

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMMSCOPE TECHNOLOGIES LLC,
Petitioner

v.

BELDEN INC.,
Patent Owner.

IPR2023-01056
Patent 9,991,030 B2

Record of Oral Hearing
Held: September 16, 2024

Before CHRISTOPHER M. KAISER, KIMBERLY MCGRAW, and
SHARON FENICK, Administrative Patent Judges.

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The above-entitled matter came on for hearing Monday, September 16, 2024, commencing at 1:00 p.m. EST, at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia via Video Teleconference.

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

1:01 p.m.

JUDGE McGRAW: Good afternoon, everyone, or good morning, depending on where you're located. It's afternoon here on the east coast. This is a virtual oral hearing being held in IPR 2023-01056 between CommScope Technologies and Belden Inc., involving U.S. Patent Number 9,991,030. I am Judge Kimberly McGraw, and also appearing today is Judge Christopher Kaiser and Judge Sharon Fenick. Let's begin with appearances from both parties, and identify who will be arguing today, and I'll also ask the arguing attorney to also identify anyone else that's attending remotely with you, but is not speaking. For example, please let us know if your client or co-counsel are attending. We'll start with appearances for the Petitioner, please.

MR. BULLARD: Good afternoon, Your Honor, this is William Bullard for Petitioner Commscope and I'll be presenting counsel, and sitting in the room with me but off camera is lead counsel Tim Lindquist, and co-counsel Dennis Bremer, and then on the Webex but not on video is another attorney from our firm, Peter Kohlhepp

JUDGE McGRAW: Thank you very much. Patent Owner?

MR. SULLIVAN: Thank you, Your Honor, this is Dennis Sullivan from the law firm of Barclay Damon, representing the Patent Owner Belden Inc. I will be presenting today, joining me on the public line, no one's in the room with me, but joining me is Co-Counsel Thomas Hoehner from Barclay Damon, also Corey Bell from Finnegan Henderson, and Belden's Chief IP Counsel, Christopher Day.

1 JUDGE McGRAW: Thank you, welcome everybody. I'll quickly run
2 through a few guidelines for today's virtual hearing. We have a court
3 reporter that will prepare a transcript of today's hearing. To ensure that the
4 transcript is clear we ask that you identify yourself before speaking and to
5 speak directly into your microphone. We also ask that you identify any
6 exhibits by their specific number, the same for paper numbers, slide
7 numbers. If you're directing us to a figure on a page, please let us know
8 what figure. The important part is to make sure you provide enough
9 pertinent identifying information when referring to any part of the record.
10 All of the judges do have access to the entire record, but it may take us a
11 moment to pull up a relevant paper or exhibit if you go to switch to a new
12 document.

13 Each party should have the ability to present their computer screen to
14 us, and whether the party can zoom or highlight on the screen will depend on
15 your computer's ability. Please note however that the record is closed and
16 no new evidence may be submitted. The Board will not retain any material
17 that has been marked up, and thus while the parties may zoom and highlight
18 the screen to aid in directing the panel to the relevant portion of the screen
19 that you want us to pay attention to, this is not an opportunity to create new
20 exhibits or new evidence.

21 To ensure a clear transcript, please mute yourself when not speaking.
22 If you have any technical difficulties, please let us know immediately. And
23 then at the end of the hearing, I would appreciate if the attorneys could
24 remain on the line to give the court reporter a chance to ask for any
25 clarification of any spelling of names or terms if needed. This proceeding is
26 being streamed to the public. I don't expect any confidential information to

1 be discussed, but if any party does intend to do so, please note that this is not
2 a confidential line.

3 Per the hearing order, each party has 60 minutes total to argue their
4 case. Petitioner has the ultimate burden of establishing unpatentability by a
5 preponderance of the evidence, and as such will present first. Petitioner may
6 reserve rebuttal time of not more than half of their total argument time.
7 Patent Owner may then respond to Petitioner's argument and may reserve
8 sur-rebuttal time, also to not exceed more than half of Patent Owner's total
9 argument time. And please remember that your arguments are only limited
10 to those arguments that have been presented for the record, and we ask that
11 parties hold any objections regarding arguments until it is their time to
12 speak. There is no official clock keeping track of the parties' times, but I
13 will try to keep an eye on the time and give each party when you reach near
14 the end of your allotted time, but we do urge the parties to also keep track of
15 their remaining time as well. So Mr. Bullard, do you wish to reserve any
16 rebuttal time?

17 MR. BULLARD: Yes Judge, 10 minutes please.

18 JUDGE McGRAW: Give me a moment to set my reminder. Okay,
19 and Patent Owner, I will ask you how much time you wish to reserve when
20 it is your time to speak. Mr. Bullard, you may begin when ready.

21 MR. BULLARD: Thank you very much. Good afternoon again, we
22 appreciate this opportunity for oral argument. We have one disputed claim
23 element here, so a pretty focused dispute, and that is the barrier tape claim
24 element. The claim describes this barrier tape as having essentially three
25 layers that form a sandwich. You have conductive material in the middle,
26 you have a dielectric layer on the top and the bottom, and the claim specifies

1 that the conductive material extends to the lateral edge. So a typical
2 example to visualize this is you have a piece of metal, plastic on the top and
3 bottom, and all three layers are flush.

4 Now I call this a disputed claim element, but one thing that is
5 undisputed is that that configuration, the three layer sandwich with flush
6 layers was known in the art, and I'll identify examples as we go along. The
7 main dispute when we get to the obviousness grounds, that's the focus of my
8 presentation, is really about what I would call Belden's teaching away or
9 discourage to modify argument. And we have three different lines of
10 invalidity here, we have three primary references. We have Cook, Glew,
11 and Roberts, and I'm going to take those in reverse order, starting with
12 Roberts' obviousness.

13 This is ground number seven, and it's a ground that the Board
14 preliminarily agreed with us, in the institution decision, and I'm going to
15 start with slide number two, and I'll share my screen. And Judges, is
16 everyone able to see my screen okay? Thank you.

17 JUDGE McGRAW: I see slide 10.

18 MR. BULLARD: Oh I'm sorry, thank you, it fast forwarded on me.
19 Now does everyone see slide number two?

20 JUDGE McGRAW: Yes.

21 MR. BULLARD: Okay. So on the left hand side of the screen, we
22 have a familiar figure from the briefing, this is the cross section of Roberts'
23 cable, Roberts is Exhibit 1009, and annotated in yellow is the focus of the
24 obviousness argument, which is what's called the metal shield or also the
25 armor. Roberts uses both of those names for this component. And as shown

1 here, this is simply a one layer tape, it's one piece of metal. So we have
2 continuous conductive material.

3 Critically, though, Roberts has an additional express teaching, and
4 that's shown on the right hand side of the screen, and Roberts explains that
5 this piece of armor is actually in a sense an electrical and mechanical shield,
6 and that's because, Roberts explains, it can have plastic firmly adhered to
7 one or more surfaces thereof. And it's undisputed that that language, one or
8 more, unsurprisingly covers two, where two surfaces would be the top
9 surface and the bottom surface, so there would be your three layer tape
10 forming a sandwich, with the same piece of continuous conductive material
11 now sandwiched between plastic on the top and plastic on the bottom.

12 Now admittedly, Roberts does not picture this plastic feature
13 specifically for the armor, but what he does picture, if we go to slide number
14 three, is a logical progression of that same exact concept, plastic on a piece
15 of metal, starting at the top, one surface, in the middle, two surfaces, and at
16 the bottom, four surfaces, what Roberts also calls surrounding, and we have
17 a finite number of surfaces here. He does illustrate that sequence for the
18 foil, which was the S-shaped piece of metal in the middle.

19 And our obviousness argument is simply connecting these two
20 express teachings in Roberts together. So a person of skill picks up Roberts,
21 he sees that we have a continuous piece of conductive material that's tape-
22 like wrapped around the outside, he sees the statement that you can have
23 plastic on one or more surfaces, he asks the question in his mind, what
24 would that look like, and then he sees this progression of what that same
25 plastic feature looks like. And Roberts explains why you want to do this. I

1 mentioned earlier that Roberts describes the armor as mechanical but also in
2 a sense electrical, and --

3 JUDGE MCGRAW: Excuse me, before we get into the details about
4 the motivation to combine, perhaps you could talk more about the claim
5 construction, because I am still unclear as to what Petitioner's argument is as
6 to the proper claim construction regarding which are the lateral ends. And
7 perhaps you could talk about that.

8 MR. BULLARD: Yes, thank you. So for this particular ground, we
9 would say that the lateral -- well, let me back up and say, our ultimate
10 position is that the lateral edge, it's going to be invalid under either
11 interpretation of the claim. And for Roberts to explain that, the cross section
12 shown there in the middle, that's the sandwich, that's the identical cross
13 section shown in the challenged patent. So if the challenged patent has any
14 support, this must also fall within the scope of the claims.

15 But to answer your question about the lateral edge, we did adopt what
16 became Petitioner's interpretation of the claim for this ground. So for this
17 ground, we're pointing to the long edges. And when we filed this IPR, we
18 did not know what their position was, because this was filed before any
19 claim construction disclosures in litigation, so we tried to cover our bases
20 and not be accused of shifting to a new argument later if they made a new
21 claim construction. So for this ground, we're focusing on, well, it's the
22 same exact disclosure as the preferred embodiment, and then for the other
23 two grounds, for Glew and for Cook, we actually explained it under either
24 interpretation. So for Glew, we said, for anticipation we said, there's
25 actually a disclosure of it going to all four edges, and I'll get to that when I

1 get to Glew, and then for Cook it's the same point. Does that answer Your
2 Honor's question?

3 JUDGE McGRAW: It does, but I have a concern about what your
4 expert testified to. It seems that your expert is disagreeing with the claim
5 construction that you're applying here for Roberts, is that correct?

6 MR. BULLARD: I think what our expert focused on is, he said, you
7 know, he's struggling with two things -- and I want to be candid, I think this
8 is kind of an awkward situation. And the reason it's awkward is because
9 lateral, just as plain and ordinary meaning, you know, pounded into patent
10 lawyer's heads is focus on the plain and ordinary meaning. The plain and
11 ordinary meaning of lateral, what comes to mind is moving sideways. Their
12 expert on the other side, for example, used the analogy of a football field
13 where a player is running down the football field, and lateral as moving side
14 to side. And I agree with that, that that is what ordinarily comes to mind.

15 So if that's the meaning, then we can have a very short oral argument,
16 because it's undisputed Glew anticipates all the claims, and the argument
17 would be over. But, we recognize that there's an issue that when you read
18 the specification, there isn't a particular discussion of those edges, and there
19 is a discussion of the long edges, they're not called lateral edges, but they
20 are identified as edges, so we recognize that. I don't think our expert was
21 trying to be inconsistent, our expert is struggling with those two facts and
22 really trying to explain why it's invalid under either interpretation. Does
23 that answer the question?

24 JUDGE McGRAW: So your expert testified that he understands the
25 lateral edge to be, for lack of a better term, the short edges of the tape. You
26 can think of a tape of being a rectangle, a long rectangle, and you have long

1 edges which would be the longitudinal edges, sides, and then you have the
2 short edges. And your expert had testified that he understands the lateral
3 edge to be the short end, is that correct?

4 MR. BULLARD: That's correct, and just to explain where my expert
5 is coming from, so this expert, you know, he's not a professional expert, he's
6 a true industry guy with 40 years in the industry, and as a result, he has his
7 own patents. And in his own patents, he explains that there's a longitudinal
8 edge, and the longitudinal edge is the edge running the long way. So you
9 end up in kind of a circumstance where you can properly account for all
10 edges, you have long edges, longitudinal edges, and you have short edges,
11 lateral edges. And so that's what in his mind as an inventor in this art. But
12 he recognizes, well counsel also instructed me that the fact finder might
13 disagree, so I'm also going to explain the alternative position.

14 And there is a weirdness on Belden's side of the equation, that you
15 have lateral edges but then you never have longitudinal edges, and you end
16 up construing lateral to be longitudinal, even though in ordinary speak those
17 would be opposite concepts to each other. Does that answer the question
18 further?

19 JUDGE MCGRAW: It does, thank you, and please feel free to go
20 back to the motivation to combine.

21 MR. BULLARD: Yeah, absolutely. So going back to Roberts, where
22 Belden can't make this an issue because this is squarely under their own
23 view of the disclosure. What Roberts explains is, he explains that by adding
24 this plastic feature, he says "the mechanical properties, i.e., resistance to
25 flexing, bending or mechanical manipulation can be improved." So that's
26 Roberts at 13, lines 49 to 53. So right there, you're improving that feature of

1 the armor, its mechanical properties, by adding plastic. But Roberts also
2 said in a sense this armor is electrical, and he explains that the added plastic
3 is also a “dielectric protection.” So you’re improving that as well, so you’re
4 getting a double improvement, and that’s at Roberts 13, line 44 to 45.

5 And I do want to be clear that no part of this obviousness argument is
6 about physically moving the foil to the armor. We’re only observing that we
7 have an express teaching for the armor itself that it can have the plastic
8 feature, and that it would be obvious it could look the same. Now if this is
9 not enough, we cited to another reference, that’s Jachimowicz, because
10 ground seven is either Roberts in view of itself or Roberts in view of
11 Jachimowicz. And if I could direct your attention now to slide number four
12 --

13 JUDGE MCGRAW: Before you move on, the slides that you
14 provided, isn’t it true that they’re talking about foil, adding plastic to the
15 foil, which would seem to imply that they’re talking about adding plastic to
16 foil 15? Where does Roberts teach adding plastic to the metal armor tape so
17 that the conductive layer reaches the edges of the dielectric material, the
18 plastic material.

19 MR. BULLARD: Yes, that’s a great question, I do think it’s central
20 to this argument. So if I back up now to slide number two, if you see the
21 quote on the right hand side of the screen, that is a teaching about the armor.
22 So this is Roberts at column four, lines 20 to 23. So he’s saying that the
23 armor can have plastic firmly adhered to either one or more surfaces thereof.
24 And I think some of the confusion comes in because we cited this in our
25 petition, but on the other side, they just sort of skipped this teaching and
26 framed the issue as something else, and we didn’t ever actually get their

1 explanation of this teaching, because it's a problem for them, it's an express
2 teaching about the armor, until we got to their sur-reply briefing. So
3 Belden's briefing, I would say if you were following Belden's briefing you
4 might be surprised by this teaching, because they don't really acknowledge
5 it until the final brief. Does that answer your question?

6 JUDGE McGRAW: It does, but I still have a concern about where
7 Roberts teaches adding plastic so that the conductive material extends to the
8 lateral edge. So this citation that you provided on column four talks about
9 adding plastic, but it doesn't specify where exactly the plastic and the
10 conductive layer are going to end, and perhaps you can address that. How
11 do you bring the teachings relating to Foil Tape-15 to the Armor Tape-18?

12 MR. BULLARD: Sure, so first, for this ground, for obviousness,
13 we're connecting the dots between those two teachings, so the phrase we use
14 in the petition is that they would "look the same," so even if, Judge, you
15 thought, I don't see enough that it goes to the lateral edge here, for
16 anticipation purposes, there's no dispute for obviousness purposes that what
17 is shown here for the foil, for the plastic feature, does go to the edge. And
18 so we're saying, well, it's the same plastic feature, so it would be at least
19 obvious that you could apply it to the armor. Does that make sense?

20 JUDGE McGRAW: It does, I'll let you continue with your
21 presentation, then I might follow up.

22 MR. BULLARD: Sure, and I guess two other thoughts. I'm sorry,
23 my brain is catching up as I'm talking, you know, again, if we were in kind
24 of the most hostile interpretations of this reference, you would still have only
25 two possible alternatives looking at this, right? How many options are there
26 for one or more surfaces? You have either two surfaces or all four surfaces,

1 and we'd say they're both disclosed, but at a minimum, I mean, that's like
2 the maximum case of a finite number of options, you only have two options,
3 and the case law is that you only need it to be "reasonably understood or
4 inferred," and we pointed out there's just nothing in the reference from
5 which you would infer a different configuration. But let's say all of that
6 doesn't quite get us over the line, if we go back to Jachimowicz, now we're
7 back in undisputed territory, because it's undisputed for Jachimowicz that
8 that is the claim configuration. It's three layers, and they're flush. And my
9 colleague is not going to be able to stand up and point out anywhere that
10 they or their expert said Jachimowicz is not three layers aligned.

11 And there's a really natural correspondence between Roberts and
12 Jachimowicz, and I'd like to explain that a little bit. First, they're both
13 telephone cables. So we have the same type of cable, and even if we were
14 more exacting and said, well can you be more specific? Yes, we can be
15 more specific. They're both telephone cables that talked about being buried
16 in the ground, and both references are concerned about the fact that when
17 you're buried in the ground you water, that's why Roberts includes the
18 grease filler that absorbs water, and Jachimowicz talks about that tape being
19 shield against corrosion, which he explains as moisture, so he's talking about
20 water.

21 So we have a very similar type of cable, they're in the same location,
22 if I fast forward to slide number five now and you compare side by side
23 Roberts and Jachimowicz, and you just look from the outside in, you have in
24 both a plastic jacket and then nestled under the plastic jacket you have the
25 armor on the left, and Jachimowicz's tape on the right. So they're in the
26 same location, they have the same general composition, a piece of metal

1 with plastic on it, top and bottom, and they even have the same application
2 technique. Roberts describes his armor as being “longitudinally folded or
3 wrapped,” and Jachimowicz describes his as being longitudinally wrapped.

4 And then just as a practical matter, Jachimowicz is cited on the face of
5 Roberts. So if we’re kind of trying to imagine a person of skill reading
6 Roberts, he’d see the armor, he’d see the teaching about one or more plastic
7 layers, and then he’d also know about Jachimowicz because it’s on the face
8 of the patent, that shows the example of two, and he would be able to
9 compare that and say well that actually looks the same as Roberts own
10 teaching about the foil. So you’re kind of triangulating, everything goes
11 back to an obvious choice is what is shown here for Jachimowicz.

12 And I will just skip ahead to some admissions. And I understand that
13 parties I’m sure stand up every day before Your Honors and say they’ve got
14 a great admission and it’s not as great as they say, but it is really undisputed
15 that Roberts statement I read earlier about one or more does teach two, and
16 these are three examples on slide six, where I asked their expert about it and
17 he said, you know, I won’t belabor reading this, but he said it’s correct, yes,
18 yes. As far as that teaching one or more covering plastic on the top, plastic
19 on the bottom, and Jachimowicz shows they can be aligned.

20 So I want to pause here though now, and I really want to take on their
21 counter argument. So what is their counter argument? And I’ll stop my
22 screen share for right now. Their main counter argument is what I’ll call a
23 teaching away or discouraged from modifying. They’re saying, you don’t
24 want to have the plastic on the top and the bottom because that’s going to
25 leave metal on the side. And there are three fundamental problems here.
26 Number one, they are fighting an express teaching in Roberts, because

1 Roberts does expressly say one or more, and as I showed with those quotes,
2 it's undisputed one or more does include plastic on the top, plastic on the
3 bottom. So it can't be that you're discouraged from implementing Roberts
4 own express teaching. I've never seen a case saying that, they don't have a
5 case saying that.

6 Number two, there is no teaching away for Roberts' armor tape.
7 Roberts is concerned about the inner separator, the foil that's come up in the
8 questions, because that's in a different location, it's right next to those
9 densely packed, you know, twisted pair conductors, and so there is more
10 potential that there would be problem, but the armor is moved away, it's not
11 in the same location. And the point I want to underline, because when I was
12 preparing for the argument, this really struck me, is we know Roberts is not
13 concerned about what they call exposed metal in the armor, because what is
14 shown in the figure I started with, the whole thing is exposed, right? It's a
15 plain piece of metal.

16 So in Belden's logic, if I put myself in Belden's logic, that's the worst
17 case, that's the maximum bad case, it's all exposed according to them. But
18 Roberts is okay with that, that's his starting embodiment, from which he
19 says, well, you could put plastic on one or more surfaces, and that's only
20 going to result in reducing your metal, right? It's going to cover up your
21 metal, it's not going to create any exposed metal, we're not talking about
22 pulling off plastic, we're adding plastic.

23 JUDGE MCGRAW: And where is this argument in the record that
24 you're starting with Roberts not having any metal so there's no concern
25 about having an exposed side?

1 MR. BULLARD: That would be in the reply brief, Your Honor,
2 where we talk about how Roberts doesn't have a concern with the outer tape,
3 his concern is with the inner separator.

4 And related to that, kind of working off this, is to me there's a logical
5 gap here, because when I hear teaching away, what I would understand is,
6 you kind of do a mental comparison, you do the reference as it is to the
7 reference modified, and you try to understand, is the modification creating a
8 problem, is it making a problem worse? That's how you can kind of assess
9 would there be a teaching away, would there be a problem created here?

10 But again, if the starting point is a plain piece of metal, you can't be
11 making the problem worse, you can only be making the problem better. And
12 it might seem a little silly, but the analogy that popped in my mind is one of
13 the benefits of Zoom is you can join it from all over the country. I'm in
14 Minnesota and it gets cold in the winter, and you don't want to have exposed
15 skin when you go outside, that's absolutely true, and you might say, there's
16 a teaching away, you know, don't go outside with exposed skin, put on some
17 winter clothing. But if your starting point was a person who was standing
18 outside in the winter and didn't have a jacket on, didn't have hat on, didn't
19 have gloves on, no one would say that there is a teaching away from putting
20 a jacket on that's going to cover up your major surfaces of your body just
21 because there's some other minor surface like, you know, your ears that are
22 uncovered. Because again, you're only making things better.

23 So now, that was their main counter argument for Roberts. They do
24 have one additional counter argument for Roberts plus Jachimowicz that
25 they developed further in their sur-reply brief that I do want to respond to.
26 They suggested there's, I'll say, an incompatibility between Roberts and

1 Jachimowicz. They want to characterize Roberts as, well that's an
2 argument, and Jachimowicz, that's a corrosion shield. But if we just peel
3 back one layer here, that's a distinction without a difference. So we would
4 admit, absolutely, Roberts, that metal tape is an armor, and as I showed, it's
5 also electrical. It says both, it says it's electrical and mechanical, and the
6 reason it's an armor is because it's thicker than the foil and because it's
7 corrugated. So those two things work together to make it stronger.

8 Well, if we look now at Jachimowicz, Jachimowicz is also thicker
9 than the foil, and we have exact measurements. The foil is one to five
10 millimeters, Jachimowicz is bigger, it's five to ten, typically eight, and we
11 actually cited a federal register showing that's typical, and Jachimowicz says
12 it can be corrugated too. So this is column two, line 17 of Jachimowicz
13 where he calls it "corrugated tape." So that's not a difference. Well, what
14 about the idea that Jachimowicz is a corrosion shield? Well if I share my
15 screen again, and is everybody able to see my shared screen again?

16 JUDGE McGRAW: Yes.

17 MR. BULLARD: Thank you. If we look at the top question and
18 answer there, this is where I'm asking their expert about the one or more,
19 and in his answer, after the highlighting, he goes on to say, that is correct to
20 provide the best degree of robustness against corrosion. So their expert gets
21 it, that adding plastic is actually adding corrosion protection in Roberts. So
22 again, that's a similarity. And he didn't just say it one time, this is a quote
23 from his deposition, which is Exhibit 1048, at page 150, lines 10 to 18,
24 where I said, question, "what do you understand the reference to mean when
25 it says it can have plastic firmly adhered to one or more surfaces?" Answer,
26 "it's my understanding and my opinion, a person of skill in the art at the

1 time would understand the metal armor shield which provides a mechanical
2 shield could be coated to enhance its resistance to corrosion.”

3 And that makes sense, because again, these are the same type of cable,
4 the shield is in the same location, so you have all these points of similarity.
5 Now I’m going slower than I hoped, so I’m going to skip a little bit, but are
6 there any questions before I go to the Glew based grounds?

7 JUDGE MCGRAW: No, feel free to move on, thank you very much.

8 MR. BULLARD: Thank you very much. And for Glew I’m going to
9 focus on obviousness, there’s just as I said, not much to talk about for
10 anticipation, it’s a pure claim construction issue, and as I said, the
11 proceeding would be over if the lateral edges were the short edges. So I’m
12 going to just grant them for this ground, ground number four, that they’re the
13 long edges, and this is a ground, again, ground number four, that the panel
14 preliminarily agreed with.

15 And if I skip ahead to slide seven, so on the left, we have Glew’s three
16 layer tape, so this is a three layer tape construction with continuous
17 conductive material in the middle. There’s no dispute that this is disclosing
18 three layers with continuous conductive material sandwiched in between, but
19 as shown here, the conductive material does not extend fully to the side,
20 that’s where Cook comes in. So we have a quote from Cook, and we cited
21 additional materials in our petition where Cook says it may stand fully
22 across a width. And so if you put those two together, then you have the
23 claimed configuration. And there’s no dispute that if you do put those
24 together, you have the claimed configuration. So this is not an IPR where
25 they’re saying, you know, even if you did combine them, it doesn’t have the

1 claimed elements. It does, it's going to be an argument about teaching
2 away. And what we pointed to --

3 JUDGE MCGRAW: Well, to be fair, it's not teaching away.
4 Petitioner has the burden to show that there would have been a reason to
5 modify.

6 MR. BULLARD: That's exactly right, I agree with that. And we did
7 provide a reason to modify, and that gets at, well, how's a tape in the real
8 world made? And our expert, because he's a real world industry guy, he's
9 always thinking about, how does this work in the real world? And so in the
10 real world when you manufacture a tape, you have to do two things. You
11 have to bond the layers together and you have to size the layers. And if the
12 layers are all going to have the same size, then you can size them all at the
13 same time using this technique called slitting, where you take a wide sheet --
14 I wish I was in person, I could hold something up, and you pass it through a
15 slitting machine. And you have a knife that's just making, you know, if you
16 imagine a knife, it's just making a vertical cut as that sheet passes through,
17 and so you're going to get a perfectly flush cut and you're going to get the
18 claimed configuration there.

19 And additionally, and this was pointed out in the petition and
20 declaration, there's sort of a follow-on advantage that you don't have to
21 make the tape individually, because you're not making the layers one by
22 one. You can make multiple tapes at the same time, because you could just
23 have multiple knives, so when you're feeding the sheet through, you know,
24 it's simultaneously cutting however many strips you want. Let's say it's six
25 strips, so you're getting six tapes at the same time.

1 And this wasn't just our expert's say-so, I would really ask that the
2 panel look at what our expert said here, and he explained that number one,
3 he has personal experience with slitting, and he pointed to background
4 references that explain slitting. It's a well-known technique, we're not
5 grabbing a brand new technique, this is a standard technique in the art. He
6 pointed to a background reference that explained that slitting is "usual," and
7 achieves "economy," so there's a benefit right there, and he included a video
8 showing the slitting process working, making multiple tapes at the same
9 time, and he also gave a real world example. It's called Zetabon. So
10 Zetabon is just a widely commercially available tape that he says is made
11 using slitting. So this has real world roots here, this obviousness argument.

12 Now again, what's their counter argument? So in our view, you
13 know, we did carry our prima facie burden, and the panel preliminarily
14 agreed at institution. So what did they come back with? They said, you
15 would be discouraged from doing this, again, similar to what I mentioned
16 earlier, because they say you don't want to have metal on the side. But, and
17 this is an important but, it's undisputed that their argument is not based on
18 any particular teaching in Glew or in Cook. For example, we challenged
19 them and we said look, Glew does not assign any benefit in his own text to
20 having the tape have different widths there as shown in Figure 13C. And
21 they don't come back and say here is where Glew says that, instead they
22 exclusively go to external references, that's Roberts, NEPTAPE, and
23 Kroushl. They don't have anything directly in Glew or Cook.

24 So why does that matter? Well they need to connect the dots here,
25 they need to explain how does this evidence from Roberts and NEPTAPE
26 and Kroushl actually connect back to what Glew is concerned about in

1 Glew's design. And that's where the argument breaks down, because what
2 Roberts is concerned about, again, if I go back to that earlier slide, slide
3 number two, he is concerned about that S-shaped separator that's right next
4 to the conductors. And he does say, I don't exposed conductive material on
5 the major surfaces, that's his main concern, is the major surfaces, and he's
6 only concerned about the minor surfaces, those smaller sides, when it
7 extends for many miles, which would happen with a telephone cable. Now
8 keep in mind, Glew is not a telephone cable. Glew is a data cable. And our
9 expert pointed out the site is in our brief, and then our expert elaborates on
10 it, that a data cable like Glew's, you'd only expect to go for, let's say, 100
11 meters. So it doesn't actually fall into Roberts' concern there, but that's
12 kind of in the weeds, there's a much bigger point here.

13 If I fast forward now to slide nine, please. Slide nine is showing,
14 okay, Glew does have a separator like Roberts, it's cross-shaped in this
15 particular embodiment, and then there's a T-shaped embodiment. And all
16 these embodiments have little black dots in them. Those are intentionally
17 added metal inclusions to make that separator conductive. So Glew has
18 made a deliberate design decision, I am trying to make my separator
19 conductive. And he goes the complete opposite direction of Roberts, he says
20 instead of covering it up with plastic on the right hand side there, in Figure
21 8(a), he adds, he says you can add a metal coding over substantially the
22 entire surface, that's that element 100 that shows kind of a second outline
23 traced around it.

24 So these are truly going in opposite directions. Roberts is concerned
25 about exposed conductive material on the separator, and he says you can put
26 plastic on the major surfaces. Glew is not concerned, and he says you can

1 put more conductive material on the plastic surfaces. And Glew actually
2 goes even farther than that, again, he goes to the maximum case in Belden's
3 world. If we go back to the three layer tape in Glew, that's Figure 13(c)
4 there on the left hand side of the screen. If you follow the numerals, you see
5 there's a bottom layer, 135, he calls that the substrate, and there's the middle
6 layer, 133, that's the continuous metal, and then on top of that is 137, which
7 is called the non-woven fabric layer.

8 And something we pointed out on our petition, on page 35, and I just
9 want to read part of what we wrote there on page 35 is that he says, "the
10 substrate layer is formed of a polymeric material such as a dielectric
11 material...that may be electrically insulative, dissipative, or conductive." So
12 right there, Roberts is saying, that bottom layer, it can also be conductive.
13 And then he goes on --

14 JUDGE McGRAW: I'm sorry, what page are you at?

15 MR. BULLARD: Yes, I'm at petition page 35. Let me make sure I'm
16 not leading you astray here.

17 JUDGE McGRAW: I'm with you.

18 MR. BULLARD: Nope, yeah, that should be right. so then he
19 continues and he says, similarly, this "the non-woven layer, 137, that's the
20 top layer, can be formed of polymeric material and may be insulative,
21 dissipative, or conductive." So in that example, now the top layer is
22 conductive. So Roberts is so unconcerned about this issue, oh, I'm sorry,
23 Glew is so unconcerned about this issue, he's saying you could have metal
24 on the bottom, so now you have a major surface that's all metal, metal in the
25 middle, and you can have metal on the top. And that would be again what I

1 call the maximum bad case according to my colleague on the other side,
2 because your three layer tape is now three conductive layers.

3 So although it's our burden of proof, they also have a burden of logic
4 and reason, they have to actually explain how does their counter argument
5 take account for Glew's own disclosure? Because the issue isn't Roberts
6 teaching away in the abstract, it's as applied to Glew and the modification
7 we're talking about. And the same is true if we look at their other evidence.
8 So they cite to Kroushl. So Kroushl, it's undisputed, is disclosing a
9 technique for a discontinuous tape. So we've got a discontinuous tape on
10 one hand, and then we've got Glew. Well, Glew is a continuous conductive
11 tape. So one is discontinuous, one is continuous, they're going in opposite
12 directions. And what Kroushl is concerned about is if you're going to make
13 a tape discontinuous, he says there can be challenges associated with that.
14 But none of those challenges applied to Glew, because Glew's not trying to
15 make a discontinuous tape, he's trying to make a continuous tape.

16 And Kroushl talks about you can make cuts, he calls them, I think,
17 score marks, with for example, a knife blade, in your conductive material,
18 and then you can physically pull apart your tape to separate where you made
19 those cuts, so you're going to like manually make a discontinuous tape there.
20 And he explains, well when you're doing these cuts, a risk is that you're
21 going to cut through the bottom and through the top and when you pull it
22 apart you're going to actually kind of tear your tape apart. So he says let's
23 add sort of a buffer zone, make your bottom and top layers a little wider so
24 you don't have that problem. That problem doesn't apply at all. And then
25 he mentions as a secondary advantage, and it's not a teaching away, it's just

1 here's a secondary advantage for a discontinuous tape, is he talks about
2 shorting.

3 So this is what Belden calls shield to shield shorting, but it's
4 important to read the full paragraph in context. So Belden points to
5 paragraph 28 of Kroushl where he says "another advantage of metallic-free
6 zones...they can help prevent unintentional shorting." And then he goes on
7 to explain this, and here is his conclusion, this is Kroushl's conclusion. He
8 says, "in the current design, with foil free edges, 14a and 14b, even after
9 tape 10 is applied to a cable core at an angle, the discontinuous metallic
10 element 16 do not touch and thus do not accidentally create a continuous
11 conducting situation." So that's what he's talking about, it goes back to, he
12 wants it to be discontinuous, not continuous. But the critical thing is that
13 Glew is continuous, so that just doesn't connect to Glew. And now are there
14 any questions on Glew before I go to the Cook ground?

15 JUDGE McGRAW: Yes. The material that you have been pointing
16 to in Glew relates to the filler, not the tape that goes around the conductive
17 pairs. So why should we understand that all of this teaching relating to the
18 filler should also apply to the tape that goes around?

19 MR. BULLARD: Thank you. So Your Honor is right in part that the
20 -- what I was focused on first as far as, if I go to this figure, what's annotated
21 in yellow there, you're right, that is the filler, but keep in mind what my
22 colleagues on the other side are pointing to in Roberts is the filler. So we
23 should at least be entitled to do an apples to apples comparison. They can't
24 change the comparison on us, which is what they did. So Roberts is -- now
25 on slide 8, that's what I've annotated as the separator there, or you could call
26 it the filler, that's where Roberts expresses a concern about conductive

1 material. Roberts never expresses a concern about, for example, the metal
2 armor. As I pointed out, that's a plain piece of metal, he's not concerned
3 about that.

4 So I would say we're not the ones changing the point of comparison,
5 it's the other side. But even just going with that, the second thing I tried to
6 explain when I read about it can be insulative, dissipative, or conductive,
7 that was a quote about the three layer tape, which would go where Element
8 310 is, so that's that numeral at the top here, that's the outer tape. So Glew
9 does go even farther and say the outer tape, 310, all three layers in it could
10 be conductive. Does that answer the question?

11 JUDGE McGRAW: Yes, thank you.

12 MR. BULLARD: And you know, when I was preparing, I thought
13 William, you're getting bogged down in the weeds here, but it is an
14 important part that I don't think should be lost. Part of the apples to apples
15 comparison too is, Roberts' concern about those minor edges, he expressly
16 says that becomes a concern when your cable goes for "many miles." And
17 we put in absolutely unrebutted evidence that Glew does not go for many
18 miles. And again, it's our burden of proof, but it's also their burden to
19 explain their argument. Their expert didn't say word one about Glew going
20 for many miles.

21 JUDGE McGRAW: To let you know, you have about 10 minutes left.

22 MR. BULLARD: Okay, just very briefly then on Cook. The issue
23 here is a little different, it's really about are we combining embodiments,
24 and the answer is no, we're not combining different embodiments. And on
25 slide number 11, that's a direct quote from the petition, where our argument
26 was centered on and focused on shield 120. And we gave two quotes, it's

1 “continuous” and “sandwiched.” And I want to put those two quotes in
2 context, so on the next slide, this is slide 12, those two quotes come from the
3 same paragraph in Cook. You can see shield 120 highlighted in the second
4 line, and then he goes on and he says, for example, the conductive material,
5 and he says whether continuous or not continuous, can be put onto a
6 substrate. And then he goes on and he gives some embodiments of that, he
7 says you could do this conductive material on one layer or in the bottom line
8 there he says in other embodiments, that conductive material I just told you
9 about that can be continuous, may be sandwiched. So these are not two
10 different embodiments, it’s the same conductive material that can be
11 continuous that’s now sandwiched between two layers.

12 And if I flip ahead now, I do want to take on their case law on this
13 point, because they say well, for anticipation, there can’t be any picking or
14 choosing, but it’s critical the end part of that quote. It says, you can’t do
15 picking or choosing of disclosures not directly related to each other by the
16 teachings of the cited reference. So here, these teachings are directly related,
17 they’re both about shield 120, they’re both in the same paragraph, and just as
18 a matter of logic, we know that the sandwich will have conductive material
19 in the middle, and the reference is expressly telling us it can be continuous.
20 So these aren’t mutually exclusive things, like you can only be red or you
21 can only be blue. There’s no explanation from the other side that these are
22 somehow mutually exclusive.

23 Now that would leave the issue of the lateral edge that we started this
24 presentation with, and again it’s just a matter of logic to start from a
25 common place. The conductive material in the middle of the sandwich, you
26 know, it’s going to extend somewhere, it will have a shape. And so we

1 would agree, okay, well the question is, does it go to the lateral edge?
2 Here's what we pointed to in our petition, we pointed to Figure 8D and then
3 we pointed to two express quotes about "running along the longitudinal
4 length," and "spans fully." And my colleagues on the other side have never
5 responded to these quotes about spans fully or running along the longitudinal
6 length. Those plainly disclose going to the lateral edge.

7 And if we look at Figure 8D, I really want to emphasize that Figure
8 8D which is part of that series, 8A, 8B, 8C, and 8D, is introduced in the
9 reference by a very helpful statement. The reference says "as desired,
10 patches of electrically conductive material in corporate into a separator may
11 have a wide variety of different shapes or orientations." And then it goes on,
12 the very next sentence, to say, "Figure 8D through 8D..." So the shape is
13 going to be "incorporated," that's the key word is incorporated. That shape
14 is going to be physically put into your embodiment, and it's not a singular
15 embodiment, this isn't a standalone embodiment. The reference said, it said
16 as desired it may be incorporated, and then the reference also uses the phrase
17 "various embodiments," plural.

18 So in our position, this is not different embodiments, but if it were, it's
19 a pretty clear statement of the reference that they're telling you to do this.
20 "As desired" is a broad teaching. So I'll pause there, any questions on
21 Cook? Thank you, I'll reserve the remainder of my time.

22 JUDGE McGRAW: Okay. You have an extra five minutes, then.

23 MR. BULLARD: Oh, thank you very much, I shouldn't have
24 accelerated so much.

25 JUDGE McGRAW: Okay, Mr. Sullivan, how much time would you
26 like to reserve?

1 MR. SULLIVAN: I would like to reserve 10 minutes, please. I'll go
2 ahead and share my screen if that's okay. Can you see my screen, Your
3 Honor?

4 JUDGE MCGRAW: Yes.

5 MR. SULLIVAN: Thank you. So I'll just briefly talk on the '030
6 Patent. As Counsel for Petitioner noted, the critical element here is the
7 multi-layer barrier tape. The problem that's addressed by the '030 Patent is
8 trying to prevent cross talk between twisted pairs of conductors. There's a
9 filler that helps prevent cross talk between twisted pairs within the same
10 cable, and the multi-layer barrier tape is intended to prevent cross talk
11 between twisted pairs in adjacent cables, which is referred to as alien cross
12 talk in the patent. So shown on slide two is Figure 1 of the '030 Patent as
13 well as claim one highlighting the twisted pairs, the filler, and the multi-layer
14 conductive layer barrier tape.

15 Turning ahead to slide three, I've highlighted the three key elements
16 of the multi-layer barrier tape. Those three requirements -- and we'll talk
17 more about the different requirements, but what we'll see is those three
18 elements together, they're neither anticipated nor rendered obvious by the
19 asserted prior art. So starting with the continuous conductive material, that's
20 requirement one, contained between two layers of a dielectric material,
21 that's Element 2, and then the conductive material extending to each lateral
22 edge of the two layers of the dielectric material. I'll note in Petitioner's
23 presentation or Counsel's presentation, there was a lot of discussion of one
24 or more surfaces and sandwiching, but just because there might be dielectric
25 material on one or more surfaces, that addresses the first two elements. You
26 might have conductive material, they may be between layers of dielectric

1 material, but the critical element in many of these grounds is whether that
2 conductive material extends to each lateral edge of the dielectric material
3 layers.

4 So we'll start with the anticipation grounds, namely grounds one,
5 three, and five. These were preliminarily rejected by the Board in the
6 decision to institute, and I think, you know, even in today's presentation and
7 certainly in the papers, the Petitioner conflates the anticipation grounds with
8 the obviousness grounds, and some cases the anticipation grounds, even
9 though it's under a heading of anticipation, morphs into an obviousness type
10 analysis. And I think that there's a reason for that, and there's a reason why
11 the Petitioner continues to press many of these anticipation grounds rather
12 than the obviousness grounds, it's because there's a key question of why a
13 person of ordinary skill in the art, without the benefit of hindsight, without
14 the benefit of knowing what the target claim elements are, why they would
15 configure the multi-layer barrier tape to meet these elements. And I think
16 that's, what we'll see is there's no disclosure for anticipation, but moreover,
17 the disclosures in each of these references would discourage a person from
18 making the modifications that Petitioner suggests would be obvious.

19 So let's start with Cook, which is what the Petitioner's Counsel
20 concluded on, but in the decision to institute, the Board preliminarily
21 rejected this ground, because noting as we had in our preliminary Patent
22 Owner response, there were several disparate embodiments, none of which
23 showed all three elements, that is the continuous layer, the sandwich
24 between two dielectric layers, and the extending to the lateral edges of those
25 layers. So here, there's no clear and unequivocal disclosure of all three

1 requirements in a tape. There is a significant amount of picking and
2 choosing in order to get to the claim elements.

3 Now for example, Figure 7B, which was relied upon the petition, but
4 no longer seems to be relied upon, it is the only embodiment that shows a
5 conductive layer between two dielectric layers. And notably, that
6 conductive layer is not continuous, there's no dispute that it's not
7 continuous. Similarly, Figures 8A through 8C, and we will address Figure
8 8D, those are not only not continuous but the conductive layers or patches
9 are only disclosed on a single dielectric layer. So those are missing two
10 different claim elements.

11 Turning ahead to Figure 8D, once again, and we'll address this in
12 more detail whether Figure 8D which is described as a relatively continuous
13 patch, that is not a continuous layer and it's not disputed, it's also not
14 sandwiched between two dielectric layers. And finally, Figure 11, which is
15 shown at the bottom of slide six, these are the annotations of the petition, by
16 the way, the Petitioner. Those clearly show that it's not a continuous layer
17 of conductive material and it's not sandwiched between two dielectric
18 layers, it's simply applied to a single layer dielectric substrate.

19 So let's look at this continuous issue, and I think this continuous issue
20 is very interesting because the presentation today by Petitioner did not
21 address a significant claim construction issue where they accused Patent
22 Owner of making up a claim construction. Well in fact, in the petition, both
23 the Petitioner and the expert, and I'm now looking at slide seven, Petitioner
24 clearly indicated that in order for a continuous conductive material it would
25 have to be extending to each longitudinal end of the tape. The expert also
26 indicated a continuous conductive material would need to extend to each

1 longitudinal end. So with that agreed upon construction, if we look at how -
2 - and I'm on slide eight now, if we look at how Figure 8D is described in
3 Cook, it's described as a relatively continuously patch. First of all, it's a
4 patch, but it's also relatively continuous, it only extends along a longitudinal
5 length. There's no suggestion that this is continuous. It's --

6 JUDGE McGRAW: But isn't it Petitioner's argument that Cook
7 teaches that any of these combination of shielding arrangements may be
8 used in the cable? And that statement in Cook that any combination of the
9 shielding arrangements can be used is an express teaching that you can
10 combine the different embodiments?

11 MR. SULLIVAN: Well, in the particular embodiments that they are
12 pointing to, and in particular 8D, and their opinion is heavily reliant, or their
13 position is heavily reliant on Figure 8D, is that Figure 8D discloses to a
14 person of ordinary skill in the art a continuous layer. And there's a
15 significant dispute about that, it's not supported by the express language of
16 Cook. And we've presented both our own expert's testimony as well as
17 cross examination testimony that this is not a continuous layer. So their
18 opinion is that you can take Figures 8A through 8D and you can use them in
19 a sandwiching configuration, but there's no teaching of a continuous layer in
20 any of these embodiments. And that's important --

21 JUDGE McGRAW: Cook states that the shield 120 is a conductive
22 material that can be either continuous or discontinuous.

23 MR. SULLIVAN: Correct.

24 JUDGE McGRAW: I think that's what they're relying on as
25 disclosing a continuous conductive material.

1 MR. SULLIVAN: Right, but there's no teaching -- you know, they
2 say somewhere, I think, in their reply brief, they say that a person of
3 ordinary skill in the art would know to choose all three elements. So what
4 they've shown is, there can be a continuous layer, in this case, it's a
5 continuous layer on a single substrate -- excuse me, they claim it's a
6 continuous layer on a single substrate, but there is no teaching of all three
7 elements, they're grabbing disparate parts of the specification including the
8 spanning across to the lateral edges. They don't have all three elements
9 disclosed, and their expert essentially says it would be obvious to pick all
10 three in combination, but there's no support for that. All of the
11 embodiments show a different configuration. And there's a reason for that,
12 it's not desirable to have a continuous layer that is sandwiched between two
13 dielectric layers that extends to the edges of the dielectric layer. And we've
14 shown that through a number of objective contemporaneous and prior art
15 references, that it's simply not desirable to do that. So it's not an accident,
16 it's not inadvertent that all of the embodiments never make that combination
17 of three. And we have testimony saying you wouldn't make that
18 combination, both objective evidence as well as deposition testimony.

19 JUDGE MCGRAW: So are you arguing -- is your argument a
20 teaching away argument?

21 MR. SULLIVAN: Well in this case, because we have pointed to other
22 references, it's that a person of ordinary skill in the art would not be
23 motivated to make this picking and choosing. So their argument, although
24 they're saying there's no picking and choosing, there's clearly, in order to
25 sustain their anticipation argument for sure, you'd have to pick and choose
26 the three different elements that are disclosed in separate portions of the

1 specification. And then you look at all of the embodiments, none of them
2 disclose that picking and choosing, and we say there's a reason for that,
3 there's a reason that combination was not chosen, here are several other
4 references explaining why you wouldn't want -- why a person of ordinary
5 skill in the art wouldn't be motivated to make that combination. So teaching
6 away -- there's no teaching in Cook itself, it's an anticipation rejection that
7 we're talking about specifically here, so at least for the anticipation rejection
8 there's no disclosure of those three elements.

9 JUDGE MCGRAW: Well, what about Cook's disclosure in column
10 three, lines 61 or thereabout, that Cook states any combination of shielding
11 arrangements may be used, and then when Cook describes each of its
12 figures, they say that each of these various embodiments of the disclosure --
13 let me look at what the exact language is, that the different embodiments can
14 be used in different ways? It's not limited to just the embodiments that are
15 expressly disclosed, Cook is teaching that a person of skill in the art looking
16 at the entire disclosure would understand that you could mix and match
17 these disclosures. For example, in column two, lines 55 to 61, how do you
18 address those teachings of Cook?

19 MR. SULLIVAN: Sure, and you're pointing to, that last cite was to
20 the description of introducing the different figures and in particular Figures
21 8A through 8D it says illustrate example configurations for electrically
22 conducted material that may be used to form a separator, a separator section,
23 or a shield layer in accordance with various embodiments of the disclosure.
24 So I don't see that as saying it could be used for all embodiments, or, it's
25 just, these are particular embodiments. And that language, in accordance
26 with various bodies of the disclosure, it's used on a description of all of the

1 figures, I don't understand it to mean that you can pick and choose any
2 permutation and come up -- using hindsight, come up with the claimed
3 invention, I don't see it that way. Especially --

4 JUDGE McGRAW: And what about -- oh, go ahead, excuse me,
5 finish.

6 MR. SULLIVAN: Especially in light of where we're looking at this
7 from the perspective of a person of ordinary skill in the art, and we have
8 testimony that frankly, in the reply is largely unrebutted, that these other
9 references teach that you do not want to have exposed edges in a continuous
10 layer. In fact, the references that they introduced as background references
11 in their petition show that you specifically want to have, if you're going to
12 have exposed edges, you want to have a discontinuous conductive layer. So
13 it's not -- they're suggesting that you can make any possible combination
14 picking and choosing from these disparate embodiments and disparate
15 disclosures, but we've shown that a person wouldn't make those choices for
16 a reason, it was known that there would be disadvantages and complications,
17 including their own references that they introduced as background material.
18 And in particular for this anticipation rejection.

19 JUDGE McGRAW: What about the statement in Cook on column
20 three, about line 60, where it states, in other embodiments, any combination
21 of shielding arrangements may be utilized? Why doesn't that statement
22 teach mixing and matching the various embodiments of Cook?

23 MR. SULLIVAN: And I will note that this is in the introduction to
24 the detailed description, and it does include that language, but any
25 combination of shielding arrangements may be used, I would argue that
26 there's nowhere in the petition or in the reply how, you know, shielding

1 arrangements -- this application is talking about separators, it's talking about
2 segmented separators, and if I call up Cook, if I may introduce the figures
3 from Cook, the different shielding arrangements -- sorry, that's the wrong
4 Cook. Let me find Cook.

5 If I look, this is subdivided separation fillers for use in cable, and
6 when we look, these are separators, in fact most of the disclosure are about
7 separators and separators segments, sometimes they're segmented. These
8 are all different arrangements, different shapes, different sizes. It's saying
9 you could use separators, you could use fillers, you could use a shield, even
10 the introduction of what's shown in Figures 8A through 8D, it says you can
11 use this as a separator, a separator section, or a shield layer. So there's
12 different shielding arrangements, and then they go on to show many
13 different embodiments of separators of shields, none of which make this
14 combination. I think that's simply addressing -- and they never addressed or
15 their expert never addressed why it would be understood to pick and choose
16 when none of the embodiments make those choices. There are lots of
17 different embodiments in here, even looking at Figure 11, which I have on
18 my screen now, you've got separators, you've got a shield, you've got
19 segmented separators, there's lots of different arrangements, I just don't see
20 the connection, especially when we've shown objective evidence that you
21 wouldn't make this combination, which is verified by the fact that in all
22 these combinations not one makes the suggested combination.

23 JUDGE McGRAW: Thank you.

24 MR. SULLIVAN: Was there anything else on that question, Your
25 Honor?

26 JUDGE McGRAW: No, thank you very much.

1 MR. SULLIVAN: So if we go back to Figure 8D, just to conclude
2 that point, whether Figure 8D itself, and in particular for anticipation
3 purposes, whether it discloses a continuous material, and I'm now looking at
4 slide nine. Petitioner's own expert admitted that this common technique in
5 drawings to show a break line is to show that this pattern is going to be
6 repeated throughout the length of the tape. So these gaps are going to be
7 repeated over and over, this is not a continuous layer, and we look no further
8 than its own expert and petition, where they indicated that you could modify
9 it, by what they did in blue annotations on the bottom of Figure 9, which
10 they do at their petition at pages 21 and 22, you could modify it to see what
11 it would look like as a continuous metal layer, but what's shown in Figure
12 8D and what's described as relatively continuous and a patch and has gaps in
13 the conductive layer, and break lines, this would not be understood as a
14 continuous metal layer.

15 And as I indicated in answering your question, I'm now on slide 10,
16 you know, Cook itself, and if I go back to Cook reference, Cook itself
17 incorporates by reference when it's discussing the different configurations,
18 and I think I'm on column -- I'm looking at the bottom of column six,
19 starting around line 60, it introduces two different disclosures of isolated
20 patches or sections of shielded material, and those two applications
21 eventually led to patents, or published applications, and in each of those,
22 those other applications shared a common inventor to the Cook application,
23 the McNutt inventor. And McNutt, these other publications or patents that
24 were incorporated by reference into Cook with similar inventors disclosed
25 that it was a disadvantage to have a continuous conductive layer, that it
26 could lead to shock hazards, it could lead to standing waves that would

1 cause interference with wireless communications. So once again, it's not an
2 accident that Cook's embodiments do not disclose anything with these three
3 different requirements, including a continuous conductive layer. I'll now
4 move on to Glew, I'm now on slide 11 of my presentation.

5 JUDGE MCGRAW: You have a little under 30 minutes left.

6 MR. SULLIVAN: Thank you. In Petitioner's counsel's presentation
7 today, he answered some questions about the different constructions of
8 lateral edges, and I'll address it, it looks like there's an understanding that
9 the lateral edge, even if it's the longitudinal or the long edge, they believe
10 there's still obviousness with respect to Glew in ground four. But I do want
11 to point out, it's the nature of what -- and we'll talk about the slitting, this is
12 a classic case of, if you know what the target claimed invention is, you're
13 going to come up with a construction that meets that. So in this case, they
14 have different constructions depending on the grounds, whatever suits them,
15 it's a target, our claimed invention is the target. So for ground three they
16 said let's say the lateral edges are the short sides, so you have a 100 foot
17 tape, we're talking about just the front, the beginning and the end of the tape.
18 So it's -- I'll go through the construction, but the main point is, for every
19 other ground, including ground four, they have adopted Patent Owner's
20 construction of lateral edges, and they did in the petition itself. There's
21 simply no support for a construction that lateral edges mean the short sides
22 of the beginning and end of the tape.

23 So if I turn ahead to slide 12, to remind the claim language is, "the
24 conductive material of the barrier tape extends to each lateral edge of the
25 two layers of the dielectric material." Patent Owner's construction, which
26 was adopted by the Petitioner in every other ground except ground three, it

1 is the edge running along the side of the tape parallel to the longitudinal
2 direction. If I go to slide 13, I'm showing annotated versions of Figures 3A
3 and 3C from the '030 Patent that shows that the only two edges that are
4 discussed in the patent, in the '030 Patent, are these conductive edges, which
5 they're labeled as conductive edges 306a and 306b. They're conductive
6 because the continuous conductive material extends to the lateral edges. So
7 there's no dispute that these are the only edges that are discussed in the '030
8 Patent.

9 JUDGE McGRAW: Are you saying those are the lateral edges?

10 MR. SULLIVAN: The lateral edges are the -- yes, 306a and 306b,
11 those are -- so if we're looking at slide 13 and Figure 3C, and we're looking
12 at that cross section, 306a is labeled, the cross section, so the cable is coming
13 out of the page at us, longitudinally, that edge will extend longitudinally
14 along the side in the longitudinal direction. Does that make sense?

15 JUDGE McGRAW: So just to make sure I understand, Figure 3A is a
16 cross section, and the lateral edge is parallel or the same as the longitudinal
17 edge, the long side of the tape?

18 MR. SULLIVAN: That's correct. And in both cross sections, the
19 tape is coming in and out of the page. And then Figure 3E, I'm now on slide
20 14, Figure 3E of the '030 Patent shows the two edges, 306a, and shows that
21 they are at the lateral edges, they are the edges running along the side in the
22 longitudinal direction. And yes, they are the longitudinal edges of the tape,
23 the term that was used in the claim is a 'lateral edge,' that term lateral edge,
24 and I'm jumping ahead to slide 17, Petitioner's own prior art, in Roberts,
25 there was a discussion about their expert and his industry experience and he
26 couldn't understand how the lateral edge could be the longitudinal edge. In

1 Roberts, those edges that run along the longitudinal edges, they are explicitly
2 referred to as the lateral edge, and this is addressed in our Patent Owner
3 response at pages 14 through 16 with various cites to Roberts. It repeatedly
4 refers to the longitudinal edge as the “lateral edge.”

5 And as we mentioned, going back to slide 15, the other grounds, now
6 on slide 15, the annotations are made by Petitioner and their expert, and it
7 shows the lateral edges are in fact the longitudinal edges in the other
8 grounds, including ground four, in obviousness, which we’ll take a look at
9 later. So ground three, the anticipation, proposed rejection based on Glew
10 falls because the construction of lateral edges is not appropriate as
11 demonstrated in all of the other grounds.

12 I want to turn to ground five in Roberts, and specifically to discuss the
13 anticipation rejection, and I’m now on slide 19. I will address the
14 obviousness rejection, but I want to specifically just address the anticipation
15 rejection at this point. What I have on the screen is the annotated, on the left
16 is the annotated Figure 17 from Roberts as annotated by the Petitioner. It’s
17 Petitioner’s position that the barrier tape that they’ve annotated in purple of
18 the Roberts cable is the claimed multi-layer barrier tape, but they’re relying,
19 as you noted in many of your questions, Your Honor, they’re relying upon
20 the details associated with the filler, the thin foil shield 15.

21 And I’m pointing to, in Roberts, Roberts column four, lines 15
22 through 22 and elsewhere, it specifically notes that 18, the metal armor
23 shield, is much different than the thin foil shield 15. There’s no -- I think
24 Counsel for Petitioner indicated that their statement is that the metal armor
25 shield would look the same, or it would look like the metal, the thin foil
26 shield, but that’s simply not the case. In fact, if you look at Figure 2, and I

1 think Figures 1 and 3 as well, and I'm showing Figure 2 on slide 19, the
2 metal armor looks different, it's a much different shield than the thin foil
3 shield, it has a different purpose. It simply does not look the same. So the
4 notion that a person of ordinary skill in the art would think that they would
5 look the same is simply not correct, and it's actually contradicted by the
6 figures.

7 JUDGE FENICK: Mr. Sullivan, can you address the portion of
8 Roberts that we saw, I guess it's Roberts column four where it talks about
9 the fact that the shield could have, and the particular piece of armor or shield
10 could have plastic firmly adhered to one or more surfaces thereof?

11 MR. SULLIVAN: Sure. I'm calling up Roberts just to make sure
12 we're talking about the same section, which I'm sure we are. I'm looking at
13 column four, and --

14 JUDGE FENICK: Like line 20.

15 MR. SULLIVAN: Yes, so yes, this particular armor in a sense is
16 electrical as well as mechanical, it can have a plastic firmly adhered to either
17 one or more surfaces, yes. So as I think was noted in the questions, that does
18 not provide any teaching that whatever plastic might be applied or adhered
19 to the one or more surfaces including the top or the bottom surface, there's
20 no teaching that that would result in a armor where the conductive layer was
21 flush with the dielectric layers. The dielectric layers, for example, within --
22 and I'm going to go back to my slides for a moment, which I had in the
23 obviousness section, if you'll just bear with me.

24 What Roberts teaches is examples where you could have a shield that
25 has plastic applied. Now this is in the context of the thin foil shield, and I'm
26 looking specifically on my slide 25, with Figures 8 and 21, Roberts

1 envisions that you could have a thin foil shield where one or more surfaces
2 are coated with a plastic where it's completely surrounded, a foil free edge,
3 and we'll look at that in the obviousness section. But that particular
4 sentence that we looked at, that says there could be plastic on one or more
5 surfaces, it does not provide a teaching that you would end up with a metal
6 armor shield where the conductive layer extends to each lateral edge of those
7 plastic layers.

8 For example, it could completely surround it. And if I go back to the
9 anticipation rejection of Roberts, in the institution decision, and it hasn't
10 changed, in the institution decision, I'm on slide 20, the Board indicated that
11 Roberts does not teach that the metal armor shield includes the claim
12 conducted material where it extends to each lateral edge of the two layers of
13 the dielectric material.

14 And since we're on the topic, Roberts not only doesn't disclose that if
15 you're going to put plastic on the top or bottom surfaces, would you do it
16 such that you still left exposed edges, I'm looking at my slide 24, Roberts in
17 column three, lines 52 through 74, it teaches that it's undesirable to have
18 electrical properties created by having an exposed surface edge of metal to
19 the electrical conductors. And one solution to that problem that Roberts
20 suggests is to have a shield completely surrounded by a dielectric plastic
21 material. So Roberts is suggesting that it could be a problem to have
22 exposed edges. And as I'll address more in the obviousness section, Roberts
23 isn't alone, there's a number of different other contemporaneous pieces of
24 prior art that show that it would not be desirable to do it that way.

25 JUDGE FENICK: I'm happy to wait for that, or if you want I can --

26 MR. SULLIVAN: I can address it now, yeah.

1 JUDGE FENICK: Yeah, that would be great, because my question
2 also with respect to obviousness is, if the option that you'll agree that
3 Roberts teaches is to have just metal, then how is the idea of having exposed
4 metal something that you can say is taught against for 18, the armor, as
5 opposed to the internal foil?

6 MR. SULLIVAN: Sure. And I do want to point out, and I think the
7 question was asked, you know, where the argument was made that because
8 Roberts allegedly discloses an armor that could be only metal without any
9 plastic applied, the question was where in the papers did Petitioner make the
10 argument that because of that it would not be a concern? I'll be happy to be
11 stood corrected, but I don't believe that argument was ever made in the
12 papers, but the point is, even on the corrosion side, if you're going to apply
13 plastic onto the shield, the metal armor shield, for example, and you're doing
14 it for corrosion purposes, for example, a person of ordinary skill in the art
15 would be motivated to completely surround the metal. So the discussion is,
16 why would you apply the plastic to the metal armor? And one of the
17 suggestions by Petitioner was that you would do it for corrosion purposes. If
18 you were doing it for corrosion purposes, why would you stop short and not
19 completely surround the entire metal armor shield? Especially when Roberts
20 itself indicates that there are moisture issues, and there are issues with
21 having an exposed conductive edge?

22 JUDGE MCGRAW: Well, I think Petitioner's argument is that
23 Roberts teaches an entirely metal shield, armor shield. It also teaches that
24 that metal shield, armor shield, can be coated with plastic on one or more
25 sides. They're saying that it would have -- either it's expressly disclosed
26 because Roberts says put the plastic on one or more sides, or one of skill in

1 the art would understand that that means put the plastic on two sides so that
2 the plastic is flush with the metal layer, and there's no need to be overly
3 concerned about a little bit of exposed metal, given that the entire armor
4 shield was metal and it was exposed. So the argument that there's a concern
5 about exposed metal is not a significant concern given that the whole armor
6 shield itself was exposed. And then you couple that with their argument that
7 Roberts says it's a conventional tape, and they point to other tapes that are
8 well known in the industry, as they assert, that teach two dielectric layers
9 flush with a conductive layer.

10 And what I'm trying to understand is, what is wrong with that
11 argument? And what I'm hearing is that there are teachings that talk about
12 downsides of having an exposed edge, but given that the entire edge, the
13 entire armor was exposed, I'm having a hard time believing that the concern
14 about having a partial edge is a significant concern, and perhaps you can
15 convince me as to your position. But that's the concern that I'm having at
16 least.

17 MR. SULLIVAN: Sure, and I will reiterate, the argument that
18 because the armor could be entirely metal with no plastic, then that would
19 address the issue, that argument was never made, and like I said, I'm happy
20 for them to point to it in the record, but I don't recall that argument being
21 made. I think there was an indication it was made in the reply, I don't recall
22 that argument being made. But I'm looking at Roberts itself, Roberts itself,
23 and I'm looking at slide 24, Roberts says having an exposed edge is a
24 concern, and I'm looking at column three lines 52 to 74. It's having an
25 exposed edge, not just there, but also at column four, lines 68 through 515,
26 column five, 48 through 54, column six, 15 through 28, Figures 9 and 10

1 show where you want to cover that edge, Figures 8 and 21 show it. So we're
2 talking about why would a person add plastic and not completely surround
3 the -- so you have to start with the premise, why are they adding plastic?
4 And now you have to say they're going to add plastic but they're going to
5 stop short, that hasn't been shown, other than in hindsight, because the claim
6 requires you have flush edges, then, according to the Petitioner that would
7 make it obvious. But Roberts itself says cover the edge. It's right in
8 Roberts.

9 JUDGE MCGRAW: But they also say cover it with grease, so that
10 would account for having an exposed flush edge, and then you have grease
11 to help alleviate, ameliorate any undesirable properties.

12 MR. SULLIVAN: Now the grease, the grease example -- and once
13 again, this starts from the premise of -- and the grease example, if I go back
14 to slide 25, the grease is shown not with respect to the metal armor shield,
15 but it's shown with respect to the foil shield, inside with the conductors. So
16 it's not necessarily an apples to apples comparison, but to address your
17 question, the grease is shown in a different application than would be with
18 respect to the armor. Were there any other questions? I see I have about
19 five minutes or so before I -- I think I'm getting close to 45 minutes. Were
20 there any questions on that particular issue?

21 I do want to go back to ground five, the anticipation rejection, or
22 proposed rejection. Dependent claims three and nine require that -- claim
23 three requires that the filler have a helical twist at a first angle, and then
24 claim nine requires that the first twisted pair and the second twisted pair of
25 conductors have a helical twist around the filler. In the petition, the petition
26 never explained nor did the expert explain how Roberts disclosure that

1 there's a twisted composite, that it -- it was never an explanation given why
2 Roberts' disclosure of twisting would necessarily result in helical twisting of
3 both the filler as well as the twisting of the twisted pairs of conductors
4 around the filler at a particular angle. So we pointed that out in our Patent
5 Owner response, and that was never addressed in the petition.

6 JUDGE McGRAW: Well I think Petitioner's argument was that by
7 using the technique disclosed in Roberts that it would result in a helical
8 twist.

9 MR. SULLIVAN: That argument was never made in the petition. It
10 was never articulated.

11 JUDGE McGRAW: Well they said if you use the structure of Roberts
12 to twist the composites, it would disclose a helical twisting. Why does the
13 technique in Roberts not result in a helical twisting?

14 MR. SULLIVAN: Well, what I would say is there's different types of
15 twisting, but the Petitioner had the burden to show that that twisting would
16 result in a helical twisting, and the Petitioner did not meet its burden, and if
17 they don't even articulate why it would result in a helical twisting, I don't
18 think the burden then shifts to the Patent Owner to explain why it wouldn't,
19 because there was no articulation of why it would or how it would. On slide
20 22, I am showing the entirety of what was argued in the petition, there's no
21 explanation, and you'll look in the expert declaration there's also no
22 explanation. The burden shouldn't shift until they meet their burden.

23 JUDGE McGRAW: Petitioner says that Patent Owner admitted that
24 using the twisting process in Roberts would result in a helical twist, and they
25 cite to Exhibit 1048, page 248 to 249.

1 MR. SULLIVAN: And I would say, Your Honor, if you look at the
2 actual testimony, there was about six pages of testimony about DNA helixes
3 and not enough information, and that testimony does not, and I'll certainly
4 address it in sur-rebuttal if they're able to show, that testimony does not
5 include that admission. The question wasn't asked, the set up in Roberts,
6 would that result in a helical twisting. There was questions about some
7 demonstratives and some DNA helical twists, but that question was never
8 asked, there was no such admission. It was tried to be asked for six pages
9 before that, and there was a denial that that was the case.

10 I'm short on time, so I've addressed the prior art, the
11 contemporaneous prior art that shows that you wouldn't want exposed
12 conductive edges. I do want to address, one of those prior art references was
13 the NEPTAPE, where there was, at the time the patents were filed and
14 before, there was a specific product for foil free edge shielding tapes. And
15 there was a discussion about whether Glew was not a telephone cable, and
16 this is only a concern in telephone cables that go for miles and miles, and
17 I'm on slide 27 of my presentation. I just want to call up the entirety of that
18 reference, if I may, and what we'll see is that reference, this -- and I'm on
19 Exhibit 2008.

20 In addition to showing that you want the foil free edge, that is you
21 want the conductive layer, the dielectric layer is wider than the conductive
22 layer, you want that to prevent shield to shield shorts is what we argued, but
23 at the very bottom, the typical applications, it's for shielding of twisted pairs
24 in multi-pair cables such as process control, computer, or instrumentation
25 cables, there's no mention that these are for telephone cables. So the idea
26 that foil free edges were only desirable, that this was only a problem when

1 you had long distances or telephone cables is not the case, foil free edges
2 were desirable in non-telephone applications.

3 JUDGE MCGRAW: And foil free edges means that there is no foil or
4 no metal on the edge, it's entirely encapsulated on the edge, is that correct?

5 MR. SULLIVAN: Whether they're entirely capsulated or the
6 dielectric layer is -- as in Glew, the dielectric layer is wider, or layers are
7 wider than the conductive layer so there's no exposed edge. It may not be
8 fully encapsulated, but there's no exposed edge. That does lead to, if we do
9 look at Glew and there was a discussion about -- and I'm going to cut into
10 my rebuttal time if that's okay, it looks like I still have about 13 minutes
11 total, but I just want to address this point.

12 I'm on slide 29, where Glew -- now Glew Figure 13C, there's no
13 debate that Figure 13C discloses a conductive layer that does not extend to
14 the lateral edges. So the argument, which I heard for the first time today,
15 was well the top layer and the bottom layer, because those might be
16 conductive, it's not a concern. That argument was never made in the papers,
17 and once again I challenge counsel for Petitioner, it may have been noted
18 what the disclosure said, that argument was never made that that wouldn't be
19 concern, certainly wasn't made in the reply.

20 But essentially what happened is Petitioner knows the problem and
21 says well, what you would do is, you wouldn't make Figure 13C, you would
22 make a completely different tape. You would make one where the edges are
23 flush, so forget about what 13C shows, you're going to make something that
24 is completely flush, and the reason you're going to do that is because
25 slitting, slitting is an option. Well, Glew discloses several techniques that
26 can be used to manufacture the exact same tape as shown in Figure 13C, and

1 it would provide the foil free edges that we have shown in other references
2 including the NEPTAPE, Exhibit 2008, it shows that this is desirable in
3 exactly the application that Glew is for, a non-telephone application.

4 So there has to be convincing reasoning why you would ignore the
5 actual disclosure in Glew and make another tape. And all that they've come
6 up with is that slitting, you could do it by slitting. But the reference that
7 they point to, in Exhibit 1037 and Exhibit 1038 as examples of slitting, and
8 I'm on slide 30, that reference itself in paragraph 60 says slitting is just one
9 possibility. You could separately apply metal to conductive patches, to rolls
10 of dielectric. So slitting isn't an exclusive thing, but they say it will be less
11 expensive. And now I'm on slide 31. But there's no evidence that it would
12 be less expensive, there's no cost analysis, there's no discussion of how
13 expensive would it be to make Figure 13C according to the way that Glew
14 manufactures it. Glew suggests and teaches different ways to manufacture
15 Figure 13C, they simply say, or their expert says in one or two sentences, it
16 would be cheaper to do it by slitting, but there's no evidence to support that,
17 there's no cost analysis.

18 And then on slide 32, they say hey, there's no concern that if you had
19 metal edges, it's no concern, because it's just on the -- it's just on a tiny little
20 bit, and the filler could be conductive. But as I show on slide 32, the fact
21 that 310 has a foil free edge, which is as Glew discloses, it prevents 310
22 from shorting on each other, so a shield to shield ground, short, as well as
23 310 shorting against the conductive filler. So there's an advantage to having
24 the foil free edge, which is to prevent shield to shield shorting, which is
25 exactly what the NEPTAPE reference teaches. It is not an accident that
26 Figure 13C has foil free edges, and the only reason they have given to

1 change that is that slitting would be a way to manufacture it, but that's
2 simply hindsight, that's knowing what the claim requires and saying how do
3 we get there? It ignores the rest of the disclosure in Glew. If I may reserve
4 the remainder of my time for rebuttal.

5 JUDGE MCGRAW: Okay, you have 10 minutes left. Mr. Bullard?

6 MR. SULLIVAN: Let me un-share, sorry.

7 MR. BULLARD: Thank you, Your Honors. I'm going to start with
8 the Glew grounds, and my colleague's suggestion that there's just simply no
9 evidence and it's pure hindsight that you would do slitting. That's not true, I
10 listed some of the evidence we provided, but I want to just read one quote
11 that's almost as good as you're going to get from the prior art. We cited a
12 background reference that says "it is usual to fabricate the inner jacket made
13 of sandwiched tape from wide sheets of material which are then slit to the
14 desired width for economy of fabrication. In such construction, the edges of
15 the foil are exposed." That quote identifies the problem they're saying is a
16 problem, the edges are exposed, but nonetheless goes on and says it's
17 actually usual to do this, and it achieves economy. That is directly on point,
18 they have no evidence to contract that, and that's because their expert has no
19 experience with slitting, in contrast to our expert.

20 And my colleagues relied a lot on NEPTAPE, and I want to pull up
21 something from his demonstrative, brief technical difficulties, please bear
22 with me. Well, I might not be able to do it. On NEPTAPE, if we look at the
23 statement he focused on in shield to shield shorting, that is about achieving
24 isolation "between pairs." And that word 'between' is critical, and makes it
25 clear that what they're citing to is being taken out of context, because
26 between pairs, that's referring to an inner tape, it's not referring to a

1 surrounding tape. A tape on the outside, that's what we're talking about in
2 the claim and in Glew, that's not between pairs, it's around pairs, and of
3 course there are different concerns when you're actually inside the center of
4 the cable and you're between pairs. So that's what NEPTAPE is talking
5 about, it's not on point.

6 JUDGE FENICK: Mr. Bullard?

7 MR. BULLARD: Yes?

8 JUDGE FENICK: Can you point us to where you made the argument,
9 the similar argument about the metal outside?

10 MR. BULLARD: Yes. So for example in our reply brief, on page 27,
11 we say armor 18 itself is metal, thus the whole armor is conductive material,
12 not merely parts of the armor. That would be one example. Briefly, back on
13 NEPTAPE, I just want to identify, you know, I really think that NEPTAPE,
14 the whole thing is a distraction, because the main thing is, Glew couldn't be
15 more clear that he's okay with exposed conductive material. Again, the
16 whole separator can be exposed, the whole outer tape can be conductive
17 material, but we also pointed out in our reply brief, we said that this feature
18 they're citing to in NEPTAPE is not in any way essential, and we cite our
19 expert. And if you look at that paragraph cited there, our expert identifies,
20 well NEPTAPE sold tapes that didn't have this feature that Belden wants to
21 emphasize, about foil free. So NEPTAPE itself was fine offering tapes that
22 didn't have that feature, and that's if you look in our reply brief at our
23 experts cite, that's where it's located.

24 And now I want to work backwards to Roberts, and just briefly on this
25 helical twisting issue, just so it's clear how the evidence sort of is on the side
26 of the scale, my colleague, as I understand it, they're not actually disputing

1 that -- they're not saying it's not helically twisted. And they couldn't even
2 get their expert to say this, their expert is mute, he says nothing. They have
3 zero evidence, they've never argued anything. So as far as the evidence
4 goes, they just have zero on their side of the scale, and if we look at the
5 admission that was flagged by one of the judges here, what happened in the
6 deposition was, I showed him the example of a rectangle being twisted along
7 its longitudinal axis that we put in our brief, I showed him that exact figure,
8 and I said does this show what happens when you twist a rectangle along its
9 longitudinal axis? Which is what is taught in the reference. And he agreed.
10 So he did admit it, and again, the bigger point, though, is they don't have
11 any evidence at all, because they can't dispute it, so they're just trying to
12 argue a technicality. But we did cite Figure 23, we did cite the text, we did
13 cite our expert, and the text makes clear the only reason twisting isn't shown
14 in Figure 23 is they just omitted it for clarity so you could see what was
15 going on.

16 And working still backwards on Roberts, as I understand his argument
17 in response to obviousness -- first of all, he has zero response to
18 obviousness, Roberts plus Jachimowicz, where we have an express
19 disclosure in Jachimowicz of the three layer tape with the lines alleged, and I
20 don't think he mentioned Jachimowicz one time. That's again, that's about
21 as close as you get, Jachimowicz expressly has the feature, it's on the face of
22 Roberts, and Roberts itself says you can have one or more features. Or, I'm
23 sorry, one or more surfaces with plastic.

24 But his arguments seem to be, well, I'm not disputing that one or
25 more does disclose two, I'm just pointing out that one or more also discloses
26 four. But that doesn't help him, that argument, because for both anticipation

1 and obviousness, you only need one embodiment that meets the claim, you
2 don't need all embodiments, all permutations to meet the claim, that's just as
3 a matter of law, that doesn't help them.

4 And on Roberts too, just to be clear, if the Board were to agree with
5 us on anticipation, then there would only be one dependent claim left. There
6 are two dependent claims, 12 and 14, that are not covered by ground seven
7 on Roberts, but there's a follow-on ground, ground nine, that covers one of
8 those dependent claims. So you only have one dependent claim left, but
9 ground 10, which is Roberts plus Clark, it covers all the claims. So if the
10 Board were to agree with us on anticipation, that would be another way that
11 all the claims are invalid, there's no dispute for any of the dependent claims
12 for that ground 10. Just to clarify kind of where the claims stand.

13 And then continuing on Roberts, my colleague showed that quote that
14 talks about how the foil is, you know, the shield there is primarily electrical.
15 We don't disagree with that, but our point is about the plastic feature. And
16 Roberts never says that the plastic feature is somehow different from the
17 armor to the foil. And the standard, you know, if we were in anticipation, I
18 would submit the standard would just expand for obviousness, is just what
19 does a person of skill reasonably understand or infer? That's the standard,
20 and we provided ample reason you would at least reasonably infer it for
21 Roberts.

22 Now going back to ground number one, so now I'm all the way back
23 on Cook, my colleague was making an argument -- there was a question
24 about well, are you arguing there's a teaching away? And he said kind of,
25 he said that you would be discouraged, and you wouldn't be "motivated,"
26 but that sort of analysis, what are you motivated to do, what are you

1 discouraged from doing, that has no place in anticipation analysis. That's all
2 irrelevant. The only question is, what does the reference disclose? Even if
3 you took an extreme case where the reference said A and B and, you know,
4 A and B could be problematic, but I'm disclosing A and B, you can combine
5 them together, unquestionably that anticipates and it is no response at all to
6 develop a disadvantages argument like my colleague did.

7 And when my colleague says over and over again there's no
8 embodiment in Cook, what he means is there's no figure in Cook. But Cook
9 is very clear that the figures are not intended to be limiting, that he has a
10 broader disclosure, and just practically, when you have a broad disclosure
11 like Cook, the Patentee does not want to put in 50 figures, which is I think
12 what my colleague is basically saying, is you would have to have every
13 single one of these in an independent figure, but that's not practically what
14 you do. You show an example, and then in your text you make clear, I'm
15 broader than that example, and that's what I intend to communicate. And
16 Cook certainly communicated that.

17 On Figure 8D, there's a lot of discussion going back on Figure 8D,
18 and we do think we win the merits of Figure 8D, but the kind of cutting
19 through the Gordian Knot, let's just get to the simplest point, is number one,
20 Cook itself expressly says continuous. So even if Figure 8D isn't
21 continuous, the reference says, continuous expressly, and my colleague
22 doesn't have any answer on that, and number two, his argument why Figure
23 8D isn't continuous really comes down to the fact that there's those white
24 ends shown. Those are called the dielectric ends. The reference expressly
25 says, that's just an optional feature, it only maybe included, and the
26 reference, this gets back to the theme that Cook is going for a broad

1 disclosure, he's not trying to limit it to his figures. He says, when I say may,
2 I mean that can be omitted. And if you omit those white dielectric ends, my
3 colleague doesn't have any argument why that would not be continuous.
4 Does the Panel have any questions for me?

5 Well, briefly in summary I want to just emphasize one more time that
6 there was no response to the combination of Roberts and Jachimowicz, he
7 didn't mention that at all, and as far as the Glew based grounds, slitting is
8 not hindsight, that is well known "usual technique," and you know, I don't
9 have the time to do the tit for tat every time we're accused of taking a
10 different position, but I think it's very clear if you read the petition and read
11 it with in mind we don't know what their arguments are going to be, we're
12 doing the best we can, we simply tried to anticipate both arguments, so
13 we're not accused later of changing our position, and for example, at Glew,
14 if you look at the petition at page 37, for the first Glew ground anticipation,
15 we said slitting. We said that's what you would understand. And then when
16 you go to the next Glew ground, we said slitting again, and both times for a
17 lateral edge. So we weren't changing our theory, we're just trying to cover
18 our bases so we're not accused of changing theories later. Thank you for
19 your time.

20 JUDGE McGRAW: Thank you very much. Patent Owner, whenever
21 you're ready.

22 MR. SULLIVAN: Thank you. Let me go ahead and share my screen.
23 So I do want to start with -- I think an important point that was just made by
24 Petitioner's counsel, and I'm showing on my screen Exhibit 2008, which is
25 the NEPTAPE data sheet, and according to Petitioner, he indicated that the
26 foil free edge benefit, which is in the middle of 2008, and it says it provides

1 isolation between pairs, preventing shield to shield shorts and eliminating
2 the need for a polyester overwrap. So I think he had argued that that would
3 be understood by a POSITA to be an internal shield as opposed to a barrier
4 tape, I don't remember that argument even being made, but more
5 importantly, I think they're trying to have both sides here.

6 They're saying in Roberts, you can look at the internal shield, the foil
7 shield, which is clearly an interior shield, and you can learn about that and
8 you can take teachings about that and apply it to the multi-layer barrier tape.
9 But now with respect to the NEPTAPE reference, the argument is, it's
10 completely in opposite because it is allegedly dealing with an interior shield,
11 which is not the case, and it was never argued, but I think that's notable, that
12 Counsel is now arguing that if it's a different type of shield, and if it's not a
13 multi, if it's not a barrier tape, then it simply is not relevant.

14 But more importantly, I'll go back to my presentation, if I may, you
15 know, when we look at Glew, Glew teaches in Figure 13C, and I'll go to the
16 right side, Glew is teaching in Figure 13C -- am I sharing my screen? I hope
17 I am, oh goodness.

18 JUDGE McGRAW: Which slide are you on?

19 MR. SULLIVAN: I'm on slide 29.

20 JUDGE McGRAW: We have them, your slides.

21 MR. SULLIVAN: Sorry. So I'm on slide 29, and you know, Glew
22 starts with a disclosure of a tape that does not have flush edges. So we're
23 starting with whether it was usual and customary or economical, we're
24 starting with a shield that is teaching do not have exposed edges, that's what
25 is shown in Figure 13C. So there has to be a persuasive reason to go ahead
26 and change that, and they have a reference that says if you're going to make

1 a tape, and the particular reference they called on, he didn't give the exhibit
2 number but it's Exhibit 1049, and I'm going to go ahead and call that up, but
3 it's talking about if you're going to do that -- and I'm going specifically to
4 column four. It says in such construction, the edges of the foil are exposed.

5 So it comes back to the issue, well, why are you going to change
6 Figure 13C when Glew discloses that's the desirable configuration, there are
7 ways to manufacture it. There's no evidence that those ways are more
8 cumbersome or more expensive. So just because slitting is an option, it
9 doesn't mean that a POSITA would ignore the teachings of Figure 13C and
10 use slitting as an example, as a manufacturing method.

11 I do want to address Jachimowicz. So the argument that we made,
12 certainly in our Patent Owner response and in our sur-reply is that
13 Jachimowicz is not directed to a metal armor, it's not. And their argument
14 is, well, if it's greater than a certain thickness then that's good enough, but
15 it's simply not the case. The Jachimowicz reference does not disclose that
16 that tape would be used as an armor, and the suggestion is that Roberts
17 would use the Jachimowicz tape as an armor, but it's simply not the case,
18 it's not designed for that purpose, and we spell that out in our sur-reply as
19 well as our Patent Owner response.

20 And this notion that it's a conventional telephone cable and that all
21 conventional telephone cables would have this configuration of a three layer
22 tape with the conductive layer extending to the lateral edges, it's notable that
23 even though it's allegedly conventional, they were only able to find one
24 reference, the Jachimowicz 036 reference. So there's no evidence that it's
25 conventional, and it certainly disproved by the fact that they were only able
26 to find one reference that had it. And in that case it was not used as an

1 armor, and they're suggesting that a person of ordinary skill in the art would
2 use the Jachimowicz non-armor tape as the armor tape in Roberts. I think
3 that's all I had, I appreciate your time.

4 JUDGE MCGRAW: Thank you both very much, we appreciate your
5 assistance in answering our questions, I know we had quite a few. We will
6 take this case under advisement, and we will issue our decision in due
7 course. If the attorneys could stay online and answer any questions that the
8 court reporter may have, I would appreciate it. Thank you very much, and
9 have a good evening.

10 MR. BULLARD: Thank you, Judges.

11 MR. SULLIVAN: Thank you.

12 (Whereupon, the above-entitled matter went off the record at
13 3:02 p.m.)

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