lose-lose situation had we addressed those exhibits in the reply.

3 Patent Owner would have argued that we opened the door and that it's
4 all definitely fair game, effectively our actions could have granted the
5 motion just by what we did. As opposed to, if we didn't address it on reply,
6 then we had no way of responding to what Patent Owner did in the sur-reply,
7 which we wouldn't have been able to do as well. Because again, they didn't
8 put this in their response, we didn't know exactly how they were going to
9 use these exhibits.

10 JUDGE AHMED: Okay. Thank you.

11 MR. JAMES: Thank you.

12 JUDGE AHMED: The Panel is going to take a brief moment, do you
13 have some rebuttal?

14 MR. RUBEN: Yes, if you don't mind.

15 JUDGE AHMED: Very briefly.

16 MR. RUBEN: Thank you. Petitioners said that they didn't have an
17 opportunity to conduct a deposition of Mr. Cooklev, but that's not really
18 relevant to this inquiry. They already conducted depositions of Mr. Gunther
19 and Mr. Marchi. And really the only new declarant that would have been an
20 issue, would have been Mr. Garcia, their own employee, and they chose not
21 to do that discovery. And the reason they did not do that discovery is
22 probably because the, it would not have been very good for them, that it
23 would have supported the evidence that Patent Owner had established.

24 JUDGE AHMED: Thank you. The Panel will take a brief moment to
25 discuss.

26 (Panel discussion.)

1 The Panel has decided to grant Patent Owner's motion. We will let
2 these exhibits in, but we do question the weight to be given to these exhibits,
3 especially since Petitioner did not have a chance to depose any of the
4 witnesses about any of these exhibits.

5 Petitioner, would you, I think Judge White asked you previously,
6 would you like any other relief in response to our decision, as it relates to
7 this motion and these exhibits?

8 MR. JAMES: Yes, Your Honor. If those exhibits are coming in, we
9 would request a short supplemental reply to address them.

10 JUDGE AHMED: Okay. The Panel will consider that request after
11 the hearing, and issue an order on that request shortly.

12 MR. JAMES: Thank you, Your Honor.

13 JUDGE AHMED: Thank you. So, with that, we can resolve most of
14 Petitioner's objections, the objections related to these exhibits are overruled.
15 The remaining objections relate to, I think, demonstratives that cite portions
16 of exhibits that were not mentioned in any paper, we're going to take those
17 under advisement and carry those over.

18 We know there are a couple more motions pending, but those don't
19 impact our hearing today, and we will carry those motions over as well.
20 And with that, I think we can get started with arguments on the merits.
21 Petitioner, whenever you are ready, how much time would you like to
22 reserve for rebuttal?

23 MR. JAMES: Thirty minutes, please.

24 JUDGE AHMED: Okay. You've already used five minutes towards
25 arguments on the motion for supplemental information, so you have 40
26 minutes and I'll let you know as you approach that time.

1 MR. JAMES: Thank you. Good afternoon, Your Honors. Again, this
2 is Joshua James on behalf of Petitioners. At today's argument, I will briefly
3 introduce the patents and then discuss the prima facie obviousness case for
4 Ground 1A. Then my colleague, Mr. Wisnia, will address secondary
5 considerations, followed by Mr. Supko addressing certain other grounds, and
6 then I will finish by addressing the Motion to Exclude.

7 At today's argument, we're addressing two IPRs on two very similar
8 patents, Patent 9,043,131, the '131 patent, and patent 8,812,227, the '227
9 patent. And we can see that these patents are similar by comparing Claim 1
10 of each patent, which we do on Slide 5. And here we can see that Claim
11 1 of both patents include the same components. They include a vehicle
12 mounted module, a transponder sensor module, a control electronics module,
13 and a user interface module. In Claim 1 of the '131 patent, however, they
14 require a first and second version of each component, while Claim 1 of the
15 '227 patent requires one or more of them.

16 Additionally, Claim 1 of the '131 patent requires a radio
17 communication unit, while Claim 1 of the '227 patent requires an ultra-
18 wideband or UWB unit. Let's go to Slide 8. These IPRs involve
19 obviousness arguments, so the definition of a person of ordinary skill in the
20 art will factor, or POSITA, will factor into the analysis. The parties have
21 similar POSITA definitions. However, only Patent Owner includes a
22 reference to experience with railway systems. Patent Owner made these
23 same arguments prior to the issuance of the Institution Decision.

24 And in that decision, the Board correctly adopted Petitioner's
25 definition, in part because the patents themselves explain that the collision

1 avoidance system described in those patents can apply to other vehicles
2 besides just railway vehicles.

3 JUDGE WHITE: Counselor, I have a question. And I know that this
4 wasn't directly addressed in the brief but looking at your definition of a
5 person of ordinary skill in the art, I was wondering about the choice to have
6 it as the person that is using these electronics, as opposed to the person that's
7 developing or designing. Why do you think a person of ordinary skill in the
8 art here is just the user of the system?

9 MR. JAMES: Well, the development of the system can also be
10 incorporated as a background in wireless, but the importance of using it will
11 provide experience with how that system can work in the field. And that can
12 be vehicle independent, how it works when it's being implemented with
13 other cars, and how it's being worked with railway vehicles.

14 However, the individuals developing it, I don't think either party has
15 suggested that if someone is just focused on developing those systems, they
16 wouldn't be able to provide helpful opinions. I don't think that's what we're
17 arguing as well.

18 JUDGE WHITE: No, but the person of ordinary skill in the art is
19 going to shape a lot of what's going forward, so I want to get a feel for this
20 individual. So, you have a bachelor's degree in EE and they're the users of
21 the system. Would the users of the system be your electrical engineers or
22 would it just be somebody who is working at the trainyard who may or may
23 not have a bachelor's degree in electrical engineering?

24 MR. JAMES: So while we do include this reference to a bachelor's
25 degree in electrical engineering, I think there's a lot of cases in both PTAB
26 and district court that explain while you may be able to satisfy a level of

1 ordinary skill based on education, experience can do that as well. So even if
2 someone does not have that electrical engineering background, if they have
3 years of experience in this field, using it and potentially even developing,
4 they're also going to have the experience needed to understand these
5 collision avoidance systems.

6 JUDGE WHITE: Would a person with a high school education who
7 had been working say two or three years in the field, would they have
8 significant enough experience to be a person of ordinary skill in the art?

9 MR. JAMES: It could potentially depend on what experience they
10 actually had, what systems were they dealing with, but if it was substantial,
11 it's possible. I don't think any of the declarants in this case are in that
12 particular situation, so that hasn't been directly addressed, but it could be
13 possible.

14 JUDGE WHITE: Okay, thanks.

15 JUDGE AHMED: Could you address Patent Owner's position that
16 the industry was resistant to change and innovation and Federal Circuit law
17 requires that one factor that we can consider is the rapidity of innovation that
18 was made in the industry. What is Petitioner's position on how you factor
19 this in to the level of skill in the art?

20 MR. JAMES: Yes. So we believe that Patent Owner is conflating
21 implementation of certain technologies and maybe products that are sold or
22 used with innovation and invention of those products. So while maybe for
23 business reasons or other reasons, certain technologies are not immediately
24 jumping to market, and this is an industry where it may be some time
25 between new products are desired by certain customers. If it's entire rail

1 lines systems of cities, they're not going to be looking to buy a new system
2 every year, like maybe a consumer is with a phone or some other device.

3 But there was plenty of innovation via inventions, there was over a
4 hundred patents filed the year that the Grisham reference came out. There
5 were over 90 references filed or patent applications filed with respect to
6 railway technologies the year before the '131 and '227 patents were issued.
7 So there was still a lot of innovation in the field.

8 JUDGE WHITE: But isn't that a bit broad, I mean, you just said that
9 you searched on the term railway. These could be, you know, improvements
10 in the metal that's going into a railway car. How do we apply this, when it's
11 sort of a broad inquiry of whether there was something that was done
12 somewhere, that had to somehow touch a railroad?

13 MR. JAMES: Well, I think that was in the response, Patent Owner
14 has focused a lot on whether or not you could apply technological shifts on
15 collision avoidance systems that happened in cars versus railway. So there
16 could be even more applications that you're looking at if you are looking
17 with respect to independent rail vehicles.

18 Additionally, with the art that we have, we can see specific innovation
19 with respect to collision avoidance systems on railway vehicles, be it the
20 Grisham reference that's the core reference. There, also in the background
21 discussion, there was a reference to a Heddebaut reference. And
22 additionally, additional evidence that we have of the applicability of the
23 innovation that can occur and how it can transfer from one field to the next.
24 One of the inventors did not begin working on rail vehicles specifically until
25 two months before inventing, showing that how that experience in one field
26 with respect to other vehicles can translate to railway vehicles.

1 JUDGE WHITE: Does that really establish anything, though? Just
2 because somebody worked on something a short period of time, as far as we
3 know, the inventor was a genius. You could have come up with something
4 really revolutionary in a short period of time. Why would that be a
5 dispositive or even persuasive factor?

6 MR. JAMES: I think it can be persuasive in view of all the other
7 evidence. It by itself, may not be dispositive, but we can see how it relates
8 to the evidence that we have from Grisham, and the expert declarations that
9 we have from Mr. Andrews that explain that these jumps were not
10 significant.

11 Additionally, Patent Owner hasn't even pointed to a particular jump
12 over the Grisham reference. All of the elements in the patent claim are in
13 this reference of Grisham. And there is no specific teaching away in
14 Grisham, there is no other reference that says "Hey, we tried what was said
15 in here, where we were worried about this specific factor of Grisham, and
16 therefore this is why we don't think we would want to do it."

17 If we can move to Slide 9, please. Grounds 1A in both IPRs show
18 that Claims 1, 11, and 14 of both patents are obvious in view of Grisham.
19 And Metrom, Patent Owner, effectively concedes that these claims were
20 prima facie obvious, and we can see that if we turn to Slide 10. Patent
21 Owner does not dispute that the claim, preamble of the Claim 1 requires a
22 collision avoidance system and Grisham discloses a railroad collision
23 avoidance system.

24 Then if we go to Slide 11, Patent Owners do not contest that Grisham
25 discloses the vehicle mounted modules required by the challenged claims.
26 And we can see that via the various units that are mounted to the first rail

1 vehicle and the second rail vehicle in the figure shown here. Additionally,
2 Patent Owner does not dispute that Grisham discloses two transponder
3 sensor modules, 902 on the first rail vehicle, and 904 on the second rail
4 vehicle.

5 And Patent Owner does not contest that Grisham discloses two control
6 electronics modules and two user interface modules. That's 1110 is the
7 control, electronics module and 1108A is the user interface module shown
8 on the second rail vehicle here, and Grisham explains that's what's on the
9 second rail vehicle can also be on the first vehicle.

10 And then finally, on Slide 12, Patent Owner does not dispute that
11 Grisham discloses using a time of flight technique to determine separation
12 distance by measuring the time it takes the signal to go from one vehicle to
13 the next.

14 So Patent Owner does not contest that Grisham discloses all of these
15 elements, they just argue about secondary considerations. And with that, I
16 will turn to my colleague, Mr. Wisnia to address those considerations.

17 MR. WISNIA: Thank you, Your Honors, Howard Wisnia on behalf
18 of the Petitioners. I'm going to address most of these questions about
19 secondary considerations in the rebuttal, but I want to touch on them briefly
20 here.

21 First of all, the law is clear that the secondary considerations must be
22 due to the merits of the invention, and they must be due to features that are
23 not in the prior art. So one of the questions that you will see from the
24 briefing, and perhaps will be addressed during Patent Owner's questions, its
25 presentation, is they haven't pinpointed anything that isn't in Grisham.

1 There's no teaching, there's no secret sauce, there's no sort of basis for
2 any of these secondary considerations that's independent from anything in
3 Grisham. So they haven't identified that.

4 Second of all, the evidence has to be co-extensive with the claimed
5 invention. They have identified in their case that they believe that claim 1 of
6 the '131 and claim 1 of the '227, as well as claim 7 of both those patents, all
7 of those are subject to the secondary considerations.

8 But claim 1 of the '131 patent does not require a UWB, claim 1 of the
9 '131 patent does not require GPS. Therefore, according to Patent Owner's
10 position, neither UWB nor GPS can be critical to the success for the
11 secondary considerations.

12 JUDGE AHMED: That brings up a good question, should we treat
13 the two patents differently in terms of secondary considerations because the
14 claims of the '227 patent actually do recite UWB?

15 MR. WISNIA: It does, the '227 does recite UWB. But, because of
16 the position that Patent Owner has taken this position, you know, they gotta
17 play the ball where it lies. And in their spot, they've affirmatively taken the
18 position that the commercial success of the AURA System is met based on
19 what's in claim 1 of the '131 patent. Let's go -- oh, I'm sorry.

20 JUDGE POWELL: So, this all goes to nexus then, right?

21 MR. WISNIA: It does go to nexus.

22 JUDGE POWELL: And are you suggesting that we don't have to
23 decide which claims go to nexus independent of Patent Owner's arguments?

24 MR. WISNIA: I'm not sure I fully understand the question.

25 JUDGE POWELL: So, you said -- you said, well, Patent Owners says
26 there's a nexus for all the claims, all the challenged claims and all the

1 patents. And so, the Panel can decide that because there's not a nexus for
2 some of the challenged claims, then you win is basically how I interpret it.

3 But I'm sitting here wondering if, well, if Patent Owner says there's a
4 nexus for every challenged claim across all the -- all the challenged patents,
5 do I as a judge have to decide well, okay, maybe there's not a nexus for
6 claim 1 of the one patent, but there is a nexus for some dependent claim in
7 the second patent independent of the fact that Patent Owner argued there's a
8 nexus for every claim.

9 MR. WISNIA: Okay, I think I -- I think I understand the question,
10 Your Honor. So it is their burden to put forward the nexus. It's not for the
11 Panel to fill in gaps so to speak, it is the burden of the Patent Owner to make
12 their argument on the nexus. To the law on co-extensiveness, right, which is
13 that, you don't count non-critical limitations that aren't there, but they've
14 already taken the position, they've taken the position that GPS and UWB
15 aren't critical while the very fact that they are asserting commercial success.

16 There's only one system, the AURA System, right, they're not
17 comparing the different systems, there's only one. And because they've
18 taken that position, that UWB and GPS, a claim that does not require that,
19 claim 1 of the '131 patent does not require that, they've taken the position
20 that those limitations are not critical to the success.

21 And therefore, I think you've got to take them at their word, take them
22 at their argument in this case. There could be, I agree with you, Your
23 Honor, that somebody could have presented evidence in a case that
24 separately identified, you know, here's my evidence for claim 1, here's my
25 evidence for claim 7, here's why it's different, here's why I think these
26 arguments are not inconsistent, they happen not to have done that.

1 JUDGE POWELL: And so we can't, it probably wouldn't be
2 appropriate for us to make arguments for them about different features that
3 might have been critical, aside from what they did argue.

4 MR. WISNIA: I think that's right, Your Honor, I think the Federal
5 Circuit has basically instructed us that in an IPR setting it's an adversarial
6 proceeding and, you know, it's up to the parties and not to the Panel to make
7 the arguments.

8 JUDGE AHMED: Why is Dr. Cooklev's testimony not enough? He
9 goes through and he has the claim chart mapping the claims to the AURA
10 System, and these are fairly broad claims and he's mapped them to different
11 components of the AURA System, why is that not enough for the nexus
12 requirement?

13 MR. WISNIA: Well, there's a couple reasons. One is, as they've
14 explained in the *Yita* case, there's two parts to the nexus, right. You have to
15 look at the nexus between the product let's say, and the claim.

16 You'd also have to look at the nexus between the claim and the prior
17 art. Cooklev didn't even look at the prior art, you've got no analysis of that.
18 And so the real question here is what is the secret sauce, so to speak, that's in
19 the AURA system that's not already in Grisham.

20 And also, Cooklev completely just misunderstood the legal test on co-
21 extensiveness. He testified under oath that he thought infringement equaled
22 co-extensiveness. He did not apply the proper test that looking at whether or
23 not additional limitations mattered in that analysis.

24 And in fact, in this case, the CEO of the Patent Owner, Mr. Marchi,
25 testified directly at his deposition, and this is Exhibit 1054 at pages 126 to

1 127, that there were important unclaimed features that drive sales of the
2 AURA product.

3 I mean, that's the death knell for a claim of co-extensiveness where he
4 was asked expressly what about these additional features in your marketing,
5 do customers care about them, are they important? Answer: Yes. Is this the
6 reason that a customer may buy your product? I believe so. That's -- that
7 ends that matter, in my view, Your Honor.

8 So there is no nexus between the AURA System at all, in our view.
9 As with respect to the Helix System, you know, as Mr. Gunther testified in
10 his deposition, he recognizes that he can't prove that there's been any sort of
11 copying here. Most importantly, I would say though, that the system that
12 they've accused of infringement in this lawsuit, you see it in the Complaint,
13 was demonstrated in New York in 2019, that's in Exhibit 1057.

14 That's prior to Mr. Garcia joining Piper. Now we don't think there's
15 any evidence, and to be honest with you, we find it on behalf of Mr. Garcia,
16 somewhat insulting to suggest that he breached some sort of confidentiality
17 here. But put that aside for a moment. And the simple fact is, the system
18 that they've asserted is infringing, that's the system that they say is covered
19 by the claim, was demonstrated prior to Mr. Garcia coming to Piper.

20 JUDGE AHMED: Where is that in the record?

21 MR. WISNIA: That's Exhibit 1057, it's a press release talking about
22 the demonstration that took place in 2019.

23 JUDGE AHMED: Okay.

24 MR. WISNIA: There's also, as the Court, excuse me, as the Board
25 itself found in its order denying discovery, Paper 18 at Pages 6 to 9, there is

1 no, excuse me, there was no presentation by Patent Owner of any sort of co-
2 extensiveness analysis between the Helix System and the claim here.

3 In fact, I mean, there's a full discussion in Paper 18 of multiple
4 features that are in the Helix System that are not addressed by the claims,
5 LiDAR being one example of those. So again, I will address some of the
6 particulars that Patent Owner may raise in their argument, in the rebuttal, but
7 in general, they haven't shown anything that's different from Grisham.

8 They haven't shown that there's any sort of commercial success or
9 long felt need or anything that was met supposedly by their system that was
10 not also met by Grisham, which we believe is dispositive here.

11 And second off, they have not met their burden with respect to co-
12 extensiveness, either with respect to the AURA System or with respect to the
13 Helix System. Unless the Court, unless the Board has some questions, I will
14 pass to my colleague.

15 JUDGE AHMED: So, on long felt need, isn't there something to be
16 said about the fact that Grisham came ten years before these patents and
17 nobody had developed a system during those ten years, is there any merit to
18 that argument?

19 MR. WISNIA: Well, if they had come forward with a different
20 system and said okay, here's the reason why nobody wanted to use Grisham,
21 here's the facts of why our system is better than Grisham or here's the secret
22 sauce, or here's why we put this somewhat promising technology of Grisham
23 and made it actually palpable for whatever reason. But they haven't put any
24 of that evidence in.

25 The simple fact that for business reasons, or for economic reasons,
26 someone may not implement the system, is not a basis for patentability and

1 it does not show -- it's not due to the merits of the invention so to speak, it's
2 the exact type of thing that the Federal Circuit says we have to carve out of
3 our analysis with respect to secondary considerations.

4 I mean, the simple facts in this case are, as Mr. Gunther testified, the
5 way he came up with UWB is he went to Grisham's company. Grisham
6 worked for Time-Domain, he went to Time-Domain and he bought it off the
7 shelf.

8 So it's somewhat -- it's somewhat humorous to suggest that Grisham
9 was languishing as an unused invention when the only way they made their
10 invention was the buying UWB from Grisham, I mean from Time-Domain.
11 So unless the Board has additional questions, I will reserve my time from
12 this point and pass to my colleague.

13 JUDGE AHMED: All right. Thank you.

14 MR. SUPKO: Thank you, Your Honors, Mark Supko for the
15 Petitioners. Josh, can we go to Slide 29, please. Your Honors as you've
16 seen from the post-institution decision briefing, a substantial thrust has been
17 secondary considerations arguments.

18 But Patent Owner did submit arguments on several particular claim
19 limitations under several particular grounds, and I would like to try to
20 address at least some of the ones that got the most attention there. So the
21 first one I'd like to talk in the context of Grounds 1B of both of the IPRs and
22 background was that claims 2 through 4 were obvious in view of Grisham
23 and Douglas. Next slide, please.

24 And the dispute between the parties focuses on the limitation that
25 we've highlighted here. It's a central tracking unit that is operable to track a

1 location of the first vehicle mounted module and a location of the second
2 vehicle mounted module. Next slide please.

3 So Metrom, Patent Owner, acknowledges that in Douglas, which is
4 the secondary reference here, Douglas's central station knows that the trains
5 are generally in the same zone and the tracks on which the trains are moving
6 are also known. But then Metrom presents the argument that Douglas has
7 no knowledge of the location of the trains in the zone.

8 And because it has no knowledge, it can't track that location. But that
9 argument ignores what a POSITA would take away from reading the
10 Douglas reference and it really makes no sense. This is a collision
11 avoidance system. So to say that Douglas's station has no knowledge of
12 where these trains are, is to say that it can't prevent collisions. It needs to
13 know where the trains are within the zone under its control.

14 JUDGE AHMED: And Patent Owner's argument, I think, goes to
15 how precise the location detection has to be. The '131 patent specification
16 says is it has to be able to precisely detect the location of the train. And the
17 way I understood Patent Owner's argument is that this is a large zone and
18 these are lengthy trains so the detection of the location is not as accurate as
19 the claims require, I guess.

20 MR. SUPKO: Well, that's the point, Your Honor, what the claims
21 require. The specification does say in certain parts it tracks the, the system
22 tracks the precise location. In other places, it talks about relative location,
23 absolute location, sometimes just location. But what the claim says is just
24 location.

25 So it doesn't say you have to track the precise location, it doesn't say
26 you have to track it down to the foot. What Douglas does, it knows where

1 these trains are. If you recall from the reference, Douglas is talking about a
2 zone. A zone includes tracks and it includes lanes that are under the control
3 of that central station. So it's not tracks that are spread all across the
4 country, it's a relatively confined area.

5 And Douglas needs to know where the train is, because the trains are -
6 - let's go to Slide 31, please, 33 please, Josh. Sorry, Your Honor, just
7 referring back to the claim, here it's just tracking a location, it's not tracking
8 a precise location. Next slide, please. Just some more examples in the
9 specification. Let's go to the next slide, please. No, we don't have a slide on
10 that one.

11 So from the Douglas reference, Your Honors, Douglas talks about
12 receiving broadcasts from the trains. And what the trains send, when it's in
13 the zone, it sends a unique identifier of the train, it sends a unique identifier
14 of the track that it's on, and then it also sends in some implementations, the
15 direction that the train is on.

16 So for every train that's in the zone that's under the control of the
17 station, that gets broadcast. All of the other trains in the zone get it, but the
18 station gets it as well. And what the station does with that information, for
19 each one of those trains, it says "Okay, what's the first link that this train is
20 going to come up to."

21 And then it says, "After that link, where is it going." If it follows
22 along its route, identifies all of the different lengths and all the different
23 tracks that it's going to be traveling along in that route. And then the station
24 broadcasts back out to the trains that series of links that the trains, every one
25 of them, is going to be following.

1 So in order to do that, Douglas needs to know, okay, where's the first
2 link, sends that information out. It can't just say "All right, that's all I care
3 about, I'm not going to track the progress of the train as it goes through the
4 zone." Because otherwise, it's going to be sending out stale information to
5 all the other trains.

6 If Link A is the first link, Link B is the second link, and the train has
7 already passed by Link A, but the central station is telling everybody it
8 hasn't gotten to Link A yet, you're going to get collisions. It makes
9 absolutely no sense for a collision avoidance system.

10 JUDGE POWELL: So, you're saying that a person of ordinary skill in
11 the art would deduce from the Douglas disclosure that it must be keeping
12 closer track of the location than perhaps is expressly stated in the reference.
13 Is that the position you're articulating there?

14 MR. SUPKO: In essence, Your Honor, Douglas doesn't say okay,
15 I'm, every time a train passes by a link that information is going to the
16 station and the station is updating the series of link information that it's
17 sending back out to the trains.

18 But Douglas probably never thought somebody was going to look at
19 this disclosure and say, "Oh, all you're going to do is determine what the
20 route is from the first link and I'm never going to look at it again." Collision
21 avoidance systems can't work that way.

22 Now Patent Owner has made the argument that Douglas is no more
23 tracking the location of the train than if you said to somebody, "I'm going to
24 be driving my car on Route 95 from Chicago to Denver." And that's it, that's
25 the extent of the location. But that's not what we're talking about here.

1 These zones are a confined area, and Douglas discloses that it knows
2 when a train is coming up to a link within about ideally 3 kilometers of when
3 it's approaching that link. And that makes sense, because this is a collision
4 avoidance system, you have to give these trains time to stop.

5 So Douglas figures out trains coming up to that location to that link,
6 figures out the route, and blasts that out to everybody. So it's not a 900-mile
7 stretch of road that we're talking about here, we're talking about a collection
8 of links and tracks at a station that's monitoring and is responsible for
9 ensuring there are no collisions. So Douglas is tracking the location of the
10 trains to the level of detail that it needs to do to perform its collision
11 avoidance function.

12 JUDGE POWELL: So, if we find, if we don't find that Douglas sort
13 of implicitly is disclosing that when the train goes through that first link, the
14 central station determines that, if we don't find that that's in the reference, do
15 you still win on this point?

16 MR. SUPKO: I would say yes, Your Honor, because at the time it's
17 coming up to that first link, what Douglas discloses is, "I need to know that
18 information within a predetermined distance," 3 kilometers is the example
19 there.

20 So right at that time, Douglas has made a decision, made a
21 determination, that train is within 3 miles of that link, Douglas knows where
22 those links are, it knows where the tracks are because it's responsible for
23 monitoring all of the train track that's there. The claim doesn't require that
24 you continually track the location, it requires that you track the location,
25 store it, every length that Douglas, that the train comes up to, it's going to be

1 within that predetermined distance, so there is tracking there. You don't
2 have to find that it's constant.

3 JUDGE WHITE: Is it proper for us to sort of extrapolate out this,
4 because that isn't exactly what's disclosed in Douglas, so is it appropriate for
5 us to get to that?

6 MR. SUPKO: I don't believe it's extrapolating, Your Honor. The way
7 I would phrase it is you're interpreting the specification from the perspective
8 of a person of ordinary skill in the art, which is what you are supposed to do.

9 A person of ordinary skill in the art reading the specification, which is
10 a collision avoidance system for trains, is not going to think the central
11 station is only sending out the intended route, and that's what all the other
12 trains as they travel through the zone, are relying on to avoid collisions, that
13 would make no sense to a POSITA. So it's not extrapolating, it's interpreting
14 what's taught in the specification from the perspective of a person of
15 ordinary skill in the art.

16 Unless you have other questions on that particular reference, I would
17 like to shift over to another one of the grounds. Can we go to Slide 40,
18 please. Grounds 1D in the '131 patent and 2D of the '227 patent involve the
19 combination of Grisham and McDaniel. Let's go to Slide 41, please. And
20 the dispute here relates to this requirement for an adaptive threshold feature.
21 It's basically the collision avoidance system sets a threshold, says that if two
22 vehicles are any closer than X distance, that's a problem, I've got to send out
23 a warning. What McDaniel teaches, and let's go to the next slide here.

24 McDaniel teaches an adaptive threshold system. So based on how fast
25 the vehicles are going and whether they're coming towards one another,

1 whether they are going away from one another, McDaniels modifies the
2 threshold, so it's an adaptive threshold.

3 Two vehicles are coming towards one another very rapidly, that's a
4 very critical situation, that gets prioritized, you shorten the threshold there
5 before you're going to give a warning because you're trying to give enough
6 time so that they can avoid a collision.

7 Now Metrom argues that a POSITA would not have been motivated
8 to make this combination of Grisham and McDaniel, because it supposedly
9 would be incapable, the combination would be incapable of distinguishing
10 false threats from real threats.

11 Well, first point on that, the claims don't require getting rid of
12 nuisance alarms, doesn't talk about false threats, doesn't talk about real
13 threats, so the argument's a bit of a red herring. But we presented substantial
14 evidence of why somebody would be motivated to make that combination.

15 McDaniel itself says the purpose for the invention is to have more
16 accurate alarms, to not be, if two vehicles are moving away from one
17 another, even though they might be close, there's not a significant risk of a
18 collision, so you don't give a warning there. But if they're going towards
19 one another very quickly, that is a significant risk, it's a higher risk, that's
20 why you have this adaptive threshold.

21 JUDGE AHMED: But if you're getting a lot of false threats, doesn't
22 that undermine the motivation to combine those references?

23 MR. SUPKO: It would if you were getting a lot of false threats, but
24 there's nothing in McDaniel that suggests there are a lot of false threats. The
25 examples that Patent Owner points to, well, if you have two trains on

1 different tracks that are very close to one another, you don't want an alarm
2 there.

3 Well, McDaniel doesn't say it's going to alarm in that situation. They
4 haven't pointed to anything in the specification that says that. Everything
5 you read in the McDaniels specification says their objective there is to
6 improve the collision avoidance, improve the quality of the alarms that are
7 being distributed there.

8 Now I want to hit one more of these before --

9 JUDGE AHMED: Mr. Supko, you have about 5 minutes before you
10 get into your rebuttal time.

11 MR. SUPKO: Okay. Thank you, Your Honor. Let's go to Slide 45,
12 please, Josh. I want to talk a bit about the arguments in Grounds 2A of both
13 the '131 and the '227. The two claims that were primarily at issue here, 7
14 and 17, 17 is the one that I want to focus on right now. Can we go to Slide
15 50, please.

16 And the dispute centers on the limitation that we've got on Slide 50,
17 there's a requirement for a first wireless communications antenna that's
18 operable to send and receive data representing the separation distance over
19 the air. Patent Owner argues that Grisham doesn't do this, we say it plainly
20 does. Can we go to Slide 51, please. Now Slide 51 shows Figure 22 from
21 Grisham.

22 Grisham, there's no dispute that Grisham determines separation
23 distance, no question at all about that. Next slide, please. And there's really
24 no real dispute about how Grisham determines separation distance. What
25 we see in Figure 21 here, the first train, 1102 on the left, sends an impulse to
26 the train on the right.

1 And once the train gets that, it says "Okay, somebody's in the
2 neighborhood here, I got to figure out what's going on." In addition to
3 sending an alarm to the operator, it sends a ping back to the first train which
4 reflects back to the second train, and from that, the second train figures out
5 what the separation distance is there.

6 JUDGE AHMED: I think that's the point, the second train figures out
7 what the separation distance is, and Patent Owner is arguing that it does not
8 send or receive that information in Grisham.

9 MR. SUPKO: So what the --

10 JUDGE AHMED: Or at least Petitioner hasn't contended that in the
11 Petition.

12 MR. SUPKO: Correct. That is the argument, Your Honor. They say
13 okay, the second train makes that determination but it never sends that
14 information back to the first train. But Grisham does do that. Could we go
15 to, I'm not sure we've got a slide on this one. I'll just identify it for the
16 record, Your Honor.

17 In Grisham at Column 24, Lines 25 to 29, which the Board cited in its
18 Institution Decision, it's the very -- go to the next slide, please, Josh, one
19 more, please. We don't have that, I thought we had the, okay. Here we go.

20 So what Grisham teaches the POSITA is that it should be understood
21 that the first locomotive can contain the same equipment as the second
22 locomotive, and as such, could be notified of the presence and speed of an
23 oncoming second locomotive.

24 So what it says there, first locomotive has the same receiver, same
25 type of receiver, because it has that, it gets notified of the presence and
26 speed of that oncoming second locomotive. It doesn't say it can figure out

1 where the second locomotive is. It doesn't say it can figure out how far it is,
2 it says it gets notified. And again, that only makes sense when you think
3 about what this system is.

4 If the second train figures out that the separation distance is creating a
5 collision risk, why would it not tell the first train that it has that problem?
6 Your goal here is to avoid collisions. Second train is going to take action,
7 take corrective action, but the first train should be doing that too, they should
8 both be putting the brakes on. So Grisham discloses that that notification is
9 sent.

10 Now granted, it says presence and speed, it doesn't say separation
11 distance. But if we are talking about presence, it would make no sense for
12 the second train to say okay, there's another train here that's coming at me.
13 If you're trying to avoid collisions and you just figured out what the
14 separation distance is, you're going to send that information to the first train.
15 That's what's meant by presence and speed here.

16 JUDGE AHMED: So, I'll go back to what Judge White said earlier,
17 all that makes sense, but how are we supposed to read that from Grisham
18 and more importantly, from your Petition?

19 MR. SUPKO: Well, Your Honor, we did cite to this back and forth
20 here. I don't believe there's a citation to this particular sentence in here. But
21 Your Honors recognize that in the Institution Decision, it's the very next line
22 from the portion of the specification that we cited to and that Mr. Andrews
23 discussed. And it's reflected in the drawing figures. So again, looking at the
24 specification from the standpoint of a person of ordinary skill in the art,
25 that's how a person of ordinary skill in the art would understand this
26 disclosure as a whole.

1 JUDGE AHMED: You're in your rebuttal time now.

2 MR. SUPKO: Thank you, Your Honor, I'll step aside.

3 MR. SCHODDE: I'm going to start with our Slide 14.

4 JUDGE AHMED: But first, how much time would you like to
5 reserve for your sur-rebuttal?

6 MR. SCHODDE: Ten minutes, more or less, and I will be splitting
7 the argument with Mr. Chiplunkar. I'm going to cover the person of
8 ordinary skill and the objective indicia of non-obviousness and Mr.
9 Chiplunkar is going to be tackling the grounds. So please keep that in mind
10 when you are framing your questions. Although, I won't shy away from it,
11 I'll try. But that's my excuse.

12 JUDGE POWELL: You're absolutely welcome to call a friend.

13 MR. SCHODDE: I will call a friend, indeed. So members of the
14 Panel and our guests at Southern, thanks for hosting us today, thanks for
15 having this hearing here, it's a unique opportunity and we appreciate the
16 opportunity to address the Panel in this courtroom. When I found out we
17 were going to be here at Southern, I put this slide together at the beginning.

18 This is a famous quote from Abraham Lincoln, he was a big fan of the
19 patent system. And I think this is going to become clear why I started with
20 this as I go through the objective indicia. From Lincoln, "Next came the
21 patent laws. These began in England in 1624; and, in this country, with the
22 adoption of our constitution. Before these, any man might instantly use
23 what another had invented; so that the inventor had no special advantage
24 from his own invention.

25 The patent system changed this; secured to the inventor, for a limited
26 time, the exclusive use of his invention; and thereby added the fuel of

1 interest to the fire of genius, in the discovery and production of new and
2 useful things."

3 And this is inscribed over the west door of the Commerce Department
4 on 15th Street, some of you may have seen it before you walked by, and
5 looked up and that's a picture of it in the upper part of the frame.

6 So I will be honest, when I first put this in, I thought how am I going
7 to tie this to the evidence in this case. This is not in the record, I'm going to
8 be subject to a motion to strike. But it came to me when I saw the slide in
9 the argument that Petitioners were making regarding whether or not this
10 industry is innovative or not.

11 And I heard my colleague say we showed you in our Reply, 90 or 100
12 patent applications that have "railway" in them during this same time period.
13 Well, I went back and checked and we cited this in our papers, the Patent
14 Office keeps statistics on how many patents are filed. And sometimes they
15 even break it down by industry.

16 In 2011, it was 250,000 more or less, patents issued. Ninety
17 applications from an industry as significant as the railroad industry is to our
18 economy and to the country is noise, it is measurement error, it is de
19 minimus in the context of the amount of innovation going on in this country.

20 I would submit that no industry other than, needs innovation and
21 needs fuel in the form of patents more than the railroad industry, which I
22 think the evidence shows is among the most reluctant, sporadic, resistant to
23 change, even fossilized industry in our country today.

24 No offense to anyone here, but Metrom was founded with the notion
25 that we would come up with new ways to approach old problems in this
26 industry. A good a place to start is the statute. Slide 15, please and

1 Demonstrative Exhibits at 2039. 35 U.S.C 103 is the basis for all of the
2 grounds.

3 A couple of observations about this. First, there is no allegation of
4 anticipation, and I think you just heard why. Grisham gets close, we
5 acknowledge that, but it's not quite there. That's why Grisham went into the
6 drawer and our invention went into their machine, Helix.

7 A second observation about this is that "Patentability shall not be
8 negated by the manner in which the invention was made." And I thought
9 this argument had disappeared when I saw the slide deck, but it came up
10 again.

11 I heard the Petitioner say "Well, Mr. Gunther was new to the industry,
12 so therefore it must be obvious." It's right in the statute, you never look to
13 the inventor to say "Oh, well, he thought of it, so it must have been obvious
14 to everyone." That's why he's the inventor and that's why that statement is in
15 the statute.

16 You don't, you can't look at the inventor and say well, he was super
17 smart, or look how fast he came up with it. He could come up with it
18 accidentally, it doesn't matter, that's not the test for obviousness. You look
19 to this ordinary person of skill in the art.

20 Which, unlike the ordinary person from torts, the reasonable and
21 prudent person that some of the students here may be familiar with, our
22 hypothetical ordinary person changes every single time. You look to the art
23 that's relevant to the claimed invention. And next slide here, keep going.
24 Let's just to go to Slide No. 18.

25 Your Honors picked up on something which I think is kind of
26 important. Both parties, including the Petitioner, put in a relatively low level

1 of skill here, the person using these inventions, especially in the railroad art,
2 does not have a high level of skill. And the low level of skill favors the
3 finding of non-obviousness.

4 Obviously more is obvious to a person with extraordinary skill, or
5 with a vast knowledge of the art, than is obvious to a person of low skill and
6 with a much narrower focus. We think the focus should be on the railroad
7 industry, because that's what this invention is limited to.

8 Notwithstanding the statement in the file wrapper in the specification
9 that it might be applicable in other areas, the claims were written for this
10 area, they are limited to that. And that's what we think should be the
11 measuring stick for who this would be obvious to, a person in the railway
12 art.

13 JUDGE WHITE: And this question shouldn't surprise you, do you
14 think this person needs to have a bachelor's degree?

15 MR. SCHODDE: I think bachelor's degree is fair, and I think we've
16 got that in our, I think people in this art who are doing railway safety
17 systems, who are using them, and implementing, are typically going to have
18 a bachelor's degree. I think that's a reasonable inclusion.

19 JUDGE WHITE: What is this distinction that you guys have as far as
20 choosing to focus on the users of the system as opposed to the developers
21 and the designers of the system, why was that choice made?

22 MR. SCHODDE: Right.

23 JUDGE WHITE: Both parties have made that choice.

24 MR. SCHODDE: Right. And I think for us, because the users tend to
25 have a lower skill. People who are not users, but perhaps designers who are
26 sitting back at maybe a large consulting engineer company or something,

1 may have a broader focus. But I, apparently the Petitioners agree, it's the
2 users, it's just we disagree on which users, we are into the railway art. We
3 don't think the automotive or the airplanes or boats is the relevant art here.

4 We think the relevant art is the railway art. And then, between all of
5 those things, we've got some evidence, testimony, that the railroad art, in
6 particular, suffers from a high degree of resistance to change, to a lack of
7 innovation, skepticism to trying the new. And that's something you need to
8 take into account as you evaluate whether or not to confirm these claims
9 which are limited to railway vehicles. Next slide, please.

10 JUDGE AHMED: A lot of the prior art the Petitioner has asserted is
11 not necessarily related to railway, but it has some of the same concepts,
12 right? So why is the, I guess this question is throughout the issues that we
13 have to address, why is the level of ordinary skill limited to railway? What's
14 so special about collision avoidance systems in the railway industry that
15 makes it different than any other area?

16 MR. SCHODDE: Yes, we talk about this a little bit in the POPR,
17 actually Exhibit 2001 goes into some of the reasons why you just can't
18 translate one to the other. And I think the nature of the vehicles are
19 different, the speeds are different, the weights are different. It's just a
20 different environment, different application.

21 And that the industry has a different attitude than perhaps automotive
22 or airplanes or boats. They're all transportation, but we're looking for the
23 person of ordinary skill in the relevant art. And the relevant art, again,
24 because the claims are directed to a rail vehicle, we think is appropriately
25 railway.

1 If you broaden it out, at some point the hypothetical person of
2 ordinary skill could become, you know, a super scientist, a person who had
3 knowledge of all kinds of different art. That's not fair to the inventor in this
4 case.

5 JUDGE WHITE: The reasonable man and the person of ordinary skill
6 in the art are probably close cousins, and they're probably both highly
7 annoying if you actually get to meet them, but I think the question here is
8 that if you're dealing with somebody who is a user of the system, they're
9 going to be focused on the practical outcome.

10 And if you're just focused on the practical outcome of whether this
11 thing is going to stop these trains from crashing, would not that person look
12 broadly at anything that's going to stop crashes from occurring?

13 MR. SCHODDE: Interesting thought, hadn't looked at it from that
14 perspective before. But I think the evidence that we've got on the record
15 about a user was that there was no way that this radio-based terrestrial
16 system is going to work.

17 Mr. Gunther had that experience with a user, a railway safety
18 supervisor at a railroad they were trying to sell the system to. He had seen
19 some other efforts to implement this in the field, complete failures. And he
20 was completely surprised when the Metrom system actually turned out to
21 work and met his needs and they made their first sale as a result. So we've
22 got that user experience in the record.

23 JUDGE WHITE: I think there's a nuance to where we're going to go
24 in this argument. But the question right now is, who this person is and what
25 they'd be looking at, whether they would look at something and say that's not
26 going to work, is something that we're going to get to of course, when we

1 get to the secondary considerations. But would this person just be motivated
2 to look to see practically what's going to work, what has worked elsewhere?
3 It's just a practical consideration as a user.

4 MR. SCHODDE: I think the user in this space, in the area to which
5 the claims are limited, is unwilling to look anywhere. I mean that's what the
6 evidence seems to show, they're not, they're very reluctant to try anything.
7 I've kind of morphed that into what would the user be willing to attempt, the
8 industry is so resistant to change, there's very little that they're even willing
9 to try.

10 That's just kind of the nature of this particular environment and this
11 particular industry. They're unwilling to try, they're skeptical of new things,
12 they just, you know, if that is the user we're speaking of, that's just baked
13 into their DNA. And I think that is a factor in favor of finding that it's not
14 obvious, it's an objective indicator that it's a non-obvious invention.

15 JUDGE POWELL: So, are you saying that even if they looked, they
16 are hesitant to take a leap of faith on something?

17 MR. SCHODDE: Absolutely. I mean, you can say that Grisham was
18 available to them, but again, you heard the argument. It's not the same thing,
19 it requires adjustment, they didn't just try it. And when they did, they didn't
20 go with a copy, they went with something that they knew would work,
21 which was our invention. So when we compare the experts, Mr. Conti and
22 Mr. Andrews, you see the contrast between the two of them.

23 One is a professional expert, our expert, Mr. Conti, is a professional
24 railway safety consultant. We think that between the two, ours is much
25 closer, I think Mr. Conti has an above the ordinary level of skill in this art,

1 frankly, given his background and experience. But more importantly, it's
2 also relevant knowledge.

3 Mr. Andrews had no experience in the railway safety area, none
4 whatsoever. He bases his assumptions about what it would not be obvious
5 to combine. He's a blank canvas upon which the Petitioner's argument is
6 written. I think there's some testimony in his deposition that the closest he's
7 ever come to a piece of railroad equipment was in a museum.

8 Mr. Conti, again, not the professional expert, not a professional IPR
9 petition writer, I think was much more candid, and he just testified to what
10 he knew, and he knows a lot about the industry. And what he testified to
11 was that no one would have ever thought to do this, no one thought to do it
12 at the time. It wasn't obvious to him, it's not obvious now.

13 All right, the indicia of non-obviousness, let's go to Slide 22. I want
14 to talk about this timeline a little bit. We put this together from the
15 evidence. And the reason I wanted to do this was because it's easy to lose
16 chronological depth perception.

17 You're looking backwards through all the references and everything
18 sort of comes up to the surface like this all happened at the same time. And
19 it didn't. Our first priority document was filed in 2011.

20 We came to market in 2013, it took five years to overcome the
21 industry's resistance to this invention, five years. It wasn't until 2018 that
22 the industry started to recognize that we had something here with that
23 AURA System. And then you've got that Next-Gen Rail Conference,
24 happens every October, in 2018, where Mr. Garcia is presenting our
25 technology while he's working with Parsons. Parsons is teamed up with
26 Metrom, they are presenting at the conference together.

1 And he's so embedded with us, that he's presenting Metrom's
2 technology to a room full of industry professionals and he touts it, and you
3 will see this later on in the evidence. But that doesn't happen until five years
4 after we come to the market. It took that long to overcome the industry
5 resistance.

6 That's the kind of empirical evidence of skepticism, reluctance, that
7 you don't often get in these cases, but now you've got an objective record to
8 look at.

9 JUDGE WHITE: Well, let me ask you about the difference between
10 skepticism and sort of a capital expenditure. I may only buy a new
11 refrigerator once every ten years, so that capital expenditure of going into
12 buying a new system, it might show that I was reluctant to adopt a new
13 technology, even though this refrigerator is much better than the
14 refrigerators that were out there ten years ago. Or it could reflect the fact
15 that I only replace this equipment and do these investitures on the basis that
16 it only happens but so often.

17 What should I take from this delay, I mean, should I just say well,
18 these are big capital expenditures to go into new railway systems. This is
19 not something that happens all the time, it's not something that, you know,
20 there's a hot iPhone, I'm going to buy it right now as opposed to a capital
21 expenditure that I might not do but every ten or fifteen years.

22 MR. SCHODDE: Sure. The response to that is, if you look at the
23 sales data, the cost of this per unit installed relative to the cost of one of
24 these giant new like tie tamping machines is trivial. The machines cost
25 millions.

1 Our invention, you can look at the sales data is in the thousands or
2 tens of thousands per unit, and it's protecting these things from a collision.
3 So the capital cost that the railroads are concerned about, is having to
4 replace a multi-million-dollar piece of machinery.

5 That's what they care about, so they're highly incentivized, if they can,
6 to not run into each other and destroy really expensive capital equipment.
7 So my argument would be there's no economic reason why this was so hard
8 to innovate and push out. The economics are the other way, they had every
9 reason to do it. They didn't because they are skeptical of the technology,
10 that's why they didn't do it.

11 JUDGE WHITE: But do they, once you've spent the money in the
12 prior art systems and you've spent the money on building up whatever the
13 system used to be and that was millions of dollars. Does somebody come to
14 your office and say "Hey, there's this system that costs less money, let's try
15 that out." Or are you going to be like, I just spent millions of dollars on this
16 and now you want me to do something else?

17 MR. SCHODDE: No, because there's no replacement of the
18 equipment. The AURA System is an add-on to an existing machine, you
19 don't have to replace it at all. It's got components that you attach to the
20 machine that's installed in the cab. It's like adding on an accessory to your
21 car, it doesn't come from the factory that way, this is an after-market thing
22 sold.

23 So there's no, the capital turnover on the maintenance of way
24 equipment itself is simply not a consideration. And I think if this was, you
25 might have heard some evidence from Petitioners in that regard. And you
26 may, they're certainly playing in the space. Siemens and Thales are two of

1 the largest corporations on the planet. They have every incentive to come up
2 with some commercial or market-based evidence why these things would be,
3 why this would have played out the way it did and there's none of that from
4 the Petitioners in the Reply.

5 JUDGE AHMED: How about the impact of regulatory requirements.
6 I think the papers talk about how the government mandated PTC technology
7 at some point. Has that played any role in the growth of these collision
8 avoidance systems?

9 MR. SCHODDE: Yes, PTC is not really developed the record and
10 this forum is not really well-suited, frankly, for factually developing all of
11 the different branches on the tree. But there was a big effort to implement
12 positive train control in the United States, huge amounts of money were
13 spent on it. Fundamentally, it is an implementation of the old way of
14 keeping trains apart that they'd been doing for decades.

15 It's a block-based system based on track circuit detection and
16 traditional methods of train location. It doesn't use UWB, it doesn't use time
17 of flight. It's fairly conventional, albeit very expensive, in terms of how it's
18 implemented. Time does not, in the record, doesn't permit going out there,
19 and I don't think the Petitioners have really developed that.

20 JUDGE AHMED: And in terms of your timeline that pre-dated the
21 invention, or?

22 MR. SCHODDE: I think it overlaps.

23 JUDGE AHMED: Okay.

24 MR. SCHODDE: But I mean, to that point, even that process took a
25 long time, cost a ton of money. We think our technology, at the end of the

1 day, would be a lot cheaper if you were to adapt it to that particular
2 application.

3 I mean, one of the criticisms of our evidence was that, you know, we
4 have a maintenance of way product. It could be applied more broadly, I
5 think, for commercial success purposes, though, the relevant market is the
6 market to which the product is addressed.

7 I mean, we don't have to expand and fill every possible niche that our
8 claims might reach in order to have commercial success. We've got a
9 product directed to the maintenance of way collisions, that product is
10 commercially successful and that should be sufficient.

11 All right. Let's go to slide --

12 JUDGE AHMED: While we have the timeline up.

13 MR. SCHODDE: Oh, sure.

14 JUDGE AHMED: Could you address Petitioner's argument that Mr. -
15 - that Petitioners had already demo'd their product back in 2019, well
16 before Mr. Garcia went to work at Piper?

17 MR. SCHODDE: Right. And I think you see a shift in their
18 argument. Once it became clear that this evidence was out there, that we
19 had Mr. Garcia on tape presenting at the 2018 conference, you see a bit of a
20 shift in their approach.

21 Now they seem to be focused on the idea that also in 2018, 2019
22 timeframe, Petitioner Piper was demoing something for the NTA that
23 included a UWB component. If you go to look at the patent they say they
24 filed at that time, it's not our invention. It's a different invention, uses
25 wayside anchors and UWB units in the cab. It's also got some pretty broad
26 claims in it.

1 They say that, you know, they filed that in the office, there's an
2 implication there that this is new, useful, and not obvious, and they got the
3 claims five years after we start pushing this out. I mean, that's actually to
4 our point, in terms of the secondary considerations.

5 They didn't do that until after we had proved this out and the industry
6 recognized its value, that's when they did it. So even if their argument is
7 well, Mr. Garcia isn't the route for the copying, that doesn't exclude the
8 possibility that they may have copied it from some other source because it
9 had been on the market for five years.

10 And also, it doesn't negate the proposition that it was only after we
11 proved it worked, had success with it that they then started to try to
12 implement it. And I will tell you that their proofs on that system that they
13 say is the same, are pretty thin.

14 And it would have been relatively trivial for them to put in a
15 declaration or something saying, you know, here's what we had before we
16 hired Mr. Garcia. They didn't do that. We had a motion to get secondary
17 considerations evidence early in this case before we'd been able to develop
18 much of this record.

19 And that motion was denied for, you know, reasons that the Panel
20 believed were sound. But having taking that attitude, that path, it's, they
21 can't be heard to complain now that, you know, well, we had this other, you
22 could have proved this, but, you know, they didn't forward the evidence on
23 their own, I mean, there's an inference you can make from their silence in
24 that regard.

25 I would like to talk about nexus just a little bit, Slide 24 please. And I
26 think this is important for a couple of reasons. First, the Petitioners, they

1 want to limit the secondary considerations. I don't like that word, I like
2 objective indicia, because they're not secondary at all.

3 It's objective evidence of whether something's obvious or not as
4 opposed to the subject of would have, should have, could have hypothetical
5 skill of person in the art test. But the suggestion is that well, you can't show
6 nexus on anything past something that we already have in Grisham, so
7 there's no nexus to any of the other evidence. I don't buy that for a couple
8 reasons.

9 One, Grisham isn't the invention, if it was, they would have had a 102
10 ground. They didn't put it in under 102, it required some modifications.
11 Number two, you can't knock claims down by saying, "Okay, Claim 1 is
12 obvious, so now I'm going to treat that as if it was prior art, and now the
13 combination is this dependent claim with that." That's not fair either, each
14 claim stands on its own.

15 And I think the overall industry reluctance to innovate that we talked
16 about before speaks to that. So you got to go to every claim and say, "The
17 secondary considerations apply to it." And in a lot of cases they do because
18 it's a long felt need, skepticism in the art, reluctance to innovate, that applies
19 across the board.

20 JUDGE AHMED: But it's evidence that Patent Owner has submitted,
21 right, it's the claim charts that you put together against the independent
22 claims of the '131 patent, so --

23 MR. SCHODDE: Right.

24 JUDGE AHMED: That's what we have to look at to see if that's
25 driving whatever the secondary considerations are.

26 MR. SCHODDE: And Claim 7 as well.

1 JUDGE AHMED: And claim, yes.

2 MR. SCHODDE: So there's a GPS combination as well.

3 JUDGE AHMED: Yes.

4 MR. SCHODDE: So I think that's where it's concentric. But the law
5 is that you don't have to have perfect concentricity, is that a word,
6 concentricity, in order to have a nexus. And once we establish a nexus with
7 the product and a claim, it's just back to them to prove that there is no nexus.

8 And again, all of this evidence about these other features drove
9 demand and whatnot, a lot of that evidence is in their control. They got their
10 customer for Helix, there's nothing about what drove the demand for those
11 sales.

12 They got hundreds, thousands of employees working in the space,
13 dozens of consultants, there's no counter-declaration saying, "No, what's
14 really driving this market, to your point, is something other than the
15 invention."

16 And the bottom line testimony from both Mr. Marchi and Mr.
17 Gunther, and we've cited it, is not withstanding their cross-examination
18 saying well this is a feature and this is a feature, they always came back to,
19 yes, but the reason the customer buys it is for collision avoidance.

20 They don't want their stuff to run into it, they don't buy it because it's
21 got a membrane over the keypad or because they really like to buy from
22 Metrom, or some other, it goes with the machine all the time. Those are
23 usually the reasons why there's no nexus. They buy it because it works,
24 because it performs what the claim says it does.

25 JUDGE POWELL: Do you tie -- you say collision avoidance
26 generally speaking and I don't want to give you too hard a time about that,

1 but do you tie the collision avoidance that's the secret sauce, in a sense, or
2 that's the desired outcome, do you tie that to specific claim limitations that
3 are critical for that collision avoidance?

4 MR. SCHODDE: Yes, I think we should drill down into the
5 dependent claims, they all relate to collision avoidance because they are, you
6 know it's part of the system. And I think the conundrum that we have is if
7 we claim chart down all the way into the dependent claims, then they're
8 saying that, "Oh, the only reason you will sell it is because of this fifth
9 dependent claim down here, that's the only thing that matters." I just, you
10 start slicing the loaf a little too thin.

11 Collision avoidance, broadly speaking is shown by the claim charts on
12 1 and 7, that's, you know, those are obviously the broader independent
13 claims. And from there, you know, we can engage.

14 What we ran into in this case is, the Petitioners won't engage. They're
15 taking shots at it, but they aren't putting any, you know, there's no
16 counterfactual evidence in the record, truthfully, to say that that isn't the
17 reason that people buy the system.

18 JUDGE POWELL: So, are you between a rock and hard place? You,
19 under current Federal Circuit law, you theoretically have to deal with co-
20 extensiveness for your nexus. And you're telling me that your claims,
21 independent Claim 1 and various dependent claims have different scopes so
22 then that makes it tough for you to establish co-extensiveness with those
23 different claim scopes? Is that --

24 MR. SCHODDE: It's impossible. I would, I think it's impossible to
25 establish co-extensiveness and then do that for every single claim. It,
26 because then at what point does it become not co-extensive.

1 JUDGE POWELL: It's an interesting thought that I've never, it had
2 never occurred to me so far.

3 MR. SCHODDE: I don't agree that the law requires that the co-
4 extensiveness be perfect, especially where you've got a product which is
5 covered by the patent that we're talking about here, like being on a fence,
6 and that's the object of the commercial success and the subject of the
7 secondary consideration. I think when you've got that, you should already
8 be there. I think a lot of these other cases the features are a lot more
9 peripheral, there's something going on factually which gives you the good
10 reason to separate the claim from the invention.

11 JUDGE POWELL: Well, I will admit that nexus law is a little
12 complicated and difficult for me, so --

13 MR. SCHODDE: Yes.

14 JUDGE POWELL: And I think I can do it competently, but --

15 MR. SCHODDE: Frankly, I just don't know when you are going to
16 get a better nexus than this one, at least from an eye test, if you look at the
17 patent and the product that we're selling and the claims, they're right on top
18 of each other, so --

19 JUDGE AHMED: Don't we have to account for Grisham itself and
20 say to the point of the secret sauce, don't we have to say "This is what the
21 invention came up with that's driving all of these secondary considerations."
22 How do we account for prior art that's basically maybe not 102, but pretty
23 close?

24 MR. SCHODDE: Well, that's where you're into the obviousness, in
25 obviousness land. We're talking about objective indicia, and that's why I
26 think we're driving this to the industry itself. It hates, they hate change, they

1 hate innovation, they're skeptical of all this. We've got some good testimony
2 from all of the different declarants that we had about how reluctant they are
3 to try new things, how afraid they were of interference.

4 Grisham doesn't have everything for that Claim 7, Grisham doesn't
5 have GPS in conjunction with UWB, that's just not in there, and a lot of the
6 other dependent claims as well. And I think what the Petitioners are trying
7 to do is take Grisham, and then say that's 102 art. And then try to knock
8 down and then say, "Well, you've got this and now that's art, so that's not a
9 new thing." And then kind of serially sort of domino down the claims that
10 way.

11 JUDGE POWELL: So, yes, so he hit on something that was probably
12 my next topic is I'm struggling a bit with. Grisham shows at least a lot of
13 what's in Claim 1. And yes, Petitioner characterized that challenge as a 103.
14 But in the absence of something compelling in Patent Owner's briefs about
15 why there's something in Claim 1 that's not in Grisham, then how do we get
16 past the precedent that says "well, if the prior art's already got the important
17 stuff in it then, commercial success and various other objective indicia really
18 aren't very persuasive?" If that makes sense.

19 MR. SCHODDE: Well, that's the balance that you have to strike as a
20 Panel. I would simply respond is because the secondary consideration, the
21 objective indicia are overwhelming. I don't think I've ever seen a case that
22 had this solid of a timeline and copying thrown in as a secondary
23 consideration.

24 Grisham went into the drawer, our product went into theirs, and I
25 think that when you look, they don't even really fight us on that. I mean,

1 you were asking earlier, well, didn't you have a remedy, do you want a
2 deposition. They don't want a deposition, that would just nail it down more.

3 We all know what happened, they gave the tribute of their praise to
4 the prior art, they gave the tribute of imitation to the invention. And I think
5 at some point, you can over -- even in a really close case, you can overcome
6 it with a strong enough showing on the objective indicia and that's what we
7 think we have here, even on Claim 1.

8 I think we certainly have it on Claim 7, there are some valid technical
9 reasons why you wouldn't, in the art want to combine GPS with this, had
10 excellent testimony on that point. But even Claim 1, I think we got a
11 compelling case. How much time?

12 JUDGE AHMED: Twenty-seven more minutes.

13 MR. SCHODDE: Twenty-seven more minutes. I did want to save
14 some for rebuttal and I don't want to steal all of Mr. Chiplunkar's thunder.

15 JUDGE AHMED: That's just you're opening time, you have ten
16 minutes saved for rebuttal.

17 MR. SCHODDE: Okay. Excellent. So --

18 JUDGE WHITE: So let me ask it a different way. One of the things I
19 see here that could be an issue is specificity. Collision avoidance is the goal
20 of what you're trying to get to. But when we look at the claims, are there
21 specific things that we can pull out of the limitation and say well, this is the
22 limitation that we should key in on, and that was definitely the thing that
23 when you went to go buy this AURA System, that was what you were really
24 looking for and not just the generalized notion of collision avoidance.

1 Because I think that's where it gets to be a little trickier because
2 generally, you want to avoid a crash, but that's not what you are trying to say
3 here.

4 MR. SCHODDE: And you can't claim that.

5 JUDGE WHITE: Right.

6 MR. SCHODDE: I claim a device that avoids a crash. All claims are
7 combinations of limitations. And all claims are combinations of old
8 elements. It was Chief Judge Markey said only God works from nothing,
9 man assembles old elements. So I think it's unfair and contrary to sound
10 principles to say, okay, well this non -- you know, this is a limitation that
11 we're going to focus on as the only thing that drives a sale.

12 Because now you're breaking the claim down into a limitation analysis
13 when you are in obviousness land. It's a combination of limitations, none of
14 which they can find all of within the prior art. So necessarily, you're doing
15 this would have, should have, could have, combination.

16 And I think a lot of what's going on, you heard some of this, is that
17 they are using the fact that we did it as a template for how they are going to
18 reassemble the prior art. That's hindsight, you know, you're supposed to
19 avoid that. Objectively, we came up with an invention, no one thought it
20 was going to work, it did work, the industry started praising it, the
21 Petitioners copied it. That's powerful. And I don't think that you stop with
22 Claim 1, I think that runs all the way through the patent. Because every
23 claim stands on its own.

24 JUDGE AHMED: Perhaps you can talk about some of the other
25 secondary considerations. So, on skepticism, what part of the claimed
26 invention was the industry skeptical about?

1 MR. SCHODDE: Sure, so I think it goes to definitely use generally,
2 it's going to be the use of radio, terrestrial radio, and a method of avoiding
3 collisions between trains. There's a lot of skepticism in the industry about
4 that. Now they're going to say, well, Grisham solved that problem. But
5 Grisham didn't solve that problem, because you've got to modify Grisham,
6 that's was, that's their position, it's a 103 modification.

7 And there's also skepticism about using multiple radios, so a UWB
8 radio with a GPS radio with a communications radio. And there's some
9 great testimony that we cited in that regard from Kurt Gunther and from Carl
10 Conti as well. They don't want interference, and why, it's because it's a
11 safety application. And if the radios are stepping on each other, you've got
12 all kinds of problems.

13 So they're reluctant to make that combination specifically, I think, if
14 you're looking for something, you know, to kind of hang your technical hat
15 on. That's what I would be pointing to, it's the, it's a safety application in a
16 conservative industry. If the radios start stepping on each other, that's really
17 bad, so they don't want to attempt it.

18 JUDGE AHMED: But don't some of the references do that, like
19 Nixon and Suzuki, they use UWB with GPS and multiple communication
20 technologies at the same time and none of them complains about having an
21 issue with it?

22 MR. SCHODDE: Yes, well, again, Suzuki, I think, is in the
23 automotive space, it's not a railway space. And I'm losing it on Nixon, I
24 think, just I'm going to phone a friend on Nixon. But the fact that you can
25 find here and there some suggestion, well, maybe this would work, but
26 objectively, this is the objective evidence, that's just not what the industry

1 really believed. Again, you can pick and choose from the prior art all the
2 limitations you want, but at the end of the day, it's an obviousness case, not
3 an anticipation one.

4 JUDGE AHMED: How about copying, and don't we need some --
5 maybe not direct evidence, but something to show that if you're looking at
6 Mr. Garcia, that he took pictures or some prototype, maybe blueprints,
7 something like that he took with him when he left in order to be able to infer
8 that there was copying here?

9 MR. SCHODDE: Yes, there's a thread in the cross-examination and
10 in the briefing, and I think the argument. The suggestion that we have to
11 prove somehow that Mr. Garcia committed a crime. You don't have to
12 commit criminal theft to copy. He can come about the information
13 legitimately, and then he just copied, because it's a good invention, it doesn't
14 mean he's a thief.

15 And I think our witnesses in that regard are being asked that question
16 and it's a rather provocative one, do you think he's a crook. Not a
17 requirement for copying, they're being diplomatic. The problem that we
18 have is the evidence that would show that it wasn't a copy, is entirely in their
19 possession.

20 If you go back to the timeline, 22, the reason that I've got braces
21 around that date, Garcia joins Piper in 2020, is because his LinkedIn page is
22 wiped, and we put that exhibit into the record, his LinkedIn page doesn't say
23 where he worked before or when he started at Piper.

24 And when we raised this issue, there's nothing in the Reply about
25 when he actually did start, I mean, they're cross-examining our witnesses
26 about Garcia, they know this is coming. But at no point do they even say

1 when he actually did start at Piper. Same thing for the introduction to the
2 Helix System, that's the reason I've got braces around it. That's the best we
3 could figure out from public sources.

4 We were denied the motion on discovery, we put it in anyway, they
5 had every chance to respond to it, they don't even respond with basic stuff.
6 And I think the inference that you can draw, and you've got this case in our
7 briefing, is that when something is uniquely in the ability of a party to prove,
8 and they don't come forth with it, you can infer that it would have been bad
9 for them, that that's the reason that they did it.

10 It's not because of the procedural schedule or because it would have
11 been hard to get a deposition or because, you know, they would have needed
12 more time to do briefing. It's because it would have been devastating to
13 their case. That's why they didn't do it. So we put it out there, I think we've
14 got a prima facie case that they had access to it at least through Mr. Garcia.

15 I think it then goes back on the Petitioners to come forward with
16 something to show that they didn't do it. But there is nothing, not even basic
17 facts, instead they shifted to this idea that well, we did do it, but we did it
18 before Mr. Garcia was hired. But just five years after, you introduced it to
19 the market, which again, even if you're not making a finding on copying is a
20 different finding, but also as an objective indicator that it's not obvious
21 because of the long delay, only after we proved it out has it been adopted.

22 JUDGE WHITE: Talk a little bit about Mr. Garcia's access, because
23 he has what, a year working with the system? Tell me a little bit more about
24 him?

25 MR. SCHODDE: Sure, so let's put up Slide, and there's testimony in
26 the depositions on this. He was working with a company called Parsons,

1 Slide 40, please. Parsons is a consulting engineer, they are working with all
2 the different bidders with the MTA for a project in New York. And they're
3 hired to sort of supervise everyone.

4 Previously, Parsons had been working with Metrom directly in a
5 teaming arrangement on another project for the Boston Transit Agency. In
6 the course of that work, he gets direct access to everything, he's under the
7 hood.

8 Metrom is not a big company, we're talking about a handful of
9 employees. So access to everything comes pretty readily because there isn't
10 a large enterprise to get access to. So he's under the hood, he's
11 understanding the technology, he's seen how we make it work. And then he
12 leaves, he goes to Piper, and then they introduce Helix, that's the copying
13 timeline.

14 JUDGE POWELL: So --

15 JUDGE WHITE: You go ahead.

16 JUDGE POWELL: Okay. On this thread that if somebody could
17 present the evidence, they have the evidence and they declined to do so and
18 there would be an adverse inference perhaps drawn against them, is there
19 any distinction between circumstances where they might need to prove
20 something that's affirmative and circumstances where they need to prove a
21 negative? Because I'm a little mindful here that the situation here might be
22 somewhat that they need to prove the negative, prove that Garcia didn't copy
23 and that gives me a little pause on this matter.

24 MR. SCHODDE: Sure. There's elements of both here, frankly.
25 Some things that are positive that they could have proved is we did this
26 before Garcia joined us, that's entirely within their control. The only thing

1 they actually put in and with no declarative support, just a tiny argument, is
2 a press release that doesn't really tell you what they did, certainly not enough
3 to develop a claim or redo a claim chart.

4 If that's their defense, Mr. Garcia is not a thief because we did it here,
5 they've got that evidence, they can produce it, that's positive as opposed to
6 proving the negative. And there are positives even in the copying timeline,
7 Mr. Garcia didn't join us until very late in the game in this month, here's
8 when he actually started.

9 We started developing Helix before he joined. Here's the project
10 initiation memo, I mean, these things don't happen in a vacuum, there would
11 be tons of documentary evidence in that regard, but there's no effort. And in
12 fact, when this first came up, and I think you asked this during the motion
13 stage, you know, what relief do you want, they don't want relief other than
14 relief from the evidence. So --

15 JUDGE AHMED: Well, they got admissions from your witnesses
16 saying that he's not a thief, there is no litigation against Mr. Garcia, why is
17 that not enough, I mean?

18 MR. SCHODDE: Because that's not the standard, copying doesn't
19 require thievery. It just doesn't, I don't have to prove you are a thief to prove
20 you are a copyist. You can go to the library and copy something that's in the
21 public domain, that's not a crime. Copying just means I'm aware of the
22 technology and I copied it so I could do it myself.

23 In some context, that might even be completely permissible. It's not
24 you can do it in the patent context, but you risk getting sued for patent
25 infringement, that's why we're here. But it's, you know, I don't have to prove

1 that he is a crook, I just have to prove that they copied, and it doesn't matter
2 whether it's criminal or it violated an agreement.

3 I mean, certainly nothing would have stopped anyone from going out
4 to a train, a piece of this maintenance of way equipment on siting, going all
5 over it, taking measurements, and taking it back to the shop, I mean that's,
6 you know, that would be copying, it would not be criminal. So it's a
7 distraction to say oh, you know, they can't prove we're thieves. Because
8 that's not what we have to prove, we just have to prove that there was
9 copying. And I think we got more than enough in the record to create that
10 inference.

11 And then there's this Slide 41, to your point, positive versus negative
12 evidence. There's all kinds of positive evidence that could have been
13 developed that, you know, there's nothing on, no response, none. And it's
14 because it would have been unfavorable to them. I think that's, it's not
15 because they don't have resources or time or energy for it, it's because it
16 would be bad for their position. That's what you can conclude from this.

17 JUDGE AHMED: And how about the second part of their argument
18 that Helix is not commensurate with Claim, the claim invention, at least
19 Claim 1, because Helix is a much bigger system, it's not just what's claimed
20 in Claim 1?

21 MR. SCHODDE: Yes, well we made the read as best we could based
22 on the material that we had, the same way that we did it for our system. If
23 there is some, to your point, positive evidence that the reason their customer
24 bought it, was because they really, really like this unclaimed feature that has
25 got nothing to do with our invention, that's positive evidence they had in
26 their power to produce.

1 They didn't do it, they still haven't done it and here we are at the
2 hearing and they haven't even asked for relief from your rules to do it,
3 knowing that it's a huge issue in the case. So, you can conclude from that
4 that if we did get the evidence, it would show that Amtrak absolutely bought
5 it because it does all the same things our system does. I wanted to save
6 some time for Mr. Chiplunkar before we got to our rebuttal.

7 JUDGE AHMED: You've got ten more minutes.

8 MR. SCHODDE: Okay. Can Mr. Chiplunkar have my remaining ten
9 and then we'll save ten for rebuttal, sir?

10 JUDGE AHMED: Yes, sure.

11 MR. SCHODDE: Okay. Thank you.

12 MR. CHIPLUNKAR: Good evening, Your Honors, Rajendra
13 Chiplunkar. I've got ten minutes, so I'm going to try to make this fast. And
14 if you could go to Slide 43. So this is what I was going to have as the
15 outline of our presentation. I'm pretty sure I'm not going to be hitting every
16 point here.

17 But I want to address some of the questions that Your Honors asked
18 regarding the Grounds and try to explain to you why the prior art reference
19 doesn't meet something, why Douglas doesn't meet something, or why
20 McDaniel is not combinable with Nixon, of, or with Grisham or with
21 Suzuki. But where I want to start with this and we touched on this point
22 about what is the person of ordinary skill in the art, what is this person and a
23 lot of time was spent on that question.

24 And what I've come back to is that their expert, Mr. Andrews, has no
25 railroad experience. He has no railroad experience, he's trying to put a

1 system for railway collision avoidance by picking up different pieces of
2 discussions from different patents.

3 And he might be free to do that, as long as he can show something in
4 the record that a person of ordinary skill in the art would want to do that, or
5 would want to take them. He, you know, we will not dispute that he perhaps
6 has found limitations in different patents.

7 But when it comes to putting these references together, his testimony,
8 if you look at his declaration, is conclusory, a POSITA would understand
9 that they will work, period, end of story.

10 There was a case from the Federal Circuit, *TQ Delta v. Cisco*, where
11 the expert's, ipse dixit, that's what they called it, "I say it and so it is." That
12 doesn't carry the day for them. If they want to rely on obviousness but they
13 don't want to meet their burden of persuasion, by coming forth with some
14 evidence more than "I see it and I say it, and by the way I don't have any
15 experience in the railroad art." He frankly admits it.

16 And I want to go to a portion of his deposition testimony, Slide 48.
17 At his deposition he was asked, what do you cite to when you make these
18 combinations or what is the motivation. He comes out and says "A person
19 would have understood," so a cite to what a POSITA would have known.
20 And now, he's not in the railroad art. There's a lot of background knowledge
21 that people carry with them.

22 And I don't have to cite to a separate reference for every single
23 assertion that I make if I understand what a person skilled in the art would
24 have known, I can rely on that. But that's just, that any expert can come and
25 say that's what a POSITA would do and they would meet the burden of
26 obviousness.

1 You cannot carry a burden of persuasion by just saying, "Believe me,
2 a POSITA would do it." And it comes back to this, combining UWB and
3 GPS, he said that's a secondary, an objective indicia argument that we would
4 not put these two technologies together, that was the prevailing wisdom.

5 A question was asked, you haven't cited to a reference that teaches or
6 suggests the benefit or, you know, says that, "Oh, there won't be a drawback
7 if we put them together." He says, "No, I've not cited to a specific reference
8 for that."

9 In fact, if you look at paragraph 176 and 177 of his report, he just
10 goes, he has not cited to a single reference other than the knowledge of a
11 POSITA to render Claim 7 obvious. It goes on endlessly, a POSITA would
12 know this, a POSITA would do this.

13 And the problem becomes clear because all of his reasoning, it doesn't
14 stand the test of a reasonable analysis. He, Mr. Andrews, says with respect
15 to the GPS range, you would want to put GPS together and you would want
16 to put UWB together. Why? To get more accuracy.

17 Elsewhere in his declaration, he admits that GPS has errors of up to 30
18 feet, 15 to 30 feet. How does that improve the accuracy? His comeback to
19 that is, because when a train is far away, you want to know well in advance,
20 UWB's limited range, you want to know well in advance where the train is.

21 But he hasn't put a reference forward which allows one train to tell the
22 other train using some other technology, how to communicate those GPS
23 coordinates. He is only relying on UWB. UWB's range is limited to 20
24 meters, 40 meters.

25 What is the point of two different trains knowing their GPS locations
26 when they cannot communicate it? He just said you would communicate

1 using UWB. The trains are already close, GPS is useless at that point in
2 time because those coordinates can only be communicated when the radios
3 are within 20 feet, when UWB communications can be received.

4 So that is an example of how, if you analyze his reasoning, you can
5 poke holes in it. And he didn't, we brought that up, he didn't come back with
6 a counter-declaration or anything of that sort. They just took, they just made
7 attorney arguments.

8 JUDGE AHMED: So, is the argument that there is no prior art
9 reference that teaches transmitting GPS using UWB, or just using the two
10 technologies together?

11 MR. CHIPLUNKAR: He didn't point to a reference. If his reasoning
12 was, GPS, you want to know well in advance that these trains are, you know,
13 on a collision course. How would one train tell the other train if it's on a
14 collision course, if the only other reference you have is a UWB reference
15 whose range is limited?

16 How would you tell -- he doesn't do that critical analysis, you know.
17 He could have gone and found a third reference, he could have done
18 something else to have his, to make his reasoning bullet proof. He just says,
19 I don't need a reference, I don't, you know, ipse dixit, I said it and so it is.

20 JUDGE WHITE: Are you telling me that an electrical engineer
21 wouldn't understand how you could communicate GPS coordinates?

22 MR. CHIPLUNKAR: There is no reference.

23 JUDGE WHITE: But we're talking about this person of ordinary skill
24 in the art and I asked if this person had to be an electrical engineer, and
25 whether they needed a bachelor's degree, and the answer I got was yes, this
26 person would likely be a bachelor's degree and the electrical engineering is

1 the background that both sides are pointing to. Are you trying to tell me that
2 an electrical engineer wouldn't understand how to communicate GPS
3 coordinates?

4 MR. CHIPLUNKAR: But the only technology you have to
5 communicate the GPS coordinates, is UWB, which is limited in range to 50
6 meters. I'm attacking Mr. Andrews' rationale. He says, you want to know
7 that these trains are coming close when they are miles apart, so I'm going to
8 communicate GPS, how? Because the only other technology to rely on in
9 Grisham or in Suzuki, is UWB. That is range limited.

10 When two trains are close enough, they're already going to collide,
11 what's the point of knowing their GPS locations? That was the motivation
12 he provided, we are only attacking his motivation. And it's their burden in
13 the first instance to come forth with a reasonable motivation, on what I think
14 *In re Khan* says is something with rational underpinnings.

15 There are no rational underpinnings, because he just puts them
16 together and as he goes around, you can read his deposition testimony, he
17 just invents on the fly. Ask him a question, he's got a new reason for it.

18 JUDGE WHITE: We can talk about whether he was successful in
19 this, but I think what you were pointing us to before was saying that they
20 were making sort of generic statements about how this would be in the
21 background knowledge of one of ordinary skill in the art. And I'm saying
22 wouldn't just communicating coordinates just be something in the
23 background knowledge of one of ordinary skill in the art, not necessarily
24 limited to UWB, but there's multiple ways to communicate coordinates.

25 MR. CHIPLUNKAR: It's not articulated in his declaration, there's no
26 evidence. In the first instance, we have to come forward with a reference or

1 a teaching, something that says, pardon me, GPS using radio frequency, I
2 don't know, LTE technology, whatever you have a central, you communicate
3 it, they have to make their prima facie case for not only finding the elements,
4 but also for showing a motivation to combine and a reasonable expectation
5 of success. They didn't do that. How much time do we have, Your Honor?

6 JUDGE AHMED: You have two more minutes before you get into
7 your rebuttal time.

8 MR. CHIPLUNKAR: Okay. I want to address Claims 2 and 4, which
9 is Slide 51. So this discussion about Douglas and the central tracking
10 system. The important thing is, they admitted, because list of links to be
11 traversed, what's communicated -- what's communicated, are the different
12 links that a train will take once it's in the zone.

13 At any given point in time, I do not know where in that zone the train
14 is. All Douglas does is it figures out if there's a conflict in the switches, my
15 friend put up a picture there of the track interlocking. All Douglas cares
16 about is, is this train at some point in time, going to be using the same link
17 as this other train.

18 Is there a conflict at that point in time, because the switches open in
19 one direction, wasn't a switching open in another direction. That's what
20 Douglas cares about. Douglas doesn't track the location, and that's our point.

21 JUDGE POWELL: Sorry, how precise, I would like to put a fine
22 point on this if we can, maybe we can't. How precisely does the claim
23 require determining the location?

24 MR. CHIPLUNKAR: Tracking location?

1 JUDGE POWELL: Yes, the tracking the location, how precisely does
2 the prior art have to track the location to meet that claim, does that make
3 sense?

4 MR. CHIPLUNKAR: Yes. It's, as the patent says, it needs to be
5 precise. Now whether it gets into feet or meters, it's left up to interpretation
6 as to what the art is, in the collision art, whatever they say they're going to
7 require.

8 But nowhere in Douglas there's a tracking of any location, there's a
9 train ID, they put it up on the screen, there's a list of links, but nowhere that
10 tells you where is that train, precision, it doesn't even get to precision,
11 because they're not, Douglas doesn't know where that train is, it knows it's in
12 the zone, because they are all broadcasting this information.

13 All Douglas knows is to say, "Oh, you are train 1, you are going to
14 pass Link 5, God knows when. And there's train 6, which is also going to be
15 using Link 5, God knows when. Tell them there's a problem, there's a
16 conflict, both are eventually going to get to 5." But there's no precision --
17 there's no precision, I mean. It doesn't track the location, that's our point in
18 the context of the patent, we require something more precise, maybe a
19 matter of feet, meters.

20 JUDGE AHMED: You know the track that it's on, and it's within that
21 zone, isn't that enough to determine the location?

22 MR. CHIPLUNKAR: That's not the location, a zone is just a, it's just
23 limited by the range of the Wi-Fi signal, that's what a zone is. The signal
24 going to die off. So it's like coming with your phone into an area and you
25 get a Wi-Fi signal. I, your phone is in the area and it can receive a Wi-Fi
26 signal.

1 But that's not a, precise location tracking is something else, it's just
2 not "I'm in the zone, I need to know" -- and it doesn't know whether at any
3 point on them on which track it is, it knows it's on the zone, and it knows
4 what tracks it's going to take. It cannot tell me that you are in the zone and
5 on track 21 at this point in time.

6 The, you know, the real time aspect of that's important for collision
7 avoidance. I mean, that's how you should be, a POSITA would understand
8 what the claim requires, and that's how a POSITA would understand that
9 Douglas doesn't teach that, that's our point. That you have to determine
10 what track location means.

11 JUDGE AHMED: You're in your rebuttal time now.

12 MR. CHIPLUNKAR: I'm going to just take one minute. The
13 separation distance, there is no disclosure of communicating separation
14 distance if you look at the slide deck and the portions that we cited from
15 their paper, they neglected to consider the transmission of separation
16 distance. They read Claim 17 on Claim 1, Claim 17 and Claim 1 have
17 different scope.

18 Grisham -- required the communication of separation distance in a
19 count and tell you what happens in Grisham. You send a pulse, and that
20 knows how far away it is, and there's a, put two radios together, and then
21 this, this other one, the first way so you can know what the separation
22 distance is. They figure out the separation distance, what is the motivation
23 to communicate separation distance.

24 There was no motivation articulated because they did not even address
25 and communicate a separation distance. Their papers just say used to send
26 and receive data over the air. Claim 17 requires more than that. Their

1 allegation is not commensurate with the scope of the claim, there is no
2 allegation.

3 You heard some arguments today, I trying to make sense out of it, but
4 it was not articulated why in their Petition, because they're the master of the
5 Petition, there was no articulation about the communication of separation
6 distance. I think I'm going to reserve for rebuttal. Thank you, Your Honors.

7 JUDGE WHITE: Thank you.

8 JUDGE AHMED: You have about 8 more minutes for sur-rebuttal.

9 MR. WISNIA: Your Honor, how much time do we have in rebuttal?

10 JUDGE AHMED: You have 28 minutes for rebuttal, Mr. Wisnia.

11 MR. WISNIA: Thank you so much. I'm going to address certain
12 issues, and my colleague Mr. Supko will address others.

13 All right. May it please the Panel, let me talk for a moment first about
14 person skilled in the art. If we take a look at Slide 8 of our deck. I think we
15 are in the unique spot of needing a Markman hearing on the construction of
16 the person of ordinary skill in the art. So the question is what did we mean
17 by using. So the language is POSITA would have a background in wireless
18 electronics and would have at least two years of experience with using such
19 electronics for control system applications such as collision avoidance
20 systems or positioning systems. So this is the idea of an engineer using
21 these systems to build these systems, to implement these systems.

22 It's not a matter of someone working the train and using the system.
23 It's the use and implementation of these control systems is the point I wanted
24 to mention on that. All right. In my earlier comments I said they haven't
25 pointed to the secret sauce. What is different from the AURA system
26 compared to what Grisham has taught us.

1 And each of you, in your own way, asked the Patent Owner that
2 question and you didn't get an answer. You got, well, one was in the drawer
3 and the other one was in the system. Well, what does that mean? There was
4 no answer there because the answer is they haven't provided an analysis of
5 that question.

6 So if you look at the question of correspondence or co-extensiveness
7 or showing that it's relevant to the product, they did point to a particular
8 limitation in the claim, but they said, "Aha, it's the use of UWB in
9 combination with GPS," for example, just making that up.

10 And then if you pointed to a reference and said well, look, that's in the
11 prior art, that's not good enough for them. In the *WBIP* case, there's a
12 question, well what happens if it's the whole train as a whole, and all of
13 those things are required for the commercial success, okay.

14 Again, all of those things are in Grisham, and secondly, there's no
15 explanation as to how their system, even as a whole is different somehow
16 from what Grisham's presented. And so my colleague would refer often to
17 say, "Well, Grisham is a 103, it's not a 102, they didn't call it a 102, they
18 must have modified it, there's some modification there."

19 But the question is, what's being modified and what matters, okay.
20 First of all, anticipation is the epitome of obviousness. Grisham is, in my
21 view, an anticipation for certain of the claims. So why wasn't it presented as
22 an anticipation of 102 for certain claims. Well, it uses the term controller as
23 opposed to processor and it talks, and there's a requirement that makes some
24 sort of input to the display, okay, like shutting off an alarm, changing the
25 color.

1 Those are minor differences, if any, in the claim. So we presented it
2 as a 103. Those differences, controller versus processor, controller in 2011
3 is a processor, all right, aren't addressed that say that isn't the secret sauce,
4 they haven't gotten up here and say "Aha, look here is why this is different,
5 here's this is different, here's how we obtained the result."

6 The simple fact is the merits of the invention talk about the technical
7 merits of the invention. Maybe they got a great salesman over there, maybe
8 that's how they were able to get more sales than Grisham.

9 Maybe Grisham, the company decided they weren't going to invest the
10 money to build out that product. Maybe they had a buddy that worked at
11 Canadian Railroad and he was able to get a sale at Canadian Railroad. I
12 don't know, it doesn't matter. Because the point is, a great salesman is not
13 commercial success in the context of a 103 analysis. It has to be the merits
14 of the invention, and they haven't put that forward.

15 JUDGE AHMED: What about Claim 7, where it uses GPS, they've
16 charted that claim as well, and that's what they pointed to today.

17 MR. WISNIA: Judge Powell had an interesting conversation with
18 Counsel on this issue as well. Are you caught in between a rock and a hard
19 place on this, his answer was yes, I am. It's impossible for me to show co-
20 extensiveness.

21 Well, the law is you've got to show co-extensiveness and it's not an
22 impossibility. So if you're showing, and you take the position, as they have,
23 this is their argument, not my argument, not the Panel's argument, their
24 argument. Claim 1 is, of the '131 patent, is co-extensive, they've taken that
25 position.

1 That means that all of the necessary requirements of the AURA
2 system are in Claim 1. That necessarily means that GPS is not one of those
3 requirements. Because they've taken that position that it's not there.
4 They've also taken the position that UWB is not a requirement of that
5 system.

6 JUDGE POWELL: If I were to take the view that maybe they're
7 arguing those things in the alternative, would I be wrong?

8 MR. WISNIA: I believe you would be.

9 JUDGE POWELL: This is a hypothetical, I haven't done it yet, but --

10 MR. WISNIA: They have not said this is doing it in the alternative,
11 right.

12 JUDGE POWELL: Okay.

13 MR. WISNIA: Right, they're, it could have been easily said in the, I
14 apologize.

15 JUDGE POWELL: That's fine.

16 MR. WISNIA: I didn't mean disrespect with that. They didn't take
17 that position, right. And that would have been a choice that they could have
18 made. They could have said, "I'm forecasting to you, Panel, that I think I'm
19 going to lose on Claim 1 by telling you I'm really making this argument in
20 the alternative," okay. But they didn't do that, it's a choice they decided not
21 to make.

22 JUDGE AHMED: Because they also rely on the claims of the '227
23 patent which actually recite UWB?

24 MR. WISNIA: They do, again it's a, you know, they had a choice in
25 this, right. They could have chosen let's go in for a rifle shot here, try to

1 make our best argument on our best claim and see what we can get, but let's
2 try to get all of it.

3 They made a choice, let's try to get all of it, they made that argument,
4 and they're stuck with it. In addition, Suzuki teaches the GPS requirement.
5 So even if you look, put Grisham aside for a moment, the idea of having
6 UWB and GPS together is known in the prior art. The requirement to Claim
7 7 is no, they haven't explained to you again, where is the secret sauce here,
8 on this point.

9 Okay. If we could, there was a discussion, I don't think I have a copy
10 here, but on their, I think it was their Slide 22, Judge White, you had some
11 questions about, well, how do I know this isn't capital expenditure versus
12 rush to the market, I'm not quoting you exactly. Because that was the point
13 they were saying.

14 Okay, well, first of all, they say well, it took us five years to get
15 market acceptance. Look at the Marchi declaration, sales fall off a cliff,
16 okay. They weren't growing, they fall off a cliff. Okay, why, because they
17 weren't, people weren't in the cycle of buying new capital equipment, okay.

18 They had not identified for you in the evidence in this record what
19 new customers, who are these people that finally accepted it, in 2018, where
20 are they, they're not identified, okay. All right, there were some questions
21 about Mr. Garcia. What did he know, who did he know, where was he?

22 As I said in the earlier discussion, he was not there when the product
23 was issued or it was tested and demoed for New York in 2019, as shown on
24 Exhibit 1057. That product, they've asserted is infringement, that's in the
25 Complaint in the underlying District Court case.

1 That product is what they've asserted infringement against. And they
2 said well, you know, maybe you asked them too tough of a question and our
3 guys are just kind of Midwest nice, and so they didn't want to say anything
4 to anybody about being a thief. If you take a look at our Slide 26, it's a
5 different question, where I asked him, and you will see this in the dot, dot,
6 dots there, if you go back and look at the dot, dot, dots, there's no discussion
7 of being a thief.

8 So simply, "Do you believe, you, Mr. Gunther, believe that David
9 Garcia took the knowledge he learned from you and wrongly use it in the
10 Piper products?" The answer: "I can't prove this, I cannot do it in a court of
11 law, with what I have physically observed."

12 It doesn't say thievery here, it doesn't say sort of crime, he should have
13 called the police. Do you think he wrongly used your information? The
14 answer is he couldn't prove it.

15 JUDGE AHMED: Can you address the argument that because the
16 Petitioner has not put any positive evidence either from Mr. Garcia or
17 otherwise, we should draw an inference from it that there must be copying?

18 MR. WISNIA: Sure. So they cite the *Graves* case, which is a 1800s
19 Supreme Court case, which if you read that case and, cut through the old
20 English, is dicta, even in that case. The reason they did that, is there is no
21 case in administrative settings, such as here in an administrative setting, that
22 allows for such an adverse inference. And there's good reason, right.

23 If all we have to do is get up and make some sort of spurious
24 allegation, and then all of a sudden I have the burden of putting in all sorts of
25 evidence, I mean, why couldn't they have gotten up here and said not just
26 Garcia, everybody, they all stormed our office one day and they ripped apart

1 our product. All of a sudden I have to put in evidence to rebut that, if it's
2 just some sort of allegation.

3 That's not the case, and I suggest that there's no PTAB decision,
4 there's no Federal Circuit decisions, allowing for an adverse inference in this
5 situation, especially where the discovery has been denied by the Board,
6 right. I don't have a duty to rebut phantom evidence in this case.

7 JUDGE POWELL: So, sorry to interrupt again.

8 MR. WISNIA: Please.

9 JUDGE POWELL: I'm back to this testimony about "I can't prove it."
10 And in that vein, they say imitation is the sincerest form of flattery and I
11 think probably, I mean, I don't know how this comes out, when all the wash
12 is done. But I think Patent Owner may have a good point that for purposes
13 of objective indicia in patent law, copying isn't necessarily even any sort of
14 indication of wrongdoing.

15 It's just that when people go out and copy something, it must mean
16 that they're flattering the original one. And so, I guess you could speak to
17 that, perhaps more about this testimony?

18 MR. WISNIA: Sure. I don't think that there's any question that he's
19 not talking about thievery here, okay. Now, if the question is well, the word
20 wrongly is in the question, and maybe they're allowed to do it, but wrongly
21 would include civil laws, which would include infringement.

22 And they said, you can copy it, you could end up in patent
23 infringement as he's alleged in this case. Now, and I think that if you look
24 through the further testimony of Mr. Gunther, it was, this is not a point he
25 was turning. He was not saying, well, maybe he rightly did it, but I can't say

1 that he wrongly did it. He just was testifying, I think a fair reading of his
2 testimony is, "I can't prove that they used it."

3 And really again, kind of the key issue here is that they've got Exhibit
4 1057, it's all being done before Garcia gets there. You have the applications
5 being filed, Exhibits 1056.

6 And I think even Counsel pivoted here with me, and so now maybe
7 it's not Garcia, but they were out there for a long time and it was public, and
8 they could have got it from that stuff. There's no evidence in the record at
9 all. That's not the test, right.

10 And otherwise, why isn't the answer patents are public, you could
11 have just read the patent and done it. And the law is that you need to show
12 copying of a particular product, okay. You need to show specific access to
13 that product, okay. And they just don't -- they just don't have it.

14 There was a question, I believe this was from Judge White, about
15 specificity and what's the level of specificity that we need in a case like this.
16 An example I always think about is, to be honest, decades ago when I was a
17 patent examiner, I think they taught us in the PETTP, patent training, that
18 the example is JFK, John F. Kennedy didn't invent the rocket that took us to
19 the moon. All right.

20 Him announcing that we shall get to the moon by the end of this
21 decade, he doesn't become the inventor of the rocket ship that got us to the
22 moon. By the same token here, you're just saying oh, some sort of collision
23 avoidance system, we have some sort of collision avoidance system and
24 that's not good enough.

25 It has to be the particular limitations, what is the merit of your
26 particular system, what is the secret sauce of that particular system that

1 allows you to obtain this, what do you want to call it, objective indicia, do
2 you want to call it secondary considerations, whatever test you want,
3 whatever language you want, what gave you that special sauce, what gave
4 you the ability to achieve something.

5 And the answer is they haven't identified that as well, okay. And they
6 certainly haven't identified anything in Claim 1 of the patents. And, you
7 know, as we just discussed, they have made a choice to avoid a co-extensive
8 analysis.

9 I was kind of thinking about the way to address this, it's almost as if,
10 when you do this analysis, you think of the claim and instead of saying
11 Claim 1 comprising, you think of Claim 1 consisting essentially of these
12 things. It's kind of, it's not the greatest analysis but it's close enough maybe
13 for discussion.

14 And so it could, that requires them to show not only are they
15 practicing the claim, but they don't have other elements of the claim that
16 matter, okay. And they've taken the position that Claim 1 of the '131 patent
17 doesn't have, has all the requirements of AURA and nothing else that
18 matters.

19 Well, that means GPS doesn't matter, that means that UWB doesn't
20 matter. And UWB of course, in any event, is required expressly by Grisham
21 and GPS by any account, as expressly taught by Suzuki. So there is nothing
22 that they can particular point to on that matter.

23 JUDGE AHMED: What about using it in context of the railway
24 systems, because Suzuki does not, right?

25 MR. WISNIA: Suzuki is not express to a railway system. We don't
26 think that that's required, I mean, for the reasons that are described in the

1 analysis. First of all, Grisham talks about a hybrid analysis, right, you have
2 cars and you have trains, right.

3 You would think that if you wanted a national system associated for
4 collision avoidance, there's a lot more cars than there are trains, so you
5 would start from the car solution and you would move yourself to the trains.
6 And of course, as our expert testifies, trains is, to a certain extent, a simpler
7 problem than cars.

8 Because you just have fewer degrees of movement, of freedom, right.
9 In other words, the train is going to be on the track, and the car could be
10 moving lanes, it could be it's harder to keep track of. But the underlying
11 issue, are people on a rail or a road, or you're in line to hit somebody, hit
12 each other, is the fundamental same question, and the person of skill in the
13 art would recognize that.

14 And of course, even in the patent at issue here, they talk about these, I
15 think the term is a HyRail, which is a hybrid in itself, which is, you know,
16 one of these moments away vehicles that you drive on the road and you can
17 drive on the -- you can drive on the train. Okay. So that tells us that this is a
18 very close analog in a natural place where people are going to to do their
19 analysis.

20 The final point I want to make wasn't addressed clearly, but just as a
21 lot of the evidence they put in this case is specific to maintenance of way
22 analysis. And of course none of the claims are limited to maintenance of
23 way analysis. Grisham teaches it expressly, but again, going back to the co-
24 extensive point, if they want to narrow themselves down, they needed a
25 claim to do it.

1 And that's, for example, in the *JE* case, where, I forget the exact part
2 at issue, but it had some sort of fan deficient, had some wood item that they
3 had been using, and what really drove the sales was the fact that it had this
4 lattice structure. But none of the claims required the lattice structure.

5 And so the court said well, there's no correspondence, there is no co-
6 extensiveness. That may be great for you that you're selling all that product,
7 but I can't use it in my 103 analysis. Unless the Court has questions, the
8 Board has questions on this point, I'm going to cast in my towel.

9 MR. SUPKO: Thank you, Your Honors. I have two very quick
10 points to make on the merits before I'm going to turn the floor back over to
11 Mr. James to hit on the Motion to Strike.

12 First off, on the combination of GPS and UWB, and the context of the
13 Grisham plus Nixon grounds, Mr. Andrews wasn't just throwing out
14 motivations off the top of his head. He gave four full pages of an
15 explanation of the motivation of combined GPS with UWB in Grisham.

16 It said, at 1003 at paragraphs 176 to 179 cited at Paper 5, pages 35 to
17 36 and it even cited a patent in support of that, it was the Arthur reference,
18 Exhibit 1037, and he explained how GPS and UWB each had their strengths
19 and are complementary, and they are already put together in Nixon. So he
20 wasn't just blue skying here, there was evidence there.

21 The other point that I would like to make on this combination of
22 Grisham and Douglas, Your Honor asked how precise location has to be.
23 Counsel said, "Well, it's got to be precise." Well, that's not what the claim
24 says. Claim says location, track the location.

25 They never asked for a construction of the term location to be precise
26 location. They were happy with the broad term location, that's what the

1 claim says, that's what Douglas tracks. Thank you. And I'm going to turn it
2 over to Mr. James, unless Your Honors have any questions.

3 MR. JAMES: Thank you.

4 MR. SCHODDE: I'm sorry, are you going to the motions now, before
5 we go to our, because we reserved some time for rebuttal on the merits.

6 JUDGE AHMED: It's all the same time, you have eight minutes for
7 surrebuttal. They are using, they still have about eight minutes of their time.

8 MR. SCHODDE: Okay. So you want to wrap the remaining motions
9 into that?

10 JUDGE AHMED: Yes.

11 MR. SCHODDE: Okay. Thank you.

12 MR. JAMES: Thank you, Your Honors. Let's go to Slide 63, please.
13 I'm going to be addressing our Motion to Exclude where we request that the
14 Board should exclude UWB opinions provided by Mr. Conti in his
15 declaration at Exhibit 2012. I heard some references to Mr. Conti providing
16 support for some of the secondary considerations and some of these opinions
17 are subject to this Motion to Exclude, which I think is relevant.

18 JUDGE AHMED: I will just ask a basic question. Isn't this a case of
19 what's good for the goose is good for the gander, you're saying Mr. Conti
20 has no experience in UWB systems, they're saying Mr. Andrews has no
21 experience in railway systems. How should we end up on both these
22 experts?

23 MR. JAMES: Yes. So I think there's a difference here because Mr.
24 Andrews, he does have the experience with UWB, they are claiming he
25 doesn't have experience with railways. And there is a difference between
26 Mr. Conti who is providing background opinions on UWB at the time of

1 invention, the failure of UWB communication systems, interference between
2 UWB and GPS when he doesn't have the experience.

3 As opposed to Mr. Andrews, who has significant collision avoidance
4 experience and is talking about how the systems are found in prior art
5 reference that sometimes deal with railway vehicles, but also deal with other
6 vehicles, and their only complaint is, "Well, Mr. Andrews hasn't dealt with
7 that on a railway, on a railroad."

8 So those are two, the gap between them is too different. And we're
9 not suggesting that Mr. Conti's entire declaration is to be excluded, we're
10 really going after the specific opinions he has about what happened in the
11 prior art with UWB.

12 JUDGE AHMED: So, what's the authority, is there any Federal
13 Circuit law that requires an expert to have personal experience in a given
14 aspect of an invention before he or she can testify about it?

15 MR. JAMES: It's, we're looking at the Federal Rule of Evidence, 702,
16 and it's not just the experience that he has, it's also that the expert has to
17 provide testimony that's based on sufficient facts and facts or data. And if
18 the witness doesn't have any experience about UWB, and he's making claims
19 about UWB, then there is no factual support coming from his prior
20 experience or what he's done in the past, it would need to come from
21 somewhere else. And then if it's not also then coming from somewhere else,
22 then you're running into a 702 problem. So if we --

23 JUDGE WHITE: Would this go to more the weight and credibility
24 than whether we need to actually exclude it as inadmissible?

25 MR. JAMES: Well, 702 is specifically inadmissibility and so that's
26 the reason it would be excluded. It can also weigh in on a weight basis. One

1 of the IPR regulations, 37 C.F.R. 42.65(a) states that "Expert testimony that
2 does not disclose the underlying facts or data on which the opinion is based
3 is entitled to little or no weight." So the no there is the exclusion, but we
4 recognized in our papers that should Your Honors not grant this Motion to
5 Exclude, in the alternative, you could grant little weight to these opinions.

6 So if we turn to Slide 64, we see in paragraph 41 of Mr. Conti's
7 declaration, he has been asked to opine on the state of railroad collision
8 technology and UWB at the time of invention, in addition to general
9 skepticism with using UWB. But in his deposition testimony, Mr. Conti
10 admitted that he has never worked on any UWB systems. So as far as
11 factual support for those particular opinions, it can't be coming from his
12 prior work and/or experience, because he hasn't had that experience with
13 UWB.

14 Additionally, he provided opinions about long felt need on Slide 65 at
15 paragraph 42. He provides an opinion that there was a long felt need to
16 prevent collisions. And in the papers on this motion, Metrom admits that
17 long felt need means that the problem the invention solves has been present
18 in the industry for a long period without a solution.

19 But during his deposition, Mr. Conti admitted that his opinions that he
20 is providing here are not based on the industry, they're just based on his
21 personal lack of awareness. Particularly, he has an opinion that was
22 unaware of the use of the narrow band radio to communicate training orders
23 and movement authority before 2011. He admits that's just based on his
24 personal lack of awareness, he's not opining that that technology did not
25 exist in the industry.

1 Similarly, with respect to his lack of awareness of a system for
2 preventing collisions on maintenance of way vehicles, again, just based on
3 his personal lack of awareness, not saying that that technology was not
4 present in the industry. So for a opinion with respect to long felt need that
5 needs to be on the industry, he's not providing factual support here based on
6 the industry.

7 If we go to Slide 66, in Paragraph 50, he provides an opinion that
8 there had been a failure of every other UWB/radar communication system
9 that was on the market so far. But during his deposition, he explained that
10 he wasn't aware of any UWB/radar communication systems on the market
11 by 2012.

12 So if he's not aware of any systems, then he can't also be, he can't be
13 aware of any failure, there just was nothing there for him. And he's not
14 claiming that there just was nothing there. He's claiming that there was
15 specific failure, something tried to be there and then failed. So there's a lack
16 of factual support there.

17 Additionally, if we go to Slide 67, on Paragraph 71 of his declaration,
18 he provides opinions about the interference between GPS and UWB. We've
19 already established that he doesn't have UWB experience so therefore he
20 also doesn't have experience on the combination of UWB with GPS. It's
21 like if someone doesn't have experience with peanut butter, they're also not
22 going to have experience about peanut butter and jelly.

23 JUDGE AHMED: You're almost out of time, if you want to wrap up.

24 MR. JAMES: Yes, so because Mr. Conti's UWB opinions lack the
25 proper factual support required by Rule 702. In addition the fact that there

1 was a lack of personal knowledge on the matter, move to strike to Rule 602,
2 the Board should exclude his UWB opinions. Thank you, Your Honors.

3 JUDGE AHMED: Thank you, Mr. James.

4 MR. SCHODDE: How much time?

5 JUDGE AHMED: You have about eight minutes.

6 MR. SCHODDE: I would like to have two minutes for Mr. Ruben to
7 wrap up, it would be a fitting end to have our LEAP practitioner wrap it up
8 for us. So please don't let me run into Mr. Ruben's stand.

9 I thought it was hard under the Petitioner's test to have a nexus before
10 Mr. Wisnia got up. After I heard that, now it's gone beyond impossible. Not
11 only do I have to have perfect co-extensiveness, I can only pick one claim.

12 Everything else that it doesn't even apply to, because I've now
13 conceded that there can't be, you know, can't be objective indicia for
14 anything else, and I got to have a product that is perfectly co-extensive with
15 claim scope to occupy the market, otherwise my product isn't co-extensive.
16 I mean, it's layers upon layers of impossibility, that just isn't the law.

17 You don't have to be perfectly co-extensive, you just have to have
18 product that's covered, a success in the market, that should be sufficient.
19 The facts, the cases that go otherwise are factually distinguishable, they just
20 stray, you know, way outside.

21 They got a commercial product on the market that they can
22 demonstrate with evidence is commercially successful for some other
23 reason, like the fishing, or with the lattice. They didn't go there, I heard for
24 the first time in this case, a reference to a capital cycle. There's nothing in
25 the record about a capital cycle, that is non-existent, at the last second
26 thrown out by Mr. Wisnia.

1 I have no idea where that came from, and if anyone would know of
2 anything about a capital cycle and thought that was a real defense here, it is
3 Thales and Siemens who sell billions with a "B" in capital equipment to the
4 railroad industry.

5 This is not capital in the sense of, you know, a giant tamping machine,
6 it's an accessory add-on, it's not subject to those kinds of forces at all.
7 There's no evidence about any of that. Slide 36, Midwest nice, they put up
8 another slide where our witness says well, I can't, you know, personal
9 knowledge swear that he copied it, that's our witnesses being honest.

10 They're told to testify to what they know, to what they, a percipient
11 observation of. Of course, Mr. Gunther wasn't, short of breaking into their
12 factory, wasn't sitting next to David Garcia and watching him design their
13 Helix system, how could he? It's impossible for him to know to a testifying
14 certainty that that's what happened. All we can do is present the timeline,
15 the evidence that he had access, that he had knowledge of the system, that
16 speaks for itself to a point.

17 And to Mr. Wisnia's point on the administrative law, that Supreme
18 Court case is still good law. I mean, you can Shepardize it, cite it out all
19 over the place. Forgive me, I'm unaware that adverse inferences didn't apply
20 to administrative proceedings, I can't believe that that is the case.

21 Certainly if we just toss out an allegation with no proof, you don't
22 have to come back and rebut it, but once you come forward with some
23 positive evidence that something happened, I think the silence is agreement.
24 You have to come back in rebuttal with something or there's an inference
25 that whatever you did have, because you controlled it, is going to be bad for
26 your position.

1 We heard again, point of novelty, secret sauce, hundreds of ways to
2 do this element, but claims are combinations of limitations. You've got to
3 look at the whole claim, there's no one limitation that drives novelty. It's a
4 combination of limitations, claims as a whole, that's black letter law.

5 And by focusing on one thing and saying, "Oh, that's the secret
6 sauce," that's inviting legal error. And sure, there are hundreds of ways to
7 do limitation X. There are millions of ways to combine limitation X, Y, and
8 Z when you factor in that there might be hundreds of ways to do that.

9 But there's only one invention, it's the claim combination, and that's
10 what they just can't come up with, that's why it's a 103 case. And it's our
11 invention that they copied, it's our invention that's in their product, and it's
12 our invention that is not obvious. How much time?

13 JUDGE AHMED: You're almost out of time. But I have a question,
14 to Judge Powell's point, is there anything in your papers that suggests we are
15 not, for co-extensiveness purposes, that we are not stuck with Claim 1 and
16 the other claims that you have mapped are basically in the alternative, so we
17 can look to those other claims that are mapped against the AURA system.

18 MR. SCHODDE: You can view it as an argument in the alternative.
19 I'm just not sure that's the right thinking, I mean, I just don't know that the
20 law says you can only get one claim and if you lose that one nexus, then
21 we'll go look at this next one, and if you lose that one, then we'll go look at
22 that next one.

23 I just think that that strikes me as a not very workable approach to this
24 nexus problem. I think that all claims are independently evaluated. There is
25 good case law on the point that you don't domino down the chain, you don't

1 say well, this claim is invalid so this one is just this little bit difference and
2 now I will treat that claim as prior art.

3 And Mr. Wisnia's point, and to not, this one not, and now that that's
4 not, you know, I just said, you know, that's you just don't do that, you've got
5 to consider the whole thing as a whole, and that's where you run into the
6 objective indicia in this case, which I think weaves through the entire, you
7 know, the entire claim set. The industry just didn't believe any of this stuff
8 would work. I will turn it over to Mr. Ruben so he can have his last two
9 minutes, unless there is any last second questions from the Panel.

10 Oh, one other thing, they said you sued it in the MTA, that's Exhibit
11 1010. You'll find the claim chart from the '227 patent on page 32, and what
12 you're going to see is there's limitations in there that we put under Rule 11
13 under the safe harbor, because we just didn't know, so reasonable
14 opportunity for discovery is likely to show that. So we suspected what that
15 system might look like, don't have access to it, use the safe harbor, and we
16 have no idea whether or not that was Helix. They certainly weren't
17 advertising Helix at that time, Helix came later. Mr. Ruben?

18 MR. RUBEN: I'll be quick. Thank you, I'll be quick. Mr. Conti has
19 decades of experience of designing safety systems in the railway industry
20 and specifically collision avoidance systems. That makes him uniquely
21 qualified to testify, not only as an expert under Rule 702, but about his
22 personal observations under Rule 602, and that's exactly what he did. He
23 designed the system, the safety system collision avoidance system, during
24 the entire span of his career.

25 Excuse me, at the time of the relevant time of invention, it was not
26 being considered, and that's what he opined on. What Petitioners are asking

1 is a Catch-22, they are wanting somebody to say that I did not consider
2 UWB in designing a safety system, but I also have extensive experience in
3 UWB for these types of systems, and that's just simply not feasible.

4 And the last point I want to make is that Rule 702 is a threshold. It
5 says that if you have the qualifications based on experience, education, et
6 cetera, then you are allowed to offer opinion testimony. And opinion
7 testimony allows you, and I think the *Daubert* case, a wide latitude to
8 research topics and to provide an opinion that your overall qualifications as
9 an expert support.

10 JUDGE AHMED: Thank you, Mr. Ruben. Thank you everyone for
11 those excellent arguments, and thank you again for participating in our
12 LEAP program and also for coming down here for this hearing. We've come
13 to the end of our hearing, and the case is submitted. We will get a final
14 written decision out within the one year deadline. I request that you hang
15 around for a minute in case the court reporter has any questions, but
16 otherwise we're adjourned.

17 (Whereupon, the above-entitled matter went off the record at 6:09
18 p.m.)

IPR2023-00468 (Patent 9,043,131 B2)

IPR2023-00470 (Patent 8,812,227 B2)

PETITIONER:

Howard N. Wisnia

WISNIA PC

howard@wisnialaw.com

Vincent J. Galluzzo

Joshua H. James

Kassidy L. Schmitz

Mark M. Supko

CROWELL & MORING LLP

vgalluzzo@crowell.com

jjames@crowell.com

kschmitz@crowell.com

msupko@crowell.com

Steven A. Moore

DORITY & MANNING, PA

smoore@dority-manning.com

Greg S. Nieberg

WOLF GREENFIELD & SACKS, PC

gnieberg-ptab@wolfgreenfield.com

Thatcher A. Rahmeier

Zachary D. Kachmer

FAEGRE DRINKER BIDDLE & REATH LLP

thatcher.rahmeier@faegredrinker.com

zach.kachmer@faegredrinker.com

PATENT OWNER:

Gregory C. Schodde

Alejandro Menchaca

Ronald (Hank) Spuhler

MCANDREWS, HELD & MALLOY, LTD.

gschodde@mcandrews-ip.com

amenchaca@mcandrews-ip.com

rspuhler@mcandrews-ip.com