

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

DBR FINANCE, INC.,  
Petitioner,

v.

RUGGED CROSS HUNTING BLINDS, LLC,  
Patent Owner

---

IPR2024-00291  
Patent 11,399,535 B2

---

Record of Oral Hearing  
Held: March 14, 2025

---

BEFORE: KEVIN W. CHERRY, CYNTHIA L. MURPHY, and  
JASON W. MELVIN, Administrative Patent Judges.

IPR2024-00291  
Patent 11,399,535 B2

APPEARANCES:

ON BEHALF OF THE PETITIONER:

THOMAS ESCHWEILER, ESQUIRE  
Eschweiler and Potashnik, LLC  
195 South Main Street  
Suite 400  
Akron, OH 44308  
(216) 502-0600  
teschweiler@eschweilerlaw.com

ON BEHALF OF THE PATENT OWNER:

ROBERT WOLTER, ESQUIRE  
Wolter Van Dyke Davis, PLLC  
1900 Summit Tower Boulevard  
Suite 140  
Orlando, FL 32810  
(407) 926-7700  
rwolter@savvyiplaw.com

The above-entitled matter came on for hearing on March 14, 2025,  
commencing at 1:00 p.m., via video teleconference.

P R O C E E D I N G S

- - - - -

JUDGE CHERRY: Good afternoon, everyone. This is Judge Cherry and with me here in Alexandria is Judge Melvin, and also on the line is Judge Murphy. Will the parties please make their appearances?

MR. ESCHWEILER: Yeah. Good afternoon. My name is Tom Eschweiler. I represent the Petitioner, DBR Finance, in this proceeding.

JUDGE CHERRY: Welcome. Patent Owner? You're muted.

MR. WOLTER. I apologize. My name is Robert Wolter and I'm representing the Patent Owner, Rugged Cross Hunting Blinds, in these proceedings.

JUDGE CHERRY: Great, thank you. Thank you, Mr. Wolter. Welcome. So this is the oral hearing in DBR Finance, Inc. versus Rugged Cross Hunting Blinds, LLC, case IPR2024-00291, involving U.S. Patent Number 11,399,535. In these proceedings, the Petitioner bears the burden of proof and so they'll go first, followed by the Patent Owner. The parties can each reserve rebuttal and surrebuttal time, respectively. After the initial presentations, then the Petitioner can offer its rebuttal, if any, and then followed by the Patent Owner offering a surrebuttal, if any. Petitioner, how much time do you want to reserve for your rebuttal?

MR. ESCHWEILER: I would like 10 minutes for my rebuttal and 50 minutes for my initial presentation.

JUDGE CHERRY: Excellent. And I'll ask Patent Owner when we get to them, how much time they want to reserve. But again, Petitioner, because you have the burden of proof, you go first, and you can begin

1 whenever you're ready.

2 MR. ESCHWEILER: All right. In terms of the demonstratives,  
3 are those going to be provided by the panel on the screen or are you wanting  
4 those to be shared by us?

5 JUDGE CHERRY: We all have copies of them on our computers  
6 here and so we can follow along. We only ask that you give us the slide  
7 number so that the record can be clear, and the Court Reporter can --

8 MR. ESCHWEILER: Okay. That's actually --

9 JUDGE CHERRY: -- know where we're at.

10 MR. ESCHWEILER: Sure. That works well for me. I'll go ahead  
11 and give you the slide number as I go.

12 JUDGE CHERRY: Excellent.

13 MR. ESCHWEILER: All righty. Well, thank you. I'm going to  
14 get started on Slide Number 2. The presentation I'll be going through this  
15 afternoon is going to focus primarily on Ground A and our arguments as to  
16 why the combination of Whybrew and Strength teach all of the elements of  
17 those claims, thereby rendering them obvious and invalid. In doing so, I'm  
18 going to be addressing why a person of ordinary skill is motivated to modify  
19 Whybrew, the primary reference in view of Strength, primarily for the  
20 motivation -- the nature of the problem to be solved the same in both cases.

21 I'm going to address the fact that the Patent Owner is incorrectly  
22 asserting that Strength does not disclose a mesh. I'm going to go into the  
23 claim language of the '535 claims to show that despite the fact of our  
24 contention that the Strength reference does disclose a mesh with holes, that  
25 the '535 claim panels do not require holes to be in the panels. And then I'm  
26 going to go into the weaknesses, in our view, of Patent Owner's secondary

1 considerations of non-obviousness.

2           Next slide, Slide 3, I'm going to go into the '535 patent. Slide 4.  
3 As can be seen in Figure 9, this shows Patent Owner's pop-up blind. It's a  
4 hunting blind that has flexible frame members, as you can see in the figure  
5 there, shown with the red arrows 14 and 16. Those flexible frame members  
6 are spaced apart from one another, along the sides and along the top.

7           Next slide. This can be seen in Figures 1A and 1B. The hunting  
8 blind has panels that extend between the flexible frame members that  
9 include a material 26 of fabric. That panel of fabric includes three elements,  
10 according to the claims. A mesh material -- and that is shown in Figure  
11 1A -- a mesh material with a first side 27 that has a camouflage pattern on it.  
12 And in Figure 1B, a second side of that fabric has a dark color coating on it.

13           Next slide. This mesh material with its panel on one side and dark  
14 color on the other side provides for a one-way viewing feature, and that one-  
15 way viewing is a situation where the exterior of the blind is visible from the  
16 blind interior, that is the occupant of the blind can see outside, while the  
17 interior is not visible from the blind exterior, which means that either game  
18 or someone outside the blind cannot see in. And that one-way viewing is  
19 effectuated by some of the features shown in Figure 1C.

20           Radiation 110a from a hunter inside the blind is incident on this  
21 dark color on the mesh material 26. A first portion of that radiation is  
22 absorbed by the dark color coating. A second portion is reflected off that  
23 coating, and a third portion, 114a of that radiation, is transmitted through the  
24 mesh material.

25           Slide 7. Still referring to Figure 1C, radiation from the sun is  
26 incident on the first side which is the camo pattern side of the mesh material,

1 and a portion of that 118 is reflected off the camouflage pattern back toward  
2 the game outside the blind. When the intensity of that reflected portion 118  
3 is significantly greater than the transmitted portion 114a from within the  
4 blind, the interior of the hunting blind is much darker than the exterior,  
5 meaning there's a significant light differential between those two. And  
6 consequently, the interior of the hunting blind is not visible from the  
7 exterior.

8           Next slide. I want to go into the primary reference, Whybrew.  
9 Next, Slide 9. Whybrew discloses a portable hunting blind that also includes  
10 flexible frame numbers, 41 through 45, having a body material, number 20  
11 and number 37, that includes a mesh fabric window 24, and those are  
12 supported on the flexible frame members, 41 through 45.

13           Next slide. The mesh window allows an occupant of the blind to  
14 see from the interior outside but does not significantly block light from  
15 entering the interior of the blind. A combination of the mesh window 24  
16 with the less translucent material of the rest of the body of the blind provides  
17 a one-way vision characteristic that allows an occupant to see outside, but  
18 observers, including animals, to not see into the blind. And specifically,  
19 according to the teaching of the Whybrew reference one-way vision  
20 characteristic, results form the light differential between the exterior and the  
21 interior wherein the sections of the camouflage body are less translucent  
22 than the mesh material, and that renders the interior of the hunting blind  
23 darker than the exterior. So therefore, Whybrew is also doing a one-way  
24 vision characteristic.

25           Next slide. Strength references of secondary reference. Next,  
26 Slide 12. Strength discloses a textile mesh material for use in hunting

1 blinds. This mesh material has a camouflage pattern on the first side 111,  
2 and a dark color coating on a second side, opposite the first side, that  
3 contains -- and the example is provided -- a carbon black pigment. The  
4 mesh material has a visible light transmission through that, such that  
5 shadows, hunters, or others inside the blind are not visible to the external  
6 environment.

7           Next slide. The dark color coating of Strength provides barrier to  
8 some of the light on the second side of the material that causes the interior of  
9 the hunting blind that uses this textile be darker than the exterior, so that the  
10 shadows are not visible on the opposite side that is exterior to the  
11 camouflage material. Figure 2 of Strength just illustrates example data that  
12 was collected that shows that you can vary the darkness of the dark color  
13 coating on the second side to vary the amount of light transmission through  
14 the material.

15           Next slide. So the graph shows that as you increase the amount of  
16 black pigment in the coating, that is increasing making it more dark, the  
17 amount of light transmitting through the textile decreases. So Strength  
18 discloses a mesh fabric for use in hunting blinds that has a camouflage  
19 pattern on the first side, a dark color coating on the second opposite side,  
20 and Strength teaches that you can vary an amount of the pigment in the dark  
21 color, and thereby tune or adjust the amount of light transmission into the  
22 interior of the blind. And therefore, obtain a desired amount of one-way  
23 vision viewing through the mesh -- woven mesh fabric.

24           Next slide. So now I'm going to go into the obviousness and how  
25 the combination of these two references reads on the claim language. Next  
26 slide. Okay. The proper rationales for combining prior art according to

1 KSR is that you can combine prior art elements, according to known  
2 methods, to yield predictable results, and you can also do a simple  
3 substitution of one known element for another to obtain the predictable  
4 results. Finally, when there's some teaching, suggestion, or motivation in  
5 the prior art that would lead a person of ordinary skill to modify the prior art  
6 or to combine prior art together to arrive at the claimed invention, that kind  
7 of combination is appropriate.

8           Next slide. Whybrew discloses a camouflage hunting blind that  
9 has a mesh window 24. The fabric that's camouflage, of the remaining body,  
10 is less translucent than the mesh, preventing some light from entering the  
11 blind and provides for a one-way viewing feature. Strength, the secondary  
12 reference discloses a mesh textile for a hunting blind that has camo on one  
13 side a dark color coating on the inside. The dark color reduces the amount  
14 of light transmission through the textile, decreasing an amount of light into  
15 the blind interior, thereby improving the one-way viewing by increasing the  
16 light differential between the interior and the exterior of the blind.

17           Next slide. Now, combining Whybrew with Strength can involve  
18 something as simple as a substitution of Strength's base textile, which is a  
19 mesh, for the mesh fabric window of Whybrew. Whybrew indicates that  
20 their mesh is just stitched to other portions of the body. One of ordinary  
21 skill then would readily expect success and have predictable results by  
22 simply replacing the one mesh window with the mesh fabric of Strength.

23           Now, if one disagrees and thinks that a simple substitution is not  
24 readily available, it's Petitioner's contention that there's ample motivation  
25 that would lead a person of ordinary skill to simply modify the mesh  
26 window 24 of Whybrew in view of the general teachings of Strength to

1 arrive at the claimed invention. And that motivation exists in the nature of  
2 the problem to be solved, that is both, Whybrew and Strength, are directed to  
3 hunting blinds and solving the same problem associated with blinds.

4 Whybrew indicates that the light differential between the interior  
5 and the exterior creates this one-way viewing capability. Strength discloses  
6 a mesh for use in blinds and teaches that conventionally, camouflage  
7 materials that were used in blinds sometimes were not -- well, they had  
8 enough -- they were not sufficiently translucent to allow for a silhouette. So  
9 it would allow too much light, and you wouldn't get the contrast that you  
10 were looking for.

11 Strength addressed this problem by a mesh having the camo on one  
12 side and the dark color on the inside, and the dark color was employed to  
13 prohibit light -- more light from transmitting through the mesh to the  
14 interior, thereby making the interior darker and improving and increasing the  
15 light differential between the exterior and interior, and thus improving the  
16 one-way viewing taught in Whybrew.

17 Therefore, modifying Whybrew's mesh window based on the  
18 general teaching of Strength that a mesh with a dark color on the inside  
19 reduces light would be natural to do. It allows for greater inhibition of light  
20 and increases the light differential. A person of ordinary skill would be  
21 motivated to make such a modification because Whybrew -- or make the  
22 modification of Whybrew and there would be a reasonable expectation of  
23 success in solving the problem that both references address. That is  
24 improving one-way viewing associated with the light differential.

25 Next slide. Now, contrary to Patent Owner's assertions that KSR  
26 employs the TSM framework, KSR had actually said the opposite. It

1 rejected a formalistic approach. It said that while TSM is certainly a viable  
2 and available approach for addressing combination of references, KSR  
3 instead said that the TSM test alone is not to be employed, but rather a  
4 flexible framework would be employed, and analysis is required that takes  
5 the prior art into context and accommodates the background knowledge  
6 possessed by a person of ordinary skill in the art. That is a person of  
7 ordinary skill is not a robot, not an automaton, and is viewed with general  
8 knowledge and creativity and to making actual leaps and jumps.

9           The general knowledge of a person of ordinary skill provides  
10 motivation to modify Whybrew to arrive at the claimed invention. Evidence  
11 of that general knowledge can be found in the Ameristep Penthouse Blind  
12 instruction manual. Ameristep was a manufacturer of hunting blinds. The  
13 Penthouse Blind was one of their blinds manufactured at least in 2005 and  
14 this is illustrated in the next slide.

15           As you can see in the figure, there's a hub style pop-up blind with  
16 panels between flexible frame members, having camouflage on the outside  
17 of the panel as well as camouflage on the external sides of the windows and  
18 door, which are mesh. Ameristep shows a camouflage blind --

19           JUDGE MURPHY: Can I --

20           MR. ESCHWEILER: Yes?

21           JUDGE MURPHY: Counsel, can I ask a question? If we were to  
22 exclude Exhibit 1014 from our analysis, do you still have a position?

23           MR. ESCHWEILER: Absolutely. Our position is that one of  
24 ordinary skill would modify Whybrew in the view of Strength solely be  
25 based on the nature of the problem to be solved. They're both solving the  
26 same problem, completely without consideration of the Ameristep blind.

1 The Ameristep blind solely supplements for buttresses or argument that this  
2 was in the general knowledge of a person of ordinary skill at that time. Is  
3 that satisfactory?

4 JUDGE MURPHY: Thank you. That was satisfactory.

5 MR. ESCHWEILER: Sure. Okay. So the point here is that the  
6 Ameristep blind taught using the ShadowGuard technology, and at that time,  
7 it says there's a black color lining on the inside portion that's used to reduce  
8 silhouetting inside the blind. So while we don't believe that the Ameristep  
9 blind is needed, we do think that it's one more piece of evidence that just  
10 buttresses our position that the combination of the primary reference and the  
11 secondary reference is appropriate and teaches the claimed invention.

12 I will skip this Slide 24 and just go to my summary, Slide 25. Both  
13 Whybrew and Strength are directed to hunting blinds and attempt to solve  
14 the same problem of avoiding a viewing of an occupant within a hunting  
15 blind from outside. Both address the problem with materials of the blind to  
16 increase the light differential. Strength's mesh can readily substitute for the  
17 mesh window or alternatively, motivate a person of ordinary skill to modify  
18 the mesh window of Whybrew to include camouflage on the outside and the  
19 dark color on the inside. Therefore, it's our contention that the modification  
20 of Whybrew in view of Strength is proper and results in the claimed  
21 invention.

22 Next slide. Now, I'd like to address the Patent Owner's arguments  
23 that were provided primarily in the Patent Owner response regarding their  
24 arguments that the combination of Whybrew and Strength are inappropriate.  
25 I'm sorry. Next Slide 27. Patent Owner argues incorrectly that a person of  
26 ordinary skill would not modify Whybrew's mesh to include a camouflage

1 pattern in the first side. In doing so, the Patent Owner argued that  
2 Whybrew's disclosure of a porthole mesh having large holes would  
3 discourage putting a pattern thereon.

4 We think that that's incorrect for the very reason that their own  
5 document argues in a contradictory fashion that porthole meshes were  
6 regularly used for practice football jerseys. Practice football jerseys, as you  
7 know, regularly have numbers, names, and school logos printed on them.  
8 The '535 patent discusses their example of a mesh could be a porthole mesh.  
9 There is nothing that would be discouraged placing a camouflaged pattern  
10 on a porthole mesh.

11 A person of ordinary -- next slide. A person of ordinary skill  
12 knowing that Whybrew contemplates a porthole mesh for its mesh window  
13 appreciates that mesh can have camouflage printed thereon, as taught by  
14 Strength, and as shown by the Ameristep blind that had camouflage on its  
15 mesh window. And it's consistent with the rest of the camouflage body of  
16 the hunting blind. Whybrew indicates that it's an object of the invention that  
17 its blind blend into the environmental setting, so the modification to put  
18 camo on the mesh to be consistent with the rest of the blind would be very  
19 normal and natural, and certainly motivated to be done based upon the  
20 teaching of Strength and the Ameristep Penthouse Blind. Patent Owner's --

21 JUDGE MELVIN: Counsel?

22 MR. ESCHWEILER: Absolutely.

23 JUDGE MELVIN: This is Judge Melvin. So I just wanted to  
24 make sure I understand. All of these arguments, they wouldn't impact your  
25 simple substitution justification; is that right? I mean, you know, that theory  
26 of obviousness doesn't involve putting a pattern on Whybrew's mesh. It

1 involves substituting the fabric entirely, if I'm not mistaken.

2 MR. ESCHWEILER: No, you're correct when you say that. We  
3 argued in our petition that you get to the claimed invention by either simple  
4 substitution or by a modification of Whybrew in view of Strength. In Patent  
5 Owner's response, he did not address the modification argument -- or I'm  
6 sorry -- the substitution argument. In this case, he was addressing the  
7 modification argument and attacking our position that the alternative of an  
8 ordinary -- a person of ordinary skill would modify the mesh of Whybrew to  
9 include a pattern on it, so I'm just addressing that point to make sure --

10 JUDGE MELVIN: Absolutely.

11 MR. ESCHWEILER: -- that it's absolutely rebutted, but you are  
12 correct. The simple substitution stands on its own.

13 JUDGE MELVIN: Okay, thank you.

14 MR. ESCHWEILER: Sure, absolutely. I'm going to move to the  
15 next slide, 28. Secondly, the Patent Owner argued that Strength, the  
16 secondary reference, doesn't disclose the mesh for three different reasons.  
17 Number one, they argued that based upon Figure 1 in the Strength patent,  
18 they didn't see any visible holes in the figure. Number two, they argued that  
19 even if there are holes in the textile fabric, when you apply the black coating  
20 in Strength's process, that that coating fills all the holes and creates a solid  
21 barrier. And number three, despite an openness of the textile fabric of 50  
22 percent, Strength's fabric has a very high hole density compared to the mesh  
23 of the '535 patent and therefore, it wouldn't be suitable.

24 It's Petitioner's contention that all these arguments are incorrect.  
25 Initially, with regards to Figure 1 of the Strength reference, the Patent -- the  
26 Federal Circuit has held very clearly that relying on just a visual inspection

1 and a patent drawing as evidence of some dimensional aspect such as holes  
2 isn't proper when the spec is silent about this.

3 And in fact, in this case, the Strength reference doesn't discuss  
4 anything about holes, and that's not really surprisingly because Strength was  
5 directed more about light transmission. It wasn't really worried or -- to  
6 ventilation of the fabric was kind of a don't care, so the fact that they talk  
7 about it doesn't mean that it does or doesn't exist. It just means that it wasn't  
8 a focus of the reference and therefore, it's silent. So when we deposed  
9 Patent Owner's expert, the expert admitted that there's nothing in the specs  
10 that establishes that Strength, the material has no holes. Therefore, looking  
11 at the drawing, you can't really rely --

12 JUDGE MELVIN: Mr. Eschweiler?

13 MR. ESCHWEILER: Yes.

14 JUDGE MELVIN: Mr. Eschweiler, I also had a question. In  
15 terms of the '535 patent, does it have any disclosure about hole size or  
16 anything beyond characterizing it as a mesh that provides any guidance?

17 MR. ESCHWEILER: Yes, it does. It says that they've got a mesh,  
18 and they talk about airflow. They have -- and I don't want to get this wrong  
19 exactly, but they talk about airflow through the fabric being between 30 and  
20 40 percent, and so they're saying that in terms of aperture size. And so -- but  
21 they don't go into a whole lot more than that. And they say that in light of  
22 an example, and whereas in another patent in their patent family, they  
23 actually have a limitation directed to airflow with the 30 to 40 percent  
24 velocity limitation in there. These claims have absolutely no limitations on  
25 the aspects of the mesh. So it's our contention that they're broadly claiming  
26 mesh without any particular definition.

1 JUDGE MELVIN: Great, thank you.

2 MR. ESCHWEILER: Absolutely. So it's our contention that the  
3 assertion that the Strength material doesn't have holes based upon the figure  
4 just doesn't hold any weight and should be disposed of.

5 Next slide. Second argument is about the -- whether there's any  
6 holes in Strength's fabric and whether the extrusion coating process covers  
7 those holes. That's the argument of the Patent Owner, but the Patent Owner  
8 does not provide any evidence to support the assertion. The Patent Owner  
9 and the expert do assert that the mesh prevents passage of water and air  
10 through it because there's a three 3 mil thick coating in that example that  
11 covers the holes, but the expert's conclusion is fully conclusory.

12 She doesn't provide any supporting analysis or intrinsic evidence to  
13 support the assertion. And upon being questioned about this, the expert  
14 admitted that Strength's disclosure of a 3 mil coating on the second side is  
15 the sole evidence that she's relying upon for her opinion. Next slide.  
16 Furthermore --

17 JUDGE MURPHY: Counselor?

18 MR. ESCHWEILER: Yes.

19 JUDGE MURPHY: Counselor, can you give us your proposed  
20 claim construction for the term mesh?

21 MR. ESCHWEILER: Yes. I believe we indicated that mesh is --  
22 has holes. It's a material that --

23 JUDGE MURPHY: So anything that has holes, you're considering  
24 mesh?

25 MR. ESCHWEILER: Correct. And furthermore, as you'll see  
26 later on in terms of claim construction, that's what a mesh is. The claim

1 language is a panel that's comprising three elements. A mesh material with  
2 camo on one side and a dark color coating on the other side. The claim  
3 language does not say that the panel has holes.

4 Now, we think, as we'll go through these arguments here, it's clear  
5 that Strength does teach a mesh material with a dark color coating that has  
6 holes, but even if it didn't, it's our contention that the plain and ordinary  
7 meaning of the claim language does not require that.

8 JUDGE MURPHY: Thank you.

9 MR. ESCHWEILER: But I will get into that at a later time, but  
10 it -- just for now since you asked the question. May I proceed? Okay.

11 JUDGE MURPHY: Yes, thank you.

12 MR. ESCHWEILER: Sure. The Patent Owner's expert admitted  
13 that the molecular weight of Strength's polymer coating is relevant in  
14 determining film coverage over mesh holes, and yet her report didn't even  
15 consider this property in rendering her opinion. A person of ordinary skill  
16 understands that when molecular weight of a polymer coating is low, stress  
17 is formed in the film upon application and holes form in the film.

18 So when a film forms on a mesh, a person of ordinary skill knows  
19 that when the molecular weight of the coating is below some threshold  
20 value, and these are conditions about which Strength is absolutely silent -- it  
21 doesn't discuss molecular weight and it doesn't discuss any of the details of  
22 the formation process -- but a person of ordinary skill knows that under these  
23 conditions, a film will not cover the holes in the fabric.

24 Next slide. So a person of ordinary skill knows that there's a range  
25 of molecular weight that exists for polymer films and those films that are  
26 used in Strength's example. And for molecular weights below this threshold,

1 the critical stress is large enough to cause holes. Strength is silent about this.  
2 Therefore, the only reasonable conclusion to a person of ordinary skill is that  
3 in some cases, you'll get a fabric with holes and in some cases, you won't.  
4 Therefore, Strength teaches in some instances that are known to a person of  
5 ordinary skill in the art, dark color coating on a mesh fabric resulting in  
6 holes.

7           Furthermore, the Strength reference states that the 3-mil coating is  
8 simply one example and states that the thickness is about 3 mils. The Patent  
9 Owner's expert doesn't provide any evaluation of what the term 'about'  
10 means in this context, and even a slight change in coating thickness can have  
11 a significant impact on whether a coating covers holes that are mesh. For  
12 example, you know, is 'about' 1 to 5 mils or is 'about' 2.99 to 3.01 mils.  
13 Well, the Patent Owner's expert doesn't even touch on what 'about' means or  
14 indicate that her opinion even considered this issue or cite to any intrinsic  
15 evidence indicating what's common in the field and in the art. So it's our  
16 contention that the expert's opinion that Strength has no holes is unreliable  
17 and shouldn't be given any weight.

18           Lastly, Patent Owner asserts that Strength's mesh is not a mesh  
19 because it doesn't exhibit sufficient airflow, meaning that we have a high  
20 hole density. But as we indicated before, the claim language has no such  
21 limitations on airflow or density. A Patent Owner chose not to limit the  
22 claim language, and we know that because they specifically limited the  
23 claim language in another patent in their patent family to an aperture density  
24 that corresponds to airflow between 30 and 40 percent. The fact that they  
25 don't have it there indicates that no such airflow limitation should be read  
26 into these claims.

1           Next slide. It's our contention, even though in this case is -- even  
2 in this instance that that argument fails because the Patent Owner's expert  
3 admits that Strength's fabric exhibits an openness of 50 percent. This is a  
4 mesh.

5           Next slide. Just as a summary of the arguments provided by the  
6 Patent Owner, it's our contention that they're all conclusory. They're not  
7 entitled to weight. Strength teaches a mesh and its combination with  
8 Whybrew results in the claimed invention.

9           Now, the next slide here, 38, goes into our contention that the  
10 claim language nevertheless does not require a panel to be mesh. The claim  
11 language says that a panel comprises a mesh material, a camouflage pattern  
12 on the first side, and a dark color coating on the second side. Strength  
13 teaches a mesh material, having a camouflage pattern on the first side and a  
14 dark color coating on the second side. If Patent Owner wants to argue that  
15 that requires a panel to be a mesh, they should've said that in the claim.

16           Now, it's our contention that it is a mesh and for the arguments  
17 we've provided below -- or above, but alternatively, even if the panel were to  
18 decide that's not the case, the plain and ordinary meaning of the claim  
19 language requires no such characteristic.

20           Next slide. I'm going to go into the priority date of the Rugged  
21 Cross application. And the reason I'm doing that, I know that the IPR is  
22 really only focused on 102 and 103, but we need to address this 112a issue  
23 because the Patent Owner's secondary consideration evidence relies heavily  
24 on this one-way mesh feature that the inventors allegedly discovered in  
25 2016. And this was the primary feature that was differentiating what the  
26 Patent Owner believed his invention was and differed from what had come

1 before.

2 This one-way mesh was disclosed in a blind that they called their  
3 Austin Blind at a tradeshow in early February of 2016, which was several  
4 weeks before Rugged Cross, the Patent Owner, had filed this provision  
5 patent application and more than a year before they filed their non-  
6 provisional application. So consequently, if Patent Owner's provisional  
7 priority claim fails, it's our contention that this one-way mesh that's relied  
8 upon as a key secondary consideration is prior art and not available  
9 evidence.

10 So the Patent Owner's expert simply presumed that the '535 patent  
11 claims were entitled to priority back to the provisional date. No evidence  
12 was provided in the expert report to establish the priority claim. It's our  
13 contention that the provisional does not provide Section 112 written  
14 description support for the patent claims.

15 Next slide. As you know, to satisfy the written description  
16 requirement, the application must describe the invention in sufficient detail  
17 that a person of skill can conclude that the vendor had possession of the  
18 invention at the time of filing. That would be at the time of the provisional.  
19 An applicant can satisfy that requirement by describing the invention with its  
20 claim limitations using the description, the words, structures, figures,  
21 diagrams, et cetera. It's our position that the Patent Owner has failed this  
22 standard.

23 Next slide. In doing so, you first have to look what does the claim  
24 language recite. The claim -- independent claims 1 and 19 recite a pop-up  
25 frame that includes flexible frame members. The provisional application  
26 does not disclose a pop-up frame with flexible frame members.

1           Next slide. The sole disclosure in the provisional is paragraph 32  
2 of the provisional and it specifically recites a pop-up frame with foldable  
3 frame members. The provisional provides no teaching of flexible frame  
4 members as recited in independent claims 1 and 19. Only the foldable frame  
5 members. And a foldable frame member does not teach, disclose, expressly  
6 or implicitly, a flexible frame member to a person of ordinary skill. Rather,  
7 it indicates a frame member that can fold about a pivot point to move or  
8 extend the member between two positions, i.e. a folded position and a  
9 deployed position.

10           Next slide. This characteristic of a folded frame member is distinct  
11 from a flexible frame member as seen in Exhibit 1015, illustrated in Figure 4  
12 of the slide. Here we have a tent frame with foldable rigid frame members,  
13 and it shows a frame assembly with hubs, leg pulls, and pivoting points. As  
14 can be seen in Figure 7, these rigid folds and frame members can fold about  
15 the respective pivoting points to collapse down into a folded position,  
16 whereas Figure 4 shows a deployed position. So this is a folded frame  
17 member. That's what the provisional patent discloses.

18           As you recall, in Figure 9 of the '535 patent, they're claiming and  
19 disclosing flexible frame members, and that figure was not disclosed in the  
20 provisional application. That was added in the non-provisional.  
21 Furthermore, all description of Figure 9 in the '535 patent discusses flexible  
22 frame members. They used a separate word. And so if those words had  
23 been synonymous, they just would've stayed with foldable, which they did  
24 not do. So a person of ordinary skill appreciates that a folded frame member  
25 is not a flexible frame member. They would not have concluded that the  
26 inventor had possession of flexible frame members at the time of the

1 provisional.

2           Next slide, 47. I'm going to go into the secondary considerations.  
3 Next slide. Because the date of the invention of the '535 patent is not  
4 February 29, 2016, which is the provisional application filing date, evidence  
5 employed by the Patent Owner in its secondary consideration analysis is  
6 prior art, and thus not available. Specifically, all the secondary  
7 consideration evidence relating to the one-way mesh is prior art, and this  
8 one-way mesh material was displayed in the Austin Blind and tradeshow,  
9 but more importantly, it was subsequently published and discussed two days  
10 afterwards in a publication and that was -- publication of this one-way mesh  
11 was more than one year before the February 28, 2017, priority date of the  
12 non-provisional.

13           Next slide. Secondary evidence. Next slide. The Patent Owner,  
14 Rugged Cross, does not establish a nexus between the secondary  
15 considerations and the claimed invention. According to the Fed Circuit --

16           JUDGE MELVIN: Sorry. This is Judge Melvin. I'm sorry to  
17 interrupt, but --

18           MR. ESCHWEILER: Go ahead.

19           JUDGE MELVIN: -- just on that last point, and that is the sort of  
20 relevance of the priority date and what it does to available evidence for  
21 secondary considerations, do you have any -- like any case law, any Federal  
22 Circuit cases that touch on that point? I'm sorry. Maybe you cited them in  
23 your brief.

24           MR. ESCHWEILER: I'm almost certain that I did. Do I know  
25 something right off the top of my head? No, I don't, but let me see here.  
26 Okay. Here we go. Slide 52, Yita LLC v. MacNeil IP LLC, reliance on

1 one-way mesh is reliance on prior art. The holding of that case was --

2 JUDGE MELVIN: Sure, sure. So we're familiar with that.

3 MR. ESCHWEILER: Okay.

4 JUDGE MELVIN: I guess I understand the sort of -- the  
5 connection there. So you're saying that the public use and the public  
6 knowledge of this product is the prior art?

7 MR. ESCHWEILER: I'm sorry. If I said that, I misspoke. It was  
8 displayed at the tradeshow more than one year before the non-provisional,  
9 but more importantly, about two or three days after the tradeshow, there  
10 were two blogs that published their reviews of their Austin Blind and those  
11 were actually publications that discussed the one-way mesh. So it was  
12 actually these publications that the Patent Owner has submitted as evidence  
13 as Exhibits 2032E and 2032F as secondary consideration evidence for  
14 unexpected results and industry praise that we contend might actually  
15 indicate, because of their lack of priority to the provisional, is actually  
16 admitted prior art.

17 JUDGE MELVIN: Okay. I think I understand it better in that  
18 light. Thank you.

19 MR. ESCHWEILER: Absolutely. Okay. So I'm on Slide 50, just  
20 to make sure we're all together here. The nexus between the secondary  
21 considerations and the claims is not presumed. The only time it wouldn't be  
22 presumed is when a product embodies the claims, which is co-extensive with  
23 the claimed invention. So therefore, there needs to be some kind of  
24 relationship between the language of the claims and the secondary  
25 consideration that's being proffered. And this requirement is not satisfied for  
26 any of the secondary considerations.

1           Next slide. Patent Owner ties the secondary consideration  
2 evidence to this one-way mesh, but the mesh features in the '535 patent  
3 claims are mesh having a camouflage pattern on the first side and a dark  
4 color on the second side, and these elements are all known in the prior art as  
5 evidenced by these exhibits that we provided. Using a mesh and a blind is  
6 known, putting a camouflage pattern on a mesh fabric in a blind is known,  
7 and employing a black lining on a mesh within the blind is also known.

8           Next slide. And here's our citation to the Fed Circuit case law and  
9 that supports that fact that when it's known in the prior art, there is no nexus.

10 Next slide. The one-way viewing features a function of mesh characteristics  
11 that are not found in the '535 patent claims. The inventor and the expert, as  
12 well as the other deponents, admitted that the one-way viewing depends on  
13 selected mesh hole size. In the '535 patent claims, those claims claim a  
14 mesh material generically and do not recite a specific hole size.

15           Consequently, the claims of the patent are much broader than  
16 capture mesh material that provides one-way viewing but also mesh that  
17 does not and that kills the nexus. The claims are simply not commensurate  
18 in scope with the proffered evidence of secondary considerations, and that's  
19 the secondary consideration evidence that focuses on the one-way viewing  
20 cannot be afforded weight. Next slide. Unexpected results --

21           JUDGE MURPHY: Counselor, can I just stop you for a second?

22           MR. ESCHWEILER: Absolutely.

23           JUDGE MURPHY: Are you saying that none of the challenged  
24 claims recite the one-way viewing feature?

25           MR. ESCHWEILER: The claims are a hub style pop-up blind  
26 with the one-way viewing feature, and the one-way viewing feature is prior

1 art. So to the extent that they're using the one-way viewing as secondary  
2 consideration evidence of non-obviousness, we're asserting that that's not  
3 available for consideration in the secondary consideration analysis.

4 JUDGE MURPHY: I'm looking at your statement here. The  
5 claims are broader and capture mesh that provides one-way viewing but also  
6 mesh that does not. Aren't there dependent claims and the independent  
7 claim that do qualify that there's the one-way viewing feature?

8 MR. ESCHWEILER: There's no claim language that articulates  
9 one-way viewing. It's Patent Owner's contention that all the claims provide  
10 one-way viewing and that's provided by the dark color coating on the second  
11 side. Our contention is that the scope of that claim is so broad that, in fact,  
12 some mesh with certain hole sizes would provide for one-way viewing and  
13 some would not.

14 And when we deposed their inventor and asked about the details of  
15 the mesh, he conceded he didn't know. He says, all that I know is the one  
16 mesh that I bought here worked, and I'm like, well what about other meshes,  
17 and he's like, oh, I don't really know and then went into the details of their  
18 specification. All they say is about this airflow of 30 to 40 percent, which  
19 they specifically decline to keep in their claims, but wanted broader  
20 coverage.

21 JUDGE MURPHY: Okay, thank you.

22 MR. ESCHWEILER: Sure, sure. Let's see. Slide 54, unexpected  
23 results. The Patent Owner argues that this discovery of one-way mesh was  
24 unexpected to the inventor in 2016. Unfortunately, this evidence is only  
25 relevant if the results are unexpected to a person of ordinary skill in the art.  
26 And at the time of the inventor's discovery, he was not a person of ordinary

1 skill in the art, as he has admitted. He didn't have the education or the  
2 experiential qualifications at the time to satisfy the requirements of a person  
3 of ordinary skill that the parties agreed to in the petition. Therefore, Seaton's  
4 subjective surprise at the results here are not legally relevant evidence of  
5 non-obviousness.

6           Next slide. Patent Owner's expert did not conduct any analysis of  
7 unexpected results and merely opined that Seaton's subjective feeling was  
8 reasonable. This is conclusory and therefore, the Patent Owner's expert  
9 testimony can't be given any weight. The expert wrongly assumed that  
10 Seaton was a person of ordinary skill, but during cross, she admitted that she  
11 had never even analyzed whether he was qualified.

12           Next slide. The starting point for considering evidence of  
13 unexpected results must be the closest prior art, and yet the patent expert  
14 admitted that she did not consider the closest prior art in connection with her  
15 unexpected results opinion. Seaton was not aware -- I'm sorry -- Seaton, the  
16 inventor of the patent, was not aware of any prior art, let alone the closest  
17 prior art. So no evidence existed of a nexus between what was unexpected  
18 in the claimed invention. The blind that Seaton built, the Austin Blind in  
19 2016, is not even a pop-up blind. It was a tool shed with the one-way mesh  
20 in it and therefore, that product is not even covered by the claims of the '535  
21 patent.

22           Next slide. No commercial success. Patent Owner relies on the  
23 commercial success of one of its licensees, the Primos Company, which  
24 marketed and sold the SurroundView Bunting Blind. Primos had long been  
25 selling blinds, which they called their Double Bull Blinds, and the  
26 SurroundView Blind was the first version that included the one-way mesh.

1 The Patent Owner doesn't offer any evidence of unit sales or profit or  
2 revenue or market share to indicate commercial success. It relies solely on  
3 the claim that Primos had increased sales due to SurroundView blinds.

4 This evidence doesn't work. It fails because these statements are  
5 unsubstantiated, non-conclusory. Without the context of sales volumes or  
6 pricing or profit, you can't assess the supposed commercial success.

7 Next slide. The Patent Owner relies on a presumption of nexus  
8 that the evidence exists, but the sales were due mostly to Primos' marketing  
9 strategy, not the merits of the invention. Jason Harris, the deponent at  
10 Primos, admitted that 100 percent of Primos' marketing spend at that time  
11 went to the new SurroundView Blind. Therefore, there's no way of divining  
12 whether their success was due to their marketing or due to the one-way  
13 mesh.

14 Next slide. No evidence of copying. Simply put, the fact --  
15 whether or not a competing product falls within the scope of a claim has no  
16 evidence or no indication of whether there's been copying. There's been no  
17 evidence proffered by the Patent Owner that there's been product replication.  
18 They simply rely on allegations of infringement. Patent Owner did not  
19 submit evidence comparing alleged infringing products to the claims of the  
20 '535 patent.

21 Patent Owner asserts -- with regards to licensing -- next slide.  
22 Patent Owner asserts that licenses to the '535 patent weigh in favor of non-  
23 obviousness, but the license can't be given weight because they didn't enter  
24 the licenses into the record. The existence of license should be given little  
25 weight when they haven't been entered because there's no way of knowing  
26 what the purpose of those licenses should be.

1           Next slide. What has been discovered via deposition, the license  
2 term showing that the license is not evidence of non-obviousness, the  
3 licenses cover multiple patents in the family and there's been no  
4 apportionment. The licenses were taken before the '535 issued and the only  
5 reasons for the licenses was for a feature of the mesh not found in the '535  
6 patent.

7           I am getting to the end of my time, and so what I am going to do is  
8 head to my conclusion and just say that a modification of Whybrew in view  
9 of Strength is proper. It results in a hunting blind that includes all the  
10 elements of the claims of Ground A, and that the Patent Owner arguments  
11 for non-obviousness in this combination are incorrect. The secondary  
12 considerations of non-obviousness fail because the primary evidence  
13 submitted with this is the one-way mesh, which is prior art, and the  
14 remaining evidence fails for the reasons we highlighted above.

15           Grounds B and C deal with dependent claims that are taught by the  
16 art that was cited in the petition that have not been rebutted or argued against  
17 by the Patent Owner, and therefore, those claims are invalid for the same  
18 reasons. I appreciate you taking the time to listen and I thank you for your  
19 questions.

20           JUDGE CHERRY: Excellent. Thank you, Mr. Eschweiler. You  
21 went over by a few seconds, but we'll wash it out between the two of you  
22 guys, so I think we're -- you still have your 10 minutes.

23           MR. ESCHWEILER: Okay, thank you.

24           JUDGE CHERRY: Mr. Wolter, are you -- you have an hour. How  
25 much time do you want to reserve for rebuttal?

26           MR. WOLTER: I think I'll reserve 50 minutes and then --

1 JUDGE CHERRY: Well, you'll use 50 minutes. Reserve 10?

2 MR. WOLTER: Yes, Your Honor.

3 JUDGE CHERRY: Excellent. All right. Just give me on second.

4 All right. Okay, I'm ready here whenever you want to begin.

5 MR. WOLTER: Yes. I'm on Slide 2 of our demonstrative exhibit,  
6 which provides a general summary of our arguments in response to the  
7 petition. In the first instance, it's the Patent Owner's position that a person of  
8 ordinary skill would not replace the mesh material of Whybrew with the  
9 camouflage material of Strength because Strength teaches away or teaches to  
10 increase the blocking of light, exactly contrary to the purpose of Whybrew's  
11 mesh fabric. It allows increased transmission of light in that location so that  
12 the exterior of the blind can be observed.

13 More specifically, Strength teaches away from the claimed  
14 invention and Strength teaches away from Whybrew, both of which require  
15 open mesh material for transmission of light for viewing outside the blind or  
16 viewing to the exterior of the blind. In addition, as noted by opposing  
17 Counsel, the mesh fabric of the claimed invention also requires airflow, both  
18 of which require holes. To that end, it's our --

19 JUDGE MELVIN: Wait. Why does -- why do you say that the  
20 mesh requires airflow? Is that in the claims?

21 MR. WOLTER: It's not in the claims. It's our position that by  
22 interpreting the claims in view of the specification, the specification  
23 provides two objectives in this invention. One of which led to the discovery  
24 of the other. That is they needed -- the inventors require ventilation for  
25 hunting in the state of Florida, especially in bow season. Therefore, they  
26 used a mesh material. In order to achieve those objectives of one, air

1 ventilation and one-way viewing visibility, holes are required in the mesh  
2 material and the resulting mesh material being coated.

3 JUDGE MELVIN: And you get to that place through a claim  
4 construction; is that right?

5 MR. WOLTER: Yes, Your Honor. By virtue of -- and we've set  
6 that forth in the surreply that as you -- obviously --

7 JUDGE MELVIN: Wait. You -- do you think it's proper to  
8 propose a claim construction in the surreply?

9 MR. WOLTER: No, it was in response to the changed claim  
10 construction that was provided by the Petitioner. The Petitioner initially  
11 required that the mesh material be a woven mesh material with open texture  
12 with spaced holes therein. The Patent Owner filed its response and our  
13 position in the response was that Strength did not disclose a mesh material  
14 by virtue of applying a thermoplastic material to the base textile of Strength.  
15 Therefore, it covered all holes. So it had no holes. The --

16 JUDGE MELVIN: How would Strength have light  
17 transmissibility if it covered all of its holes?

18 MR. WOLTER: Well, it depends. I think if you look at the graph,  
19 it may depend on the level of pigment that's placed into the thermoplastic  
20 material. That is they provided pigment in, I think, three different examples.  
21 One is six percent and lower, so by reducing the amount of pigment, there  
22 may be some level of transmissivity. Of course, in Strength, the whole point  
23 of Strength is to avoid translucency that may create shadows. And so  
24 indeed, by virtue of having covered those holes, you may be able to reduce  
25 translucency and light transmission. We're not saying that it's -- light  
26 transmission is entirely blocked, but certainly the holes are blocked in that

1 regard. And to suggest that Strength --

2 JUDGE MELVIN: But how does the light get through if the holes  
3 are blocked?

4 MR. WOLTER: Well, it can transmit partially, at least, possibly  
5 through the film itself.

6 JUDGE MELVIN: Is there any evidence of that in the record?

7 MR. WOLTER: Other than possibly what's in Strength, that is the  
8 different examples that show the different level of light intensity that's  
9 detected by virtue of an application of a candle relative to the inside of the  
10 blind. Did that answer your question, Your Honor?

11 JUDGE MELVIN: I guess. I mean, you agree that Strength  
12 discloses embodiments that transmit light; do you not?

13 MR. WOLTER: It -- there's a transmission -- there are examples,  
14 and some of which -- one of which there is complete blocking of light,  
15 which is opaque, and then others -- or opacity, and the others are -- don't  
16 include as much pigment, and therefore, there is apparently some level of  
17 transmission because it's detected on the other side of the blind.

18 JUDGE MELVIN: Okay, thank you.

19 MR. WOLTER: So, but in the end, by virtue of having a film on  
20 that material there, it covers all the holes, and the light is transmitted through  
21 that film, assuming that there is any light transmission, but the whole point  
22 of --

23 JUDGE MELVIN: What do you mean assuming there's any light  
24 transmission? I mean, what does Figure 2 show for the first two examples?  
25 Does that not show that there's light transmission? I don't think this needs to  
26 be an assumption.

1           MR. WOLTER: Well, it does show it in that respect. You're  
2 correct, Your Honor.

3           JUDGE MELVIN: Okay. So when Strength teaches that there is  
4 light transmission in at least two examples, it's your view that that amounts  
5 to light going through the film and what is the basis for that contention? I  
6 believe it's your expert's view that the film would cover mesh holes; is that  
7 right?

8           MR. WOLTER: Right.

9           JUDGE MELVIN: Okay. But do you agree that your expert did  
10 not consider the molecular weight of the film?

11          MR. WOLTER: In the initial report, they did not include  
12 molecular weight. The molecular weight was cited for the purpose of  
13 possibly determining whether or not an extruded film would form holes  
14 during the extrusion process. That is if it's below a certain threshold, then  
15 holes may form. However, our position is, is that the particular reference  
16 cited, the 1012 reference, was cited by -- or with the fact that it was -- you  
17 determined the molecular weight in order to determine and in order to avoid  
18 the formation of irregularities in the extruded film, and therefore, avoid  
19 making holes, which would increase light transmission.

20          To that end, Strength is trying to avoid increasing light  
21 transmission, which would then, by virtue of increasing light transmission,  
22 may indeed create silhouettes forming that could be viewed from the outside  
23 of the material. But to be clear, Strength does not and never mentions the  
24 word 'mesh', one. And two, Strength never mentions whether or not there is  
25 one-way visibility. In fact, there is no disclosure in Strength in which  
26 Strength expressly says that you can see through the mesh material because

1 the whole point of --

2 JUDGE MELVIN: How do your claims require one-way  
3 visibility?

4 MR. WOLTER: Is -- which claim are you talking about? Because  
5 there are two -- at least two claims that specifically call out one-way  
6 visibility. That is --

7 JUDGE MELVIN: Well --

8 MR. WOLTER: That is Claim 17, which is dependent from Claim  
9 1, and then Claim 19, which also specifically or expressly calls out one-way  
10 visibility.

11 JUDGE MELVIN: So when you're arguing about one-way  
12 visibility, are you only talking about those two claims or are you also  
13 including Claim 1?

14 MR. WOLTER: No, I'm not. That could potentially violate the  
15 doctrine of claim differentiation. What we're saying is that there's holes, and  
16 at least at a minimum, those holes allow for airflow. That is consistent with  
17 the specification. And in particular, that there is a description in the  
18 specification in reference to airflow. In order to have airflow, you have to  
19 have holes. In order to see, you have to have holes in this particularly.  
20 Those are the only embodiments that are disclosed in there, so we're not  
21 reading a limitation. We are interpreting that claim consistent with what's  
22 stated in the specification. Also, the specification --

23 JUDGE MELVIN: And to make sure I understand you correctly,  
24 this is the embodiment discussed in Column 7 of your spec?

25 MR. WOLTER: It's the embodiment that is disclosed in --  
26 referenced in Figures 1C and 1B. I believe there is reference to in Columns

1 5 and 6 if I can pull it up.

2 JUDGE MELVIN: Yeah. I'm just trying to find where your spec  
3 describes airflow as an important characteristic to a mesh. I see that airflow  
4 is discussed in an example embodiment in Column 7 between lines 16 and  
5 20, so I'm interested in other areas --

6 MR. WOLTER: At the very --

7 JUDGE MELVIN: -- of this --

8 MR. WOLTER: Well, I think it begins even before the  
9 specification. When the Seaton's set out to build this blind, they were doing  
10 so -- of course, both were first responders. Tim is a firefighter, and Chris is  
11 a retired sheriff's detective, and one of the goals that they wanted to achieve  
12 was to have proper ventilation for hunting. And in order to achieve that,  
13 they needed ventilation.

14 JUDGE CHERRY: Did they put that in the spec? Where's --

15 MR. WOLTER: Because it's --

16 JUDGE CHERRY: -- that in the spec?

17 MR. WOLTER: It's in the background --

18 JUDGE CHERRY: Okay.

19 MR. WOLTER: -- where they identify the objectives, and that's  
20 specifically identified both in the provisional application and in the non-  
21 provisional application, when it's referring to why they were doing what  
22 they're doing. Their objective was to use a mesh material that had holes -- or  
23 it didn't say holes -- but it had a mesh material that allowed for ventilation  
24 and referred to the closed panels of the prior art, which did not allow  
25 ventilation. So that was the primary -- one of the primary objectives in  
26 building this blind, to use a mesh material that provided airflow. That's both

1 in the background and --

2 JUDGE CHERRY: Now --

3 MR. WOLTER: -- in the summary of the invention.

4 JUDGE CHERRY: One thing I'm struggling a little bit with, Mr.  
5 Wolter, is you agree that Strength -- the fabric that's disclosed in Strength --  
6 I'm just talking about the woven material before you apply these coatings.  
7 Do you agree that that is a mesh or qualifies as a mesh?

8 MR. WOLTER: Under the broadest -- under the interpretation  
9 provided by -- in the claim construction, it may be considered a mesh.

10 JUDGE CHERRY: So -- okay, so the fabric starts as a mesh. And  
11 then I guess where I'm struggling a little bit is your claim kind of -- at least  
12 Claim 1 talks about the mesh and then it has other layers that are added on.  
13 So are you saying that after you apply these layers, that you still have to  
14 have a mesh?

15 MR. WOLTER: Yes, in view of the specification.

16 JUDGE CHERRY: Okay.

17 MR. WOLTER: That is by -- even after applying the coating, you  
18 necessarily have holes, and that's not reading a limitation of the airflow  
19 limitation. We're just simply reading that the mesh material requires holes  
20 as proposed by the Petitioner, and therefore, meets the objectives and it's  
21 consistent with the specification. And in fact, I'm going to go to Slide 11,  
22 which are images or photographs that are provided from the provisional  
23 application. These are similar to claim -- or the Figures 1A and 1B of the  
24 non-provisional, but this -- the provisional was filed with these photographs  
25 showing the mesh material as being coated and having holes.

26 And in fact, in the provisional application, in paragraphs 25 and 29

1 through 30, there is one-way visibility described, and in paragraphs 24 and  
2 32, there is the reference to airflow, in reference to this particular mesh  
3 material that has holes. Figure A, for example, shows the camouflage print  
4 on the one side and Figure B shows the coating on the second side. And in  
5 particular, these both have the holes through it after having applied the  
6 coating.

7           And again, in reference to the provisional application -- I'm now  
8 on Slide 12. We've kind of -- which shows the provisional application,  
9 including the hunting blind that shows the mesh material for the blind from  
10 an exterior, and then from the interior, which shows the clear visibility, at  
11 least for the panoramic view for hunting and identifying game in order to  
12 shoot the game. So in that sense, our interpretation, and the original  
13 construction of mesh material as proposed by the Petitioner, is consistent  
14 with the specification.

15           I'm going to skip back to Slide 3, and this is the Austin Blind that  
16 was displayed at the SWTF Tradeshow that shows the one-way visibility  
17 with respect to this. This is in 2016 and soon thereafter, it filed the  
18 provisional application, identifying in there the two -- the one objective of  
19 ventilation and airflow, and by doing that and applying camo on one side  
20 and black on the other, there is this one-way visibility that they surprisingly  
21 discovered with respect to this scrim banner material.

22           So we've -- so our position is, with respect to the mesh material  
23 that is in -- is that the claim limitation is not reading -- we're not reading a  
24 claim limitation of airflow or one-way visibility into these. What it does  
25 require are holes, which is consistent with the specification, which describes,  
26 as an objective to this, is to have airflow, one, and then two, there is one-way

1 visibility, that in case -- in order to hunt and similar to Whybrew for that  
2 matter, you have a mesh material that has a clear viewing area.

3 In contrast, however, Strength teaches away from that by virtue of  
4 one of the goals of Strength is to block light. I think it identifies that in the  
5 first paragraph in Strength. And in doing that, it does that with by applying  
6 a sheet material that covers -- to the extent any holes exist in the base  
7 textile -- it apply -- and include a pigment or a dye within the thermoplastic  
8 to restrict transmission of light through the fabric.

9 But if one -- and to be clear, again, Strength does not disclose or  
10 mention whether or not there is one-way visibility relative to the camouflage  
11 material of that patent. So I mean, the Federal Circuit -- so in that regard,  
12 it's our position that Strength actually --

13 JUDGE CHERRY: I think where I'm having a problem is it does  
14 seem like we're trying to bodily incorporate here. Strength talks about one  
15 way to -- that you can have a fabric and that you can print, you know, you  
16 can print a camo pattern on side and then you can have this -- what it just  
17 describes as a coating with a dark pigment in it on the other side to kind of  
18 decrease light transmission. I don't understand -- I don't see where it talks  
19 about anything about holes. It doesn't seem to discuss that at all. It just talks  
20 about a coating with this dark pigment, as what's causing this effect.

21 And I guess I'm having trouble. It seems like we're, you know, it  
22 says in one example, it can be a thermoplastic, but it doesn't seem to limit  
23 the coating to just this thermoplastic layer. It just has to be a coating with  
24 this dark pigment, so I mean, I -- it seems like the teachings of Strength are  
25 lot broader than what we're discussing right now. Do you disagree with  
26 that?

1           MR. WOLTER: Yes, I disagree with it wholeheartedly, especially  
2 with respect to one of the first objectives is identifies the prior art as  
3 including translucent material that allows for the creation of these  
4 silhouettes. And the prior art, in order to eliminate that as a problem, used  
5 heavier materials, which made the hunting blind more bulky. So what they  
6 were --

7           JUDGE CHERRY: Yes.

8           MR. WOLTER: So --

9           JUDGE CHERRY: So how is that inconsistent with what I just  
10 said?

11          MR. WOLTER: I was about to get there. I'm sorry.

12          JUDGE CHERRY: Okay.

13          MR. WOLTER: So what they did was that they were -- used a --  
14 wanted to use a lighter material that made it lightweight and could be  
15 carried, but by doing so, they needed to apply this thermoplastic material to  
16 it or a coating that restricted light transmission. In their words, it was 'that  
17 blocked light'.

18          So in the specification, they -- while they refer to the base textile,  
19 they also refer to the thermoplastic material as being applied in different  
20 methods, but in each method, what they're talking about, I believe, is in  
21 Column 2, 26 through -- lines 26 through 29, the coating can be placed on  
22 the side of the base textile by hot melt coating, extrusion coating, laminating  
23 a sheet to the base textile. So what they're describing there is the application  
24 of an entire sheet or in sheet form without holes in order to block light.

25          In addition, they are -- describe the pigment as -- in, I think,  
26 Column 2, lines 34 through 37, they are referring to light blocking pigments.

1 I believe they include carbon black, for example, and iron oxide. But in the  
2 end, the goal is the same. That is to block light so that silhouettes are not  
3 created. They do not mention any sort of visibility or provide that sort of a  
4 characteristic for that camouflage material disclosed in Strength.

5 JUDGE CHERRY: Okay, thank you. That's helpful.

6 MR. WOLTER: So I -- we've kind of jumped there, but I think  
7 that what our position is with respect to this combination is that one skilled  
8 in the art would not combine Whybrew -- I'm sorry -- Strength with  
9 Whybrew. That is Strength teaches away from Whybrew by virtue of  
10 describing this light blocking camouflaged material in order to avoid the  
11 creation of silhouettes.

12 The Federal Circuit, in referring to teaching away, found a  
13 reference may be said to teach away what a person of ordinary skill upon  
14 reading the reference would be discouraged from following the path set out  
15 in the reference, or would be led in a direction divergent from the path that  
16 was taken by the applicant. The path taken by the applicant was to provide a  
17 hunting blind with a mesh material that had airflow for hunting in Florida.  
18 That required a mesh material with holes.

19 So if you look at Strength, it is using a base textile that covers that  
20 and would restrict airflow, if not completely eliminating it. So it's taking  
21 one of skill in the art in a path that is divergent from airflow and one-way  
22 visibility. Again, Strength does not mention or even suggest that there is any  
23 sort of one-way visibility with respect to that camouflage material. So I  
24 think that -- I would like to just reference so that the -- okay, we've already  
25 looked at that slide.

26 So the next issue we have on here is priority. Again, we -- our

1 position remains the same, that is we believe that priority was improperly  
2 raised in the reply, but besides that, it's our position that the specification for  
3 the provisional application indeed meets the requirements of Section 112.

4 To that end, the standards for -- excuse me -- the standard of  
5 whether or not it meets the written description has been made clear by the  
6 Federal Circuit, that is whether the disclosure relied upon reasonably  
7 conveys to those skilled in the art that the inventor had possession of the  
8 claimed invention. One thing that the -- one may consider is whether or not  
9 it was well known in the art to satisfy the -- or may concern what a person of  
10 ordinary skill knew in terms of what was well known in the prior art in the  
11 specification, need not redescribe this known prior art.

12 In addition, they also -- the Board may consider the -- whether or  
13 not the technology involved is predictable in nature, and as in this case when  
14 we're dealing with mechanical technologies, there is, in fact, a very  
15 predictable nature associated with this. The claim -- the specification -- I'm  
16 now on Slide 82 -- I'm sorry, Slide 18 in reference to paragraph 32 of the  
17 provisional application, and this refers to the pop-up frames, and as Mr.  
18 Eschweiler said, refers to pop-up frames, as including foldable. It does not  
19 use the specific term 'flexible'.

20 It is our position that at the time of filing this application, that pop-  
21 up frames and hub style frames were well known in the prior art, and that in  
22 fact, those pop-up frames and hub style frames included flexible frame  
23 members. Flexible frame members that were foldable relative to one  
24 another, and given the predictable nature of this, it certainly provides one of  
25 skill in the art -- or one skilled in the art would understand that these  
26 inventors were in possession of the claimed invention to a pop-up frame.

1           And in particular at Slide 19, we -- this is the Reis reference. This  
2 is actually Exhibit 2020. This discloses -- and I will back up. This is a --  
3 Mr. Eschweiler used the term 'hub style' and 'pop-up frame' almost  
4 interchangeably. In fact, the declarations -- in the declarations of Mr. Jason  
5 Harris and Bob Ransom, that term 'hub style' and pop-up' are used  
6 interchangeably.

7           And Reis in this particular case discloses a hub style frame, and in  
8 particular, it describes these poles. Each of the poles includes a rigid rod --  
9 semi-rigid rod. The rod having been made of a strong, flexible material,  
10 such as plastic, the carbon composite or fiberglass. It further describes the  
11 frame in the unfolded position, telling us that, in fact, this frame is foldable  
12 and unfold. And again, Reis has actually cited during the course of the  
13 prosecution of the application for the '535 patent.

14           Similarly, there's U.S. Patent -- the Stumbo patent, the '338 patent,  
15 which is specifically cited in the Reis patent. And the Stumbo patent that's  
16 provided in Slide 20, specifically refers to rods. These rods are resilient and  
17 flexible, and their inner ends are secured in tubular receivers. It further  
18 describes that these receivers can pivot, and it is shown there that these  
19 flexible rods are not only flexible, but they're foldable relative to one  
20 another.

21           Again, other examples of pop-up frames or hunting blinds with  
22 pop-up frames, including Slide 21 and Slide 22, further refer to pop-up  
23 frames as including flexible frame members. The similar hub style frame as  
24 to Reis and Stumbo is also referenced in Slide 23, which shows, again, a hub  
25 style blind.

26           These hub style blinds are also described in the declarations of

1 Harris and Ransom. The hub style blind came out -- I think they referred to  
2 it in 1996. And these blinds included -- typically included four sides. That  
3 means that in each side and on the roof, there was a central hub in which  
4 flexible frame members were connected at the hub, and that the hub was  
5 movable in and out to fold and collapse the blind or to pull away the blind,  
6 for carrying the blind out to the field and then popping it up and having it  
7 ready and deployed for hunting or otherwise viewing nature.

8           So in this particular instance, it's the Patent Owner's position that at  
9 the time of the invention, hub style and pop-up blinds were so well known.  
10 They had been out since 1996. That the reference to the pop-up blind -- one  
11 of skill in the art would understand that that means a blind that includes  
12 flexible frame members that are foldable relative to one another to collapse  
13 and deploy that blind. Those frame members are spaced apart along the side  
14 and along the roof of the frame. And given the technology and the  
15 predictable nature of the technology, one of skill in the art would understand  
16 that the inventors were in possession of the claimed invention at the time of  
17 the filing.

18           So therefore, the filing date of the non-provisional or the effective  
19 filing date is February 2016, which means that the Exhibits 2032E and  
20 2032F are not prior art. But even if those may be considered prior art, those  
21 particular publications don't disclose a mesh material with camouflage on  
22 one side and a dark color or a black coating on the inside surface. These  
23 includes photographs of a hunting blind, which presumably is the Austin and  
24 Michael blinds, it's showing an exterior blind that shows camo.

25           And in fact, the other article refers -- doesn't even have a picture of  
26 it, both of which we agree disclose and discuss briefly, very briefly, the one-

1 way viewing characteristic of these blinds, but it does not disclose that there  
2 is or mention that there is a mesh material. It does mention mesh in one, but  
3 with the camo on one side and black on the other.

4 JUDGE CHERRY: I know you guys both want us to decide this  
5 priority issue, but it seems like, more importantly, we need -- before we do  
6 that, we need to, find there's a nexus between the claims and the secondary  
7 considerations evidence before we --

8 MR. WOLTER: Okay.

9 JUDGE CHERRY: -- and this becomes really relevant. So, what  
10 is your evidence of the nexus between the secondary considerations and  
11 these claims?

12 MR. WOLTER: Well, I think the Federal Circuit said that there is  
13 a nexus if the product in question is reasonably commensurate in scope with  
14 the claims of the invention. So the evidence that we provided in our  
15 response was a claim chart in which our expert has images of the  
16 SurroundView Hunting Blind, manufactured and sold by Primos, that was  
17 the subject of industry praise and commercial success. That evidence is  
18 Exhibit 2031 on pages 53 through 66. It includes a claim chart -- I'm sorry,  
19 this begins on Slide 33.

20 This was referenced in the Cameron declaration. She had actually  
21 a hunting blind, a Primos Hunting Blind, and that maps Claims 1 --  
22 independent Claim 1, dependent Claim 15, dependent Claim -- I'm sorry --  
23 16 and 17. The reason we included 17, for example, is that Claim 17 is  
24 indirectly dependent from Claim 1 and refers to the one way visibility  
25 characteristic. Claim 19 is an independent claim, also referring to the one-  
26 way visibility characteristic.

1           This was provided in the response and this shows that each of these  
2 claims read on the product that was the subject of industry praise,  
3 commercial success, also an exclusive license agreement between Rugged  
4 Cross and Primos. So here's the nexus. These claims read on this product,  
5 and this is the proof -- this proof has gone un rebutted.

6           JUDGE MELVIN: Doesn't commensurate in scope require  
7 something more than just the claims read on the product? I seem to  
8 remember cases that address this, you know, they might address a product  
9 that has many unclaimed features and that could preclude the product from  
10 being commensurate in scope with the claims. So I'm not sure that the  
11 standard you just stated is what we should follow.

12          MR. WOLTER: I'm not sure of the question.

13          JUDGE MELVIN: Well, do you agree that if a product has many  
14 unclaimed features, that could -- not withstanding that the claim reads on the  
15 product -- that could preclude the product in the claim from being  
16 commensurate in scope?

17          MR. WOLTER: Well, that is if that unclaimed product is the  
18 subject of the -- or forms the basis for the industry praise or commercial  
19 success, or one of the other features. In this case --

20          JUDGE MELVIN: Well, it depends if you're relying on a  
21 presumption to get your nexus, right? So maybe I should clarify that. I  
22 mean, are you saying that because the claims and your product are  
23 commensurate in scope, you deserve the presumption of a nexus?

24          MR. WOLTER: Yes, we are -- we would be entitled to a  
25 presumption of nexus because these claims read on that. In particular,  
26 they -- as it relates to Claim 17 and Claim 19, it's the one-way visibility,

1 which is, you know, the industry praise and the secondary considerations do  
2 indeed revolve around the one-way visibility of the feature of the blinds. So  
3 we are entitled to that presumption of the nexus.

4 JUDGE MELVIN: Well, I think that conflates the two issues  
5 because if you're talking about the evidence of secondary consideration  
6 specifically relating to a particular feature, that would be a way to establish a  
7 nexus without a presumption. If you want entitlement to a presumption,  
8 then I don't think that the nature of the evidence is important. What's  
9 important is the scope of the claims, as compared to the product at issue. So  
10 I mean, when -- I guess my difficulty right now is that you keep saying,  
11 we're entitled to a presumption because the claims read on the product, but I  
12 don't think that's the same as saying that the claims are commensurate with  
13 the product.

14 MR. WOLTER: No.

15 JUDGE MELVIN: So it's your understanding that those two  
16 statements are the same?

17 MR. WOLTER: No, no. I apologize. We're entitled to the  
18 presumption because the product in question includes the feature of the one-  
19 way visibility, which is the subject of the industry praise and the commercial  
20 success, and the other claim features -- I'm sorry, and the other evidence of  
21 secondary considerations. And in particular, the evidence of secondary  
22 considerations result -- include -- beginning with industry praise, but I would  
23 like to address long-felt need before we get into the industry praise, unless  
24 the Board has further questions regarding --

25 JUDGE MURPHY: Counselor, can I ask a quick question here?  
26 When you're talking about this one-way viewing feature and being

1 commensurate, are you limiting this argument then only to the claims that  
2 require that feature, as opposed to, for example, Claim 1 that does not?

3 MR. WOLTER: No. I -- in considering -- by virtue of at least the  
4 presumption would apply to the dependent Claim 17 and Claim 19, for  
5 example, but Claim 1 is broad enough to cover, obviously, this particular  
6 feature because Claim 17 is dependent from Claim 1. So it would apply to  
7 both independent Claims 1 and 19.

8 JUDGE MURPHY: Okay.

9 MR. WOLTER: I'm sorry. You were muted there for -- I think  
10 you were talking and --

11 JUDGE MURPHY: No, I'm just curious, if we had a claim that  
12 just had a camouflage structure with a pop-up frame and a mesh panel, could  
13 this be used as proof that a nexus and secondary consideration?

14 MR. WOLTER: I'm sorry. Could you state that, again? If you  
15 had a pop-up frame with a mesh material and that was the --

16 JUDGE MURPHY: I think what you're saying is as long as the  
17 claim is broad enough to cover what's shown in this, then you can see that --  
18 then you'll be able to claim this, and let's suppose we had a claim that said a  
19 camouflage structure comprising a pop-up frame and a mesh panel, which  
20 would read on this product right here, correct?

21 MR. WOLTER: Well, the claim would not read on the product.  
22 Claim 1 would not. Claim 1 requires camo with black on one side.

23 JUDGE MURPHY: You're missing my point, Counselor.

24 MR. WOLTER: I'm sorry.

25 JUDGE MURPHY: I'm trying to get to where -- I'm trying to get  
26 the correlation between the claim language and the product that you're

1 relying on for your secondary considerations, and what I hear you saying --  
2 and please correct me if I'm wrong -- the claim can be very, very broad as  
3 long as it covers what is shown in this picture here, then you can rely on that  
4 for secondary considerations; is that correct?

5 MR. WOLTER: Our position is that if we're going to try -- if we  
6 don't have a presumption of the nexus, we can establish that by showing  
7 these claims are commensurate in scope with the product that is the subject  
8 of the secondary consideration. And these claims --

9 JUDGE MURPHY: And you're saying commensurate -- I'm  
10 sorry -- and you're saying that commensurate means that the claim is broad  
11 enough to cover the product, correct?

12 MR. WOLTER: Yes, broad enough or narrow enough, in this  
13 case, I think.

14 JUDGE MURPHY: Okay, thank you.

15 MR. WOLTER: Okay. So, the evidence of long-felt need that was  
16 submitted -- are there any other questions before I begin because I was going  
17 to go into the secondary consideration, including long-felt need, industry  
18 praise, and so forth.

19 Okay. So the evidence of long-felt need was provided in the form  
20 of the declarations of Ransom, Harris, and Scholes. Both -- all three of  
21 which are persons of ordinary skill in the art. In particular, Mr. Ransom and  
22 Mr. Scholes have over 30 years' experience in the outdoor industry and Mr.  
23 Harris, who is a -- been involved in product development for at least 12  
24 years, and all of which their experience deals with the introduction and  
25 development of products, and introduction of those products into the market,  
26 including pop-up style hunting blinds.

1           The particular long-felt need -- and Mr. Ransom has referenced in  
2 his declaration in paragraphs 42 through 64, and Harris referred Exhibit  
3 2033, includes paragraphs 32 through 46. Scholes is paragraph 11 through  
4 21. The long-felt need identified in the response in these declarations is a  
5 long-felt need for a ground hunting blind that minimized or eliminated blind  
6 spots at a ground blind that restrict a field of view of an occupant yet conceal  
7 the occupant so the movement in the blind could not be detected by game.

8           This is explained -- the long-felt need is explained in reference to  
9 the hunting blinds that were introduced in 1996, including the hub style  
10 blinds. The hub style blinds essentially had four walls and windows, but in  
11 order to see out, you had to have the windows open, which exposed the  
12 hunter, which restricted the field of view and required the hunter or the  
13 occupant to move around. That movement could be detected.

14           We also referred to -- I think it was in reference to Exhibit 1014, in  
15 which there is a black lining, and both, Mr. Ransom and Mr. Harris referred  
16 to prior art blinds that included black line. That was, in part, used for this  
17 light differential, for example, that's taught by Whybrew, but that still  
18 required an open window. So the hunter is still exposed, but in addition to  
19 being exposed, in order to see, because all of the other walls were black, the  
20 hunter had to move in order to crane his neck to see and get a better view of  
21 the outdoor surroundings in order to identify game.

22           In addition, Mr. Harris also refers to the problem -- one way -- or  
23 one potential solution was to change the configuration and placement of  
24 windows. You could make -- change the size of the windows and make  
25 them smaller or you can change the placement of those windows, relative to  
26 the space to park, flexible frame members in the different quadrants, or did

1 they expand the entire width of a particular side of a hunting blind. They  
2 didn't solve the problem in the sense that you still had windows that still had  
3 to be open, and you're still exposed. That problem has persisted up until at  
4 least 2016 when the inventors filed their application and discovered this one-  
5 way see through mesh with camo on one side and black on the other.

6 Another particular solution -- or was not a solution but was -- has  
7 been used and still is used, is what's known as a shoot through mesh. The  
8 problem with the shoot through mesh, similar to what is disclosed in  
9 Strength, is that the material is lightweight, and it was translucent. That is  
10 while the blinds may have had a black interior, if there was any sort of  
11 introduction of light into the blind through, for example, a door that was  
12 open or a window that was open, the hunter still could be seen or the  
13 occupant can still be seen through the mesh material, which created a  
14 shadow at the window.

15 So as Mr. Harris, Scholes, and in particular, Mr. Ransom and Mr.  
16 Scholes attest that this need was satisfied by virtue of this one-way see  
17 through mesh material, what Mr. Ransom refers to as the ultimate in  
18 concealment. The Petitioner suggests that the evidence as to long-felt need  
19 is insufficient because there is no extrinsic evidence of an articulate  
20 problem.

21 However, he cites the Apple v. Samsung case, and in that case,  
22 they didn't specifically say that extrinsic evidence was required. What -- and  
23 in another case, which I think that was actually an NBOC decision, which  
24 the Federal Circuit specifically rejected this statement as a categorical rule,  
25 wherever the Court in Apple did not state that extrinsic evidence beyond  
26 witness testimony was required to prove long-felt need.

1           And in fact, the Board has in the past relied on expert testimony  
2 alone in order to establish long-felt need. And in particular, the case of  
3 E.I.S. GmbH and -- I'm not sure I'm pronouncing -- the Novuloto case, in  
4 which they relied on a single expert, and that expert's vast experience. In  
5 this case, we had three witnesses, three persons of ordinary skill in the art  
6 attesting to long-felt need, all of which had experience in developing and  
7 introducing into the market pop-up style hunting blinds.

8           So extrinsic evidence is not required, and in fact, we have the  
9 testimony of three witnesses, persons of ordinary skill in the art,  
10 corroborating the long-felt need. And the solution to that long-felt need is  
11 the one-way see through mesh produced and invented by -- or the -- I'm  
12 sorry -- the camouflage structure that includes the one-way see through  
13 mesh, as invented by decedents in Rugged Cross.

14           JUDGE CHERRY: You have about a minute left.

15           MR. WOLTER: I'll address the further secondary considerations  
16 in my 10 minutes remaining, if that's okay with the Board.

17           JUDGE CHERRY: Yeah. I'm giving -- you have anything else  
18 you want to wrap up with? So about a minute --

19           MR. WOLTER: Well, I think just for summary is that we remain  
20 firm on our position with respect to Strength. That is Strength teaches away  
21 from the claimed invention and Whybrew, such that one skilled in the art  
22 would not combine those references. Strength's specific goal is entirely  
23 different, that is in blocking light, in order to prevent the creation of these  
24 silhouettes.

25           In contrast, Whybrew, for that matter, promotes the transmission of  
26 light, at least through the mesh material, in order to see out. To that end,

1 Strength does not suggest or otherwise disclose one-way disability. In fact,  
2 the Strength camouflage material is more akin to the prior art hunting blinds  
3 that included black interior that are referenced by Mr. Harris and Mr.  
4 Ransom, and are generally used on the walls, and also consistent with  
5 Exhibit 1014, which is the Ameristep Blind.

6 Our position, at least with the nexus, is that we're entitled to the  
7 presumption and/or the claims, including Claims 17 and 19, in particular, are  
8 commensurate in scope with a product that is the subject of the secondary  
9 consideration, the Primos SurroundView Blind. And I'll address  
10 furthermore the secondary considerations, and to the extent the Board wants  
11 to discuss further the priority issue, we're prepared to do that on our  
12 response.

13 JUDGE CHERRY: Great. Thank you very much, Mr. Wolter.  
14 Mr. Eschweiler, do you want to do your rebuttal?

15 MR. ESCHWEILER: Yes. Thank you very much. I'd like to start  
16 by just addressing -- since this is kind of a fresh issue in everybody's mind --  
17 this issue of nexus on the secondary considerations. Particularly, with  
18 regards to these Exhibits 2032E and 2032F, and Patent Owner's arguments  
19 in arguing that they're against us on our nexus argument, they basically  
20 admit that the one-way mesh in these exhibits are not commensurate with  
21 the scope of the claims because it doesn't teach a dark color coating on one  
22 side of the mesh in these exhibits, while it clearly talks about it being a one-  
23 way mesh.

24 Well, if all of the evidence relying on one-way mesh is going to be  
25 considered, what is one-way mesh? Well, they set forth what a one-way  
26 mesh is in their claims. It's a mesh material with camo on one side and a

1 dark color coating on the other side. If you don't have that, you don't have  
2 one-way viewing. It's not a one-way mesh. We argued that these exhibits  
3 are admitted prior art. He's arguing they're not admitted prior art because  
4 they don't disclose a dark color coating on the other side. If that's the case,  
5 then none of this evidence is commensurate with the scope of the claims and  
6 it kills their nexus on all their secondary considerations. So, you know, we  
7 can argue about which position you want to take, but I went either way.  
8 So --

9 JUDGE CHERRY: So your contention with that is that there --  
10 you're saying there could be one-way viewing without the dark color, so  
11 therefore, the praise of one-way viewing isn't tied to the --

12 MR. ESCHWEILER: Correct.

13 JUDGE CHERRY: -- claims?

14 MR. ESCHWEILER: Yeah. The recitation of one-way viewing in  
15 their claims is basically a thereby clause that is an inherent by-product  
16 resulting of the feature of the mesh having camo on one side and a dark  
17 color coating on the other side, and they describe that feature in conjunction  
18 with Figure 1C of their specification where they're describing how the light  
19 is reflecting from the inside and I kind of discussed that in my presentation.

20 And we argued that, hey, if the one-way mesh is this, then -- and  
21 they disclosed that more than one year before their priority date -- and now  
22 he's saying, no, don't consider, that's not prior art because there's no dark  
23 color coating discussed in this piece of reference. And if that's not the case,  
24 then this evidence that everyone is talking about, that everyone says is so  
25 important and revolutionary in the long-felt need and industry praise,  
26 unexpected results, it's not commensurate with the scope of the claims

1 because it didn't disclose the dark color coating on the other side.

2 So he admits the argument that there's no nexus by saying that  
3 these one-way mesh is not prior art. It either is or it isn't, and if it is, then it  
4 knocks them out from that point of view. If it's not, then he doesn't have  
5 nexus.

6 Also, with regards to the initial discussion about these holes in the  
7 claim and claim instruction, we did do claim construction with regards to the  
8 term mesh, and a mesh does have holes. Petitioner concedes that a mesh has  
9 holes. What we don't attempt to construe and what we don't concede is that  
10 a panel requires holes. The claims recite a panel that has three elements. It  
11 comprises a mesh material with camo on one side and dark color coating on  
12 the other side.

13 Strength teaches such an element that's got mesh fabric, which  
14 opposing Counsel has admitted is a mesh. It's got camo on one side, and it's  
15 got dark color coating on the other side. Therefore, it is a panel according to  
16 his claims and it, being substituted into Whybrew, teaches the claimed  
17 invention.

18 If, alternatively, someone were to say, hey, we are going to require  
19 there be holes in here based upon poling limitations from the detailed  
20 description, we still win because we've set forth the arguments that in  
21 modification of Whybrew in view of the general teachings of Strength would  
22 motivate a person of ordinary skill in the art to modify Whybrew's porthole  
23 mesh by placing camouflage on one side of that mesh and a dark color on  
24 the second side of that mesh. And when you do that, you arrive at the claim  
25 invention, so we've set forth two theories by which the combination of art  
26 results in the claimed invention, and we believe that in both cases, it renders

1 those claims obvious and therefore, invalid.

2 JUDGE CHERRY: Mr. Eschweiler, the way I understood what  
3 Mr. Wolter was saying was that the -- what is being done in Strength is that  
4 you're applying this film, and the film will block the holes and that's what's  
5 going to result in the reduction and light transmission. Do you agree with  
6 that or how do you understand the teachings of -- how does your expert  
7 understand the teachings of Strength?

8 MR. ESCHWEILER: In the example set forth in Strength, they  
9 indicate the dark color coating of about 3 mil is applied in one example, or  
10 in each of the examples, that's what applied. They say that can be applied in  
11 a number of ways and it lists a number of ways, and then it says, or the like.  
12 So it was pretty clear that to Strength, you can apply this dark color to the  
13 second side and the various ways here are a few examples.

14 One was a film, one was an extrusion coating, which our expert  
15 said, hey, in these situations, I can tell you that you're going to have holes  
16 sometimes and other times, you're not going to have holes, and Strength  
17 doesn't talk about that. When I asked our expert, why doesn't Strength talk  
18 about that, he said, well he doesn't really know, but probably because  
19 Strength didn't care. Strength wasn't worried about ventilation in what he  
20 was trying to disclose. He was more interested in light transmission.

21 Therefore, the whole issue was more of a don't care. It doesn't  
22 mean that there will always be holes or never holes, but it does indicate with  
23 the state of the art and a person of ordinary skill in the art would appreciate  
24 that under circumstances, when that molecular weight is low and you use an  
25 extrusion process, there will be situations where you will have holes.

26 Furthermore, that was just one of the examples of the application

1 techniques. There's nothing in Strength -- they talk about printing camo on  
2 one side. There's nothing that precludes Strength from printing the dark  
3 color on the other side. It says, this, this, this, this, or the like. And one of  
4 ordinary skill in the art can appreciate that you can put a dark color on that  
5 side in all sorts of different ways.

6           And since Strength was talking about the percentage of the  
7 darkness by the amount of pigment you put in it, that's what's tuning the  
8 light transmission. That's what he cared about, and so to say that Strength  
9 wants no light transmission -- he showed that at 6 percent, you can block all  
10 the light, but he also showed that there's a continuum between 0 and 6  
11 percent by weight pigment that you can tune it to anything that you want.

12           Whybrew says, we want a light differential and provide one-way  
13 viewing. Strength says, I can help you by tuning this to any light differential  
14 you want. We're both dealing with hunting blinds, we're both dealing with  
15 the mesh, but one of ordinary skill in the art sitting at his work bench  
16 looking at this says, hey, I can use Strength right here, I can modify  
17 Whybrew, and I can get whatever light differential I want. I can make this  
18 one-way viewing really good. If there's other reasons I want it, you know,  
19 slightly different, I can do that, too. So Strength has very broad teachings,  
20 but it reads on the broad claims that Rugged Cross has set forth, and  
21 therefore, it invalidates.

22           Lastly, on the whole topic of teaching away, there is nothing in  
23 Strength that discourages anything. Strength is just telling you, hey, I can  
24 tune light with the amount of darkness in this coating. I'm trying to get rid  
25 of silhouetting. Whybrew says, hey, that's great, I'm trying to get rid of  
26 silhouetting, too. I want one-way viewing. I can add this, and I can make it

1 as dark as I want to get me the desired feature that I want. I don't want to  
2 block all the light, so I get what I want, and I read on the claims and  
3 invalidate them. So this whole teaching away argument, just as an opposite.  
4 I believe that's the last of my time. Do you have any questions that I can  
5 help you with?

6 JUDGE CHERRY: No. I think -- I don't have any questions. Any  
7 questions? No. No one has any questions. Thank you very much, Mr.  
8 Eschweiler. And now we'll hear the Patent Owner's surrebuttal.

9 MR. WOLTER: Again, with respect to Strength and the  
10 application, to us, when you reach Strength, it is specific in what is being  
11 done in terms of applying a thermoplastic coating. In fact, it refers to  
12 methods that apply a sheet. It gives us samples of those and other methods  
13 that would apply a sheet because the end goal is to block light. And so in  
14 doing so, they are covering whatever holes that may or may not exist in that  
15 base textile. So, and in effect, opposing Counsel's reference to there may be  
16 holes or there may not be holes, well, that would be -- the formation of holes  
17 in the thermoplastic material would be directly contrary to the purpose of  
18 Strength, which is to block light.

19 In the end, that is their objective to block light. How much may  
20 depend on the amount of pigment they may put in it. How much may be --  
21 depend -- how much pigment they may have on it may depend on how thick  
22 or how heavy the base textile is, but in the end, they are trying to block light.  
23 And in doing so, they are covering holes to restrict transmission of light,  
24 which would restrict airflow and/or visibility. And in fact, if they put that  
25 material on Whybrew, at least with respect to one of the examples, no one  
26 can see out of the blind, so --

1 JUDGE MELVIN: But why isn't that exactly the reason that  
2 there's -- I guess I'm taking an issue with your view that strength intended to  
3 block light. I mean, I think that's an underdeveloped statement. If  
4 Strength -- if all Strength wanted to do were block light, it could have done  
5 so fairly easily, but it would no longer function as an effective hunting blind  
6 if one couldn't see out. So clearly, what Strength wanted to do was block  
7 light to a certain degree, but not too much. I mean, you're --

8 MR. WOLTER: I want to --

9 JUDGE MELVIN: -- characterizing Strength as seeking an  
10 opaque structure, but that's clearly not the case.

11 MR. WOLTER: No, that's not what I said, and if I said that, thank  
12 you for clarifying. What they are doing to do is to overcome the problems  
13 with translucent materials. What they are trying to do is prevent the  
14 formation of a silhouette, but under no circumstances does Strength suggest  
15 that you can see that material that's disclosed and more specifically, see  
16 through it to see wild game that you can take aim at and shoot at. With  
17 Strength --

18 JUDGE MELVIN: But Strength is a hunting blind.

19 MR. WOLTER: That has walls. What I was suggesting earlier is  
20 that at best, Strength discloses walls -- I'm sorry -- the prior art walls that  
21 included a black lining, so you may have four walls. And so three of those  
22 walls, which may or may not have a window for all of them, but you don't  
23 look through those walls. You have a window to open up to see how of  
24 those walls. So it discloses a hunting blind, but it's disclosing a blind in  
25 which -- if you were sitting there in the blind and you had a very light  
26 material and light is coming through, that occupant or wild game can see

1 from outside the silhouette forming and they can see movement of that  
2 silhouette. Just because it's disclosing and using it on a hunting blind doesn't  
3 suggest or any way say that you can see through that mesh to see wild game  
4 and take aim at that game and shoot it. No. What they are talking about are  
5 walls that prevent someone from seeing in and seeing a silhouette.

6 I'm not saying it necessarily discloses blocking all light, but for  
7 sure what it discloses is blocking enough light to prevent a silhouette from  
8 being formed and being seen from the outside. So in that sense, you can  
9 tune it. You can tune the pigment, but that may -- depending on the amount  
10 of pigment may depend on the type of underlying base textile you have, is it  
11 thicker or lighter.

12 JUDGE MELVIN: Okay, thank you.

13 MR. WOLTER: Did that answer your question?

14 JUDGE MELVIN: I think so, yes.

15 MR. WOLTER: So while it's disclosed as a hunting blind -- so  
16 any hunting blind has -- sometimes, they have five walls, but for sure, the  
17 prior art blinds had, you know, a flexible material so that it could fold and --  
18 or collapse and unfold relative to the frame. And so they include a black  
19 lining. No holes in that lining because holes would promote the  
20 transmission of light, and that's being controlled -- the transmission of light  
21 is being controlled by a single sheet film that does not have holes.

22 You couldn't really control -- the way that Strength tunes it is by  
23 controlling the pigment and the amount of pigment. By relying on whether  
24 or not holes may or may not form, there is no predictable nature whether or  
25 not those -- when you're using an extrusion process, whether or not the holes  
26 will form or if they do or they don't.

1           The predictable nature of using the pigment can control -- better  
2 control the amount of light that may be blocked and/or transmitted, but in  
3 the end, they're trying to prevent the formation of silhouettes and prevent  
4 enough transmission of light through that wall that may form silhouettes.

5           So there is a particular outstanding issue that I think we would like  
6 to address with the time I have left. There was some issue with respect to  
7 whether or not we provided sufficient evidence in terms of our licensing.  
8 Licensing documents or actual licenses were not filed, either on public  
9 record or under seal, but in -- the Petitioner cites Affinity, but Affinity  
10 doesn't hold that the actual license agreement is required in order to establish  
11 or be probative. What Affinity -- the test is whether the facts indicate that  
12 the licenses were entered into because the merits of the claimed invention or  
13 because they were entered into as business decisions to avoid litigation, or  
14 because of prior business relationships.

15           When considering this, we request the Board to review the  
16 declarations of Mr. Ransom, Mr. Harris, and Mr. Scholes, all which  
17 corroborate the testimony of Mr. Seaton. In the case of Primos or in all  
18 cases, Rugged Cross was a newcomer to this industry. They didn't know  
19 anybody at Primos. They didn't know Jay Scholes or Bob Ransom. They  
20 were a sheriff's detective and a firefighter. At that point, they didn't have  
21 that much skin in the game. They did not threaten litigation on any of these,  
22 and in fact, at the 2016 tradeshow, Jason Harris at Primos thought that that  
23 was a game changing technology. They figured that that would be a major  
24 advancement in ground blinds. Primos approached Chris Seaton at that  
25 point.

26           From there, a business relationship was established, in which they

1 granted -- or Rugged Cross granted an exclusive license to Primos to  
2 manufacture and sell hunting blinds and add a one-way see through mesh.  
3 Jay Scholes in 2021, after having done some research to see where the  
4 market was going with respect to ground blinds and having actually sat in  
5 one of those ground blinds, contacted Chris Seaton. Chris Seaton did not  
6 contact Jay Scholes first. Jay Scholes contacted Chris Seaton. Jay Scholes  
7 flew down to Tampa, Florida, so they sat and negotiated and talked, and  
8 later, entered into a non-exclusive license agreement.

9 At that point, the exclusivity of Primos's agreement had changed to  
10 non-exclusive, but under no condition -- in both of those situations, there  
11 was never a threat of litigation, there was not a prior business relationship.

12 Similarly with respect to Bob Ransom, there was never a threat of  
13 litigation, and if you take a look at the surreply, we have testimony with  
14 respect to why these persons entered into it. They thought that this was  
15 revolutionary technology, especially with respect to the pop-up frames and  
16 ground blinds. And so it was on that basis that they wanted to get a license  
17 and essentially do the right thing and pay royalties. In fact, Primos and Bob  
18 Ransom had -- in their deposition testimony, said that they continue to pay  
19 royalties under this agreement. Bob Ransom -- Chris -- Bob Ransom started  
20 making the blinds, Chris approached him to identify and say, look, we've got  
21 patents on it. Bob Ransom took that information back to an attorney and  
22 came back --

23 JUDGE CHERRY: I guess -- Mr. Wolter, are the licenses -- are  
24 they only for this one patent or are they for other patents, as well?

25 MR. WOLTER: For the other -- no -- well, they're all related to  
26 the same technology. Any other patents are listed in the license --

1 JUDGE CHERRY: Are they all --

2 MR. WOLTER: -- are in the same family of blinds.

3 JUDGE CHERRY: The same family. They all have the same  
4 specification?

5 MR. WOLTER: Yes. It's all based on that original patent at issue.  
6 It's the same specification. Claims are different, but it's the same. There are,  
7 I think, three or four patents, all of which include the same specification.  
8 There -- we have another patent I'm going to issue soon or has issued, but  
9 there are varying degrees of the scope of the claims, but it's the identical  
10 specification. All claiming priority to the provisional application, which  
11 disclosed the mesh material with holes in it. All of which was done relative  
12 to and filed as a result, in large part, of the success or the -- what happened  
13 at the 2016 tradeshow when they showed that pop-up -- or it was not a pop-  
14 up blind, but the Austin Blind at the NWTf tradeshow in 2016, which kind  
15 of led to this whole process where we are today. The success and the  
16 commercial success that Primos did, the copying by the -- and I would like  
17 to refer to the copying in this sense. I think we were -- if we go to claim --  
18 I'm sorry, Slide 28. That's the Primos blind.

19 And so the copying can be established for purposes of secondary  
20 consideration if there was access. Access to the product and that the  
21 products -- or the alleged infringement products for this -- in this case are  
22 substantially similar. Access is established by Primos actually selling this  
23 blind, so it was available to the public to anybody, but in addition, Jason  
24 Harris testified that it was typical practice, at least for someone at Primos, to  
25 identify competitors' products, inspect those products, and in particular as to  
26 ground blinds, inspect the materials of those products.

1           So access was available. If not at the tradeshow, wanted their  
2 competitors, just like the Petitioner, to go out and inspect the product,  
3 identify the interwoven mesh material that has one-way see through  
4 capabilities, and incorporate it in their blinds. And in fact, that's what the  
5 Petitioner did. The un rebutted testimony is that DBR reached out to Chris  
6 Seaton, and they arranged a business relationship -- or I'm sorry -- a business  
7 meeting in Indiana in 2021.

8           Prior to that meeting, DBR asked Mr. Seaton for a sample of the  
9 one-way see through mesh. Chris Seaton sent that material to DBR. They  
10 subsequently met, were not able to reach an agreement as to the licensing  
11 arrangement, but that alone testimony is un rebutted and establishes access.  
12 The similarities can be found, at least for example, in Slide 28. I mean, all  
13 of these -- this is the Primos blind. The only real difference between any of  
14 these blinds, and this is the -- in Slide 30, there are samples of --

15           JUDGE CHERRY: We can review that --

16           MR. WOLTER: Okay.

17           JUDGE CHERRY: -- Mr. Wolter. We're three minutes over, so I  
18 give you a little bit of leeway there.

19           MR. WOLTER: I'm sorry.

20           JUDGE CHERRY: Do you have anything just in your conclusion?  
21 I'll give you 30 seconds to kind of sum it all up here. Are you done?

22           MR. WOLTER: So in this case, Whybrew and Strength cannot be  
23 combined. Strength clearly teaches away from the claimed invention and  
24 the teachings of Whybrew. There is a nexus, either presumed or that these  
25 claims are commensurate in scope with the product that was subject to this  
26 industry praise, including the awards, the commercial success, subject at

1 least to one of the licenses, and which there are three licenses. Two of  
2 which are with -- two of the leaders of this industry.

3 The commercial success is indeed there, which the SurroundView  
4 Blind resulted in the increase of sales, and there was context provided in  
5 that, in the sense that the SurroundView Blind sold all over ground blinds  
6 that Primos had, so there is context in that regard, and that number is that it  
7 increased ground blinds of Primos sales for that year --

8 JUDGE CHERRY: Okay. We're --

9 MR. WOLTER: -- by 60 percent.

10 JUDGE CHERRY: Okay. Thank you very much, Mr. Wolter.  
11 Thank you very much, Mr. Eschweiler. Thank you both for your very fine  
12 presentations and they were very helpful. And with that, the case is  
13 submitted.

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

IPR2024-00291  
Patent 11,399,535 B2

PETITIONER:

Thomas Eschweiler  
Nathanael Smith  
Dennis Abdelnour  
ESCHWEILER & POTASHNIK LLC  
teschweiler@eschweilerlaw.com  
njsmith@epiplaw.com  
dabdelnour@honigman.com

PATENT OWNER:

Robert Wolter  
WOLTER VAN DYKE DAVIS, PLLC  
rwolter@savvyiplaw.com