

1	1	IN THE UNITED STATES PATENT AND TRADEMARK OFFICE	
		BEFORE THE PATENT TRIAL AND APPEAL BOARD	
2	2		
3	3	COLGATE-PALMOLIVE COMPANY	)
		Petitioner,	)
4	4		)
		vs.	) IPR2023-01254
5	5		) U.S. PATENT NO. 8,881,332
		NOBLE INNOVATIONS NC L.L.C.	)
6	6	Patent Owner	)

9	9	ORAL DEPOSITION
10	10	KELLY R. KODAMA
11	11	JUNE 28, 2023

16	16	ORAL DEPOSITION OF KELLY R. KODAMA, produced as a
17	17	witness at the instance of the Petitioner and duly
18	18	sworn, was taken in the above-styled and numbered cause
19	19	on the 28th day of June, 2024, from 11:40 a.m. to
20	20	3:35 p.m., before Katharene McCulley, Certified
21	21	Shorthand Reporter in and for the State of Texas,
22	22	reported by computerized stenotype machine via Zoom
23	23	Communications, pursuant to the Federal Rules of Civil
24	24	Procedure and the provisions stated on the record or
25	25	attached hereto.

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PROCEEDINGS

COURT REPORTER: My name is Katharene McCulley, Texas CSR 3206. I am reporting the deposition remotely by stenographic means from Arlington, Texas. The witness is located in San Francisco, California.

Attorneys, agreements? Under the Federal rules of Civil Procedure?

MR. WILSON: No, this is under the rules of the Patent Trial and Appeal Board for inter partes review.

Yeah, if we can just briefly do attorney introductions. My name is Mike Wilson. I'm with the law firm of Munck Wilson Mandala and I'm here representing Colgate Palmolive, which I might refer to as Colgate, the petitioner in the IPR of the US Patent 8,881,332.

MR. ZITO: Joe Zito here representing the patent owner. I'm also located in San Francisco, California. And I did want to note that when the court reporter mentioned the location, she said San Francisco, Texas.

COURT REPORTER: I'm sorry.

MR. ZITO: We're both in the same place, San Francisco, California.

MR. WILSON: Okay. There probably is a

1 San Francisco, Texas, but...

2 COURT REPORTER: I don't think so. I
3 apologize.

4 THE WITNESS: There's a Frisco, Texas.

5 COURT REPORTER: Frisco, yes.

6 MR. ZITO: Also Ben Deming of DNL Zito and
7 Eric Lunn, also of DNL Zito, as am I, are also
8 attending. The three of us are the counsel of record in
9 the inter partes review of the proceeding in front of
10 the Patent Trademark and Appeal Board.

11 KELLY KODAMA,
12 having been first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 Q (By Mr. Wilson) Thank you.

15 Mr. Kodama, good morning. I just
16 introduced myself. If you could please give us your
17 full name.

18 A Kelly Robert Kodama.

19 Q Mr. Kodama, how many times have you given a
20 deposition?

21 A I believe six times.

22 Q And I saw four of them were described in your
23 declaration that you've submitted in this case.

24 Can you tell me briefly the other two
25 times that you've given depositions, just a general

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1 description of what the case was about and what your
2 role was?

3 A Sure. They were similar to the other four, so
4 they were E-cigarette vaporizer type devices, both for
5 an IPC case and for an IPR case.

6 Q Okay. And about when did you give those other
7 two depositions?

8 A Those were earlier this year.

9 Q Okay. Thank you.

10 It's my understanding that you're a
11 professional engineer; is that correct?

12 A That's correct.

13 Q Where are you licensed as a PE?

14 A I don't have a PE license, so -- but my
15 profession is design engineer.

16 Q Thank you. We have in -- up on the screen here
17 Exhibit 2002. This was provided to us with your
18 declaration.

19 (Exhibit 2002 marked.)

20 Q (By Mr. Wilson) Is this -- what is Exhibit
21 2002?

22 A This is my CV.

23 Q And is it current and accurate?

24 A It is current and accurate, yes. Some -- some
25 of the years might be a little bit behind, but meaning I

1 wrote this probably last year, but all of the content is
2 correct.

3 Q And it's my understanding that you've designed
4 or assisted design teams on a variety of different
5 products; is that correct?

6 A That's correct.

7 Q Have you ever designed a toothbrush?

8 A No, I have not.

9 Q Have you ever designed any sort of brush?

10 A Any sort of brush, yes, in the cosmetic
11 industry, cosmetic laser industry, there's a clean up
12 brush that's part of the package for one of the
13 products, so we did the industrial design for the brush.

14 Q Other than the laser cosmetic brush, have you
15 designed any other type of brush that you can think of?

16 A No.

17 Q Have you ever designed -- other than a
18 toothbrush, have you designed any other personal
19 grooming device of any type?

20 A No.

21 Q Have you ever designed a product that would be
22 used to apply a paste, gel, or powder to any part of the
23 human body?

24 A Yes.

25 Q Which -- what have you done in that regard?

1 A When I worked at Siemens Ultrasound, there were
2 some dispensers that were used to put the ultrasound gel
3 on the patient that were custom designed for Siemens.

4 And also for the cosmetic laser company,
5 they also use gel for some their procedures, so they
6 have packaging and bottles that are used to dispense
7 that gel.

8 Q In terms of expert witness work, you've
9 described either in your declaration or just now that
10 you've given six depositions, correct?

11 A Correct.

12 Q And that's the entirety of your actual sworn
13 testimony as an expert?

14 A As it relates to depositions, yes. I've
15 testified at trial as well.

16 Q How many times have you testified at trial?

17 A I believe four times.

18 Q All right. And were those also in vaping cases
19 that were associated with the depositions that you've
20 described?

21 A That's correct.

22 Q All right. And so six depositions, four times
23 at trial, and I assume trial includes an ITC proceeding?

24 A That's correct.

25 Q Okay. And so all ten times that you've

1 testified, whether by deposition or at trial, have
2 involved vaping devices?

3 A That's correct.

4 Q Other than those ten times that you've
5 testified, have you generated reports as an expert in
6 other legal matters?

7 A Not beyond those cases.

8 Q Okay. Thank you.

9 In your declaration, you have a brief
10 description of a person of ordinary skill in the art.

11 Do you recall that?

12 A I do.

13 Q All right. I'm going to find the wording that
14 you used for that because as I recall it, in general
15 terms in your view, a person of ordinary skill in the
16 art would have at least a bachelor's degree in
17 industrial design, mechanical engineering, or related
18 field; is that correct?

19 A I believe that was the wording, yes.

20 Q And in addition to that formal education, would
21 have approximately five years of experience in consumer
22 product design and manufacturing, correct?

23 A That's correct.

24 Q All right. And you used the term POSITA. It's
25 sometimes easier for me to say POSA. If I use the term

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1 POSA, which is an acronym, P O S A, will you understand
2 that I'm using that to refer to a person of ordinary
3 skill in the art as you've described in your
4 declaration?

5 A Yes.

6 Q Okay. Great. Do you -- would you consider
7 yourself to be a person of skill in the art with respect
8 to the technology at issue in this case?

9 A Yes.

10 Q All right. Let's pull down Exhibit 2002. And
11 let's pull up Exhibit 2001.

12 (Exhibit 2001 marked.)

13 Q (By Mr. Wilson) I've already mentioned a
14 declaration that you submitted in the IPR proceeding and
15 I pulled the first page up of Exhibit 2001.

16 Did you review your declaration to prepare
17 for your testimony today?

18 A Yes, I did.

19 Q And in your review, does this declaration,
20 Exhibit 2001, summarize the opinions you have that are
21 relevant to the patent owner's response in the IPR?

22 A Yes.

23 Q Did you identify any errors or mistakes in your
24 review of the declaration in preparation for the
25 deposition?

1 A There was some spelling errors, but otherwise
2 no opinions were different.

3 Q Okay. Nothing substantive?

4 A Correct.

5 Q In your review, did you find that the -- your
6 opinions as stated in the declaration are complete? In
7 other words, that they contain all the opinions you
8 intend to present?

9 A Yes.

10 Q I couldn't hear you. Sorry.

11 A Oh, yes.

12 Q Thank you. So we're here today to talk about
13 US Patent 8,881,332. Inventors were the Nobles.

14 Is it okay if I refer to that either as
15 the 332 patent or the Noble patent? Will you understand
16 that I'm referring to the patent that's the subject of
17 the IPR?

18 A Yes.

19 Q Great. Given your experience as an expert, are
20 you familiar with the concept of claim construction?

21 A Yes.

22 Q All right. You're not offering any opinions on
23 claim construction for terms or phrases in the 332
24 patent; is that correct?

25 A I believe my report does not include any

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1 definition of claims.

2 Q All right. And given that, is it your
3 understanding that all the terms and phrases that appear
4 in the claims of the 332 patent should be construed
5 according to their ordinary and plain meaning?

6 A Yes.

7 Q There's a few terms that come up in several of
8 the patents that I wanted to check with you about. The
9 332 patent and all of the prior art, at some point, use
10 the term bristle or bristles.

11 Is it your view that all of those pieces,
12 the 332 and the prior art, are using the term bristle
13 according to its plain, ordinary, and well-understood
14 meaning?

15 A Yes.

16 Q Some of these patents, the prior art patents,
17 date back as far back as 1920, I believe. The
18 Fitz-Gibbon patent that we will talk about a little
19 later dates back to 1920.

20 Would you agree that the plain,
21 well-understood meaning of the term bristle or bristles
22 has not changed in the last hundred years?

23 A I agree.

24 Q There are references in some of the patents to
25 tufts of bristles, T U F T S, or T U F T.

1 Do you recall seeing that term in
2 different patents?

3 A Yes.

4 Q Okay. In the context of -- of this technology
5 and, again, using the plain meaning, would you agree
6 that a tuft of bristles is a cluster or grouping of
7 several individual bristles that are bound together
8 somehow?

9 A Yes, a grouping of bristles.

10 Q Okay. And then as opposed to a bristle, which
11 is -- could refer to an individual strand that might
12 be -- could be part of a tuft of bristles, correct?

13 A Yes.

14 Q All right. There is in some of the patents
15 that we will talk about today the use of the term
16 recess. The 332 patent uses the term, recess.

17 Again, do you understand that the term
18 recess as used in the 33 patent -- 332 patent is to be
19 applied according to its plain meaning?

20 A Yes.

21 Q And would a recess in the context of these
22 patents mean basically some sort of depression or
23 indention in the face of a brush, for example?

24 A Yes.

25 Q Okay. There is in the independent claims of

1 the 332 patent --

2 MR. WILSON: And we can pull down the
3 declaration temporarily, Kelly.

4 Q (By Mr. Wilson) -- there is a term called
5 capsule retaining element, correct?

6 A I'm sorry. In the patent?

7 Q Yes. In --

8 A In the claims?

9 Q Yeah, in the claims of the patent, the 332
10 patent, I should be clear. For example, both Claim 1,
11 which is an independent claim, as well as Claim 10, use
12 a term, capsule retaining element, or, capsule retaining
13 elements.

14 Do you understand that?

15 A Yes.

16 Q All right. And those are the only two
17 independent claims in the 332 patent, right, Claims 1
18 and 10?

19 A Yes.

20 Q Okay. Is it your understanding that capsule
21 retaining element is limited to angled bristles?

22 A No. At least as it relates to Claims 1 and 10.

23 Q Okay. Prior to working on this case, have you
24 ever seen or used the term capsule retaining element?

25 A I don't believe so.

1 Q In your view as a POSA, does the term retaining
2 element refer to any commonly known or understood device
3 or particular structure?

4 A No.

5 Q Would you agree that in the context of this
6 patent, that retaining element is a generic term that
7 could be used to refer to anything that can retain the
8 capsule?

9 A Something that has a function of retaining the
10 capsule, yes.

11 Q Okay. And so in the context of this patent,
12 capsule retaining element doesn't have to be of any
13 particular material, for example, correct?

14 A As is specified in Claims 1 and 10, yes.

15 Q And it doesn't have to be any particular size,
16 correct?

17 A There's no size specified I believe in claim --
18 in the claim language.

19 Q And there -- well, there's nothing about the
20 phrase capsule retaining element that connotes or
21 suggests any particular size, correct?

22 A There's no dimensions or -- or specification of
23 the size of the capsule retaining element.

24 Q And there's nothing that would indicate, for
25 example, any particular shape, right?

1 A Well, there is some definition about the
2 location of the capsule retaining elements in some of
3 the claim language.

4 Q Okay.

5 A Number and location of them.

6 Q Okay. Number and location, yeah. There are
7 claims that require a certain number of retaining
8 elements or perhaps a location. I was asking about
9 shape.

10 I mean, could a capsule retaining element
11 be of any shape so long as it performs the function of
12 retaining the capsule?

13 A I believe it says -- yeah, it just says angled,
14 if you define that as a shape, in the retaining
15 elements.

16 Q But I mean, it could be a single prong, it
17 could be a fork, it could be curved, it could be any of
18 those shapes, right?

19 A The claims don't specify the specific shape of
20 the retaining element.

21 Q And there's no well-understood meaning of
22 retaining element that would limit it to a particular
23 material or shape or structure, right?

24 A Yes, it would be dependent upon the material of
25 the -- of the product.

1 Q Okay. And we'll talk about this a little bit
2 later, but have you reviewed in connection with your
3 priority analysis, did you review the original patent
4 application that eventually led to the issuance of the
5 332 patent?

6 A Yes, I believe that was the 077 patent; is that
7 right?

8 Q Well, I was referring to it in my mind as the
9 627 application. Let's see if can I find that. So, if
10 we -- we can pull up --

11 A You're right.

12 Q You're looking at the face of the patent?

13 A Not that -- not that patent. I think it's in
14 my report.

15 Q Okay.

16 MR. WILSON: So if we can pull up Exhibit
17 1001, which is the 332 patent, Kelly. Okay. See
18 where -- on the left-hand side, where it says: Related
19 US application data, if we can get that little bit
20 bigger for us.

21 (Exhibit 1001 marked.)

22 Q (By Mr. Wilson) So on the face of the Noble
23 patent, it indicates that it's continuation in part of
24 application number 114/840,627 that was filed on
25 August 17th, 2007.

1 Have you reviewed that original
2 application?

3 A Yes.

4 Q Okay. And if I refer to that as the 627
5 application, you'll know what I'm referring to?

6 A Yes.

7 Q Okay. So, would you agree that the only angled
8 capsule retaining element -- let me start over. Sorry.
9 Different question.

10 The original 627 application does not use
11 the words angled capsuled retaining element, correct?

12 A I'd have to look at the specific patent
13 language. I don't remember specifically what the
14 wording was.

15 Q In terms of what the claim said in the original
16 application?

17 A Right, I'll pull up the claim to the 627.

18 Q Okay. So let's -- let's pull up Exhibit 1003.

19 (Exhibit 1003 marked.)

20 Q (By Mr. Wilson) So Exhibit 1003 from the IPR is
21 the prosecution history. If we go to Page 16, you'll
22 see front page of the patent application, if we can go
23 to the next page, you'll see the paragraphs starting at
24 1. And then on Page 28, we have claims.

25 So happy to let you look at this if you

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1 need to because I'm not sure what you were looking for
2 when you gave me your last answer, but my question was:
3 Do you agree that the original 627 application does not
4 include the words angled capsule retaining element, just
5 refers to angled bristles?

6 A It doesn't include those three words together.
7 That's correct.

8 MR. WILSON: Okay. You can pull down
9 1003. Thank you. We'll come back to that a little bit
10 later. All right.

11 Q (By Mr. Wilson) I would like to jump right into
12 some of the prior art that's been cited in Colgate's
13 petition and then in your response of declaration and
14 I'm going to start with the Wolcott patent.

15 MR. WILSON: So that is Exhibit 1009 in
16 these proceedings. And Kelly, if you can just pull up
17 front page of that.

18 (Exhibit 1009 marked.)

19 Q (By Mr. Wilson) So I've got now on the screen
20 for you the front page of US Patent 2,262,982 which is
21 issued to FE Wolcott in 1941.

22 You have reviewed this Wolcott patent in
23 connection with your opinions, correct?

24 A Yes, I have.

25 Q And for whatever reason, in my mind, I've

1 decided not to use numbers here, I'm using the inventor
2 names. If I refer to this as Wolcott, you'll understand
3 that I'm referring to Exhibit 1009, the 982 patent?

4 A Yes.

5 Q Okay. Great. So let's -- let's talk about
6 some of your opinions about Wolcott. One of the
7 opinions that you've given in your declaration is that
8 Wolcott does not disclose angled bristles.

9 Is that true, is that your opinion that
10 Wolcott does not disclose angled bristles?

11 A That's fair.

12 Q Okay. And consistent with what we talked about
13 earlier, do you agree that Wolcott uses tufts as a
14 distinct term from individual bristles?

15 A Yes, they specify both bristles and tufts.

16 Q Okay. And when Wolcott uses the terms tufts
17 and bristles, it's using it -- he's using those terms
18 according to what we discussed a few minutes ago, right?

19 A Yes.

20 Q In other words, when Wolcott refers to a tuft,
21 it's referring to a grouping of individual bristles,
22 correct?

23 A Yes.

24 Q So, if we -- and if we look at the first page
25 of Wolcott, which has the figures on it, for example, if

1 we look at Figure 2 of Wolcott, there's the number 5
2 that points to a particular tuft of bristles, right?

3 A Yes.

4 Q All right. And there is -- in Figure 2, there
5 is a -- a group of tufts that form a recess for
6 insertions of a pellet, correct?

7 A Correct.

8 Q All right. One of the figures that was
9 discussed in the petition, and I believe in the
10 institution decision is Figure 4.

11 MR. WILSON: And if we can kind of blow up
12 Figure 4 a little bit bigger for us. Thank you.

13 Q (By Mr. Wilson) So, I'm looking with you at
14 Figure 4 from Wolcott and it appears to me that the
15 Number 9 is pointing to a tuft of bristles that should
16 be the same tuft that is depicted as Item Number 9 in
17 Figure 2, correct?

18 A Yes.

19 Q In other words, Figure 4 is a cross sectional
20 view as indicated by the line marked 4 in Figure 2?

21 A Yes.

22 Q Let me repeat it because I might have said it
23 wrong. Figure 4 is a cross sectional view looking at
24 the toothbrush along the line marked 4 in Figure 2,
25 correct?

1 A Correct.

2 Q All right. And so focusing in on the tuft of
3 bristles that is either marked 5 or 9, but the one on
4 the right, do you see the one I'm referring to?

5 A Yes.

6 Q Do you agree that that is a view from one side
7 of a tuft of bristles, correct?

8 A You're referring to Figure 4, still?

9 Q Yeah, I'm referring to the triangular tuft of
10 the bristles on the right side of Figure 4 that has --
11 it has both a 5 and a 9 kind of pointed at it, do you
12 see that?

13 A Yes, uh-huh.

14 Q Okay. So that's the particular feature that
15 I'm talking about in Figure 4.

16 That triangular-shaped item is a tuft of
17 bristles, you understand that, right?

18 A Items 5 and 9 are a tuft of bristles, yes.

19 Q And you would agree that --

20 MR. WILSON: Well, let's pull up -- let's
21 pull up the institution decision which is Item 12.

22 Q (By Mr. Wilson) Let's go to Page 27, I want to
23 show you an annotated image of Figure 4 that's from the
24 panel's institution decision.

25 You've read the institution decision,

Page 23

1 correct?

2 A Yes.

3 Q All right. So Page 27 of the institution
4 decision, they include Figure 4 that we were just
5 looking at from Wolcott and they included these
6 red-dotted lines and you've seen that, right?

7 MR. ZITO: Objection, slightly misleading.

8 MR. WILSON: Okay.

9 A I believe these red lines are from your
10 expert's report.

11 Q (By Mr. Wilson) Okay. And it's been reproduced
12 in the institution decision itself, correct?

13 A Yes.

14 Q All right. Do you agree that the bristles that
15 are on the outside or the perimeter of the tuft that we
16 were just looking at that would be on the right side
17 looking at this image, that those individual bristles
18 are at an angle?

19 A I believe they're splayed out as shown in
20 Figure 4, yes.

21 Q Okay. And you used the term "splayed out" and
22 I'm just trying to make sure I got a clear understanding
23 of your opinion.

24 When you say "they're splayed out," as
25 they're installed in the face of the brush, those

1 perimeter bristles end up splaying out and therefore as
2 positioned, they're at an angle. Agreed?

3 A Yes, they're curved or an angle.

4 Q Okay.

5 MR. WILSON: So if could you go up a
6 little bit, just show us a few more sentences. Okay.
7 There we go. Thank you.

8 Q (By Mr. Wilson) So in the institution -- I'm
9 sorry, in the institution decision, right above that
10 figure, the decision states: Petitioner reasonably
11 argues and illustrates via an annotated version of
12 Wolcott's Figure 4, that Wolcott discloses bristle
13 surrounding a dentifrice-receiving pocket and a
14 dentifrice pellet, when present, that are provided at
15 angles inclined toward the pocket and pellet.

16 Do you agree that that is what Wolcott
17 discloses in Figure 4?

18 A I believe Figure 4 shows some of the bristles
19 angled or splayed out, but I don't believe that
20 necessarily was the intention of Wolcott's teachings.

21 Q Okay. So, let's separate those two things.
22 You agree that Wolcott, the patent, including Figure 4,
23 do disclose that the bristles that surround the pellet
24 and the receiving pocket are at an angle, correct?

25 A I believe Figure 4 shows bristles that are at

Page 25

1 an angle, yes.

2 Q Okay. And then you said that's not sure what
3 was intended. What do you mean by that?

4 A Wolcott does not necessarily define the purpose
5 of the angle or what -- what -- what specific angle or
6 what it's trying to do with that angle, so it doesn't
7 teach the angle. The angle is really just a resultant
8 of the manufacturing process of the way the brushes are
9 installed.

10 Q Okay. And -- and with respect to the claims of
11 the 332 patent, is there any -- I realize that that
12 patent has the term angled capsule retaining element,
13 and then some of the dependent claims talks about angled
14 bristles.

15 Is there any claim language that requires
16 that the manufacturer somehow intended that the bristles
17 be at an angle or just that they are at an angle?

18 A Well, I believe, as you mentioned, the wording
19 angled retained on it means that the angle is
20 purposeful. It's intention is to retain the pod.

21 Q Okay. And so, earlier we talked about, I think
22 you said that the function of the capsule retaining
23 element is to retain the pod.

24 But, does that function have to be
25 purposeful? Is that your opinion?

1 A Yes, as we're trying to optimize the
2 performance of something, we would want -- a POSITA
3 would want the design to be purposeful, so you -- you
4 know the resultant through your testing that particular
5 angles and materials or shapes will retain the pod,
6 which is the purpose of the -- of the product.

7 Q Is it your opinion that Wolcott does not
8 describe that the angling of the bristles as we see in
9 Figure 4 help retain the pellet?

10 A I don't believe it teaches specifically using
11 the angled bristles to retain the pellet.

12 Q Okay.

13 MR. WILSON: Can we go down a little bit
14 more? I just want to see what it says below there.
15 Okay. You can pull that down. Thank you, Kelly.

16 Q (By Mr. Wilson) So, let's look at Exhibit --
17 the one from Mr. Kodama's declaration, which is Exhibit
18 2001. Okay.

19 I can't recall if we've already briefly
20 looked at this, but -- yeah, we did. This is your
21 declaration, Exhibit 2001. I want to turn to Paragraph
22 61, which is Page 23. I wanted to ask you about a
23 statement you made in here. So, in Paragraph 61, we're
24 talking about the red line annotations on Figure 4 that
25 the petitioner made and with respect to that in

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1 Paragraph 61 of your declaration you say: Petitioner
2 attempts to create the illusion of angled bristles by
3 superimposing an angled line over stray bristles.

4 What do you mean by that?

5 A Well, again, it goes to the intention or the
6 purpose of the bristles. So, you know, clearly the
7 Wolcott's bristle tufts are extending straight up where
8 they attach. So the fact that the ends of the bristles
9 or the tufts may splay out and result in some angled
10 portion of the bristle tufts, it's not really the
11 intention, or at least Wolcott does not teach that
12 intention of using those angled bristles to retain the
13 pod.

14 Q Okay. So -- but when you use the term,
15 "illusion," it suggests some kind of attempt to mislead.
16 I mean, you don't deny -- I think we've already covered
17 that the perimeter bristles in each tuft are actually at
18 an angle. That's not an illusion from the annotation,
19 correct?

20 A Yes.

21 Q Okay. All right. And in fact, when you
22 tightly bunch a -- a tuft of bristles tightly at the
23 bottom, it would be expected that the bristles on the
24 perimeter of that tuft would splay out at an angle,
25 correct?

1 A Depending on the material, yes.

2 Q And certainly we see that in all of the prior
3 art packets for example, right?

4 A Yes, the ones that show bristles and tufts.

5 Q Okay. So I mean, at least in all of the prior
6 art that we're looking at of record, at least Wolcott,
7 Davidson, Fitz-Gibbon, and Young, which we'll go
8 through, when those pieces of prior art display tufts of
9 bristles, it is routine and expected that the bristles
10 along the perimeter of the tuft are going to splay out,
11 as you say, at an angle, correct?

12 A As shown in those four prior art patents, yes.

13 Q So, in that same Paragraph 61 of your
14 declaration, you indicate that petitioner ignores, I
15 think is what you're saying, the other perspectives that
16 clearly show Wolcott's bristle tufts extending straight
17 up where they attach to the toothbrush.

18 What do you mean by that?

19 A It's just that it wasn't highlighted that the
20 initial -- the bristle tufts are vertical or standing
21 straight up at the attachment point --

22 Q Okay.

23 A -- to the toothbrush.

24 Q Is there any requirement in the claim language
25 of the 332 patent that requires that the capsule

1 retaining elements be angled at the point that they
2 attach to the brush?

3 A They merely define an angle retaining element.

4 Q All right. So they're silent -- the claim
5 language is silent about where it has to be angled,
6 correct?

7 A I don't believe the patent mentions anything
8 about the attachment point.

9 Q So in Paragraph 64, if we can go to the next
10 page, please, of your declaration, you talk about the
11 top down perspective of Figure 2. Let's go back and
12 look at -- and again, you kind of use this language
13 about trying to create the illusion that you believe is
14 clarified by looking at the top down version of Figure
15 2.

16 MR. WILSON: Can we show him Figure 2
17 again, the front of the Wolcott patent, right? Thank
18 you.

19 Q (By Mr. Wilson) How is it that you believe that
20 Figure 2 shows that the bristles in Wolcott are not at
21 an angle?

22 A Well, it shows the bristle tufts being inserted
23 perpendicular to the brush surface.

24 Q Okay. You're not suggesting that Figure 2
25 shows that the tufts don't splay out as we've indicated

1 as shown in Figure 4, right?

2 A That's correct.

3 Q Okay. If we look at -- if we were to look at
4 Tuft No. 5 in Figure 2 from a side view, it would be
5 splayed out as we see in Figure 4, right?

6 A Correct.

7 Q Okay.

8 MR. WILSON: Let's take down Wolcott --
9 well, no, let's leave it up for a second.

10 Q (By Mr. Wilson) I want to talk to you about
11 Wolcott's discussion of retention of the pellet and just
12 as a -- as a general statement, Wolcott discloses that
13 you can insert a dentifrice pellet through the top of
14 the brush by inserting it into that open recess that we
15 see in Figure 2, correct?

16 A That's Item 11, is that the recess or item?

17 Q Yes, Item 11 is the recess, yes.

18 A Okay.

19 Q Do you agree --

20 A Yes.

21 Q Okay. Sorry. Sorry.

22 A Sorry. A dentifrice pellet into the recess,
23 yes.

24 Q Okay. Thank you.

25 Do you agree that Wolcott discloses that

1 the splaying out of the bristles in the individual tufts
2 help retain the dentifrice pellet in Wolcott?

3 A I don't believe Wolcott is intending or focused
4 on the bristles retaining the dentifrice pellet.

5 MR. WILSON: So if we can look, Kelly, at
6 Column 3.

7 Q (By Mr. Wilson) So some these don't have --
8 these older patents don't have the columns numbered, but
9 in the institution decision, they said they were still
10 going to refer to columns, so I'm going to try to do the
11 same thing, so here on Page 2 on the left, I'm referring
12 to that as Column 3 of Wolcott.

13 MR. WILSON: If we can go down to the 60s,
14 Kelly, okay. So let's -- if you can highlight -- again,
15 on the left, if you can highlight starting at 60 and go
16 down to, say, 66. Is that possible? Okay. That's all
17 right. We'll try and work without it.

18 Q (By Mr. Wilson) So starting at 60, Column 360,
19 Wolcott says: As the pellet moves downward into the
20 recess, the surfaces on the pellet spring apart the
21 bristles surrounding the recess, and these bristles then
22 spring back in such a manner as to securely position the
23 pellet at the bottom of the recess as shown in Figure 4.

24 Do you agree that when Wolcott uses the
25 phrasing securely positioned, that it's suggesting that

1 the bristles are retaining the pellet?

2 A Not necessarily. It could be securely
3 positioning it in X and Y or left and right, but not
4 necessarily preventing it from falling out.

5 Q Okay. Would you agree that when it refers to
6 the bristles springing back, that that's referring to
7 the same concept we've been talking about as splaying
8 out?

9 A Again, not necessarily. They don't -- Wolcott
10 doesn't speak about the angle that's being used to
11 retain the pellet, so it could just be pushing the --
12 pushing the bristles apart and then they come back
13 naturally based upon the material.

14 Q Okay. But when they come back naturally, based
15 on the material, that is them returning to the splayed
16 position that we have been talking about, correct?

17 A Well, down at the bottom of the recess, it's
18 not clear what part of it is actually retaining the
19 pellet or holding -- or positioning the pellet, so it
20 could be, again, it doesn't necessarily define or
21 describe the angle being used to retain the pellet.

22 Q All right. But it does refer in this sentence
23 to Figure 4, correct?

24 A Yes.

25 Q And you would agree that at least one

1 reasonable way to interpret this statement in Wolcott,
2 especially with reference to Figure 4, is that the
3 angling or splaying out of the bristles, that are
4 adjacent to the recess help retain the pellet in place?

5 A Well, it's not entirely clear, again, as the
6 pellet is down at the base or the bottom of the recess,
7 that's where the -- the bristles are most -- are
8 vertical, right, that they're in -- inserted into the
9 main part of the brush. So that would be the portion
10 that's holding -- that's forcibly locating the pellet in
11 place.

12 Q All right. Would you agree that one reasonable
13 way to interpret this statement is that the splaying out
14 or angling of bristles helps retain the pellet in place?

15 A Well, Wolcott doesn't really specify that angle
16 is being used to retain the pellet specifically.

17 Q Yeah, I -- I'm hearing that, I've heard that.

18 Would you agree that one reasonable way
19 that a person may interpret this statement, especially
20 with reference to Figure 4, is that the angling or
21 splaying of the bristles that surround the recess help
22 retain the pellet in place?

23 A Well, again, the contact point of the pellets
24 is down at the bottom of the recess which is where the
25 bristles are not splayed out. So I'm not sure if we

1 take the literal translation of what's written in
2 Wolcott, whether it's trying to define those splayed or
3 angled bristles as being -- as holding or locating the
4 pellet in place.

5 Q You believe that the interpretation that I've
6 suggested is an -- a reasonable interpretation or not?

7 A I would say it's an interpretation. I don't
8 think Wolcott is clear specifically whether those -- the
9 angled portion or the straight portion of the bristles
10 are really the part that's locating the pellet.

11 MR. WILSON: We'll go to Column 4 up at
12 the top.

13 Q (By Mr. Wilson) So, starting at Column 4, Line
14 4, there's a sentence that starts, for example, it says:
15 For example, should the brush be accidentally inverted
16 before inserting in the mouth, the pellet will still
17 remain in its recess. Its portion, 12A, then engaging
18 the wider expanded tuft portions or moving into
19 engagement herewith.

20 Do you see that?

21 A Yes.

22 Q All right. And when Wolcott refers to the
23 wider expanded tuft portions, would you agree that he is
24 referring to the splaying out or angling of the
25 perimeter bristles in the tufts?

1 A Yes, the splayed bristles at the top of the
2 tuft.

3 Q Okay. And so in this disclosure in Column 4,
4 would you agree that Wolcott discloses that the angled
5 bristles help retain the pellet when the brush is
6 inverted?

7 A Yes.

8 MR. WILSON: I'm going to look back at
9 Figure 2. It's the first page, Kelly.

10 Q (By Mr. Wilson) So, talk a little bit about the
11 recess and the tufts of bristles around the recess, so
12 in Figure 2 as we've discussed, there's a recess that's
13 marked Item 11, correct? I can't tell 11 -- yeah, 11 is
14 the recess and 12A is the pellet, correct?

15 A Correct.

16 Q All right. And so surrounding both 11 and 12A
17 are ten tufts of bristles, correct?

18 A Yes.

19 Q And for example, if we just treat this as a
20 clock, there's a tuft of bristles roughly at
21 o'clock, right?

22 A Yes.

23 Q And that appears to be marked 8 and then
24 another tuft at roughly 7:00 o'clock which is marked 9,
25 right?

1 A Yes.

2 Q And would you agree that those two tufts of
3 bristles are diametrically opposed from each other?

4 A Looking at the figure, yes, they're potentially
5 opposed to each other.

6 Q I mean, that's what it appears, right?

7 A That's what it appears in Figure 2, yes.

8 Q And there are four other pairs that are
9 similarly diametrically opposed to each other, four
10 other pairs of tufts?

11 A The way it's displayed in Figure 2, yes.

12 Q All right. And so if you consider that --
13 those to be located around the perimeter of a circular
14 recess, that all of those pairs are roughly 180 degrees
15 from each other; is that fair?

16 A Yes.

17 MR. WILSON: All right. Let's pull down
18 Wolcott.

19 I'm going to try and stop about once an
20 hour, so let's take about five minutes and we'll move on
21 to the next patent. Okay?

22 THE WITNESS: Okay. Sounds good.

23 (Break taken.)

24 Q (By Mr. Wilson) Mr. Kodama, I want to pick up
25 with the next piece of prior art which is the Davidson

1 patent that's been identified as Exhibit 1010, 1,010.
2 That is US Patent 2,307,493.

3 (Exhibit 1010 marked.)

4 Q (By Mr. Wilson) Again, like Wolcott, if I refer
5 to that as Davidson, you'll know what I'm referring to,
6 correct?

7 A Yes.

8 Q All right. And I didn't mention this, but
9 you -- with respect to Wolcott, which was issued in
10 1938, you don't dispute that that is prior art for the
11 332 patent, correct?

12 A No.

13 Q All right. And same is true for Davidson, the
14 1941 patent, that is prior art, right?

15 A Yes.

16 Q All right. I think we already talked about the
17 term -- the term recess that appears in the 332 patent.
18 Davidson uses the term, well, I believe.

19 From your perspective, is there any
20 distinction to a POSA in the context of this technology
21 between a well and a recess?

22 A No.

23 Q Okay. Those terms are interchangeable as far
24 as you're concerned?

25 A Depending on the functionality trying to be

1 achieved, there could be some slight differences, but as
2 it relates to these patents, they're basically
3 equivalent.

4 Q Thank you. And there's no dispute from you
5 that the recess in the Davidson patent is located in the
6 front of the brush, correct?

7 A Yes.

8 Q You also don't dispute that the purpose of the
9 recess or well in Davidson is to hold dentifrice?

10 A Yes.

11 Q And I -- I don't think I'm doing a great job
12 because I'm creating some double negatives.

13 Do you agree -- sorry, but do you agree
14 that the purpose of the well or recess in Davidson is to
15 hold dentifrice?

16 A Dentifrice pattern, yes.

17 Q And so, you're a design engineer, and we talked
18 about the skill set of a POSA for this case.

19 If a -- if a POSA wanted to adapt the well
20 in Davidson to hold a capsule rather than powdered
21 dentifrice, is there any particular technological
22 challenge to modifying the well so that it could be in
23 the shape and size of a capsule?

24 A You're just speaking specifically about the
25 well?

1 Q Correct. Modification of the well itself.

2 Is there any engineering challenge of
3 modifying the size and shape of the well in Davidson so
4 that it could accommodate a spherical capsule?

5 A No.

6 Q And so if you asked one of your colleagues who
7 had a design engineering degree and five years of
8 experience in industrial design, they -- he or she could
9 easily adapt the well we see in Davidson so that it was
10 rounded and big enough to hold a particular gel cap,
11 right?

12 A Yes, the portion that's in the brush --
13 toothbrush itself, that could be modified to any shape.

14 Q And you would agree that as of the priority
15 date for the 332 patent, the idea of a semi-spherical
16 well to hold a round object is something that we've all
17 seen in everyday life?

18 A I'm not sure about the qualification, but I
19 would say that's -- that's a -- yeah, you can easily fit
20 a sphere into a spherical recess.

21 Q Well, and I guess my question was: Spherical
22 recesses to hold ball-shaped objects are -- are known
23 commonly by everyone, not just POSAs, right?

24 A That's correct.

25 Q I mean, an egg carton has spherical recesses,

1 right?

2 A Yes.

3 Q I, a couple weeks ago, played Chinese Checkers
4 with my kids. That has a bunch of spherical recesses
5 that hold balls, right?

6 A Yes.

7 Q I assume you have a socket set at home?

8 A Yes, of course.

9 Q And any engineer would, I assume, but those
10 have round recesses that hold the individual sockets,
11 right?

12 A Some of them do, yes.

13 Q All right. These are common things to use to
14 hold spherical or round objects in everyday life, not
15 just something that POSAs are familiar with, would you
16 agree?

17 A Yes.

18 Q So going to your declaration --

19 MR. WILSON: And, again, Kelly, that is
20 Exhibit 2001.

21 Q (By Mr. Wilson) I want to ask you about some
22 statements that you made about Davidson. So in
23 Paragraph 66, which is Page 27 --

24 MR. WILSON: If we can get that a little
25 larger for us.

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1 Q (By Mr. Wilson) You -- you state in your
2 declaration that: Davidson does not consider usage of
3 the bristles of the brush to hold the dentifrice in
4 place, correct?

5 A Yes.

6 Q All right. And then second part of that
7 sentence: Davidson asserts that the well -- the well
8 only is able to hold dentifrice by way of suction.

9 Let me start with that second part. When
10 it says that holds dentifrice by way of suction, are we
11 basically talking about gravity?

12 A Well, suction is not necessarily gravity, it's
13 more by friction along the wall.

14 Q Okay. And is it fair to say that a spherical
15 recess would hold a ball by suction?

16 A No, it primarily would be for gels or powders.

17 Q You haven't cited in your declaration any
18 authority for the idea that the concept of suction only
19 applies to powders or gel, have you?

20 A No, I just mentioned that Davidson asserts that
21 the well is holding dentifrice by way of suction.

22 Q Is it important to your opinions on
23 non-obviousness, your statement that Davidson did not
24 consider the usage of the bristles to hold the
25 dentifrice in place?

1 A Davidson does not consider the usage of the
2 bristles of holding the dentifrice in place.

3 Q Is that important to your opinions on
4 non-obviousness?

5 A I'm not sure if I understand the question.

6 Q That observation that you just described that
7 Davidson, in your view, does not consider the usage of
8 bristle to hold the dentifrice, my question is: Is that
9 observation of yours or opinion of yours, is that
10 important to your opinion that the patent, 332 patent,
11 is not obvious in view of Davidson and the other art?

12 A It's one of my arguments of why Davidson is not
13 a relevant prior art to the 332 patent.

14 MR. WILSON: Okay. We can pull back up
15 Davidson, please. And I'm going to zero in on Column 2.
16 So let's kind of look at the top of Column 2. Make it a
17 little bigger. Thank you. Move it up just a little bit
18 so we can see down to -- yeah, that's probably pretty
19 good.

20 Q (By Mr. Wilson) Okay. So we're looking at
21 Column 2 of Davidson, right-hand column, and I'm looking
22 at -- it's talking beginning on Line 20 about pouring
23 the dentifrice into the space in Davidson.

24 Do you see that?

25 A Yes.

1 Q And it is talking about pouring the dentifrice
2 through the top and into the recess, correct?

3 A Yes.

4 Q All right. And then the next line starting at
5 Line 24, it says: The surrounding bristles as well as
6 the well will successfully hold this ample amount of
7 powder dentifrice.

8 Do you agree that Davidson discloses that
9 both the well and the surrounding bristles help retain
10 the dentifrice?

11 A I believe they form a container, yes, to hold
12 the dentifrice.

13 Q And if we go down to the bottom where it starts
14 on the very last line, it says: In the manufacture
15 of -- and then going over to Column 3: The brush, the
16 tufts, or bristles surrounding the well should be
17 sufficiently close together as to provide a suitable
18 holding means for the dentifrice placed in the brush.

19 Right, that's what Davidson says?

20 A That's what it says there in Davidson, yes.

21 Q Okay. And using suitable holding means, do you
22 agree that Davidson teaches that the bristles
23 surrounding the well hold the dentifrice in the recess?

24 A They form a container, yes, but they don't
25 actually hold the dentifrice inside the brush. So if

1 you turn the brush over, the bulk of the dentifrice will
2 fall out.

3 Q Okay. And in the 332 patent, when the claim
4 language says: Angled capsule retaining element, is
5 there any language in the claims that require that the
6 retaining element retain the dentifrice in any
7 particular position?

8 A I don't believe the claim language defines the
9 specific position, no.

10 Q Okay. And so, from that perspective since
11 there's no requirement in the claims that the retaining
12 elements or bristles retain the dentifrice when the
13 brush is held in any particular position, it would be
14 sufficient to meet the claims that it retains it even
15 when the brush is being held vertically, correct?

16 A No, because I think the plain and ordinary
17 meaning of angled retaining elements would imply that it
18 keeps the dentifrice pellet from falling out in any
19 orientation.

20 Q Okay. And what language are you relying upon
21 to add the requirement at any position?

22 A Well, just that common definition of the angled
23 retaining element would imply that it holds the pellet
24 from leaving -- from moving in any direction.

25 Q Is there any language in the 332 patent that

1 requires that the angled retaining element work
2 regardless of the position that the toothbrush is held
3 in?

4 A As I mentioned before, I don't believe that the
5 332 patent has any specific orientation language in the
6 claims.

7 Q Thank you. And in Davidson --

8 MR. WILSON: Let's go back to the figures,
9 please.

10 Q (By Mr. Wilson) So before we move on, just --
11 just to make sure I understand your opinions clearly,
12 with respect to the description of how the bristles help
13 hold the dentifrice in Davidson, you do agree that
14 Davidson discloses that the bristles help retain the
15 dentifrice at least when the brush is held vertically,
16 correct?

17 A Yes, they, along with the recess or the well,
18 basically form a five-sided box to try and keep the
19 dentifrice from spilling out.

20 Q All right. And so from that perspective,
21 because it talks about both the well and the bristles
22 assisting in the retention of the dentifrice, would you
23 agree that a person would understand that there is a
24 benefit to having both bristles that retain a dentifrice
25 as well as a well or recess to retain the dentifrice?

1 A Well, I believe that Davidson mentions that
2 adding the bristles or keeping the bristles at such a
3 spacing would allow a greater volume of dentifrice
4 powder to be inserted into the well/bristles.

5 Q Okay. And I'm not sure that -- look, I
6 probably asked a bad question.

7 Reading Davidson, it teaches you that
8 there's a benefit to having both a well, as well as the
9 bristles to hold the dentifrice, correct?

10 A As it relates to the volume of dentifrice
11 powder, yes.

12 Q Okay. And going back to -- let's look at
13 Figure 3, and I know we've already kind of discussed
14 this issue with respect to Wolcott --

15 MR. WILSON: But we need to see Figure 3,
16 which is at the bottom of -- thank you.

17 Q (By Mr. Wilson) Can you see Figure 3 now,
18 Mr. Kodama?

19 A Yes.

20 Q Great. So, here in Figure 3, again, we're
21 looking at a cross sectional view of the bristles that
22 would surround the recess in Davidson?

23 A Yes.

24 Q All right. And you would agree, similar to
25 Wolcott, that each of the tufts of bristles that

1 surround the well include individual bristles that are
2 at an angle and kind of hang out over the recess,
3 correct?

4 A Figure 3 shows some of the bristles being at an
5 angle at the top of the tuft, yes.

6 MR. WILSON: Let's pull that down.

7 Q (By Mr. Wilson) So I'm going to talk to you
8 about Fitz-Gibbon which is Exhibit 1011.

9 MR. WILSON: We can pull that up please,
10 Kelly.

11 (Exhibit 1011 marked.)

12 Q (By Mr. Wilson) And so we've now pulled up on
13 the screen Exhibit 1011, patent issued to J.J.
14 Fitz-Gibbon, that's Fitz, hyphen, Gibbon. And this was
15 issued in 1920. It's US Patent 1,346,536. And you'll
16 understand if I use the term Fitz-Gibbon, that I'm
17 referring to Exhibit 1011?

18 A Yes.

19 Q And again, you do not dispute that Fitz-Gibbon
20 is prior art that's relevant to the 332 patent?

21 A No.

22 Q And I apologize. I keep doing the double
23 negative.

24 Do you agree that Fitz-Gibbon is prior art
25 that is relevant to the 332 patent?

1 A Yes.

2 Q Thank you. It's my fault, not yours.

3 Figures 4 and 5 of Fitz-Gibbon disclose
4 tufts of bristles that have been -- the entire tuft has
5 been angled, correct?

6 A Yes.

7 Q Do you agree that the angled tufts of bristles
8 in Fitz-Gibbon are retaining elements for the dentifrice
9 that's used with Fitz-Gibbon?

10 A Retaining in one direction, yes.

11 Q What do you mean by that?

12 A Or -- sorry. So it retains it in the -- for
13 example, Figure 5, the upwards direction and potentially
14 the left and right direction, but not necessarily the
15 down or 6:00 o'clock direction.

16 Q Let me just see if I'm understanding.

17 How is the dentifrice applied in
18 Fitz-Gibbon? How is it applied to the brush, if you
19 know?

20 A The powder is placed in the backside.

21 Q Okay. All right. And so when you say it
22 retains it in certain directions, and you said
23 o'clock and some other things, can you tell me which
24 figure you're referring to, so I can follow along?

25 A Sure, sorry, Figure 5.

1 Q Okay. So on the downward direction, the angled
2 bristles do not necessarily retain the dentifrice. All
3 right. And that's because 7 refers to -- or in the area
4 of 7, there's an opening for applying the dentifrice?

5 A Yes, Item 7 is the opening.

6 Q Okay. And so, you agree that the angled
7 bristles act as retaining elements, but only with
8 respect to retaining it in certain directions?

9 A Right. So they basically form a container or a
10 pocket to hold the dentifrice powder in place.

11 Q But -- okay. But the bristles are used to hold
12 the dentifrice, correct?

13 A Fitz-Gibbon is not specific about whether the
14 dentifrice is actually contacting the bristles or not.

15 Q All right. Well, let's set aside contacting
16 for the moment or maybe that's important to your answer.

17 But do you agree that Fitz-Gibbon
18 discloses that the angled bristles hold the dentifrice?

19 A As I mentioned it, he doesn't -- Fitz-Gibbon
20 does not disclose that the bristles necessarily are
21 contacting the dentifrice powder. He's talking about
22 the pocket.

23 Q And so, does -- in your view, does the angled
24 bristle have to touch the powder in order to act as a
25 holding element?

1 A Yes.

2 Q When the brush of Fitz-Gibbon is turned upside
3 down, so that the bristles are pointing down to the
4 ground, do the angled bristles retain the dentifrice in
5 the brush?

6 A It's not clear from the figures or the
7 specification.

8 Q In Column 1, if we can go to Column 1, I'm
9 looking at Line 20 so, here it says: A relatively large
10 opening form in the brush back or head and bristles
11 associated therewith to provide a pocket for holding the
12 dentifrice.

13 It does use the term "holding," correct?

14 A Yes.

15 Q And in that sense, holding would mean
16 retaining?

17 A If they -- if the dentifrice makes contact with
18 the bristles, yes.

19 Q Okay. And in Column 2, which is Lines 79, it
20 says: The bristles are so disposed and -- let me stop
21 there.

22 When it says the bristles are so disposed,
23 do you agree that that's talking about how they are
24 angled?

25 A I'm not sure if this is -- this line is

1 referring to that particular embodiment, but one could
2 assume, yes.

3 Q Well, it says up here at Line 65, it says: The
4 Series 12 and the Series 13 converge inwardly so that
5 their tips are slightly spaced, et cetera.

6 And then down below: The bristles are so
7 disposed.

8 Do you agree that it's talking about the
9 arrangement of these angled bristles that point at each
10 other?

11 A Yes.

12 Q All right. So in Line 79, it says: The
13 bristles are so disposed on the brush head as to provide
14 a dentifrice-holding chamber.

15 You see that, right?

16 A Yes.

17 Q And you agree it's reasonable to interpret that
18 that the angled bristles are designed or intended to
19 hold the dentifrice on the brush?

20 A If they're in contact with the dentifrice, yes.

21 Q All right. And if you turn the brush upside
22 down to put it in your mouth to start brushing, the
23 dentifrice would come in contact with the angled
24 bristles, correct?

25 A Partially.

1 Q And if a POSA were to modify Wolcott so that
2 the tufts were at -- the entire tuft was inserted at an
3 angle, would they understand that that would help retain
4 a pellet of dentifrice?

5 A Potentially, depending on how it's arranged and
6 whether the dentifrice pellet is coming from the front
7 or the back.

8 Q I mean, it's no great engineering -- it doesn't
9 take any great engineering mind to understand that if
10 bristles are put at an angle, it could help hold an
11 object beneath it in place, right?

12 A Right. There's a -- an angle would be helpful
13 to retain something.

14 Q And that would be known to a POSA as of the
15 date, priority date of the 332 patent, right?

16 A Yes.

17 MR. WILSON: Let's take that down and go
18 to Young.

19 (Exhibit 1012 marked.)

20 Q (By Mr. Wilson) So I'm going to pull up Exhibit
21 1012. So I've now got on the screen for you,
22 Mr. Kodama, what's been marked in the IPR as Exhibit
23 1012. This is US Patent 1,995,374, issued to J.D. Young
24 in 1935. You've reviewed this in connection with your
25 work on this case, correct?

1 A Yes.

2 Q And you agree that -- and I'll refer to this
3 patent as Young, you'll understand I'm referring to
4 Exhibit 1012, correct?

5 A Yes.

6 Q You agree Young is prior art?

7 A Yes.

8 Q Looking at --

9 MR. WILSON: We'll leave Young up, Kelly,
10 but I'm going to read from his declaration.

11 Q (By Mr. Wilson) In Paragraph 72 of your
12 declaration, you indicate that you believe that: Young
13 teaches away from the inventive solution of the Noble
14 patent.

15 Is that your opinion?

16 A Yes.

17 Q Why -- why do you believe that Young teaches
18 away from the invention of the Noble patent?

19 A The dentifrice is -- at least on some of the
20 embodiments, designed to come in from the backside, not
21 the front side of the toothbrush.

22 Q Is there any other reason other than how the
23 dentifrice is inserted that teaches away from the Noble
24 patent?

25 A Well, Young doesn't have the angled retaining

1 elements of the 332 patent.

2 Q Okay. And we'll talk about what is and isn't
3 there. I was more talking about the teaching away and
4 it may be the same answer, but I just want to make sure
5 we're getting clarity on that. With respect to why
6 Young, in your opinion, teaches away from the Noble
7 claims, is there any reason other than the fact that in
8 some of the embodiments, the dentifrice is inserted into
9 the back of the brush?

10 A That's the primary reason.

11 Q Okay. Is there another reason why it teaches
12 away?

13 A As we talked about before, the angled retaining
14 elements for the tufts and the brushes.

15 Q Okay. So -- so with respect to the angled
16 retaining elements in the tufts of the brushes, are you
17 arguing or saying that because you don't believe there's
18 angled bristles disclosed in Young, that the absence of
19 those angled bristles teaches away from the Noble
20 patent?

21 A Well, it doesn't include the angled elements,
22 angled retaining elements.

23 Q Okay. And because it doesn't include them, in
24 your view, that in your opinion is sufficient to teach
25 away from the Noble patent claims; is that what you're

1 saying?

2 A Yes.

3 Q All right. Are you aware of any criticism in
4 Young of having angled retaining elements?

5 A I'm not sure if I understand the question,
6 sorry.

7 Q Is there any statement in Young that would
8 criticize or discourage a POSA from using angled
9 retaining elements?

10 A Oh, I see what you're saying.

11 No, there's nothing specifically
12 referencing the angled retaining elements.

13 Q Okay. And then with respect to the whole
14 teaching away, you would agree that there are three
15 different embodiments that are depicted in Young?

16 A Yes, at least three.

17 Q And only one of those three discloses inserting
18 the dentifrice in the back or rear of the toothbrush,
19 correct?

20 A For Figures 8 and 9, yes.

21 Q And so, with respect to that argument about
22 teaching away, there is no teaching away with respect to
23 the embodiment that is disclosed in Figure 1 or the
24 embodiment that is disclosed --

25 MR. WILSON: Can we scroll down a little

1 bit?

2 Q (By Mr. Wilson) -- in Figures 10 and 11?

3 A Those have the dentifrice pellet coming from
4 the front, yes.

5 Q Okay, great. And when you say those have the
6 dentifrice coming from the front, both the embodiment
7 disclosed in Figures 10 and 11 of Young as well as the
8 embodiment disclosed in Figure 1 --

9 MR. WILSON: Can we scroll up?

10 Q (By Mr. Wilson) -- figure 1 of Young, have a
11 brush in which the dentifrice is loaded from the front
12 of the brush, correct?

13 A Yes.

14 Q All right. So you indicate in your declaration
15 and I think it's Paragraph 73 that: Young fails to
16 disclose bristles being angled to receive and hold the
17 dentifrice.

18 Right?

19 A Yes.

20 Q And is that, again, based on your opinion that
21 in order to disclose an angled retaining element, that
22 it must be -- that the entire tuft must be positioned at
23 an angle, not just individual bristles?

24 A There must -- there needs to be some
25 intentionality to the angling of the bristles to retain

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1 the dentifrice pellet.

2 Q And when you say "intentionality," again, what
3 claim language in the Noble patent are you relying upon
4 to reach the conclusion that that -- that the claim
5 require intentionality?

6 A The use of the angled retaining element
7 terminology implies that the retaining element is angled
8 in order to hold the dentifrice pellet in place.

9 Q And like the other prior patents that we've
10 discussed today, you do agree that all of the tufts of
11 bristles disclosed in Young do have bristles that fan
12 out at an angle from where they are attached to the
13 brush, correct?

14 A Yes.

15 MR. WILSON: And if we can scroll down,
16 just show us Figure 8 a little bit better.

17 Q (By Mr. Wilson) In Figure 8, first of all, we
18 see two sets of -- two tufts of bristles on either side
19 of the dentifrice pellet, correct?

20 A Yes.

21 Q And the bristles that are at the interior,
22 they're in contact with the dentifrice in Figure 8,
23 correct?

24 A Yes, it appears to be from the figure.

25 Q And do you agree that Figure 8 shows that it is

1 the splaying out of the bristles that is preventing the
2 dentifrice pellet from just falling through the front of
3 the brush, the bottom side of the brush in Figure 8?

4 A Yes, I believe that's what Figure 8 is trying
5 to show.

6 Q Okay. And so at least in the position shown in
7 Figure 8, the angled bristles are retaining the capsule
8 in place, agreed?

9 A That's what's being shown in Figure 8, yes.

10 Q And the patent in Young discloses that the
11 bristles or the resiliency of the bristles will engage
12 and retain the pellet, correct?

13 A Yes, that's correct.

14 Q And to be clear, that's -- if we can go to
15 Column 2, in the 20s, So Column 2 starting at Line 26,
16 Young says: The bristles are resilient and thus when a
17 pellet is passed through the hole, it is engaged and
18 retained in the bristles as shown in Figure 8, right?

19 A That's what it says there, yes.

20 Q And so when it refers to the resiliency of the
21 bristles, it's referring to the fact that they fan out
22 at an angle and effectively catch the dentifrice pellet,
23 correct?

24 A At least as the wording is, not necessarily,
25 right? The bristles could be vertical and still be

1 resilient and still retain the pellet.

2 Q Well, if the bristles were perfectly vertical
3 in Figure 8, the pellet would fall just straight
4 through, wouldn't it?

5 A Unless the pellets were somehow closer together
6 than the pellet diameter.

7 MR. WILSON: Can we look at Figure 8 real
8 quick?

9 Q (By Mr. Wilson) As shown in Figure 8, if all of
10 the bristles just went perfectly vertical from where
11 they're attached to the brush, the pellet would just
12 fall straight through, right?

13 A As shown in Figure 8, yes.

14 Q And so a POSA looking at Young, would
15 understand that it is the splaying out or spreading out
16 of the bristles that is helping retain the dentifrice
17 pellet in Figure 8, correct?

18 A As it's shown in Figure 8, yes.

19 Q In the institution decision --

20 MR. WILSON: If we can pull up the
21 institution decision at 32. Page 32, yes. So this is
22 fine. I think you've got a good spot.

23 Q (By Mr. Wilson) So the institution decision
24 discussed this concept that the angled bristles retained
25 the dentifrice pellet with respect to both Figures 8 and

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1 10 of Young.

2 Did you read that?

3 A Yes.

4 Q Okay. And it describes that it's Petitioner's
5 position that Young's bristles are angled to retain a
6 dentifrice pellet.

7 Do you see where it says that at the top?

8 A Yes.

9 Q And then below the figures, third line down, it
10 says: We find no error in this understanding of Young.

11 Did you read that?

12 A Yes.

13 Q All right. So, do you agree with the PTAB
14 panel, the institution decision statement that the tufts
15 of bristles in both Figures 8 and 10 are angled to
16 retain a dentifrice pellet?

17 A That's what the decision specifies there.

18 Q And I'm asking if you agree with the decision
19 on that point.

20 A I'm sorry. Well, as it relates to Figure 8,
21 yes, but it's coming from -- the pellet is coming from
22 the rear.

23 Q Okay. And the institution decision makes the
24 same conclusion as to Figure 10.

25 Do you agree or disagree with the

1 institution decision's conclusion that Young's bristles
2 in Figure 10 are angled to retain a dentifrice pellet?

3 A That's what Figure 10 shows, yes.

4 Q It's my understanding that you're offering no
5 opinions on Sorrentino -- let me be a little clearer on
6 that.

7 You have not offered any opinions
8 regarding whether or not Sorrentino, which is Exhibit
9 1013, whether that renders the claims of the Noble 332
10 patent obvious; is that correct?

11 A I didn't render any opinions about the
12 Sorrentino patent in my report.

13 Q So -- and the reason you didn't offer opinions
14 on Sorrentino is because you concluded that Sorrentino
15 is not prior art because it was published after the
16 priority date stated for the Noble patent, correct?

17 A I believe, yes, the two -- the two Noble
18 patents.

19 Q Well, we're just talking about the 332 patent,
20 but you don't consider Sorrentino prior art because it
21 was published in May of 2008 and you've concluded that
22 the 332 patent is entitled to a priority date of
23 August 2007, correct?

24 A Correct.

25 Q And the basis for your opinion that the Noble

1 patent is entitled to the August 2007 priority date is
2 that all of the elements of all of the claims in the
3 Noble patent are disclosed in the original 627
4 application; is that correct?

5 A Yes, there were some minor changes in the
6 current patent, but the two patents were -- contained
7 the same -- same claims.

8 Q I'm sorry. I didn't understand that. The two
9 patents contain the same claims; what do you mean by
10 that?

11 A The two patents contain the same -- not claims,
12 but the same -- basically the same information.

13 Q Same specification or disclosure?

14 A Similar, yes.

15 Q Okay. And I don't -- I'm really focused on the
16 332 patent. Is it your opinion that the original 627
17 application filed in August 2007 includes an adequate
18 disclosure for all of the claim elements for the claims
19 of the 332 patent?

20 A Relating for the claims that are at issue.

21 Q So let's bring up Exhibit 1003. 1003, I think
22 we briefly looked at earlier, that's the file history
23 that includes the 627 application.

24 MR. WILSON: Let's go to the first page of
25 that, which I think is Page 16.

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1 Q (By Mr. Wilson) So, in Claim 1 of the 332
2 patent --

3 MR. WILSON: You won't find it, Kelly.

4 Q (By Mr. Wilson) -- but in Claim 1 of the 332
5 patent, there's a requirement that: A first and second
6 angled caps and retaining element are arranged along
7 diametrically opposed sides of an oral care capsule when
8 present in the capsule receiving side.

9 Do you recall that requirement of Claim 1?
10 Would you like for me to point it out to you a little
11 bit better?

12 A No, it's okay. I think -- yes, I remember that
13 portion of it.

14 Q It's in that long, final element of Claim 1 if
15 you're looking at the patent itself right now.

16 A Right.

17 Q What disclosure in the 627 application do you
18 believe supports that claim element of pairs that are
19 arranged along diametrically opposed sides of the
20 capsule and receiving zone?

21 A I don't know if the 627 specifically uses that
22 language.

23 Q I don't think that it does. I would agree with
24 that. I'm asking given that that language does not
25 appear in the 627 application, what part of the 627

1 application do you believe adequately discloses that
2 element, if any?

3 A Well, I believe a POSA or POSITA would
4 understand that the retaining elements would perform
5 ideally if they're across from each other or
6 diametrically opposed in order to retain the dentifrice
7 pellet.

8 Q Okay. And they may understand that. I'm
9 asking whether the 627 app discloses it.

10 Do you know whether or not the 627
11 application includes any disclosure from which a POSA
12 could see that the Nobles conceived of having pairs --
13 pairs of angled capsule retaining element that were
14 diametrically opposed?

15 A Like I mentioned, the 627 doesn't use that
16 specific language.

17 Q Okay. And so you can't point me to anything in
18 the 627 application from which a POSA could conclude
19 that the Nobles actually conceived of having pairs of
20 retaining elements that were diametrically opposed.

21 A I'd have to go back through the 627 patent, but
22 I think it would be understood that the retention
23 elements would perform best if they were opposed to one
24 another.

25 Q There's other language in the claims that refer

1 to specific degrees apart, that angled capsule retaining
2 elements are either 180 degrees apart or 144 degrees
3 apart.

4 Do you remember those claim elements?

5 A In the 332 patent?

6 Q Yes, sir.

7 A Yes.

8 Q All right. And would you agree that there's no
9 language in the 627 application that uses those words?

10 A The 627, that does not use that specific
11 language.

12 Q Okay. And so are you able to point me to any
13 disclosure in the 627 application that would show to a
14 POSA that the Nobles actually had conceived of and
15 possessed an invention in which the angled capsule
16 retaining elements were either in pairs that were 180
17 degrees apart or 144 degrees apart?

18 A I think it would be generally understood as it
19 had multiple retaining elements is that they would be
20 ideally equally spaced to give the best performance.

21 Q There is a -- it would be understood, but you
22 can't point me to any specific language in the 627
23 application that teaches that or discloses that,
24 correct?

25 A That word is not in the 627 patent, correct.

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1 Q So, there is in Claim 1, at the very final
2 element, it indicates that at least one pair of capsule
3 retaining elements is arranged to contact the oral care
4 capsule.

5 Do you see that?

6 A Yes.

7 Q And there's similar language in the only other
8 independent Claim 10, again, at the very end of the
9 claim, at least three angled capsule retaining elements
10 is arranged to contact the oral care capsule.

11 Is there any language in the 627
12 application that describes that the angled retaining
13 elements contact the oral care capsule?

14 A I'm not sure if it uses that exact word, and I
15 believe it talks about the retaining element retaining
16 the capsule, which would imply it's in contact with the
17 capsule.

18 Q Okay. Well, we've talked about with respect to
19 some of the other prior art, according to you, there
20 could be situations where a dentifrice is placed into a
21 pocket or holding chamber and it's not in contact with
22 the bristles that were disclosed, correct?

23 A Right.

24 Q And so, would you agree that whatever
25 implication you've reached from reading the 332, that

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1 given the actual disclosure of the 627 application, the
2 capsule may or may not be in contact with the angled
3 capsule retaining elements?

4 A Well, I believe the fact that it's retaining
5 the pod, it would need to be in contact with the
6 dentifrice pod.

7 Q Could you have a smaller capsule below angled
8 bristles such that when it's held in a vertical
9 position, it's not in contact with the bristles?

10 A I don't opine about that in my report. It's
11 kind of hypothetical. I guess it's possible, but I
12 don't see that in my -- I don't have anything in that in
13 my report.

14 MR. WILSON: Thank you. All right. I'm
15 about to go on to a different topic, so let's do another
16 five minutes. It's, I guess, 11:35 for you. Let's do
17 ten minutes. Okay. So back at 11:45.

18 (Break taken.)

19 Q (By Mr. Wilson) Mr. Kodama, we're back on the
20 record, and I want to -- if you have a copy of the 332
21 patent, I want to talk about some of the dependent
22 claims, okay?

23 A Okay.

24 Q So, start with Claim 2, and Claim 2 includes an
25 element where: Multiple pairs of angled bristles canted

1 away from vertical in a direction toward a center of the
2 capsule-receiving zone. I want to talk about that
3 element.

4 Do you agree that in Wolcott that the
5 bristle that face the capsule-receiving zone in that
6 circle, that those individual bristles will be canted
7 away from vertical towards the center of the
8 capsule-receiving zone of Wolcott?

9 A Some of the bristles in Wolcott are splayed or
10 angled as we discussed.

11 Q And I appreciate that. I just want to make
12 sure, the ones that are on the interior, the bristles
13 that are closest to the receiving zone for the pellet in
14 Wolcott, do you agree that those particular bristles are
15 angled in a direction towards the center of the
16 capsule-receiving zone of Wolcott?

17 A Yes, sir. They're angled toward the receiving
18 zone.

19 Q Okay. There's another element -- by the way,
20 is the same true of the Davidson -- and again, I can
21 pull these up, but it seems like you know the patents
22 pretty well. But the -- in Davidson, there also is a
23 group of tufts of bristles that surround the receiving
24 zone and well, correct?

25 A Yes, that's correct.

1 Q And again, the interior -- interior-most
2 bristles in those tufts, you would agree would be angled
3 toward the center of the receiving zone, correct?

4 A I would say they're angled towards the
5 receiving zone.

6 Q Okay. And in Young, for example, in Figure 10,
7 and that's the one where the capsule is at the end, the
8 tufts of bristles on either side, would you agree that
9 the bristles that are engaged with the pellet, that
10 those would be angled toward the center of the receiving
11 zone?

12 A A portion of the bristles would be angled, yes,
13 toward the receiving zone.

14 Q Thank you. So going back to the Claim 2,
15 there's a discussion about a flexural portion that
16 allows the bristles to be spread apart for the loading
17 of the capsule. I paraphrased it. I didn't read it
18 exactly, but do you see that claim element?

19 A Yes.

20 Q Do you agree that Wolcott discloses that the
21 bristles surrounding its pellet recess spread apart to
22 allow for insertion of the pellet?

23 A Are you speaking specifically about Figure 10,
24 the embodiment discussed in Figure 10?

25 Q I'm sorry, I've moved on to Wolcott. I

1 apologize.

2 A Oh, Wolcott. I'm sorry. Yes.

3 Q Yeah. So in Wolcott which is the one with the
4 circle of tufted bristles around the recess, do you
5 agree that Wolcott discloses that the bristles will
6 spread apart to receive the pellet when it's being
7 inserted into the front of the recess?

8 A I'm not sure if Wolcott uses that wording, but
9 the --

10 Q Let's take -- go ahead, you can finish.

11 A But, yes, if the bristles overlap or form a
12 pocket that's a smaller diameter than the pellet, they
13 would have to move out of the way, if the pellet were
14 inserted.

15 Q And isn't that what Wolcott discusses?

16 MR. WILSON: Let's pull up Wolcott, which
17 is Exhibit 1009. Let's go to Column 3, with lines about
18 40 through 65.

19 Q (By Mr. Wilson) So, looking at Column 3 and
20 this is talking beginning at Line 43, where it says:
21 Thus, when the pellet is inserted in that recess, it is
22 definitely located therein due to the location and
23 resiliency of the bristles, which latter causes them to
24 swing back to reduce the size of the mouth of the recess
25 after the insertion of the pellet.

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1 So, does that confirm that Wolcott's
2 bristles provide a flexural portion adapted to permit
3 bristles to be spread apart to enable a capsule to be
4 inserted?

5 A Yes, Wolcott talks about the bristles moving
6 out of the way when you insert the pellet.

7 Q Thank you.

8 MR. WILSON: You can pull that down,
9 Kelly, thank you.

10 Q (By Mr. Wilson) So, I want to talk about Claim
11 7. 7 talks about angled capsule retaining elements
12 being located between vertical bristles and the capsule
13 receiving zone.

14 Do you see that?

15 A Yes.

16 Q All right. So, I want to talk about Wolcott
17 for example.

18 MR. WILSON: If you can pull back up
19 Wolcott and show us Figure 2.

20 Q (By Mr. Wilson) Do you agree that in Wolcott
21 that each of the tufts of bristles that surround the
22 receiving area, that each those tufts will have vertical
23 bristles located toward the center of the tufts?

24 A Yes, those bristle tufts have bristles that are
25 vertical.

1 Q Okay. And generally speaking, the vertical
2 bristles in those tufts would be towards the center of
3 the tufts, correct?

4 A Generally, yes.

5 Q Do you agree that Wolcott discloses an oral
6 care -- oral care capsule?

7 A I'm sorry, can you say that again?

8 Q Do you agree that Wolcott discloses an oral
9 care capsule?

10 A I'm sorry. You'll have to point me to the
11 specific language on Wolcott.

12 Q Sure. So if we look at Column 3 of Wolcott,
13 let's look at Lines 18 through 25 roughly.

14 It's talking about the dentifrice pellet,
15 correct?

16 A Yes.

17 Q And it says starting on Line 20: This pellet
18 may be formed of any various different dentifrices in
19 powdered form or even of hardened or enclosed
20 toothpaste, but it will be understood that irrespective
21 of the material used, it's adapted to break down
22 relatively quickly.

23 Do you agree that that description falls
24 within the broad language of the 332 patent for an oral
25 care capsule?

1 A For brushing your teeth, yes.

2 Q Okay. And you would agree that the Nobles
3 didn't invent gel caps, right, they acknowledge in the
4 patent that those are well-known to those in the art?

5 A Yes.

6 Q In Claim 9 of the 332 patent discloses the
7 method for loading a capsule into a receiving zone by
8 inserting at least a portion of the capsule in a
9 direction past vertical bristles in the recess.

10 Do you see that?

11 A Yes.

12 Q Okay. Do you agree that Wolcott discloses
13 inserting the oral care dentifrice pellet past the
14 bristles that surround the receiving zone?

15 A Like we looked at before, Wolcott mentions
16 putting the pellet pass -- past the bristles, yes.

17 MR. WILSON: Give me one second, guys.
18 I'm not -- I just need to respond to something real
19 quick.

20 (Break taken.)

21 MR. WILSON: Thank you, sorry.

22 Q (By Mr. Wilson) And I think we've already
23 discussed this, but Young -- the Young patent has
24 embodiments including Figures 1 and Figures 10 and 11
25 where the dentifrice pellet is loaded from the front,

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1 correct?

2 A Correct.

3 Q Thank you. I want to talk about -- go back to
4 the 627 application, which is Exhibit 1003. I'm happy
5 to pull it back up.

6 MR. WILSON: Kelly, and remember it starts
7 at Page 16, I believe, of 1003.

8 Q (By Mr. Wilson) And I know we visited this a
9 little bit, but I want to go back and talk about angled
10 capsule retaining element.

11 The term, phrase, angled capsule retaining
12 element, does not appear in the original 627
13 application, correct?

14 A I believe that's the case, yes.

15 Q And the only item that you believe could
16 constitute an angled capsule retaining element that is
17 disclosed in the 627 application is an angled bristle,
18 correct?

19 A I'd have to look at the claim language, but I
20 believe that's what we discussed.

21 Q Well, do you agree or disagree that the only
22 embodiment of an angled capsule retaining element that
23 is disclosed in the original application are angled
24 bristles?

25 A I believe that's what's called out in the

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1 claims, yes.

2 Q Well, not just in the claims, but in the
3 specification and the application itself, there's no
4 discussion of any angled item that is going to retain
5 the capsule other than angled bristles, correct?

6 A Yes.

7 Q Okay. And with respect to a retaining element,
8 the only discussion in the 627 application is a
9 discussion of a movable retaining element or a door on
10 the back of the brush, correct?

11 A I'm not sure if that's the only one, but --

12 MR. WILSON: Yeah, if we can go to
13 Paragraph 36. I'm not sure what page that is, but...

14 Q (By Mr. Wilson) And I'm specifically asking
15 about use of the phrase, retaining element. There's a
16 discussion here about in Paragraph 36 of the 627
17 application which is part of Exhibit 1003, where it
18 talks about: A rear portion of the brush head may
19 include a hinge cover that can be opened.

20 And then further in Paragraph 36, it says:
21 Upon movement of such movable retaining element to an
22 open position.

23 So, I have seen in the 627 application a
24 discussion of a -- of the, quote, retaining element
25 associated with this hinged or slidable cover on the

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1 back of the brush.

2 Do you agree that the only time the
3 phrase, retaining element, is discussed in the 627
4 application, it's in the context of this retaining
5 element associated with the optional cover on the back
6 of the brush?

7 A I believe that's the case, yes.

8 Q And so as a person of skill in the art
9 reviewing the 627 application, the only angled means to
10 retain a capsule that is disclosed is a bristle or pairs
11 of bristles, correct?

12 A That's what's called out in the patent, yes.

13 Q Certainly you would agree that there's no
14 disclosure in the Noble patent of using plastic prongs
15 that are not bristles to retain an oral care capsule,
16 correct?

17 MR. ZITO: Objection, beyond the scope.

18 A I don't believe they use those particular words
19 in the -- in the Noble patent, correct.

20 Q (By Mr. Wilson) All right. I'm going to talk
21 to you about your opinion about --

22 MR. WILSON: Let's pull down Exhibit 1003,
23 but I do think we are going to need his declaration,
24 which is Exhibit 2001.

25 Q (By Mr. Wilson) So I want to talk to you about

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1 your opinions about secondary considerations of
2 non-obviousness.

3 Are you familiar with the legal concept of
4 secondary considerations?

5 A Yes.

6 Q All right. And -- and what is your general
7 understanding of the significance of secondary
8 considerations in analyzing whether the 332 patent is
9 obvious?

10 A You'll have to point me to the part of my
11 report.

12 Q Okay. I believe there's a discussion of legal
13 principle starting at Page 8 and there's -- I think the
14 first place that I see it is Paragraph 32 on Page 11.
15 There's kind of a legal description of obviousness in
16 Paragraphs 30 and 31. And then Paragraph 32, it just
17 says: Secondary considerations of un-obviousness exist
18 and weigh strongly in favor of patentability.

19 So you say it there.

20 And then on Page 14, after additional
21 discussion of the obviousness standard on -- in
22 Paragraph 41, you say: I also find that several
23 secondary considerations indicate novelty and
24 un-obviousness.

25 And then you identify some what you're

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1 calling secondary consideration.

2 So that's where you described them in the
3 declaration and then I think there's a further
4 discussion at the very back of your declaration, very
5 final two or three pages.

6 I guess my preliminary question is: What
7 is your understanding of how and why secondary
8 considerations may support a finding of non-obviousness,
9 if you have an understanding?

10 A I think the non-lawyer understanding because
11 I'm not a lawyer, is considerations that are not related
12 to prior art. So things that would affect obviousness
13 or un-obviousness of an invention.

14 Q And so which secondary considerations are you
15 relying upon or opining would be indicative of
16 non-obviousness of the Noble patent?

17 A So primarily, as I mention in my report, is the
18 history of the Wisp and the fact that no product came
19 out using that sort of angled retention feature until
20 after the Noble patents.

21 Q And do you understand which secondary
22 consideration that would be relevant to?

23 A Primarily, the angled retaining elements.

24 Q Okay. I appreciate that. But in terms of the
25 list of possible secondary considerations that may be

1 relevant to a Court or in this case the PTAB, which
2 secondary considerations do you believe are relevant to
3 non-obviousness in this case?

4 A I'm sorry. I'm not sure if I quite understand
5 what you mean.

6 Q Okay. Do you understand that the law
7 recognizes different categories of secondary
8 considerations that could be considered?

9 A Yes.

10 Q Okay. And that's -- I don't know, there might
11 be seven or eight different secondary considerations
12 that the law talks about.

13 My question to you is, you're saying i
14 Paragraphs 32 and 41, secondary considerations of
15 un-obviousness exist and weigh strongly. And in
16 Paragraph 41, several secondary considerations indicate
17 novelty and non-obviousness.

18 And my question is: Which secondary
19 considerations do you believe show that?

20 A I don't believe I opine on that in my report.

21 Q So, you're not able to point to me to which
22 secondary considerations you think are relevant?

23 A I don't list that in my report.

24 Q Okay. All right. So, you have some brief
25 mentions in your report about your understanding that

1 the WISP is a successful product.

2 Do you recall that?

3 A Yes.

4 Q All right. So, I want to talk about the idea
5 of commercial success for a product and I'm going to
6 start with just in terms of your qualifications on that.

7 Are you a financial expert?

8 A No.

9 Q Do you have any degrees that are relevant to
10 evaluating commercial success of a product?

11 A No.

12 Q All right. And I know this is clear, but
13 you're not an accountant or an economist, correct?

14 A Correct.

15 Q And have you ever offered expert opinions on
16 the topic of commercial success of a product?

17 A Not specifically, no.

18 Q All right. With respect to your understanding
19 as stated in the declaration that the Wisp, the Colgate
20 Wisp is a successful product.

21 Do you have an understanding of what the
22 legal requirements would be in order to support a
23 finding that commercial success shows that a patent is
24 non-obvious?

25 A No, I'm not a financial expert.

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1 Q Okay. Do you know whether or not commercial
2 success refers to financial success in the context of a
3 secondary consideration analysis?

4 A I do not.

5 Q Okay. You don't cite -- and I assume you don't
6 have any knowledge of what the sales of the Wisp have
7 been; is that fair?

8 A I do not.

9 Q Do you know what profits Colgate has earned
10 from sales of the Wisp?

11 A No.

12 Q Do you have any information about Wisp's market
13 share in the toothbrush market?

14 A No.

15 Q Do you have any financial information about the
16 Wisp at all?

17 A No.

18 Q Is it fair to say you do not know whether the
19 Wisp has been a commercial success?

20 A A commercial success, that's correct.

21 Q Have you ever -- are you familiar with a -- the
22 term, nexus, it may relate to relying upon secondary
23 considerations to show non-obviousness?

24 A No, I don't know that term.

25 (Exhibit 2005 marked.)

1 Q (By Mr. Wilson) In your declaration, you refer
2 to a press release from Colgate discussing the Wisp that
3 is -- has been marked as Exhibit 2005.

4 Do you remember that press release --

5 A Yes.

6 Q -- on the launch of the Wisp. Okay.

7 MR. WILSON: Let's pull that up. It's
8 Exhibit 2005, Kelly. So, let's -- let's look at the top
9 half, maybe -- maybe a little, blow it up a little bit.

10 Q (By Mr. Wilson) Are you able to read that,
11 Mr. Kodama?

12 A Yes.

13 Q Okay. Great. So, this is Exhibit 2005. I
14 guess a press release from Colgate in April 2009
15 regarding the Wisp. The second paragraph starts a
16 discussion about the Wisp. It says: Colgate Wisp has
17 unique bristles which gently remove food and plaque.

18 Does the Noble patent claim anything about
19 unique bristles for gently removing food or plaque?

20 A I don't believe the Noble patents refer to food
21 or plaque.

22 Q So, in that same paragraph, the last sentence
23 says: There's no need for water or rinsing.

24 Is there anything in the Noble patent
25 about inventing a brush that did not require water or

1 rinsing?

2 A I don't believe there's any reference to water
3 in the Noble patent.

4 Q Okay. There is the next -- there's a short
5 paragraph, Use it anytime, anywhere. And then the next
6 paragraph talks about the fact that the Wisp is a
7 single-use mini toothbrush.

8 Does the Noble patent contain any claims
9 referring to the fact that the brush is a single-use
10 toothbrush?

11 A I don't believe the Noble patent refers to
12 single use.

13 Q What about the fact that it's a mini or small
14 toothbrush; is that part of the Noble claims?

15 A There's nothing in the claims about mini.

16 Q Are you aware of any information that whatever
17 success the Colgate Wisp has had, that any patented
18 feature of the Noble patent is a factor in driving sales
19 of the Wisp?

20 A I'm sorry. Could you repeat that question?

21 Q Sure. You're familiar with the various aspects
22 of the toothbrush that are claimed in the Noble patent,
23 right?

24 A Yes.

25 Q Okay. Are you aware of any information that

1 the patented features described in the Noble patent are
2 factors that are driving sales of the Wisp?

3 A I have not seen any mention in the Noble
4 patents in any sort of Colgate promotions.

5 Q And aside from mentioning the -- I'm sorry, the
6 Noble patents themselves, are you aware of any
7 information that would suggest that the features that
8 are claimed in the Noble patent are what are making the
9 Wisp successful?

10 A I have never seen that claim.

11 Q Okay. You discuss in your declaration kind of
12 a prosecution history associated with some Colgate
13 patents that resemble different aspects of the Wisp.

14 Do you remember that discussion?

15 A Yes.

16 Q All right. And as I understand your opinion,
17 you believe that the continuation of those patent
18 application suggest that prior designs of -- of the Wisp
19 didn't work; is that kind of what you're suggesting?

20 A I think I was just trying to show at the top of
21 the line of the -- any sort of pertaining elements in
22 the various patent files.

23 Q Okay. So you focused in in particular on when
24 or in which application Sorrentino first disclosed the
25 use of little plastic prongs to hold the gel cap, right?

1 A Correct.

2 Q Okay. Do you have any information that would
3 suggest that the prior designs of the Wisp that did not
4 employ little plastic prongs, that those didn't work for
5 any reason?

6 A I don't have any specific financial information
7 about that.

8 Q Okay. And even setting aside financial
9 information, just in terms of engineering, whether it
10 worked for its intended purpose, some of the earlier
11 patents disclose a raised socket for holding a gel cap.
12 I don't know if you remember seeing that, I could show
13 it to you if you want.

14 A I vaguely remember that, yes.

15 Q Okay.

16 MR. WILSON: So let's pull up the 959
17 patent. Is that going to be -- yeah, that's Item H.

18 MR. COOK: It's already marked as 2011.

19 MR. WILSON: Oh, that's 2011. Okay.

20 Okay. Great. So let's pull up Exhibit 2011.

21 (Exhibit 2011 marked.)

22 Q (By Mr. Wilson) Okay. And is this one of the
23 patents that you discuss when you're talking about the
24 development of the Wisp over time?

25 A Yes.

1 Q And so, if we look at Figure 16, you'll see
2 there, Item 68, that points to, like, a black ring
3 around the area where the gel cap is going to be
4 located.

5 Do you see that?

6 A Yes.

7 Q All right.

8 MR. WILSON: And if we go then, Kelly, to
9 Column 9. And looking at Lines, like, 45 to 55. Thank
10 you.

11 Q (By Mr. Wilson) So, here's the discussion of
12 Item 68 that we just looked at in Figure 16 and it
13 discusses a raised socket extending from the outer
14 surface.

15 Do you have any reason to believe as an
16 industrial engineer that a raised socket would not be
17 adequate for holding a gel capsule?

18 A Yes, depends on the socket shape and the
19 material and the composition of that socket.

20 Q Okay. But depending on the socket shape and
21 the material, there's no reason -- you would agree that
22 a raised socket could work, correct?

23 A I'm not sure -- I'd have to -- it would have to
24 be something that would have to be tested and tried.

25 Q Do you have any information that the raised

1 socket embodiment that's discussed in Exhibit 2011
2 didn't function as intended or hold the gel cap in
3 place?

4 A I've never seen a product or a prototype that
5 uses a socket.

6 Q Okay. So you don't know one way or the other
7 whether that earlier means of holding the gel cap was --
8 worked or not; is that fair?

9 A As I said, yeah, I haven't seen a prototype or
10 anything to prove that it works or doesn't work.

11 MR. WILSON: You can pull that down, thank
12 you.

13 Q (By Mr. Wilson) I want to talk to you about
14 your suggestion about copying.

15 Are you offering an opinion that when
16 Colgate incorporated the four plastic prongs that you
17 show in Paragraph 14 of your declaration, that Colgate
18 got that idea and copied it from Noble; is that what
19 you're suggesting?

20 A It seems to use the same angle retaining
21 elements as what's claimed in the Noble patents.

22 Q Okay. I'm asking a little bit different
23 question.

24 Are you offering an opinion that Colgate
25 looked at what Noble was doing and copied Noble's idea

1 in adopting the use of these four prongs that we see in
2 the photograph that's Paragraph 134 of your declaration?

3 A I don't know the process of how Colgate
4 develops their products, but based on the timing and
5 retaining element portion of the Wisp product, it
6 closely resembles what's explained in the Noble patent.

7 Q Okay. And when you say it resembles what's
8 claimed, you -- you're referring to literally the claim
9 language that says: Angle capsule retaining element?

10 A Right. What a POSITA would potentially come up
11 with for an angled retaining element for a pod of that
12 type.

13 Q Okay. But, when you're saying or suggesting
14 that there was copying, are you saying that because of
15 the claim language, angle capsule retaining element,
16 that Colgate could have seen that claim language and
17 then adopted these prongs that we see in the photograph?

18 A They could have, yes.

19 Q Okay. So, based on Exhibit 2005, that was the
20 press release article that we looked at a moment ago
21 about the release of the Wisp.

22 Do you remember looking at that?

23 A Yes.

24 Q All right. You understand that the Wisp was
25 released in April of 2009?

1 A Based on that press release, yes.

2 Q Do you know when Noble, during prosecution of
3 its patents, first adopted the claim language: Angled
4 capsule retaining element?

5 A I don't know the date, the specific date.

6 (Exhibit 1002 marked.)

7 Q (By Mr. Wilson) So let's pull up Exhibit 1002.
8 So, this is a prosecution history that's Exhibit 1002 in
9 the IPR, if we can go to Page 223.

10 So I am showing you part of the
11 prosecution history that's a response to the July 5,
12 2012, Non-Final Office Action, and if we go to the next
13 page.

14 So, are you familiar with during
15 prosecution when amendments are made, that new matter is
16 underlined and removed items are struck through kind of
17 in a red-lined fashion?

18 A Yes.

19 Q All right. So if we look at Claim 1, the
20 amendments to the claim in this nonfinal office action,
21 you can see at the bottom of Claim 1 where it says: A
22 plurality of angled -- that language had been in there,
23 and that the patent owner changed the word bristles to
24 now say capsule retaining elements that are elevated
25 above the recess.

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1 Do you see that?

2 A Yes.

3 Q All right. Do you have any reason to dispute
4 that the first time the language: Angled capsule
5 retaining elements appeared in -- during the prosecution
6 of the Noble patents was in October of 2012, the date of
7 this office action or this response?

8 A I'm not sure what that specific date would be,
9 but I'll take your -- I wasn't sure --

10 MR. WILSON: Show him Page 236.

11 Q (By Mr. Wilson) So this document that we've
12 just been looking at was filed on October 5, 2012.
13 Assuming that this document was the first time that the
14 claim language: Angled capsule retaining element
15 appeared in any proposed claim of the Noble patents, you
16 would agree that Colgate could not have gotten the idea
17 of using plastic prongs from the claim language: Angled
18 capsule retaining element.

19 Do you agree with that?

20 A Specifically for the plastic prongs.

21 Q Okay. And in fact, if what I'm representing to
22 you is accurate, up to 2012, the angled items disclosed
23 in the Noble prosecution were angled bristles, correct?

24 A Yes.

25 Q All right. And you would agree that the Wisp

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1 launched in 2009 does not use angled bristles to retain
2 the gel cap, correct?

3 A Yes.

4 Q You understand that the priority date for --

5 MR. WILSON: Thank you. You can pull that
6 down. We've talked about it, but we can pull back up
7 the 332 patent if you'd like.

8 Q (By Mr. Wilson) But you understand that the
9 earliest possible priority date was the 627 application
10 filed on August 17th, 2007, right?

11 A Yes.

12 Q All right. And so, do you know or have any
13 information regarding when Mr. Sorrentino or others at
14 Colgate conceived of using the plastic prongs that
15 appear in the photograph in your declaration?

16 A No.

17 Q Would you agree that if Colgate adopted or came
18 up with that design prior to August 2007, that there's
19 no way that that idea could have come from Noble?

20 A I don't know when the -- Colgate would have
21 come up with those -- the retaining elements.

22 Q Right, I understand that. But if -- if they
23 came up with them before August 2007, that design choice
24 had nothing to do with Noble, right?

25 MR. ZITO: Objection, misstates facts in

1 evidence.

2 A So it came about before the patent was ever
3 filed or published then --

4 COURT REPORTER: I'm sorry, Mr. Kodama,
5 you really cut out there. Can you start over?

6 THE WITNESS: Oh, sure.

7 Q (By Mr. Wilson) Yeah, you've been -- you've
8 been halting a little bit.

9 A Oh, sorry.

10 Q That's okay.

11 A Yeah, if it was -- if it was come up with
12 before being filed or the patent was published then,
13 yes, someone -- it wouldn't have been influenced by the
14 Noble patent, but I don't know when the Colgate design
15 was created.

16 MR. WILSON: Katharene, did you get all
17 that?

18 COURT REPORTER: I believe I did.

19 MR. WILSON: Just making sure because he
20 was kind of breaking up a little bit. I just wanted to
21 make sure you got it.

22 COURT REPORTER: Yeah, he broke up, but I
23 believe -- yeah, it broke up, but I believe it all came
24 through.

25 MR. WILSON: Can you just read it back and

1 just make sure that he agrees with it as you transcribed
2 it?

3 COURT REPORTER: Yeah, if it was -- if it
4 was come out with before being filed or the patent was
5 published then, yes, someone -- it -- wait a minute --
6 it wouldn't have included by the Noble patent, but I
7 don't know when the collective bargain --

8 MR. WILSON: Thank you for trying that.
9 I'm just going to ask the question one more time and see
10 if we can get it clean.

11 COURT REPORTER: I'm sorry. He cut out
12 more than I thought he did.

13 MR. WILSON: That's all right. That's all
14 right. I understand, technology.

15 Q (By Mr. Wilson) Mr. Kodama, I understand that
16 you don't know, as you've testified, when Colgate first
17 conceived of using prongs to hold the gel cap in the
18 Wisp. So I understand you don't know that one way or
19 the other.

20 But you would agree that if that happened
21 prior to August 2007, Colgate could not have gotten that
22 idea from Noble, right?

23 MR. ZITO: Objection, misstates facts in
24 evidence.

25 A So if the idea was created before any

1 information from Noble, then yes, it wouldn't have been
2 influenced by Noble.

3 Q (By Mr. Wilson) Okay. And certainly Colgate
4 didn't get the idea of a toothbrush with an embedded
5 capsule from Noble because, as you point out in your
6 declaration, they have patents with an embedded gel cap
7 going back to at least 2002, correct?

8 A Yes.

9 Q So I've shown you a -- the response to the
10 Non-Final Office Action with the amendments that changed
11 angled bristles to angled capsule retaining element in
12 October 2012. Those were part of Exhibit 1002. We just
13 looked at that a few minutes ago. The Wisp came out, as
14 we've seen, in April 2009.

15 Have you investigated whether the Nobles
16 got the idea to expand the language in the patent from
17 angled bristles to angled retaining elements based upon
18 viewing the Wisp product?

19 A No, I have no knowledge of that.

20 Q Have you asked?

21 A No.

22 Q Do you know whether or not the Nobles or their
23 patent prosecution counsel had purchased and examined
24 Colgate Wisp products prior to making the amendments
25 that we saw in October 2012?

1 A I have not had any discussions about that.

2 Q You reference in your declaration that the
3 prosecution history of the Sorrentino patents shows a
4 long felt need, I believe is your language. Yeah, so
5 Paragraph 134 of your declaration, Mr. Kodama, that's
6 the one with the photograph.

7 You say: It is my understanding that the
8 Wisp is a successful product, practicing the challenged
9 claims. And the next phrase says: And demonstrating
10 long felt need and commercial acceptance of the
11 solution.

12 Do you see that?

13 A Yes.

14 Q Okay. So, from a legal standpoint, do you have
15 an understanding of what constitutes or shows a, quote,
16 long felt need, close quote?

17 A Yes.

18 Q All right. What is your understanding of long
19 felt need in the context of secondary considerations of
20 non-obviousness?

21 A So, something relating to an issue or problem
22 that needs to be solved.

23 Q What do you contend was the problem or need
24 that was solved by the Noble patent?

25 A Retaining the gel pack or gel pod.

1 Q Okay. Are you aware of any publication or
2 other document expressing that there was an industry
3 need or problem with finding adequate way to retain a
4 gel cap in a toothbrush?

5 A No.

6 Q Are you aware of anyone other than Colgate and,
7 I guess, the Nobles even endeavoring to retain a gel cap
8 in a toothbrush?

9 A Not in -- not in the market, the current
10 market, no.

11 Q Is it your opinion that there's evidence that
12 the industry could not figure out an appropriate way to
13 retain a dentifrice capsule in a toothbrush prior to the
14 Noble patent?

15 A Just as it relates to no other products
16 successfully doing so.

17 Q Okay. But, someone could come up with a
18 solution to hold a gel cap without having successful
19 product, right?

20 A Sure.

21 Q And would you agree that the prior art,
22 including Wolcott, does disclose one solution for
23 holding a dentifrice pellet in a toothbrush?

24 A Some of the prior art speaks about holding a
25 pod, yes.

1 Q And Young, as well, discloses one way or
2 actually three different embodiments for retaining a
3 spherical dentifrice pellet in a toothbrush, right?

4 A Young talks about dentifrice pods, yes.

5 Q Okay. And in all of the pieces of prior art
6 that we've been talking about with the exception of
7 Sorrentino, Wolcott, Davidson, Fitz-Gibbon, and Young
8 are somewhere between 80 and over 100 years old, right?

9 A Yes.

10 Q Is there any evidence that the industry as a
11 whole could not solve the problem of retaining a gel
12 capsule in a toothbrush prior to the Noble patent?

13 A Just the nonexistence of products that do so.

14 MR. WILSON: Okay. Let's take five
15 minutes and let me see what else I have. I'll just try
16 and efficiently figure out what other questions I have.

17 (Break taken.)

18 Q (By Mr. Wilson) Mr. Kodama, we're back on the
19 record and I really don't have much more, just a couple
20 of items.

21 So, in your declaration, it's Exhibit
22 2001.

23 MR. WILSON: If we can go to Page 12,
24 Kelly, Paragraph 34 up at the top.

25 Q (By Mr. Wilson) While she's pulling that up,

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1 where did you get your understanding for the legal
2 standard for obviousness that you discuss in your
3 declaration?

4 A In discussions with the legal team.

5 Q Okay. So, Mr. Zito and his team?

6 A Correct.

7 Q Okay. So, at Paragraph 34, which is in your
8 discussion of the legal standards for obviousness, you
9 state that: I have been informed and I understand that
10 independently made, simultaneous inventions made within
11 a comparatively short space of time are evidence that
12 the claimed apparatus was the product only of ordinary
13 mechanical or engineering skill.

14 What is your understanding of what that
15 means and how that might be relevant to a finding of
16 obviousness?

17 A Well, I think it means that the technology or
18 knowledge base allows for inventions that happen almost
19 simultaneously or simultaneously, then that means it's
20 the product of, you know, skill and not copying.

21 Q Okay. So, get to a little bit deeper on that.
22 Is the idea there that if multiple people are
23 independently coming up with the same idea at around the
24 same time, that that would be evidence that the idea is
25 something that only requires ordinary, average,

1 mechanical or engineering skill?

2 A The ordinary or average engineering skills,
3 yes.

4 Q Okay. So if in this case, Colgate conceived of
5 using plastic prongs to hold the gel cap around the same
6 time, say, within six months that the Nobles conceived
7 of using angled bristles as disclosed in their original
8 application, that that would be evidence that those
9 ideas were just the result of ordinary mechanical or
10 engineering skill?

11 A Not necessarily. It could be, but something
12 relatively simple like that could either be independent
13 made or could be influenced by seeing someone else's
14 ideas.

15 Q And when you say relatively simple, what do you
16 mean?

17 A Well, it's a mechanical component, there's not
18 a huge amount of technology, like, chip making or, you
19 know, semiconductors or some other technology involved
20 with making that invention.

21 Q Okay. And so you would consider coming up with
22 whether it be plastic prongs to hold the gel cap or
23 angled bristles to hold the gel cap to be a relatively
24 simple invention?

25 MR. ZITO: Objection, mischaracterizes

1 testimony and outside the scope of the report.

2 A Yeah, I would say, as I mentioned, relative to
3 you know, other, more complex technologies.

4 (Exhibit 1018 marked.)

5 Q (By Mr. Wilson) I want to show you -- and I
6 guess this will be -- what -- are we having to mark a
7 new exhibit? I'm going to show you, this is going to be
8 Exhibit 1018, which is a declaration of yours from a
9 different case, one of cases that I think you mentioned
10 in your declaration.

11 MR. WILSON: Can we pull that up? So
12 Exhibit 1018 will be declaration of Kelly Kodama dated
13 February 26th, 2021, relating to -- that's a little big,
14 isn't it? Yeah, let me put it someplace. That looks
15 good, thank you.

16 Q (By Mr. Wilson) So Exhibit 1018 is your
17 declaration from an IPR filed by RJ Reynolds against
18 Phillip Morris.

19 Do you remember working on this IPR?

20 A Yes.

21 Q And that is your signature at the bottom of the
22 first page?

23 A Yes, it is.

24 Q So, in this case, in this IPR, you are actually
25 an expert testifying on behalf of the petitioner

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1 claiming that the Phillip Morris 911 patent was obvious,
2 correct?

3 A Correct.

4 Q And beginning on Page 9, Paragraph 15?

5 MR. WILSON: Get to Page 9, Paragraph 15.

6 Q (By Mr. Wilson) There is a recitation of the
7 legal standard for obviousness.

8 MR. WILSON: Page 9, Paragraph 15. Yep.
9 I'm reading the bottom -- the page on the bottom, I'm
10 sorry. I didn't give you the -- yes, okay, sorry. It
11 took us a moment to find the right page. So we're
12 looking at Exhibit 1018 and we might be at PDF Page 16,
13 but it's indicated as Page 8.

14 Go to the first page of this. I want to
15 make sure I'm looking at the right -- give me a second
16 guys.

17 Q (By Mr. Wilson) All right. So Exhibit 1018, I
18 think I said it wrong, I said this was relating to an
19 IPR for Phillip Morris' 911 patent. This is actually
20 challenging Phillip Morris --

21 A 556.

22 Q 556. I apologize. I had the wrong document in
23 my hand. So 1018 is your declaration from IPR 2021-585.

24 And at Page 8, there is at beginning of
25 the discussion of the legal standard for obviousness, do

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1 you see that?

2 A Yes.

3 Q And that discussion continues over to end of
4 Page 11, which is through Paragraph 17.

5 MR. WILSON: You can show him that if he
6 hasn't seen it, so --

7 Q (By Mr. Wilson) So this discussion of
8 obviousness continues through Page 11, correct?

9 A I see it.

10 Q Okay. Do you believe and understand that the
11 legal standard discussion in your declaration relating
12 to the standard for obviousness in Exhibit 1018 is an
13 accurate and appropriate standard for obviousness?

14 A I believe so for when the filing was -- was put
15 in, yes.

16 Q All right. Do you have any reason to dispute
17 that the standard that you discuss in Exhibit 1018 for
18 obviousness would be equally applicable to this case?

19 A I don't have legal knowledge of why it would be
20 different or the same.

21 MR. WILSON: Thank you. Mr. Kodama that's
22 all questions that I have right now. I will pass the
23 witness. Thank you.

24 MR. ZITO: I don't need a break right now,
25 but I may need a break halfway through this. All right.

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FURTHER EXAMINATION

Q (By Mr. Zito) We just reviewed a section of your report which talked about secondary considerations, correct?

A Yes.

Q Was that section of the report based upon any independent investigation you made?

A No.

Q Did you introduce the idea that the Wisp was the same as the claimed invention?

MR. WILSON: Object as leading.

A Could you ask that again?

Q (By Mr. Zito) Sure. Is it correct that, from your understanding, Colgate made the assertion that the Sorrentino patent was -- anticipated the claims correspondent to the claim?

A Yes.

Q Is that the basis upon which you analyzed secondary consideration based upon the Wisp product?

A Yes.

Q Okay. Is the Wisp product, from your understanding, the same as the Sorrentino patent?

A It's similar, yes.

Q And have you claimed that the Wisp product was successful?

1 A I mention in my report that it was.

2 Q But do you make a claim it was successful or
3 was that claim made by Colgate?

4 A That was not my -- that was not my
5 determination.

6 Q Now, I'm going to try and share my screen, see
7 if I can do this successfully.

8 Everybody see the patent in suit?

9 A Yes, I see it.

10 Q Okay. Let you guys are looking. Okay. It
11 should be scrolling up.

12 A It's not scrolling.

13 Q Not scrolling up.

14 MR. WILSON: If you would like, Joe, I can
15 have Kelly show Exhibit 1001, if you prefer, just
16 offering, but up to you.

17 MR. ZITO: That might work better because
18 it's telling me I can't share.

19 MR. WILSON: Yeah, 1001. Well, it's not
20 scrolling. I'm going to have Kelly pull it up. You can
21 just give her directions and she can hear you, so...

22 MR. ZITO: Okay. Okay. I will just pull
23 it up here. If you could go to the top of Column 5.

24 Q (By Mr. Zito) Now, we talked about the spacing,
25 the angular opposed bristles. And in the 332 patent,

1 there's a sentence in the paragraph at the top of the
2 file that was added in, but it was added as shown in
3 Figures 1, 4, and 5?

4 A Yes.

5 Q Okay. And that talks about equally spaced and
6 we're talking about opposing bristles and more.

7 MR. ZITO: If we could now pull up -- just
8 leave that sentence until later.

9 MR. WILSON: I'm sorry. I couldn't quite
10 hear you, but go ahead.

11 MR. ZITO: Oh, sorry. I'll talk -- I'll
12 speak a little louder.

13 MR. WILSON: Thank you.

14 Q (By Mr. Zito) If we could now look -- if you
15 could pull up, I believe it was 1002, which is the
16 original pending application.

17 A Yes.

18 Q And if you'll recall, you were asked was there
19 any disposure of opposing bristles or bristles spaced at
20 180 and the like?

21 MR. WILSON: It's going to be 1000 --
22 sorry to cut you off, Joe. I think it's 1003 and the
23 app starts on Page 16 of -- pretty sure that's the case,
24 yeah, so it's Exhibit 1003.

25 MR. ZITO: That's correct. 1003 is the

1 final history of 627. If you could scroll to the
2 Figures 1. Scroll down.

3 MR. WILSON: No, no, towards the bottom of
4 that first figure is where it says -- right.

5 MR. ZITO: It says figure. Right there,
6 okay.

7 Q (By Mr. Zito) Your response to where the
8 disclosure was for several of the words in Claim 1 and
9 Claim 2 and Claim 7 of the patent in suit and I believe
10 the words were arranged along diametrically opposed
11 sides of the oral care capsule was in Claim 1.

12 Do you find that disclosure in the figures
13 of the original disclosure?

14 A Yes.

15 Q And you recall you said did you not find those
16 words in the initial disclosure, correct?

17 A That's correct.

18 Q And I'm going to ask you the same thing about
19 multiple pairs in Claim 2 from the patent, the words:
20 Multiple pairs of angled bristles.

21 Do you find the multiple pairs, you said
22 did you not find the words, but do you find the
23 disclosure in the figures of the pending -- the original
24 application which 1003?

25 A Yes, shown in Figure 1.

1 Q Clarify. Now, I'm going to go backwards to
2 what was in most of your deposition, but I'm going to
3 try and do this in a -- rather than picking words here
4 and there in a proper analysis of what the claimed
5 invention is.

6 MR. ZITO: So if we could pull back up the
7 patent in suit. Can we look at Claim 1?

8 MR. WILSON: Claim 1, it's going to be
9 further down.

10 MR. ZITO: I just note for the record
11 Mr. Kodama also has a paper copy that he's looking at.
12 It does not have any notes on it.

13 MR. WILSON: Yeah, so go to Claim 1. See,
14 it's in the right column right here. There you go.
15 Stop right there. Thanks.

16 Q (By Mr. Zito) Do you note that the preamble
17 recites a toothbrush comprising a brush head?

18 A Yes.

19 Q Do you see where it says there's a front
20 surface of the brush head?

21 A Yes.

22 Q And a back surface?

23 A Yes.

24 Q And a plurality of vertical bristles extending
25 upward from the front surface?

1 A Yes.

2 MR. ZITO: Now, if we could look at Figure
3 1 of the patent.

4 MR. WILSON: There you go. It's one more
5 up. So it's on Page --

6 MR. ZITO: Yeah, perfect.

7 MR. WILSON: -- 3.

8 Q (By Mr. Zito) Now, by number, what are those,
9 quote, plurality of vertical bristles extending from the
10 head?

11 A So those are Items 26.

12 Q And did Items 26, plurality of vertical
13 bristles extending upward from the front surface exist
14 in the prior art?

15 MR. WILSON: Object.

16 A Yes.

17 Q (By Mr. Zito) Did they exist in the prior art,
18 Davidson?

19 A Yes.

20 Q Did they exist in the prior art, Wolcott?

21 A Yes.

22 Q Did they exist in the prior art, Young?

23 A Yes.

24 Q The next element, I'll go ahead and read it.
25 You can look at it. We don't need to pull it up on the

1 screen: Is a capsule receiving zone sized to receive an
2 oral care capsule, capsule receiving zone including a
3 recess defined in the front surface and arranged to
4 receive at least a portion of an oral care capsule
5 inserted past the vertical bristles.

6 A Yes.

7 Q And what is that in Figure 1?

8 A I don't know. I think it's Item 25, but that
9 maybe the actual pellet or --

10 Q But it's in that area?

11 A Yes, it's in that 25 area.

12 Q All right. Then let me read you the final
13 element of Claim 1: At least one pair of angled capsule
14 retaining elements that are elevated above the recess,
15 figured to retain an oral capsule in the capsule
16 receiving zone.

17 Okay. Is that the same as the bristles
18 that you've identified as 26?

19 A No, those are identified as 26A.

20 Q So, did -- does the patent in suit claim the
21 bristles to be -- claim the vertical bristles to be the
22 same thing as the angled capsule retaining elements?

23 A No, they're identified differently in Figure 1.

24 Q Is it accurate to say that the element, at
25 least one pair of angled capsule retaining elements is

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1 something added to the standard toothbrush with vertical
2 bristles that are shown in Wolcott, Davidson, and Young?

3 A Yes.

4 MR. WILSON: Objection, leading.
5 Objection, leading.

6 A So yes, the items identified as 26A, the angled
7 capsule retaining element are different than the
8 vertical brushes coming up identified as Item 26.

9 Q (By Mr. Zito) And now if we could look at
10 Young, in particular Figure 8 and Figure 9. We don't
11 have to have it on the screen. You can just look it up.

12 A Okay.

13 Q Figure 8 and Figure 9 show that -- appear to
14 show that if you put a capsule through a hole in the
15 back of a toothbrush, it could be held in place -- in
16 place by the already existing common standard vertical
17 bristles, correct?

18 A Correct.

19 MR. WILSON: Objection. Objection -- I'm
20 sorry. And Mr. Kodama, I'm going to try to get
21 objections, so for Katharene, just give me a second.

22 THE WITNESS: Sorry.

23 MR. WILSON: That's all right. That's all
24 right.

25 So I'll object as leading.

1 Q (By Mr. Zito) Would any capsule of any weight
2 or any size be held?

3 A No.

4 Q So some capsules might and some capsules might
5 not?

6 A Correct.

7 Q Is it correct to say that what is holding them
8 there are standard vertical bristles in your opinion?

9 MR. WILSON: Objection, leading.

10 A All -- I'm sorry, go ahead.

11 MR. WILSON: I stated an objection, you
12 can go ahead.

13 A All the bristles in Figure 8 and Figure 9 are
14 the same.

15 Q (By Mr. Zito) Okay. Would those equate to the
16 third element of Claim 1 of the patent in suit that
17 we've been talking about?

18 If you look back at Claim 1, the first
19 element was a front surface, the second element a back
20 surface, a third element was a plurality of vertical
21 bristles.

22 A Right. So the bristles shown in Figures 8 and 9
23 appear to be the third element of Claim 1.

24 Q Does Young add the fifth element of Claim 1?

25 MR. WILSON: Objection, vague.

1 A Figure 8 and Figure 9, all the bristles appear
2 to be the same element.

3 Q (By Mr. Zito) Okay. Are there any special
4 bristles, tufts, that are -- have been added to the
5 standard bristles of Young as capsule retaining
6 elements?

7 A As I mentioned, all of the bristles shown or
8 tufts shown in Figure 8 and 9 appear to be functionally
9 identical.

10 Q If you could take a look at Davidson, please.
11 Do all the bristles of Davidson fall into
12 the category of Element 3, or having vertical bristles?

13 A The bristles shown in Figure 1, 2, and 3 are
14 all functionally identical, too.

15 Q Does Davidson have any special bristles or any
16 other special elements that are considered angled
17 capsuled retaining elements?

18 A All of the bristles are identified as the same
19 item number 13 in the Figures 1, 2, and 3.

20 Q Now, let's look over at Wolcott.

21 Would all of the bristles, the tufts of
22 bristles, the pairs and packets of bristles of Wolcott
23 fall into the third element, a plurality of vertical
24 bristles extended upwardly from the front surface?

25 MR. WILSON: I'll object to form as vague,

1 compound, leading.

2 A All of the bristles shown in the figures of
3 Wolcott appear to be functionally identical.

4 Q (By Mr. Zito) Does Wolcott add any special
5 bristles or other special element that would become the
6 angled capsule retaining elements, Element 5 of Claim 1
7 of the patent in suit?

8 A No, all of the bristles shown in figures -- in
9 the figures in Wolcott appear to be identical.

10 Q Now let's look at Fitz-Gibbon if we could.
11 Does Fitz-Gibbon have the third element, a
12 plurality of vertical bristles extending upwards from
13 the front surface?

14 A The figures of Fitz-Gibbon show all of the
15 bristles being angled.

16 Q So Fitz-Gibbon's does show angled bristles,
17 correct?

18 A That's correct.

19 Q Does it show them retaining any capsules?

20 A It does not.

21 Q Does it discuss retaining any capsules?

22 A No.

23 Q Okay. If we look at the first column of
24 Fitz-Gibbon, Lines 10 through 17, does Fitz-Gibbon give
25 a reason for the angled -- for the angle to the

1 bristles?

2 A In this section, it talks about the direction,
3 the angles of the bristles be in the direction of the
4 movement or line of force of the brush against the
5 teeth.

6 Q If we look at -- I guess it's Column 2, Lines
7 66 through 77, does Fitz-Gibbon say why the bristles are
8 sharply inclined?

9 MR. WILSON: I'm going to object as
10 seeking to obtain opinions that are not disclosed in the
11 witness's declaration.

12 A So, the -- I'm sorry. I lost my train of
13 thought. The tips of the tufts are designed to engage
14 the surfaces of the teeth.

15 Q (By Mr. Zito) I think we discussed Fitz-Gibbon
16 enough in the first part. We can move on.

17 Now, Fitz-Gibbon dates back to 1919,
18 correct?

19 A Correct.

20 Q And the next came Young in 1934?

21 A Correct.

22 Q And then Wolcott in 1938?

23 A Correct.

24 Q And then Davidson in 1941?

25 A Correct.

1 Q And there's no art between 1941 and Sorrentino
2 cited or asserted by the petitioner in this IPR that you
3 know; is that correct?

4 A None that I'm aware of.

5 Q And at no point in time between -- according to
6 the prior art in 19 -- is it correct to say at no point
7 in time between 1941 and the filing of the patent in
8 suit, did any -- were any extra angled capsule retaining
9 elements added to Wolcott, Young, or Davidson according
10 to the references you have before you?

11 MR. WILSON: I'm going to object to the
12 form of the question, calls for speculation, lack of
13 foundation.

14 A Not that I'm aware of.

15 Q (By Mr. Zito) Are you aware of any teaching
16 based upon everything that's before you that you
17 considered, everything in the case, which says -- would
18 teach one to take some of the tufts, which were tufts or
19 vertical bristles, Element 3 of the claim, and convert
20 them, add to them, include a different set of angled
21 capsule retaining elements in order to better hold an
22 oral care capsule?

23 MR. WILSON: Object to form, vague,
24 leading.

25 A Are you referring to the -- the note besides --

1 Q (By Mr. Zito) Side note.

2 A I am not aware of any, no.

3 Q It's been suggested in the Petitioner's
4 arguments and in earlier today in deposition that -- and
5 I'll put it to my own words here, the fortuitous
6 happenstance that could help retain the capsule because
7 some of the bristles splay out or disperse towards their
8 end is the same thing as adding the fifth element, the
9 pair of angled capsule retaining elements, do you agree
10 with that characterization?

11 A No.

12 Q Do you think the fact that the resilience of
13 the bristles as shown in Young is the same thing as an
14 additional element of a pair of angled capsule retaining
15 elements?

16 A No.

17 MR. ZITO: Can we take five minutes and
18 I'll go back through my notes and see if there's
19 anything else?

20 (Break taken.)

21 MR. ZITO: I apologize, I had to go
22 through my notes, Mr. Kodama. I didn't get all of my
23 notes and, I guess, answers.

24 Q (By Mr. Zito) There's one thing I wanted to
25 clarify. After asking about each of the references

1 individually and going through a little bit of the
2 disclosure issues, do you recall that Mr. Wilson went
3 back to ask you about angled bristles?

4 A Yes.

5 Q And he asked you if -- I believe in Young and
6 in Davidson and in Wolcott, if the bristles -- they were
7 angled bristles and you said yes.

8 Do you recall that?

9 A Yes.

10 Q Okay. What he didn't ask you, I'm going to ask
11 you the more relevant question: Are any of those angled
12 bristles angled capsule retaining elements as required
13 in the claims of the patent in suit?

14 A None of those are intentionally angled in order
15 to retain the -- the dentifrice pod or gel pack.

16 MR. ZITO: And let's look one last time of
17 Figure 1 from the patent.

18 MR. WILSON: It's okay. I think
19 everybody's got a copy, I don't think you need to pull
20 it up.

21 Q (By Mr. Zito) When you say specially angled,
22 are you referring to what's indicated as 26A?

23 A That's correct.

24 Q Okay. And can you describe in your words what
25 is special angled about those bristles as opposed to the

1 vertically-oriented bristles, the third element of Claim
2 1 which is indicated as 26?

3 A Correct. So those are actually inserted and
4 molded in the toothbrush at a different angle and
5 actually a variant angle relative to the vertical
6 brushes shown as Item 26.

7 Q And is that what qualifies them as the fifth
8 element of Claim 1?

9 MR. WILSON: Objection, leading.

10 A Yes.

11 Q (By Mr. Zito) And how does that make 26A
12 qualify in your opinion as the fifth element of Claim 1
13 as opposed to 26 being able to qualify?

14 A So 26 are just the standard toothbrushing
15 bristles which are Element 3. And element -- or Item
16 26A are specifically designed to hold and retain the
17 dentifrice pod.

18 Q But isn't it correct that Element 26 has some
19 non-vertical bristles or angled bristles?

20 MR. WILSON: Objection, form, leading.

21 A Yes, that's correct -- I'm sorry.

22 Q (By Mr. Zito) So why would not, in your
23 opinion, the angled bristles of 26 qualify as the angled
24 retaining elements, which is Element 5 of Claim 1, if
25 they do?

1 A So Item 26A are -- they're designed
2 specifically to provide the proper amount of force to
3 allow the dentifrice pod to be inserted past them, but
4 also to retain them properly. Whereas Item 26 is
5 primarily for the brushing of the teeth and not for
6 trying to retain or allow the dentifrice pod to be
7 pushed past them.

8 MR. ZITO: Thank you. I don't have any
9 further questions.

10 FURTHER EXAMINATION

11 Q (By Mr. Wilson) I just have a few follow-up,
12 Mr. Kodama.

13 So, Claim 1 of the 332 patent requires
14 both vertical bristles and angled capsule retaining
15 elements, correct?

16 A That's what it says in the claim.

17 Q Okay. In Wolcott and all of the other pieces
18 of prior art that we discussed -- I should say Wolcott,
19 Davidson, and Young, do you agree that all of the tufts
20 disclosed in those pieces of prior art include vertical
21 bristles within the tufts?

22 A Possibly, yes. I believe they're intended to
23 be vertical.

24 Q Okay. And certainly at the -- at the middle or
25 center of the tuft, many of the bristles will be

Further Examination by Attorney Name

1 oriented vertically, correct?

2 A That's correct.

3 Q But each of those tufts, again, disclosed in
4 Wolcott, Davidson, and Young, also include individual
5 bristles at the perimeter of the tuft that would be
6 splayed at an angle as we've discussed throughout the
7 day, right?

8 A That's fair. I would go back on the previous
9 answer though. They're not necessarily perfectly
10 vertical. They could all be somewhat angled depending
11 on how they're manufactured.

12 Q Okay. And you indicated in response to
13 Mr. Zito's question that certain angled bristles in
14 Figure 1 are designed to exert a proper force on the gel
15 cap; is that more or less what you said?

16 A Yes.

17 Q All right. Is there any language in Claim 1 or
18 claim 10 of the 332 patent that specifies any level of
19 force that is required to become a retaining element?

20 A No, the amount of force is not specified.

21 MR. WILSON: Okay, thank you. I think
22 that's all the follow-up I had.

23 COURT REPORTER: Mr. Zito?

24 MR. ZITO: Yeah, I had one.

25 COURT REPORTER: Okay. Go ahead.

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FURTHER EXAMINATION

Q (By Mr. Zito) Do you recall earlier regarding the testimony that you gave regarding the word, retaining, as to the meaning you understand that to have in the plain and ordinary meaning of the word in the context of this patent?

A Yes.

Q Okay. Could you refresh us?

A So basically restraining or keeping something in place.

MR. ZITO: Thank you.

THE WITNESS: Okay, thank you very much.

MR. WILSON: Nothing else for me. Off the record?

COURT REPORTER: Off the record. Mr. Zito, do you want a copy?

MR. ZITO: Yes.

(Proceedings concluded at 3:35 p.m.)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

COLGATE-PALMOLIVE COMPANY)
 Petitioner,)
)
 vs.)IPR2023-01254
)U.S. PATENT NO. 8,881,332
 NOBLE INNOVATIONS NC L.L.C.)
 Patent Owner)

REPORTER'S CERTIFICATE
ORAL DEPOSITION OF KELLY R. KODAMA
JUNE 28, 2023

I, Katharene McCulley, Certified Shorthand Reporter in and for the State of Texas, hereby certify pursuant to the Rules and/or agreement of the parties present on the following:

That the witness, KELLY R. KODAMA, was duly sworn and that the transcript of the deposition is a true record of the testimony given by the witness;

That \$_____ is the charge for the record
of the testimony given by the witness after said witness
was duly sworn by me.

That the deposition transcript ____ was _XX was not
duly submitted to the witness or to the attorney for the
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That the original deposition transcript, or a copy thereof together with copies of all exhibits, for safekeeping and use at trial, was delivered to the

1 attorney or party who asked the first question appearing
2 in the transcript, pursuant to Rule 30(f) of the Texas
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4 That pursuant to information given to the deposition
5 officer at the time said testimony was taken, the
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7 Michael Wilson (2h56m)

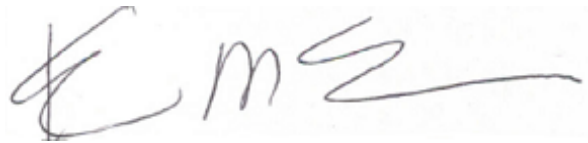
Attorney for Claimant

8 Joe Zito (0h32m)

Attorney for Patent Owner

9
10 I further certify that I am neither counsel for,
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13 that I am not financially or otherwise interested in the
14 outcome of this action.

15 Certified to by me on this 15th day of July,
16 2024.

17 

18
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[61 - agree]

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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