

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COLGATE-PALMOLIVE COMPANY,

Petitioner

v.

NOBLE INNOVATIONS NC L.L.C.,

Patent Owner.

IPR2023-01254|

Patent 8,881,332 B2

Record Of Oral Hearing

Held: October 31, 2024

Before RYAN H. FLAX, TIMOTHY G. MAJORS, and
MICHAEL A. VALEK, Administrative Patent Judges.

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The above-entitled matter came on for hearing Thursday,
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P-R-O-C-E-E-D-I-N-G-S

(2:00 p.m.)

JUDGE FLAX: Good afternoon, everybody, I am Judge Ryan Flax, I am joined today by Judges Tim Majors and Michael Valek, who are my panel mates. We are here today in IPR2023-01254, between Colgate Palmolive Company as Petitioner, versus Noble Innovations NC LLC as the Patent Owner, concerning U.S. Patent 881332. If I am wrong about any of those things according to you all, please let me know right away, but I think I'm right.

So we're all joining today remotely, which means that there will be potentially some technical things that we should be concerned about. What I would ask is that unless you need to be speaking immediately, please mute yourselves so that we can keep as clear a record as possible and help our court reporter as much as possible to develop an accurate transcript. Also, in view of having an accurate and complete transcript, as you are presenting arguments, if you are discussing slides that you are presenting as demonstratives, please identify which slide you are talking about. If you are referring to certain briefing that you filed during the proceeding, please identify what you're talking about and where the arguments are by page number if you can. More clarity rather than less is better, and if you are talking about any specific evidence, I would ask you to please identify what that evidence is if you can by exhibit number. All these things will help us have as accurate a record as we can.

Each party today is going to have 60 minutes of oral argument. None of you are under any obligation to use all 60 minutes, and there will be no points deducted for not doing so, but you are allowed to reserve some time

1 for rebuttal after your opposing counsel has argued. So we will start today
2 with the Petitioner, who has the burden in this matter. They will go first to
3 present their arguments. If you want to reserve time for rebuttal, please let
4 me know how much time you'd like to reserve, I will time you. I suggest
5 you also time yourselves so that you know how much time you have, but as
6 you approach the time limit where you've reserved some time, I'll let you
7 know, but I will not require anyone to stop arguing, that will be your
8 decision how you'd like to allocate your time during your argument. Same
9 thing goes for Patent Owner, when it is your turn, just let me know how
10 much time you want to reserve for your rebuttal and I'll track you as well.

11 When you start speaking, it would be helpful if you'd just identify
12 yourself when you do. I will try to do the same. I know there's a lot of us
13 on the screen right now, so the more we can clarify things for each other, the
14 better, and we will be ready to roll right now with arguments from
15 Petitioner. So if you would introduce yourself and let me know who else is
16 here with you, we can start.

17 MR. WILSON: Thank you Judge Flax. My name is Mike Wilson,
18 I'll be arguing for the Petitioner, Colgate Palmolive, and I'm joined today by
19 Keith Harden who is lead IPR counsel, and we plan to reserve 10 minutes
20 for rebuttal.

21 JUDGE FLAX: Okay. I'll start you whenever you start arguing, but
22 I'll let you know, let's say about five minutes before your 50 minutes are up
23 so you can decide what to do at that point.

24 MR. WILSON: Thank you, Your Honor, may it please the Court.
25 Again, my name is Mike Wilson. Each of the challenged claims of the '332
26 Patent claim a very simple toothbrush design that is a design that has a

1 bristle arrangement that creates a pocket or a receiving zone along with a
2 recess to receive a pellet or a capsule, and in which the bristles are angled
3 over the recess to help retain the pellet or capsule. The evidence in this case
4 shows that toothbrushes with those features have been in the art since at least
5 the 1920s and 1930s and that is the four main pieces of art that have been
6 cited that I refer to as Wolcott, Davidson, Fitz-Gibbon, and Young, and
7 Wolcott is Exhibit 1009, Davidson 1010, Fitz-Gibbon 1011, Young 1012.

8 I will be using a slide deck and so I want to make sure that I
9 successfully share that with your permission, Judge Flax.

10 JUDGE FLAX: Please do, thank you.

11 MR. WILSON: Please let me know if you're now able to see the
12 slides.

13 JUDGE FLAX: We do see slide one.

14 MR. WILSON: Excellent. In Petitioner's view, the panel should
15 largely adhere to the findings in the institution decision, in the final written
16 decision, including as to claim construction and especially as to grounds one
17 through four.

18 JUDGE FLAX: So one question on that, we didn't do any claim
19 construction in the institution decision, so your position is that it's really not
20 needed, is that correct?

21 MR. WILSON: Well, I think what the panel did in the institution
22 decision under the Nidec holding which was basically determine claim
23 construction to the extent that the term 'angled capsule retaining element'
24 covers individual angled bristles. I think the panel could do that again, and
25 under the Nidec decision that would be sufficient. As I'll talk about it in a
26 minute, we think that that is obviously supported by the claim language and

1 specification and really even the other testimony from experts in the case. If
2 the panel is going to do a formal construction, the Petitioner has proposed
3 means plus function under 112 paragraph six, I'll briefly touch on that, I
4 don't believe that it is necessary for the panel necessarily to make that
5 decision in order to find obviousness in this case, but if the panel is going to
6 do a formal construction, we think that that position is well supported.

7 There's a table of contents to the slides, I don't intend to cover all 85
8 slides, I intend to cover really four topics. The first is the claim construction
9 issue that Judge Flax you just touched upon, I'm going to spend a little bit of
10 time on that, including addressing the Patent Owner's implied position on
11 claim construction of angle capsule retaining element, then I want to walk
12 through in some detail grounds one and two, which are the Wolcott
13 combinations. The third thing I want to do is discuss grounds three and four,
14 which are the combinations that rely upon Young. I'll spend a little bit less
15 time on that because the Young combinations, as I call them, still use
16 Davidson and Fitz-Gibbon and they largely overlap with grounds one and
17 two. And then finally, I do want to address at least some of the arguments
18 that the Patent Owner has raised relating to secondary considerations. And
19 obviously all of that is subject to the panel's questions and guidance, which
20 of course I welcome.

21 I wanted to start with a brief overview of the '332 Patent. One thing
22 that strikes me about this patent is how little of the patent is actually directed
23 to the claimed elements of claims one and 10 of the '332 Patent. The
24 general focus of the '332 Patent was a combination toothbrush and capsule
25 dispenser, and none of the claims in the '332 really address the dispenser,
26 it's a very brief discussion of the claimed elements. It's really Figure 1 and

1 about 30 lines of specification. The rest of the figures, at least seven or eight
2 of the figures, and about 250 lines of the spec relate to the dispenser. So
3 what's actually claimed in the '332 is not really a big focus of the '332
4 Patent in terms of the specification.

5 I'm now on slide four, and we're quoting from the '332 Patent,
6 Exhibit 1001, column four. What we have in front of us on slide four is
7 essentially the entirety of the patent's disclosure relating to the claimed
8 elements. It's very broad, very simple, it says that we're going to have the
9 recess, that's the hole shown in Figure 1 on the right, a receiving zone that
10 may include a recess, and we're going to have a plurality of angled bristles
11 that help retain a capsule that's inserted into that recess or receiving zone.
12 There is nothing in the patent about the composition of the bristles, there's
13 nothing in the patent about any specific angling or way to achieve the
14 angling of the angled bristles, there's nothing in the patent about how the
15 angled bristles are attached to the brush head, it just merely broadly says you
16 have angled bristles that retain or help retain the capsule. But a very, very
17 short disclosure in terms of the actual claim elements of claims 1 and 10 and
18 the dependent claims that we're arguing about.

19 I'm now on slide five, just going to briefly mention, the inventor does
20 not claim to have brought anything to the art in terms of capsules
21 themselves, the patent merely cites prior art patents that are preferred
22 capsules, but there's nothing in the patent that claims they invented capsules
23 or even added to the art in terms of what types of capsules might be
24 preferred for the claimed brush.

25 So slides six and seven show the independent claims that we're
26 talking about today, claims one and 10, we have highlighted what I view to

1 be more or less the disputed terms, in other words, the terms for which the
2 Patent Owner has argued are not present in the prior art references. And
3 that's essentially, I think the case boils down to whether or not the prior art
4 discloses in Wolcott, Young, and the other references, whether the prior art
5 discloses an angled capsule retaining element. I that's more or less what the
6 case comes down to, and of course we believe and agree with the institution
7 decision that the references do disclose that. Claim 10 is very similar --

8 JUDGE FLAX: Counsel, on this, on that first limitation, the capsule
9 receiving zone, is there any dispute here that that is taught in the prior art?

10 MR. WILSON: No, I highlighted these two elements because they
11 contain at least some language that's disputed, but no, I don't believe that
12 the Patent Owner has contested that for example, Wolcott and Young or
13 even Fitz-Gibbon do have a pocket or receiving zone for dentifrice. So I
14 don't think that's disputed. And as I walk through here in a few minutes,
15 once we get through the claim construction slides, I will walk through that in
16 terms of each of the elements, at least briefly, in Wolcott. We've got slides
17 on each element, even where it's not disputed, and I hope that will help the
18 panel in terms of to the extent you need to cite further evidence in the final
19 written decision.

20 Claim 10 really is very similar to claim one, the only real difference
21 relates to the configuration of the angled bristle or the angle capsule
22 retaining element. Claim one says that you need to have a pair of retaining
23 elements that are diametrically opposed, opposite sides of a circle, and claim
24 10 has a little bit more specific geometric limitations that say you have to
25 have at least three and they have to be a certain distance from each other.

1 Again, not really disputed, but that is the main difference between claims
2 one and 10.

3 So I want to walk through claim construction, I really think we have at
4 the end of the day one dispositive question, and that is, is the term angle
5 capsule retaining element broad enough to cover individual angled bristles
6 that retain dentifrice. I think the answer to that, based on the breadth of the
7 claim language, specification, and plain meaning is that yes, that term is
8 broad enough to cover an individual or group of individual bristles on a
9 brush that retain dentifrice pellet or capsules, and therefore we think that the
10 claim are invalid based on the prior art. The second element, as I've already
11 mentioned, is should the panel decide to go through and formally construe
12 the angle capsule retaining element term, we think that based on not only the
13 generic claim language, but also the testimony of Mr. Kodama, the Patent
14 Owner's expert, that that is the proper way to construe the term.

15 So I want to start kind of at the end rather than starting with Phillips
16 with the claims, I want to start with essentially what Noble is arguing, and I
17 would start by saying Noble has not presented a formal construction, so I
18 think there's a threshold issue of whether or not that's been waived. I don't
19 think this is merely a technicality, I think they've essentially said what they
20 don't think angled capsule retaining element covers, for example in their
21 view it doesn't cover the tufts of bristles that are disclosed in Wolcott and
22 Young and the other references, but they haven't given us an actual
23 affirmative construction, and I think the reason is there's no real way to
24 support a formal construction that would read out the prior art. Essentially,
25 Noble is saying it has to be an entire tuft of bristles that's angled. Of course
26 we don't think that's supported, the '332 Patent never uses the words tufts,

1 never discussed angled bristles that are within a larger tuft of bristles, and
2 they use this terminology, it has to be purposefully angled or intentionally
3 angled, I don't exactly know what that means, but they haven't tried to
4 support that formal construction, and I think that whatever those terms mean,
5 that the prior art does disclose angled bristles that are intentionally there and
6 intended to retain a capsule.

7 So, as I've already mentioned, Noble has not presented any formal
8 construction, they haven't also really cited any actual language in the claims
9 themselves or in the specifications that would support the narrowing
10 arguments that they're making. And I have here a quote from Mr. Kodama,
11 I'm now on slide 10 by the way, where he agreed, at least in his view that
12 these terms are used according to plain meaning. So I think that's important
13 where they're trying to inject narrowing language or limiting language into
14 angled capsule retaining element, when their expert says that this is plain
15 meaning.

16 So of course we are, the panel is bound to apply Phillips, and so you
17 start with the claims, and so on slide 11 we've got the language that needs to
18 be construed, and it's very broad, it just simply says that the retaining
19 element, which in most cases what we're talking about here is an angled
20 bristle, has to be angled and has to be something that retains the capsule, and
21 that is has to be elevated above the recess. That's essentially the
22 requirement, there's nothing in here about intentional or purposeful angling,
23 there's nothing in here that would suggest it has to be angled at any
24 particular location on the brush, for example, to make myself clear, that says
25 that it has to be angled, for example, where it's attached to the brush, that

1 it's mounted at an angle. There's no language that would support that kind
2 of narrowing, just based on the claim language itself.

3 I did want to point out that there's a couple of times where the Patent
4 Owner suggests that what we're talking about is tufts, and slide 12 has an
5 excerpt from the Patent Owner's sur-reply where they've substituted the
6 word tufts into the element 26a from the figures, and of course tufts does not
7 appear in the patent, that's misleading. What appears in the patent are actual
8 individual bristles, both the vertical bristles and the angled bristles in the
9 '332 specification, for example Figure 1, are all individual bristles, there is
10 no tuft of bristles that's disclosed or discussed in the '332 Patent.

11 We've already mentioned this part of the patent, this is pretty much
12 the entire disclosure relating to the meaning of angled capsule retaining
13 element, it discusses that they're over a receiving zone and that it's disposed
14 with any plurality of angled bristles. So again, nothing here that would
15 suggest any narrower meaning that the fact that we have individual bristles
16 that are canted away from vertical at an angle over the recess or the pocket
17 where the capsule is going to go.

18 So I'm now on slide 14, and I do think obviously we agree with the
19 panel's discussion of grounds one through four in the institution decision,
20 one thing that is new since the panel, Judge Flax, since you wrote the
21 institution decision, is the deposition of Patent Owner's expert, Mr. Kodama.
22 I really encourage the panel to read that deposition, because there are many
23 instances in which Mr. Kodama's testimony contradicts the Patent Owner's
24 position, including even in the sur-reply but also in the Patent Owner's
25 response, and really contradicts his own declaration as well. This slide deck,
26 which I assume the panel has, I think we've cited maybe 18 or 20 excerpts

1 that I think are particularly illuminating, but really the entire deposition I
2 think is impactful in terms of contradicting the Patent Owner's position and
3 supporting the Petitioner's position.

4 This is just one instance in which Mr. Kodama acknowledges that a
5 person of skill in the art understands the difference between a tuft or a
6 cluster or a group of bristles and an individual bristle, and that all of the
7 patents in this case, the prior art patents, the four prior art patents, Wolcott,
8 Davidson, Young and Fitz-Gibbon, as well as the '332 Patent, all use those
9 terms accordingly. When it refers to a bristle, it's referring to an individual
10 bristle, and in some cases, although the '332 Patent does not discuss tufts,
11 some of the prior art does, and it's using it as you would expect, that is a
12 group or cluster of bristles.

13 I think we're now on slide 15, I think I've already touched on most of
14 these points, but just to sum up, there's nothing in the patent that would
15 narrow or limit or really even inform a reader how the bristles are mounted.
16 You know, if they're mounted at an angle or intentionally angled, there's
17 nothing in the patent specification that would distinguish an individual
18 bristle that stands by itself and is angled, or that is part of a tuft of bristles if
19 that's the way the brush has been manufactured, and there's no reference to
20 tufts at all, it's all about vertical bristles and individual angled bristles.

21 Again, I'm now on slide 16, this is another excerpt from Mr.
22 Kodama's deposition, and we're talking here, I was talking to him about the
23 claim language itself, and I asked him, is there anything here in this claim
24 language that you think would support the idea that it has to be mounted at
25 an angle or has to be at an angle in any particular location or way, and he

1 just says no, it doesn't mention anything about the attachment point. And of
2 course that's clear from the short disclosure itself.

3 Judge Flax, you already asked me about this, in slide 17, quotes from
4 the institution decision. I think this is one of those instances, maybe slightly
5 unusual that a formal construction may not be needed so long as the panel
6 agrees that angle capsule retaining elements includes individual angled
7 bristles that retain dentifrice or a capsule or a pellet, that's probably
8 sufficient to resolve the dispute here, because that's the main argument
9 about the obviousness case for grounds one through four. So I do think that
10 that's one option the panel has if it wants to do the same as it did in the
11 institution decision.

12 So the Petitioner has proposed a formal construction --

13 JUDGE FLAX: I'm sorry, I was trying to unmute myself, I didn't get
14 it done in time.

15 MR. WILSON: Okay, no worries.

16 JUDGE FLAX: Could you go back one slide? I just have one
17 question for you on that.

18 MR. WILSON: Of course.

19 JUDGE FLAX: So at the point where we instituted trial, there was no
20 dispute that the retaining elements included within their scope angled
21 bristles. Is that still the case, or is there a dispute about that at this point?

22 MR. WILSON: No, I don't think there is a dispute there, nor do I
23 think, I don't see how there could be a dispute there. If you look at Figure 1
24 of the '332 Patent, it is literally the only disclosure in the patent of what the
25 angled capsule retaining element is, it is an individual angled bristle. So
26 from my perspective, the dispute more turns into application of that, Patent

1 Owner's position is well, in order to be an angled bristle, it would have to be
2 part, for example, of a tuft of bristles where the entire tuft is angled in order
3 to be intentionally angled, I guess, is how I would interpret it. But no, I
4 really don't believe that it's Patent Owner's position that an individual
5 angled bristle that retains a capsule meets this claim element. Did that
6 answer your question, Judge Flax?

7 JUDGE FLAX: I think so. The last thing you said is you don't think
8 that Patent Owner disputes that angled capsule retaining elements as claimed
9 includes angled bristles, is that right?

10 MR. WILSON: Correct, that is my understanding.

11 JUDGE FLAX: All right, we'll see what they say, thank you.

12 MR. WILSON: Yes. I won't spend a long time in terms of discussing
13 112 paragraph six, the panel is familiar with the requirements for a finding,
14 we have slide 19 that discusses the case law. I think the key takeaways on
15 the case law is that words like element, and specifically element and even
16 retaining element have been recognized as generic nonce words that support
17 a 112-6 finding. And the other thing you'll see from the law, kind of my
18 understanding, if you can't tell what the structure is just by reading the claim
19 language and you need to resort to the specification, you're talking about a
20 112-6 term.

21 So I think that's what the case law supports and again, we've cited
22 cases that deal with the term element and even retaining element that support
23 the idea that those are generic nonce words that fall into the jurisprudence
24 that even where you don't use the word means, it can still be subject to 112-
25 6, and again, this is another point where Mr. Kodama agreed. I asked him
26 specifically, does that refer to any commonly known or understood structure,

1 and he said no, it doesn't, it's a nonce term, it's a generic term. And he even
2 added yes, it's a retaining element, it's a generic term, something that has a
3 function of retaining the capsule. So I think if the Court decides to formally
4 construe it that we -- and by the way, that hasn't really been opposed. We
5 proposed that in the petition and I think we briefly mentioned it in the sur-
6 reply and there's really been no response on that.

7 So, with proper construction, we think that it's very clear that going
8 back to pre-World War II times that there were patents that disclosed angled
9 capsule retaining element, and more specifically, brushes that have angled
10 bristles around a pocket to hold a pellet or other form of dentifrice. So we'll
11 talk about some of these pieces of prior art in more detail, I'm now on slide
12 22, but you can quickly see, just looking at figures from Wolcott, which is
13 Exhibit 1009, Young which is Exhibit 1012, Fitz-Gibbon, which is Exhibit
14 1011, they all really kind of address the same idea, let's arrange bristles in a
15 way to form a pocket to hold dentifrice, including many different types of
16 dentifrice, and the angling of those bristles will help keep it in place. So it's
17 really a concept that goes way back and we believe that that's what renders
18 the '332 Patent obvious.

19 So I want to talk about ground one, and I think ground one, again,
20 kind of boils down to a single question, which is are the bristles in Wolcott
21 that encircle the receiving area, are they angled and do they retain the
22 dentifrice pellet? If the answer to that is yes, then I don't see how the panel
23 can change its decision from what it held in the institution decision. So to
24 walk through the elements, and Judge Flax earlier you asked me about the
25 receiving zone, but it's starting at slide 24, you will see at least a shorthand
26 reference to where we believe each of the elements is disclosed, we use this

1 numbering system, 1.0, 1.1, or 10.0, 10.1 for the different elements that are
2 in the independent claims, we lay out that terminology in Exhibit 1007, we
3 included a table of what each of those mean. And these slides, hopefully it's
4 helpful, also cite to where we've discussed these elements in the petition and
5 where they are in the exhibits as well, and where relevant on the occasion
6 cited to expert testimony.

7 So I don't believe that any of the elements that are listed here on slide
8 24, which is elements 1.1 through 1.3 or 10.1 through 10.3 are disputed. I
9 do want to note that there's a requirement for vertical bristles, a separate
10 requirement for vertical bristles from the angled bristles or the angled
11 retaining element, and I wanted to mention that we do have testimony from
12 Mr. Kodama where he acknowledges that where you have tufts of bristles in
13 the prior art that those tufts of bristles are going to include separately both
14 vertical bristles that meet element 1.3 and 10.3 and then the ones that
15 surround the receiving area are going to have angled bristles that meet the
16 other element, the angled capsule retaining element.

17 So moving to slide 25, Judge Flax you asked me about the capsule
18 receiving zone, I don't believe that this is disputed, and we have a quote here
19 from Wolcott where it expressly uses the term 'dentifrice receiving pocket,'
20 or a 'central pellet recess' that is adapted to receive the pellet. So I don't
21 believe that's disputed, but it's also very clearly shown, you know, we have
22 Figures 4 and 5 which show the pellet outside of the brush and then Figure 4
23 where it shows that the pellet has now been inserted past the bristles into the
24 brush, and surrounded.

25 JUDGE FLAX: Is Figure 5, does Wolcott disclose these are sort of --
26 I mean they're in reversed numbered order, but are they sort of sequential in

1 how you got that pellet that is 11, it's on top of the brush bristles and then it
2 would be pushed down onto the handle part of the head of the toothbrush
3 through them? Is that accurate?

4 MR. WILSON: Yes, it is accurate, and I actually think that's a
5 separate element. So yeah, if we look at the next slide, we're now on 26,
6 that element that you alluded to about them being received past the bristles
7 into the recess is covered on slide 26, and so you can see the same figures
8 we were just looking at, Figures 4 and 5, but I think the actual disclosure in
9 the specification is here on slide 26 as opposed to the previous slide. It
10 shows it's moved downward into the recess where it's securely positioned at
11 the bottom, so it is a very clearly disclosure that they're anticipating and
12 disclosing how the pellet is actually loaded onto the toothbrush.

13 JUDGE FLAX: Okay, thank you.

14 MR. WILSON: I don't believe this element is disputed, but you
15 know, we'll wait and see --

16 JUDGE FLAX: I know there's some argument about other references
17 having holes in the back of the brush that receive dentifrice or toothpaste or
18 powder or whatever it might be, and that that somehow means that the prior
19 art doesn't teach this element.

20 MR. WILSON: Yeah, I think there is that argument, we're relying on
21 Wolcott as well as, for grounds three and four, Young, for this, what I would
22 call front-loading of the dentifrice. So, but -- and specific embodiments in
23 Young, but yes, you're correct, I mean the Fitz-Gibbon reference in
24 particular, which is Exhibit 1011, does contemplate rear loading. But we
25 aren't relying on Fitz-Gibbon for this element, we're relying on Wolcott and
26 Young which both disclose loading a pellet or a capsule from the front.

1 So I believe this is the main dispute, whether or not Wolcott has an
2 angled capsule retaining element, which of course I guess breaks down into
3 two questions, are there angled bristles in Wolcott, and do they retain the
4 pellet? And I think the clear answer to that is yes, and the institution
5 decision used the annotated Figure 4 that was provided in the petition, and
6 you can clearly see that the individual bristles of the tuft that surrounds that
7 pocket, and again we see the pocket in Figure 2, from above, but the
8 individual bristles that are closest to the receiving zone are at an angle. You
9 can see it in the figure, but you can also discern that from the disclosures or
10 the discussion in the specification, and some of them are here on slide 27,
11 some of the quotes from Wolcott, but it talks about the bristles swinging
12 back to reduce the size of the mouth of the recess, suggesting at an angle,
13 that the bristles spring back to securely the position, and that it remains in
14 the recess because of the engaging wider expanded tuft. So all of those
15 things I think are pretty clear, certainly to a person of skill in the art, along
16 with Figure 4 that the inventor (audio interference) and that that angling will
17 help retain the pellet.

18 Again, one thing that's a little bit different from the time of the
19 institution decision is that we have Patent Owner's own expert agreeing with
20 these points that I was just going through. I asked Mr. Kodama about the
21 disclosures in Wolcott and he agreed that a POSA would understand, a
22 person of skill in the art would understand. I'm now on slide 28, that when
23 you have a tuft you're going to have individual bristles that then go out at an
24 angle, and he says yes. And he doesn't just limit that to Wolcott, he says in
25 all four prior art patents he understands that you're going to have tufts that
26 then form angled bristles around the recess.

1 He agreed, looking at slide 29, this is from page 69 of his deposition,
2 that the individual bristles that are closest to the pellet, that they're going to
3 be angled in that direction, which is another claim element, that they're
4 canted towards the receiving zone. He agreed with that, and he even used
5 that word, he said yes they were angled towards the receiving zone, and then
6 he agreed that they help retain a pellet, so I'm now on slide 30. So again,
7 Mr. Kodama's deposition really I think seals the decision for the panel that
8 was preliminarily made in the institution decision in that he agrees with
9 Petitioner's position and largely contradicts the core position of Patent
10 Owner.

11 Slide 31 is from the institution decision, the panel of course knows
12 what it ruled. One thing that I think is worth pointing out is the fact that the
13 institution decision really challenged the Patent Owner, the institution
14 decision indicated that the Patent Owner argument inaccurately characterizes
15 the prior art disclosure as to the annotated bristles, where the Patent Owner
16 basically took the position that the tufts go straight up, and from my
17 perspective, even in the sur-reply, the Patent Owner's really not addressed
18 that, and if anything we have their expert that has come back and essentially
19 given his testimony that aligns with the panel's institution decision that yes,
20 there are angled bristles in Wolcott and in fact in all four pieces of prior art.

21 So those slides which went up, slide 31, basically we have slides 27
22 through 31 that deal with angled capsule retaining element. Again, I believe
23 that's the main dispute today, despite the agreement from Mr. Kodama. So
24 moving on to some of the -- is that 15? Thank you. So moving on to some
25 of the other elements, we have these geometric, I would call them, elements
26 of diametrically opposed and 108 degrees apart, I don't think these are in

1 dispute, but slide 32 kind of recaps some of the arguments and figures that
2 we've provided in the petition and some of the references from the patent
3 and the papers. And then finally, in terms of contact between the bristles
4 and the pellet, Wolcott's express about this, that the bristles actually engage
5 the pellet, and that's element 1.8.

6 So I'm going to move on to the combination, because for the recess
7 itself, the Petitioner is relying upon Davidson. I don't think there's any
8 dispute that Davidson does have a recess defined in the front surface. I also
9 think that what's important about Davidson is its discussion of the benefit of
10 the combination of bristles and a well, and I don't believe it's quoted on
11 slide 34, but if you look at Davidson column two, lines 24 to 27, there's
12 actually a sentence -- and it's a very short disclosure, but the sentence where
13 it indicates that the surrounding bristles, as well as the well, will successfully
14 hold the dentifrice. So when we get to talking about obviousness and
15 motivation to combine, one of the two references is expressly saying look,
16 there is a benefit to having the bristles retain dentifrice as well as the well.

17 JUDGE FLAX: What lines were you saying say that in column two
18 of Davidson, which is Exhibit 1010?

19 MR. WILSON: Yes, it's line 24 to 27. So Mr. Fletcher and
20 Petitioner's Experts addressed motivation to combine. I really think what
21 we have here is a classic combination for obviousness, what we have is a
22 group of patents -- this doesn't just apply to Wolcott and Davidson, it
23 applies to all of them, really, all of the combinations for grounds one through
24 four. What we have is four patents, they're all in the same space, they all
25 deal with toothbrushes, they all are directed to and disclose forming a pocket
26 that's formed by bristles that is going to hold dentifrice in place. And so

1 they're in the same field, they're identifying the same problem, and they're
2 largely identifying the same solution, which is using the bristles and
3 combination of bristles to retain it. Several of them mention that these ideas
4 and the benefits of angled bristles and wells can apply regardless of the type
5 of dentifrice.

6 I think it's important to consider the skill of the POSA, we have an
7 engineer, we have somebody that has five years of experience in consumer
8 products, and if you look at KSR in its progeny, and we've cited a few cases
9 that are helpful, I think, at slides 84 and 85, but just even going back to
10 KSR, we have a classic case of patents in the same field, directed to the
11 same problem that have very simple, straightforward, predictable
12 improvements, and I couldn't find a single case, certainly not post-KSR,
13 single case that under these circumstances wouldn't find that a POSA would
14 understand and be motivated to use these similar patents that have similar
15 objectives and similar benefits, that you would combine them with
16 predictability. And so that's what Mr. Fletcher addresses, and we think it's
17 really kind of a classic case of obviousness, even as a matter of law.

18 Briefly on the combination of ground one, Mr. Kodama agreed of
19 course that there's no difference between a well and a recess. He also
20 agreed that it would be very easy to modify Davidson's well to
21 accommodate a spherical capsule and say yes, you could modify that to
22 accommodate any shape. Mr. Kodama agreed that spherical recesses to hold
23 spherical objects are commonplace. I talked to him about socket sets and
24 egg cartons and Parcheesi, these are all very common everyday items that
25 would be well known to a POSA in terms of accommodating or modifying a
26 recess to accommodate a spherical capsule.

1 So I want to address ground two and I'm kind of going a little bit
2 longer than I wanted so I'll try and be brief, but even if the panel were to
3 somehow narrow angled capsule retaining element to require that it be
4 intentional or that it be the entire tuft be mounted at an angle, and of course
5 the panel understands that we disagree with that, I think Fitz-Gibbon is
6 another very clear case of obviousness, we have in Fitz-Gibbon entire tufts
7 that are sat at an angle in order to create a pocket for dentifrice and it's the
8 same field, it's the same purpose, the same focus, the angling is there to
9 retain dentifrice, that's what Fitz-Gibbon says. And going back to the
10 motivation to combine, of course we have Mr. Fletcher's testimony on that,
11 and we have all the reasons that I've already mentioned in terms of the
12 similarity of the patents and similar focus, but we also have, one more time,
13 Mr. Kodama, who admits what I think is obvious, and that is yes, an
14 engineer with five years of experience in this field would understand that if
15 you put something at an angle, it's going to help retain. So you put all that
16 together, along with the case law, and the things that Mr. Fletcher addresses,
17 and I think that even if the panel were to decide that the term is narrower, we
18 have grounds two and well as grounds four that add Fitz-Gibbon that would
19 still render all of the claims obvious.

20 Grounds three and four are very similar to grounds one and two,
21 where Young, which is Exhibit 1012, has been substituted for the Wolcott
22 reference. It is important to understand that Young has multiple different
23 embodiments. It's got two embodiments where the pellet is loaded from the
24 front, and in one case it's on the end and in one case it's in the middle, and
25 it's got this rear loaded embodiment that's discussed in Figures 8 and 9. I'm
26 seeing if I have 8 and 9 on here. I don't see it in the figures, and by the way,

1 the ground three starts at slide 46, but there's a teaching away argument I
2 just briefly want to address. The argument, as I understand it is you
3 wouldn't combine Young with Davidson or Fitz-Gibbon because it has rear
4 loading of the pellet, and that's just not true. Young has both rear back
5 loading as well as front loading embodiments, and I think that shows that a
6 POSA understands that you can do different, and it's easy to adjust it. A
7 front-loading, you could still have angled bristles that retain a pellet, rear-
8 loading you could have angled bristles that form a pocket and retain a
9 capsule. And so I don't think there's any possible teaching away in Young,
10 even though it does disclose in its discussions of Figures 8 and 9 that you
11 could have a rear-loading mechanism.

12 JUDGE FLAX: How does Young teach the angle of separation
13 requirements for the retention, retaining element?

14 MR. WILSON: So I'm not sure I understand the question, Judge
15 Flax, but in terms, I do think that --

16 JUDGE FLAX: I'm sorry, let me clarify. For example, in claim 10,
17 the retaining elements are required to be at least 108 degrees apart from one
18 another --

19 MR. WILSON: I see.

20 JUDGE FLAX: And I know there are other claims where they have
21 to be 180 degrees or some other --

22 MR. WILSON: Sure. Yeah no, that's a good question. So the
23 combination that's been proposed by Mr. Fletcher in the petition is to
24 essentially take the embodiment of Figures 10 and 11 where the capsule is at
25 the end and move it to the middle, similar to what we see in Figure 1. I
26 don't believe we have the same top-down perspective that we have for

1 example in Wolcott. Let me quickly look at Young. So we don't have a
2 nice top-down perspective that shows us the bristles surrounding the pellet.
3 What we have is disclosures that indicate that that's what retaining the pellet
4 in place, and so if you have the capsule, either where it's rear loaded, 8 and
5 9, and you make it from the front, or if you move the pocket from Figure 10
6 to the middle, you're going to have the bristles that surround the capsule.

7 JUDGE FLAX: So as long as they're all the way around in some sort
8 of circular fashion, they're going to meet these separation by degrees
9 requirements, is that right?

10 MR. WILSON: Yes, that is our position, because of the number of
11 bristles that you can see you're going to have to have multiple tufts of
12 bristles that surround the capsule in order to retain it.

13 JUDGE FLAX: Okay, thank you.

14 MR. WILSON: So let me -- and how much time is that, Keith? Five?
15 Because I want to preserve some time, I do encourage the panel to look at
16 the other slides on grounds three and four including Mr. Kodama's
17 testimony, but I think I want to jump ahead to the secondary consideration
18 which starts at slide 64.

19 JUDGE FLAX: Counsel, I thought it was interesting in your reply
20 that you listed several different categories of objective indicia of non-
21 obviousness. In reading the Patent Owner's response, I really only see that
22 they're arguing a long felt but unmet need. So why did you argue those
23 other things?

24 MR. WILSON: Well, let me say, we were -- it wasn't clear. The
25 secondary consideration argument of the Patent Owner was not clear in the
26 Patent Owner's response, but if you look at Mr. Kodama's declaration,

1 there's three or four pages and he kind of at least uses all of those words, he
2 uses the word copying, he uses success, and so we didn't know which
3 secondary considerations they were necessarily relying upon, so we went
4 ahead and tried to address them as best we can. What I would say is, the
5 theme for all of them, whichever ones are raised, including long felt need is,
6 they haven't met their burden. You know, it's their burden to show the
7 secondary consideration as well as show the nexus, and if the panel or you,
8 Judge Flax, believe that the only one they've read is long felt need, if you
9 look at the case law, which we do have a slide on, on long felt need, what
10 you need in the law for long felt need is you actually need the industry
11 expressly saying here's a problem we can't solve. And if you look at
12 Holbein (phonetic), they actually cite the previous patents that were filed by
13 Colgate, there's nothing in there in those patents that say we're having a
14 problem retaining a capsule, we need a different --

15 JUDGE FLAX: Let me tell you, counsel, you've got about two
16 minutes. You're under no obligation to stop then, but I'm just giving you
17 your warning.

18 MR. WILSON: Yes, thank you. So we don't believe that they've
19 presented any affirmative evidence, including in the Colgate patents, that say
20 we need a better way to retain a capsule. And in fact, when we're citing
21 patents that go back to the 1920s and 1930s that specifically say here you
22 can use angled bristles to retain a capsule, we don't see how they've met
23 their burden to show long felt need, and of course we've cited the case law
24 here that says look, where there is a clear case of obviousness, clear
25 combination, you can't rely on -- a secondary consideration is not going to
26 save the patent. So with that, unless there's any further questions on

1 secondary considerations, I will stop sharing and reserve the rest of my time
2 for rebuttal.

3 JUDGE FLAX: All right, well let's call it 11 minutes then, because
4 you quit a minute early there, so we'll say 11. I don't have any questions on
5 any of this right now for you, I don't know if my panel mates have any
6 questions for you. If not, then we can move onto Patent Owner's argument.
7 Counsel, if you will introduce yourself, please?

8 MR. ZITO: Yes, Joseph Zito, here for Patent Owner, with me is also
9 Benjamin Deming and Erik Lund.

10 JUDGE FLAX: Sir, if you would like to reserve some time for
11 rebuttal, how much would you like to reserve?

12 MR. ZITO: I'll reserve 15 minutes, I don't think I'm going to use the
13 whole 45 before that.

14 JUDGE FLAX: Let me set you up here, and I'll give you a reminder
15 as you approach 45 minutes, if you do, and like I said before, it's your time,
16 you don't have to stop then, I just want you to understand where you're at in
17 your argument, and you can begin when you're ready, sir.

18 MR. ZITO: All right, I'm going to go ahead and just begin by sharing
19 my screen.

20 JUDGE FLAX: Let's pause for one second, what are you about to
21 share, sir?

22 MR. ZITO: Some of the exhibits that have been submitted, by their
23 exhibit number, and highlighting some of the slides that were just presented
24 by the Petitioner.

25 JUDGE FLAX: Okay, so you're going to show evidence of record in
26 the form that it was filed?

1 MR. ZITO: Correct

2 JUDGE FLAX: And you are going to show your opposing counsel
3 slides that they just showed annotated by you, is that correct?

4 MR. ZITO: Not annotated by me, just as they were shown.

5 JUDGE FLAX: As they were shown.

6 MR. ZITO: Yes sir

7 JUDGE FLAX: Okay, I think that's probably fine. Do you have any
8 objection to that, Mr. Wilson?

9 MR. WILSON: No, I think that's permissible.

10 JUDGE FLAX: Okay, sorry for interrupting then, go right ahead, sir.

11 MR. ZITO: Not a problem. Okay, we are looking at Exhibit 107,
12 which is the independent claims, the charter claims. Here we have --

13 JUDGE FLAX: Before we get into your arguments on the merits,
14 may I ask a few questions just to clear some things up?

15 MR. ZITO: Certainly.

16 JUDGE FLAX: Are you arguing -- now I know you did not argue in
17 the briefs, so I think probably you can't, but are you arguing that a claim
18 construction is required in this case?

19 MR. ZITO: No, what we're arguing is that the proposed claim
20 construction by the Petitioner is incorrect and inappropriate in this case.

21 JUDGE FLAX: But you're still relying on the ordinary and
22 customary meaning as would have been understood by a person of ordinary
23 skill as of the invention for the meaning of all claim language?

24 MR. ZITO: Correct.

25 JUDGE FLAX: Okay, thank you for answering that. One other
26 question I have relates to the claim language that is in dispute here. So in

1 reading your brief, it appears to me that you are focused on whether or not
2 the prior art discloses the angled capsule retaining elements. I'm not sure if
3 other than perhaps motivation to combine arguments, you've argued over
4 any other specific claim language? Am I correct on that, or do you have
5 arguments that some other element of the claims are not disclosed in the
6 prior art?

7 MR. ZITO: Well our argument is that the capsule receiving zone is
8 not, for one, appropriately disclosed in the art, that where there is something
9 that could be a capsule receiving zone, it is not, because it does not have the
10 proper surrounding angled elements, angled capsule retaining elements,
11 and/or it is not a capsule receiving zone because it is actually a hole in the
12 back of the toothbrush head, which yes, you can put a capsule in there, but it
13 falls back out. It doesn't perform the function of receiving a capsule, it just
14 allows a capsule to pass through. So some of the things that are pointed to
15 as being capsule receiving zones we say are not there, and the ones that
16 could be are not because they do not receiving the capsule, they're just an
17 absence of something else.

18 JUDGE FLAX: Okay, all right, well that makes more sense why your
19 opposing counsel had those highlighted in his slides then. Thank you, and
20 I'm sorry for interrupting you at the very beginning, please go ahead.

21 MR. ZITO: Okay, and I'm going to go into a lot of detail about why
22 the claim construction that's being proposed is not correct and why, what we
23 understood to be the understanding of the Board in the initial decision to be
24 correct. And I'll go to that, here I think this is -- the Board's decision talks -
25 - well, let's go back here. In the claim element, the claim element we're
26 looking at is a pair of angled capsule retaining elements. It's not individual

1 angled bristles, it's not some angled bristles that act as -- it's capsule
2 retaining elements, and as Petitioner has asserted, this could be a 112, we
3 need to look at the specification. I think that's correct, but because the
4 Board said bristles in the plural, not a bristle, or as Petitioner has now
5 argued, an individual angled bristle. It was never our understanding --

6 JUDGE FLAX: May I interrupt you there, sir? What I heard you just
7 say is that your opposing counsel's, the Petitioner's position is that angled
8 capsule retaining element is a means plus function limitation is correct, and
9 we should interpret it that way, is that your position?

10 MR. ZITO: No, we haven't proposed that interpretation, so that's not
11 our position. We believe that the reasoning behind that is correct. And I can
12 go through a couple of slides, maybe it will become more clear.

13 JUDGE FLAX: I'm sorry, I'm going to let you go ahead, but I'm
14 feeling a little bit confused about where you are on the Petitioner's position
15 on claim construction. So I'm going to let go and I think maybe you'll clear
16 it up for me, but if not, I'll ask another question.

17 MR. ZITO: Sometimes I clear it up, sometimes I don't.

18 JUDGE FLAX: All right, let's give it a shot.

19 MR. ZITO: All right. If you look at the toothbrush as it is in the
20 specification, there are bristles that are in tufts here, and bristles that are in
21 tufts here, but there's a completely separate element, 26A, which is the
22 angled capsule retaining element. So it's not bristles, which are referred to
23 here, bristles which are referred to here, it's capsule retaining elements, it's
24 something different. And that's also on Petitioner's slide 74, where you see
25 it highlighted in red, or the capsule retaining elements.

26 JUDGE FLAX: What are we looking at there, sir? What is that?

1 MR. ZITO: That is slide 74 from the slideshow we just looked at.

2 JUDGE FLAX: And what is that that we are looking at?

3 MR. ZITO: Oh, this is a screenshot that Petitioner took from a
4 website selling my client's toothbrush. It's the colored version of what we
5 look at as Figure 1 from the patent. And we can just concentrate on Figure
6 1, that's fine.

7 JUDGE FLAX: I think that's probably better.

8 MR. ZITO: Okay. And so if you can -- and what Petitioner's trying
9 to do is read out the angled capsule retaining elements, element 26, by
10 proposing they are nothing more than, the retaining elements 26A are
11 nothing more than the bristles, 26. You can see it clearly, if you compare
12 Figure 1 to Wolcott. Wolcott just has bristles, it has nothing that's not
13 bristles. Same thing with Davidson, it just has standard toothbrush bristles,
14 and this part where some are missing. The patent claims an extra element
15 which are not called bristles, they're called angled capsule retaining
16 elements, 26A. If you give them no meaning beyond bristles, you have
17 written that element completely out of the claim, that's an element in the
18 claim, it's now gone. We have a plurality of vertical bristles and now 1.6
19 comes down to some more plurality of vertical bristles. So the problem with
20 this claim construction that's being proposed by Petitioner, which isn't the
21 claim construction they claim, is you've just taken 1.3 and 1.6 and made
22 them the same thing. You have a plurality of vertical bristles extending
23 upward from the front surface and a further plurality of vertical bristles
24 extending from the upward surface

25 JUDGE FLAX: Counsel, one thing that your opposing counsel said in
26 his opening argument was that your expert during deposition testimony

1 agreed that all the prior art teaches vertical bristles and angled bristles, just
2 by the way that toothbrushes are made, throughout perpetuity I guess. Is that
3 wrong?

4 MR. ZITO: No, that's correct, and I think that was slide 14 where he
5 showed that, okay, but that's correct, because -- that's correct about bristles
6 and angled bristles, but we're talking about bristles, a plurality of vertical
7 bristles, which includes some that are angled, some that are splayed out,
8 some of them straight, a bunch of random bristles, which is different from a
9 separately claimed element, a pair of angled capsule retaining elements.
10 And that's where the distinction lies.

11 JUDGE FLAX: Is an angled capsule retaining element not bristles, in
12 your opinion?

13 MR. ZITO: It's not, as many phrases have been used and I wrote
14 some of them down, it's not individual angled bristle, or some individual
15 angled bristles, it's not the regular bristles that splay out, it's a particular
16 configuration of something which can include bristles that creates an angled
17 capsule retaining element. That may be a bunch of bristles grouped together
18 in a tuft, then the entire tuft is turned at an angle, because that's what shown
19 here, it's not showing some individual bristles, which Petitioner keeps
20 arguing, individual bristles, individual bristles, said that many, many times,
21 individual angled bristles.

22 JUDGE FLAX: So understanding that this was going to be your
23 argument, your opposing counsel pointed to Fitz-Gibbons as teaching that,
24 that their bristles are as tufts, as groups, angled inwardly towards where the
25 toothpaste or tooth powder would be in that toothbrush, or if you used those
26 bristles in a toothbrush like Wolcott's, they would all be angled inwards

1 towards the pellet that Wolcott discloses. So if you made that combination,
2 why would that not be what you were arguing is required of your claims?

3 MR. ZITO: Okay, we go into detail in our briefing and through Mr.
4 Kodama's testimony as to why that won't work, but let me briefly go into it
5 here, too. If you take Figure 5 of Fitz-Gibbons, which is the figure they're
6 looking at, saying okay, now you've taken a number of bristles and you've
7 put them together and you mounted them at angles, now you have an angled
8 retaining element. There's a hole below that retaining element, so it won't
9 retain anything to begin with, secondly --

10 JUDGE FLAX: Would you have to have that hole if you just added
11 the bristles and their orientation to Wolcott?

12 MR. ZITO: Yes, because secondly, you can't insert anything from
13 this direction, the bristles are in the way, they're not going to flex out the
14 way, they're too angled, if you will, and they're intentionally too angled
15 because Fitz-Gibbons teaches putting in a dentifrice from the back, which is
16 a powder or possibly a gel, not a pellet. And in order for that to not just
17 come out the front, you have to have the bristles. Essentially what they've
18 taught is an upside-down toothbrush, where you put your toothpaste in from
19 the back side. It's not --

20 JUDGE FLAX: Okay, so your position is that -- excuse me. You just
21 can't have this orientation with Wolcott because Wolcott wants to put the
22 pellet in from the front side? Is that your argument?

23 MR. ZITO: Correct, that's what the patent teaches and that's what
24 Wolcott teaches is put it in from the front side, and then put it past
25 something that will -- well in Wolcott it doesn't hold it in place, you're
26 dropping a pellet into a hole.

1 JUDGE FLAX: So let me ask another question, what is it about your
2 invention that allows this to happen, where you say it would be impossible if
3 you combined Fitz-Gibbon and Wolcott? What does your specification
4 disclose that allows that, that is not in the prior art?

5 MR. ZITO: The specification discloses that the angled capsule
6 retaining elements allow the capsule to pass through and then be retained
7 securely therein. And it teaches that --

8 JUDGE FLAX: I guess my question is why can it pass through if you
9 angle the bristles, but it can't pass through if Wolcott and Fitz-Gibbon angle
10 the bristles? What do you disclose that's different?

11 MR. ZITO: The Fitz-Gibbon bristles touch each other at the top and
12 are angled too far over to allow anything to be pushed through, the bristles
13 would bend down, that's Young. Again, in Figure 5, if you tried to push a
14 capsule through the top there, the bristles would deform downwardly and out
15 the hole, you wouldn't get -- and if you did get the capsule past it, it would
16 fall out the hole in the back. Again, those bristles are not taught to retain a
17 pellet or an oral capsule or anything against the back surface, they're taught
18 to keep a liquid or powder dentifrice from falling out the front when you
19 load it from the back. It's very different, it doesn't say -- and again, this also
20 goes to secondary considerations, it's all kind of one, that toothbrushes such
21 as the primary references, toothbrushes such as Wolcott and Davidson have
22 been around for a long time, toothbrushes where you take out some of the
23 sets of bristles and put the dentifrice, in Davidson into a bowl at the bottom
24 which through suction keeps liquid dentifrice or gel dentifrice in place, or
25 here by putting a pellet in there in the empty space. But it doesn't teach the
26 secure manner of doing that by adding the element of angled capsule

1 retaining elements, okay? Again, it's yes, the prior art does show a hole and
2 you can put stuff in a hole, but stuff falls back out of a hole.

3 JUDGE FLAX: The hole, meaning in the top of it where the bristles
4 are creating a void, or in the back of it where there is a physical hole?

5 MR. ZITO: In the void in the bristles, through the top, in the void in
6 the bristles.

7 JUDGE FLAX: How does Wolcott hold its pellet in if it's not using
8 the angle of the bristles to do so?

9 MR. ZITO: Wolcott will provide some retention just by virtue of the
10 fact that some of the bristles randomly splay out from the group of bristles,
11 but again, Wolcott only teaches element 1.3, plurality of vertical bristles
12 extending upward from the front surface. It doesn't teach element 1.6,
13 specifically angled capsule retaining elements that are something different
14 from individual splayed out angled bristles, which only provide a little bit of
15 resistance, they do not retain the capsule. They provide some resistance to
16 the capsule falling out, they don't retain the capsule, and that's the
17 fundamental difference here.

18 And to assert that angled capsule retaining elements means any group
19 of bristles where some of them might be angled, you've now read 1.6 out.
20 And so it becomes necessary, even to have element 1.6, it becomes
21 necessary to argue Fitz-Gibbon, because none of the other references teach
22 anything like that, they just teach element 1.3, and as we know, you can't
23 have the same thing satisfy element 1.3 and satisfy element 1.6, different
24 elements are cited for the specific purpose of there has to be two different
25 things. So you can't say some of the 1.3 --

1 JUDGE FLAX: Counsel, if I agree, if we as a panel agree with the
2 Petitioner that Wolcott and Davidson and Young teach angled bristles,
3 which your expert agrees that they do, and that they also teach some of those
4 bristles are vertical, does your case fall if we find that? Or what else do you
5 have that might change our mind?

6 MR. ZITO: It doesn't fall because having a tuft, let's use that word,
7 with some of the bristles vertical and some of the bristles angled is element
8 1.3, it's some angled bristles or bristle, okay? It is not element, what's seen
9 as 26A, which is also element 1.6, which is the angled capsule retaining
10 element. So our expert agreed that element 1.3 includes vertical bristles and
11 some angled bristles, that's what a plurality of vertical bristles extending
12 upward from the front surface means, and that's what's indicated as element
13 26 in Figure 1. Element 1.6, which is 26A in Figure 1, is not some bristles
14 in a group of bristles 1.3 that happen to be at an angle, it's an intentionally,
15 purposefully added element, that the element is at an angle, not some of the
16 bristles in it, and it's at an angle such as retains the capsule, and we believe
17 simply by bringing this up that they agree, that it's angled bristles means is
18 the 1.6, it's a structure that's formed to retain the oral capsule in the capsule
19 receiving zone, it's not some --

20 JUDGE FLAX: Okay, so here we are. Are you advocating now that
21 we do a construction of this claim term under section 112-6, or section 112-
22 F, whichever one you want to look at? So is this a means plus function
23 limitation where we need to go and do a whole means plus function
24 construction on it?

1 MR. ZITO: We don't disagree, that could be an alternative, okay?
2 But again, that burden would then be on the Petitioner to have raised that
3 issue and insisted on that construction --

4 JUDGE FLAX: Well, they did raise it, it is in their petition. I believe
5 that we decided we didn't need to do that, because at that point at the
6 institution decision there was no dispute that the structure of angled bristles
7 would be within that construction, any way you did it, that claim limitation
8 included within its scope angled bristles. So that was our decision at
9 institution, but are you now saying that we should do a means plus function
10 interpretation of this to decide the case?

11 MR. ZITO: Our position is that angled bristles as shown as 26A
12 which form an angled retaining element clearly has to fall within it, because
13 that is the disclosed preferred embodiment, okay? But --

14 JUDGE FLAX: If we do a means plus function interpretation of this
15 claim and I think we all can agree that the specification other than the claims
16 doesn't use that term, right, it doesn't use the claim language -- I want to be
17 accurate, angled capsule retaining element anywhere other than the claims,
18 so how would you suggest we go about doing that means plus function
19 interpretation, if indeed that's what you're asking us to do at this point?

20 MR. ZITO: Very clearly. The specification includes the drawings,
21 the drawings distinguish between 26, which is vertical bristles which clearly
22 illustrate some that are at an angle, they're splayed out, and the drawing,
23 Figure 1, which is part of the specification, clearly distinguishes that from
24 26A which are the angled retaining elements. So if one looks at the
25 specification, including the drawings, the drawings clearly show that you
26 have to have a different structure, not just a few angled bristles over here,

1 you have to have a different structure that is purposefully, specifically
2 angled in so as to accomplish this function of retaining, for the simple reason
3 that the prior art, if you take out 26A, you get the prior art, which didn't
4 have that function. So the proper construction under a 112 or what we think
5 -- well we think that's the plain and ordinary meaning, the patent points out
6 26A, they are clearly different from 26, that's why we argued plain and
7 ordinary meaning. If the Board feels that a construction is necessary and a
8 112 function construction necessary, we believe you get to the exact same
9 result, it has to be 26A, it can't just be the random bristles that might be at an
10 angle in the tufts 26.

11 JUDGE FLAX: But 26A is angled bristles, is that right? In the spec,
12 that's what that refers to?

13 MR. ZITO: Correct, bristles in the plural, it's not an individual
14 angled bristle, singular.

15 JUDGE FLAX: And what are we seeing in this figure exactly, what
16 are those things that -- they look mostly like cylinders, but then at the top
17 they seem to have some whiskers on them, is that a special type of a bristles,
18 or is that supposed to show just a normal type of bristle, or do we have any
19 evidence on that at all?

20 MR. ZITO: It's a tuft, pardon that word again, of bristles that the
21 whole thing is angled in, so it can be an ordinary bristle angled in, or it could
22 be a special structure angled in to hold that in place. It's the orientation, the
23 location and the orientation that is being shown in Figure 1 and described in
24 the patent. A plurality of angled bristles adapted to retain an oral capsule in
25 the capsule receiving zone. So it's not just 26, which is a plurality of
26 bristles, it's 26A, adapted to retain.

1 JUDGE FLAX: So if we did a means plus function interpretation of
2 that and found that phrase right there to be the corresponding structure,
3 would that satisfy you?

4 MR. ZITO: I think there's that phrase and another phrase, but yes,
5 there's a phrase where they describe 26A. The angled bristles 26 are
6 preferably canted away from the vertical direction, towards the center, so
7 there's a description of 26A there and 26A here. They are selected to retain
8 an oral capsule predetermined size and shape. And again, or position is
9 they're different from 26, so they can't just be normal bristles that are there,
10 and they are called out as a separate element from 1.3 so they can't just be
11 normal bristles, they have to be special angled capsule retaining elements
12 which can be formed from bristles, but they can't be normal bristles, they
13 can't be a standard vertical set of bristles with some of them angling out or
14 splaying out at the top, it has to be the functionality --

15 JUDGE FLAX: Something like Fitz-Gibbons discloses? That would
16 not work with Wolcott, right?

17 MR. ZITO: Correct.

18 JUDGE FLAX: Is that accurate, there would have to be something
19 like Fitz-Gibbons?

20 MR. ZITO: Something like Fitz-Gibbons that is purposefully put in at
21 an angle, yes.

22 JUDGE FLAX: Okay, if we disagree with you that Fitz-Gibbons and
23 Wolcott aren't combinable and we believe that they could be combined in
24 that way, is that a severe problem for you, or is there any other reason that
25 you think you might win this?

1 MR. ZITO: You're kind of asking the conclusion in the question. If
2 you found that Wolcott and Fitz-Gibbons could be combined to find all the
3 elements of the claim, then obviously that would be a significant problem,
4 but again we feel there are reasons why you can't combine them, reasons
5 why if you combined them you would not have a workable product, as we
6 put forth in our briefing, and that one would not be motivated to combine
7 them. And again, this also goes to the long felt need that toothbrushes
8 missing regular bristles without something added have been around, and
9 Fitz-Gibbons has been around, but no one was inclined or motivated to
10 combine them because they teach away from each other, and that also shows
11 the long felt need of properly retaining a capsule or other element not being
12 satisfied.

13 JUDGE FLAX: You've got about 17 minutes left. I would like you
14 to clarify your position on your objective indicia of non-obviousness. Am I
15 correct there that you are only arguing a long felt and unmet need, or did I
16 miss other arguments that were in that section of your response?

17 MR. ZITO: The other argument was there is non-conclusive evidence
18 of copying, and we show that with the original Colgate product did not have
19 capsule retaining means, it just had if you will a pocket to put the capsule in.
20 After our clients, after the '123 application was published, there was
21 adopted, and we showed that in the subsequent continuation in part, there
22 were capsule retaining elements added, and that's the product that has been
23 successful. And we agree that some of the success is touted on its portability
24 and disposability, but the one that was in the earlier application was also
25 disposable and portable, but it did not have capsule retaining elements and
26 that's why it did not become a commercial product. Do we have direct

1 evidence of that? No, but we believe the circumstantial evidence shows
2 copying also.

3 JUDGE FLAX: Did they have access to your clients' designs before
4 they came out with their design?

5 MR. ZITO: Yes, it was published, the application was published, yes.

6 JUDGE FLAX: Before they had their invention disclosure, which I
7 think there's some evidence of that having a certain date, was that before or
8 after the publication of your --

9 MR. ZITO: That evidence was submitted late by Petitioner, so we
10 didn't have that evidence before we made our evidence of copying.

11 JUDGE FLAX: Okay.

12 MR. ZITO: But I don't think it predates -- and that's part of the,
13 there's a sub-dispute about new evidence being added in.

14 JUDGE FLAX: Did you ever actually allege copying in your
15 briefing? I don't remember seeing that.

16 MR. ZITO: No, we did not allege copying in our brief.

17 JUDGE FLAX: So the only actual allegation is long felt but unmet
18 need, is that right?

19 MR. ZITO: Right, and the copying evidence satisfies that too,
20 because they had a product that they did not launch because it had the need
21 of retaining elements, and whether they realized they needed better retaining
22 elements, which they then applied for a patent on, before or after seeing our
23 disclosure, it still shows the long felt need for, according to them since
24 before World War II, it was not satisfied until our clients satisfied it. And
25 whether they copied or came up with it subsequent on their own -- because
26 they don't claim to have invented it before the patent that's being examined,

1 they claim to have come up with it independently after, that still shows the
2 long felt and unsatisfied need, and it's either copying or independent
3 invention came up with it.

4 JUDGE VALEK: Counsel, this is Judge Valek, I have a question. Is
5 there any evidence in the record that they ever saw your published
6 application, published patent, whatever, such that they could copy it?

7 MR. ZITO: There is evidence, and I believe it's in the record, where
8 the inventors reached out to Colgate and to Crest, which is Proctor and
9 Gamble, about their product, including the dispenser that dispenses the
10 dentifrice and the toothbrush. So they were apprised of it, that is correct.

11 JUDGE VALEK: That evidence that you think is in the record, I
12 would appreciate if you could point us to it. If you don't have the exhibit
13 number in mind now you could come back to it later, but I want to ask you
14 about that evidence, does that evidence actually disclose these angled
15 bristles or angled pellet retaining elements?

16 MR. ZITO: Yes, it disclosed the published application. But again,
17 based upon their submission of records which we only saw just recently,
18 they may have already had an internal invention disclosure statement a few
19 months before they received the letter indicating the publication from the
20 Patent Owner. So I agree that their evidence raises a question that we were
21 not aware of as to whether or not they copied or independently invented
22 subsequent to our invention.

23 Let me try and put the timeline together. Our client invented, filed an
24 application, the application was published. Published application was
25 disclosed to Petitioner. After that, a year after, or a few months after that,
26 Petitioner filed their patent application which included retaining elements,

1 which would indicate copying, okay? And then a year later launched the
2 product. Prior to all of that, Petitioner had filed an application for the exact
3 same toothbrush that did not have any retaining elements whatsoever,
4 including no bristles or anything, just a dentifrice sticking in a little fold. So
5 there was the disclosure of the retaining elements and subsequent
6 modification of Petitioner's patent application to add retaining elements to
7 their application. In the last filing of Petitioner, they said oh no that didn't
8 happen, we can go before the publication of your application with an
9 invention disclosure document, an internal document that was never
10 circulated anywhere, to show that the idea of needed some sort of retaining
11 element already existed at Petitioner prior to the publication of the
12 application.

13 I know, the timeline gets a little confusing, it jumps back and forth,
14 but the evidence is there and supports at least long felt need and the need for
15 some sort of retaining that was not satisfied prior to the filing of the patent at
16 issue here. Does that answer your question or did I make it more confusing?

17 JUDGE VALEK: I think I understand your position.

18 JUDGE MAJORS: I have a question, Mr. Zito, this is Judge Majors.
19 How are you defining the need that is being met?

20 MR. ZITO: In all the prior art, and they admit this, and we've cited it
21 in our briefing, you're putting the dentifrice into the hole, into the back, into
22 the end, wherever you're putting it in, and then brushing your teeth right
23 away. And it does say that it holds it temporarily, we'll keep it in place on
24 the toothbrush, and actually in one of the Davidsons it actually just sits on
25 top of the bristles, you just take the dentifrice, sit it on top of the bristles, and
26 then you pop it in your mouth and brush your teeth. The need was for

1 something that would make it portable, that you could preload the dentifrice
2 and take it with you, carry it upside down, sideways, bounce it around, and
3 the dentifrice would still be there, that's the need.

4 JUDGE MAJORS: Okay, does your client's claim, does it require
5 some level of durability with the capsule being held in place no matter how
6 the toothbrush is moved, or just that be held in place for some transient
7 period of time?

8 MR. ZITO: There's not a defined period of time in the patent. The
9 holding in place is that its capsule retaining elements, is what -- if you retain
10 something, you hold it in place, but there is no required duration claimed,
11 that's correct.

12 JUDGE MAJORS: Okay, so assume for the moment, even if the
13 panel agrees with you that the bristles in Wolcott are holding its pellet in
14 place in a manner different than what is claimed, doesn't the Wolcott
15 toothbrush still hold a dentifrice, a toothpaste pellet in place on a
16 toothbrush?

17 MR. ZITO: Wolcott as opposed to Fitz-Gibbons. It will keep it from
18 rolling off the side because it's in between bristles, but it won't keep it from
19 falling out the front, no.

20 JUDGE MAJORS: Do you have any evidence of that?

21 MR. ZITO: None of the references recite retaining, retention in
22 different orientations. Wolcott does say, and I don't have the exact, that will
23 help keep it in place if the toothbrush is inadvertently inverted, okay? So it
24 recognizes that inversion is not part of its invention, that it's just holding it
25 place so you can stick it in your mouth and brush your teeth, but it does say
26 that there will be some holding effect even if inverted, just by the

1 engagement between the sides of the pellet and the normal bristles. But that
2 is not the -- again, the art is that that's not the angled capsule retaining
3 element, that is simply a byproduct of missing some of the bristles and
4 putting dentifrice in between there. The other ones talk about powders,
5 pastes, and the like, and that's not the same kind of holding, they hold by
6 sticking to the bristles, and suction as one of them says, in the hole in the
7 bottom. So they don't perform that same function. It's better than having it
8 -- let me find the one that shows it on top. That's Wolcott, and Wolcott
9 agrees -- it says it's down in there and it keeps it from rolling off. Davidson
10 --

11 JUDGE MAJORS: Well I believe your own expert said it, the bristles
12 in Wolcott will retain the pellet in place.

13 MR. ZITO: He may have used the word retain, but -- we don't
14 disagree that if you remove some bristles and put the right size dentifrice in
15 there that it will be held more so than if you don't have it, but if you look at
16 Young, Young doesn't even make that distinction. You put it on top, it
17 keeps it from rolling off, it's not to keep it from falling out.

18 JUDGE MAJORS: Sorry to interrupt you, I wasn't asking about
19 Young, I'm just trying to understand your position on why Wolcott wouldn't
20 meet the need as you've defined it.

21 MR. ZITO: Because it's not designed to retain the capsule, and it
22 doesn't have that extra element. It incidentally uses element 1.3 if the
23 capsule is of the right size, and Wolcott doesn't say you have to have a
24 capsule of the right size, nor does Davidson or any of the others, they just
25 say you now have this missing bristles and you can put a capsule in there,
26 you can put a dentifrice in there, you can put a liquid in there, powder in

1 there. It's a place to put, not a place to retain the toothpaste, tooth powder,
2 or the tooth pellet. And you can put it in there and you can place it in there
3 because there's a void to place it in, and since you're just going to take it and
4 then brush your teeth it doesn't need to be retained there. It says an
5 incidental factor of having missing bristles, which are 1.3 in our claim not
6 1.6, isn't the same as specifically claiming the 1.6 element, the retaining
7 element, which again, going back to how we're going to interpret it as a 112,
8 the bristles in Wolcott and Davidson and the like are there to brush your
9 teeth, they're not there for the purpose of retaining a capsule, so they're not
10 retaining elements. Now will they, if it's the right size? Sure. Will they if
11 you tilt it slightly to keep it from rolling off the toothbrush, assuming it's
12 round, yes. If it's a square dentifrice it might not even roll off the top of the
13 bristles. Again, these are incidental consequences but not a claimed
14 element, nor does it satisfy the claimed element.

15 JUDGE FLAX: Do you think that if it's inverted as you said, I mean
16 it's designed to hold that pellet inside the recess, inside that opening in the
17 bristles, even if it's inverted, why do you say that's not intentional if it's in
18 the disclosure of Wolcott?

19 MR. ZITO: It's in the disclosure of Wolcott --

20 JUDGE FLAX: Just to be clear, I'm talking about -- I don't know
21 what column, it says one, two, three, column four, beginning at line four. So
22 it says, for example, should the brush be accidentally inverted before
23 inserting in the mouth, the pellet will still remain in its recess, its portion
24 12A then engaging the water expanded tuft portions or moving into
25 engagement therewith, or herewith maybe it says. So why is that not
26 intentional? Why are the bristles of Wolcott not intentionally designed to

1 spring back and retain the pellet even when the brush is inverted? And I'll
2 give you some extra time, you've got about two minutes before you eat into
3 your reserved time, but because I know I'm asking this question I'll give you
4 a little bit extra.

5 MR. ZITO: I think the fact that it says should the brush be
6 accidentally inverted. So it's not the purpose or intent of Wolcott to have
7 retaining elements that will retain it if it's inverted, it's the purpose, the
8 design of Wolcott to remove some of the normal bristles to create a void into
9 which you can put a pellet.

10 JUDGE FLAX: So if it's intentionally inverted it won't work, is that
11 the point?

12 MR. ZITO: No, it's not that, it's that there are many things -- okay,
13 I'll take a large pair of pliers. You can certainly drive a nail with a large pair
14 of pliers, but it doesn't make the large pair of pliers a hammer, and if the
15 hammer claim says a head portion designed for providing maximum impact
16 to a nail to drive it in an efficient manner or whatever, that's a hammer. If I
17 take a pair of pliers and whack a nail with it, I can drive the nail, but that's
18 not the design of the pair of pliers and it doesn't satisfy the claim to a
19 hammer. Here it's the same thing, Wolcott teaches that if I take some
20 bristles away I can throw some dentifrice in that empty space, by the way, if
21 it's the right size or maybe if it twists a little bit and you accidentally invert,
22 the pellet will still remain in its recess portion than engaging the wider
23 expanded tuft portion or moving into engagement therewith. In other words,
24 it's not necessarily even engaged with the tufts, it's not necessarily being
25 retained by the tufts, because that's not the purpose and that's not what it's
26 teaching, but should you accidentally turn it over it's less likely to fall out

1 than if you did not have an opening, okay, if you just had it on top. I don't
2 disagree with that, but that doesn't make it satisfy the claims, it's an
3 accidental, not even incidental factor that can be accomplished, but it's not
4 retaining elements that are --

5 JUDGE FLAX: Let me ask you this, for that same portion. If the
6 pellet remains in its recess when the Wolcott brush is inverted, are the
7 bristles retaining the pellet?

8 MR. ZITO: Again, it's a question that has the conclusion in it, that's
9 fine, yes.

10 JUDGE FLAX: I mean that seems a reasonable question, something
11 is retaining the pellet, is it the angled bristles?

12 MR. ZITO: Right, if I take a pellet and moisten it and stick it on top
13 of a normal toothbrush, it will be retained by the bristles because it's gotten
14 kind of sticky because I've wet it slightly. Is that element 1.6, angled
15 retaining elements? No it's not. If a bristle was vertical it would also retain
16 a pellet. If I put a pellet down inside a void and all those bristles are
17 perfectly vertical and that pellet is the right size, the resistance against the
18 side of that void is going to retain it too. Now they're not even angled.

19 JUDGE FLAX: Well if that's true then why did all of the prior
20 designs of Colgate fail according to you, that didn't have the angle?

21 MR. ZITO: I didn't test the product, but I'm guessing because the
22 pellet was too small for the hole. If you have a pellet that's the same
23 diameter or almost the same diameter as the hole then it will rub against the
24 sides of vertical bristles and be retained thereby. But that would clearly not
25 be angled retaining elements, and our point is that just because some of the
26 bristles bend in, they are not angled retaining elements as taught in the

1 patent, look at Figure 1, those are different structures that are completely
2 bent in intentionally to hold it and that they go over the top, they're not some
3 fuzzy element of something else that isn't there for that --

4 JUDGE FLAX: Okay, I get you, Mr. Zito. As promised I gave you a
5 couple extra minutes there because I asked a tough question there. You are
6 not obligated to stop at this point for your opening argument, but if you want
7 to retain your full 15 minutes, now would be the time.

8 MR. ZITO: If there's no other questions, I'll go ahead and stop.

9 JUDGE FLAX: Okay, we'll keep your 15 minutes for the end, Mr.
10 Wilson, if you want to have your rebuttal argument you'll have 11 minutes
11 and you can begin when you're ready.

12 MR. WILSON: Is the panel able to see the slide deck again?

13 JUDGE FLAX: Yes.

14 MR. WILSON: Okay, thank you. I'll try to go through argument by
15 argument. I think one of the most important points that I want to make is
16 that the Patent Owner continues to conflate, confuse the difference between
17 bristles and tufts. So here, and I don't really think it's disputed, but their
18 expert who is a POSA, Mr. Zito is not, to my knowledge, there is a
19 difference when you're talking about a tuft you're talking about a cluster of
20 bristles, and when the patents, including the '332 Patent, use the word
21 bristle, they're talking about individual bristles. And I think --

22 JUDGE FLAX: So Counsel, I have a question on this. Your
23 opposing counsel was pointing to the illustrations and related disclosure in
24 the '332 Patent, so when you look at Figure 1, reference number 26A is
25 pointing to a sort of finger-like projection that the specification describes as
26 angled bristles. When it does that, it appears to be pointing at sort of a

1 grouping of them, is there a reason that that would not be the corresponding
2 structure, are angled bristles in view of that necessarily a group of them, or a
3 tuft as Patent Owner wants?

4 MR. WILSON: Yeah, I mean again, this patent uses the term bristle,
5 they've admitted this is plain meaning, Mr. Kodama admits they're using
6 bristle for a claimed meaning. What I see in Figure 1 is kind of a rubber,
7 cylindrical, individual bristle.

8 JUDGE FLAX: Counsel, we lost your audio.

9 MR. WILSON: Can you hear me?

10 JUDGE FLAX: Yes.

11 MR. WILSON: Okay. So the patent uses the term bristle, according
12 to Mr. Kodama, and that's plain meaning, it's referring to an individual
13 bristle. So when it says here in the spec that there's a plurality of angled
14 bristles, what I understand again, using plain meaning, is that that circle, that
15 receiving area has individual like large rubber individual bristles. That's,
16 again, Mr. Kodama admits bristles means bristles, it doesn't mean tuft, and
17 the patent never refers to a tuft, period. We also showed the commercial
18 embodiment, or at least from toothpods.com, again it appears what their
19 design was, was kind of larger, rubber bristles, but they're still individual
20 bristles. And I think when you apply the claims, according to their plain
21 meaning, and it has to cover angled bristles, you have to use the term bristle
22 to mean individual strand. And so you know, we're not reading out any
23 element of the claim by saying that Wolcott has both vertical bristles and
24 angled bristles. We reference here, Mr. Kodama --

25 JUDGE FLAX: Somehow 26 there, if you go back.

26 MR. WILSON: Sure.

1 JUDGE FLAX: It's a confusing patent. 26 is described in the
2 specification as a conventional straight bristle, and yet it still looks like that
3 cylindrical thing with the fuzz on top, which doesn't -- I mean maybe it's a
4 matter of drawing is hard to capture what it looks like, but the prior art
5 sufficiently captures the look of a toothbrush's bristles, so I'm finding it hard
6 to reconcile that 26 is a conventional straight bristle and 26A is something
7 other than a leaned-over version of that.

8 MR. WILSON: Yeah, I understand, it's obviously very easy, going
9 back to the 20s and 30s to show a cluster or a tuft of bristles if you want to,
10 and that's not what we see in Figure 1. I'm not sure it really matters, I mean
11 these claims have to be interpreted according to what a POSA would think,
12 and we know we've got dependent claims that say angled bristles, so we
13 know, going back to where we began, the claim term, angled capsule
14 retaining element, has to cover angled bristles, individual angled bristles,
15 and there's nothing in the spec, nothing in the claims that would somehow
16 disclaim a tuft of bristles that has both vertical bristles and angled bristles,
17 and we cited it I think on slide 24, the testimony from Mr. Kodama, at least
18 we cite it, and I looked it up during Mr. Zito's argument. 'Do you agree that
19 in Wolcott each of the tufts of bristles that surround the receiving area, each
20 of those tufts will have vertical bristles located towards the center of the
21 tufts?' 'Yes, those bristles tufts have bristles that are vertical.'

22 That's Mr. Kodama's admission. So he understands the difference
23 between a bristle and a tuft as a POSA would, and we are not reading out
24 26A, the tufts in Wolcott and the other prior art include both vertical bristles,
25 which is element 1.3, and angled bristles, which is element 1.6. and I don't
26 see how there's any support in the specification or the claim language where

1 you would somehow construe this claim as to read out use of angled bristles
2 and vertical bristles the way that Wolcott does it.

3 In terms of the retaining issue, I just don't understand where Patent
4 Owner is coming from. The Wolcott reference very clearly says, and I think
5 it was you, Judge Flax, that cited this section from Wolcott that's at the
6 bottom of slide 27, the pellet will still remain in its recess. So there's
7 nothing in the claims that require some kind of special amount --

8 JUDGE FLAX: Sir, we lost your feed there for a second. We can
9 hear you now.

10 MR. WILSON: Okay. So there's nothing in the claims that require
11 any special amount or extent of retention, and if you look at the prior art
12 including what we've quoted in these slides, it's clear that the bristles do
13 retain the dentifrice, and that's all that's required, it's an angled capsule
14 retaining element, it doesn't require any special retention. And I think I
15 heard Mr. Zito admit that yes, the angled bristles in the prior art do provide
16 some retention, that Wolcott's bristles do retain, and even more importantly
17 we've got their expert, a person of skill in the art, making the same
18 admissions, I've quoted those in slides 28 through 30. They do have angled
19 bristles, they do angle toward the middle, they do retain. That's what's
20 required by these claims and their own expert has admitted in addition to our
21 expert's testimony and the patents themselves that Wolcott satisfies the
22 requirements of that claim language. I think it's also pretty clear that it's
23 intentional, and Wolcott mentions multiple times that the expanding bristles,
24 the resiliency secure and retain the pellet in place. Clearly the inventor
25 understood that these angled bristles provided that benefit.

1 In terms of copying, I'm going to go to slide 72, Mr. Zito's -- go a
2 different way. The timeline is just wrong, there is unrefuted, well
3 corroborated testimony that the Colgate engineers came up with what I
4 would call this gemstone design, that's how they referred to it, holds it like a
5 diamond ring, this gemstone design in February of 2007. That's not been
6 rebutted, it's clear, it's corroborated, the first publication of any of the Noble
7 patents was in 2009, and even that one didn't use the term angled capsule
8 retaining element, it just used angled bristles, and yet the 2007 disclosure
9 uses a small little plastic gemstone retaining item. There's just no evidence
10 or suggestion of copying, and I really think we really know what's going on
11 here, which is it's the opposite. The Wisp was released in 2009, and at that
12 time Noble's patents only referred to angled bristles, there was no discussion
13 of a generic angled capsule retaining element, and it wasn't until three years
14 later -- this is the first time that Noble decides that it's not angled --

15 JUDGE FLAX: Counsel, you only have about two minutes left, I
16 don't particularly find any of these arguments persuasive. So let me ask
17 another question. Your opposing counsel said that upon combining Fitz-
18 Gibbon with Wolcott, you would wind up with something where you would
19 not be able to put the capsule in through the front of the bristles. Do you
20 have any response to that, or do you agree with that?

21 MR. WILSON: No, I mean I disagree, I think this goes back to the
22 extensive case law that a person of skill in the art is not an automaton, they
23 have common sense, these are very simple, mechanical designs. So if what
24 we're starting with is Wolcott which is a front-loaded toothbrush, right,
25 that's what the combination -- or Young, a front-loaded embodiment of
26 Young, and so obviously if a person of skill in the art decides that they want

1 the extra retention of Fitz-Gibbon, if they needed it, they're obviously not
2 going to make the Fitz-Gibbon tufts go in at such an angle that you can't
3 load it through the front. So I think our expert, Mr. Fletcher, addresses that,
4 but to assume that we have to bodily incorporate everything from Fitz-
5 Gibbon including the fact that it can only be loaded from the rear, or even
6 the exact angle or width of the tufts, I think that's very inconsistent with
7 KSR and its progeny in terms of how a person of skill in the art is going to
8 combine things, especially where we're looking at very straightforward, very
9 predictable types of modifications.

10 JUDGE FLAX: All right Counsel, well that bell signifies the end of
11 your time. I don't have any other questions for you, but I will leave open to
12 my panel mates in case they do. Doesn't look like they do, so we can move
13 on to Mr. Zito and Patent Owner's rebuttal. Sir, you'll have 15 minutes, you
14 can start when you're ready.

15 MR. ZITO: Yes, thank you, certainly, Your Honors. I'm going to
16 repeat what I said before, if you take the Petitioner's position that any
17 individual bristle is bristles, so he goes from individual bristle, the language
18 says bristles, which is plural, but if you take that then you've eliminated 26A
19 and you just have a brush full of 26, which are standard bristles that are
20 clumps and groups of bristles, and I don't think it matters whether they're
21 single, individual rubber bristles or a group of flexible bristles or the like,
22 okay? Secondly, if you take anything that might help hold a dentifrice in
23 place, and say now this satisfies element 1.6, you have again read out
24 element 1.6, just to save some extra bristles, okay?

25 And if Wolcott says the dentifrice stays in there perfectly fine with
26 these random splayed out bristles, it's okay if you accidentally turn it over,

1 then where is Wolcott's motivation to combine itself with the severely
2 angled bristles of Fitz-Gibbon, because it's already there, there's no
3 motivation to make more? So it goes back to the same argument, there's 26
4 and 26A, there's element 1.3, which is 26, the standard bristles on a brush,
5 and there's element 1.6, which is 26A, the particularly angled retaining
6 elements, and there's nothing in the art that says Wolcott needs those or
7 Wolcott would like those or any other would like those, and so there's no
8 reason to combine, and if you did combine, again as it's detailed in our
9 briefing, and from our expert, you can't combine them, they all have
10 problems. And that's it, I don't need to use up all my time, if there are any
11 questions.

12 JUDGE FLAX: Okay, does anyone else have any questions? Okay, I
13 think we don't have any other questions for anybody, so we can now
14 consider oral argument concluded, and at this point the record is closed. We
15 will consider your arguments made in briefing, in view of what you all have
16 had to say today. We thank you all very much for your time and hope you
17 have a very nice Halloween.

18 MR. WILSON: Thank you very much, have a good day.

19 MR. ZITO: Thank you, have a good day.

20 (Whereupon, the above-entitled matter went off the record at
21 3:58 p.m.)

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