

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CASPER SLEEP INC.
Petitioner,

v.

WERNER MEDIA PARTNERS, LLC,
Patent Owner.

IPR2024-00474
Patent 10,842,301 B2

Record of Oral Hearing
Held: January 24, 2025

Before: BARRY L. GROSSMAN, JASON W. MELVIN, and
RYAN H. FLAX, *Administrative Patent Judges*.

IPR2024-00474
Patent 10,842,301 B2

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The above-entitled matter came on for hearing on January 24, 2025, commencing at 1:00 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE FLAX: Okay. Good morning everyone. We are here today in IPR2024-00474. That is Casper Sleep, Inc. as Petitioner v. Werner Media Partners, LLC as Patent Owner concerning challenges to the claims of U.S. Patent 10,842,301.

If any part of what I said is not accurate, please speak up. I think we're accurate. Great. So if Counsel for the parties could please stand up and introduce themselves for the Court Reporter and the record.

MR. SERBIN: Morning, Your Honor. Gary Serbin from Koffsky Schwalb LLC, representing Petitioner Casper Sleeping.

MR. KOFFSKY: Good morning. Mark Koffsky, Koffsky Schwalb LLC also representing Petitioner, Casper Sleep.

MR. POPOWITZ: Good morning, Your Honor, Greg Popowitz on behalf of Assouline & Berlowe representing the Patent Owner, Warner Media Partners, LLC and with me witnessing or observing is Wes Ali, who is backup counsel.

JUDGE FLAX: Okay and Mr. Popowitz, I understand that you are a LEAP Practitioner today. Is that correct?

MR. POPOWITZ: Yes, Your Honor.

JUDGE FLAX: So because of that, as you know, when you went through the process, you're entitled to an extra 15 minutes of time for argument. We'll factor that in when your time comes to stand up. Each side can request some time to reserve for rebuttal. No more than half of their time. Again, you'll have the 15 minutes. You're under no obligation to use

1 it, but it is your time.

2 And again, no matter what you've done for reserving time on both
3 sides, if you want to keep arguing and you want to eat into the time that
4 you've reserved, that's your choice. It's up to you. You use your argument
5 the best way that you decide.

6 We have your full record in front of us on computer screens here.
7 We have your demonstratives with us as well. So if you would please, as
8 you're arguing, refer to papers by their name.

9 If it's the Response or the Petition or one of your Replies, you
10 don't need to necessarily identify the paper number for those, but for things
11 that are a little less prominent in the case, please refer to the paper numbers
12 too, page numbers very helpful. When you're referring to any exhibit, please
13 refer to the exhibit number not just some shorthand term for it.

14 And if you are referring to your demonstratives, if you would
15 please identify which slide you're talking about. And if you forget to do it,
16 and we realize, well, we'll remind you. But if you could try to do that along
17 the way.

18 So Mr. Serbin, it looks like you are beginning arguments for
19 Petitioner as you're standing here in front of me. You can see that you've got
20 60 minutes up on the sign right there. How much would you like to reserve
21 for rebuttal time?

22 MR. SERBIN: We are thinking about ten minutes total. The way
23 we were planning on conducting this presentation is I would be arguing on
24 issues dealing with obviousness. Which should take about 30 minutes, and
25 my partner, Mark Koffsky will handle the secondary consideration portion

1 of the demonstrative presentation, and then we should have about ten
2 minutes left for response.

3 JUDGE FLAX: Okay. That's fine. I see behind you and I do
4 know that you all have asked to bring these actual physical things here
5 today. Are these going to be demonstrative exhibits or what are these
6 things?

7 MR. KOFFSKY: So Your Honor, we have at least what we
8 brought and I know Patent Owner has brought some others, these are
9 physical exhibits that were marked in depositions. They have numbers on
10 them. This is physical Exhibit 1054.

11 There's a photo of that 1055 which is also in the record. This is the
12 core of the GhostPillow, the Patent Owner's product and this is from the
13 Element test, Exhibit 1066. This was marked by Patent Owner's expert
14 during the deposition.

15 MR. SERBIN: There's another one.

16 MR. KOFFSKY: And we have a small bag here, Exhibit 1072,
17 also marked during the deposition of Patent Owner's expert. And I know
18 Patent Owner brought two physical exhibits as well.

19 JUDGE FLAX: Okay so this is kind of an unusual situation. We
20 don't usually have exhibits that aren't documents and in our P-TACTS
21 record. So these things have not been entered into the record in any way. At
22 least not in this proceeding. Maybe they're in as part of the --.

23 MR. KOFFSKY: I would just like to add there's a picture of each
24 of these.

25 JUDGE FLAX: Right. I got you.

1 MR. KOFFSKY: In the record.

2 JUDGE FLAX: Okay.

3 MR. KOFFSKY: So it's the one higher so 1054 and 1055 is the
4 picture, 1072, 1073 is the picture.

5 JUDGE FLAX: Okay. I understand. So I mean I think you'll
6 probably be taking these away with you today rather than leaving them with
7 us because we have no way to --

8 MR. KOFFSKY: Yes, Your Honor.

9 JUDGE FLAX: -- catalog them or store them in any way. Any
10 objection to the way that these are, all these things are going to be used
11 today from either side?

12 MR. POPOWITZ: No, Your Honor.

13 MR. KOFFSKY: No, Your Honor --

14 MR. POPOWITZ: We have a demonstrative.

15 MR. KOFFSKY: -- we conferred before the hearing.

16 JUDGE FLAX: All right. We'll let you handle it as you see fit.
17 So, Mr. Serbin, when you're ready, you see that I've now got 50 minutes on
18 the board for you. I'll start it. It will give you a warning as it gets lower, but
19 you can see it click down the whole time.

20 MR. SERBIN: Your Honor, we also made color copies of our
21 demonstrative presentation, hard copies, if anybody, you're interested in hard
22 copies to make markings on anything, we're happy to distribute those.

23 JUDGE FLAX: I don't think I need one, but if either of the other
24 judge wants one.

25 JUDGE GROSSMAN: We have copies of them electronically in

1 front of us.

2 MR. SERBIN: Yes, okay.

3 JUDGE GROSSMAN: I don't need one.

4 JUDGE FLAX: I'll tell you what, we do have one of our Clerks
5 out there. Maybe hand one to her. She might appreciate having it.

6 CLERK: There's another Clerk over there.

7 JUDGE FLAX: Oh, you have another, --

8 MR. SERBIN: Okay, we'll hand you one as well.

9 JUDGE FLAX: -- clerk over there. Two clerks.

10 MR. POPOWITZ: I can give --

11 MR. SERBIN: May I give her mine now just to get --

12 JUDGE FLAX: Yes. Sure.

13 MR. POPOWITZ: Just so you have one, actually easier.

14 MR. SERBIN: And thank you.

15 (Off-microphone comment.)

16 MR. POPOWITZ: One left.

17 JUDGE FLAX: She'll take it. The Court Reporter here.

18 MR. SERBIN: Oh, yes. Thank you.

19 JUDGE FLAX: That may help her along the way.

20 MR. POPOWITZ: Is it okay to approach?

21 JUDGE FLAX: Sure, yes. Okay, Mr. Serbin, so when you're
22 ready, I'll start your clock.

23 MR. SERBIN: Okay. I'm ready, Your Honor. Good morning.

24 I'm going to be presenting the part of the oral argument dealing with

25 obviousness. And I will be going through some, but not most of the slides

1 for the purpose of just making sure we're fit within the required time.

2 So if we look at Slide 3 which you see on the screen, it shows the
3 two claims of the 3L1 Patent that is in issue in this case. And what we've
4 done is we've highlighted the terms that are sort of in dispute or the terms
5 that are required to be considered when dealing with second, with secondary
6 references because we're dealing with combinations of primary and
7 secondary.

8 So for some of these terms, the secondary reference will come into
9 play for the purpose of filling in the gaps in the combination.

10 JUDGE FLAX: That's fine. I mean, from a legal perspective, we
11 don't care about primary or secondary references.

12 MR. SERBIN: I understand, Your Honor.

13 JUDGE FLAX: They are just combined references.

14 MR. SERBIN: I understand. Okay. Slide No. 4, this shows the
15 sort of a high level presentation of the different grounds on which this IPR
16 was granted and what we are showing the references for each ground.

17 And not only the references, but the elements for which each
18 reference is being presented. So, for example, for Ground 1, Lievestro,
19 which is Exhibit 1013, discloses all of the steps of Claims 1 and 2 except for
20 the applying PCM step.

21 And therefore we are referring to Schneider to fill in the gap for
22 the missing step. And when we go later on, we'll show why each reference
23 is -- why they're combinable and what's in each of the references.

24 JUDGE FLAX: Mr. -- I do have a question before you get --

25 MR. SERBIN: Yes.

1 JUDGE FLAX: -- into that stuff on the merits. I know that there's
2 some dispute here about who exactly would be the person of ordinary skill in
3 the art. The argument, to my understanding, is whether or not experience
4 could overcome a lack of certain education.

5 In my view, the witnesses here all appear to have a lot of
6 experience in the relevant field. Some of them even have patents covering
7 relevant technology. Would you agree, would you have any problem with
8 us adopting what you said in your Petition about equivalent level of
9 education and experience?

10 So someone of say 25 years of experience in the pillow and
11 bedding manufacturing industry, couldn't that practical experience overcome
12 not having a bachelor of science degree? Would you agree with that?

13 MR. SERBIN: To some extent, yes, Your Honor. There is, there
14 are certain features of the in the case, for example, when we're talking about
15 testing and specific characteristic properties of foam that may require
16 scientific background.

17 If you look at some of the specifications under which these devices
18 were tested, these foams were tested, and you go back to the spec, you will
19 find formulas which are relatively complex and establishing heat flow fluxes
20 and things like that.

21 So I will leave it to the Board to decide. I think the experience is
22 important, but I think the bachelor of science degree which the inventor
23 itself, himself has.

24 JUDGE FLAX: But that's in accounting. Right?

25 MR. SERBIN: Correct.

1 JUDGE FLAX: So that has nothing to do with pillows or bedding.

2 MR. SERBIN: I --

3 JUDGE FLAX: So I would guess, I don't know this, but he must
4 have got his understanding of pillows and bedding from experience because
5 you don't learn that in any accounting degree that I've ever heard of.

6 MR. SERBIN: I agree, Your Honor.

7 JUDGE FLAX: So I mean, you point is what it is. Please proceed
8 as you like.

9 MR. SERBIN: So for, with so for we are identifying on each of
10 the slides where in the record the discussion of all of the different elements,
11 for example, for Lievestro, on Paper 24, Pages 5 through 6, Exhibit 1074,
12 line 74 through 1422, this is where there is admission or showing that all of
13 the elements except for applying PCMs is presented.

14 And that's why Schneider is used for that other step. Under
15 Ground 2, Crawford has all of the elements except for hole forming or
16 compressing while forming hole step for Claim 2 and that is Exhibit 111.

17 The record on the demonstrative shows where there is evidence
18 that there is admission by the Patent Owner's expert that all of the other
19 elements are present. And what we're doing, we're using Lievestro to fill in
20 the gap with respect to cracking and hole forming steps.

21 With respect to Ground 3, we have Ohta for both Ground 3 and 4.
22 And we are combining Ohta with Schneider for PCM. Again, Ohta was
23 admitted to have all of the steps with respect to Claim 2. With respect to
24 Claim 1, there is a dispute as to what constitutes cracking.

25 If the Board in its final construction determines that cracking

1 includes compressing by a plate press to open cell walls, then Ohta would
2 also apply to Claim 1 under Ground 3. For Ground 4 --

3 JUDGE FLAX: Let's talk about that claim construction first.

4 MR. SERBIN: Yes.

5 JUDGE FLAX: I understand what you proposed to add plate
6 pressing in addition to rollers. The reason that we preliminarily had that
7 construction for cracking was based on what the specification said and so the
8 specification said roller, so we went with rollers.

9 My understanding at this point is that Mr. Gross, who you deposed,
10 explained that there's lots of ways to crack pillow foam. And it could be
11 with a roller. It could be with a plate. It probably doesn't matter how it's
12 compressed as long as it's sufficiently compressed to break internal walls of
13 cells in the foam. Is that accurate?

14 MR. SERBIN: That is accurate and actually both experts testified,
15 including Mr. Gross, that cracking as the term is used in the field applies to
16 opening cell walls whether you do it by a roller or a plate press or other
17 presses.

18 For the purpose of this dispute, Ohta uses a plate press and that's
19 why we bring that up because if plate press is included in the final definition
20 of cracking, then Ohta would meet the definition of cracking of Claim 1
21 under Ground 3 as well as Ground 4.

22 JUDGE FLAX: And, Mr. Gross testified that the degree of
23 compression that Ohta discloses is enough to crack foam. Right?

24 MR. SERBIN: Correct.

25 JUDGE FLAX: Ninety-five percent I believe is how much it could

1 be --

2 MR. SERBIN: Ohta compresses to 95 percent and Mr. Gross
3 during the position when asked about what degree of compression you
4 would need, he goes anything, you know, over 40 percent. So in this case,
5 Ohta is 95, Crawford is 90.

6 And Dr. Brienza, who is an expert in this field, testified that either
7 one of those is sufficient to open cell walls. So it's just a question of
8 whether the plate press is also within the definition of cracking and both
9 experts testified that in the field that is considered to be within the scope of
10 the term.

11 So the last thing on Ground 4 whether there's a change in the
12 definition of cracking with respect to Ohta, it doesn't really impact the
13 validity or invalidity of Claim 1 because Crawford can fill in that gap
14 because Crawford also provides cracking.

15 And there is admission by Mr. Gross without going into the
16 percentages that Crawford discloses all of the elements of Claim 1 and 2
17 except for hole making and compressing. So with this, I will now go to,
18 hold on a second. Next slide and that would be Slide 6.

19 And on Slide 6, we're showing the, some of the figures of on the
20 right side of Lievestro. Lievestro is Exhibit 1013. That's a translation of a
21 Dutch reference. There's no dispute that it's a prior art. And the reason
22 we're showing it is that Lievestro shows a roller, two rollers with a foam
23 block, disclosed foam block passing between the rollers with punch sleeves
24 punching a hole at 6 o'clock position.

25 So it's being compressed, a hole is being punched, and being

1 passed out and the pass through, it returns to its original shape and the result
2 is the foam block that is, has vertical holes through it from top view and side
3 view in Figure 6 and Figure 5 respectively.

4 Now what's interesting about Crawford is not only does it talk,
5 excuse me, Lievestro, not only does it talk about making holes, but it also
6 says that making holes the way it's doing, it also crushes the foam and opens
7 cell walls. So effectively, Lievestro discloses cracking expressly within this.

8 And on this slide we've identified that this disclosure is happening
9 on Page 3 of Lievestro and on Page 2 Lievestro specifically talks about using
10 this mechanism in order to make mattresses. So these foam bodies are for
11 mattresses, so we're talking about bedding.

12 Moving -- one thing that I wanted to talk about Lievestro is that in
13 this particular case, Patent Owner's expert raised several objections to
14 Lievestro as well as other references and, for example, for Lievestro, the
15 objections were that it's not suitable for pillows, particular mattress toppers,
16 that there may be temperature rise due to the operation of the rollers, that
17 there may be pressure gradient that might impact PCM or phase change
18 material.

19 I'm going to use PCM for abbreviation. And also that Lievestro
20 doesn't work for anything more than four centimeters. Those were the
21 arguments made by Mr. Gross and Patent Owner expert and that's in Exhibit
22 2001, paragraph 31 through 35, 44 through 45 as well as the paragraph next
23 to it. There are several problems with those arguments.

24 Number one, in many of the cases where Mr. Gross is objecting to
25 Lievestro's use, he's using the word may and probably. Mr. Gross never has

1 said that this is the fact and this will happen. He's speculating what might
2 happen.

3 In the deposition, he admitted that he never designed a
4 manufacturing line for bedding products, never done any calculations or
5 engineering calculations regarding heat dissipation of manufacturing of
6 equipment, never done any calculation of adhesion of laminated PCM, and
7 never done any calculations on damage to PCM due to any possible uneven
8 compression.

9 And also when asked how he would potentially cool the Lievestro
10 system, if there were a rise, he said I'm not engineer, I'm not going to
11 speculate. So that's just deposition. And one thing that happened during his
12 deposition, he retracted a number of his positions in Exhibit 2001
13 concerning Lievestro.

14 He mischaracterizes Lievestro in his testimony originally and then
15 at the deposition he retracted a number of paragraphs, 28, 39, 40, 42 and also
16 impacted paragraph 141. So Mr. Gross's characterization of Lievestro was
17 not correct to start with.

18 Now with respect to suitability for Lievestro for pillows, as
19 testified by Dr. Brienza, Petitioner's Expert, in Exhibit 1075 --

20 JUDGE GROSSMAN: Before we go too far into what Mr. Gross
21 said in his Declaration and what he acknowledged about Lievestro, you've
22 got your Slide 5 of your demonstratives which is just one page out of, I
23 guess, deposition testimony?

24 MR. SERBIN: Yes.

25 JUDGE GROSSMAN: Where the heading of it, Mr. Gross

1 admitted that Lievestro discloses all the steps except for applying the PCM.

2 MR. SERBIN: Correct.

3 JUDGE GROSSMAN: The phase change material.

4 MR. SERBIN: Correct.

5 JUDGE GROSSMAN: And is that, that's sort of the conclusion
6 that you want us, after his original, he recanted his original testimony about
7 what it didn't disclose and now based on his deposition, seems to
8 acknowledge that Lievestro has everything.

9 MR. SERBIN: Correct.

10 JUDGE GROSSMAN: Except phase change material.

11 MR. SERBIN: On Slide 3, when I show the chart between the
12 references, we actually point to where in the record whether it's in the, where
13 in his deposition transcript those admissions were made for Lievestro, for
14 Crawford as well as for Ohta.

15 So that Slide 3 chart kind of gives you the layout of where we are
16 going. The reason I'm mentioning this is that not only were there retractions
17 done during the deposition, but the position that he was taking, some of
18 these, for example, doesn't apply to foam pillows.

19 As presented by Dr. Brienza in paragraphs 37 through 39 of his
20 second declaration, Exhibit 1075, there's no factual basis for those
21 arguments that it doesn't apply to mattresses when Lievestro especially says
22 it applies to mattresses and applies to bedding.

23 With respect to temperature rise, besides being speculative, there
24 are no calculations to support that on Mr. Gross's behalf. Dr. Brienza, who
25 actually did design and is an engineer who has done design and manufacture

1 alliances. That's not an issue.

2 Number three, even if it were an issue, there are several ways to
3 reduce any heat issues that might come, could have come up. Number one,
4 there is testimony that can be -- the revolution, speed of revolutions of the
5 rollers can be slowed down.

6 Air and fluid can be used to cool these things and, in fact, on Page
7 7 of Lievestro, Lievestro talks about using fluid and air to punch through the
8 punch leaf to push out of the foam through the punch leaf. Whenever you
9 have air passing through, that automatically creates convection, number one.

10 And the last thing is that if you look at it, the roller, the top roller
11 that actually produces the punching is not shown as touching the foam. So
12 the only thing that's touching the foam are the sleeves. The sleeves are not
13 going to be warmed up, because the sleeve that's doing the punching doesn't
14 come back until the full revolution.

15 So it's every other, every eighth holes that a particular sleeve is
16 being used to punch a single hole. So all of the issues about heat are very
17 speculative and they don't apply. The pressure gradient --

18 JUDGE GROSSMAN: Wait on one other question about that.
19 When you talk about all the issues about heat, where in the claims do they
20 require any specificity about heat? Or about how the hole is formed?
21 Doesn't it just say forming a hole?

22 MR. SERBIN: Your Honor, there's nothing. Nothing. But I'm
23 presenting it because we see this as an argument that was presented by Mr.
24 Gross why one wouldn't use Lievestro. And that's why I'm applying this.
25 With respect to pressure gradient, again, no calculations.

1 And nothing to prevent Lievestro from using PCM, from using
2 PCM on the bottom of the phone. And if you can see on the bottom of the
3 phone, there is no pressure grading at all. And Mr. Gross admitted that it
4 could be done.

5 JUDGE GROSSMAN: Okay.

6 MR. SERBIN: The last thing, the last thing I want to mention
7 about Lievestro is that Mr. Gross says that Lievestro doesn't work for less
8 than, for more than four centimeters foam blocks. Not only is it not
9 accurate, but it contradicts the exact teaching of Lievestro which teaches that
10 the form blocks can be up to 400 centimeters.

11 So not having done any testing, not having built anything, Mr.
12 Gross creates out of Lievestro four things that are not even in dispute. All
13 right that's all I was going to say about Lievestro. My next slide would be
14 with respect to Crawford and that's Slide No. 8.

15 And the reason I wanted to show the slide is that this is one of the
16 embodiments of Crawford. It shows a block from Block 3 being passed
17 through a chamber that sprays gel that includes foam in it and there are
18 optional rollers that can compress the foam.

19 And once it passes through, there is a cured chamber and the result
20 is at the 13, a product with the PCM applied on the surface of a foam block.
21 Now in this slide, we also identified paragraphs from Crawford, paragraph 2,
22 paragraph 60 and plane 43 discussing the fact that this is applicable to
23 mattresses.

24 And the reason they're spraying the gel, they're calling it gel with
25 PCM embedded in it, so effectively you're applying PCM on the surface, is

1 to prevent heat absorbed from the heat release for thermally enhanced
2 construction.

3 So the reason Crawford is doing it is to enhance thermal
4 characteristics of the foam. Moving over to Ohta, that's Exhibit 1009, Ohta
5 discusses using a plate press. This is what we're talking about earlier in as
6 far as this.

7 Compressing the foam, punching holes and then releasing it with
8 the foam pillow returning to its original size. What we've done is we also
9 identified paragraph 2 of Ohta where Ohta actually says that not that the
10 holes in general, in general are made in order to prevent muggy feelings of
11 the foam during use.

12 And they actually say that pillows are made of perforated foam
13 that there appears with holes to prevent oppressive feeling and they talk
14 about this is a general statement why you would want to make holes in the
15 foam.

16 The muggy -- the word muggy, as defined in the dictionary, means
17 hot and damp with no stirring of air. So what this does is creates air
18 passages to enhance the cooling properties of the resulting device. Okay.
19 Now moving over to Slide 12.

20 This is where we're talking about 95 percent compression. Your
21 Honor, you asked whether 95 percent compression provides cracking. You
22 can see here the last line of that on that slide says most likely, yes. So that's
23 Exhibit 1074, Page 143, lines 2 through 10 and that's the deposition
24 testimony of Mr. Gross. Now moving over to --

25 JUDGE FLAX: I mean your point being what? That would at

1 least make cracking obvious?

2 MR. SERBIN: Well the, Mr. Gross that in other areas he basically
3 has 40 percent as sufficient to provide cracking. We have 95 percent. Mr.
4 Brienza says 95 percent that's actually performs cracking. Otherwise, what
5 happens is if you compress it too much it may actually destroy the structures
6 of the cell foam. It may not repair or come back.

7 JUDGE FLAX: I guess my question is, you're not relying on
8 inherency here or are you? Are you relying on it being obvious and you
9 have 95 percent --

10 MR. SERBIN: I'm relying that 95 percent cracking, 95 percent
11 compression is considered cracking to a person skilled in the art. That's the
12 testimony of Dr. Brienza. Now moving over to Schneider which is Exhibit
13 1010 and as previously shown of Schneider, the primary purpose of
14 Schneider is to fill in the gap with respect to application of phase change
15 material to the surface of the foam block.

16 And Schneider is shown in the figures. You can see the second on
17 Figure 6 the dark, two dark layers. Those are the foam layers shown in
18 Schneider and then in Figure 8 they're shown with holes on top.

19 Schneider actually talks about using washable mattresses and that
20 comprises microencapsulated phase change material. We've highlighted
21 those portions of Schneider disclosure. That's paragraph 29 and in that case,
22 Schneider teaches the use of phase change material on a layer of memory
23 foam.

24 And the reason Schneider does that is in the last sentence it says
25 the test results demonstrate the ability of phase change gel to provide

1 significant cooling benefits when applied to the flexible polyurethane foam.

2 So the reason Schneider is applying PCM to this polyurethane
3 foam is to enhance cooling properties of the pillows. Now what you also
4 will notice here in this paragraph, Schneider is incorporating by reference an
5 international patent application W2011107849.

6 I would refer to that as the Rossi reference. If we go to the next
7 slide, that's Slide 16, that's Exhibit 1085. Now Rossi, which is incorporated
8 by reference in Schneider, we excerpted certain areas from Rossi, but
9 effectively, if you look at the second paragraph sentence from on the screen,
10 it says that the special soap gel covering allows you to increase the comfort
11 and thermal properties of this substrate on which it is applied. Again, same
12 idea.

13 You're applying it in order to enhance thermal characteristics. But
14 what's interesting about Rossi is that not only is it talking about application
15 of foam gel which described in Schneider's PCM, at the last sentence it talks
16 about that the gel allows you to put holes in the above-mentioned products
17 before or after application of the gel.

18 So not only Rossi is filling in the gap on the PCM end, but actually
19 talks about -- teaches using holes in the product to which the gel is applied.
20 All right. And that's incorporated by reference within Schneider. All right.
21 So we're going to --

22 JUDGE FLAX: Is this rebuttal evidence to their arguments that
23 you can't have a viable process for making these bedding products with
24 holes and gel?

25 MR. SERBIN: That's correct. And that's right within Rossi and

1 it's discussed here. They made several arguments with respect to Rossi, but
2 with respect to Schneider. One is that Schneider only deals with a reticulated
3 foam.

4 And during his deposition, Mr. Gross admitted that Schneider
5 discloses non-reticulated foam. Well, here it doesn't really matter. The
6 claim doesn't require reticulated or not, but even if it were, it doesn't matter.

7 Their construction of solid somehow impacts this word of
8 reticulate or not reticulated because it tries to exclude reticulated from the
9 definition. So what happens there is we, the owners, determined that solid
10 doesn't need to be construed because it's understandable.

11 We provide a definition of solid. They provided a different
12 definition of solid and that definition requires, it seems to exclude reticulated
13 foam. Now, they also provided a specification which is an interesting
14 specification under which these devices were tested.

15 Mr. Brienza, Dr. Brienza is one of the co-authors of that
16 specification. That specification has a definition of the term solid with
17 respect to surfaces. That definition, Mr. Gross admitted, comports with
18 Petitioner's definition and conflicts with their definition. So this whole idea
19 of solid --

20 JUDGE FLAX: So let's talk about solid. Since we're talking about
21 solids, let's do the claim construction argument here. Why does solid in this
22 patent claims mean anything other than the state of matter?

23 Because when I read the patent, that's how it describes solid. The
24 pillow or bedding starts as a gas, becomes a liquid, then becomes a solid.
25 There's no mention of using solids or something where the solids might be a

1 noun. It's describing the state of matter. Is it anything other than that?

2 MR. SERBIN: No, Your Honor. I believe you are correct. And
3 it's a non, really it's a non-issue. It's something that we saw in their papers
4 and we're not, we're not even sure why it came up, but the bottom line is that
5 their construction that they're advocating, somehow creates an issue with
6 reticulation and somehow excludes Schneider or impacts Schneider, use of
7 Schneider, for the purpose of combination.

8 We're not really sure why that's being done because effectively
9 when you're combining Schneider with Lievestro, you're not using
10 Schneider's form, you're using Lievestro's form to make, apply PCM as told
11 by Schneider.

12 But even there, Schneider clearly teaches non-reticulated foam.
13 Reticulation is not required in Schneider and has been admitted by Mr.
14 Gross. So I think that's just put to rest at that point. If I may proceed, Your
15 Honor?

16 JUDGE FLAX: Please.

17 MR. SERBIN: Okay. So the next thing is the Slide 20. Okay so
18 now we're getting to the holes of Lievestro. There is, Dr. Brienza testified
19 that the primary goal of making holes in the foam for micro climate
20 management is to improve cooling properties.

21 The Ohta reference that we talked about earlier actually says that
22 the foam pillows are made of perforated foam that is sphered with holes to
23 prevent oppressive feeling. That's another general statement as a person of
24 skill in the art, why would do it.

25 And Patent Owner's expert, Mr. Gross, admitted that making holes

1 does improve convection. So we believe that the Liestro is using the holes
2 to improve thermal characteristics of the foam. So now we're getting to the
3 combinations.

4 When you're looking at the combination of Liestro and
5 Schneider, both are dealing with mattresses in the same art. Both are doing
6 their, you know, hole making versus application of PCM for the purpose of
7 enhanced product, cooling effect.

8 Therefore, a person of skill in the art would know to combine the
9 two as presented in the record. And as provided by, presented by Dr.
10 Brienza, the result would have been expected product which has enhanced
11 cooling properties.

12 The same thing which we said about Ground 2 where we have
13 Crawford in combination with Liestro. Crawford is doing it for the
14 purpose of enhancing thermal characteristics. Liestro is doing for the
15 purpose of improving thermal characteristics.

16 A person of skill in the art would know to combine them.
17 Liestro can be put before or after Crawford. There's absolutely no
18 requirement in the claims when the holes versus PCM are being applied.

19 And, as such, a person of skill in the art would know to combine
20 the two, and the combination of the two would create the process of Claim 1
21 and the process of Claim 2. With respect to Ground 3, we have Ohta. Ohta
22 clearly expressly talks about making holes for the purpose of thermal
23 enhancement.

24 Schneider is doing it for the purpose of thermal enhancement. A
25 person of skill in the art would know to combine the two. With respect to

1 Claim 2, that combination would result in all of the elements of Claim --
2 steps of Claim 2 being satisfied. With respect to Claim 1 on the Ground 2,
3 that will depend on the Board final construction of cracking.

4 If the cracking is changed to include plate press, then the
5 combination would also cover Claim 1 under --

6 JUDGE FLAX: Why do we need a plate press? Can it just be
7 anything?

8 MR. SERBIN: Any press, Your Honor. The reason is that --

9 JUDGE FLAX: Is there something that doesn't qualify that would
10 crush by compression? What would not qualify as a cracking?

11 MR. SERBIN: I don't know, Your Honor.

12 JUDGE FLAX: Okay.

13 MR. SERBIN: I don't. I think if you look at the record, both
14 expert says like, you know, compressing in general would provide cracking.
15 It's just that in the preliminary construction, it was talked about the roller
16 press and that's why it created an issue with respect to Ohta. Our original
17 construction of cracking would be pressing.

18 If you look at the original construction when they were asked for
19 roller and equal plate, but plate comes in because of Ohta. And then the last
20 thing, again, between, under Ground 4. We have Ohta in combination with
21 Crawford, same situation.

22 Holes for the purpose of enhanced cooling, PCM for enhanced
23 cooling combination, but under this Ground 4, even if the claim construction
24 of cracking is not changed, Crawford, because there was admission by Mr.
25 Gross, that Crawford does provide cracking, it, the combination of the two

1 under Ground 4 would still satisfy the cracking step of Claim 1 when
2 you're -- regardless of whether you're putting Ohta or Crawford.

3 And if Ohta is also producing cracking, you're doing cracking
4 twice under that combination. Your Honor, that's all I have for the
5 presentation obviousness. If I may turn it over to my colleague, my partner?

6 MR. KOFFSKY: Thank you, Gary. Your Honors, Mark Koffsky
7 for Petitioner Casper Sleep. I'm going to move over now to the secondary
8 considerations presentation beginning with Slide 40. One thing as Mr.
9 Serbin mentioned, it's important to understand for the secondary
10 considerations arguments, these are process claims.

11 These are claims for making a pillow using cracking and/or
12 pressing before making the hole. And therefore, the secondary consideration
13 factors have to have a nexus between those features and, in our view, the
14 merit of the claim dimension meaning the reason the claims were loud and
15 that's in the record in the reads and proceeding in Exhibit 1005.

16 The Patent Office declined to re-examine these claims through
17 another third party, but did mention that, in that declination, that the reason
18 the claims were granted was because of the cracking step in Claim 1 and the
19 compressing and hole forming step in Claim 2.

20 So under case law, that merit of the claimed inventions has to have
21 a nexus to the categories of secondary considerations. We made a general
22 argument in our papers that there's really no nexus at all, in part because, for
23 example, if you looked at a pillow that was out in the marketplace, for
24 example, you wouldn't be able to tell whether it was actually -- had
25 undergone cracking or not.

1 And that's something that their expert, Mr. Quinn admitted. You
2 can see here on Slide 41 --

3 JUDGE FLAX: What about the Claim 2 limitations?

4 MR. KOFFSKY: That was my next slide, Your Honor. And that's
5 a --

6 JUDGE FLAX: That's more interesting to me.

7 MR. KOFFSKY: I understand, yes. So there was, there was some
8 testimony about that you wouldn't be able to tell whether a particular pillow
9 like the pillow I'm about to show you was, had the holes that were made
10 before compression or not.

11 Mr. Quinn, their expert, essentially said no, we have to have
12 compression. You know, I have to not -- have to have compression. That
13 it's the only way, is Claim 2. You can't do it any other way. However, Mr.
14 Gross, their technical expert here on Slide 41 mentioned there are other
15 possible ways you could drill the holes, you could do it by molding.

16 In other words, pull in the sort of proto-foam into a mold that
17 already had punch outs so that the holes would form. And there were other
18 ways that one could do hole making that did not involve compression before
19 the making of the holes.

20 And we also had art that was in Slide 41. In Slide 42, our expert,
21 Mr. Shiroff, investigated and even found that there are other drilling
22 machines for pillows that don't involve any compression before the actual
23 drilling.

24 JUDGE FLAX: So I know there's dispute about this thing.

25 MR. KOFFSKY: Right.

1 JUDGE FLAX: Whether or not it's holding the pillow in place by
2 squeezing it --

3 MR. KOFFSKY: Yes.

4 JUDGE FLAX: -- is that compression or not. I would say it
5 sounds like it would be compression, but --

6 MR. KOFFSKY: I understand. Look this is frankly a minor point
7 in the scheme of things in the sense that there's molding which doesn't --
8 which their expert admitted would not require compression to make holes.
9 This was just something that we, you know, tried to find that was --

10 JUDGE FLAX: Here's what I find in very carefully reviewing the
11 record in this case. I don't see other than just conclusory points evidence
12 that that GhostPillow product from Patent Owner is -- shares a nexus with
13 the claimed invention.

14 Other than that conclusion, I don't see any actual effort made by
15 Patent Owner to establish that fact. I don't see that the sequence of
16 photographs in the manufacturing process in Exhibit 2022 establishes
17 cracking or establishes compression before and during hole making, for
18 Claims 1 and 2.

19 So I have a really hard time finding the nexus that Patent Owner
20 needs to establish for any of the secondary considerations or objective
21 indicia of non-obviousness. I'm looking forward to hearing what Patent
22 Owner has to say in a minute about where that is proven in the briefing and
23 in the evidence cited in the briefing.

24 But all I see is their expert, Quinn, saying that it happened and
25 that's the case. So I would like you to explain that exhibit to me.

1 MR. KOFFSKY: Which exhibit, Your Honor?

2 JUDGE FLAX: 2022.

3 MR. KOFFSKY: That is, I believe, the Patent Owner's process of
4 showing how the pillow is --

5 JUDGE FLAX: Right.

6 MR. KOFFSKY: -- made.

7 JUDGE FLAX: Is there any other evidence?

8 MR. KOFFSKY: I'm not aware of any, Your Honor, in terms of
9 direct evidence. I mean --

10 JUDGE FLAX: Is there any argument or assertions made in their
11 briefing to explain that process other than just saying that it is what it is.

12 MR. KOFFSKY: I mean, my understanding, you know, speaking
13 for Patent Owner, putting on Patent Owner hat, is that the pictures show the
14 cracking, show the compression before the hole making for this particular
15 model of pillow.

16 JUDGE FLAX: And what is your position on that --

17 MR. KOFFSKY: My position --

18 JUDGE FLAX: -- exhibit and their assertions?

19 MR. KOFFSKY: -- I mean, I agree with you that the assertion that
20 the Ghostpillow is made by the 301 Patent lacks sufficient evidence when
21 I've actually seen a video. It would be nice to say I have a witness who was
22 there to testify to exactly when it happened.

23 And I think it also goes to the failures that we found even with that
24 which the specific categories of secondary considerations failed because
25 they themselves had flaws in and of themselves besides the lack of nexus.

1 JUDGE FLAX: So this nexus point that I'm making, can you, can
2 you talk about the other, the various objective indicia facts that they have
3 alleged? You know, you've got copying alleged, you've got unexpected
4 results alleged, you've got market share and commercial success --

5 MR. KOFFSKY: Correct.

6 JUDGE FLAX: -- alleged. How does this all relate?

7 MR. KOFFSKY: My, well again, our position is that it doesn't
8 because there is no nexus and because even if there was a nexus the market
9 share analysis has fatal flaws. The market survey has fatal flaws. The
10 element tests, which I would like to address next, has -- the interpretation of
11 the element tests have fatal flaws.

12 JUDGE FLAX: I do see that term that you just used, the element
13 test, is sort of a separately made point in their argument. Is it not just
14 directly related to unexpected results, or is there something else to it?

15 MR. KOFFSKY: So the way we sort of broke it out is that there
16 were six secondary consideration categories in their brief and we combined
17 number three, testing analysis and number six, unexpected results and I refer
18 now to Slide 52.

19 And we sort of address them together, but I believe that the idea of
20 the element test was that they, by taking a piece of foam that did not have
21 holes, and not a PCM, and then testing the piece of foam that was the same,
22 but had holes and had PCM and then seeing the differences one could then
23 derive the fact that, oh, there are differences between Sample A and Sample
24 B, and therefore scientifically that has meaning.

25 I want to make clear, just so it's clear, we have no quarrel with the

1 element test themselves. We believe we have no reason to believe that they
2 were not done properly.

3 We understand that it's a reputable lab with a reputable lab
4 designer. Our quarrel is with the way the element tests are interpreted. And
5 I did bring these --

6 JUDGE FLAX: Element is the name of that company?

7 MR. KOFFSKY: Element is a testing lab that Patent Owner --

8 JUDGE FLAX: Yes.

9 MR. KOFFSKY: -- Patent Owner engaged and produced six test
10 results.

11 JUDGE FLAX: Got you.

12 MR. KOFFSKY: And in the limited time we have, I do want to
13 emphasize what Element did and what Element did not do. What Element
14 should have done in our view, is to take the GhostPillow -- this is the
15 GhostPillow core. Mr. Quinn opened it up --

16 JUDGE GROSSMAN: If I could stop you before you go too far.

17 MR. KOFFSKY: Sure.

18 JUDGE GROSSMAN: Just identify what you're holding there for
19 the record.

20 MR. KOFFSKY: Absolutely. Thank you, Your Honor.

21 JUDGE GROSSMAN: For the Court Reporter.

22 MR. KOFFSKY: Record, I'm holding physical Exhibit 1054
23 which was marked during Mr. Quinn's deposition. And Mr. Quinn basically,
24 at the deposition, he was presented with a complete GhostPillow. He
25 opened it up, he cut it open, and this is the core that's in the Patent Owner's

1 GhostPillow. And you will see in the deposition of record that the PCM is
2 the -- the pillow core is sort of a light blue and the PCM is painted on
3 approximately 90 percent of the front face of the pillow.

4 And that's the dark blue or darkish green that you see here that's
5 painted across in a bit of a layer across, and then there are holes that are
6 punched through the entire pillow, kind of in density, and the pillow and the
7 pillow -- now I'm referring to Slide 53, the pillow has a density of four
8 pounds per cubic feet.

9 JUDGE FLAX: Now Element's tests weren't of that.

10 MR. KOFFSKY: Correct.

11 JUDGE FLAX: There were some other foam samples, right?

12 MR. KOFFSKY: Correct. What they didn't test that, they tested
13 this. This is a 50 --

14 JUDGE FLAX: What is that?

15 MR. KOFFSKY: This is a 50-inch by 20-inch by 5-inch piece of
16 bulk foam that Element tested. They tested two, they tested -- actually were
17 three tests, but they tested a foam like this that does not have PCM holes and
18 then they tested this form that has PCM --

19 JUDGE FLAX: Okay.

20 MR. KOFFSKY: -- holes.

21 JUDGE GROSSMAN: Could you also identify --

22 MR. KOFFSKY: Absolutely. Your Honor.

23 JUDGE GROSSMAN: -- for the record, identification.

24 MR. KOFFSKY: For the record, this is Exhibit 1066. And it has a
25 different size, a different thickness, and Your Honors can see the PCM sort

1 of coming off my hand here. The PCM is striped down the sides of the
2 foam. The foam is a different density. It's 3.3 pounds. Its --

3 JUDGE FLAX: Okay.

4 MR. KOFFSKY: -- holes are different sizes. Small holes, not
5 large holes, a low density of holes, not a large density of holes. So, what
6 Element should have tested, they should have taken what I'll call the proto-
7 pillow for lack of a better term in that exhibit we referred to earlier which is
8 this 1054 --

9 JUDGE FLAX: So I guess my question is you're saying they
10 should have. But from the record, I don't know that that thing you're holding
11 is an embodiment of the claimed invention.

12 MR. KOFFSKY: We do not dispute that, Your Honor. This is,
13 we're just making additional arguments that, you know, in case that you do
14 find that there is a nexus which we believe does not exist for the reasons
15 we've discussed.

16 In case that you do find such a nexus, the test to tell shows nothing.
17 It shows that the results that came from the testing of Exhibit 1066 and its
18 pair which we didn't bring in, which is the same kind of size foam, there's a
19 picture in the record, except it doesn't have holes and doesn't have the street
20 PCMs down the side.

21 That's all very nice, those results, but they don't mean anything.
22 Because they didn't test --

23 (Simultaneous speaking.)

24 JUDGE FLAX: But is that, is that other --

25 MR. KOFFSKY: -- the pillow itself.

1 JUDGE FLAX: -- that other thing, that other pillow that they
2 actually did test? Was it cracked?

3 MR. KOFFSKY: Was this cracked?

4 JUDGE FLAX: Yes.

5 MR. KOFFSKY: I don't know.

6 JUDGE FLAX: Were those holes punched after the pillow was
7 compressed and while it was compressed?

8 MR. KOFFSKY: I don't know.

9 JUDGE FLAX: Okay.

10 MR. KOFFSKY: Okay so that's, again, that's the issue we have
11 with the --

12 JUDGE GROSSMAN: Let me just interrupt you.

13 MR. KOFFSKY: Please.

14 JUDGE GROSSMAN: Again, just to clarify. When you say you
15 don't know, does that mean that there's really, there's no evidence in our
16 record that establishes one way or the other how that --

17 MR. KOFFSKY: I believe that's correct. I don't think I asked Mr.
18 Quinn that when I deposed him and I don't think it's in the briefs. And let
19 me just, and even the test themselves, the Element test -- I'm turning now to
20 Slide 54 on the bottom.

21 There were actually six tests, three different kinds of tests on three
22 different pairs, and just to complete the record, two of the tests involved big,
23 large foam blocks like 1066. One test was the air flow test.

24 Out of all of these little baggie, this little baggie of three very small
25 foam blocks, Exhibit 1072 picture in the record is 1073 so, again, these little

1 bags with three little foam blocks that have some PCM on them.

2 JUDGE FLAX: Okay.

3 MR. KOFFSKY: I have two.

4 JUDGE FLAX: Considering the same Element testing, what were
5 the comparative samples that were alleged to not be the invention?

6 MR. KOFFSKY: I'm not sure what you mean, Your Honor.

7 JUDGE FLAX: Well, they did a test on things that they said were
8 the invention and then they did a test on things that they said were not the
9 invention.

10 MR. KOFFSKY: I don't --

11 JUDGE FLAX: And then they compared them and they said, the
12 invention's better than not the invention.

13 MR. KOFFSKY: They compared, just let's take again, this is
14 1066. They compared, imagine there is -- and it's in the record, I'll get you
15 the picture number on the rebuttal -- but there's a piece of foam just like this,
16 this size, this shape, this weight, except it doesn't have holes and doesn't
17 have PCM.

18 That was -- so they subjected that which called, what do they call
19 it? Sorry. They called it GBsolidfoam. That's what you'll see as the next
20 exhibit.

21 JUDGE FLAX: So that's just foam?

22 MR. KOFFSKY: Just foam like this, exactly like this, except it
23 doesn't have holes and it doesn't have PCM.

24 JUDGE GROSSMAN: If you could just identify for the record
25 when you say it's just like this, --

1 MR. KOFFSKY: Just like this Exhibit 1066. There's another --

2 JUDGE GROSSMAN: Okay.

3 MR. KOFFSKY: -- picture and I'll have it in rebuttal during
4 rebuttal, identify the picture of the piece of foam that is exactly like 1066,
5 same size, same look, same shape, et cetera, except it doesn't have foam,
6 doesn't have holes, doesn't have PCM. And --

7 JUDGE FLAX: Okay.

8 MR. KOFFSKY: -- these foams were tested and Test One was
9 testing a solid plate, a solid hot plate test that was applied to the solid foam
10 without PCM and holes and then this 1066 foam with PCM and holes.

11 JUDGE FLAX: Okay.

12 MR. KOFFSKY: And there was there were similar tests done in
13 other samples. Again, solid foam --

14 JUDGE FLAX: You're eating into your rebuttal time. You've
15 only got about two and a half minutes left and I would like you to say
16 something about that market --

17 MR. KOFFSKY: Sure.

18 JUDGE FLAX: -- that was created or defined by Mr. Quinn.
19 What's wrong with it?

20 MR. KOFFSKY: So there are a number of things wrong with it.
21 I'll hit the highlights, Your Honor. Essentially it's an artificial creation.
22 Basically, Mr. Quinn presented that he took the GhostPillow, the sales of the
23 GhostPillow and then six other pillows from five companies and created a
24 market which he deemed Molded Gel Memory Foam PCM pillow with
25 punched holes.

1 That's how he defined that market. And he then used Amazon and
2 a tool called Jungle Scout to derive the revenue figures for the previous year
3 for --

4 JUDGE FLAX: These are Amazon things? Amazon products?

5 MR. KOFFSKY: They were sold on --

6 JUDGE FLAX: Are these for sale on Amazon?

7 MR. KOFFSKY: They were for -- the only data that Patent Owner
8 used was a drive from Amazon using a tool called Jungle Scout.

9 JUDGE FLAX: And is that how customers search for products on
10 Amazon? Is that what they type in?

11 MR. KOFFSKY: We don't believe so, Your Honor. In fact, we've
12 typed in that exact same -- and I will note my adversary will probably talk
13 about that. We typed in the exact same thing. It came up with several
14 hundred models.

15 But no, we believe that it's an artificial construct. That memory
16 foam, memory foam pillows is perhaps, as Mr. Shiroff said, the better
17 market and by nature, you know, Mr. Quinn's market ending up with 29
18 percent, the more pillows you add to it, obviously, is a market share would
19 necessarily go down. So, and we believe he missed a number of things, that
20 he missed king-sized pillows even when there were queen-sized pillows in
21 this analysis.

22 He only used Amazon data when he didn't use any other online
23 data and he didn't use any brick and mortar data at all. And we have
24 evidence in the record from a BedTimes article. I'm looking at Slide 46. It's
25 possibly 50/50 in the pillow world, 50/50 percent, 48 percent are purchased

1 online, 52 percent are purchased brick and mortar.

2 So not even all of the, not even all of the online sales are used.

3 There's significant online sales, Walmart, Costco, Target not analyzed in any
4 way. And I want to finish with the fact that on Slide 47, the total revenue of
5 Mr. Quinn's analysis was involving \$3 million in revenue.

6 So you add it all up, all these seven models, \$3 million, \$3 million
7 in a country of 350 million people, all of whom or many of whom or most of
8 whom own at least one pillow, perhaps more. They don't replace pillows
9 every year, to be sure, but many of them do.

10 And we put in evidence in the record in Slide 48 from a Fortune
11 Business article that, you know, that there was a pillow market of last year
12 or two years ago, \$3 billion of which about 20 percent was memory foam
13 pillows, \$600 million or so. And Patent Owner has some quibbles about the
14 evidentiary issues. We obviously dispute that. But the point is that \$3
15 million total revenue in your analysis is noise in the greater U.S. market of
16 \$350 million people, all of whom own a pillow, and many of whom buy a
17 pillow this year or last year.

18 So I see I'm into my rebuttal time. Unless the Court has any
19 further questions, I'll reserve the other nine minutes for rebuttal.

20 JUDGE FLAX: I don't have any. Do you all?

21 JUDGE GROSSMAN: I have one question.

22 MR. KOFFSKY: Yes, please.

23 JUDGE GROSSMAN: Is there anything in the Patent that talks
24 about gel memory foam patents or products? Is that just an artificial name
25 that got labeled and --

1 MR. KOFFSKY: I don't believe --

2 JUDGE GROSSMAN: -- is that what --

3 MR. KOFFSKY: -- I don't believe the word gel is used and I'm
4 blanking on how it's used. I will check and I'll be back in rebuttal to answer
5 that question.

6 JUDGE GROSSMAN: I couldn't find it when I did a word search
7 in the patent that they even used the word gel.

8 MR. KOFFSKY: Sitting here, I think that's right.

9 JUDGE FLAX: Okay. Thank you.

10 MR. KOFFSKY: Thank you, Your Honors.

11 MR. POPOWITZ: Gary, I'm going to unplug your cord.

12 MR. SERBIN: Oh, yes, sorry. Sorry.

13 (Off-microphone comments.)

14 JUDGE FLAX: Okay. Mr. Popowitz, you have 75 minutes of
15 time to argue. It's a lot.

16 MR. POPOWITZ: That is a lot.

17 JUDGE FLAX: How much would you like to reserve for your
18 rebuttal?

19 MR. POPOWITZ: I'd like to reserve ten minutes, Your Honor.

20 JUDGE FLAX: Okay. Okay one down here. So same thing, if
21 you find that you've argued for 65 minutes and you want to keep going, you
22 can. It's your choice to eat into your rebuttal time. But you don't have to.

23 I mean, you don't have to use your full 65 minutes now. And in
24 fact, if you don't, I'll credit you that time for your rebuttal time.

25 MR. POPOWITZ: Understood. Appreciate that, Your Honor.

1 JUDGE FLAX: So the floor is yours.

2 MR. POPOWITZ: Okay. Let me make sure this is working.

3 Okay. Thank you, Your Honor. Again, Greg Popowitz on behalf of the
4 Patent Owner. Turning to Slide 2, again, this is a summary of the claims we
5 just talked about.

6 Again, the focus is Claims 1 and 2 have the same first three
7 elements of the claims, the focus from a cracking and compression
8 standpoint are the differential in claim element 4 for Claim 1, and 4 and 5
9 regarding Claim 2.

10 Now one of the parts I want to focus Your Honors on is the fact
11 that the Claims both require applying PCM, we refer to PCM as phase
12 change material, to the surface of the foam block which is defined in the
13 Patent claims. This is different than a gel.

14 All the references we've talked about is a gel and it being infused
15 into the foam. There is a distinction of that. We looked at the --

16 JUDGE FLAX: Is it your argument that a material that is, includes
17 PCM material is different than PCM material?

18 MR. POPOWITZ: Well I think there's a distinction is there are, I
19 don't dispute that some of the references have gel that include an additive of
20 PCM. You can't dispute that. The concern I have is that the references, and
21 they talk about it, Schneider and Crawford, that you have to infuse that gel
22 into the foam.

23 And that infusion aspect is changing the dynamic of applying the
24 PCM, not a gel, onto the surface of the actual block. When you apply
25 something, you're intending it to stay there. You're not, if you're infusing it,

1 is it technically --

2 JUDGE FLAX: How do we know that?

3 MR. POPOWITZ: Well otherwise it would defeat the purpose of
4 applying it. Like Mr. Gross gave an example in his deposition regarding I
5 can apply water to an oily surface. It's not going to stay there.

6 The whole purpose from a functionality standpoint is it's designed
7 to stay there. And it talks about that in the specification regarding the
8 purpose of the patent, this process is to provide a cooling effect where the air
9 is traveling through the holes and it is passing past the cooling layer.

10 It's no longer a cooling layer if the PCM is not actually applied to
11 that top surface. If it could just fall down, drip down, it's not technically a
12 cooling layer anymore.

13 JUDGE MELVIN: Wait, is that a claim construction that you're
14 seeking?

15 MR. POPOWITZ: It's not a claim construction. It's, to me it's the
16 ordinary definition of the term applying, that this is opposed to depositing
17 something.

18 JUDGE MELVIN: You can't deposit something on a surface?

19 MR. POPOWITZ: You can deposit it. That doesn't mean it's
20 going to stay there.

21 JUDGE MELVIN: Applying is more specific than depositing; is
22 that your view?

23 MR. POPOWITZ: My view, yes.

24 JUDGE MELVIN: Okay.

25 JUDGE GROSSMAN: Would it also be your view from what you

1 said that applying includes within it that it infused, I think you used the word
2 infusing?

3 MR. POPOWITZ: I think there's a distinction between infusing,
4 and we have a definition of that, versus applying.

5 JUDGE GROSSMAN: The claim just says applying so do we
6 really care what infusing means because it has, if infusing is different than
7 applying, then why should I care what infusing means?

8 MR. POPOWITZ: Well I care, you care because the effect of the
9 prior art. When you're combining the prior art, that is not applied to the
10 surface. It is infused. That gel is infused and if you look at all of the
11 variations of the gel in the prior art, nowhere does it say it's just left on the
12 surface, that it's applied to the surface unless the --

13 JUDGE FLAX: How does the gel -- how does the PCM, starting
14 with one of the prior art references that includes infusion, how does the
15 PCM get to the foam?

16 MR. POPOWITZ: My understanding is that the PCM is an
17 additive in the gel such as Crawford.

18 JUDGE FLAX: Okay.

19 MR. POPOWITZ: And then that gel is deposited on the foam,
20 don't dispute that. I don't dispute the prior references, they obviously --

21 JUDGE FLAX: Okay.

22 MR. POPOWITZ: -- they say what they say, except for Schneider
23 which we'll talk about, or Rossi. But then the system in Crawford
24 compresses and rolls that gel with the PCM additive into the foam.

25 In our view, Patent Owner's view, it's no longer on the surface. It's

1 not applied to the surface. It's now embedded in the foam. It's part of the --

2 JUDGE FLAX: So the infusion, your argument is that there seems
3 to be an added step of forcing that PCM into the interior of the foam
4 material?

5 MR. POPOWITZ: Correct. And if you look at the Rossi reference
6 which the Petitioner has brought up --

7 JUDGE FLAX: Because here's a question on that. Your claims
8 are comprising claims.

9 MR. POPOWITZ: Yes.

10 JUDGE FLAX: Why couldn't they just also include infusion?

11 MR. POPOWITZ: Well, that would not fit the definition of
12 applying it to the surface, in our view.

13 JUDGE FLAX: Well it would be subsequent to that.

14 MR. POPOWITZ: Subsequent is fine. So it can be an added step.

15 JUDGE FLAX: Yes.

16 MR. POPOWITZ: But it's not, it's not meeting the requirement
17 that the PCM is applied to the surface. And if you look at the Rossi
18 reference which is incorporated by reference into Schneider.

19 JUDGE FLAX: What exhibit is that? Is it R-O-S-E or is it R-O-S-
20 S-I?

21 (Simultaneous speaking.)

22 MR. POPOWITZ: R-O-S-S-I. I think Rossi is 1085, I know from
23 memory. I can -- let me find my notes. Schneider is 1085 I'm thinking.

24 JUDGE FLAX: Yes, I see 1085 is Rossi. WO849?

25 MR. POPOWITZ: I believe that's correct, Your Honor.

1 JUDGE FLAX: Okay. Go ahead with Rossi.

2 MR. POPOWITZ: The Rossi reference talks about the fact, the
3 whole purpose of Rossi is to describe how you're infusing that gel. By itself,
4 it's not going to stay there, that it's sticky, that's it's oily. It's a process
5 designed to focus on how that gel is being infused into the actual foam.

6 And if you note, Mr. -- the Petitioner referenced Rossi and talked
7 about the cutting of the holes before and after the application of the gel. If
8 you look at Rossi, it requires full absorption of the gel into the foam and
9 essentially cured because it's so fragile.

10 The PCM -- the gel itself, because Rossi does not talk about PCM,
11 it does not talk about phase change gel. It just talks about gel. Schneider, in
12 our view, mischaracterizes Rossi when it says that it discloses phase change
13 gels.

14 You read through Rossi, it talks about gels. No dispute. There is
15 no reference as to phase change material within Rossi. Is it Schneider? Yes.
16 It's disclosed there. But the reference to Rossi is dealing with how the gel is
17 actually being infused into the foam.

18 JUDGE FLAX: So that would be some gel that would include
19 PCM hypothetically?

20 MR. POPOWITZ: Just --

21 JUDGE FLAX: Not in Rossi, but in Schneider.

22 MR. POPOWITZ: Repeat that, I'm sorry, Your Honor.

23 JUDGE FLAX: It would be -- in Schneider's applications, it
24 would be a gel that would also include PCM, but you're saying that Rossi
25 itself does not disclose PCM?

1 MR. POPOWITZ: Yes, Your Honor.

2 JUDGE FLAX: Okay. Thank you.

3 MR. POPOWITZ: So our view is from the way Rossi -- Rossi
4 shows that the PCM or I'm sorry, that the gel itself is very brittle. That you
5 have to have complete curing so and drying so that way it does not get
6 disturbed.

7 And Your Honor just saw Petitioner holding up the foam and it
8 was coming off. The PCM was actually coming off. So it is very brittle and
9 that gets into some of the rationale of why a POSITA, a person of ordinary
10 skill in the art, may or may not combine references because of the effect of
11 gel with the additive of PCM and the various manufacturing processes.

12 JUDGE FLAX: So it's, is it a technical challenge to apply PCM
13 material to a foam bedding layer?

14 MR. POPOWITZ: We believe it is and if you look at the process
15 steps which I can take you through, I'll fast forward to Slide --

16 (Simultaneous speaking.)

17 JUDGE FLAX: What is disclosed in your patent that explains how
18 to overcome that technical challenge?

19 MR. POPOWITZ: Our view is that the application of that PCM on
20 the surface is helping to fix that problem.

21 JUDGE FLAX: So if it just stays on the surface --

22 MR. POPOWITZ: Right.

23 JUDGE FLAX: -- and isn't infused then it won't fall off?

24 MR. POPOWITZ: Well it's more concentrated, number one, as
25 opposed to being spread out through -- I mean, there's no disclosure. I can't

1 dispute that. There's a talk in the patent about the diluting of PCM when it's
2 mixed within the foam. It's in, I can find the reference.

3 I have it written down. It's on the first page of the 1001, but it
4 talks about the drawback, from a background standpoint, of adding PCM
5 into the actual mixture of the foam and how it degrades. So our view is
6 when you apply it to the surface, number one, it's more concentrated and it
7 improves that cooling effect.

8 Again, the purpose of this process is a cooling effect to the user.
9 And that's an active cooling effect. We can get into it later, but to us there's
10 a distinction between negating cooling versus an active cooling effect.

11 The Petitioner has used the broad term of thermal characteristics to
12 encompass both, but to us there is a difference between negating a
13 mugginess, adding holes, versus providing an active cooling effect to the
14 user which we'll discuss later, but I'm happy to jump into it now if need be.

15 JUDGE FLAX: So one question I have. I saw a lot of this
16 discussion in the record about the cooling effects. It's not a claim limitation
17 in any way.

18 MR. POPOWITZ: It is not a claim limitation.

19 JUDGE FLAX: So I understand that your product may offer that
20 advantage to customers, but I don't know why it matters to the claims here
21 other than potentially the prior art is concerned with controlling thermal
22 properties of pillows and maybe it would be good to combine pillows that do
23 that in various ways.

24 MR. POPOWITZ: I think the issue is the combination of these
25 specific references because none of those references apply the PCM to the

1 surface. So, yes, I agree with you that the claims do not restrict the process
2 of a cooling benefit, but the way in which the claims are written, that the
3 PCM is required to be at the surface of the foam block, that is what's
4 exhibited by the cooling effect of the process.

5 JUDGE FLAX: When it's applied?

6 MR. POPOWITZ: Correct.

7 JUDGE FLAX: At the surface? That is a claim limitation.

8 MR. POPOWITZ: Correct, Your Honor.

9 PARTICIPANT: Sorry to interrupt, the timer is frozen.

10 JUDGE FLAX: Oh, all right. Let's say you've just used eight
11 minutes. How about that?

12 MR. POPOWITZ: Fair enough.

13 JUDGE FLAX: All right so.

14 MR. POPOWITZ: I have plenty of time. I don't think I'm going to
15 go over.

16 JUDGE FLAX: All right.

17 MR. POPOWITZ: Is that with, oh yes, that's with the ten minutes.
18 Okay.

19 JUDGE FLAX: Thank you.

20 PARTICIPANT: No problem. Appreciate it.

21 MR. POPOWITZ: So let me take you through the process of, and
22 this is kind of getting to your question earlier, Your Honor, of the nexus.
23 Now let's turn to Slide 4 for the Panel. This is Exhibit 2022 of the Patent
24 Owner.

25 And this is showing one of three PDF pages of the Patent Owner's

1 process. And we believe this is showing the claims and how the product is
2 made pursuant to the claims.

3 JUDGE FLAX: This is representative of Exhibit 2022; is that
4 right?

5 MR. POPOWITZ: Yes, Your Honor.

6 JUDGE FLAX: Okay.

7 MR. POPOWITZ: This is Page 1 of that exhibit and it is a series
8 of pictures on different rows showing the various process steps that the
9 Patent Owner uses to make the GhostPillow, which our contention is that
10 that follows the claims of the 301 Patent.

11 JUDGE FLAX: Okay so here is, here is a question. Other than
12 this exhibit, and both of your witnesses, Quinn and Gross's, statements in
13 their declarations that the GhostPillow is made in a way that embodies the
14 claims. Right? I don't see any real explanation about why that's true.

15 MR. POPOWITZ: Which part of that do you --

16 JUDGE FLAX: Any of it. I'm looking at these rows in this exhibit
17 that we're looking at, 2022. And I see that it begins with one, you have an
18 unfinished lavender-scented pillow then you have two twice polished. Or
19 used for fixing composite PCM with pictures next to them.

20 Three, you have material PCM being showed so it's a blue liquid
21 being poured from one container into another. And then going to the next
22 page, brush twice PCM material on one side. So this is the step of applying
23 PCM material to a surface.

24 MR. POPOWITZ: Yes, Your Honor.

25 JUDGE FLAX: And then air drying. So up to this point, I get it.

1 Punching on the pillow, so I see that there are now holes in the pillow, but
2 there's no explanation about how that happens. There's no explanation about
3 what that machine is that's being shown there, how it functions, whether
4 compression happens, when compression happens, did cracking happen
5 before this?

6 Is cracking going to happen after this? These are all claim
7 requirements that I have no idea whether they occur, other than the
8 conclusion by your witnesses that they do.

9 MR. POPOWITZ: Understand, Your Honor. So I know parts of
10 our surreply were stricken, but in some of the write-up regarding this exhibit
11 in the surreply, we detail -- it's not testimony, it's argument of counsel, we
12 detail these steps and what is occurring at each step.

13 JUDGE FLAX: Sir, right, no part of your surreply is stricken.

14 MR. POPOWITZ: Those are the exhibits.

15 JUDGE FLAX: We'll just consider how much to consider any part
16 of your surreply based on the exhibits that are no longer of record. So your
17 explanation now is that you explained as counsel in your briefing what this
18 stuff is, but other than that there is no direct evidence as to what --

19 MR. POPOWITZ: Well we believe the pictures do provide
20 evidence because you can see in the pictures at the various steps that there is
21 a compression and cracking going on. If you look at this first step with the
22 yellow boxes on Slide 4, this is the polishing operation that you refer to in
23 step, in Row 2 and that is compressing the block.

24 It is, you know, polishing the block, but it is some level. There
25 is -- and this is something that came up in the deposition. It's something

1 that's been asked of us. There is no limitation in the Patent itself of the level
2 of compression or the amount of cracking required to open the cells.

3 I understand there's testimony from various experts about what that
4 is, but there is no requirement in the claims and there is no write-up in the
5 actual specification that says it has to be an inch, it has to be 95 percent. It
6 just says compressed or cracking to open the cells. Does that mean one cell?

7 JUDGE FLAX: Well Mr. Gross said he doesn't know when the
8 cracking happened at any point in these pictures.

9 MR. POPOWITZ: Well --

10 JUDGE FLAX: Or you can't tell by looking at the pillow itself if
11 you're holding it.

12 MR. POPOWITZ: Well I can't dispute that just by looking at a
13 pillow, you can't see if it's going to crack. It's a feel. It's a comfort thing. I
14 think we all can agree on that. Unless there's some microscopic
15 measurement that we can measure about how the cells have opened up, it's a
16 comfort feel to the user.

17 JUDGE FLAX: Was your expert incorrect when he said that?

18 MR. POPOWITZ: Well I think he was asked about how you can
19 crack the -- and he referenced many ways to crack the pillow.

20 JUDGE FLAX: He did.

21 MR. POPOWITZ: And I think he was doing that from a general
22 term of how do you actually compress it? And I don't think he took the view
23 of, you know, that the cracking is actually defined in the Patent.

24 And that the Patent is its own lexicographer and can define the
25 term in the Patent which is part of the claim instruction argument. So our

1 belief or our position is that the pictures of this process show the various
2 steps. It shows the liquid PCM. It's blue mixed with resin.

3 It shows it being applied on a roller on the far right of Slide 5, and
4 that's being applied to the surface. You can see some deflection of the foam
5 pillow itself. So, again, another potential step of cracking the foam. It's
6 compressed.

7 And then if you go to Slide 6, the zoomed in picture on the right in
8 the yellow box is the flattened press that has a, that will compress the pillow
9 and punch the holes into it.

10 JUDGE FLAX: How do we know that will compress the pillow?

11 MR. POPOWITZ: How do we know?

12 JUDGE FLAX: Right.

13 MR. POPOWITZ: Well I think Mr. Gross testified that it's very
14 difficult to deal with foam, number one, in a drilling operation because it's
15 going to create havoc and tear apart. But there's no way to compress it, or
16 I'm sorry, to punch it without compression.

17 We had testimony from Mr. Shiroff, Petitioner's expert, that when
18 he talks to the borer's technic people regarding their operation with a drilling
19 foam, that they had one centimeter of push. Now, Mr. Shiroff gave his
20 declaration and said there was no compression in that operation.

21 But when he talked to them on the phone for his deposition, there
22 is one centimeter of push to compress it and hold it down. It's necessary to
23 hold it down. You can't functionally do it otherwise.

24 JUDGE MELVIN: I have a question about Slide 5.

25 MR. POPOWITZ: Yes, sir.

1 JUDGE MELVIN: You said that when the PCM material is
2 applied, that's -- the fill is compressed as part of that.

3 MR. POPOWITZ: When the -- Slide 4, oh, I'm sorry. Slide 5.

4 JUDGE MELVIN: I'm talking about Slide 5.

5 MR. POPOWITZ: Yes, sir.

6 JUDGE MELVIN: I believe you said a moment ago that the
7 depiction of that process shows that there's some compression during
8 applying the PCM material.

9 MR. POPOWITZ: Yes, Your Honor.

10 JUDGE MELVIN: So why wouldn't that force the PCM material
11 into the surface as opposed to --

12 MR. POPOWITZ: Well --

13 JUDGE MELVIN: -- leaving it on the surface?

14 MR. POPOWITZ: I understand your question. It's very slight. It's
15 not infusing it and it's not a gel. I think there's a difference of --

16 JUDGE MELVIN: So how do we know -- oh, it's --.

17 MR. POPOWITZ: The PCM is not a gel. Everybody keeps
18 referring to gel and I think it's easy to use them interchangeably because the
19 references talk about gel, phase change gel material, and it's kind of lost.

20 But the gel from everything we've seen in the prior art, and there is
21 other prior art from the Patent history that talks about PCM and gel. But the
22 gel is infused. This is more like, as you look at the picture in Slide 4, go
23 back, it's more like a paint-like substance. It's not a gel. And when that is --

24 JUDGE MELVIN: Is not a liquid more likely to infuse than a gel?

25 MR. POPOWITZ: It's -- I don't know the answer to that. I --

1 JUDGE MELVIN: What's the difference between a paint and a gel
2 in your view?

3 MR. POPOWITZ: A gel is more of a solid.

4 JUDGE MELVIN: Right. So how could a liquid be less likely to
5 infuse than a solid?

6 MR. POPOWITZ: Well I think it depends on the properties of the
7 liquid. I mean I think oil is going to, you know, act differently than water in
8 how it's applied to something so the way this is, but --

9 JUDGE MELVIN: Do you have any reason to think that the
10 hydrophobic or hydrophilic nature of these materials leads to separation?

11 MR. POPOWITZ: I don't know the answer to that. But my
12 understanding is that the liquid PCM is only touching the surface. It's not
13 being infused. It's a very slight, if not -- it's not compressing 95 percent like
14 Crawford or, I'm sorry, Ohta or the rest are so.

15 JUDGE MELVIN: Okay.

16 JUDGE GROSSMAN: Doesn't -- your claim says we just apply a
17 PCM to the surface. Doesn't that mean that it just is on the surface? And
18 how does it go from being applied on the surface to being something more,
19 that you're suggesting is infusing?

20 MR. POPOWITZ: Well --

21 JUDGE GROSSMAN: And I'm looking at the slides and your
22 own production process and I don't see any PCM being applied to a surface.
23 All I see is a, is a box pouring blue liquid from one pail into another. It's on
24 your Slide 4.

25 MR. POPOWITZ: Well --

1 JUDGE GROSSMAN: And --.

2 MR. POPOWITZ: If you look at the description and it's in our
3 surreply as well, that the material that you're looking at, the blue paint, or the
4 blue liquid, is the material of PCM. So that meets the requirement of
5 applying PCM onto the surface.

6 Now the infusion part is something we're dealing with because of
7 the prior art. But there's nothing dealing with infusing in the 301 Patent or
8 its claims.

9 JUDGE GROSSMAN: And what about, you've got a step of twice
10 polishing. Is that significant in your production process because there's
11 nothing in the claim about polishing at all or, if there is, you're using a
12 different word in the claim to mean twice polished. And is there a word in
13 the claim that suggests a polishing process?

14 MR. POPOWITZ: I don't believe the polishing is a requirement of
15 the claim. The polishing is something that's helpful to allow the PCM to be
16 applied and stay on the surface of the foam block. And also, the polishing
17 operation is, in some regard, cracking the block.

18 It is compressing it to create that abrasion, that polishing operation
19 to compress and crack the block.

20 JUDGE GROSSMAN: And when you say the polishing helps the
21 PCM stay on the surface, what does that do with infusion? How does it go
22 from staying on the surface to being infused throughout the foam?

23 MR. POPOWITZ: Well in the 301 Patent, it's not infused with the
24 foam. So in our contention, you know, that the Patent Owner's process and
25 the resulting product, the GhostPillow, it does not have infused PCM. The

1 PCM is at the surface. That is why there's a benefit of that process of
2 creating a cooling effect to the user.

3 JUDGE GROSSMAN: Thank you.

4 JUDGE FLAX: I know I'm jumping around here when I ask you
5 that question and I'm sorry. But I just, it just occurred to me that we hadn't
6 discussed cracking as a claim term in terms of how we would want to define
7 it at this point.

8 Do you disagree with the proposition that's been made by
9 Petitioner, and it's sort of floating around here in this room now, that a roller
10 is not required, that it's really the compressing of the foam material to break
11 open internal cells is the important part of cracking?

12 MR. POPOWITZ: I think they're both doing the same thing, but
13 I'm going to argue cracking is a defined term or phrase in the Patent, and it
14 requires a roller. So yes, to answer your question, it's having the same
15 effect, cracking versus compression, but cracking is doing it with a roller.

16 JUDGE FLAX: In this Patent?

17 MR. POPOWITZ: In this Patent. And then the Patent, as his own
18 lexicographer, I know I'm butchering that word probably, has the right and
19 he has the special meaning, and it was regarding the decision, about if you
20 provide the definition, a special definition with reasonable clarity,
21 deliberateness and precision, a patentee, an inventor, can define his own
22 terms.

23 In our view, the Patent Owner did that. He defined the term
24 cracking as he understood it.

25 JUDGE FLAX: So if, okay, I'm looking at the part of the patent

1 now that says it, that we used to try to understand the term in our Institution
2 Decision. And it's not so black-and-white as what you're saying.

3 If we were to take what arguably might be a definition of cracking
4 straight from the spec, it says -- and I'm looking at Exhibit 1001, Column 3,
5 beginning at line 40 -- cracking is a term for processing a foam block with a
6 roller press. Period.

7 That seemed -- there, you've got it. That seems to be the closest it
8 comes to trying to "define" the term cracking. But that whole paragraph
9 relates to cracking. And I agree with you that it really only describes it in
10 terms of rollers doing it. But, ultimately, it says that that roller press opens
11 some of the closed cells that make up the foam block. And that's at lines,
12 same column, 46 and 47.

13 So why doesn't that explanation about what the process does shed
14 more light on what cracking really means?

15 MR. POPOWITZ: Well, I think the distinction is Claim 1 is
16 requiring the cracking, Claim 2 is only requiring a compression obviously in
17 an ordered dynamic. But cracking is specific to a rolling operation as the
18 Patent requires. It is doing the same thing.

19 I don't dispute that. It is, it's a goal, the purpose of cracking and
20 compressing as described in the Patent is to open the cells.

21 JUDGE FLAX: So pressing with a plate or rolling with a roller,
22 once you do it enough, it would result, each one, in opening some of the
23 closed cells that make up the foam block?

24 MR. POPOWITZ: Yes, Your Honor.

25 JUDGE FLAX: It's just different techniques?

1 MR. POPOWITZ: Different technique. But to me, to the Patent
2 Owner, it reads upon which pieces of prior art we are using because
3 depending on when you add the PCM, either through an infusion process as
4 disclosed by the prior art or as an applying to the surface as disclosed by the
5 Patent, that rolling operation can have negative effects to the fragileness of
6 the PC.

7 JUDGE FLAX: So in a technique as disclosed in Ohta?

8 MR. POPOWITZ: Yes.

9 JUDGE FLAX: Does that compression that it describes, does that
10 crack that foam?

11 MR. POPOWITZ: The compression in Ohta I can't dispute that. It
12 cracks. It doesn't disclose that it does that, but I can't dispute that it's
13 compressing the foam and it is very likely to open the cells.

14 JUDGE FLAX: Okay. So really the distinction there is on
15 whether it's a roller or not a roller in that process of cracking?

16 MR. POPOWITZ: With regard to Ohta, yes.

17 JUDGE FLAX: Okay. Oh, let's talk about solid. As long as --

18 MR. POPOWITZ: Okay. We're jumping around a little bit so.

19 JUDGE FLAX: Yes, I know. I'm very sorry, but claim
20 construction is foundational to the case here so we need to talk about it. So
21 your definition of solid implicates a texture or, you know, internal
22 composition of the foam.

23 Why is solid is as it's used in this entire spec, but in the claims
24 themselves not just a state of matter? Because it looks like that to me when I
25 read, same Column. Right? It's Column 3, beginning at Line 16 let's say

1 when it starts describing solids it says the block of solid revealing
2 compressible foam is made by mixing the materials for the foam, spraying
3 the mixture with a gas to form a liquid foam filling a mold with the liquid
4 foam and curing the liquid foam to form a solid foam.

5 So that to me looks like states of matter rather than density or
6 internal composition or voids or not according to your proposition. So why
7 am I wrong?

8 MR. POPOWITZ: Well I think the issue is that the Patent Owner
9 used the word solid and resilient. And I understand your contention that the
10 word solid is more of the state of matter, but resiliency is dealing with is it
11 flexible enough?

12 Is it going to hold its own form? And as the Petitioner has argued,
13 you know, to me those are redundant. Those are the same, as the Petitioner's
14 argument of what the term solid means, that it effectively means resilient.
15 So to us there is a distinction.

16 The Patent Owner used two distinct words, two of them that are
17 also compressible, but two distinct words to describe the characteristics of
18 the foam block, one being solid, and another being resilient. And to us,
19 they're not going to mean the same thing.

20 They have to mean something different otherwise why would you
21 use two words? So in argue, solid, you know, is it a state of matter? Yes.
22 But it also describes the characteristics of the foam. And in argue, Schneider
23 has, you know, primary purpose being reticulated foam from a washable
24 mattress assembly teaches away from that because the whole point of
25 Schneider is dealing with a washable mattress assembly.

1 And as we will show later or we can show now, it's to allow water
2 to migrate and pass through the foam. And it's doing that and the pictures
3 will show because of the reticulated nature, the open nature of the foam
4 itself.

5 JUDGE FLAX: I thought, well okay. So I'm mingling your points
6 here, but you're talking about Schneider in terms of its point being to have
7 an open foam through which water can pass, but aren't a lot of your
8 arguments relating to water proofing that materials so water can't pass
9 through it with the PCM material?

10 MR. POPOWITZ: You mean from the 301 Patent standpoint or
11 for Schneider?

12 JUDGE FLAX: Schneider.

13 MR. POPOWITZ: Schneider is allowing water. It's a washable
14 mattress assembly. The whole design is to allow it to be water to be washed.

15 JUDGE FLAX: So did I misunderstand your arguments about
16 Schneider that you said it only applies PCM to be a water proofing material
17 and not a cooling material.

18 MR. POPOWITZ: I'm sorry, can you ask that one more time?

19 JUDGE FLAX: I thought one of your arguments was that in
20 Schneider's process, they applied PCM for waterproofing purposes not for
21 cooling purposes. Did you not argue that in your briefing?

22 MR. POPOWITZ: I think we did.

23 JUDGE FLAX: So how does that jive with what you're saying
24 right now about the materials Schneider not being solid because it can allow
25 water to pass through it?

1 MR. POPOWITZ: Well it's allowing it, it's already allowing the
2 water to drain I would imagine as opposed to water proofing it. It's water,
3 the reticulated nature of the Schneider Patent reference is allowing water to
4 pass through it.

5 It's not to absorb the water so the PCM is going to help resist that
6 water. But if you look at the pictures and I can pull them up on the slide, the
7 water in Schneider passes directly through the foam. On a non-reticulated
8 foam it bounces off of it. Would you like me to take you to that slide? Is
9 that helpful?

10 JUDGE FLAX: Well you don't have a picture of Schneider's
11 material. You have a picture of different types of foam.

12 MR. POPOWITZ: Fair, we have a picture of reticulated versus
13 non-reticulated. It's not foam --

14 JUDGE FLAX: When your witness testified, your witness, your
15 expert testified on cross-exam during deposition that Schneider is not limited
16 to reticulated foam even if it's a preferred material.

17 MR. POPOWITZ: It is not. I don't dispute that. It does have
18 other variations of foam, but from a motivation to combine argument of why
19 is a person of ordinary skill looking to combine Schneider with Lievestro or
20 whatever, why are they looking at it in washable mattress assembly?

21 And which uses reticulated foam to combine that gel with
22 potentially PCM to a different operation.

23 JUDGE FLAX: So what's wrong with the proposition that
24 knowing that the law says we don't need to bodily incorporate one
25 reference's disclosure into the other when you're combining for obviousness

1 purposes?

2 What's wrong with the idea that someone of ordinary skill sees
3 Schneider say that PCM is a nice coating to apply to bedding if you want
4 cooling properties? And say, well, here's another pillow, why don't I just
5 add this PCM to this bedding and I'll get the cooling properties that
6 Schneider discloses.

7 MR. POPOWITZ: Well I think you're doing it in, it's doing it a
8 different way. I don't think it's any different better example as to what
9 Crawford's doing where it's a gel with PCM and where you apply it is
10 important from the reference of how the 301 Patent Claims are requiring it
11 on the surface.

12 So I don't dispute that Schneider has gel with PCM. It's very
13 similar to what Crawford has. They're very similar in that regard. It's a gel
14 with an added, a PCM additive. But the question is, how do you apply that
15 with the other reference to complete the Patent Claims to achieve the actual
16 claims that are required in the 301 Patent?

17 And those claims and this is going to be a theme of the surface
18 application of the PCM versus the gel application.

19 JUDGE FLAX: Well in paragraph 29 of Schneider, Exhibit 1010,
20 it just says this phase change material may be similar to the phase change
21 materials and it says that the layer of memory foam can be coated with a
22 layer of phase gel material. Phase gel material is PCM. Is that right?

23 MR. POPOWITZ: Well see there's a difference because they call
24 this phase change gel material. I mean people are using these terms
25 interchangeably.

1 JUDGE FLAX: I understand that.

2 MR. POPOWITZ: But they're not.

3 JUDGE FLAX: It's in that material. Right? Phase change

4 material is in phase gel material? Phase change gel material?

5 MR. POPOWITZ: It was a, the PCM is an additive to the gel.

6 And --

7 JUDGE FLAX: Right.

8 MR. POPOWITZ: -- to your point about the layer, the coating, the

9 Schneider reference is incorporating by reference the Rossi reference

10 because of how do you actually do that? And Rossi is what discloses

11 Exhibit 1085.

12 This discloses how you actually penetrate the gel into the foam.

13 It's not just simply adding it and putting on the layer on the surface as what

14 the 301 Patent does, it's actually infusing it into the actual foam and Rossi

15 talks about how the prior versions of gel is liquid, it's fully, et cetera and it

16 wouldn't actually bind.

17 JUDGE FLAX: So you think that Schneider should be limited by

18 Rossi?

19 MR. POPOWITZ: Yes.

20 JUDGE FLAX: Okay.

21 MR. POPOWITZ: Incorporated by reference and it relied on it to

22 say this is what we were getting our phase change gel material, whatever

23 that --

24 JUDGE FLAX: Right.

25 MR. POPOWITZ: -- framing is.

1 JUDGE FLAX: Okay.

2 JUDGE MELVIN: I've got a question about solid.

3 MR. POPOWITZ: Yes.

4 JUDGE MELVIN: What might be, how could a material be
5 resilient, but not compressive?

6 MR. POPOWITZ: Like it's depending on the material, it could
7 still hold its shape under pressure maybe lateral pressure but it can't be
8 compressed. Like they're saying --

9 JUDGE MELVIN: And does resilient and compressible refer to
10 orthogonal directions?

11 MR. POPOWITZ: I'm saying, you asked me how it can be
12 different.

13 JUDGE MELVIN: Yes.

14 MR. POPOWITZ: In my eyes there's a difference of compressing
15 versus resiliency.

16 JUDGE MELVIN: That's what I'm asking.

17 MR. POPOWITZ: Well --

18 JUDGE MELVIN: There may be a difference, but I'm asking how
19 can a material be resilient, but not compressible? Does resiliency not mean
20 coming back to your original state after being compressed?

21 MR. POPOWITZ: It does.

22 JUDGE MELVIN: Okay. So I guess I don't understand how that
23 supports your view that solid has to mean something distinct because it
24 seems that resilient and compressible don't, the word compressible at least
25 doesn't seem to offer anything distinct as compared to resilient.

1 So it seems that the claim language is using words without an eye
2 to their distinctness.

3 MR. POPOWITZ: I understand your point.

4 JUDGE MELVIN: Okay. Thank you.

5 JUDGE GROSSMAN: Let me ask you a similar question in that
6 you're saying that the claim says solid, resilient and compressible. That's
7 three distinct elements. I think the way the Patent is printed there's a comma
8 between them. I think between resilient and compressible. So you've got
9 three different modifiers of what the foam block has to be. It has to be solid,
10 it has to be resilient, it has to be compressible and I'm looking at your
11 definition on your Slide 8.

12 And it looks like you want us to say that something can be
13 resilient, but a resilient and compressible foam is not spongy. What's the
14 distinction between resilient and compressible and foam and spongy? How
15 do we draw the distinction between whether it's resilient and compressible,
16 but not spongy?

17 MR. POPOWITZ: Well what the Patent Owner is trying to say is
18 that solid, it cannot be defined by spongy. Like --

19 JUDGE GROSSMAN: I can't hear. I'm sorry.

20 MR. POPOWITZ: It's not a spongy material. The definition under
21 Merriam-Webster which is what we have on Slide 8 and it's Exhibit 2010 of
22 the record is that something that is solid is not spongy. That's not an open, it
23 doesn't have an internal cavity.

24 JUDGE FLAX: Is a kitchen sponge solid?

25 MR. POPOWITZ: So that's a good question. And as we use it as

1 an example, our position is that the Scrub Daddy foam which we use as an
2 example to show what is an articulate, articulated -- reticulated foam is not
3 solid. It's open solid. It's open.

4 Water passes right through it. And it has a different dynamic than
5 a solid. A normal sponge that you would normally see like with the -- I'm
6 trying to bait myself here, with the green top, the solid green top and the
7 lighter color underneath, that is a more solid dense material.

8 A reticulated foam like this Sponge Daddy foam which is relied
9 upon in our briefs is reticulated foam. I use it in my dishwasher and have it
10 in my sink and I look at it and I say it's reticulated foam. Water passes
11 through it. The chemical characteristics of that reticulated foam change
12 based on, as Mr. Gross testified, the glass transition point of that foam, that
13 reticulated foam.

14 And if you don't have any water on it or hot water on it, it's very
15 hard and abrasive. If you put water on it, it gets softer as you scrub the
16 dishes. So there is a distinction of solid when you talk about reticulated
17 foam.

18 And I understand the point of Schneider and it only has other
19 variations of it. I fully understand that. And I don't dispute what's disclosed
20 there, but from a motivation to combine standpoint, Mr. Gross testified that a
21 person of ordinary skill, at that time, would not look to a Schneider reference
22 when looking to combine and create the Patent Owner's --

23 JUDGE FLAX: Because its foam is reticulated?

24 MR. POPOWITZ: Because the primary purpose of it is for a
25 washable mattress assembly and the preferred embodiment --

1 JUDGE FLAX: Well you're saying it's not analogous art. Is that
2 your argument?

3 MR. POPOWITZ: Well I don't dispute that it's prior art. I don't
4 think it's --

5 JUDGE FLAX: No, no, I agree. It's definitely prior art. But
6 you're saying that it's not analogous art meaning that it wouldn't just
7 automatically be combinable with other analogous art?

8 MR. POPOWITZ: Correct.

9 JUDGE FLAX: Because of its foam material?

10 MR. POPOWITZ: Because of its foam material and what it's
11 trying to achieve. The purpose of Schneider is to deal with a washable
12 mattress assembly. And if you look at it, that layer is not even a comfort
13 layer. Mr. Gross talks about this at length that, you know, I understand
14 there's no restriction on a comfort layer on the claims, but we're looking at a
15 motivation to combine, what are we trying to show?

16 That the pictures in Schneider show the foam layers, elements 128,
17 I can pull up the slides. That is not a surface layer of the bedding material.
18 There is another layer on top of --

19 JUDGE FLAX: So why is it, why doesn't in that same paragraph
20 of Schneider which is Exhibit 1010, why does it extoll the cooling benefits
21 of its phase change gel if it's not a material that's going to provide cooling
22 benefits to a sleeper?

23 MR. POPOWITZ: Well I think there's an inherent, anything with
24 PCM doesn't have a cooling benefit.

25 JUDGE FLAX: Right. But why mention it? What do they care?

1 If it's not for the purpose of cooling down someone using it?

2 MR. POPOWITZ: Well I think there's a different --

3 JUDGE FLAX: For cooling them I guess is my question.

4 MR. POPOWITZ: Well to your point, I think there's a distinction
5 of cooling versus an active cooling. Now PCM is going to add a cooling
6 benefit. That's what it does.

7 JUDGE FLAX: For who?

8 MR. POPOWITZ: It's going to try to --

9 JUDGE FLAX: For a hot pad element or for a person sleeping on
10 the --

11 MR. POPOWITZ: It's got a cooling benefit, but the manner in
12 which it does, it provides that cooling benefit is critical. To your point, the
13 mugginess in Ohta, okay, that is a -- you're negating the mugginess. You're
14 negating something that is inherent with --

15 JUDGE FLAX: What is mugginess?

16 MR. POPOWITZ: It's like that hot, damp feeling in my view.

17 JUDGE FLAX: And who would experience that?

18 MR. POPOWITZ: The user.

19 JUDGE FLAX: And why would they care?

20 MR. POPOWITZ: Well most users don't want to sleep on a hot
21 pillow. They want a --

22 JUDGE FLAX: So a user wants to be cooler when they sleep?

23 MR. POPOWITZ: Of course.

24 JUDGE FLAX: And so why wouldn't they use PCM to cool off
25 their pillow?

1 MR. POPOWITZ: They would, but the manner in which they're
2 doing it provides a different benefit. If you're, you know, Ohta, number one,
3 is not adding PCM. It's just adding the hole --

4 JUDGE FLAX: Right.

5 MR. POPOWITZ: So the --

6 JUDGE FLAX: Schneider is adding PCM.

7 MR. POPOWITZ: -- so the holes are only done to allow more air
8 to ambiently just flow through. It's not providing a cooling benefit directly
9 to the user. I think there's --

10 JUDGE FLAX: Well who's getting the benefit?

11 MR. POPOWITZ: I can't dispute that the user is getting the
12 benefit, but the manner in which it's getting the benefit is there's a
13 distinction. There's a distinction of putting holes in a product that just
14 allows the pillow naturally to have less mugginess versus putting a PCM on
15 the top layer so when the air does get compressed and travel through those
16 holes and hit that cooling layer as the 301 Patent requires, that it is now
17 creating an active cooling benefit.

18 JUDGE FLAX: So this is like the difference between driving with
19 your windows open and turning on the air conditioning?

20 MR. POPOWITZ: Yes.

21 JUDGE FLAX: So why do cars have both?

22 MR. POPOWITZ: It's an option, but it's doing it differently.
23 When you open your car windows, you're getting a gust of air and some
24 people don't like that.

25 JUDGE FLAX: Right.

1 MR. POPOWITZ: Some people want that controlled environment
2 and there's a different level of cooling. You're dealing with in your example,
3 the ambient air and that could be in South Florida right now it's in the 60s
4 and 70s.

5 Right now up in here up in Virginia, it's in the 20s. So when you
6 have air conditioning in a car, it's more controlled and it's more defined.
7 And when you have PCM at the top surface, it's much more of a controlled
8 active cooling to the user.

9 JUDGE FLAX: Okay. I get it. Thank you.

10 MR. POPOWITZ: Okay I'm going to -- I think we have attacked
11 the person of ordinary skill. I don't want to circle back to that if it's not
12 necessary.

13 JUDGE FLAX: We have not, you and we have not. We did
14 discuss it with opposing counsel. I'm of the opinion that there's a level of
15 experience, practical experience, that can overcome not having a specific
16 degree which seems to be the case for your inventor. Am I wrong?

17 MR. POPOWITZ: That's correct. Our position is that, you know,
18 we don't have a problem if somebody has a degree whatever the degree may
19 be, but to us the practical experience is critical and the inventor has a degree
20 in Accounting.

21 Mr. Shiroff has a degree in Accounting. Mr. Quinn and Mr. Gross
22 have degrees in the arts. Mr. Quinn actually has a degree in the arts
23 regarding marketing and communications so they all have different skill sets
24 from an education standpoint, but I don't dispute that they all have
25 experience in the bedding industry.

1 We believe Mr. Shiroff has more experience in the retail side
2 which we'll get to, but the practical side is what we're looking at from a
3 POSITA standard.

4 JUDGE FLAX: Well it seems like from talking about experts, his
5 experience is not altogether different than Mr. Gross's experience. They're
6 business men that operate on the business side of things and care about
7 selling pillows not necessarily making pillows for the most part.

8 MR. POPOWITZ: Well I think Mr. --

9 JUDGE FLAX: There's a difference.

10 MR. POPOWITZ: -- Mr. Gross has more manufacturing
11 experience and understands the manufacturing processes more than Mr.
12 Shiroff.

13 JUDGE FLAX: I mean his, he testified during deposition, Mr.
14 Gross I'm speaking of that all of his opinions were from the perspective of
15 trying to commercialize this product and whether or not people would buy it.

16 MR. POPOWITZ: Sure.

17 JUDGE FLAX: You agree with that?

18 MR. POPOWITZ: I agree with that.

19 JUDGE FLAX: So it seems to me that none of his opinions are
20 about the technology here. They're about whether I can make a product and
21 sell it.

22 MR. POPOWITZ: I don't think that's what his opinions are. I
23 think that's where he's coming from on part of his experience, but he has
24 been to manufacturing facilities. He understands how foam is poured.

25 The reason he talked about the four centimeters in Lievestro is

1 dealing with that he saw the term 400 centimeters and said I have never in
2 my life seen a 13-foot high piece of foam when it's poured. He's talking
3 about the practical experience that he's viewed and he understands.

4 You know, they both said we touch the PCM, it's cool to the touch.
5 They understand the manufacturing, they understand the components. So
6 our view is that they have that manufacturing base to understand the
7 dynamic of this 301 Patent.

8 JUDGE FLAX: So your position is that his opinions are not based
9 on whether ultimate products will be commercially viable.

10 MR. POPOWITZ: I think that's part of his, of what his opinion is,
11 but he understands that --

12 JUDGE FLAX: Why does commercial viability have any
13 implications on these claims at all?

14 MR. POPOWITZ: So I think it comes into effect when you're
15 looking at why you're combining these references and the effect of
16 combining those references on what the end product is and the process has
17 been --

18 JUDGE FLAX: Why does that matter? Why does the end product
19 matter based on your claims?

20 MR. POPOWITZ: If you don't have a functional product, it's not
21 going to be a salable product.

22 JUDGE FLAX: Why does salable product matter relating to your
23 claims?

24 MR. POPOWITZ: It doesn't matter from the claims standpoint,
25 but when you're looking at a motivation to combine and if you cause damage

1 to the PCM when you're doing that combination, you're not going to have a
2 salable product. So a POSITA has got to look it in the lens of is this
3 something that if I combine these references, is this actually going to
4 function?

5 Is this actually going to achieve the result that the 301 Patent
6 requires?

7 JUDGE FLAX: So that leads me to another question that I have
8 for you about the challenges of making pillows with holes, foam pillows
9 with holes that have a PCM material applied to the surface? A lot of your
10 arguments relate to those technical challenges.

11 Maybe it's going to be too hot, maybe it will damage the PCM
12 material, maybe the PCM material might clog up holes if they were made
13 before it was applied or maybe you could make appropriate holes if you'd
14 applied it first. Right?

15 Lots of technical line issues. Right? Product line issues?
16 Manufacturing line issues that need to be overcome. Right? Why are these
17 beyond the level of ordinary skill and creativity in the art? Because as KSR
18 tells us, the person of ordinary skill is not an automaton, it's a person of
19 ordinary creativity.

20 These people know how to manufacture pillows and bedding.
21 Why couldn't they just design around these, what seem to be minor,
22 technical issues to me? Tell me why I'm wrong about that?

23 MR. POPOWITZ: Well why I believe you're wrong is that nobody
24 had done it before. If it was that simple to do and as we talk about the prior
25 art in the length, the two drilling operations Ohta and Schneider are over ten

1 years before the Patent Owner's filing date of 2017. Okay so that
2 technology's been out there.

3 The PCM has been out there according to Mr. Gross, in the sense
4 of a gel dating back to I believe 2011. Now the references I believe are
5 2014, '16 and that timeframe, a few years before the Patent Owner.

6 Neither Schneider or Crawford talked about punching holes in that
7 foam to create that cooling benefit. So there is a uniqueness in what Mr.
8 Werner has done in the creation of his patent that combines those features in
9 a way that you don't have to worry about the heat.

10 JUDGE FLAX: Well he didn't claim anything about that. He
11 didn't claim how to solve those problems with manufacturing heat or
12 clogging of holes or damaging PCM. None of that is explained in the Patent
13 anywhere. So if that's his innovation, why is it not in the Patent?

14 MR. POPOWITZ: Well I think the way the claims are drafted and
15 the claim steps that are required in that process help alleviate those concerns.

16 JUDGE FLAX: Lets even ignore the claims. Let's talk about just
17 what the disclosure of the Patent is. How did he overcome these, what
18 you're saying are insurmountable problems before he came along? I don't
19 see any explanation except they apply the PCM, let it cure, make holes.
20 What does he do?

21 MR. POPOWITZ: Well I think the issue is he wasn't dealing with
22 combining the prior art references that have limitations on the manufacturing
23 processes. We're dealing with Lievestro that has a roller and it is applying a
24 gradient force when applying it, when it's doing because it's combining
25 that --

1 JUDGE FLAX: Okay.

2 MR. POPOWITZ: -- compression standpoint and the cutting
3 operation in the same operation. So when you're doing that with a PCM or a
4 gel, that causes complications. That --

5 JUDGE FLAX: How we know that's happening in Lievestro?

6 MR. POPOWITZ: The cutting operation, the compression?

7 JUDGE FLAX: And the -- I'm sorry, you're saying compression,
8 not a gel application?

9 MR. POPOWITZ: I'm saying that Lievestro --

10 JUDGE FLAX: You're compressing and punching holes at the
11 same time? That's the misunderstanding.

12 MR. POPOWITZ: Yes, that's correct.

13 JUDGE FLAX: Okay sorry.

14 MR. POPOWITZ: Sure. So my, my interpretation is that the
15 concern that's not discussed in the 301 Patent because it wasn't a concern to
16 Mr. Werner, is that when you are combining these prior art references as the
17 Petitioner has tried to do, that is what causes these problems to occur.

18 JUDGE FLAX: Well he must have overcome these problems or
19 else he wouldn't have an enabled claim. Right?

20 MR. POPOWITZ: Well I don't think he had the same problems
21 that occurred from combining these references because he's not using a
22 roller when he's actually cutting the product. Lievestro is requiring --

23 JUDGE FLAX: He's using a press.

24 MR. POPOWITZ: He's using a press and a different operation.
25 It's a different step. Lievestro speculatively has a step that says I'm

1 compressing and cutting --

2 JUDGE FLAX: Okay.

3 MR. POPOWITZ: The foam at the same time.

4 JUDGE FLAX: And that is a technical issue that causes maybe
5 heating?

6 MR. POPOWITZ: Well that causes, number one, the gradient
7 manner in which the roller is compressing the foam which I can show you
8 on the, you can see on the block in the figures. That would affect the gel
9 with PCM additive in the actual foam.

10 That would compress it. And what we've seen and in some of the
11 disclosures, that the PCM is very brittle. It's very, it's easy to break and
12 we've seen it here in person today. So taking care of that so the end user and
13 I know there's been an argument that the user is putting his head on the
14 pillow. That's going to cause it.

15 That's a different level of force and compression than a roller.
16 That is potentially, you know, 15, 16 --

17 (Simultaneous speaking.)

18 JUDGE FLAX: So what about Ohta, they don't use a roller.

19 MR. POPOWITZ: They don't use a roller. The problem with Ohta
20 is that the whole purpose of Ohta is to properly eject the foam pieces, the cut
21 pieces out of the foam.

22 JUDGE FLAX: Okay.

23 MR. POPOWITZ: You're now adding a gel material being infused
24 into that foam. That has to get ejected.

25 JUDGE FLAX: So what?

1 MR. POPOWITZ: That's going to create a problem with the
2 extraction of that foam pieces. You're adding a gel. Now on the top surface,
3 Mr. Werner has the PCM on the top surface.

4 JUDGE FLAX: It is wet?

5 MR. POPOWITZ: It's not wet. Well there's no requirement either
6 way. But --

7 JUDGE FLAX: Right.

8 MR. POPOWITZ: -- from a functional standpoint, it's dry.

9 JUDGE FLAX: Okay.

10 MR. POPOWITZ: And if it's wet, or the gel is going to act
11 differently than PCM by itself, that has a different property of how it's going
12 to change the dynamic of that cutting operation.

13 JUDGE FLAX: So if you pre-applied PCM to Ohta's pillow from
14 one of the other references, call it Schneider or Crawford, either one,
15 whatever, and then you made holes, that wouldn't work because it would
16 ruin Ohta's machine?

17 MR. POPOWITZ: Well I don't know if it would ruin the machine.
18 It would cause problems with the ejection process. And the whole purpose
19 of Ohta is not to put holes in the foam. That's known. It was to design it to
20 make it faster to extricate those holes from the Patent, from the machine,
21 from the final result, sorry.

22 So adding now a gel-infused layer or gel-infused foam, is going to
23 cause problems with that ejection process. It's the same issue that you're
24 going to have with Schneider and Crawford when you deal with it in the
25 combination of Ohta so. I know I'm running surprisingly pressed on time.

1 Is it okay if I --

2 JUDGE FLAX: Well we've asked you a lot of questions so.

3 MR. POPOWITZ: Fair enough. Is it okay to shift -- I want to
4 make sure I don't cover anything on the obviousness, but I want to shift to
5 the secondary considerations.

6 JUDGE FLAX: Please. I'd love to hear about the nexus proof.

7 JUDGE GROSSMAN: Before you make that shift, let me ask you
8 a couple of questions that occurred to me and one was in your, the context of
9 your, the answering Judge Flax's question. You said that putting the
10 references together is it going to achieve the results the Patent requires?

11 MR. POPOWITZ: Yes, sir.

12 JUDGE GROSSMAN: What are the results that are required by
13 this claim? It's a process and you go through some steps. What results are
14 required from those steps?

15 MR. POPOWITZ: Well, you've got to look at it from what is the
16 invention the Patent Owner of the 301 Patent trying to achieve? And that's
17 when you're combining these references, you're looking at that objective.
18 And the objective of those process steps is to provide a cooling benefit.

19 JUDGE GROSSMAN: Okay so you're, so somehow we have to
20 interpret the, as a claim construction, we have to somehow get the word
21 cooling into the Claims 1 and 2?

22 MR. POPOWITZ: Well I don't think you have to get there. As
23 part of the analysis of looking at the claims, looking at the intrinsic evidence,
24 if it's not clear than obviously then go into extrinsic evidence.

25 So you're looking at the claims in light of the specification. And

1 the specification clearly talks about the steps that are achieved in the claims
2 are providing a cooling benefit to the user when the user puts his head on the
3 pillow.

4 It's through that burst of air, through the holes, past the cooling
5 layer that is hitting the user. That is providing an active benefit. That is not
6 something that has been disclosed through the prior art that active cooling
7 benefit is not there. Yes, Your Honor.

8 JUDGE GROSSMAN: Now I want to sort of expand that trend,
9 but I'm going to shift the questioning a little bit, but on the slides presented
10 by the Petitioner, there's a number of slides where the says Patent Owner's
11 expert, Mr. Gross, admitted something in a deposition testimony.

12 You know, for example, at the Petitioner's Slide 5, it says Patent
13 Owner's expert, Mr. Gross, admitted that Lievestro discloses all of the steps
14 of Claims 1 and 2 except for applying the PCM so that would mean that
15 Lievestro if cooling is somehow read into these claims as to what they, that
16 Lievestro would do the same thing, Lievestro would also cool.

17 So why isn't it then, even if we accept your premise that the claims
18 require a certain result like cooling, wouldn't Lievestro and other references
19 do the same thing because they provide the same process or --

20 MR. POPOWITZ: Well Lievestro and Ohta by themselves do not
21 provide the same process because they don't have the PCM aspect to it by
22 themselves. And so yes, they have holes, I can't, yes, obviously it's very
23 clear. And the purpose of those holes according to Ohta is to prevent
24 mugginess.

25 JUDGE GROSSMAN: So, but so, yes, the Petitioner's slide says

1 recognizes the Lievestro doesn't apply to PCM and that's why they rely on a
2 secondary reference for that. But I'm looking just at the context of you agree
3 with Mr. Gross's deposition testimony where he, it appears he admitted that
4 Lievestro does everything that's in the claim except apply PCM.

5 MR. POPOWITZ: I don't dispute that because it's providing, it's
6 punching a hole. It's a compressible block. It's compressing it so I think,
7 you know, it's technically cracking it. So I do agree that the only thing that's
8 limited by Lievestro is the application of a PCM material to the surface.

9 JUDGE GROSSMAN: And so whether we have to do a claim
10 interpretation that includes that the holes provide cooling, or that not
11 whatever Lievestro has holes and if your holes cool, so might Lievestro's.

12 MR. POPOWITZ: I think the distinction there, Your Honor, is that
13 the holes by themselves are not cooling. They are negating in effect and Mr.
14 Gross testified to this as well, they are negating the mugginess that's created
15 by the foam that is used, the type of foam that is used whether it's a closed
16 cell, open cell that inherently there is a mugginess in that foam block.

17 And to counter that mugginess, the user or the manufacturer is
18 putting holes in it. That is not an active cooling benefit. We are talking
19 about an active cooling benefit and we are talking about the air in those
20 holes now passing through a cooling layer.

21 The cooling layer being the application of the PCM on that top
22 surface. That is what is actively cooling the user. It is providing a targeted
23 location of the PCM on the top surface. That's our limitation on the claims
24 that is now cooling the user as that air is passing through.

25 None of the prior references talk about the application of the PCM

1 on the surface or providing that cooling benefit to the user through those
2 similar processes claims.

3 JUDGE GROSSMAN: So the PCM on the top surface doesn't
4 infuse?. The infusing is not that critical to this PCM? It can stay on the
5 surface?

6 MR. POPOWITZ: It does, it's right here. It's the physical Exhibit
7 1054 that Petitioners used. The PCM is on the surface. They've even argued
8 and we'll get to the fact that they believe it's not enough on the sample block
9 that's on the Element testing because it's really not infused.

10 It's just only on top surface and they don't think it's enough. So it
11 is not being infused into the actual foam block. It is staying at the surface
12 and we can, I can show you how, what the foam looks like. You can even
13 see the painted operation in Exhibit 1054 of this physical exhibit that shows
14 that it is staying on the surface.

15 And you can even see within the holes that it's not penetrating the
16 actual foam inside.

17 JUDGE GROSSMAN: Okay thank you.

18 MR. POPOWITZ: Thank you, Your Honor.

19 JUDGE GROSSMAN: And why we don't -- you were finished. I
20 interrupted you before you were going to turn to the secondary
21 considerations with you also when I yield back.

22 MR. POPOWITZ: Okay, excellent. Thank you, sir. So I'm going
23 to jump to Slide 38. In the interest of time, and talk about, oh I'm sorry.
24 Hold on, 26. I apologize. And talk about the Element testing regarding a
25 sand-filled box.

1 Now the Patent Owner provided samples to Element. Element
2 dictated the size of the samples. It is in one of the exhibits. It's Exhibit I
3 believe 1032 or 1033. It's an email between Patent Counsel, Petitioner and
4 myself saying this is the sizes that were requested by Element. I don't know
5 why.

6 I don't know if that's the limitation on their equipment. I don't
7 know that, but this is the sample that was tested and an apples to apples
8 comparison of a foam block versus a foam block with holes and PCM on the
9 top.

10 The goal was to show the difference between a standard foam
11 block that has nothing done to it versus a foam block that has punched holes
12 and PCM on the top.

13 JUDGE FLAX: So how do we know how that tested foam was
14 treated in terms of whether it was cracked or whether it was compressed
15 before and then during hole formation?

16 MR. POPOWITZ: I understand your question. It's inherent in the
17 fact they were putting holes in the foam that has to be compressed. We
18 heard it from the lawyers' technic, we've heard it from the experts, you
19 can't --

20 JUDGE FLAX: We did not hear it from your expert, Mr. Gross.
21 He said there was a variety of ways to make holes.

22 MR. POPOWITZ: Well not regarding this type of foam. He
23 talked about I think a tile-lay foam with a mold, but he said that's not
24 practical because I think it's not going to form.

25 JUDGE FLAX: What is this type of foam? We know that's not

1 the appropriate type for some other --

2 MR. POPOWITZ: Well this --

3 JUDGE FLAX: -- hole foam.

4 MR. POPOWITZ: -- polyester foam which is the 3315 and the 3.3
5 density and another one of the testing one was 4.0 or vice versa. Now this
6 type of density foam is what we were talking about which is what the
7 GhostPillow was made of. And to compress --

8 JUDGE FLAX: Those two things are the same material?

9 MR. POPOWITZ: This is, almost.

10 JUDGE FLAX: And for the record, I'm referring to the exhibits
11 that were brought in today. One of which is the product of Patent Owner
12 GhostPillow and the other one is tested foam example from Element.

13 MR. POPOWITZ: And for your reference, it's Exhibit 1066 is the
14 tested foam and 1054 is the sample of the GhostPillow.

15 JUDGE FLAX: Okay so these two things are the same foam?

16 MR. POPOWITZ: There's a difference in the density.

17 JUDGE FLAX: Okay.

18 MR. POPOWITZ: Three point three versus four point four and,
19 I'm sorry, four point zero, excuse me. And I understand --

20 JUDGE FLAX: Does that matter?

21 MR. POPOWITZ: In my eyes, no. And the Petitioner has said
22 that it's a major difference. We say we don't know the tolerance of the
23 poured samples Mr. Gross or Mr. Quinn talked about the fact that when you
24 pour these things, when you pour the foam, there's tolerances. We don't
25 know what those tolerances are whether it's 3.4 different than 3.3? Yes. It --

1 JUDGE FLAX: How do I know from the evidence of record that
2 the tested foam samples correspond to the claim limitations? You telling me
3 right now does not suffice. I need something in the record that explains that
4 the foam that was tested meets the claim limitations.

5 MR. POPOWITZ: The only thing I can point to is the fact that the
6 title of these foam pieces is GB Punched PCM. And the only way it can be
7 punched is if it's compressed. There's no other way to do it. The tittle from
8 the reports from Element have those labels on it.

9 So the only way to actually put those punches, put those holes in
10 the foam is to compress that foam. It's inherent in the operation.

11 JUDGE FLAX: Okay. Whether or not that's true, I have another
12 question for you. That foam with the holes and the PCM which you say
13 represents your claimed invention was compared to other foam that was also
14 tested. Correct?

15 MR. POPOWITZ: Yes.

16 JUDGE FLAX: That foam is the same material, but has no holes
17 and has no PCM material applied to it. Is that correct?

18 MR. POPOWITZ: It's exactly the 1066 exhibit without the holes
19 in it. And without this --

20 JUDGE FLAX: Without the PCM?

21 MR. POPOWITZ: Without this PCM I know they describe it as
22 streaking.

23 JUDGE FLAX: Okay.

24 MR. POPOWITZ: No holes, no PCM. Otherwise it's the same
25 block.

1 JUDGE FLAX: Okay so, --

2 MR. POPOWITZ: It's exactly the same block.

3 JUDGE FLAX: -- here's my question from a legal standpoint.

4 How is that a comparison to the closest prior art? Because the closest prior
5 art has either PCM or holes punched in it.

6 MR. POPOWITZ: Well our objective was to show the cooling
7 benefit of the pillow.

8 JUDGE FLAX: It may be fantastic, but for unexpected results,
9 you need to compare it to the closest prior art. By law.

10 MR. POPOWITZ: Okay. Well the closest prior art is dealing with
11 Lievestro and Schneider.

12 JUDGE FLAX: Right. And what do they teach?

13 MR. POPOWITZ: They teach the compression or the cracking,
14 putting foam or putting the holes in the foam and application of a gel. Now
15 in that --

16 JUDGE FLAX: Okay so both those references either have holes or
17 have PCM.

18 MR. POPOWITZ: Correct.

19 JUDGE FLAX: But you did not test any foam that only had holes
20 or only had PCM. Is that correct?

21 MR. POPOWITZ: That is correct.

22 JUDGE FLAX: So how do any of these tests result to the closest
23 prior art is my question. I think I don't. Am I right?

24 MR. POPOWITZ: I understand from the test results, you know,
25 it's not connected directly because it doesn't have only one of those

1 elements. I understand, I agree with that. I can't dispute that.

2 JUDGE FLAX: Okay. Thanks. Appreciate it.

3 MR. POPOWITZ: So let's shift to Slide 28. And we deal with
4 copying the product timeline which shows copying by competing brands.
5 Now in Item 1, Number 1 on the Slide 28, it shows when the GhostPillow,
6 Patent Owner's product, was introduced to the market.

7 This Patent was secured by Mr. Quinn using the Jungle Scout
8 software regarding the first sale date from Amazon in the e-commerce store.
9 If you see, accept this all secondary, all following products came after the
10 Patent Owner's product at the market and the Patent Owner's disclosure.

11 JUDGE FLAX: And so what is the evidence that there was
12 copying in these products? And by that I mean, how do we know they
13 copied the inventive part of the GhostPillow if the GhostPillow incorporates
14 any part of the invention.

15 MR. POPOWITZ: So Mr. Quinn reviewed these specific
16 examples and under his opinion they meet the elements of the processed
17 claims. They had PCM on the surface. They have, I understand we can't
18 show visually compressor or pressure.

19 But aside from that from the inherent nature of that to put a hole in
20 the foam, you need some type of compression. We are accepting that as
21 true. It has --

22 JUDGE FLAX: That could not have been made by drilling or
23 molding them with holes.

24 MR. POPOWITZ: But we've seen what the Petitioners tried to use
25 the bores technique drill to show that you can drill a hole through the foam

1 without compression. And Mr. Shiroff testified that when he contacted the
2 manufacturer, that they said there is a level of push.

3 There's a level of compression. Mr. Gross talked about that if you
4 drill this foam, it will essentially tear it apart because of how porous, not
5 porous, but how the construction, the density of the foam, it's going to eat up
6 the drill is going to eat up the foam.

7 So Mr. Quinn looked at these references and saw that they met the
8 various process requirements of the claims and showed that at the timeline
9 of how it came, all these products came after the Patent Owner. In our
10 opinion, this rebuts the presumption of obviousness given this nexus.

11 JUDGE MELVIN: Mr. Popowitz?

12 MR. POPOWITZ: Yes, sir.

13 JUDGE MELVIN: Is there any evidence that any of these
14 competing brands tried and failed to introduce a competing product before
15 the patented product was available?

16 MR. POPOWITZ: I don't know about these specific companies.
17 The Petitioner has pointed to two references regarding it's called ironically a
18 Fohm, F-O-H-M. I don't want to be confusing with the actual foam. It was
19 a video that they provided, a video that's on one of my other slides and it
20 shows a similar product.

21 But the focus in that F-O-H-M material was and you can see in the
22 handprint of the slides, of the difference of the heat staying in the foam
23 itself. There was no PCM on the top layer when they were doing the
24 experiment.

25 So that's one and the other one was I believe Brooklyn Bedding

1 pillow that they have an Amazon listing for that they claim predates the
2 Patent Owner's filing date and disclosure on Amazon. But if you look at the
3 reviews of that reference as I talked about with Mr. Shiroff in his deposition,
4 the reviews show that the products that were shipped did not meet what the
5 product showed on the Amazon listing.

6 So we have no idea what those products were and that they
7 actually read upon the Patent claims in the 301 Patent.

8 JUDGE MELVIN: Doesn't the law require for something to be
9 considered a copying—in a secondary consideration context of a patent—
10 require that there's got to be specific evidence of replicating a specific
11 product?

12 MR. POPOWITZ: We believe that the fact that the disclosure was
13 public by the 301 Patent and then this product was available for sale, that is
14 the notice to the consumer, to the competitors and that's why shortly
15 thereafter people, other competitors started copying it with a very similar if
16 not identical process they shifted.

17 There was no more gel-infused foam. And that's it, no more, but
18 the focus was on applying the PCM to the surface which is exactly what the
19 Patent Owner did in his 301 Patent. He was the first one to combine it in
20 that way.

21 That's why we believe that was a novel invention, that it should be
22 held valid and that the evidence of these competitors copying that model of
23 applying the PCM to the surface as opposed to infusing it is evidence of
24 copying that shows it negates a finding of obviousness.

25 JUDGE MELVIN: Is that evidence in our record? I mean, I know

1 you've got a slide, your Slide 28 is a chart that puts together a comparison of
2 seven different products, but all they are some pictures with some labels.

3 Is there any testimony by an expert comparing with process or
4 structure of these alleged competitive products to the patented invention?

5 MR. POPOWITZ: Well Mr. Quinn talks about these products in
6 his declaration as Exhibit 2013. Does he go into each specific product and
7 no, he said he did his own review and he believes that these products meet
8 the process requirements of the 301 Patent.

9 JUDGE MELVIN: So we've got a conclusion with no data or
10 analysis.

11 MR. POPOWITZ: Well he did his analysis that he gave his
12 opinion as to why, but you know, if you're looking for a line-by-line of each
13 product, I don't believe he did that, no.

14 JUDGE MELVIN: Thank you.

15 MR. POPOWITZ: And looking at, turning briefly or do I even
16 have any time left?

17 JUDGE FLAX: Well you can use your time as you see fit. You
18 have begun to eat into your ten minutes that you reserved, but it's your
19 choice.

20 MR. POPOWITZ: Okay. Let me just make one more --

21 JUDGE FLAX: We did ask you a lot of questions so I mean, we're
22 not going to be too hard on time.

23 MR. POPOWITZ: I'll be brief. I want to talk about the defined
24 market and Mr. Shiroff took issue with the defined market and I'll be brief
25 about this about whether or not the molded gel memory foam PCM pillow

1 with punch holes was accurate for a market definition.

2 JUDGE FLAX: It struck me as quite narrow when I first saw it.

3 MR. POPOWITZ: Well you're asking for a nexus. That
4 encompasses all of the features of the 301 Patent. We're saying, this is what
5 the 301 Patent requires, this is the market and there are --

6 JUDGE FLAX: That doesn't include the term cracking.

7 MR. POPOWITZ: Well it's, again, we believe that in, it's punched.
8 It's fair. I understand that. But it's getting the same result. It's doing it the
9 same, it's getting the same benefit of the cracking versus the compression.

10 But Mr. Shiroff in his definition said it's memory foam with the
11 cooling features, but when we talked to him during his deposition, he first
12 categorized pillows in three different categories, memory foam, polyester,
13 down pillows.

14 So I asked him why did you now add cooling features to memory
15 foam if your definition of a pillow market of three markets which do not
16 include cooling? And he simply said that it gives me the ability to
17 essentially have a less data to deal with.

18 It's a more manageable population. Otherwise, "it would boggle
19 my mind," the exact phrase. So he arbitrarily just added cooling features
20 with no explanation. So we added the actual features that are defined by the
21 Patent into our market definition.

22 And briefly, the Amazon results which I believe speak for
23 themselves which is on the next few slides --

24 JUDGE GROSSMAN: Okay before we move off of that, I just
25 want to make sure that the record is clear when you were talking about Mr.

1 Shiroff's testimony you had on the screen --

2 MR. POPOWITZ: Yes.

3 JUDGE GROSSMAN: -- your Slide No. 30.

4 MR. POPOWITZ: Yes, Your Honor.

5 JUDGE GROSSMAN: Which was an excerpt from Exhibit 2029,
6 the deposition testimony of Mr. Shiroff.

7 MR. POPOWITZ: Yes, Your Honor.

8 JUDGE GROSSMAN: Okay.

9 MR. POPOWITZ: Thank you. The Amazon results briefly, I don't
10 want to eat into too much of my other times of the rebuttal, there was results
11 of 184, only 48 were providing this exhibit. Mr. Shiroff testified that he did
12 a mere quick review of this exhibit.

13 He didn't even know that it was the full 184 results were not
14 present. There's only 48 snapshots of these little summaries from the results.

15 JUDGE FLAX: I'm sorry, I don't understand what that means.

16 MR. POPOWITZ: So the Petitioner took our defined market, the
17 molded memory foam PCM pillows with punch holes and put that into the
18 search query of Amazon. And well the result was 184, let's get this --

19 JUDGE FLAX: One hundred eight-four based on that?

20 (Simultaneous speaking.)

21 MR. POPOWITZ: -- TV, sorry. The border isn't going to let us
22 see, but it shows --

23 JUDGE FLAX: I get it.

24 MR. POPOWITZ: So the exhibit which is Exhibit 1043, is only of
25 48 results. It does not include the remaining 136 if my math is right results.

1 And of the 48 if you look at it, you can't tell briefly if there's holes or PCM
2 on the first picture on the left.

3 On the two on the right, you can't tell if there's PCM on the top. If
4 you look at the next picture, some of these results, --

5 JUDGE GROSSMAN: If we could go back when you were
6 talking about if the two on the right --

7 MR. POPOWITZ: Oh, sorry.

8 JUDGE GROSSMAN: -- the transcript doesn't have any idea what
9 we're looking at and we're looking at your Slide 32.

10 MR. POPOWITZ: 32, thank you, Your Honor. And turning to
11 Slide 33, a couple of more examples, it shows some of these results are
12 memory fill, not even a pillow so I understand that the Petitioner was trying
13 to show that there is a bigger universe, but the purpose of the algorithm for
14 Amazon is to show comparable products to consumers. It's not to just only
15 show these exact few pieces.

16 So and we don't even know what the other ones were. And Mr.
17 Shiroff agreed and said that they're not representative, all of them, of the
18 search terms that was provided there. But despite that, and despite not
19 reviewing the remaining 136, he still stood by his opinion that it was a fatal
20 flaw of Mr. Quinn not to include the Amazon results.

21 So with that I now have about five and a half minutes left. I'm
22 going to reserve the rest for rebuttal.

23 JUDGE FLAX: So, Mr. Serbin, you ate into let's say one minute
24 of your rebuttal time.

25 MR. SERBIN: Yes.

1 JUDGE FLAX: We'll round up or round down.

2 MR. SERBIN: If you give me a minute to set up. I want to --

3 JUDGE FLAX: Of course.

4 MR. SERBIN: -- I wanted to bring my laptop back because --

5 JUDGE FLAX: Sure.

6 MR. SERBIN: -- some of the slides need to be shown. Okay. I'm
7 ready.

8 JUDGE FLAX: Okay go ahead.

9 MR. SERBIN: Your Honors, I'm going to respond to the point on
10 claim construction first just to get it out of the way and then I'll go into the
11 PCM versus gel application in a different reference exhibit. I believe that
12 during this presentation the opposing counsel said that they are interpreting
13 cracking as well as solid-based because the inventor was his own
14 lexicographer. That's a new argument.

15 That argument was never presented. It's not in the record. If you
16 look in the record, the Patent Owner replied Paper No. 12, Page 6. They
17 agree that solid should be interpreted as a, you know, on the general ordinary
18 meaning as used in the field.

19 And with respect to cracking, the set aside from interpretation of
20 the term solid, Patent Owner does not dispute Board's preliminary finding of
21 claim construction as detailed in its decision. And as detailed in the
22 preliminary, as detailed in the decision, the term believe the Panel found it to
23 be a term of art as used in specification.

24 That's all I'm going to say about claim construction and cracking.
25 With respect to opposing counsel's discussion of PCM and gel, if you look at

1 Slide 26 of our demonstratives, this is Crawford. And as I mentioned
2 earlier, Crawford talks about many different ways of applying PCM gel with
3 PCM in it.

4 But what you see in Figure 18 which was actually in the record,
5 you could see the PCM gel being applied without any compression. It's an
6 application on the surface without any pressing it. So the infusion that's
7 happening during the press is not in there.

8 And if you look at Figure 27, the rollers that are shown as being
9 for compression rollers, No. 8, those are in dash lines because Crawford said
10 those are optional features. So in other words, your, what Crawford is
11 saying is I'm going to spray PCM or I'm going to apply it with liquid in
12 Figure 18. I don't need to compress it.

13 When that happens, you have result is a layer as shown in Figure
14 18 of PCM on the surface of the foam. And if you look at Figure 19, what
15 happens is when the compression happens, you have a little bit thicker layer
16 of PCM.

17 But in both cases, the PCM is on the surface. Okay. Now if you
18 look at the Patent, the Patent doesn't talk about the applying PCM. On
19 Comment 5 of the Patent, they talk about applying PCM mixture containing
20 PCM because they don't apply PCM by itself.

21 Just like the mixture in Figure 18, just like the spray mixture with
22 gel in Figure 27, the Patent talks about application of PCM containing
23 mixture. And that's what you saw in that I believe Exhibit 2022 where it
24 looks like blue paint.

25 It's PCM in liquid in fluid that's then being rolled on. Not any

1 different from what's happening in Crawford, not any different that's what
2 happening in Schneider. Now with respect to Schneider, if you -- let me go
3 back to 14, Slide 14 of our demonstratives.

4 If you look at the disclosure of Schneider, paragraph 29,
5 Schneider, in the first sentence of the paragraph, says that well mattresses
6 comprise microencapsulated phase change material. If you read the 301
7 Patent that actually talks about microencapsulated PCM, that's exactly what
8 Schneider teaches.

9 Now Schneider doesn't say that it's limited by Rossi. Schneider
10 says you can use PCM as in Rossi as an example. It's not, doesn't say it
11 should be limited by Rossi. And then at the end Schneider says that hey, the
12 use of PCM gel, phase change gel to provide significant cooling benefits
13 when applied to a flexible polyurethane foam.

14 Now, I don't have it on the slide, but if you look at the following
15 paragraph of Schneider, No. 30, Schneider also talks about PCM gel layer on
16 the foam for the purpose of sleeping surface to be, to provide comfort to the
17 user.

18 So the use of gel is just a distraction because in both cases, you just
19 have a PCM. Now the last thing I wanted to point out is that in the claim, if
20 the infused, even if infused were different from applying, to get something
21 to be infused, you first have to apply.

22 And there is nothing in the Claim 1 or 2 that prevents it from
23 having additional steps, first applying and then infusing. If infusing means
24 pressing something in. So the fact that Schneider and Crawford talk about
25 infusion does not mean that they don't apply in the surface as shown in

1 Crawford earlier in Figures 18 and as well as 27 or as disclosed in Ohta. I
2 mean Ohta and Schneider.

3 With respect to Rossi, now Rossi does not use the term phase
4 change material, but if you look at our Slide 16, Rossi talks about increase
5 using the gel that increase thermal properties of the enhanced thermal
6 properties of device.

7 And that's in the second sentence, second quotation from it. But
8 Rossi talks about including paraffinic materials. Paraffinic-based materials.

9 JUDGE MELVIN: And if you could just make sure that we're --

10 MR. SERBIN: We're looking at Slide 16 on the first sentence
11 quotation that's addressed on Pages, Exhibit 1085, Pages 2 and 3. We've
12 provided, talked about the gel, but the gel includes paraffinic materials.

13 If you search paraffin, it will be described, for example, as phase
14 change. Now putting it aside, Rossi does not limit Schneider. Rossi is in
15 addition to Schneider. And by itself, Rossi talks about PCM materials being
16 used for the purpose of cooling benefits.

17 I think that's all I needed. I think I'm going to leave one and a half
18 minute for my partner to address the secondary consideration.

19 MR. KOFFSKY: Thank you, Gary. Very briefly, Your Honors,
20 Patent Owner's counsel made a point about the Element test could only be
21 done on certain kinds of foam and not the foam that was actually used in the
22 GhostPillow.

23 I respectfully respond then you should find another lab and do the
24 tests that are proper and not present a test that, a foam that has different
25 density and different PCM application and different hole density especially

1 when the lab itself tells you that the results of one test are not to be applied
2 to similar products for anything else which is a sign at the bottom of each
3 and every of those six tests.

4 And with respect to the issue about Mr. Shiroff and the 184
5 products on the Amazon search, essentially what we did is we, is Mr. Shiroff
6 typed in molded gel memory foam PCM pillows with punched holes into the
7 Amazon search box.

8 One hundred eighty-four products came out. His declaration,
9 paragraph 61, Exhibit 1076 says it is, meaning Mr. Quinn, it is a fatal error
10 that is by Mr. Quinn not to consider any of the 184 products that the
11 Amazon algorithm identified.

12 Not that he had to include all 184 products. Of course, many of the
13 Amazon products that I think as we well know, maybe have noticed recently
14 in the past year or so Amazon doesn't always come up with exactly the right
15 thing, but he included none of them.

16 He didn't consider any of them and that's what Mr. Shiroff was
17 saying. Finally, I'll just read into the record as I promised at the opening, the
18 solid blocks tested by Element, the pictures are Exhibits 1061, 1063, 1065.

19 The punched foam large blocks tested by Element are pictures
20 1067, 1069, 1071. The picture of the little baggie with the little blocks is
21 1072. Thank you, Your Honors.

22 (Off-microphone comments.)

23 MR. KOFFSKY: Apologies.

24 MR. POPOWITZ: Oh, no worry.

25 JUDGE FLAX: Mr. Popowitz, we'll just call it six minutes. We'll

1 give you an extra 30 seconds.

2 MR. POPOWITZ: I appreciate it. Your Honor, okay to start?

3 JUDGE FLAX: Sure. Whenever you're ready.

4 MR. POPOWITZ: All right. Thank you, Your Honor. And a
5 brief response to Petitioner's rebuttal, it was Mr. Shiroff admitted in his
6 deposition that it was not he who actually typed the search for Amazon into
7 the search box.

8 It was the Petitioner's counsel that did that search. And he just did
9 a brief review of that. Secondly, as to the cracking limitation and that the
10 Patent Owner can be his own lexicographer, that is specifically in the
11 surreply in Page 3. We did reference that.

12 That is not something new that we are arguing today. That was in
13 response and it was to the extent they're arguing that we made a
14 determination regarding the term solid earlier, we are in our surreply we
15 were responding to the reply that is now trying to change the definition of
16 cracking.

17 JUDGE FLAX: So it is your point with this lexicography
18 argument that your inventor specially defined the term cracking as limited to
19 only compression by rollers.

20 MR. POPOWITZ: Correct. That is correct. And lastly as to one
21 of the other points, before I turn to the market survey briefly is Mr. Quinn
22 testified that at least one company changed their products after seeing the
23 301 Patent because they believed that -- I don't want to speak for them, but
24 they changed it enough to go around the 301 Patent.

25 They removed holes and Mr. Quinn testified that he didn't include

1 I think it was BlueSleep or Bluewave, he didn't include that in his analysis
2 because they changed their product than earlier that it would have been, but
3 because they changed the product, --

4 JUDGE FLAX: I knew that he testified that he selected those
5 products because he thought they infringed.

6 MR. POPOWITZ: Well the list, he testified that he looked at those
7 products from a list of infringing devices, but he specifically pulled out the
8 Bluewave product because they had changed their product and no longer met
9 the criteria regarding --

10 JUDGE FLAX: The ones that were included, he thought they
11 infringed?

12 MR. POPOWITZ: I would say, I don't want to put words in their
13 mouth, but they infringed.

14 JUDGE FLAX: I think that's what he said.

15 MR. POPOWITZ: They infringe, but he believed they met the 301
16 claims.

17 JUDGE FLAX: Right. He had testified initially during his
18 deposition that he didn't know anything about patent law.

19 MR. POPOWITZ: Fair, that's fair.

20 JUDGE FLAX: So how does he know what infringes or what
21 doesn't infringe?

22 MR. POPOWITZ: I don't know if he knows it was infringing, but
23 I actually --

24 JUDGE FLAX: That's what he said.

25 MR. POPOWITZ: He understands --

1 JUDGE FLAX: I don't mean to be arguing with you, but I think
2 that's what he said.

3 MR. POPOWITZ: No, I understand that, but I think he
4 understands what the Patent Claims require from a process standpoint and he
5 was looking at those products and saying do they meet the claims?

6 Now I don't think he understands, you know, claim construction in
7 the sense of, you know, infringement. I understand that. But he knows this
8 is what the Patent Claims require and do these products meet those process
9 claims?

10 JUDGE FLAX: So that's an interesting point though. Do only
11 infringing products compete in the marketplace for sales? I don't think that's
12 possible. But if it is, tell me that I'm wrong.

13 MR. POPOWITZ: Well I don't think only infringing products.
14 There could be more. There could be additional factors that layer into it,
15 but --

16 JUDGE FLAX: Compete with the GhostPillow?

17 MR. POPOWITZ: Right. I mean, and there's a distinction --

18 JUDGE FLAX: But they're not included in any analysis.

19 MR. POPOWITZ: Well the Petitioner brought up that, you know,
20 the market survey didn't include the same competitors as the defined market.
21 But all because you're a competitor doesn't mean you have the exact same
22 product as the Patent Owner.

23 People have different products that compete that do different
24 things. Like Serta has a sleep number thing. I mean, you know, I don't
25 believe the Patent Owner has that or maybe he does. But, you know, they're

1 still competitors, but they don't have the exact same products. There's a
2 distinction there.

3 When you're looking at it from a copying standpoint, we are
4 looking at to see which products have similar or exactly the same features.
5 That's the dynamic from a copying standpoint not a competition standpoint.

6 You know, if they're copying, I would assume they are competing
7 as well. It's in that same bucket. Lastly, I do want to talk briefly on the
8 market survey. That the Patent Owner did send a survey to 4,000 purchasers
9 of the GhostPillow and received a 2.5 percent response rate for 100 results.

10 And they looked at some of the features and Mr. Quinn developed
11 these questions. Given his background, he developed questions to say why
12 are you purchasing this? And on Slide 38, it's on the screen, what was the
13 most important factor in choosing GhostPillow versus the other brands?

14 Fifty-one percent picked the cooling technology which is twice
15 more than any of the other factors regarding material, styling, size, et cetera.
16 The focus for the consumer was the cooling technology from the
17 GhostPillow. Second, if you go to Slide -- it's not working, 39.

18 Again, how important are the following factors when shopping for
19 and purchasing a new pillow. Rate each one. By far and away, sleeping too
20 hot, looking for a cooler sleep solution is what the consumers are looking
21 for.

22 Now Mr. Shiroff didn't like the way the results were done. He
23 believed they were flawed, but Mr. Quinn factored these questions based on
24 his experience, based on his understanding of the pillow and he tied it, you
25 know, Mr. Shiroff wanted us to ask the Patent Owner to ask specific

1 manufacturing-based questions to consumers.

2 You know, what do you think about the compression? What's the
3 benefit of the compression? What's the benefit of the PMC? You know?
4 Consumers don't understand that. They don't understand manufacturing
5 processes.

6 They understand the results of those manufacturing processes.
7 They want to see how does it feel to them? How does it touch to them?
8 They understand, consumers understand is it soft, is it hard, is it cooling, is it
9 hot?

10 You know, that's what, how the questions were tailored by Mr.
11 Quinn to extract from a nexus argument what are the benefits of those claims
12 and the processes that are created? The consumer is not going to understand
13 how the construction of the pillow occurs and what the benefits are directly?
14 They understand the results and that's the tie in?

15 JUDGE FLAX: And which bar there relates to the cracking?

16 MR. POPOWITZ: The cracking? So if you go to -- there's --

17 JUDGE FLAX: What slide are we on?

18 MR. POPOWITZ: This is on Slide 40. If you look at firmness,
19 softness of the pillow, this is the middle graph. Again, that's blue. It's like
20 literally in the middle of the seventh, the fourth. It shows that the firmness
21 and the softness is very important.

22 He tried to layer in all of the features of temperature, the cracking
23 which is dealing with how soft or hard the pillow is. The purpose of the
24 cracking, Your Honor, is if you didn't do that step and you gave the product,
25 you sold the product to the consumer, and I know I'm over on time so I want

1 to just alert, but I can finish the thought?

2 JUDGE FLAX: Sure.

3 MR. POPOWITZ: If you gave that uncompressed pillow to the
4 consumer, the first time they put their head on the pillow or their body on
5 the bed, it's going to feel harder and then over the next several months, it's
6 going to get softer.

7 The purpose of compression and cracking is to eliminate that break
8 in period. It opens the cells. It puts it in a position that it's going to stay
9 consistent throughout the use of --

10 JUDGE FLAX: Mr. Quinn explained all this?

11 MR. POPOWITZ: I believe he did, yes.

12 JUDGE FLAX: Okay.

13 MR. POPOWITZ: Or at least the purpose of that crowd of the
14 cracking. Or Mr. Gross.

15 JUDGE FLAX: Okay. Thank you, sir.

16 MR. POPOWITZ: Thank you, Your Honors.

17 JUDGE FLAX: Well okay. We have now concluded our final
18 hearing in this proceeding. I appreciate everyone showing up here in person.
19 I much prefer that way for holding a hearing. We will consider your
20 arguments today in view of the record which is now closed.

21 We will also consider your outstanding motions on evidence.
22 We'll probably deal with that at the same time as we do the final decision in
23 this case. I think that's about it. And so we'll go off the record at this point.

24 (Whereupon, the above-entitled matter went off the record at 12:36
25 p.m.)

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