

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BOWMAR ARCHERY LLC,
Petitioner,

v.

MATTHEW FUTTERE,
Patent Owner

IPR2024-00401
Patent 8,043,177 B2

Record of Oral Hearing
Held Virtually: April 1, 2025

Before SCOTT A. DANIELS, CARL M. DeFRANCO, and
SEAN P. O'HANLON, *Administrative Patent Judges*.

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The above-entitled matter came on for hearing on April 1, 2025,
commencing at 10:00 a.m., via video teleconference.

P R O C E E D I N G S

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JUDGE O'HANLON: Good morning, everyone. I am Judge O'Hanlon, and I am joined by Judge DeFranco and Judge Daniels. This is a hearing in case number IPR2024-00401, Bowmar Archery, LLC v. Matthew Futtere. This concerns U.S. Patent Number 8,043,177. I'd like to start by having Counsel for the parties introduce yourselves for the record, beginning with Petitioner, please.

MR. SHULL: Good morning, everybody. This is Jason Shull from Banner Witcoff on behalf of Petitioner, Bowmar Archery.

MR. McKINNIE: This is Jason --

JUDGE O'HANLON: Good morning. Thank you, Mr. -- sorry, please proceed.

MR. McKINNIE: This is Jason McKinnie with McKinnie & Paul on behalf of the Patent Owner, Matt Futtere.

JUDGE O'HANLON: Thank you, Mr. Shull and Mr. McKinnie. I have a few housekeeping items to mention before we begin. First of all, the camera for me, I believe, is right here, but the screen is over here, so I might be -- you might be seeing the side of my face this morning. I apologize for that. Our primary goal is to allow you to make arguments and be heard. If, at any time during this proceeding, you encounter technical or other difficulties that undermine your ability to do so, please let us know immediately by contacting the members who provided you with the contact information for today's hearing.

Recording of any PTAB hearing is prohibited. The court reporter

1 will provide a transcript of the hearing that will become a part of the record
2 in this proceeding. To ensure the transcript of this hearing is clear, we ask
3 you to ensure your microphone is positioned close to you when speaking.
4 And when not speaking, please mute yourself. When referencing your
5 demonstratives, papers, or exhibits, please state the slide or page number so
6 we can follow along more easily and for clarity of the record.

7 Each side will have 60 minutes of total time to argue. Petitioner
8 will go first, followed by Patent Owner, and either side may reserve time for
9 rebuttal. I'm in the Alexandria hearing room today, which has a timer that I
10 am planning to use, but I want to make sure the parties can actually see the
11 timer. Mr. Shull, can you see the timer?

12 MR. SHULL: I can. Thank you.

13 JUDGE O'HANLON: And Mr. McKinnie?

14 MR. McKINNIE: Yes, I can see it.

15 JUDGE O'HANLON: Okay, wonderful. So I'll use the timer this
16 morning. And finally, please remember that your arguments should be
17 limited to only those arguments previously presented in your briefs. Please
18 make it clear what challenges and claims you are addressing at all times.
19 And we ask that the parties hold any objections regarding the other party's
20 arguments until it's your time to present.

21 Now, does anybody have any questions before we begin this
22 morning?

23 MR. SHULL: This is Jason Shull. I do not.

24 MR. McKINNIE: I do not either.

25 JUDGE O'HANLON: Wonderful. With that, I invite Mr. Shull to
26 begin. Mr. Shull, would you like to reserve any time for rebuttal?

1 MR. SHULL: I would. I'd like to reserve at least 15 minutes.
2 Potentially how long I go, maybe 10.

3 JUDGE O'HANLON: So I'm going to set the timer for -- do you
4 want me to set it for 45 minutes or for 50 minutes?

5 MR. SHULL: I would set it for 50. Then if I have to bleed over
6 just a little bit, then I'll go ahead and do that.

7 JUDGE O'HANLON: Okay. So you're reserving 10 minutes for
8 rebuttal. Give me just a moment while I set the timer. Okay. The timer is
9 set, and you may begin when you're ready, Mr. Shull.

10 MR. SHULL: Okay. I'd like to share my screen, if possible. I'll
11 try to do that now. Okay. Can you see my screen okay?

12 JUDGE O'HANLON: I do not see it.

13 MR. SHULL: Okay. It says that it's being shared.

14 JUDGE O'HANLON: I do have the demonstratives before me,
15 so --

16 MR. SHULL: Okay, maybe --

17 JUDGE O'HANLON: -- you can just tell us the slide number.

18 MR. SHULL: If you don't mind, there are maybe three or four
19 slides with, actually, embedded animations. During those slides, I'd like to
20 play those animations, but if you have those, you can certainly reference
21 those as exhibits. I'll describe in words what the animations will show. I
22 think they really clarify things, but I'd like to be able to show my screen, if
23 possible, if you don't mind just a couple minutes of trying to work out this
24 technical issue. I'll stop sharing that and try this again.

25 MR. McKINNIE: Jason, I could see it when you had shared it,
26 just to let you know.

1 MR. SHULL: Okay, so you can see that.

2 JUDGE DANIELS: I could see it. I don't know about the --

3 MR. SHULL: Okay.

4 JUDGE DANIELS: -- other judges.

5 JUDGE DeFRANCO: Yeah. This is Judge DeFranco. I can see
6 it, as well.

7 MR. SHULL: Okay, great. That's perfect. Okay. We can get
8 started then. Great, thank you. Okay. So good morning, again. This is
9 Jason Shull on behalf of the Petitioner. I am going to address -- as far as the
10 order of my arguments, I'm going to address Grounds 1 and 3 first. Ground
11 1 is Lint anticipates the claims. Ground 3 is Lint renders the claims obvious
12 in view of other prior art -- either alone or other prior art. After addressing
13 Grounds 1 and 3, I'm going to address Ground 2, which is Vandewater
14 anticipates the claims. Finally, I'm going to address Ground 5, which is
15 Liechty anticipates the claims. Due to the time restraint this morning, I do
16 not plan on addressing Ground 4. Petitioner will rely solely on its papers
17 and supporting exhibits with respect to Ground 4.

18 So let's move on to Ground 1, which is Lint anticipates. The
19 central issue with respect to Lint in Ground 1 is whether the outer barb 19 in
20 Lint constitutes a blade. In its petition, Petitioner advanced the plain and
21 ordinary meaning of the term "blade." In the response, the Patent Owner has
22 proposed a construction that's inconsistent with the plain and ordinary
23 meaning.

24 As I'll explain, however, under either interpretation, whether it's
25 Patent Owner's construction or Petitioner's plain and ordinary meaning
26 construction, Lint anticipates. In other words, Patent Owner's construction

1 isn't correct, but even if you apply that construction, Lint, nonetheless,
2 anticipates the claims, and I'll walk you through that analysis.

3 So let's turn to Slide 2 of the demonstrative. The plain and
4 ordinary meaning of blade is a tool or device with an edge. Patent Owner's
5 interpretation of the term "blade" requires a cutting edge or a sharp part.
6 That construction is wrong. It's overly restrictive because it improperly
7 excludes blades that are commonly used in the industry that have dull, blunt,
8 and unsharpened edges.

9 The Petitioner has pointed out in its briefing and supporting
10 exhibits the terms "cutting edge" and "sharp" don't appear anywhere in the
11 intrinsic evidence. They're not in the claims, they don't appear in the
12 specification, they don't appear in the prosecution history.

13 JUDGE DANIELS: Mr. Shull?

14 MR. SHULL: Yes.

15 JUDGE DANIELS: This is Judge Daniels. I have a question.
16 When you have, in the industry here -- are we talking the plain and ordinary
17 meaning in the industry of arrowheads and broadheads?

18 MR. SHULL: Well, arrowheads and broadheads are essentially
19 the same thing.

20 JUDGE DANIELS: Right.

21 MR. SHULL: Broadhead has been a term that's developed over
22 time to refer to an arrowhead. The term "broadhead" merely means the head
23 is broader than the arrow shaft, and so when you hear the terms "arrowhead"
24 and "broadhead", they're essentially the same. So when we're talking about
25 the plain and ordinary meaning of the term "blade," we're talking about it in
26 the context of not only the archery industry, which pertains to broadheads

1 and arrowheads, but just generally, even outside the archery industry.

2 JUDGE DANIELS: Well, the reason I'm asking the question is I
3 appreciate your argument in terms of -- for instance, if you were thinking
4 about a propeller blade or a blade of a wind turbine, those don't have sharp
5 edges, correct?

6 MR. SHULL: Correct. You're exactly right. They do not have
7 sharp edges, but what they do have is an edge.

8 JUDGE DANIELS: Agreed. My concern is here -- for instance, if
9 I look at the '177 patent, I do appreciate that it doesn't say that there are
10 sharp edges, but I do see that -- I'm looking at Column 4, and it talks about
11 the blade members are in an extended position. It's Column 4, lines 21 --
12 starting at lines 21 through 24. The blade members 20 are in the extended
13 position on either side of the bone to maximize the cutting surface. So
14 doesn't that in context mean that we need to have -- that those blades need to
15 be at least sharp enough and have some edge?

16 MR. SHULL: Well, that's a very good question, because as I will
17 explain in our presentation, all that's required to achieve cutting is pressure
18 plus velocity, plus an edge. These are -- this is an undisputed -- this is an
19 undisputed facts in this case, that all you need to cut is an edge, plus
20 velocity, plus pressure, and I'll walk you through the analysis. So going
21 back to the term "blade" --

22 JUDGE DANIELS: Well, let me ask another question.

23 MR. SHULL: Sure.

24 JUDGE DANIELS: I've handled plenty of broadheads. I've shot
25 them. They're very dangerous implements. They're made to do a
26 tremendous amount of vascular damage most of the time. I have very rarely

1 seen a dull broadhead. In fact, you have to be so careful with them that here,
2 where I live, when you hunt with them, you have to have your name on them
3 so that they can be traced back to you. My concern is that if we don't have
4 some sort of sharpness or apply Patent Owner's interpretation, then we're
5 really well outside the context of this patent.

6 MR. SHULL: Actually, sharpness is actually a subjective term.
7 So whether or not a blade is sharp really depends on, you know, the person
8 or the -- the person that's actually using the blade, but as I will explain, the
9 term "blade" or "blades" generally can have different forms. They can have
10 sharp, unsharp, blunt, or full edges. Regardless of the edge, it's still a blade,
11 and that's an undisputed fact with respect to what one of ordinary skill in the
12 art would know about a blade in the archery industry.

13 JUDGE DANIELS: Thank you.

14 MR. SHULL: So turning to Slide 3 of the demonstrative, we have
15 excerpts of the expert opinion -- expert reports from Dr. Kuhn and Mr.
16 Mizek first. Taken from paragraph 96 of Dr. Kuhn's reply declaration, he
17 explains that the ordinary and customary blade is a tool or device with an
18 edge. Dr. Kuhn was actually deposed in this proceeding on September 6th,
19 2024.

20 During that deposition, he was very clear what the plain and
21 ordinary meaning of the term "edge" is. Likewise, with respect to Mr.
22 Mizek's declaration taken from paragraph 16, he explains that a person of
23 ordinary skill in the art knows that the ordinary and customary meaning of
24 blade is a device that has an edge. On Slide 4 of the demonstrative, there's
25 another excerpt from Dr. Kuhn's reply declaration taken from paragraph 98.
26 He explains that the blade can either have a sharp edge or a dull edge.

1 Broadheads with dull blades are commonly sold and used in the archery
2 industry. He explains that such blades do not have a cutting edge or a sharp
3 part, but they still constitute blades.

4 On Slide 5 of the demonstrative, there's another excerpt from Dr.
5 Kuhn's reply declaration taken -- I'm sorry -- Mr. Mizek's declaration taken
6 from paragraph 19. There he explains that it's common knowledge to those
7 of ordinary skill in the art in the archery industry. Edges or blades on
8 broadheads can be sharp, dull, or blunt. An unsharpened, dull, or blunt edge
9 blade constitutes a blade even though the edge is not sharp. A blade with a
10 dull edge is still a blade. A blade with a blunt edge is still a blade.

11 Both Dr. Kuhn's and Mr. Mizek's opinions are supported by art-
12 specific evidence. Slide 6 of the demonstrative identifies some of the art-
13 specific evidence that makes clear that blades can have different forms.
14 They can have dull, blunt, sharp, or unsharpened edges. Regardless of the
15 form, they're still blades. That art-specific evidence was submitted as
16 Exhibit 1038, 1039, and 1010. Importantly, the general usage projection
17 areas the Patent Owner relies on for the term "blade" can't overcome this art-
18 specific evidence. That's made clear by the Federal Circuit several times,
19 including in Phillips v. AWH Corp, 415 F.3d 1303. That's a Federal Circuit
20 2005 decision.

21 JUDGE O'HANLON: Mr. Shull, let me ask you, you're citing
22 extrinsic evidence here. Is it even proper for us to turn to the extrinsic
23 evidence when the '177 patent talks about -- as Judge Daniels pointed out,
24 the disclosures in the patent talk about the blade performing a cutting
25 function. So if that's clear from the '177 patent, why would we turn to the
26 extrinsic evidence?

1 MR. SHULL: Well, with respect to the '177 patent you're referring
2 to, it's obviously a small snippet of the specification. So you take that
3 description, the specification, and you included that in the claims, that would
4 be wrongly importing that limitation in the claims. That doesn't appear
5 anywhere in the claims. With respect to the intrinsic evidence, the prior art
6 evidence, Exhibit 1038, 1039, and 1010, that is direct evidence of what one
7 of skill in the art would know in the industry as far as blades, right?

8 JUDGE O'HANLON: But don't we interpret the claims in light of
9 the specification? And if the specification --

10 MR. SHULL: We do.

11 JUDGE O'HANLON: -- in every instance of blade talks about it
12 performing a cutting function, why wouldn't we understand "blade" to be --

13 MR. SHULL: Because the specification is --

14 JUDGE O'HANLON: -- an element to perform a cutting function?

15 MR. SHULL: Because the specification is not limiting, right?

16 And the claims are not limiting to a cutting function and that's the point.

17 JUDGE O'HANLON: Is your position that the '177 patent talks
18 about dull blades or blades that do not perform a cutting function?

19 MR. SHULL: No, they don't, but the point is, you've got to look at
20 the claims. What do the claims say, not the spec. Obviously, the
21 specification brings light into what the claims could mean, but the claim
22 language is merely a blade member. And in the industry, a blade -- it's very
23 clear that a blade can be sharp, it can be unsharp, it can be dull, and it can be
24 blunt. So wrongly excluding or limiting the term "blade" to only a sharp
25 edge would wrongly exclude all these other blades that are commonly
26 known and used in the industry.

1 JUDGE O'HANLON: But if the industry doesn't have a set
2 definition, again, why wouldn't we look to the specification and the
3 prosecution history of the '177 patent to see which of the, as you assert,
4 many meanings of blade was intended by the inventors here?

5 MR. SHULL: There's no evidence in the specification, the claim
6 to the prosecution history, that the inventors meant to limit the claims to
7 only sharp edges. The specification is merely exemplary. And in the
8 industry, naturally, the preference is to have the sharpest blade as possible.
9 That's not disputed, but the bottom line is in the industry -- as evidenced by
10 the expert opinions of Dr. Kuhn, Mr. Mizek, and the art-specific evidence
11 that they submit, the term "blade" can encompass many different forms --
12 blunt, sharp, unsharp, and dull edges. Turning to Slide 7 in the
13 demonstrative.

14 JUDGE O'HANLON: So Mr. Shull, it's your position or
15 Petitioner's position that if we were to interpret "blade" as requiring it to be a
16 cutting blade or a sharp blade, then we would be improperly importing
17 limitations into the claim?

18 MR. SHULL: That's correct. That's exactly what would be
19 happening. The claims --

20 JUDGE O'HANLON: Okay.

21 MR. SHULL: -- say blade member. Blade member is not limited
22 to sharp edges.

23 JUDGE O'HANLON: So if they meant for it to be a cutting blade
24 or a sharp blade, or even a blunt blade, it would have that term in the claim,
25 as opposed to simply being in --

26 MR. SHULL: Yes.

1 JUDGE O'HANLON: -- the specification? Okay.

2 MR. SHULL: That's correct. If they meant to limit it to that -- the
3 sharp edge or a cutting edge -- they could have and should have put that
4 limitation in the claims.

5 JUDGE O'HANLON: All right. Thank you.

6 MR. SHULL: Sure. Turning to Slide 7 of the demonstrative, you
7 can see that Mr. Willkomm did not consider any art-specific evidence when
8 forming his construction of the claim term. On Slide 7, there's an excerpt
9 from Dr. -- Mr. Mizek's expert declaration taken from paragraph 23. There
10 he says that he's reviewed the deposition testimony of Mr. Willkomm. Mr.
11 Willkomm admitted that he did not consider any such art-specific evidence
12 when forming his opinion. His interpretation of the term "blade" is therefore
13 incorrect. You can see Mr. Willkomm's deposition transcript at Exhibit
14 1034 at page 150, line 24 to page 151, line 10 -- contains his admission that
15 he did not consider any art-specific evidence when forming his opinion.

16 Slide 8 of the demonstrative, there's an expert from the reply
17 declaration of Dr. Kuhn at paragraph 99. It's a myth that you need sharp
18 broadhead blades to achieve cutting. All you need is velocity plus pressure,
19 plus an edge. Dr. Kuhn explained this undisputed concept on page 86, line
20 21 to page 88, line 17 of his deposition, but on paragraph 99 of his reply
21 declaration, he also states that a person of ordinary skill in the art knows that
22 the edge of a blade does not need to be sharp in order to cut flesh.

23 Dr. Kuhn submits a video that was published by Patent Owner, Mr.
24 Futtere, in advance of the filing of the '177 patent. Patent Owner has not
25 disputed any of the public statements that Mr. Futtere has made. In the
26 video, which I'll play in the next slide, Mr. Futtere states that a safe-to-

1 handle edge can achieve capillary cutting that is based on the laws of
2 physics. He states all you need is an edge to the cutting, plus velocity, plus
3 pressure. He states it's a myth that you need scalpel sharp broadhead blades
4 to achieve cutting, that any compound bow today, even recurves, will cause
5 a broadhead to travel well in excess of 125 to 130 miles an hour, and that
6 velocity, coupled with the pressure being forced through an animal, takes a
7 safe-to-handle edge and cuts at the capillary level every single time. That
8 video can be found in Exhibit 1041. I'd like to play that video for the panel.

9 (Whereupon a video, marked Exhibit 1041, was played in Court,
10 transcribed as follows.)

11 MR. FUTTERE: The Atom broadhead is the world's first safe-to-
12 handle broadhead. I'm not cutting myself, yet we still achieve capillary
13 cutting that's based off the laws of physics. You need an edge to do the
14 cutting, plus velocity, plus pressure. Simple demonstration to shatter the
15 myth of requiring scalpel sharp broadhead blades is as easy as this. Just
16 increase the velocity a little bit, little bit more pressure, and that safe-to-
17 handle razor wire easily cuts through that paper. It is that easy to show you
18 the myth has been shattered regarding scalpel sharpness being a mandate.

19 So we have a much more durable edge, as well. I can cut and cut,
20 and cut and cut, and I'm not dulling the edge of this titanium, safe-to-handle
21 razor wire because I simply have a less steep front angle. You can see it
22 easily cuts this paper. Now, imagine this broadhead traveling in excess of
23 150 miles an hour, which is what happens when you launch it from any
24 compound bow today. Even recurves launch it well in excess of 125 to 130
25 miles an hour. That velocity coupled with the pressure of being forced
26 through an animal takes this safe-to-handle edge and cuts at the capillary

1 level every single time.

2 (Whereupon the video, marked Exhibit 1041, concluded at this
3 time).

4 MR. SHULL: Patent Owner argues that Lint does not anticipate
5 the claims because they disclose barbs and not blades. Dr. Kuhn and Mr.
6 Mizek explain in their expert declarations that the term “barb” and “blade”
7 can be referred -- can be used to refer to the same element or component of
8 broadhead in the industry.

9 On Slide 10 of the demonstrative, there's excerpts from Dr. Kuhn's
10 declaration and Mr. Mizek's declaration. First, at paragraph 103 from Dr.
11 Kuhn's reply declaration, he explains that a person of ordinary skill in the art
12 knows that the terms “blade” and “barb” are often used to refer to the same
13 thing. The term “barb” refers to an element of an arrowhead in which the
14 angle form between the trailing or rear edge of the element in the ferrule is
15 less than 90 degrees.

16 Likewise with respect to Mr. Mizek's declaration taken from
17 paragraph 25, he explains that the terms “barb” and “blade” are routinely
18 used in the archery industry, refer to and describe the same component or
19 element of a broadhead. He goes on to explain that a blade and a broadhead
20 constitutes a barb if the angle formed between the trail and a rear edge and
21 the ferrule body is less than 90 degrees. Likewise, a barb can be -- a barb on
22 a broadhead constitutes a blade if the barb has an edge. In other words, a
23 blade can be a barb, and a barb can be a blade.

24 JUDGE DeFRANCO: Mr. Shull, this is Judge DeFranco. Other
25 than testimonial evidence, do you have anything that shows the
26 interchangeability between the terms “barb” and “blade?” And I say that

1 because, you know, when I think of barbed wire fence, I don't hear it being
2 called blade wire fence. It's just simply called barbed wire fence, so I'm not
3 totally sure I'm buying the interchangeability of these terms. But if you have
4 evidence other than testimony, which I think maybe you're going to show us
5 right now, I'll let you go on.

6 MR. SHULL: Yeah, yeah. I'm going to show you exactly that.

7 JUDGE DeFRANCO: Okay, thank you.

8 MR. SHULL: So I'm going to turn to Slide 11 of the
9 demonstrative. And Mr. Mizek explains that the blade members in the '177
10 patent, which he refers to the Flanagan patent, are all barbs. They're all
11 barbs. In paragraph 26 of his expert declaration, he explains the blade
12 members in Figures 1 through 8 of Flanagan, which is the '177 patent, are
13 examples of elements that constitute the barbs and blades. The blade
14 members in Figures 1 through 8, one, have an edge, and two, the angle
15 formed between the trailing, the rear edge of each blade member, and the
16 ferrule body of the broadhead is less than 90 degrees.

17 On page 15 of his expert declaration has been reproduced on Slide
18 12 of the demonstrative. He has an excerpt or annotated excerpt of Figures 1
19 and 2 show exactly how those blade members are barbs. The angle between
20 the trailing edge and the body is less than 90 degrees. Likewise, during his
21 deposition, Patent Owner's expert admitted that all the blade members in the
22 '177 patent are barbed.

23 His deposition excerpts are shown on Slide 13. He was asked in
24 paragraph 77 of his declaration -- he stated that the plain and ordinary
25 meaning of the term "barb" is a projection extending backward from a point,
26 having an angle of less than 90 degrees from the body. He then admitted

1 that all the blade members in Flanagan or the '177 patent are extending
2 backward from a point, having an angle of less than 90 degrees from the
3 ferrule body.

4 He also cites the Idaho Administrative Code for the definition of
5 the term “barbed broadhead,” which is a broadhead which has any portion of
6 the rear edge of the broadhead forming an angle of less than 90 days with a
7 shaft or ferrule. During his deposition, which was reproduced in Slide 14 of
8 the demonstrative, he admitted that Figures 1 through 8 of Flanagan, or the
9 '177 patent, are all barbed broadheads per the Idaho Administrative Code
10 definition.

11 JUDGE O'HANLON: Mr. Shull, would you agree that -- at least
12 as used in the '177 patent or the references asserted in the petition -- a blade
13 and a barb perform different functions, where a blade is -- performs a cutting
14 function and a barb acts to resist removal of the arrowhead from the animal?

15 MR. SHULL: I would not agree with that. If you think of the term
16 “barb” and “blades” -- if you imagine a Venn diagram, there's going to be
17 substantial overlap. A barb is going to be a blade that has an edge, and
18 there's velocity plus pressure to achieve cutting. The blade is going to be a
19 barb if that blade is oriented a certain way in relation to the ferrule body. In
20 other words, if the trailing edge -- any portion of the trailing edge of that
21 barb or blade is less than 90 degrees in relation to the ferrule body, then it's a
22 barb. So in that sense --

23 JUDGE O'HANLON: The --

24 MR. SHULL: -- the definitions of “blade” and “barb” are exactly
25 the same.

26 JUDGE O'HANLON: I understand they can refer to the same

1 element. I'm asking if they perform different functions.

2 MR. SHULL: Yeah, so --

3 JUDGE O'HANLON: What is the purpose -- what function does a
4 barb serve?

5 MR. SHULL: The barb can cut, if it has an edge, and the barb will
6 retain the broadhead in the animal if it's oriented in a certain way, i.e. if any
7 portion of the trailing edge in relation to the ferrule body is less than 90
8 degrees. A blade can cut much like a barb, if it has an edge, but a blade can
9 also retain the broadhead in the ferrule body if the blade is oriented less than
10 90 degrees in relation to the ferrule body.

11 JUDGE O'HANLON: You're not really answering my question. I
12 understand that the same element can act as a blade and a barb, but don't
13 those two perform different functions? Does "barb" refer to resisting
14 removal of the arrowhead from the animal?

15 MR. SHULL: Not exclusively, no. I would not say that at all. I
16 think the term "barb" merely refers to the orientation of the blade in relation
17 to the ferrule body. If it's in that orientation, then it has the function of
18 retaining the broadhead in the animal. A blade can have that same function,
19 as well, in addition to cutting.

20 JUDGE O'HANLON: So it's your position that there's absolutely
21 no difference between a barb and a blade? Just the orientation of the
22 geometry?

23 MR. SHULL: No. There are differences. So imagine, again, a
24 Venn diagram. If you have two circles, there's going to be a substantial
25 overlap between those circles. In that overlap, the functions of a blade and a
26 barb are going to be the same. The blade is not only going to retain the

1 broadhead in the body, but it's also going to cut. If those overlap, the barb is
2 going to retain the broadhead in the body, and it's also going to cut.

3 JUDGE O'HANLON: So you do agree that those are different
4 functions -- cutting and removing -- or resisting removal from the body?

5 MR. SHULL: There are two functions. Retaining the broadhead
6 in the body and cutting flesh. A barb can have that function if it has an edge.
7 A blade can have that function if it's related -- if it's orientated in relation to
8 the ferrule body, such that it forms an angle of less than 90 degrees.

9 JUDGE O'HANLON: And if we're looking at your Venn diagram
10 that you mentioned, the part that does not overlap, what does a barb that
11 does not overlap with a blade -- what does that barb do?

12 MR. SHULL: So a barb that is not aligned with the blade, it
13 wouldn't be a barb. It would just be a blade. A blade that doesn't form an
14 angle less than 90 degrees is not a barb, and that's --

15 JUDGE O'HANLON: I was asking about the portion of your
16 hypothetical Venn diagram. You have blade and barb, and they overlap at
17 some point. What does the portion of the barb that does not overlap with
18 blade, what does that barb do?

19 MR. SHULL: The portion of the barb that does not overlap with
20 the blade is --

21 JUDGE O'HANLON: I'm asking about your hypothetical Venn
22 diagram.

23 MR. SHULL: Sure.

24 JUDGE O'HANLON: You have blade and you have barb. They
25 overlap at some point, and they do not overlap at some point. The portion of
26 barb that does not overlap in the Venn diagram with blade, what does that

1 barb do?

2 MR. SHULL: It merely retains the broadhead in the body of the
3 animal.

4 JUDGE O'HANLON: Okay, thank you.

5 MR. SHULL: Because it wouldn't have an edge. It wouldn't be
6 able to cut.

7 JUDGE O'HANLON: Thank you.

8 MR. SHULL: Mr. Willkomm was also shown examples of well-
9 known broadheads in the industry. On Slide 15, there's excerpts from his
10 deposition transcript -- superimpose or a juxtapose against Exhibit 1031.
11 There he admitted that that broadhead contains both barbs and blades. Dr.
12 Kuhn's reply declaration at paragraph 71 contains figures from Exhibits
13 1028 and 1031, juxtapose against Mr. Willkomm's deposition testimony
14 where he concedes that the term "blade" and "barb" refer to the same
15 element of a broadhead.

16 Let's skip ahead a few slides for the purpose of time and refer to
17 Slide 19 of the demonstrative. There we have examples demonstrating that
18 the term "blades" and "barbs" are used interchangeably in the archery
19 industry to refer to the same element or component of a broadhead. That art-
20 specific evidence was submitted as Exhibits 1028, 1029, 1048, 1042, 1043,
21 1044, and 1045. As can be seen, barbs and blade is used in the archery
22 industry to refer to the same element of a broadhead. Again, Patent Owner's
23 general usage dictionaries cannot overcome this art-specific evidence that
24 was submitted in Dr. Kuhn's reply declaration at paragraph 70 and 71.

25 The outer barb and blades are -- the outer barbs in Lint are blades
26 because they have -- are a tool or a device with an edge. Slide 20 of the

1 demonstrative contains an excerpt from Dr. Kuhn's reply declaration taken
2 from paragraph 109. There he provides annotated versions of Figures 1 and
3 4 from Lint. You can clearly see the edges that are highlighted in red.

4 Turning to Slide 21, you can see an excerpt of Mr. Mizek's excerpt
5 declaration taken from paragraph 27. There he explains that each barb 19
6 constitutes a blade because it's a device with an edge. The edges of the
7 broadhead in Lint is clearly shown in Figure 1. Each barb 19 also
8 constitutes a barb because the angle formed between the trailing or rear edge
9 would be barb 19 in the ferrule body where the broadhead is less than 90
10 degrees.

11 JUDGE O'HANLON: Mr. Shull, let me ask you about that. Is it
12 your position that any edge makes something a blade? There's no
13 qualifications on whether the edges oriented so as to perform a cutting
14 function. Just anything that happens to have an edge?

15 MR. SHULL: Correct. If it has an edge, it's undisputed that all
16 that is required to achieve cutting is an edge plus pressure plus velocity. If a
17 broadhead has an element with an edge on it, that's going to achieve flesh --
18 cutting of flesh, as long as there's sufficient pressure and velocity.

19 JUDGE O'HANLON: And does it matter how wide it is? If it's
20 two inches wide, it's still going to perform a cutting function?

21 MR. SHULL: Well, at that point, it's going to become blunt, right?
22 The wider it gets, the rounder it gets. It's still an edge, but then you get into
23 the term -- the category of a blunt edge, which we've just demonstrated is
24 still a blade, per the art-specific evidence and the expert opinions of Dr.
25 Mizek -- Dr. Kuhn and Mr. Mizek.

26 JUDGE DeFRANCO: Mr. Shull, does Lint disclose a sharp edge

1 or a blunt edge?

2 MR. SHULL: Can you ask that again please, sir?

3 JUDGE DeFRANCO: Sure. Does Lint disclose a sharp edge or a
4 blunt edge?

5 MR. SHULL: Lint discloses an edge and one of skill in the art
6 would look at that edge and know that it's going to cut. In particular, they
7 know it's going to cut because the way that -- I'll refer to the disclosure of
8 Lint real quick. Starting at Column 65 -- I'm sorry -- Column 2, line 65 at
9 Lint, it says, the initial impact of the outer portions 21 of the barbs cause the
10 barbs to be retracted in the slots 18 against the biased of the spring 24.

11 After the broadhead 10 has completely penetrated the flesh of the
12 animal, the spring 24 forces the barbs 19 outwardly. That edge -- because
13 that broadhead is going so fast through the flesh -- it's got enough pressure,
14 it's got enough velocity, and it's going to achieve cutting. Whether or not it's
15 razor sharp or just sharp enough, it doesn't matter. It's got an edge, plus
16 pressure, plus velocity. It's going to achieve cutting a flesh.

17 JUDGE DeFRANCO: What evidence is there that it's going -- that
18 it is going to achieve cutting? I mean, I hear what you're saying, but I'm just
19 wondering what evidence points to the fact that it will achieve cutting?

20 MR. SHULL: Well, the evidence is that broadheads are moving
21 through -- everybody in the archery industry knows that broadheads are
22 launched either from a compound bow, a recurve bow, or a crossbow.
23 Regardless of the bow, the velocities that are generated from those weapons
24 are in excess of 125 to 130 miles per hour. That's undisputed in this case.
25 Those were evidence by Patent Owner's own public statements. That was
26 made clear by Dr. Kuhn's expert opinions. That's uncontested in this case.

1 So one of skill in the art is going to know that coming in looking at Lint.
2 They're going to know that broadhead is traveling so fast, there's edge in
3 Lint -- is going to achieve cutting every single time.

4 JUDGE DeFRANCO: But doesn't Lint say that barbs are retracted
5 from the arrowhead as part of penetrating the animal?

6 MR. SHULL: This is --

7 JUDGE DeFRANCO: Is that what you just read?

8 MR. SHULL: Yeah. It says, upon initial into that, because the
9 skin of any animal is so dense, the blades or barbs are initially retracted
10 inward, but then it very clearly explains, as soon as the broadhead penetrates
11 that skin and into the flesh, the force of the spring pushes that barb or blade
12 forward, hence --

13 JUDGE O'HANLON: That's not actually what Lint says. It
14 doesn't say after it penetrates the skin. It says, after it completely penetrates
15 the flesh of the animal.

16 MR. SHULL: The flesh --

17 JUDGE O'HANLON: Then the springs push the barbs out.

18 MR. SHULL: Sure. Well, as soon as it's going to get into the
19 flesh, i.e. past the outer skin of an animal, those blades are going to move
20 forward. And you --

21 JUDGE O'HANLON: After it has completely penetrated the flesh
22 means just through the skin?

23 MR. SHULL: That's correct. That's exactly the way it should be
24 interpreted. It doesn't say completely pass through, it doesn't say anything
25 like that. It says, as long as it gets past the initial impact of the animal, as
26 soon as that broadhead goes in -- and I'll have an animation that shows

1 exactly that – the barbs start to expand and under the velocity and pressure
2 that broadheads are generated, as a result of bows used in the industry, that
3 edge is going to achieve cutting.

4 JUDGE DANIELS: Mr. Shull, do you know – what's the
5 minimum that – bow weight that these are fired with? Do you know?

6 MR. SHULL: The minimum weight?

7 JUDGE DANIELS: Bow weight. To reach these velocities you're
8 talking about, what's the minimum bow weight? Bows have a weight when
9 you pull them. When you pull them back, they have a weight.

10 MR. SHULL: I don't think there's any evidence to indicate what
11 the minimum weight would be, but what a skill in the art knows is evidenced
12 by Mr. Futterer's public statement is any recurve or compound bow today
13 generates velocities in excess of 125 to 130 miles per hour. That's pretty fast
14 and that generates a lot of pressure. That velocity, plus pressure, plus an
15 edge is going to achieve capillary cutting every single time.

16 JUDGE DANIELS: What if we just took Patent Owner's – part of
17 Patent Owner's claim construction? Would cutting edge be good enough?
18 What if we get rid of the sharp part?

19 MR. SHULL: Yes. Well, that's a good question and if you look at
20 Slide 22 of the demonstrative, it explains that even under Patent Owner's
21 interpretation of the term “blade”, Lint discloses blade members. On Slide
22 22, we have an excerpt of Dr. Kuhn's reply declaration taken from paragraph
23 112 and 113. There he explains that barbs in Lint satisfy Mr. Willkomm's
24 definition because they have both, cutting edges and a flat sharp part. He
25 explains that a person of skill in the art knows that the outer edge in barb 19
26 in Lint can cut flesh. As we previously discussed, a person of skill in the art

1 knows that all that's needed for such an edge to achieve cutting flesh is
2 velocity and pressure.

3 Patent Owner has one additional argument with respect to Claim 1
4 and it only relates to Claim 1. Patent Owner contends that Lint does not
5 disclose the biasing member being the only element operable to hold the
6 blade members in the extended position. As we can see from Mr. Mizek's
7 deposition, which is -- has excerpts on Slide 23 of the demonstrative -- he
8 interprets the phrase the biasing member being the only element operable to
9 hold the blade members in the extended position, to mean the biasing
10 member is the only element operable to exert a force on the blade in the
11 extended position. As can be seen in Figure 2 of Lint, the spring is the only
12 element that exerts a force on that blade in the extended direction.

13 Slide 24 of the demonstrative contains an excerpt of Mr.
14 Willkomm's deposition testimony superimposed against Figure 2 of Lint.
15 During his deposition, he admitted that Lint at Column 2, lines 59 through
16 64, states that the spring 24 acts to hold the barbs 19 in the open position of
17 Figure 2. And under those circumstances, the arrowhead is conditioned for
18 hunting live game.

19 As far as when the blades are in an extended position or a retracted
20 position or vice versa, the claims are very open-ended. Mr. Willkomm
21 admitted in his deposition -- excerpts are included on Slide 25 of the
22 demonstrative -- but he admitted that there's no timing element in Claim 1
23 that dictates when the blades must move from an extended position to a
24 retracted position. And it's undisputed that the spring in Lint will expand the
25 blades forward when one, the broadhead is moving through an animal; two,
26 gets embedded in an animal; or completely exits an animal. That makes --

1 that's made clear in Dr. Kuhn's reply declaration at paragraph 93, which is
2 reproduced on Slide 26 of the demonstrative. As you can see --

3 JUDGE DeFRANCO: So point me to exactly where in Lint it says
4 that those barbs are in the expanded position as they're going through the
5 animal -- the flesh of the animal. In other words, if they're doing some sort
6 of a cutting --

7 MR. SHULL: Sure.

8 JUDGE DeFRANCO: -- function.

9 MR. SHULL: Sure.

10 JUDGE DeFRANCO: Because I'm just wondering whether those
11 barbs are only released after the arrow is stopped or actually those barbs are
12 in an expanded position as they're going through the animal.

13 MR. SHULL: Sure. Well, I just read into the record Column 2,
14 lines 65, which explains that after the initial impact, the force of the spring
15 forces those barbs out, where the broadhead completely penetrates the flesh
16 of the animal. Once it's inside the flesh of the animal, those broadheads are
17 moving out. It's not going to be completely stopped after impact because the
18 velocities that are generated from the bows, that are launching these
19 broadheads into the animal.

20 But more importantly, when we asked Mr. Willkomm during his
21 deposition whether the Lint in the -- whether the barbs in Lint will expand,
22 he admitted that the spring will expand the barbs and blades of Lint forward
23 when the broadhead completely exits the animal. He also testified that
24 there's a spring of the Lint broadhead that causes the outer barbs or blades to
25 move forward or extend. His deposition transcript or excerpts thereof is
26 shown on Slide 27 of the demonstrative.

1 There's also additional excerpts on Slide 28 where he testified that
2 the barbs or blades of Lint will extend or move forward when the broadhead
3 is moving through an animal or gets embedded in an animal. This is an
4 undisputed fact based on their expert's own testimony.

5 So it's undisputed that the blades or the barbs of Lint are going to
6 move forward, one, when it's moving through an animal; two, when it
7 altogether exits an animal; or three, when it gets embedded or stuck in an
8 animal. This is illustrated in Exhibit 1037, which is an animation that Dr.
9 Kuhn had created, which shows what the broadhead of Lint is going to look
10 like during use, and I'd like to play that animation for the panel.

11 JUDGE DANIELS: Sure.

12 MR. SHULL: Here you can see the broadhead to -- once the
13 broadhead is shot and you want to extract it from the body, rotate that arrow
14 shaft all the way forward, the blades are retracted and the broadhead is
15 pulled out. The same concept here. You can see to retract the broadhead,
16 the arrowhead is rotated all the way forward, the blades are retracted, and the
17 broadhead is pulled out. And here you can see the same annotated figure of
18 Figure 2 that's included in Dr. Kuhn's declarations.

19 You can see that the spring is the only element that's pushing those
20 blades toward an extended position. The arrow shaft is actually locked into
21 position and doesn't move at that point. Once the broadhead is shot and you
22 want to extract the broadhead, the arrow shaft is rotated all the way forward,
23 the arrow is pulled out.

24 During this portion of the animation, it shows what the broadhead
25 is going to look like as it moves through an animal and penetrates a dense
26 material, such as bone or cartilage. When it exits the animal, the barbs fully

1 extend. The blades are retracted by moving the arrow shaft forward and the
2 arrow is pulled out. This portion of the animation is going to show what the
3 broadhead looks like as it gets stops or embedded in an animal. So unless
4 the Board has any questions with respect to Ground 1, I'd like to move on to
5 Ground 3. Okay.

6 So Ground 3, which is Lint either alone or in combination of other
7 prior art, renders the claims obvious. As we already discussed, the Lint --
8 the barbs or blades on Lint have clearly defined edges. It would be obvious
9 to simply sharpen those edges and doing so is a simple and easy process. In
10 Slide 30 of the demonstrative, we have excerpts of Dr. Kuhn's original
11 declaration taken from pages 82 to 83.

12 There he explains that it would've been obvious to simply add a
13 sharp edge to the first blade member. He's also got the same analysis for the
14 second blade member because a person of skill in the art would know that
15 sharp edges facilitate expeditious cutting of flesh, expedited hemorrhaging,
16 which ultimately leads to humane discharge of game animals, while greatly
17 enhancing the aerodynamic flight characteristics of broadheads. He explains
18 that such practices date back some thousands of years when the earliest
19 ancient arrowheads have been documented in primitive fishing and hunting
20 activities.

21 Minisini is one of the references that makes clear that a person of
22 ordinary skill in the art would sharpen the edges disclosed in the barbs in
23 Lint. Figure 1 of Minisini is shown on Slide 31 of the demonstrative. There
24 you can see that there's a pivotably mounted barb 20, much like Lint.
25 Minisini expressly states that the barb 20 preferably has its outer launch tool
26 edge sharpened to cut through fish.

1 On Slide 32 of the demonstrative excerpts of the Minisini patent,
2 like Lint, Minisini comes from the field of broadheads for hunting. Like
3 Lint, Minisini discloses a pivotably mounted bar. Again, Minisini expressly
4 states that the longitudinal edge of the barb is sharpened to cut through fish.
5 On Slide 33 of the demonstrative, you can see an excerpt from Dr. Kuhn's
6 original declaration taken from paragraph 162. He explains, as
7 demonstrated by Minisini and Krieger, a person of skill in the art would've
8 known that adding sharp edges to such blades or barbs would facilitate
9 cutting flesh and improve the flight characteristics of the broadhead.

10 Sharpening the edge on the barbs or blades in Lint is a simple and
11 easy process. All that's required to add a sharp edge to the barb of Lint is
12 using a sharpening stone, a file, or pull through sharpener. This was made
13 clear in Dr. Kuhn's reply declaration taken from paragraph 126, which is
14 reproduced on Slide 34. Mr. Kuhn -- or I'm sorry -- Mr. Willkomm, Patent
15 Owner's expert, agrees. He was asked during his deposition, how would you
16 add a sharp edge to a barb. He answered very clearly. All you would do is
17 put the barb in a vice, use a file until you get the preferred angle. So unless
18 the Board has any questions with respect to Ground 3, I have to move onto
19 Ground 2, which is Vandewater anticipates.

20 It's undisputed that Vandewater discloses the claim's basic
21 elements. It discloses a ferrule, a first blade member, a second blade
22 member, and a biasing element. Patent Owner's arguments against Ground 2
23 are two-fold. The first argument is that the Petitioner allegedly only relies
24 on the fourth embodiment and the fourth embodiment is prior art. Their
25 second argument is that Vandewater only discloses a generic description of
26 the biasing element and doesn't actually describe how that biasing element is

1 used with the various embodiments.

2 Both of those arguments are wrong. With respect to the first
3 argument, as I'll point out, Petitioner very clearly relies on the first, second,
4 third, and fourth embodiment. All we need to anticipate the claim is the
5 first, second, and third embodiment, which the Petitioner expressly relies on.
6 Whether or not the fourth embodiment is prior art, we don't even have to
7 consider that issue because we rely specifically on the first, second, and third
8 embodiment, and I'll walk you through that analysis.

9 With respect to the second argument, that doesn't have any merit
10 either because as I will explain -- and as explained in Dr. Kuhn's reply
11 declaration -- Vandewater expressly states, chapter and verse, how one of
12 skill in the art would use the bias element with the first, second, and third
13 embodiments.

14 Turning to Slide 37 of the demonstrative, there's an excerpt of the
15 institution decision where the Board recognizes that the Petitioner relies on
16 multiple embodiments, including Vandewater's arrowhead 210 of Figures 7
17 through 11. That's referring specifically to the third embodiment in
18 Vandewater.

19 If you look at the petition, for the majority of the limitations that
20 were cited, we specifically rely on the first and second embodiments. For
21 example, on Slide 38 of the demonstrative, we have excerpts of the petition.
22 We state that Vandewater discloses that the arrowhead has a body 14 and
23 may further include an externally threaded portion 32 for connection to an
24 arrow shaft, there citing specifically to Column 3 of Vandewater, lines 29 to
25 36 and Dr. Kuhn's declaration at paragraphs 91 and 93. That relates
26 specifically to the first and second embodiments.

1 Likewise, the petition states for the next claim element that
2 Vandewater discloses that body 14 has an elongated shape, such as a
3 cylindrical shape and may have a substantially pointed portion or tip 26.
4 Again, citing Vandewater, Column 3, lines 13 to 15, Dr. Kuhn's declaration
5 at paragraphs 91 and 94, again, that relates specifically to first and second
6 embodiment. Turning to Slide 39 of the demonstrative --

7 JUDGE O'HANLON: Mr. Shull, let me interrupt you for a
8 moment. Looking at the petition, you have with every claim recitation of
9 Claim 1, you have an annotated figure from Vandewater. It's only, as I read
10 it, Figures 15 and 16, which are embodiment 4 of Vandewater. So if we
11 were to agree with Patent Owner that this embodiment 4 does not have
12 support in the provisional application and therefore, that the embodiment
13 and this description is not prior art, is that fatal to the challenge in the
14 petition?

15 MR. SHULL: Not at all because the petition in words specifically
16 rely on the first, second, and third embodiment. The annotated drawings for
17 the fourth embodiment were merely exemplary. They're not limiting. We
18 cited to the first, the second, the third, and the fourth embodiment. When
19 citing to the fourth embodiment, we merely used the figures as examples.
20 We could've easily done the third embodiment and annotated the figures, but
21 we shouldn't be penalized because we use the fourth embodiment as
22 examples, and we don't even have to rely on the fourth embodiment to
23 anticipate the claims.

24 JUDGE O'HANLON: I'm not sure --

25 JUDGE DeFRANCO: Let me ask Mr. --

26 JUDGE O'HANLON: -- I agree with your statement that you

1 shouldn't be penalized. I'm not sure exactly what that means. This is what
2 you put in the petition, and most of the petition arguments, it seems to me,
3 are in the annotated figures. There's only a couple of sentences for each
4 recitation, but it's mainly the figures where you -- for example, I'm looking
5 at page 37 of the petition. That's where you identify the forward end, the
6 rearward end, and the ferrule. And that's only relying on, as I read it,
7 embodiment 4.

8 MR. SHULL: That's not correct. If you look at Slide 38 of the
9 demonstrative, there we have excerpts of the actual petition where we cite
10 specifically the first and second embodiment. Again, we say body 14 has an
11 elongated shape, such as a cylindrical shape and may have a substantially
12 pointed portion or tip 26. The citation there is Vandewater, Column 3, lines
13 13 to 15, that's the first and second embodiment. We're not citing the fourth
14 embodiment. In that second, the only place where we cite to the fourth
15 embodiment is an annotated version of Figure 16. It's merely exemplary.
16 It's not limited.

17 Slide 39 contains additional excerpts. Again, for the majority of
18 claim limitations, we're citing specifically to the first and second
19 embodiment. We state --

20 JUDGE DeFRANCO: Mr. Shull, this is Judge DeFranco. So I
21 mean, I tend to agree with you, and I think this was made clear in the
22 institution decision that you did rely on figures, other than simply the fourth
23 embodiment, so I think this has already been resolved in the institution
24 decision and I think Patent Owner had adequate opportunity and notice that
25 you did rely on Figures 7 through 11, as well as these other -- the fourth
26 embodiment. But let me ask. Do you agree, is the fourth embodiment not

1 prior art because it's not in the provisional?

2 MR. SHULL: I don't agree with that. I think --

3 JUDGE DeFRANCO: Why?

4 MR. SHULL: -- the fourth embodiment is supported by the
5 provisional. While those exhibit --

6 JUDGE DeFRANCO: How?

7 MR. SHULL: -- figures are not disclosed in the provisional, the
8 supporting language and text is. It's still the same. With respect to the
9 fourth embodiment, there's slight variations with the design of the blades.
10 They have a channel as opposed to a single hole where a pin goes through to
11 pivotably mount the blades. Other than that, there's not much difference.
12 There might be a slight difference with your orientating of the biasing
13 element of the first, second, and third embodiment, which we expressly rely
14 on, including for the biasing element, makes clear that the first, second, and
15 third embodiments anticipate the claims.

16 JUDGE DeFRANCO: Okay. So even if you lose -- even if we
17 don't count the fourth embodiment, you're saying that you still prevail based
18 on those other three embodiments?

19 MR. SHULL: Absolutely. So even if the fourth embodiment is
20 prior art, which we don't agree, but even if it is, if you look at the petition,
21 we very clearly rely on the first, second, and third embodiment.

22 JUDGE DeFRANCO: No, I get that. I get that. I agree with you
23 there. I think you do. It's just a matter of the fourth embodiment.

24 MR. SHULL: Sure. And then with respect to Slide 40 of the
25 demonstrative, we have excerpts, again, from the petition. This one relates
26 specifically to the biasing element. Again, we're specifically pointing to the

1 biasing element that's used in the first and second embodiment. We cite to
2 exhibit -- I'm sorry -- Vandewater, Column 7, line 55 to Column 8, line 2.
3 We also count -- cite to Vandewater, Column 3, lines 63 to 66. Again, that's
4 specifically citing the first, second embodiment and using that biasing
5 element with the blades of the third embodiment. In paragraph --

6 JUDGE O'HANLON: Mr. Shull, you've used up your time. If you
7 want to take another few minutes to finish up --

8 MR. SHULL: I will. I'll take another five minutes, and I'll run
9 through these slides relatively quick.

10 JUDGE O'HANLON: Okay. I'm going to reduce your rebuttal
11 time to five minutes.

12 MR. SHULL: Sure. On Slide 42 of the demonstrative, the expert
13 declaration of Dr. Kuhn taken from paragraph 74 makes very clear that all it
14 needs to do in order to use the ferrule body of the first and second
15 embodiment with the second -- with the first and second blade of the third
16 embodiment is one, widen the slot, and two, add a notch at the bottom of the
17 blades to accommodate the ball bearing that's urged forward by the
18 compression spring. In paragraph 75 of his reply declaration, it's reproduced
19 on 43. He makes clear that specification of Vandewater explains chapter
20 and verse exactly how we'd use the blades of the third embodiment with the
21 ferrule body 14 of the first and second embodiment. He said --

22 JUDGE O'HANLON: Mr. Shull, is this line of argument in the
23 petition or is it just in the expert declaration filed with the reply?

24 MR. SHULL: This is in direct response to Patent Owner's new
25 argument they raised in their formal response that the biasing element or --
26 the biasing element disclosure does not explain how you would use it in the

1 first, second, and third embodiment. So this is --

2 JUDGE O'HANLON: So it's not in the petition then? Is that what
3 you're saying?

4 MR. SHULL: It's not in the petition, but it directly relates to
5 Patent Owner's formal response for the first time. Obviously in our petition,
6 we can't anticipate every argument that Patent Owner is going to make.
7 They make the contention that the biasing element doesn't adequately
8 disclose how it's used in the first, second, and third embodiment. Well, look
9 at the expressed disclosure of Vandewater, which it does.

10 So again, Mr. -- Dr. Kuhn at paragraph 75 of his expert declaration
11 specifically cites Vandewater, Column 6, lines 54 to 57, and he says the
12 body 214 may be used with the overlapping blades and all you need to do is
13 widen the slot 215. Likewise, on paragraph 76 of his reply declaration,
14 what's in paragraph 44, he explains that Vandewater expressly teaches that if
15 you're going to use a biasing element, all you need to do is add a notch at the
16 bottom of the blade 212 and blade 213.

17 He explains in paragraph 77 of his expert declaration, taken from
18 his reply declaration, reproduced on Slide 45, he says based on the express
19 disclosure of Vandewater, a person of skill in the art knows that a broadhead
20 that utilizes the ferrule body 14 with the first blades 212 and second blades
21 213 looks like the figures in Exhibit 1026. Exhibit 1026 is reproduced in
22 Slide 46.

23 These figures look familiar to you likely because the top two
24 figures correspond to Figure 7 and 8 in Vandewater. The bottom right figure
25 is Figure 10A and 10B. The bottom left figure is merely the ferrule body
26 that's described in the first and second embodiment shown in drawing 2,

1 combined with the blades 212 and 213 of the third embodiment. Per the
2 express teaching of Vandewater, all that's required is a wideness slot to
3 accommodate the overlapping blades and add a notch at the bottom to
4 accommodate the ball bearing that's pushed forward by the biasing element.
5 The biasing element or spring in Vandewater biased the blades toward the
6 extended position.

7 Slide 47 contains excerpts of Dr. Kuhn's reply declaration at
8 paragraph 86, superimposed with excerpts from Vandewater. Vandewater
9 expressly states that the biasing element urges the engaging element into the
10 notch to retain the blade or limit or impede pivotable movement of the blade.
11 The biasing force retains the blade in its initial or centered position. I'm
12 going to forego, showing you the argument --

13 JUDGE O'HANLON: Mr. Shull, can you turn back to that
14 previous slide?

15 MR. SHULL: Sure.

16 JUDGE O'HANLON: Is it your position that the biasing element
17 helps the -- I believe it's -- I believe they're referred to as blades from the
18 position of the bottom illustration there on this slide, to the position that's
19 shown in the top illustration. Is that what you're saying?

20 MR. SHULL: I'm saying once the blades go from the retracted
21 position, which is shown at the bottom of the excerpt shown on Slide 47 to
22 the fully deployed position, the spring then biases those blades in the
23 deployed position. It resists pivotable movement. It only rotates once an
24 external force is applied to the outside edge of those blades. The spring
25 holds those blades in position. They're biasing it in an extended position.

26 JUDGE O'HANLON: Thank you.

1 MR. SHULL: I'd like to move on to --

2 JUDGE O'HANLON: You've used up all of your extra time here.
3 I'll give you just one more moment, if there's anything else you want to say.

4 MR. SHULL: I would like to run through Liechty. It's undisputed
5 that Exhibit 1023 --

6 JUDGE O'HANLON: I'm going to let you go forward, if you
7 wish, Mr. Shull, but you will not have any time for rebuttal if you keep
8 going forward.

9 MR. SHULL: Yeah. That's fine.

10 JUDGE O'HANLON: You've already eaten into 10 minutes of
11 your 10 minute rebuttal --

12 MR. SHULL: Sure. I'll just run through Liechty. I think what's
13 important about Liechty is Exhibit 1023. It's undisputed that it shows the
14 blades going from fully open to a fully closed position. That's undisputed as
15 evidenced by Mr. Willkomm's deposition testimony.

16 As can be seen on Slide 50, Liechty embodies all the claims as it
17 goes from Figure E in Exhibit 1023 to Exhibit C. It's undisputed that
18 Liechty discloses all the claim basic elements -- a ferrule, a first end, a blade
19 member, a second blade member. It's got a first end and a second end. It's
20 got a biasing element.

21 As it relates to language 11, it's undisputed that blades progress
22 from position E to position D in Exhibit 1023. The first ends of the blades
23 are forwarded to the second ends. It's also not in dispute that the blades,
24 unless you move forward, as depicted in Exhibit 1024, is one, the moving
25 through the animal; two, it exits the animal; or three, gets embedded in an
26 animal. Mr. Willkomm testified that the blades will actually move forward

1 under the force of the spring as depicted in 1024, Exhibit 1024, when the
2 broadhead moves to an animal and when it exits an animal. He also agreed
3 that it moves forward, as depicted in Exhibit 1024, when the broadhead gets
4 stopped in an animal.

5 I'd like to briefly just talk about what constitutes a retracted
6 position and an extended position per the claims. They're very open-ended.
7 The claims define a retracted position as the second end, which is spaced
8 from the ferrule body in the first instance. The claims define an extended
9 position as the second end that's based from the ferrule body by a distance
10 which is greater than the first distance. The specification uses same
11 language to define retracted and extended position.

12 Mr. Willkomm agreed, as evidenced by the excerpts of his
13 deposition transcript which is shown on Slide 58 of the demonstrative.
14 Notably, nothing in the claims dictate when the blades must move to a
15 retracted position or extended position, or vice versa, or whether blades from
16 a retracted position to an extended position. Mr. Willkomm agreed that
17 there's no timing element in Claim 1 that dictates when the blades must
18 move from an extended position to a retracted position.

19 As can be seen in Exhibit 1024, when the Liechty broadhead is
20 moving from Figure E, there's a first distance, which is the distance between
21 the end of the blade from the ferrule body. As the blades of Liechty move
22 forward, they arrive at a second distance which is the end of the blades in the
23 ferrule body in Figure D. The second distance is greater than the first
24 distance. Mr. Willkomm agreed. We walked him through and showed him
25 Exhibit 1024, which he agreed accurately depicts the blades of Liechty as
26 they're moving forward. He admitted as the blades move forward, the

1 distance putting the end of the blade in the ferrule body increases.

2 It's undisputed that the spring 80 of Liechty is what causes the
3 blades to move forward. Mr. Willkomm's expert declaration taken in
4 paragraph 116, which is reproduced on Slide 63, he says, as seen in Figure 5,
5 the spring 80 is fully compressed which translates to a biasing force towards
6 the forward end, resulting in biasing the blade. He admitted that the spring
7 moves the blade forward. He admitted the biasing member is the only
8 element operable to exert a force in the blade member in the extended
9 position.

10 And that rounds out my initial presentation. Hopefully I have at
11 least a couple of minutes left over.

12 JUDGE O'HANLON: Mr. Shull, you actually used all of your
13 time; however, we asked quite a few questions, so I'm going to give you
14 three extra minutes to use in rebuttal, and we'll also give Petitioner -- I'm
15 sorry, Patent Owner -- three extra minutes, for a total of 63 minutes.

16 MR. SHULL: Great. I appreciate that. Thank you.

17 JUDGE O'HANLON: Thank you for your presentation. Mr.
18 McKinnie, we'll now hear from you. Would you like to reserve any time for
19 rebuttal? I don't hear you. You might be muted.

20 MR. McKINNIE: Sorry about that. I'll reserve about 10 minutes,
21 but as Mr. Shull --

22 JUDGE O'HANLON: Well, I'll --

23 MR. McKINNIE: -- I may end up going over.

24 JUDGE O'HANLON: All right. I'll set the clock for 50 minutes.
25 Okay. You may begin when ready.

26 MR. McKINNIE: Okay. Can everybody see the screen that I have

1 shared?

2 JUDGE O'HANLON: Yes.

3 JUDGE DANIELS: Yes.

4 MR. McKINNIE: All right. Thank you. Judges, again, my name
5 is Jason McKinnie. I'm with McKinnie & Paul. I'm representing the Patent
6 Owner, Matthew Futtere. I'd be remiss to -- I should have stated in the very
7 beginning of this, Mr. Futtere and his wife are actually in the office with me.
8 Obviously, they're not going to be speaking or providing any feedback, but
9 they are in the room.

10 JUDGE O'HANLON: Well, welcome to them both.

11 MR. McKINNIE: I want to basically just start off by saying, the
12 Flanagan patent -- I will reference this as the Flanagan patent. Obviously,
13 I'm referring to 8,043,177, but Flanagan still has an unmet need. And I just
14 want to start by addressing that some of the basics of broadheads and
15 archery, this is all covered in the Patent Owner's response and highlighted a
16 little bit in the sur-reply, but the important part here is to put your mind into
17 a person of ordinary skill in the art, put yourself into how archery works,
18 how do broadheads work, how do fishing -- how does fishing work with
19 broadheads, and how does hunting work with broadheads.

20 Obviously, the bow and arrow have an ancient history. They used
21 the typical arrowhead that you would see that, you know -- from Native
22 Americans and other ancient civilizations. They usually have the two sharp
23 edges on the side and a point. They evolved over the years. According to
24 Patent Owner's expert, it was pretty clear that cutting tissue worked better
25 than tearing tissue, so you would have these edges, these sharp edges on the
26 blades, to actually penetrate the animal and create more damage by doing so.

1 Now, there's two issues with hunting with broadheads. One is
2 lethality. You want to actually kill the animal that you are shooting, but you
3 also want to have recovery. And so that is one of the -- those are the -- it's
4 the double edged sword of broadhead hunting is because while you may
5 shoot an animal and it may ultimately die, if it dies two days later, that
6 doesn't aid in recovery. It's also inhumane, and as a result, hunters have
7 always tried to go for the more humane kills, and it also increases the
8 recovery of the animal. So for example, whenever you shoot a deer,
9 depending on where you shoot it, it may still live for 30 to 40 seconds, and a
10 deer can run pretty far during that time period.

11 So lethality is covered -- one of the best ways to get the lethality
12 and new enhanced recovery is to create a substantial blood loss. So what
13 that means is you want to do enough damage within the animal itself to
14 generate a lot of blood loss, a lot of blood loss quickly, so that the animal,
15 you know, loses its oxygen, it stops moving, and ultimately collapses.

16 Now, to do that, one of the best ways to do that is to have an entry
17 wound and an exit wound in the animal. Ideally, it's to go through the lung,
18 so you can collapse both lungs, create a lot of vascular damage within the
19 animal, create an entry wound and an exit wound so that the animal bleeds
20 and will fall quickly upon being shot. So now you have lethality, and you
21 also have recovery.

22 But the challenge is getting through fur, getting through skin,
23 getting through muscle, getting through other connective tissue, getting
24 through bone, and then doing that process in reverse. So if you're just
25 thinking of the lungs, you have the rib cage, so you have bones on either side
26 of the entry wound and the exit wound. That takes a significant amount of

1 kinetic energy to do that.

2 Now, whenever we get into the state of the art, in 2008, because
3 that's when the Flanagan patent was filed. So even with the advent of the
4 compound bow, we're talking about these 125 mile an hour, 150 mile an
5 hour shots, you still have the issue of how are you actually maintaining and
6 getting an entry wound and an exit wound when dealing with bone.

7 Obviously, the scapula is a very hard bone within deer, elk, any of those --
8 bears -- all those other animals. The scapula is very thick, as is the rib bones
9 can cause a lot of loss of kinetic energy as the broadhead moves through it.

10 So there was still this long-met need -- long-felt need to make a
11 better broadhead. And at the time in 2008, you generally had three types of
12 broadheads. You had the fixed blade, cut on contact, and the mechanical
13 broadhead. Now, the fixed blade and cut on contact, none of those parts
14 moved, so those blades are static. The broadhead is static as it enters the
15 animal. It is static as it goes through the animal, and potentially, if it were to
16 exit the animal, it still remains static.

17 Mechanicals, on the other hand, typically have the moving parts.
18 You've seen those in the prior art references, you see that in the Flanagan,
19 where the blades ultimately get deployed at some point during this process.
20 And one of the reasons that fixed blade and cut on contacts have issues were
21 because of the large footprint. So as I mentioned, it had a static. Blades
22 don't move, so the footprint of that blade entering the animal is the same
23 footprint as it's going through the animal. And clearly, you can have a
24 strong loss of kinetic energy if it's hitting bone. So to get around that, a lot
25 of inventors try to do the mechanical broadheads to try to come up with
26 different ways to avoid bone or somehow pass through bone. The

1 mechanical --

2 JUDGE DANIELS: Mr. McKinnie?

3 MR. McKINNIE: Yes?

4 JUDGE DANIELS: Do the mechanical blades also facilitate the
5 flight of the arrow?

6 MR. McKINNIE: Yes, they do, because they help make a reduced
7 footprint, and so it's not as wide as it's going through the air and it does help
8 for a more accurate shot, and it helps it reserve that kinetic energy -- I
9 believe I'm using the term correctly. I believe it helps reserve that kinetic
10 energy because there's less drag, as well. So it maintains more force as it's
11 entering into the animal.

12 Now, one of the drawbacks of the mechanical, though, is that it
13 does take a lot of kinetic energy to deploy these blades. So there are
14 potential loss. You have to balance this loss of the deployment of the blade,
15 along with getting the smaller footprint as it is going through the air.

16 JUDGE DANIELS: Mr. McKinnie, this is why I was asking
17 before. I don't know, I'm a little curious. In my state, you -- the minimum
18 bow weight for hunting any large animal is 40 pounds. Do you have to use a
19 bow with 40 pounds or greater to get these to have that type of kinetic
20 energy to get through bone?

21 MR. McKINNIE: For the Flanagan patent with its innovative
22 design, the intent of it is that no, you don't have to have as much force to
23 shoot it through because it can now penetrate through because it has the
24 collapsible blades to allow it to go through. If you were to look at the
25 Liechty patent or look at Vandewater, or look at those other ones, they don't
26 help it go through the bone, they don't collapse the blades to allow it to go

1 through. And so the innovation of Flanagan was collapsing the blades as it
2 goes through that extremely dense bone to help it go through that.

3 Now, I wanted to point out that Petitioner's expert, Dr. -- did I
4 answer your question, to the best that I could?

5 JUDGE DANIELS: Yeah. No, that was helpful. Thank you.

6 MR. McKINNIE: So Dr. Kuhn, Petitioner's Expert, wrote a book,
7 and I believe it was called The Shooter's Bible or something to that effect. It
8 is attached as Exhibit 2009, I believe, to the Patent Owner's response. He
9 recognized that mechanical broadheads didn't have much innovation after
10 the 1970s. They swapped out some materials, but you still have this issue of
11 the loss of kinetic energy during the deployment of the blades. It took a lot
12 of energy to get those mechanical broadheads to work properly and there
13 just wasn't a solution out there to go through bone -- to fix this bone issue, to
14 generate the entry wound and the exit wound.

15 And so there's a need. There's a need for Flanagan, and that plays
16 a role in understanding the motivation to combine, obviously, but it's also
17 helpful to understand, like how bow hunting works and how does big game
18 animal hunting work, and what are you looking for in a broadhead. And one
19 of the reasons why I'm bringing this up is because a lot of the references that
20 the Petitioner is using are related to fishing and they're related to barbs, and
21 they're related to the smaller broadheads that -- with the intent of going
22 through a fish. Now, that's in Minisini, Krieger, Hendricks. I'll discuss that.

23 Lint, to another extent, also references being used in fish. So when
24 you're hunting fish, you're not going through the scapula. You're not going
25 through hard rib bones. You're going through a relatively thin piece of flesh,
26 you're dealing with fish bones that are much more fragile, less dense,

1 nowhere near as strong. Penetrating a fish, getting a broadhead to go all the
2 way through a fish doesn't require a whole lot of effort. It doesn't require a
3 whole lot of design.

4 So that's why you saw, from the 1930s to the 1960s, these
5 references that Petitioner is using, was coming up with innovative ways to
6 deploy a barb because you're shooting a fish with a broadhead, and you
7 wanted to have the barb deploy after it went through the fish so that it could
8 retain it. And this sort of goes to a commonsense element here that I just
9 wanted to bring to the forefront. If you have a barb that pushes through that
10 isn't retracted and it just goes through the fish, you're going to make a pretty
11 large -- potentially a large hole or a large damage amount within -- in the
12 fish. That's a potential issue.

13 If you do that, you're now creating less tissue for that barb to retain
14 on as you're trying to pull it back, so you lose the function of the barb if you
15 don't retract them very well because tearing the blunt force trauma that could
16 be caused to the fish, because again, it doesn't require a whole lot of energy
17 to pierce the fish, can actually cause an issue with the purpose of the barb to
18 retain it. So they came up with these innovations at the time in the 30s to the
19 60s, which is when these references were, to have a barb that was retracted
20 as it entered the fish. Now, I want to go through quickly -- and to reiterate --

21 JUDGE DANIELS: The most important -- Mr. McKinnie, is -- it
22 would seem to me that that would be an important aspect of spearfishing,
23 because if you can't -- when you spear a fish, it's going to wriggle around a
24 lot and if the barbs have created an immense hole, then that fish is going to
25 get away and you want to keep it on the end of your spear. So is that making
26 sense with what you're explaining to me?

1 MR. McKINNIE: Exactly, because the barb -- the point of a barb
2 is to retain. Despite what Petitioner is arguing otherwise, that's the point of
3 the barb and it has a very functional difference than a blade does. And so
4 the point of the barb is to retain it after it has gone through the animal, and
5 generally, these barbs are always related to fishing.

6 And it's important because, you know, as Petitioner referenced in
7 Patent Owner's, you know, response, barb broadheads are banned for -- in a
8 lot of these states for hunting big game animals because they don't want an
9 arrow to be stuck within the animal barbed, so that the -- if the animal gets
10 away, you get some sort of potential lethality, but you don't have this
11 recovery element that we were discussing earlier. They don't want to have a
12 barbed broadhead stuck in the animal.

13 Now, there are exceptions for mechanical broadheads. A lot of
14 these states have that. Some of that is in the Patent Owner's response, but
15 that's the whole point that the -- the traditional barb broadhead is not
16 permitted in a lot of these instances because they want the animal to be able
17 to survive if it wasn't a kill shot or have the opportunity to survive.

18 So I want to move on to the overview of the Flanagan patent and I
19 want to -- I believe it's helpful for you to understand, just to go through this
20 walkthrough. It's clear the Judges have all read everything, but I just wanted
21 to go through this real quickly because again, it puts you into the mindset of
22 what Flanagan did, and when you go through this, you're going to find that
23 the references Petitioner cites do not anticipate Flanagan, and they do not --
24 there's no reason to make the obviousness combinations that Petitioner
25 asserts.

26 So the Flanagan patents filed in 2008, it was assigned to examiner,

1 John Ricci. The purpose of the invention is pretty clear on the face of the
2 Flanagan patent, and that is to have an improved arrowhead, having
3 outwardly biasing collapsible blade members that retract or held in retracted
4 position as the arrowhead passes through bone, and then expand once the
5 arrowhead re-enters flesh to maximizing cut.

6 Flanagan discloses four embodiments. Typically, the four
7 embodiments differ in the biasing element in the actual structure of the
8 biasing element, but the blades members -- the tip, the ferrule body, the
9 retracted position, the extended position -- are all common throughout those
10 four embodiments.

11 So in reference to Slide 2, Figure 1 shows it in the retracted
12 position. You have a retraining element 50 which holds the blades into this
13 retracted position. You have these biasing elements 40, which are springs in
14 this embodiment that, as you can see in the strong end, that they are
15 compressed. The blade members are fully retracted. You have two
16 individual blade members, you have a forward end, pivotably mounted to the
17 ferrule body. You have a rearward end and then it's, of course, a blade
18 member.

19 Figure 2 shows it in the extended position. There is -- again,
20 there's no retaining member now holding it. The blade members 20 are now
21 in the extended position. The biasing members are the sole element that is
22 pushing them out. Now, in reference to Slide 3, in use, the arrow 60 is fired
23 toward and animal. The blade members are preferably initially maintained
24 in the retracted position as the arrow is in flight towards the animal. The
25 retracted position reduces the size of the broadhead, thereby increasing
26 accuracy. As the tip 14 and blade members 20 penetrate the skin of the

1 animal, the blade members 20 remain in the retracted position until the
2 retaining element 50 is removed by the penetration. So that is how it is
3 entering the animal.

4 Slide 4 shows what happens after the retaining element has been
5 removed. The blade members are then urged to the extended position due to
6 the outward bias of the biasing members 40. Now, as it approaches and
7 enters bone as seen on Slide 5, as the tip 14 in blade members 20 encounter a
8 bone in the animal such as a shoulder blade, the blade members 20 collapse
9 toward the retracted position to allow the arrow to continue progress through
10 the bone.

11 As you can see in the retaining element, I removed that on this
12 drawing. This drawing is not in -- the retaining element is shown in the
13 patent, but this is what the words would describe it, was the retaining
14 element gone. The bone would be, you know, where Figure 1 is listed or on
15 this side pushing those blade members into the retracted position.

16 Moving on to Slide 6, as the ferrule passes through the bone, the
17 blade members 20 return to the extended position due to the force applied by
18 the biasing member 40. So now, as you can see, the spring is now pushing
19 those blade members back up. Skip down a little bit. That's the blade
20 members 20 are in the extended position on either side of the bone to
21 maximize the cutting surface of the arrowhead 10 through the soft flesh of
22 the animal. Clearly, the cutting surface is this blade.

23 Now, the other embodiments, as I mentioned, really only discuss --
24 only change the springs. They have different mechanisms for how the
25 biasing element on the springs works. Now, moving on to the claims. There
26 are two independent claims in this patent -- Claim 1 and Claim 11. I think

1 it's helpful to go through this just a little bit to show where some of these
2 differences are.

3 On Claim 1, you have the rearward end and opposite forward end
4 of the ferrule body, so you have directionality within the ferrule body. You
5 have the first blade member having a first end pivotably enter, connected
6 with the ferrule body and opposite second end. And then the blade member
7 has a retracted position where the second end is spaced from the ferrule body
8 at one distance at an extended position where it is faced by the body with a
9 greater distance from the first.

10 Second blade member is the same, and then you have a biasing
11 member, biasing the first and second blade members toward the extended
12 positions. The biasing member being the only element operable to hold the
13 blade members in the extended position. So as we go through and refer back
14 to Slide 2, again, you have your two blade members, you have it pivotably
15 connected at the first end, you have a second end of the blade. Figure 1 is
16 showing the retracted position. Figure 2 is showing the extended position.
17 Again, the spring is the only element operable to hold it at that extended
18 position.

19 Now, moving to slide 8 and looking at Claim 11, the other
20 independent claim, you again have directionality in the ferrule, discussing a
21 rearward end and a forward end. Now you have a forward end where it
22 defines the tip of the arrow and that it's fixed in relation to the ferrule body.
23 You have a first blade member, again, now having directionality, where you
24 have a forward end pivotably interconnected. So it's no longer the broader
25 first end term. It is now the more specific forward end, and then the second
26 end is at the rearward end. And again, you have the same issue of the

1 retracted and the extended positions.

2 And then you get down to the biasing element. You have one
3 biasing member biasing the first and second blade members toward the
4 extended position. That clause is the same from Claim 1 to Claim 11, but in
5 Claim 11 now, you do not have that -- that being the only element operable
6 to hold it.

7 Now, I want to just -- before I move on to the invalidity grounds,
8 there's a couple common themes that I want to just point out that flow
9 through multiple of the references and multiple of the arguments from
10 Petitioner. First, the Liechty II reference was already reviewed by the patent
11 office during the prosecution. It's plainly listed on the patent itself and
12 identified on there. Prosecution history of Flanagan, as indicated in the
13 preliminary response and as is still contained in the Patent Owner's expert
14 declaration, was initially rejected by the Tentler reference, which was
15 attached as Exhibit 2002. You see that the Tentler reference is attached as
16 Exhibit 2003. The prosecution history is in 2002.

17 But the Tentler reference discloses the Lint reference and the
18 Hendricks reference, and so you've got all these references -- Flanagan,
19 ultimately Vandewater, Liechty II, Tentler, that are either in the prosecution
20 history, related to the prosecution history. And on top of that, all those
21 four -- Flanagan, Vandewater, Liechty II, and Tentler -- were all reviewed
22 by the exam -- same patent examiner, John Ricci. So a lot of this stuff has
23 gotten new to what Petitioner is bringing up in this case.

24 The second issue I wanted to bring up was the claim term. We've
25 already outlined a discussion in Petitioner's presentation regarding -- now
26 referring to Slide 9 -- of what the blade member is. So both parties, at the

1 onset of this, said it's the plain and ordinary meaning. But when you have a
2 plain and ordinary meaning, you've still got to define it. It's not claim
3 construction as a specific term that was a term of art within the patent.
4 We're not saying that. We're not articulating that. We're saying it's the plain
5 and ordinary meaning.

6 But to get to our basis of the plain and ordinary meaning, we've
7 defined it as a cutting edge or a flat sharp part. That's supported by the
8 specification, so it's to increase the amount of flesh cut by the blade
9 members in the patent itself, as the tip and blade members penetrate the skin
10 of the animal. That would be a cutting edge. Thus, the blade members 20
11 are in the extended position on either side of the bone to maximize the
12 cutting surface of the arrowhead through the soft flesh of an animal.

13 We also have a dictionary definition, defined as the flat, sharp part
14 of a weapon or tool that is used for cutting. These are -- this is a
15 commonsense definition. It's a blade, it cuts, it's got a sharp edge on it.
16 That's common sense, that's what's in the ordinary meaning, and how a
17 person of ordinary skill in the art would understand this, would understand
18 the -- would understand how everything is operating within Flanagan when
19 you say the term "blade member." It doesn't mean a barb, it doesn't mean
20 dull or blunt, but it means sharp, it means cutting edge. That's how Flanagan
21 uses it. That's -- Flanagan is supporting the plain and ordinary meaning of
22 blade member. Now, and then the third --

23 JUDGE O'HANLON: Mr. McKinnie, if I could interrupt for a
24 moment. I believe during Mr. Shull's presentation, Judge Daniels asked if
25 we could define blade as an element having a cutting edge, so just the first
26 part of your proposed definition, excluding the flat sharp part. Would you

1 agree with that interpretation?

2 MR. McKINNIE: I think that's a little bit of -- perhaps, a little
3 semantics, I guess, to maybe even read out the flat sharp part because it's
4 cutting. And so when you have that, there's a sharp aspect to it. If you
5 noticed in the -- and I'll get into this, but I'll go ahead and get into it now,
6 that Mr. Mizek, in his reply declaration that was filed, you know, at the reply
7 stage -- not at the petition stage -- it was citing different patents and a basis
8 for changing the language of a blade member to just be something with an
9 edge. And he based things on saying like some of those references -- I think
10 it was the Cartwright patent said that it has blade, preferably a dull one, and
11 then there's a Cartwright patent that also said, preferably a dull blade.

12 They're using dull because it's modifying the default language of
13 blade is sharp. It cuts. Now, there's degrees of sharpness. You can have
14 super sharp and not as sharp, and arguably blunt and dull or just degrees of a
15 sharp blade, but the point is, is that that's the default primary meaning, you
16 know -- the plain and ordinary meaning of blade -- has this cutting edge,
17 which is sharp. It cuts. And so all of the references that they're citing to that
18 are changing it, they're using modifiers and qualifiers to change the meaning
19 of blade.

20 Well, that actually supports my position because the default rule --
21 the primarily definition of blade is sharp, cutting edge. And so they're
22 having to use qualifiers to change that, and so I don't know that I would
23 necessarily agree that you can just read out flat sharp part, because I think
24 that's sort of -- it's implicit within the cutting edge, and so I don't think I
25 would necessarily agree you can just strike that out, but we are -- you are
26 kind of getting into some semantic words at that point, which I understand.

1 My construction of terms always do that.

2 JUDGE DANIELS: Mr. McKinnie, this is Judge Daniels. But
3 there is -- it really -- I will say from my experience it sometimes doesn't
4 matter how sharp an object is. It can have different levels of sharpness. It
5 could even be dull and still do a lot of damage as long as it's cutting, which
6 is why we're asking this question because it -- sharp lends some degree of
7 sharpness to it, which we don't seem to have in the patent, but we do have
8 cutting. Isn't that right?

9 MR. McKINNIE: True, but Petitioner hasn't exactly put forth a
10 definition of cutting or -- you know, it's their burden on IPR to show that a
11 barb is a blade member, and to do that, they are -- they're twisting the plain
12 and ordinary meaning of a blade. If I were to ask you without any briefing
13 what a blade is, you're instantly going to be thinking of something that is
14 sharp. If you're especially thinking of -- when you're dealing with a blade
15 member in the archery industry -- not that there's any sort of specialized
16 meaning for it. Even Mr. Mizek even acknowledged in his, you know,
17 deposition, that there's not a specialized term in the art for blade member and
18 archery that changes the plain and ordinary meaning of a blade.

19 And so I understand Petitioner's newfound reliance here on this
20 pressure and cutting and velocity, but that's not in their petition for IPR. So
21 to the extent that they're now arguing for new definitions at the reply stage --
22 I brought this up in the sur-reply and in the motion to exclude. They're
23 moving the ball quite a bit and they're doing it because they want to take that
24 barb from Lint and turn it into a blade.

25 And put on our commonsense hats here and just look at it. The
26 Lint barb is not a blade. If you look at Flanagan, that's a blade. If you look

1 at Liechty II, that's a blade. If you look at Vandewater, that's a blade. Those
2 are blades. It's very clear, it's very obvious. And so they're trying to use
3 these little semantics to change the definition. They've got an expert that
4 says a barb is a blade and a blade is a barb. And then you've also got the
5 other expert, so Dr. Kuhn stated that. Mr. Mizek said no, not all blades are
6 barbs, and not all barbs are blades.

7 We had a long length discussion of Venn diagrams and where
8 things come in. Well, is a brick a blade? Well, according to Petitioner, it is,
9 because it's -- even though it's got a giant flat side, that's a blade. And let's --
10 again, let's just apply some common sense here. You throw a brick at a deer,
11 you're not throwing a blade at them, but that's their definition and that's a
12 newfound definition found in their reply, not in their petition for IPR.

13 JUDGE DANIELS: Well, this is why we were quizzing, you
14 know, Mr. Shull about the cutting aspect of that barb because, you know, it's
15 not clear to me. None of this is clear to me yet and I'm hoping this hearing
16 elucidates it all, but it's not clear to me really that that's a -- that that barb
17 was made for cutting. So it seems to me you might prevail, even if we did
18 shorten your claim construction.

19 MR. McKINNIE: Thank you. So -- and I get that. They're
20 confusing, they're conflating the issue. They're taking a commonsense term,
21 and they're flipping it on its head, and that kind of gets to the other issue that
22 I wanted to point out on the general issue of this IPR is that they're also
23 flipping the general language of what is -- what's closed and -- what's an
24 open position and what's a retracted position, and what's a closed position
25 and an extended position. They're flipping that.

26 If you read the Liechty patent, nowhere does it support the

1 interpretation that they're taking it. They're taking an open position and
2 calling that a closed position or extended and retracted. Language matters
3 and they are flipping the orientation on Liechty. They're flipping things
4 around and they're doing it in terms of an anticipation reference. Not an
5 obviousness. They're trying to do it through anticipation.

6 And so I wanted to bring out -- and again, it comes into play with
7 Vandewater, it comes into play with Liechty II, that the position of the
8 blades matter. Flanagan teaches it in the spec and the claims do also reflect
9 that, because the claims have an extended position and a retracted position.
10 It moves from retracted to extended by the biasing element. That's what
11 matters.

12 And I understand that the spec does teach and kind of gives some
13 color to those claims, but again, let's go back to the claim language. You go
14 from retracted position to extended position because of the biasing element.
15 Now, do these other patents meet that? They don't, and I'll go ahead and
16 start to go through them now.

17 Vandewater, as we've seen -- I'll kind of cut through some of the
18 issue. I want to do something a little probably non-traditional, and you guys
19 can tell me if this is wrong, but I'd actually like to go back and show
20 Petitioner's exhibit, page 46 on their demonstrative. I did not identify that as
21 one of my demonstratives, but the Petitioner identified it as a demonstrative,
22 so I don't feel like there would be any issue with me using it.

23 The picture at the bottom left corner, that, for one, is a generated
24 manufactured drawing that their expert created for this IPR that does not
25 show in the reference, and again, they're using Vandewater as an
26 anticipatory reference by generated an image to try and meet their claims.

1 Now, again, what they've failed to explain -- and fourth
2 embodiments, third embodiments, let's move beyond all of that. What does
3 that biasing element show you? It shows the blades in the extended position,
4 and it shows them keeping them from pivoting from right to left. How is
5 that an extended position and a retracted position? And not only that. The
6 biasing element is optional. It doesn't have to be there.

7 So those blades can move from the retracted position, I guess. If
8 their position is that if the blade moves to the right or to the left, that's a
9 retracted or extended position, which isn't entirely clear at this point, but
10 that's their position -- how does the biasing element do that? It doesn't. It
11 has nothing to do with it. If anything, the biasing element helps keep that
12 unitary blade centered. That's it. It doesn't meet --

13 JUDGE O'HANLON: Mr. McKinnie --

14 MR. McKINNIE: -- that element.

15 JUDGE O'HANLON: -- looking at the language of the claims, I
16 read it as just saying the biasing member biases the first and second blade
17 members towards the extended positions. It does not say it moves blades
18 from the retracted position to the extended position. Just biases the blade
19 members towards the extended position.

20 MR. McKINNIE: You're correct. It does say that. I was a little
21 sloppy with my language. So it biases it from a retracted position to the
22 extended position, but again --

23 JUDGE O'HANLON: That's my issue. It doesn't say from the
24 retracted position. It just says biases towards the extended position. It
25 doesn't say where it's biasing from. Just towards the extended position.

26 MR. McKINNIE: I think that's pretty implied from the claim that

1 it's biasing it from the retracted position into the extended position. I think
2 that's pretty implicit in the claim, otherwise it wouldn't make any sense. It
3 has to come from somewhere. It didn't define a third position, but my point
4 on Vandewater is that --

5 JUDGE O'HANLON: It --

6 MR. McKINNIE: Oh, go ahead.

7 JUDGE O'HANLON: Couldn't it just -- as I understand the
8 arrowhead to work, if one of the blades hit a bone when penetrating an
9 animal, that will deflect the blade in and then the biasing member biases it
10 back towards the extended position, but it doesn't necessarily have to start all
11 the way from the retracted position; isn't that correct?

12 MR. McKINNIE: That would be correct. It wouldn't have to be at
13 the full -- you are correct in that interpretation. But my broader point here is
14 that Vandewater teaches, you know -- if you look at the figure on the top
15 left, that is the retracted position of the blades. The image to the right of that
16 is showing it in the extended position, but in the extended position, it's
17 locked, so if you look at those tabs, the 222 tabs, it locks those individual
18 blades, a new unitary blade.

19 And again, there's still no -- there's no explanation in the IPR
20 petition, nor in the reply, that explains how the movement of the unitary
21 blade goes from extended or retracted positions because of the biasing
22 element. And even then, the biasing element, if anything, is moving the
23 blades to the -- I guess closer to the ferrule body, if anything, because that's
24 what the biasing element is meant to do, is it's meant to center that blade.
25 Not bias it one direction or the other. It's meant to bias it in the center
26 position, if anything.

1 JUDGE DANIELS: Mr. McKinnie, let me -- if I'm understanding
2 your argument, can you go back to that -- go back to that last slide.

3 MR. McKINNIE: Sure.

4 JUDGE DANIELS: So in the upper left where we have it in the
5 collapsed position where you're going to -- you're going to shoot this arrow,
6 biases -- am I correct that what biases the -- these blades from the retracted
7 to the expanded position is when they impact the animal somewhere. Those
8 two elbows in the front, when they impact some surface, they're going to
9 open -- they're going to -- that's what's going to pull it from the retracted to
10 the extended position. Not -- is that correct -- and not the spring?

11 MR. McKINNIE: That's correct. It's elements 224 and 225, those
12 shoulders or those wings. You're going to see this on Liechty, as well.
13 Those wings impact the flesh, and they cause the blades to rotate to extend
14 to their deployed extended position. In those two tabs, the 222 interlocking
15 tabs then interlock and then they form a unitary blade, and this is all in the
16 briefing. Discusses it --

17 JUDGE DANIELS: Yep.

18 MR. McKINNIE: -- how exactly it works, and it becomes a
19 unitary blade. That's why they're referencing embodiments one and two.
20 Embodiments one and two don't even have two different blade members.
21 They just have one blade, just a unitary blade. And so that biasing element
22 doesn't do anything as far as going from a retracted to an extended position.
23 And then once Vandewater gets to that extended position, it's locked. It
24 doesn't un-deploy anymore.

25 Now, it can rotate, it can pivot along that pivot point 216, but they
26 have failed to show how that creates a retracted or an extended position, and

1 they have failed to show how the biasing element has anything to do with
2 that. That's where -- that's how it doesn't meet that element in Claim 1 and
3 Claim 11. And that's beside the point on the fourth embodiment issue,
4 which you guys have already covered, but Vandewater simply doesn't meet
5 that element. It doesn't meet that clause of Claims 1 and 11 requiring the
6 biasing element to bias towards that extended position.

7 JUDGE DeFRANCO: So Mr. McKinnie, this is Judge DeFranco.
8 Let me see if I understand your argument as far as Vandewater goes in the
9 biasing mechanism. So your position is that the biasing member is not really
10 biasing anything, it's just centering the blade or maintaining the blade in the
11 center position, as opposed to biasing the blades to an extended position?

12 MR. McKINNIE: Correct.

13 JUDGE DeFRANCO: So it just simply serves as a centering
14 mechanism?

15 MR. McKINNIE: Correct, and that's why --

16 JUDGE DeFRANCO: So that the blade doesn't rotate or pivot
17 around?

18 MR. McKINNIE: Right, but it still rotates and pivots around, even
19 with that biasing element, because they put a force stop in there so if it hits a
20 part or tissue, let's say, I -- if it hits a harder -- depending on the density of
21 the tissue that it hits is to whether or not it will rotate the blade. If it doesn't
22 have that biasing element in there, then the blade is going to be more easy to
23 rotate.

24 JUDGE DeFRANCO: Got it.

25 MR. McKINNIE: So again, you don't have to have that biasing
26 element to go -- for it to be going to this -- the rotating to the pivoting issue,

1 which again, fails to show how it reaches the retracted and the extended
2 position in the first place.

3 JUDGE DeFRANCO: Okay, got it. Thank you.

4 MR. McKINNIE: Now going to Lint, there has already been
5 significant discussion on Lint. I just want to hit two points here. One is
6 first, I did want to object to the animation that they provided on Lint that
7 shows the barbs flapping in and out as it's going through the tissue. There's
8 nothing in Lint that says that it does that. And again, we're dealing with an
9 anticipation reference here and let's look at the actual language up at the
10 initial impact on the outer portions 21 of the barbs 19, causes the barbs to be
11 retracted into the slots against the biased of the spring.

12 After the arrowhead 10 has completely penetrated the flesh of an
13 animal, the spring 24 forces the barbs 19 outwardly so as to retain the
14 arrowhead within the animal. Now, the -- if you look at Figure 2 and Figure
15 3 where the shaft can be screwed into the broadhead itself to forcibly retract
16 these barbs.

17 Let's think about this. The language, it says it has to completely
18 penetrate the flesh. Well, how are you screwing in the arrow shaft without
19 having access to the broadhead on the other side? So it has to go through the
20 animal so you could hold it on one side and screw on the other side,
21 otherwise it's not going to work. And so that in and of itself, you know,
22 reinforces the common -- again, common sense approach here. It has to go
23 through the animal before you can -- you know, before those barbs come
24 back out. So there's nothing in the patent that says those barbs are flopping
25 in and out as it's going through it.

26 And again, as Mr. Willkomm had in his declaration that's in Patent

1 Owner's response, that you don't want these barbs tearing anything up or
2 doing blunt force trauma within there because that's the whole point of the
3 barb is to help retain it once it exits the fish or exits the small game or
4 whatever that it's in.

5 So this brings us to the point where there's two issues as to how
6 Lint doesn't satisfy the claim limitations. One is again, the -- I'm moving
7 now to Slide 14 -- there's --

8 JUDGE DANIELS: Mr. McKinnie, can we just go back to that?
9 Can we go back one slide?

10 MR. McKINNIE: Sure.

11 JUDGE DANIELS: I get what you're saying that this was
12 supposed to go all the way through, but this says that the arrowhead is
13 retained within the animal.

14 MR. McKINNIE: It does, but I'm looking at it as completely
15 penetrating the flesh. You're not completely penetrating the flesh if it's still
16 sitting, you know, inside the liver.

17 JUDGE DANIELS: Okay, okay.

18 MR. McKINNIE: So regarding Claim 1, again, it had the
19 limitation of the biasing element as the only element operable to hold the
20 blade members in the extended position. And so -- but what Lint teaches is
21 that you actually need two elements and that you actually have to screw the
22 shaft in, or you have to -- more accurately, you have to actually unscrew the
23 shaft to a certain point as seen in Figure 2 in order for those barbs to even
24 come out.

25 So it's Patent Owner's position that it doesn't meet the claim
26 limitation of Claim 1 that requires the biasing element to be the only element

1 operable, because clearly, you can move the shaft to change that. So the
2 shaft has to be in a certain orientation that is manually and moveable before
3 the springs can even move those in length, the barbs out, or in the claims, the
4 blades members to that extended position.

5 And second -- and then the other issue is, is a barb a blade, and it's
6 not. Again, as I stated earlier, you have -- the barb is meant to retain, a blade
7 is meant to cut, even if it has a not as sharp edge on it as Petitioner likes to
8 claim. It's -- there are two different functions. Is it possible that one
9 element may have both? Yes. That is possible, but is that the general rule?
10 No. Can you simply change the name of Flanagan to be -- or I have
11 Vandewater sitting in front of me. An arrowhead with pivoting barb. That
12 doesn't make any sense. Blade has a meaning. Even Liechty II, non-
13 consumable blade retention for blade opening arrowheads. You replace the
14 term "blade" with "barb," it just doesn't make sense. Again, that's why I'm
15 arguing for the commonsense approach here.

16 But I also wanted to kind of bring up some of the issues with the
17 declarations from Petitioner after the fact. Moving the goal post. They had
18 a burden on IPR to identify blade member and they had the burden at that
19 point to explain how a barb is a blade member, and they failed to do it. They
20 failed to provide a definition of blade member; they failed to provide a
21 definition of barb. They failed to do any of that.

22 Did they have the opportunity? Absolutely they had the
23 opportunity to do that and that's covered in the motion to exclude, but then
24 they decided to wait until the reply stage to add these new definitions in
25 there. That was their burden. Should they be penalized for it? Absolutely.
26 They're the ones that have this obligation to do it. They have the burden of

1 proof to show that this patent is invalid. They don't get to change the game
2 later on down the road. Now, Mr. Mizek, he had --

3 JUDGE DANIELS: Mr. McKinnie, I tend to disagree with you,
4 but I think it's a matter of what's going on and what's argued and what's the
5 focus of every case. Every case is different before the Board and, you know,
6 sometimes Petitioner, they don't come in with a claim construction. They
7 just argue plain and ordinary meaning to see what Patent Owner is arguing.
8 Patent Owner is -- they're the owner of the claims. They know those claims
9 better than anybody else. And so really, until Patent Owner disputes the
10 construction of a Petitioner, Petitioner has full rights to come in, in the reply,
11 and argue claim construction based on what Patent Owner says in the Patent
12 Owner response.

13 So, you know, this whole burdens on claim construction, it's
14 always changing. It depends on the burden of production, not necessarily
15 the burden of persuasion here. So I tend to disagree with the way you're
16 characterizing Petitioner here. They don't know what's going to be in
17 dispute until Patent Owner all the sudden makes a big dispute about the
18 claim construction. So, you know, I don't think you're going to, you know,
19 get a lot of headway making that argument here as far as this motion to
20 exclude goes.

21 MR. McKINNIE: That's fine.

22 JUDGE DANIELS: But I understand what you're saying, so we do
23 have to come up with a claim construction.

24 MR. McKINNIE: I completely understand your point.

25 JUDGE DANIELS: Okay.

26 MR. McKINNIE: And it's not lost on me, and I understand weight

1 of the evidence and you guys are fully capable of making that.

2 JUDGE DANIELS: There you go.

3 MR. McKINNIE: I want to point out, they use Lint that described
4 it as a barb and in their petition for IPR, their initial expert, Dr. Kuhn, just
5 changes it. He just says -- he just points to the figures on Lint and points to
6 it and says, blade member. Well, there's no support in Lint for it to be a
7 blade member. He just changes the terminology, and so where I'm --

8 JUDGE DANIELS: That's where your argument should be.

9 MR. McKINNIE: That's where I have some bone to pick here --

10 JUDGE DANIELS: Okay.

11 MR. McKINNIE: -- is that they knew it, they just changed it, and
12 they waited until the reply to do it. Now, I deposed Mr. Mizsek, it's in the
13 Patent Owner's sur-reply, a lot of these issues were rectified and taken care
14 of at that point. But, you know, Mr. Mizsek had several issues in his
15 declaration that I think are kind of helpful from my position or helpful from
16 the Patent Owner's position. One, you know, he concedes the term "blade"
17 does not have a special meaning in the archery industry, so again, we're
18 going with the commonsense term of a blade. Two, he acknowledges the
19 blade may be sharp, dull, or blunt, and in doing so, he references -- and these
20 are things I discussed earlier -- that the (INDISCERNIBLE) patent discloses
21 blades that are preferably dull.

22 Cartwright discloses blades that are preferably dull, not sharp.
23 These are qualifying languages. This is qualifying terms added to rebut, in
24 essence, the plain and ordinary meaning of blade. So he's adding dull --
25 these patent references that they're using that he's citing to or using this
26 extreme extra language to help define what a blade is, and the reason they

1 have to do that is because the general plain and ordinary meaning of blade is
2 not dull, or not an edge of a tool.

3 Third, he acknowledges a blade is to cut. Four, he acknowledges a
4 barb may be to retain, and most importantly, he agreed that not all barbs are
5 blades, and not all blades are barbs. So there's some context, I guess. He
6 never really fully defined exactly how he comes up with whether a barb is a
7 blade or a blade is a barb, or his Venn diagram argument that Mr. Shull was
8 putting forward. That's not in the briefing, so I don't have great clarity as to
9 when a barb is a blade or when a blade is a barb.

10 I understand the angle of it and how it could -- how the functions
11 are. I understand the functions of them, but Mr. Mizek seemed to, you
12 know -- in essence, he was acknowledging that a blade is to cut. It's a
13 cutting edge, and so it's after that point now that they have now sort of
14 modified their positions to now show the -- I would call it a brick edge, if
15 you will, on the barb of Lint, is now somehow a blade. And I don't believe
16 they've done enough to show that a person of ordinary skill in the art would
17 understand the barb of Lint to be a blade.

18 Adding the Minisini reference -- it's all covered through the
19 briefing -- but again, Lint retracts the barbs as it's going through the fish.
20 Patent Owner's expert has explained why you wouldn't want to have that out
21 there. Patent Owner's expert has explained that you don't, you know -- for
22 the barb to be retaining, you don't want to be shaving off a bunch of sides of
23 it to weaken it structurally, because if you have this real thin piece of metal
24 now, like the flat sharp part or the cutting edge of a blade, you've now
25 weakened the structure integrity of that blade, or for their intents and
26 purposes, a barb. So it wouldn't function as a barb.

1 They wanted it to retract. All of Lint's entire specification, entire
2 purpose, is retracting the barbs so that it doesn't go through into the tissue
3 and they become expanded after they go through the tissue. So why would
4 you add the cutting edge flat sharp part to the Lint barb? It doesn't make any
5 sense. There's no reason -- no rational reason to do that, so they fail on the
6 obviousness issue on the combination. If I may --

7 JUDGE O'HANLON: Mr. McKinnie, just to let you know, you've
8 used your time, but as we've done with Mr. Shull, we will allow you to keep
9 moving forward.

10 MR. McKINNIE: Mr. McKinnie. We're both Jason.

11 JUDGE O'HANLON: Yes. No, I meant as we did with Mr. Shull,
12 you can keep going, eating into your rebuttal time.

13 MR. McKINNIE: Right. And I believe I had 10 minutes of
14 rebuttal time, correct?

15 JUDGE O'HANLON: Yes.

16 MR. McKINNIE: So going into the Liechty reference, again, let's
17 go through the fundamentals of how Liechty operates. Figure 2 shows it in
18 the closed position. When it penetrates the animal, the wings here -- I think
19 58 is what it's showing -- shows those edges of that. To back up, Liechty
20 does have two blade members, but it has them pivotably connected at the
21 rearward end, not the forward end, not the forward end, so it does not meet
22 the elements of Claim 11.

23 The biasing member is pushing up on the blades and as you can
24 see, it is pushing it into the slots -- I believe it is 40, maybe 60 -- but it's
25 pushing it into these recesses. It's 40, is the notch. So there's a notch that
26 holds the blade. The biasing member is pushing the blade up into that notch.

1 That's the closed position. The biasing member pushes the blade into the
2 retracted closed position. As it hits the animal, 100 -- the line 100 shows the
3 force hitting the blade. It pushes the blade down, compressing the biasing
4 element, allowing the blade member to be released out of that notch that
5 holds it.

6 As seen in Figure 4, now the blades start to rotate, and so now,
7 they can move from that closed retracted position into the open or extended
8 position. So as seen in Figure 5, the blades are now fully deployed. They
9 are in their fully open position, which is how they operate.

10 Now, in Liechty, they do mention that the spring can bias the blade
11 upward, but let's look into what it's doing. It's biasing the blade back to the
12 retracted position. That's what it's doing. So if you go look -- so again,
13 they're asserting that these are anticipation. This is an anticipation ground.
14 Again, Claim 11 requires the forward end to be pivotably -- sorry, the
15 forward end of the blade to be pivotably mounted to the ferrule body. That's
16 clearly not met, because again, directions matter. The disclosure of Liechty
17 matters, and this is exactly how the orientation is. These drawings all come
18 straight from the actual Liechty reference.

19 So Claim 11 is not met by that, and then the biasing element is
20 biasing the blade towards the retracted position. The claim requires biasing
21 towards an extended position. Now, here's another issue with Petitioner's
22 changing of positions. In the petition for IPR, Dr. Kuhn generated this
23 drawing. He made his own annotations to it and put the blade members -- I
24 like to refer to it as this magical 90 degree angle. They're trying to use that
25 as the extended position or they're trying to, I guess, claim that as being the
26 extended position, but he acknowledged that that was exaggerated. He

1 didn't actually know how far the blades moved. He didn't know if it would
2 move the blades a millimeter or something that's in the briefing.

3 When I asked him directly, could it be possible that the spring
4 could rotate these blades all the way back up, he answered no. Very clear.
5 Very clear in the record as to what his record was. So now fast forward.
6 Patent Owner files their response, have the declaration from Mr. Willkomm,
7 they depose Mr. Willkomm. Now all of the sudden, we have new drawings
8 that show up that are introduced at the deposition. They introduced this
9 drawing, given to Mr. Willkomm at the deposition. This is all kind of
10 covered in the motion to exclude and other briefings. He created these
11 drawings.

12 Well, low and behold, his position now is that the blades can go
13 from position E, all the way back up to A because of the spring. So he's
14 changing his position pretty fundamentally. That doesn't necessarily matter
15 because at the end of the day, what he is confirming is that the spring -- the
16 biasing element is biasing the blades to the retracted position. What does the
17 claim require? Biasing to the extended position. And so even if they were
18 to say, well look and see, it's a magical 90 degree angle.

19 They're trying to state that it doesn't move again -- maybe they're
20 taking the position it doesn't move again after position C. That's not what
21 their new declarations say and that's not what their position on the reply
22 says, but even if you're freezing in at C, the biasing element is still biasing
23 the blade towards the retracted position, not the extended position, because
24 again, you unfreeze, and it moves back up to A. So the point is that the
25 claim limitation is simply not met by Liechty. I'll go ahead and reserve. I
26 believe I've got four to five minutes left.

1 JUDGE O'HANLON: Yes, you have four, but then the extra three
2 that we're going to give to your colleague, so we'll say you have about seven,
3 yes.

4 MR. McKINNIE: Okay, thank you. Unless there's other
5 questions?

6 JUDGE O'HANLON: Hearing none, we'll hear from Mr. Shull on
7 rebuttal. You have three minutes, and you may begin when you're ready. I
8 don't hear anything. You might be muted, Mr. Shull.

9 MR. SHULL: Can you hear me now?

10 JUDGE O'HANLON: Yes.

11 MR. SHULL: Okay.

12 JUDGE O'HANLON: I'll restart the clock.

13 MR. SHULL: Yeah, sorry about that. Okay. I discussed
14 Vandewater briefly. Mr. Willkomm, Patent Owner's expert testified that
15 nothing in the claim prohibits, one, when the blades must be in the retracted
16 position or extended position; and two, when the blades must move from an
17 extended position to a retracted position or vice versa. He admitted that on
18 Exhibit 1034 at page 81, lines 1 through 17.

19 He also testified that the claims are not limited to blade members
20 that move independently from each other. He made that admission in
21 Exhibit 1034, line -- or sorry -- page 87, lines 17 to 22. I'll refer to Slide 47
22 of the demonstrative, which we've talked about previously, but Vandewater
23 expressly states that the biasing element urges the engaging element into the
24 notch to retain the blade, and limit or impede pivotable movement of the
25 blade. That's exactly what the claims require. The biasing member biases
26 the blades in an extended position.

1 Let's briefly talk about Liechty. Referring to Slide 49 of Liechty,
2 it's undisputed, as evidenced by their own expert, Exhibit 1023 accurately
3 shows the blades moving forward under force of the spring. During his
4 deposition, Mr. Willkomm admitted to every single element in the claims.
5 There's a lot of discussion about extended and retracted position, but let's
6 take a look at the actual claim language. Claim language is shown on 57 of
7 my demonstrative.

8 Claim 1, for example, expressly recites the retracted position to be
9 the second end that's spaced from the ferrule body at a first distance. An
10 extended position is merely defined as the second end that's spaced from the
11 ferrule body by a distance, which is greater than the first distance.

12 During his deposition, as evidenced by Slide 62 of my
13 demonstrative, we have excerpts of Mr. Willkomm's expert testimony. He
14 agreed that as the broadheads in Exhibit 1024, as they move from position E
15 to position C, they disclose every single element of the claim. This is
16 undisputed. They can now try to walk back Mr. Willkomm's testimony, but
17 the fact is, they hold him out as an expert. He was shown an exhibit -- an
18 exhibit very similar to what was originally in Dr. Kuhn's expert declaration,
19 and he admitted -- Mr. Willkomm admitted -- that those blades move
20 forward as depicted in Exhibit 24, and under that circumstances, literally
21 every claim limitation is met.

22 With respect to Lint -- I'll be brief -- I just heard Patent Owner's
23 Counsel say that the novel aspect of the Flanagan patent is the ability of the
24 blades to collapse, if the force is more than the spring. That's exactly what's
25 happening in all the prior art that we are setting forth in all of our grounds.

26 With respect to Lint, also it's important to point out that even Mr.

1 Willkomm admitted that there's no statement of use of any kind of Claim 1
2 or Claim 11. So there's some discussion about broadheads being for fishing
3 and for hunting, but their own experts -- expert, Mr. Willkomm, admits that
4 that's not a distinction that should be made.

5 Also, he admitted there's nothing in the disclosure of Lint that
6 limits the use of the Lint broadhead to hunting fish. He admits that Lint
7 discloses hunting arrowhead, and Lint expressly states that it can be used for
8 field shooting, target practice, fishing, and many others. And multiple times,
9 Lint refers to an animal, not a fish.

10 Also, with respect to just the terms retract and extend, you know,
11 retract merely means to draw or pull back, whereas extend merely means to
12 stretch out and distance, so again, when there's discussion about this
13 retracted position and the extended position, Patent Owner's arguments are
14 completely divorced from the broad language of the claims. All that's
15 required from going from a retracted position to an extended position is the
16 distance from the second end of the blade becomes larger. It's undisputed by
17 their own testimony of their expert that that's what happens in literally every
18 prior art that we set forth. It goes from a retracted position to an extended
19 position.

20 Again, the claims are not limited to when that happens. All that's
21 required is that when it is in the extended position, the compression spring or
22 the biasing element pushes it or biases it toward that position. In every prior
23 art that we're discussed in all of our grounds, the biasing element or the
24 spring is the only element in the broadhead that provides that force to move
25 blades forward from a retracted to an extended position.

26 JUDGE O'HANLON: Thank you, Mr. Shull. You've used all your

1 time for rebuttal.

2 MR. SHULL: Thank you.

3 JUDGE O'HANLON: We will now hear from Mr. McKinnie. Let
4 me please set our clock. I believe you had seven minutes.

5 MR. McKINNIE: Yes.

6 JUDGE O'HANLON: You may begin when you're ready, Mr.
7 McKinnie.

8 MR. McKINNIE: Thank you. I want to address the issue of Mr.
9 Willkomm's deposition and this concept of the agreement. We never agreed
10 that the biasing element, bias is the blade members, to -- of Liechty -- to the
11 extended position. In fact -- and it's in Patent Owner's sur-reply -- Exhibit
12 1034, at 34, 4 to 7. Mr. Willkomm testified in his deposition, when the
13 resistance of the medium through which it's traveling is less than the spring
14 force, then the blades will then move forward toward the closed position.

15 He's always said -- it's been biasing it towards the closed position
16 or this -- or the retracted position. And I know -- again, as I said when I first
17 started my presentation, the words and the positions, and the directionality of
18 these prior art references, they all (INDISCERNIBLE). And so what
19 Liechty discloses is closed blades with the blades in that notch, and that's
20 how it penetrates and that's in the retracted position.

21 So if it were to move back to that position, then the biasing
22 element is biasing it to the retracted position. It's pretty clear cut on what
23 Liechty says. If you also go back and look at paragraph 123 of -- sorry --
24 apologize on that one. But again, the concept that Mr. Willkomm agreed,
25 you have to be careful on how you're looking at how Petitioner is construing
26 his testimony. They're reading words into what he stated.

1 Sure, he said that those blades would move back to that retracted
2 position, so does that satisfy that element of biasing it to an extended
3 position or is that satisfying element that's not in the claim, but biasing it
4 towards the retracted position? Patent Owner's argument is that it doesn't
5 satisfy Claim 1 and 11 because of that reason.

6 The other reason -- and I want to go back to that demonstrative of
7 this magical 90 degree angle that we have for Petitioner to say that is the
8 new extended position, let's say. It's not the only element operable to hold it
9 there because it can't be held there, because it's clear that there's tissue force
10 acting on it, as well.

11 And so the tissue force is what's keeping it at that 90 degree angle,
12 not at any sort of -- in other words, there has to be another force applied or
13 another force or another element applied to keep it at that 90 degree angle
14 that they rely on, because otherwise, the spring is going to bias it all the way
15 back to the retracted position. So even then, that does not satisfy Claim 1
16 that requires that to be the only element. Other than that, I have nothing else
17 further to add. If there's any other questions, I'd be happy to address them
18 with my remaining time.

19 JUDGE O'HANLON: I don't believe we have any more questions
20 for you, Mr. McKinnie. Thank you both for your presentations today and
21 addressing the many questions we asked. We appreciate your presentations
22 today. A final written description will be issued in due course. Let's go off
23 the record.

24 (Whereupon the above-entitled matter went off the record at 12:12
25 p.m.)

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