

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KOHLER CO.,
Petitioner,

v.

DELTA FAUCET CO.,
Patent Owner.

IPR2024-00700
Patent 10,393,363 B2

Held: July 10, 2025

Before GRACE KARAFFA OBERMANN, JANE E. INGLESE, and
BRIAN P. MURPHY, *Administrative Patent Judges*.

IPR2024-00700
Patent 10,393,363 B2

APPEARANCES:

ON BEHALF OF THE PETITIONER:

K. PATRICK HERMAN
Orrick, Herrington & Sutcliff
51 West 52nd Street
New York, NY 10019-6142
(212) 506-3596
p52ptabdocket@orrick.com

ON BEHALF OF THE PATENT OWNER:

GREG ISRAELSEN, ESQUIRE
Wilmerhale
2100 Pennsylvania Avenue NW
Washington, D.C. 20037
(202) 663-6215
israelson.greg.israelson@wilmerhale.com

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

P R O C E E D I N G S

- - - - -

JUDGE INGLESE: All right. Good morning. This is a hearing in IPR2024-00700. Petitioner challenges the patentability of Claims 1 through 24 of U.S. Patent 10,393,363, and Patent Owner opposes the challenge. I am Judge Inglese, and Judge Obermann, and Judge Murphy are appearing with me on the panel.

Before we begin, we would like to remind the parties that a full transcript of this hearing will become part of the public record. And to ensure that the transcript is clear, we ask you to identify yourselves before speaking, and to identify specific slide numbers, numbering of figures, and any other pertinent identifying information when referring to demonstratives. And please mute yourself when you're not speaking. If you encounter any technical difficulties, please let us know immediately. This proceeding is open to the public, and if you wish to discuss confidential information, please let us know before doing so.

As you know, from our order of June 10, 2025, each party has 60 minutes in total to present their argument. Because Petitioner bears the burden of proof, Petitioner will proceed first, followed by Patent Owner, and Petitioner may reserve part of the total time for rebuttal, and Patent Owner may reserve part of the time for surrebuttal. And to keep this hearing focused on the merits of the case, we ask counsel not to interrupt the other side to make objections, and any objections can be discussed during the rebuttal time.

So, let's start with introductions. Who will be presenting

1 arguments for Petitioner?

2 MR. HERMAN: Good morning, Your Honor, this is Patrick
3 Herman from Orrick, Herrington & Sutcliffe, and I will be presenting on
4 behalf of Petitioner. And also joining me on the public line today, are
5 several representatives from Petitioner Kohler.

6 JUDGE INGLESE: Okay. Is there anybody you would like to
7 introduce who's with you on the line?

8 MR. HERMAN: Not on the video, but with me today.

9 JUDGE INGLESE: Okay. Who will be presenting for Patent
10 Owner?

11 MR. ISRAELSEN: Good morning, Your Honor. This is Greg
12 Israelson from WilmerHale, representing Delta, and I'm joined today by my
13 colleagues Dave Cavanaugh and John Kim, also from WilmerHale. And on
14 the line we also have several representatives from Delta.

15 JUDGE INGLESE: Okay. So, does either party have any
16 preliminary matter that you would like to discuss before we begin
17 arguments?

18 MR. HERMAN: None from Petitioner, Your Honor.

19 MR. ISRAELSEN: None from Patent Owner, Your Honor.

20 JUDGE INGLESE: Okay, let's begin. Mr. Herman, would you
21 like to reserve time for a rebuttal?

22 MR. HERMAN: Fifteen minutes, Your Honor.

23 JUDGE INGLESE: Okay. So, that means you will have 45
24 minutes to present your primary argument. Just please give me a second, I
25 will set the clock. Okay, please begin when you're ready, and I will start the

1 clock when you begin to speak.

2 MR. HERMAN: Thank you. Again, this is Patrick Herman on
3 behalf of Petitioner, and we're here today to talk about the '363 Patent.
4 Petitioner submits that this is a straightforward case. The '363 Patent is not
5 complicated or difficult to understand. It relates to a plumbing fixture, like a
6 kitchen sprayhead or a bath showerhead, that's typically found in a home.
7 The patent's plumbing fixture includes a light, what the claims call a
8 translucent light pipe, which allows emitted light to be diffused from the
9 fixture.

10 As I'll explain throughout my presentation today, this is exactly
11 what the prior art at issue in this proceeding teaches. Just like the '363
12 Patent, the prior art is replete with examples of plumbing fixtures with
13 lights. And these fixtures, also like the '363 Patent, either already include, or
14 would obviously include, light-diffusing light pipes to improve the appeal of
15 the fixture. So, Patent Owner would have the Board ignore all this. Again
16 and again, it fails to give effect to the teachings of the prior art and the
17 straightforward terms of the '363 Patent's claims.

18 Now, before discussing the parties' dispute further, I would like to
19 provide a little more elaboration on the patent at issue and the prior art, to
20 provide context for the rest of my presentation this morning.

21 So, turning to Slide 3 of Petitioner's demonstratives, the '363
22 Patent begins by explaining that it relates to, quote, "an illumination device
23 for a sprayhead," end quote. The patent concedes that such devices are
24 known in the prior art. So, the patent seeks to improve on these known
25 devices by using what it calls a light pipe. Per the patent, use of such a light

1 pipe purportedly helps diffuse light, eliminating what the patent calls hot
2 spots or discrete areas of illumination. So, fundamentally, the '363 Patent is
3 directed to a better-looking lighted plumbing fixture with more uniform light
4 emission. Now, the patent includes three independent claims. Those are
5 Claims 1, 10, and 19. Claim 1 of those claims is the broadest. Claims 10
6 and 19 are narrower and respectively relate to the patent's two main
7 embodiments.

8 Slide 4 of Petitioner's demonstratives reproduces Figure 1 and
9 Claim 10 from the '363 Patent. This claim relates to the patent's pull-down
10 sprayhead embodiment. As shown, the claim requires a light pipe with an
11 outer illumination surface that essentially surrounds the sprayhead like a
12 belt. This allows at least some light to shine outwardly from the sides of the
13 sprayhead.

14 Turning on to Slide 5, this slide reproduces Figure 8 and Claim 19
15 from the '363 Patent. This claim is directed to the patent's other
16 embodiments, a lighted pendant showerhead. The light pipe in this
17 embodiment is differently arranged from what's shown in Figure 1. Rather
18 than surrounding the sprayhead sides like a belt, is it now supported by the
19 sprayface of the showerhead and surrounds a water outlet. This allows light
20 to be emitted in the same direction as the water coming out of the
21 showerhead.

22 Turning to Slide 6, this slide provides a summary of the grounds.
23 The petition relied on two primary references. A reference to Tseng is at
24 issue in Grounds 1 through 3, and a reference to Tse is at issue in Grounds 4
25 through 6.

1 Slide 7 provides a very brief overview of the Tseng reference.
2 Tseng teaches a pull-out faucet with a light-emitting light conductor. As
3 shown by the figures on this slide, Tseng's light conductor is visible on the
4 sides of, and surrounds the ends of Tseng's faucet like a belt.

5 Turning to Slide 8, Slide 8 provides a brief overview of the Tse
6 reference. Tse teaches a showerhead that emits light. As shown by the
7 figure, light is emitted from the sprayface of the showerhead in the same
8 direction as water coming out of the showerhead.

9 The petition also cited a handful of references when addressing the
10 '363 Patent's dependent claims, and Slide 9 of Petitioner's demonstratives
11 identifies those references. A reference to Carter includes extensive
12 teachings regarding light pipes that are designed to improve lighted
13 plumbing fixtures. A reference to Mizuno teaches a hydroelectric generator
14 for lighted plumbing fixtures that overcomes problems with prior art
15 methods for powering fixture lights. A reference to Schneider teaches a
16 kitchen faucet with a light that changes color, depending upon water
17 temperature. And finally, a reference to Spangler teaches a particular type
18 of showerhead water outlet.

19 So, I'll begin now discussing the parties' disputes, and I'll start with
20 the Tseng reference. So, turning to Slide 11, Patent Owner makes three
21 primary arguments with respect to the Tseng reference. First, it argues that
22 Tseng does not teach a translucent material. Next, it argues that Tseng lacks
23 an outer illumination surface that diffuses light outwardly in the way the
24 claims require. And finally, it argues that the petitions failed to properly
25 articulate a motivation to combine.

1 As I'll explain, everything about this is wrong. Patent Owner
2 ignores and negates what Tseng teaches, and what the petition argues, and it
3 also repeatedly contradicts itself.

4 Turning to Slide 12, I'll start with the argument that Tseng doesn't
5 teach the use of a translucent light pipe material as required by the '363
6 Patent's claims. According to Patent Owner, a POSITA would instead only
7 consider use of a transparent material in implementing Tseng's second and
8 third pull-down faucet embodiments. Petitioner submits that that cannot be
9 squared with Tseng itself, as shown on the slide here, which explicitly states,
10 "that it's light conductor," that's it's light pipe, " is made from translucent
11 material." Translucent material is the only material that Tseng references.
12 Tseng does not reference transparent materials. In fact, it does not reference
13 or instruct a POSITA to even consider the use of any other material at all,
14 besides the translucent material that's discussed and shown here in the slide.

15 So, of course, a POSITA reviewing Tseng, would obviously have
16 employed a translucent --

17 JUDGE MURPHY: Counsel?

18 MR. HERMAN: Yes.

19 JUDGE MURPHY: Yeah, Judge Murphy. Question for you.
20 Paragraph 70, does that apply to all embodiments in Tseng?

21 MR. HERMAN: Yes, Your Honor. So, Patent Owner does argue
22 that this particular passage is found in the discussion of Tseng's first
23 embodiment, and it does appear in that portion of Tseng. But that does not
24 mean, Your Honor, that this particular passage is limited to just Tseng's first
25 embodiment, and provides no insight whatsoever into the material that

1 should be used with Tseng's other embodiments.

2 Petitioner submits that a POSITA does not read the prior art in
3 such a narrow and cabined manner. Tseng's embodiments are related and
4 build off each other. So, Petitioner submits that the only reasonable way to
5 read Tseng's disclosure is by considering its various teachings together.

6 So, by way of example, Tseng does not specifically mention water
7 outlets 316 to 317, a water supply, or wiring for its lights in the paragraphs
8 in its specification that are walking through the second and third
9 embodiments. But despite that, you would not conclude that there are no
10 water outlets -- no water supply -- or no power supply in those second and
11 third embodiments. And that wouldn't make sense.

12 JUDGE MURPHY: Is there any internal cross reference back to
13 the first embodiment, where you have the expressed disclosure of
14 translucence, either by inference or otherwise?

15 MR. HERMAN: So, by inference, Your Honor, and I'll get to that
16 in a minute, and I'll explain more specifically why that's the case. But I
17 submit that there is, by inference, a reference back to this particular material.
18 And the reason for that is, that when Tseng gets to its second and third
19 embodiments, it explains what the differences are between the second
20 embodiment and the first embodiment, and what the differences are between
21 the third embodiment and the second embodiment.

22 And while those second and third embodiments are different in
23 structure, Tseng never says that they are different in the material used. So,
24 the structure of Tseng is to discuss its first embodiment comprehensively,
25 and then move on to discuss the differences between the second embodiment

1 and the first, and the second and the third embodiment, and the second and
2 the first. And it does not identify differences in material, only minor
3 differences in structure. So, because that's the way reference is laid out,
4 Petitioner submits that there is a very strong inference, in fact, an explicit
5 instruction that you're supposed to be using the same material in all the
6 embodiments.

7 JUDGE MURPHY: Thank you, Counsel.

8 MR. HERMAN: So, all that Tseng has done here, is it's chosen to
9 not to unnecessarily repeat unchanging subject matter as it moves through its
10 embodiments. So, again, the same applies to Tseng's material choice. All of
11 Tseng's light conductors are meant to use the same translucent material.
12 Tseng chose just not to repeat discussion of the same unchanging material
13 multiple times. So, I'll elaborate a little bit more on that.

14 So, if we turn to on to Slide 13. As shown on Slide 13, all of
15 Tseng's embodiments employ a light conductor. And this light conductor
16 includes, in all cases, in all three embodiments, the same primary
17 components: an input face, a transmission portion, and an output face. So,
18 not only that, but the light conductor performs the same function throughout
19 Tseng. It transmits lights from Tseng's LEDs from the input face to the
20 output face. So, since all of Tseng's embodiments include the same type of
21 light-transmitting conductor that performs the same function, it makes sense
22 that all the embodiments would obviously use the same translucent material.

23 So, turning on to Slide 14, all of Tseng's embodiments are also
24 meant to achieve the same general effect. As shown by the passage on the
25 left of Slide 14, the first embodiment's light conductor includes a rib that

1 exposes outside to enhance illumination effect. As shown by the middle
2 passage, the second embodiment also includes a rib that exposes outside to
3 enhance light transmission and illumination. Likewise, the third
4 embodiment includes an annular protrusion that extends outwardly to
5 enhance light transmission. So, in all cases, Tseng's light conductor includes
6 a structure that extends outward. And in all cases, this structure is meant to
7 enhance the conductor's ability to emit light from Tseng's pull-down faucet.

8 So, Patent Owner argues that Tseng's use of the word,
9 "transmission," when discussing the second and third embodiments, would
10 for some reason lead a POSITA to conclude that a transparent and not
11 translucent material should be used, but Tseng never says that. It never
12 mentions transparent materials. It does, however, mention translucent
13 materials. Moreover, Tseng is simply saying here, that its second and third
14 embodiments are structured to better get light out the sides of its light
15 conductor. Nothing about that requires the use of a different material, let
16 alone a transparent material. Nothing about that requires ignoring the one
17 type of material, which is a translucent material, that Tseng actually
18 mentions.

19 So, moving on to Slide 15. As I mentioned previously, if all that
20 were not enough, Tseng also explicitly lists how its embodiments differ from
21 each other, and you can see that summarized on Slide 15. As shown by the
22 left passage, the second embodiment includes a separate water-guiding
23 member 36 and light conductor 37. Now, that differs from the first
24 embodiment in Tseng, where the water-guiding member and the light
25 conductor are one and the same structure. As shown by the right passage,

1 the third embodiment's light conductor has a continuous sleeve shape. This
2 differs from the second embodiment, where the light conductor is formed as
3 a ring with four upwards extending pillars.

4 So, the identified differences in Tseng between the embodiments
5 all relate to the shape of the light conductor. Tseng makes no mention,
6 however, of the use of any different materials. This is because Tseng plainly
7 intends the same translucent material to be used across all of its
8 embodiments.

9 Now, in addition to arguing that Tseng somehow lacks the claimed
10 translucent material, Patent Owner also argues that Tseng does not emit light
11 outwardly. According to Patent Owner, Tseng will only emit light
12 downward, like a flashlight. Petitioner submits that this argument also flies
13 in the face of the prior art's actual disclosure. It's also contrary to how Patent
14 Owner itself characterized Tseng earlier in this proceeding.

15 So, starting with Slide 16, Patent Owner effectively negates
16 Tseng's disclosure. What does Tseng say? According to Tseng, its third
17 embodiment's light conductor 38 is sleeve shaped and includes an annular
18 protrusion 383 extending outwardly. What is the purpose of this outwardly
19 extending protrusion? According to Tseng, it's to enhance light
20 transmission. This is not referring to emission of light in one direction, like
21 a flashlight. Instead, Tseng specifically states that its light conductor
22 extends in a different direction, outwardly. This is plainly meant to allow
23 light to also be emitted in this direction. There would be no reason to
24 include outwardly extending protrusion 383 if light is only to be emitted
25 downward as Patent Owner argues.

1 So, what Patent Owner --

2 JUDGE MURPHY: Counsel?

3 MR. HERMAN: Yes.

4 JUDGE MURPHY: Judge Murphy again. So, on Slide 16 of the
5 Patent Owner's slides, if you have that?

6 MR. HERMAN: I do, Your Honor.

7 JUDGE MURPHY: So, they're taking the position that Mr. Cook,
8 who I take it is Petitioner's expert, agreed that the light enters downward
9 through input face 311 so that it's a downward directional light emission, not
10 a perpendicular or sideways transmission. What's your response to that?

11 MR. HERMAN: So, with that all addressed, I'll direct Your
12 Honors' attention to Slide 17. So, Your Honor's right that Patent Owner
13 alleges that Petitioner's expert somehow admitted that Tseng only emits light
14 downward, and Petitioner submits that he did not. He did not make such an
15 admission because Patent Owner never asked him the relevant question
16 during his deposition. So, what Patent Owner did was ask a series of very
17 narrow questions that did little more than repeat Tseng's actual language,
18 and it's now trying to use those questions and answers in a very misleading
19 way.

20 So, yes, Tseng labeled input face 311 in Figure 36 as a face that's
21 facing downwards. And yes, face 313 in Figure 35, is identified as an output
22 face in Tseng. And that's all that Patent Owner's attorneys asked during the
23 deposition for Mr. Cook to confirm that face 311 is identified as an input
24 face, and that face 313 in Tseng is identified as an output face. They did not
25 ask and Petitioner's expert never testified that light only enters input face

1 311 in Tseng. And they did not ask and Petitioner's expert never testified
2 that light only exits output face 313. Patent Owner did not ask those
3 questions because it did not want the answers to those questions.

4 As shown on Slide 17, Petitioner's expert included --

5 JUDGE OBERMANN: Counsel? Counsel?

6 MR. HERMAN: Yes.

7 JUDGE OBERMANN: Counsel, this is Judge Obermann. I have
8 a question for you about Mr. Cook. If we accept the Patent Owner's
9 definition of the ordinarily skilled artisan under the *Kyocera* decision, can
10 we even consider Mr. Cook's testimony? Does he qualify as a competent
11 person to testify about the ordinary level of skill in the art, if we accept the
12 definition that's been proposed by Patent Owner?

13 MR. HERMAN: So, Your Honor, I believe the distinction
14 between the two parties' definitions has to do with qualifications relating to
15 optics. And I don't believe Patent Owner's counsel has argued that Mr. Cook
16 does not have the required qualifications when it comes to optics, and I don't
17 believe they asked him any questions about that at his deposition.

18 So, putting aside that, that Petitioner submits that this particular
19 definition is wrong, if Your Honors do decide to accept Patent Owner's
20 definition of the level of ordinary skill of the art, Petitioner submits that it is
21 not necessary to make a decision regarding the admissibility of Mr. Cook's
22 testimony. And the reason for that is that this patent is so simple and so
23 straightforward that Petitioner submits that expert testimony is not even
24 required to understand it. This is a patent that's --

25 JUDGE OBERMANN: Thank you. Thank you, but I really want

1 to get your -- on the record does your expert satisfy all the conditions of
2 Patent Owner's proposed definition of the ordinarily skilled artisan?

3 MR. HERMAN: So, I believe that he has a sufficient amount of
4 qualification that he would satisfy either parties' definition of the level of
5 ordinary skill of the art.

6 JUDGE OBERMANN: And doesn't Patent Owner's definition
7 require some practical experience with illumination devices?

8 MR. HERMAN: I believe it's mentioned in there. But at the same
9 time, I think a reasonable interpretation of that definition would allow
10 additional educational or experience to --

11 JUDGE OBERMANN: Well, that's not in there. That's not in
12 there. That hasn't been proposed by either party. Does your expert Mr.
13 Cook have that experience with illumination devices? Do we have anything
14 in the record that demonstrates that?

15 MR. HERMAN: So, I don't believe that was the subject of
16 questioning at his deposition. So, I don't believe there's one way to say -- I
17 don't know if it's possible to say one way or another whether or not he does,
18 unfortunately, Your Honors.

19 JUDGE OBERMANN: Okay. Well, we'll ask your friend when
20 it's his turn to talk. Thank you.

21 MR. HERMAN: I'll continue --

22 JUDGE MURPHY: Can I just --

23 MR. HERMAN: Yes.

24 JUDGE MURPHY: Can I just follow up on Judge Obermann's
25 question? Both sides define a person of ordinary skill as including two years

1 of professional experience in kitchen, bath, and plumbing fixtures. Does Mr.
2 Cook have that expertise?

3 MR. HERMAN: Yes, Your Honor. And he testified --

4 JUDGE MURPHY: Where is that in the record?

5 MR. HERMAN: So, it's both in his declaration -- he explains the
6 work he has done in connection with plumbing fixtures. He's consulted, a
7 number of times, both --

8 JUDGE OBERMANN: Counsel, can you please direct us to the
9 records for the proof that you're spouting?

10 MR. HERMAN: Yes, Your Honor. Just give me one moment to
11 open up the proper exhibit. So, the portion of Mr. Cook's declaration
12 discussing his experience, begins on paragraph 5 of his declaration, which is
13 Exhibit 1003, and it proceeds on through paragraph 15 of his declaration. In
14 paragraph 14 of his declaration, discusses the experience he has with
15 plumbing fixtures. He explained that he worked on a heating and flow
16 control medical device in 2010. He explains that he designed restaurant
17 equipment with a draining system in 2023. And he explains that he also
18 engaged in thermal reliability testing for water and air-control systems over
19 an approximately 15-year period in his declaration.

20 In addition to that, he explains that he spent a year reviewing a
21 natural gas pipeline system for a residential and large transmission project.
22 And he also explains that he engaged in his own plumbing work. That's all
23 in paragraph 14 of his declaration. That's Exhibit 1003.

24 And also to note for Your Honors' edification, that during the
25 deposition of Patent Owner's expert, he admitted that his only experience

1 with plumbing fixtures was of work that he performed at his home. So, if
2 Your Honors are disinclined to accept Petitioner's expert's qualifications,
3 then Patent Owner's expert fails for the very same reasons.

4 But again, that does not matter, Your Honor, because this is not the
5 type of patent that requires expert testimony to understand. So, Petitioner
6 has carried his burden of proof, regardless of whether or not Your Honors
7 decide to consider Mr. Cook's testimony or not.

8 Now, turning on to Slide 18, in contrast, the Patent Owner's
9 attorneys, who elected not to ask the most relevant questions, did
10 specifically ask the Patent Owner's expert if light comes out the sides of
11 Tseng's light conductor.

12 As shown on Slide 18, while Patent Owner's expert attempted to
13 minimize the impact of this, he nonetheless responded to this questioning by
14 admitting that, yes, at least some light will come out the sides. So, Tseng
15 does not, in fact, act like a flashlight with all light being directed
16 downwards, and all that the '363 Patent's claims require is that some light be
17 emitted outwardly. There is no requirement that all light come out the
18 sprayhead sides, or even that most light come out the sprayhead sides, only
19 some light needs to be diffused outward for the claims to be satisfied. So,
20 Petitioner submits that the admission on this slide should end the analysis.

21 Turning on to Slide 19, Patent Owner and his expert are also
22 contradicted by the very evidence on which they rely. As shown by the
23 passage on the top of the page, Patent Owner explained that a POSITA
24 would have reviewed the '874 reference, cited by Tseng, to further
25 understand the problems Tseng addresses, and what does this purportedly

1 important '874 Patent say? It says that the light conductor is structured like
2 that in Tseng, emits light not only downwards but also from its sides. Patent
3 Owner's only response to this is to complain that it relied on the '874 Patent
4 only to show how important Tseng's wiring is to a POSITA. In other words,
5 it wants the Board to consider only the portions of the '874 reference that
6 Patent Owner likes but ignore everything. This, of course, is not how
7 evidence is reviewed. Patent Owner injected this patent into the proceeding.
8 Patent Owner argued that the '874 Patent is important to understanding
9 Tseng, and the '874 Patent says that Tseng doesn't shine light down like a
10 flashlight in the same way Patent Owner says it does.

11 Finally, turning to Slide 20, if all that were not enough, Patent
12 Owner's own briefing also contradicts its argument. This slide includes an
13 excerpt from pages 32 to 33 of Patent Owner's response. What does Patent
14 Owner say here? It repeatedly explains that Tseng's external sleeve 34
15 blocks perpendicularly transmitting light. Why is that important? For two
16 reasons: first, it's a concession that light is moving perpendicularly, or
17 towards the sides of Tseng's sprayhead. If it were not, no blocking would
18 occur as Patent Owner says it does. Second, as shown by Patent Owner's
19 figure on the slide here, annular protrusion 383 is not covered by the sleeve
20 34. It follows that perpendicularly moving light, which is admittedly
21 present, would not be blocked in this area and will instead be emitted
22 outwardly from the sprayhead just as Claim 10 requires.

23 Patent Owner, in fact, even included a demonstrative figure in its
24 preliminary response. That's paper 6, showing that light moves in the very
25 same way discussed in Petitioner's expert declaration. You can see that on

1 page 29 of the preliminary response. There, Patent Owner included blue
2 arrows showing that light from Tseng's LEDs is not emitted exclusively
3 downward. According to Patent Owner's own drawing, light also goes up,
4 goes to the left, and goes to the right, just the way Mr. Cook said it did in his
5 opening declaration.

6 Patent Owner also showed some light moving perpendicularly
7 through annular protrusion 383. So, what Patent Owner is saying now is
8 inconsistent, not only with the prior art, but also with its own prior
9 characterizations and drawings in its preliminary response showing how the
10 prior art operates.

11 Now, turning to Slide 21, Patent Owner also argues that the
12 petition somehow failed to explain how Tseng's embodiments are being
13 combined, or why a person having ordinary skill in the art would have been
14 motivated to combine those embodiments. So, this misunderstands both the
15 petition and Tseng. The petition did not combine or modify embodiments.
16 Instead, Tseng's second and third embodiments standing alone rendered the
17 claims obvious.

18 As noted on Slide 21, the petition explains that a person having
19 ordinary skill in the art would not have read those embodiments in isolation.
20 A person having ordinary skill in the art would not have considered only the
21 passages relating specifically to the third embodiment when trying to
22 understand how that embodiment operates. A POSITA would not have
23 limited the analysis this way because it is contrary to Tseng. Tseng's
24 embodiments are overlapping and share features, as I've explained. Thus, all
25 of Tseng must be read to understand how the third embodiment operates and

1 how it is structured. So, the petition is not combining embodiments. It is
2 not modifying Tseng's third embodiment; it simply gave effect to the full
3 effect of Tseng's teachings.

4 So, unless there are further questions on Tseng, I'll move on to
5 briefly address the secondary references the petition combined with that
6 reference.

7 So, turning to Slide 23, the petition explains that it would have
8 been obvious to use Mizuno's hydro generator with Tseng. So, Patent
9 Owner's first response to this is that Tseng supposedly requires the use of a
10 wired power supply. It does not. Yes, it includes structural features that are
11 meant to protect a wire if present, but it never requires the use of a wire.
12 Instead, as shown on Slide 23, Tseng highlights the downsides of using such
13 a wire. According to Tseng, the wire is at risk of damage. So, far from
14 leading a person of ordinary skill in the art away from the use of a hydro
15 generator, like that in Mizuno, Tseng actually directs a person having
16 ordinary skill of the art towards the solution by discussing the problems that
17 arise when using a wired power supply. So, Patent Owner also argues that a
18 POSITA would be dissuaded from including Mizuno's generator in Tseng
19 because Tseng's sprayhead is characterized in the specification as narrow.

20 But as shown on Slide 24, Mizuno explains that its generator is
21 specifically designed for use with conventional kitchen faucets. Moreover,
22 as shown by the passages that are reproduced on the right of the slide,
23 Mizuno also explains that its generator is designed to reduce bulk, while
24 providing other benefits, such as reduced running and maintenance costs.
25 Yes, Mizuno's generator includes other components, like cooling fins, but

1 this does not somehow weigh against the combination. Again, Mizuno
2 repeatedly explains that its generator is designed for use with standard
3 kitchen faucets like that taught in Tseng. Moreover, those additional
4 components simply provide a motivation to use Mizuno's generator
5 specifically, as opposed to some other generic hydro generators in the arts
6 that do not work as well as Mizuno's.

7 So, turning to Slide 25, Patent Owner next argues that a POSITA
8 would not combine Tseng with the Schneider reference in the way discussed
9 in the petition. As shown by the slide, the petition explained that a POSITA
10 would simply follow Schneider's teachings to allow Tseng's existing LEDs
11 to change color with water temperature. So, rather than explaining why that
12 isn't obvious, Petitioner spends pages theorizing the other ways that Tseng
13 and Schneider can be combined. Yes, one could conceivably also graft a
14 completely separate display onto Tseng's faucet, but that isn't what the
15 Petitioner argued. And the mere fact that there could theoretically be other
16 ways to combine prior art references does not negate obviousness. So,
17 Patent Owner's arguments, which simply list these other alternatives, are not
18 even responsive.

19 Moreover, Schneider, like Mizuno, explains that its temperature
20 sensor and controller are specifically designed to work with a kitchen faucet.
21 So, given this, Petitioner submits that there's no reason why a POSITA
22 would have considered it impractical to include these components in Tseng.
23 The mere fact that Tseng uses the word narrow twice in its specification to
24 describe its faucet does not somehow operate to categorically prevent any
25 and all modifications to the faucet as Patent Owner argues.

1 So, now I'll shift gears and discuss the other primary reference, the
2 reference to Tse. So, turning to Slide 27, Patent Owner makes two
3 arguments here: first, it argues that Tse's cover is not a light pipe, and next it
4 argues that the cover does not surround the water outlets as required. It
5 relatedly argues that the cover is not supported between the water outlets and
6 the showerhead housing as certain dependent claims require. Once again,
7 these arguments lack merit.

8 So, turning to Slide 28, I'll begin with the argument that Tse's
9 cover is not a light pipe. As shown on this slide, Tse's cover 28, which is
10 annotated in yellow is structurally indistinguishable from light pipe 346
11 shown in Figure 11 of the '363 Patent. Yes, the '363 Patent's light pipe is
12 depicted as being slightly thicker, but Petitioner's expert explained, at length,
13 why cover thickness is a simple straightforward design choice.

14 JUDGE MURPHY: Counsel, this is Judge Murphy. Can I
15 interrupt you, please?

16 MR. HERMAN: Yes.

17 JUDGE MURPHY: I want to ask you a question. Where does Tse
18 disclose that it's a translucent light pipe as opposed to a transparent or a
19 semi-transparent light pipe?

20 MR. HERMAN: So, Tse identifies its light pipe as being made of
21 semi-transparent material. And you can imagine, Your Honors, that
22 materials fall on the continuum. There are transparent materials, there are
23 opaque materials, and there's everything in between, which is translucent
24 materials, and that's what Tse --

25 JUDGE MURPHY: Where is that in the record?

1 JUDGE OBERMANN: Where is that in the record?

2 MR. HERMAN: I don't believe there's any dispute remaining,
3 Your Honor, that Tse's reference to semi-transparent means that its material
4 is translucent. That's not a position that that Patent Owner has taken in his
5 briefing. It is not denied that this limitation is met by Tse, right? So, there's
6 no dispute here that Tse, by disclosing semi-transparent materials, discloses
7 a translucent material. So, that's not a disputed issue.

8 JUDGE MURPHY: Well, let me ask you this then. I guess Patent
9 Owner's expert, Exhibit 2003, paragraph 42 -- and this was cited in
10 Petitioner's reply as an admission that there's no dispute over the disclosure
11 of a translucent material. And when I read paragraph 42, what I read is an
12 expert distinguishing translucent from semi-transparent. So, talk to me
13 about that testimony.

14 MR. HERMAN: So, I'm not seeing that there, Your Honor. All
15 that the expert says is that translucent materials exhibit service irregularities
16 and/or internal discontinuities and as such, experience surface-scattering
17 and/or volume-scattering when used as light pipes, and then he distinguishes
18 that from transparent materials. So --

19 JUDGE MURPHY: Yes, that's my point.

20 MR. HERMAN: -- distinguishing its translucent materials from
21 transparent materials. He is not distinguishing translucent materials from
22 semi-transparent materials. There is no testimony, in this declaration, or
23 anywhere else in the record, that even remotely indicates that there is any
24 difference between a translucent material and a semi-transparent material.
25 That's not a position that Patent Owner has taken. Patent Owner has not

1 argued, in this proceeding, that Tse does not disclose a translucent light pipe.
2 Its expert has not testified that Tse does not disclose a translucent light pipe,
3 and there's no evidence in the record that even remotely indicates that a
4 semi-transparent material is any different from a translucent material. In
5 fact, the only evidence of record that Your Honors have to rely on is Mr.
6 Cook's testimony that says that it is the same thing, and that's the evidence of
7 record. And if that was --

8 JUDGE INGLESE: Counsel, could I please point you to Mr.
9 Klopp's declaration, paragraph 147?

10 MR. HERMAN: Okay.

11 JUDGE INGLESE: Where it states, "Tse's disclosure that the
12 cover, which is more like a window, is made of transparent or semi-
13 transparent material, further suggests that the cover does not effectively
14 diffuse light. This is consistent with my observation that Tse does not use
15 terms such as diffuse, diffusion, scatter, or glow anywhere." How would
16 you respond to that?

17 MR. HERMAN: So, essentially, what the expert is saying here is,
18 that in his view, he does not believe that Tse's cover is thick enough to
19 diffuse light from the LEDs in Tse. So, even if that were true, even if Tse's
20 cover were not thick enough to diffuse light from the LEDs, the petition
21 includes a second ground. A ground that applies Carter's light pipe teaching
22 to Tse's showerhead. And in that particular combination, the cover would be
23 made thicker, is admittedly a light pipe, and is also made from a material
24 that is semi-transparent, and includes service irregularities for purposes of
25 diffusing light. And Carter explicitly says that the purpose of its light pipe is

1 to diffuse light. So, there's no dispute in that particular ground that there
2 would be light diffusion. So, this --

3 JUDGE INGLESE: So, can I just -- can I ask you a question, if we
4 could just skip ahead? We only have about six and a half minutes left.

5 MR. HERMAN: Sure.

6 JUDGE INGLESE: So, for Ground 5, I'm a little unclear on the
7 proposed modification of Tse in view of Carter. Is Petitioner proposing to
8 substitute the material of Tse's cover for the material of Carter's cover, or is
9 the modification just to integrally mold Tse's cover?

10 MR. HERMAN: So, the proposed combination would be instead
11 of using a separate thin cover, like disclosed in Tse, to use a thicker light
12 pipe cover that is integrated with the sprayface of Tse's showerhead, which
13 is what Carter teaches. So, Carter teaches making a single plumbing fixture
14 piece that includes molding into it a light pipe. So, that's the proposed
15 combination.

16 JUDGE OBERMANN: I'm looking at your petition, where you
17 have the reasons for this modification. I'm not seeing that. Can you maybe
18 direct me to where you've made that argument in your petition?

19 MR. HERMAN: Sure. So, this begins, Your Honor, on page 70 is
20 the beginning of this ground.

21 JUDGE INGLESE: Let me -- can I just point out also, on page 70
22 here, that it explicitly says that Carter's light pipe is transparent?

23 MR. HERMAN: That's not --

24 JUDGE INGLESE: That goes to also --

25 MR. HERMAN: Yeah.

1 JUDGE INGLESE: That also goes to the question of what
2 material is being used in this combination for the light pipe, Carter's material
3 or Tse's material?

4 MR. HERMAN: So, Carter's material is not limited to just
5 transparent materials, it can also be semi-transparent, Your Honors.

6 JUDGE OBERMANN: I'm not sure you've answered Judge
7 Inglese's question.

8 MR. HERMAN: Yes. I believe a second question was answered
9 in the middle of my attempts to find the answer to the first question, but I'll
10 return to that in a moment, Your Honor.

11 So, Your Honor, on page 73, the petition explains replacing Tse's
12 simple cover with a customized molded light pipe would have resulted in a
13 better, more customized dispersion of light. So, we're replacing Tse's simple
14 cover with a customized, molded light pipe. And the implication of that is
15 that the light pipe would be molded into the cover itself, and you can see that
16 in the sentence before. "Moreover, design features can be molded directly
17 into the integrated light pipe to further increase functionality
18 (CROSSTALK) --

19 JUDGE OBERMANN: That doesn't tell us what material you're
20 using. Have you told us in the petition whether it's Tse's material or Carter's
21 material?

22 MR. HERMAN: I believe, since the claims require a translucent
23 light pipe, that the combination would be using a translucent material, which
24 is a material that these (CROSSTALK) --

25 JUDGE OBERMANN: Yeah. Well, where is that -- where is that

1 in either reference, and where have you directed us, in the petition, to the
2 material that you're using in this combination?

3 MR. HERMAN: Because in this particular combination, the only
4 modification that we're proposing making is integrating a light pipe into the
5 cover. We're not proposing changing the material used. So --

6 JUDGE OBERMANN: So, you're using Tse's material, is that
7 what you're saying?

8 MR. HERMAN: Yes, we're using a translucent material just
9 formed as a light pipe instead a flimsy cover. That's what our
10 (CROSSTALK) --

11 JUDGE OBERMANN: So, this also depends on your argument
12 that even though Tse doesn't refer to translucent materials, or diffusion, that
13 it's obvious from Tse's disclosure? You're not relying on Carter for that?

14 MR. HERMAN: So, we're relying on Carter for diffusion in the
15 light pipes, Your Honor, not to change the type of plastic material that's
16 being used. The type of plastic material is just being formed differently.
17 Instead of being formed as a thin cover, as Tse itself is teaching, and as we
18 relied on in the prior ground, now that particular piece of plastic is being
19 formed differently. It's being formed --

20 JUDGE OBERMANN: I understand.

21 MR. HERMAN: -- (CROSSTALK) --

22 JUDGE OBERMANN: Same material?

23 MR. HERMAN: Yes.

24 JUDGE OBERMANN: Same material, different process?

25 MR. HERMAN: Yes.

1 JUDGE OBERMANN: Got it.

2 MR. HERMAN: Yes, that's what we're relying in Carter for, the
3 process for molding that light pipe into the cover itself.

4 So, I'll conclude my opening remarks by just very briefly
5 discussing secondary considerations. And if we could turn to Slide 35.

6 JUDGE INGLESE: You have about a minute and a half.

7 MR. HERMAN: Yes. Thank you, Your Honor. Actually, if we
8 could turn to Slide 36. Patent Owner's arguments regarding secondary
9 considerations fall short for multiple reasons: first, it hasn't shown the
10 required nexus. While the burden of proof, of course, rests on Petitioner
11 when it comes to unpatentability, Patent Owner bore a burden of production.
12 It was required to come forward with evidence showing a product falling
13 within the claim scope, and Petitioner submits that it did not do so here.
14 Instead, it just pointed to product pictures, included no claim charts. It
15 included no explanation of why the claims are satisfied. There was no
16 discussion of why its products include LEDs, include substrates, include
17 water passages, or employ translucent materials instead of something else as
18 the claims here require.

19 So, Patent Owner argues that its expert's bald statements without
20 any explanation, that its products are covered by the claims is enough.
21 Petitioner submits that that type of conclusory testimony falls well short.
22 Likewise, the mere fact that Patent Owner marks its products with the
23 number of the '363 Patent does not substitute for the required claim element-
24 by-element showing. Next, there was no showing of a long-felt need.
25 Patent Owner does not even explain what the need was, let alone why that

1 need was long-felt, besides the fact that the prior art at issue here is dated
2 many years before the '363 Patent was filed. Finally, there has been no
3 showing of industry praise. While a handful of reviews on the Home Depot
4 website are cited, that does not show industry praise.

5 With that, I'll reserve my remaining time for rebuttal.

6 JUDGE INGLESE: All right. Thank you, Mr. Herman. So,
7 Patent Owner's counsel, Mr. Israelsen -- did I pronounce that correctly?

8 MR. ISRAELSEN: Yes, Your Honor.

9 JUDGE INGLESE: Okay. Would you like to reserve time for
10 rebuttal?

11 MR. ISRAELSEN: I would, Your Honor, 15 minutes, please.

12 JUDGE INGLESE: Okay. I will just set the clock here, and once I
13 get the clock set, I'll let you know, and then I'll start it when you begin
14 speaking. Okay, you may begin when you are ready.

15 MR. ISRAELSEN: Thank you, Your Honor. Good afternoon. I'm
16 trying to share my slides here. I don't know if that's showing up on the
17 screen. But, in the event it's not, I can just refer to the numbers. Good
18 afternoon. As I noted, my name is Gregory Israelsen. I'm from the Law
19 Firm WilmerHale, representing Delta. And before we dive into the disputes
20 here, I think it would be helpful to provide a little more context for this
21 patent here.

22 And beginning on Slide 4, this is a very competitive market, and
23 Delta is constantly trying to innovate in a crowded space. Faucets, of
24 course, they have been around a long time, and even faucets with lights were
25 known before this patent. But that doesn't mean, as Petitioner suggested,

1 there was no innovation here. This patent it represents the fruits of Delta's
2 labor to add the light to a sprayhead. It could be for a shower or a kitchen
3 faucet, as we've been discussing, and it diffuses that light outwardly.

4 And Figures 1 and 3, which are depicted here on Slide 4, show an
5 illustration of what a lighted sprayhead might look like. And on Slide 5, the
6 patent explains that a lighted sprayhead might provide a visual status
7 indication, like, for example, whether the water is hot or cold.

8 Slide 61, it shows an example of a Delta commercial embodiment
9 with a temperature indicator light. This is particularly meaningful to people
10 who could benefit from understanding water temperature via light.

11 Slide 63 shows another example here of a sprayhead with a
12 downward-facing light. And a lighted sprayhead like this might illuminate a
13 space, such as within a shower, to make it safer or more pleasant.

14 Going to Slide 6, Delta embodies these solutions in the claims.
15 Each of the claims, shown on Slides 6, 7, and 8, include features of light
16 emitters, light piping, diffusing the light outwardly away from the housing,
17 and these features, which we're focused on today are in the claims.

18 Now, the Petitioner would have you believe, as the reply states and
19 as we've heard today, that because the '363 Patent is directed to a plumbing
20 fixture, that it requires little expertise to be understood. But that's no excuse
21 for the failures of the petition here.

22 Slide 2 summarizes the deficiencies of the references, and we've
23 been talking about a few those -- we've heard about some of those
24 deficiencies today, and we can talk more about them in detail, but I just want
25 to touch briefly on a few.

1 On Slide 2, one example is that the Petitioner made multiple
2 assumptions about what the references say. But, if you look, Your Honors,
3 at what the references actually disclose, they don't say what the Petitioner
4 claims.

5 As one example, the Tsengreference doesn't disclose the outer
6 illumination surface, nor does it have the translucent material in the second
7 and third embodiments that the Petitioner chose to rely on.

8 And at Slide 3, even if the references did have all of the required
9 limitations, which obviously we dispute, the petition used our patent's claims
10 as a roadmap in ways that are inappropriate and exhibit complete use of
11 hindsight.

12 As one example, the petition, for multiple of the grounds, they rely
13 on single-reference obviousness. And the Tseng Ground, T-S-E-N-G for
14 Ground 1, and the Tse Ground for Ground 4, T-S-E. But for neither ground
15 is there any explanation of why a person of skill in the art would have
16 modified that single reference to arrive at the claims. Slide 3 summarizes
17 the failings of some of those attempts to combine the various references.

18 So, in addition to the insufficiency of the grounds in the petition,
19 this patent is marked on actual products. We saw those examples on Slide
20 61, 63 just now. So, this actually provides a meaningful contribution to
21 what Delta is selling in the marketplace. And (CROSSTALK) --

22 JUDGE OBERMANN: I have a question there. I have a question.
23 You showed us some pictures that have a showerhead, or a faucet head, that
24 has light indicators so that somebody, who might need to know, visually,
25 would know if the water's hot or cold. That's not in your claims, is it?

1 MR. ISRAELSEN: So, in the independent claims, that's not in
2 the -- the temperature indicator is not in the claim, the light certainly is.
3 Some of the dependent claims do talk about a temperature sensor that
4 changes color. It could be blue if it's cold. It could be red if it's hot. And
5 thinking about, for example, the Schneider combination, that's what the
6 Petitioner is relying on the Schneider combination for, is to bring in a
7 temperature sensor into the sprayhead.

8 JUDGE OBERMANN: Okay. But your broadest claims don't
9 include those features that you're relying on for secondary considerations?

10 MR. ISRAELSEN: So, the broadest claims do talk about the light
11 that's part of the sprayhead. And I'll point Your Honor to Slides 63 and 64.

12 JUDGE OBERMANN: But there's no light indicator -- there's not
13 an indicator of temperature?

14 MR. ISRAELSEN: That's right, Your Honor. The broadest claims
15 don't have a temperature indicator in independent claims, that's true.

16 But, for example, on Slide 63 and 64, which is the showerhead,
17 that doesn't necessarily have a temperature indicator, it's just a light in the
18 shower space.

19 Okay. So, one more point to ground today's discussion. On Slide
20 10, there was a lot of discussion of the single-reference Tseng ground. And
21 the only ground that challenges independent Claim 10, as well as dependent
22 Claims 11 through 18, and Claims 2 through 5, depending on Claim 1, those
23 all rely only on the single-reference Tseng ground. And so, Your Honors, if
24 you agree with us on the same deficiencies, then at least those claims would
25 survive Petitioner's challenge.

1 And so, I'd like to start there with the deficiencies of the Tseng
2 ground. And if we go Slide 26, there is certainly extensive discussion about
3 the translucent material in Tseng, and that's one of the two deficiencies of
4 the petition with regard to the Tseng grounds.

5 Now, in Slide 27, all the claims do require a translucent light pipe,
6 so this argument was relevant to all of the claims. And again, to show this
7 translucent material, the petition refers to Tseng's paragraph 70, which
8 describes the light conductor from Tseng's first embodiment.

9 And Slide 28, to show the other claimed features, the Petitioner
10 relies on Tseng's second and third embodiments. And, Your Honors'
11 institution decision pointed out that those other embodiments have light
12 conductors with a different structure from the first embodiment.

13 JUDGE MURPHY: Counsel?

14 MR. ISRAELSEN: Yes, Your Honor.

15 JUDGE MURPHY: Let me interrupt you there for a moment.
16 This is Judge Murphy. So, what's your response to Counsel for Petitioner's
17 argument that the second and third embodiments merely build on the first
18 embodiment and, in fact, Tseng only discloses translucent material? And
19 where there are differences in the structure of the light pipe, or light
20 conductor in embodiments 2 and 3, Tseng points those out and never
21 discusses the different material. It's only translucent.

22 MR. ISRAELSEN: Yes, Your Honor. So, it's true that Tseng is
23 totally silent about what the material used in the second and third
24 embodiments is. And Petitioner, I think, mischaracterizes our position in
25 that they suggest that we would say that Tseng's second and third

1 embodiments must have a translucent material, and that's not what the record
2 reflects. What we said instead was Tseng is silent on what the second and
3 third embodiments say, and the petition only relied on the first embodiment.

4 And so what we have here is a deficiency of the petition in not
5 explaining what a person of skill in the art would have understood, or why
6 they would have understood the disclosure of Tseng's translucent material
7 with regard to the first embodiment, why that should have been applied to
8 the second and third embodiment.

9 Now, they came back in the reply and tried to backfill a bit, but
10 that was unsupported by any expert testimony. And so what we have in the
11 end is, Dr. Klopp, he explained, after looking at the references, he said, from
12 his view as an expert, there are suggestions of why somebody of ordinary
13 skill would have used some other material other than a translucent material,
14 perhaps a transparent material, when building Tseng's sprayhead for the
15 second and third embodiments, but that's all that we have. And so, there's
16 no -- ultimately, the Petitioner bears the burden here, and the petition is
17 silent, and they are speculating on what material you would have used for
18 the second and third embodiment, but they don't have an answer to
19 support --

20 JUDGE MURPHY: Wait, let me interrupt you there. When you
21 say the petition is silent, what do you mean?

22 MR. ISRAELSEN: So, in the petition, when they're talking about
23 the translucent material, they say, "Tseng refers to a translucent material, see
24 paragraph 70," and they moved on. They didn't give any discussion of why
25 somebody of skill in the art would have understood this mention of a

1 translucent material with regard to the first embodiment, and would have
2 applied that to the second and then third embodiment. It's just not in the
3 petition.

4 After we pointed that out in our response -- we asked Mr. Cook
5 about that in his deposition, and he said, yeah, I just relied on paragraph 70,
6 and that relates to Tseng's first embodiment, and we pointed that out in our
7 response. And in the reply, they opted not to give a second expert
8 declaration. Mr. Cook didn't submit another declaration. He didn't sit for
9 another deposition. And so, there is no expert testimony to support the
10 additional arguments that they introduced in the reply that say, well, here's
11 maybe why somebody would have understood the second and third
12 embodiment to also use a translucent material, but that additional
13 speculation is just pure attorney argument, and there's no expert support in
14 the record.

15 On the other side of it --

16 JUDGE MURPHY: There's no legal requirement that they file a
17 reply declaration.

18 MR. ISRAELSEN: That's true, Your Honor. Absolutely, there's
19 no requirement. But what that does leave us with is where they have added
20 additional arguments of what a person of skill in the art would have inferred,
21 the second and third embodiment -- to what material the second and third
22 embodiment would have used, if they don't have any expert testimony
23 saying why a person of skill would have inferred that, then the Board is left
24 just purely with attorney argument.

25 And on the other side --

1 JUDGE OBERMANN: We have the reference. We have the
2 reference itself. It refers in one embodiment to translucent material, and
3 then it goes on, and builds on that, and talks about other embodiments, and
4 you're asking us to divorce that. I can see your point if this was anticipation,
5 but for an obviousness ground, it's pretty clear that they're relying on the
6 disclosure of several embodiments here. And we don't -- their position is,
7 we don't even need expert testimony, that it's pretty simple, we can read this
8 reference. And when there's no reference to any other material in Tseng,
9 why shouldn't it be inferred as a matter of obviousness that one would have
10 used the material that's referenced in Tseng?

11 MR. ISRAELSEN: So, Your Honor, if the petition had said that in
12 the petition, then that would be a different case. But in the reply --

13 JUDGE OBERMANN: They pretty much did. They cite the part
14 of Tseng that refers to the type of material it uses. Why isn't that enough? I
15 mean, come on.

16 MR. ISRAELSEN: So -- you're right, Your Honor, they cite the
17 part of Tseng that refers to the first embodiment's material. But what they
18 actually did, Your Honor, in the reply, was they double-down and said, we
19 are not relying on the first embodiment. They said, they're not relying on
20 any modifications to the second and third embodiment, they're only relying
21 on the explicit disclosure of those embodiments, and Tseng doesn't have any
22 disclosure of what material they use.

23 So, there's certainly conjecture. The Petitioner has offered some
24 speculation about reasons why maybe somebody would have used that same
25 material for those embodiments. But there's also evidence in the record

1 from our expert, who put in his declaration, he sat for a deposition, and the
2 Petitioner had the opportunity to ask questions about that. And he said, there
3 are reasons why a person of skill reading Tseng wouldn't have thought to use
4 this translucent material for the second and third embodiments. Tseng,
5 itself, it says these have different structures, and the light conductor,
6 specifically, is one of the key things that's different between the first
7 embodiment and the second and third embodiment.

8 And so, if a person of skill in the art, Dr. Klopp testified, is looking
9 at, well, here's a different light conductor, with a different objective,
10 different structure, then maybe they would have used a different material so
11 that they could achieve those different objectives more successfully. But
12 with only one expert testifying, we don't have -- this isn't (CROSSTALK) --

13 JUDGE OBERMANN: But you're telling us it wouldn't have been
14 obvious to use the only material that Tseng mentions?

15 MR. ISRAELSEN: The Petitioner themselves --

16 JUDGE INGLESE: Wait. I'm sorry, this is Judge Inglese. Before
17 you answer that, I'll add something else maybe for you to respond to as well.

18 So, I understand your point. But on page 15 of the petition, when
19 Petitioner's giving an overview of Tseng, Petitioner says, Tseng includes
20 three embodiments with slightly different internal structures, referring to the
21 light conductor a few lines down. It says, "This petition focuses on the
22 second and third embodiments, but because Tseng's three embodiments are
23 overlapping, and have numerous common structural features, many of which
24 are discussed only in the context of the first embodiment, this petition also
25 cites to certain first embodiment passages."

1 So, there is some language, in the petition itself, explaining
2 Petitioner's reliance on the first embodiment?

3 MR. ISRAELSEN: Yes, Your Honor. They do have that -- at the
4 top, they have what's effectively a boilerplate statement that, well, maybe
5 there's some other disclosure. But when they're actually discussing the
6 translucent material claim element, they only refer to paragraph 70, check
7 the box, then move on.

8 And so I want to make sure that I've addressed Your Honor's prior
9 question about obviousness here. And again, that's not what the Petitioner
10 has said they're trying to do. They've taken the position that there's no
11 obviousness required. And it would be one thing if they were saying, look,
12 Tseng is silent, and somebody of skill in the art, they would have
13 understood, from the first embodiment, that you would also apply that same
14 material to the second and third embodiment, maybe you would combine the
15 embodiments, here's why somebody would have understood that. Even if
16 that is a pretty simple logical leap, in the *Apple v. Arigina Tech* case, that's
17 exactly what the Board addressed. That even if you have a very simple
18 obviousness leap, if there's no evidence, and no allegation that that leap
19 should be made, no motivation for making that leap, then it's inappropriate
20 for the Board to do so.

21 And here, the Petitioner has taken the position that the Board
22 shouldn't do that because they don't need to rely on obviousness. In their
23 reply, they explicitly said we are not relying on obviousness. We think that
24 everything you need is already in Tseng's second and third embodiments.
25 And so, we have to take the Petitioner at their word that there's no

1 obviousness required here. But then, when we go look at what Tseng
2 actually requires, it's silent. And so, in that situation, where there's an
3 inference that's required, there is, as Your Honor said, effectively,
4 obviousness would be required, but the Petitioner has asked the Board not to
5 rely on obviousness for that point.

6 So, I think we've covered the translucent issue, but I'm certainly
7 happy to answer any other questions.

8 Absent that, there's another reason that I'd like to touch on for why
9 Tseng is deficient, and that relates to the direction that light travels in
10 Tseng's light conductor. And so, going to Slide 11 is where that discussion
11 starts.

12 And so, stepping back for a bit for context Slide 12 shows that
13 Claim 10 recites an outer illumination surface that extends perpendicular to
14 the longitudinal axis of the housing. And so, here the requirement is that
15 there is light that's moving out to the sides of the sprayhead.

16 And in Slide 13, in Figure 1 from the patent, we can see a
17 depiction of this, where the outer illumination surface is on the side of the
18 sprayhead, and that's highlighted in blue here. And light is moving laterally
19 out the side surface. In Tseng, it doesn't describe light moving out the side
20 of its sprayhead.

21 On Slide 15, Tseng, as Your Honors pointed out earlier, Tseng
22 only describes LED 40 shining light downward through input face 311 and
23 then continuing on downward through the output face 313. And Mr. Cook
24 agreed with that --

25 JUDGE MURPHY: Counsel? Counsel?

1 MR. ISRAELSEN: Yes, Your Honor.

2 JUDGE MURPHY: Counsel, this is Judge Murphy. Let me stop
3 you there for a moment. If you go back to Slide 14 --

4 MR. ISRAELSEN: Yeah.

5 JUDGE MURPHY: -- you're illustrating Figure 4 from the '363
6 Patent, right?

7 MR. ISRAELSEN: That's right.

8 JUDGE MURPHY: And so -- and you've highlighted the outer
9 illumination surface 184 that protrudes radially outside of the outer wall of
10 the fixture. And so, when I look at that sectional view, and I look at Figure
11 36 in Tseng on the next slide, or better yet, Figure 32 from Tseng, also in a
12 sectional view, it also has what it calls an annular protrusion, 383 in Tseng
13 32. How is the Tseng annular protrusion -- excuse me, 383, how is that any
14 different than the annular protrusion in Figure 4 of the patent numbered
15 '184?

16 MR. ISRAELSEN: Yes, Your Honor. So, if you were looking at
17 Figure 4 on Slide 14, you also have -- what you have is the LED is 172 here,
18 and the LED is shining upward. And so, if you can imagine the light
19 traveling upward out of the LED, it's going to hit this light conductor, and
20 the light is going to scatter. There's no clear, straight shot path for it to go
21 outward. It's going to hit that angled wall at the top, and then it's going to
22 reflect and then go sideways. And so, you end up -- that's where you end up
23 having light moving laterally out the side of '184.

24 Tseng -- it doesn't work like that. Tseng, it has light moving
25 downward, and when it comes out the bottom face, if you see like on Slide

1 17, it comes out this bottom face 313, and there's no wall, or angle, or any
2 other structure for the light to hit and bounce off of, it's just going to come
3 straight out the bottom, out this output face 313.

4 And so, without seeing it -- when it's just -- looking at it at a very
5 high level, sure, there are similar shapes here, but the way that the light
6 moves through the material, and the way that those internal reflections are
7 happening, that's exactly why we've relied on Dr. Klopp to help us
8 understand that, and to help us understand how the light would move
9 through that material. And what he explained was, when you have the light
10 moving straight downward, through the input face 311, and through the
11 output face 313, there's nothing to reflect or diffuse that light going
12 anywhere except for straight out the bottom.

13 JUDGE MURPHY: But didn't he also testify that at least some of
14 the light will deflect or reflect outwardly through that perpendicular surface?

15 MR. ISRAELSEN: So, Your Honor, what he actually said was --
16 he didn't say that any of the light would reflect outwardly. The Petitioner
17 asked, well, is it possible that some stray photons could have made their way
18 out, and are you testifying that, no, that's impossible? And he's like, well,
19 no, I can't say that it's impossible for any photon to have escaped, but not
20 any kind of a substantial amount. And somebody reading this reference
21 would have understood that, generally, there's not enough light for this side
22 surface to be considered an outer illumination surface, that all of the light is
23 being directed in a downward direction.

24 JUDGE MURPHY: And that's because there's no angled surface
25 or any other structure to reflect it outwardly. Is that the point?

1 MR. ISRAELSEN: Yes, exactly, Your Honor. The LED is
2 shooting downward, and if it's going through a material that doesn't have --
3 that's not -- well, we don't know if it's translucent or transparent, like we
4 were just talking about, but if it's going through a material, and it doesn't
5 have a sidewall or anything to reflect or make a light change direction, the
6 light's just going to keep going straight.

7 JUDGE MURPHY: Thank you, Counsel.

8 MR. ISRAELSEN: Thank you, Your Honor. And we can see that
9 on -- I just want to correct one point that I heard earlier. If we go to Slide
10 16, Mr. Cook, in his deposition, we did ask him quite a few questions, in
11 fact, about the direction that light moves in, in Tseng. And he says, that the
12 input face is where the light enters. And he said, yes, that's correct. And the
13 light would go downward through the output face 313, yes.

14 And then, if we go to Slide 18, we ask him, we said, no other
15 surfaces are marked as an output face, correct? And he said, yes, that's
16 correct, that's what I see. And so, it's not the case that we're not asking Mr.
17 Cook for his testimony about what other output faces there might be. He
18 said, the only output faces are these ones that are marked as 313, and those
19 are (CROSSTALK) --

20 JUDGE OBERMANN: Counsel? Counsel? Counsel?

21 MR. ISRAELSEN: Yes, Your Honor.

22 JUDGE OBERMANN: This is Judge Obermann. What you're
23 saying, I think, tell me if I'm wrong, is that the prior art -- everyone agreed,
24 including, I think, your witness, that there could be some scatter. But what
25 we're really seeing here is, everyone knows that when light goes in one

1 direction, it's going to go in that direction unless there's something to
2 persuade it to go in a different direction.

3 MR. ISRAELSEN: Sure.

4 JUDGE OBERMANN: What I'd like you to do for me, can you
5 show me where the claim language excludes the scatter of the prior art? In
6 other words, if we accept your proposition that the prior art reference here
7 does not have a mechanism that's going to direct that light to go out the other
8 surface, but we all agree that some photons are going to scatter, even if it's
9 going downward, why doesn't that scatter meet the claim? And I'd like you
10 to refer to some language in the claim that we could latch onto for that.

11 MR. ISRAELSEN: Yes, Your Honor. So, in Claim 10, that's the
12 one that this light moving in a perpendicular direction is relevant to. And
13 the language that we're talking about here is an outer illumination surface
14 extending perpendicular to the longitudinal axis of the housing. So, if the
15 housing is longitudinal, and then we have an outer illumination surface that's
16 perpendicular to that, it would be light that's moving out the sides. And so,
17 Your Honor, the Petitioner wants to take the position --

18 JUDGE OBERMANN: Don't we have an outer illumination
19 surface in Tseng? I mean, it's there.

20 MR. ISRAELSEN: So, there is a surface that is on the side of
21 Tseng, this annular protrusion, but the -- Dr. Klopp, he testified that the only
22 meaningful light that's going to be coming out, is coming out Tseng's bottom
23 surface. Tseng doesn't have any suggestion, explicitly, that there's light
24 that's going to be coming out the sides of --

25 JUDGE OBERMANN: Okay. I don't want to make your case for

1 you, but is it really -- the next clause, "translucent light pipe defining a
2 closed loop to diffuse light from the light emitters outwardly to the outer
3 illumination surface," does that require that the light actually has to be
4 directed toward that outer illumination surface or is scatter enough to meet
5 this claim?

6 MR. ISRAELSEN: So, Your Honor, I agree with you that that
7 additional part of the claim is relevant, that the light has to be scattered, or
8 diffused outwardly to the outer illumination surface. So, if you have the
9 outer illumination surface that there's, but there's not sufficient light going
10 outwards, then it's not going to meet this second (CROSSTALK) --

11 JUDGE OBERMANN: Well, where do you get that? We need to
12 have something in the claim that would exclude the -- let's call it,
13 unintentional scatter that we see in Tseng. If we accept that light is being
14 directed downwardly, and there's nothing in the path of the light that's going
15 to cause it to change direction and go outwardly from that side surface, but
16 we also recognize that there are photons that are scattered and will actually
17 diffuse through that outer illumination surface, why isn't that enough to meet
18 this claim?

19 MR. ISRAELSEN: Well, so, Your Honor, if -- there's a number of
20 assumptions that would need to be met before the light would scatter to go to
21 the side. So, Dr. Klopp, he explained --

22 JUDGE OBERMANN: I'm sorry, but didn't your expert testify
23 that, of course, there would be some scatter? That he couldn't say that there
24 wouldn't be photons that are going that way?

25 MR. ISRAELSEN: Yeah. So, I don't think he said of course there

1 would be scatter, I think he said, he couldn't necessarily rule that out. But
2 what we have here is we only have what the reference can teach us, and the
3 reference says there's only one output surface, and that's on the bottom.

4 JUDGE MURPHY: Counsel, this is Judge Murphy. I want to
5 follow up on that, please. In the Tseng exhibit itself, Exhibit 1004.

6 MR. ISRAELSEN: Yes, Your Honor.

7 JUDGE MURPHY: All right. Yeah, 1004, paragraph 98, Mr.
8 Cook's -- in his declaration, testifies that this is a disclosure of light diffusing
9 outwardly by intention, not by happenstance, so to speak. And so, if you can
10 find paragraph 98 in Tseng, can you tell us why Mr. Cook's testimony
11 should not be credited, that this is sufficient to meet the claim language that
12 Judge Obermann was referring to?

13 MR. ISRAELSEN: Yeah, Your Honor, let me make sure that I'm
14 following that same part. You said paragraph 98, right?

15 JUDGE MURPHY: Yes, 98 in the Tseng reference.

16 MR. ISRAELSEN: Okay. Yeah, so -- I see this. So, this is
17 regarding the third embodiment. And the only thing that this says is that
18 there's an annular protrusion that moves outwardly. So, it's true that it
19 describes this annular protrusion, but it doesn't say that light is extending
20 outwardly, it's just saying the structure goes wider. And so, again, this is a
21 situation where there's some inferences that --

22 JUDGE MURPHY: Well, it does say -- it starts out that paragraph
23 by -- it says to enhance light transmission.

24 MR. ISRAELSEN: Sure. And, Your Honor --

25 JUDGE MURPHY: (CROSSTALK) --

1 MR. ISRAELSEN: Yes, it says, to enhance light transmission.
2 So, if you imagine the -- saying, like the sprayhead, and the light is coming
3 out the bottom face, if you don't have that annular protrusion, you've got a
4 smaller circle that light can come out of. And so, what this is saying is, if
5 you make that surface bigger, that it would enhance light transmission. And
6 that makes sense, that if you've got light coming out of bottom face and you
7 make that face bigger, then it would enhance the light transmission. And
8 that doesn't necessarily mean that because you're making your output face
9 bigger that suddenly you have light coming out the side as well. That's an
10 inference that's just not explicitly in Tseng.

11 JUDGE OBERMANN: May I ask -- I'm sorry to interrupt. Do we
12 have either expert opining on the meaning of the phrase that Judge Murphy
13 just noted about the enhancement of the transmission, and what you're just
14 talking about? Because that seems like something that we would need some
15 testimony about, not just argument.

16 MR. ISRAELSEN: Yes, Your Honor. So, Dr. Klopp, he pointed
17 to this exact phrase to enhance light transmission when he was talking about
18 what he would have understood the direction of Tseng's light to go. And so,
19 one of the --

20 JUDGE OBERMANN: Where is that? Where is that? That
21 would be great. Where is that?

22 MR. ISRAELSEN: Yes, Your Honor.

23 JUDGE OBERMANN: Did he expound upon it in his deposition
24 perhaps?

25 MR. ISRAELSEN: If we go to paragraph 93 of the response of the

1 POR -- I'm sorry, of Dr. Klopp's declaration.

2 JUDGE OBERMANN: I'm sorry, which paragraph was that?

3 MR. ISRAELSEN: Paragraph 93. Okay. So, in paragraph 93, if
4 you go to the second sentence, he starts talking about this bottom surface of
5 the protrusion. And specifically here, he's responding to Mr. Cook's
6 highlighting in the petition. In our demonstrative Slide 19, we can see a
7 reproduction of that highlighting, where Mr. Cook has alleged that the LEDs
8 are going to be shining light sideways, and the Petitioner needs the lights to
9 be shining sideways so that, again, we can have that internal reflection the
10 lights would bounce around. And in that instance, in the Petitioner's
11 position, then the light would end up coming out the side of that surface.
12 But absent the -- if we start with what direction are the light's coming out of
13 the LED, that they're only coming out downward, then we don't start with
14 that internal bouncing or reflection of the light, within the light conductor
15 itself. And so --

16 JUDGE OBERMANN: Okay. And I think I'm following you and
17 thank you for this paragraph 93. Now my concern is that Dr. Klopp, in
18 paragraph 93, seems to be tying this to the lack of the use of a translucent
19 material in Tseng's third embodiment. And if we assume that it would have
20 been obvious to use translucent material in Tseng's third embodiment, does
21 that negate everything else he's saying because there would be diffuse scatter
22 that would intentionally send it sideways? Wouldn't that provide the
23 interference that we require to change the direction of the downward-
24 directed light?

25 MR. ISRAELSEN: So, Your Honor, I think that these two issues

1 stand alone, that you don't have to agree with us on the translucent material
2 in order to also agree with us on the direction of the light. But to your
3 question, it's true that if this was made out of a translucent material, there
4 would be more internal scattering than there would be if the material was
5 completely transparent, certainly. But that still doesn't suggest that Tseng
6 discloses any surface other than the bottom surface as being an illumination
7 surface.

8 JUDGE OBERMANN: Okay. Look, is there anything in the
9 disclosure of your patent that indicates that the outward transmission of light
10 requires anything other than a translucent material? In other words, you
11 have directed us to this surface in one of the figures of the patent, that pretty
12 clearly provides something that this downwardly-projected light is going to
13 bounce off of and go in another direction. Is there any text in your
14 specification indicating that that's how your inventors are envisioning this
15 invention? In other words, does it say that in order to have this required
16 illumination out of this side illumination surface that you need to have,
17 basically, an angled surface in the path of the light? You know what I'm
18 trying to say? I want to see if there's anything in your spec that would allow
19 us to read Claim 10 as not contemplating scatter from a translucent material?

20 MR. ISRAELSEN: Yeah, Your Honor, I think I understand your
21 question. So, I would point -- we were just talking about Figure 4, and
22 certainly we can take what the figures would describe -- or what a person
23 with skill in the art would have understood just from the figures themselves.

24 JUDGE OBERMANN: It would be really helpful though, because
25 I have a feeling that your spec talks about translucent material, and that that

1 may be enough to sort of, for lack of a better word, catapult the light through
2 the side.

3 MR. ISRAELSEN: Your Honor, I can take a look at that and
4 follow up in a surrebuttal for exact part of the spec, but --

5 JUDGE OBERMANN: That would be helpful, thank you. Yeah, I
6 don't want to take up any more of your time. Thank you so much.

7 MR. ISRAELSEN: Sure.

8 JUDGE INGLESE: Could I just ask one question? So, you had
9 mentioned earlier that the purpose of the annular protrusion is to make the
10 output face 313 larger, because your position is that -- because the output
11 face 313 is where the light's being emitted, it's not being emitted through the
12 side. So, if the purpose of the annular protrusion is to length -- for lack of a
13 better way to put it, lengthen that output face 313, why do the external
14 sleeves not extend all the way to the bottom? Why do they stop before the
15 annular protrusion? And is there anything in the record that addresses that?

16 MR. ISRAELSEN: So, Your Honor, that didn't -- Tseng is not
17 explicit about what the need of that is, and that exact question didn't come
18 up in the record. But you can imagine if -- the way that Tseng describes
19 these pieces as they're manufactured separately, which makes sense, because
20 they're made out of different materials, and then they are later assembled
21 together, and so if you imagine this light conductor, that it snaps up into the
22 bottom of the spray face, that if those sleeves are not supported around the
23 base by something, that they might slip down or not be held in as securely.
24 And so, that's one possible reason, but Tseng isn't explicit about why the
25 sleeves don't come down all the way around the outside, it's just silent on

1 that point.

2 JUDGE INGLESE: Okay, thanks.

3 MR. ISRAELSEN: So, what Dr. Klopp did explain about those
4 sleeves is, to the extent that there are any stray photons that are scattering as
5 the light is coming out of the LED, that those sleeves would help reflect, or I
6 guess, channel the light in a downward direction, so that by the time --
7 there's a bit of a distance between where the light enters the input face 311 at
8 the LED, and by the time it gets to the end of those sleeves. And so, if there
9 was an opening, or the annular protrusion extended up higher on the side of
10 Tseng, Dr. Klopp explained, maybe the light would have been more prone to
11 moving laterally, but because those sleeves help focus it, by the time the
12 light gets to the bottom in the output face, it's all moving in the downward
13 direction. And that's where he uses the analogy of a flashlight, that you've
14 got the light kind of moving through the tube, and by the time it gets to the
15 end of the tube, it's just going straight out. And that helps with enhancing
16 the light transmission, which is exactly what Tseng says its purpose is.

17 Your Honors, I'd like to briefly talk about the Tse reference as
18 well. And moving to Slide 37, one of the issues that -- with Tse is that its
19 cover is not a light pipe. And so, on Slide 38, as we've been discussing, all
20 the claims require a light pipe. And so, this deficiency of Tse is relevant to
21 all of the claims. And there's no dispute among the parties that light pipe is
22 a term of meaning to -- of someone that's skilled in the art, but not every
23 object that has light pass through it is a light pipe, right?

24 So, an example, like, a window might have light pass through it,
25 but a window's not a light pipe, and Tse's cover is too thin to be a light pipe.

1 And the Petitioner implicitly acknowledged that in the petition, where they
2 said, it might be the case that Tse's cover isn't a light pipe, and that's why
3 they brought in the Carter combination.

4 But in the first instance, Dr. Klopp, he looked at Tse's disclosure,
5 and its cover just is not -- doesn't have the right structure -- it's not
6 sufficiently thick to carry light in a meaningful way. And so, for at least that
7 reason, the cover is not a light pipe.

8 The second issue with Tse, which this one I think also is helpful,
9 because it's an independent reason that Tse is deficient, is that -- excuse me.
10 The second issue with Tse is that it's cover doesn't completely surround the
11 water outlet. And so, what Petitioner would have you believe is that every
12 individual water outlet opening is itself a water outlet, but that's inconsistent
13 with the understanding of what a water outlet would mean to a person of
14 skill in the art.

15 And so, if we looked at Slide 35, this is what the '363 Patent shows
16 the light pipe doing when it surrounds the water outlet, that it's completely
17 surrounding each opening of the water outlet. And in the specification at
18 column 6, lines 3 through 5 here on the bottom side of Slide 35, you can see
19 that the specification refers to water outlet openings. And so there's a
20 difference between the water outlet and then the water outlet openings when
21 you're using those terms.

22 And on Slide 36, Tse, it doesn't -- Tse's water outlet openings are
23 different than the water outlet. Of course, you can't individually shut off
24 each one of these water outlet openings on the showerhead. The outlet is the
25 end of Tse's showerhead, and Tse's cover doesn't completely surround the

1 outlet, and Mr. Cook, he admitted that.

2 JUDGE MURPHY: Is that in the claim though? Where is that in
3 the claim, one of the independent claims?

4 MR. ISRAELSEN: Yeah. So, in independent Claim 19, it says
5 that the light pipe surrounds the water outlet. And so, that's the whole issue,
6 Your Honor, is that the Petitioner is confusing a water outlet with a water
7 outlet opening. And certainly Tse has many different water outlet openings,
8 and only some of them -- some of them are inside the cover circle, some of
9 them are outside the cover circle, but the water outlet itself is not surrounded
10 by the cover.

11 JUDGE MURPHY: What's the antecedent basis in that claim for
12 the water outlet?

13 MR. ISRAELSEN: So, the claim, we have -- Claim 10, a spray
14 face fluidly coupled to the waterway and defining a water outlet.

15 JUDGE MURPHY: And then -- so, that's the water outlet being
16 referenced down below?

17 MR. ISRAELSEN: Correct.

18 JUDGE MURPHY: And I guess, if I understood Petitioner's point,
19 they're saying the claim doesn't require surrounding all of the outlets; that
20 this reference Tse has a water outlet that is being surrounded by this semi-
21 transparent material?

22 MR. ISRAELSEN: Yeah, Your Honor. So, I just want to be clear,
23 I might have misspoken. So, Claim 19 is what has the closed loops
24 surrounding the water outlet. And so, just to be clear, what the Petitioner's
25 position is, that Tse has the water outlet openings, and those are what should

1 be considered the water outlet in the claim. And what we're making clear is
2 that there's a difference between a water outlet, and that's the showerhead as
3 a whole, where the outlet is what you can -- you turn it on and off for
4 shower, and the water that's coming out of the shower, the outlet, is what
5 turns on and off -- that each one of those individual holes isn't turning on
6 and off. And the specification refers to water outlet openings separately
7 from a water outlet. And so, that's why that language matters there, that the
8 claim requires surrounding the water outlet, and Tse doesn't have that.

9 JUDGE INGLESE: Counsel, I just wanted to let you know that
10 your time is up.

11 MR. ISRAELSEN: Yes. Thank you, Your Honor. So, just
12 finally, I'll just say that there's a number of tertiary references here, and none
13 of those references -- I guess they're secondary references. But these
14 additional references, none of them are -- the Petitioner relies on them to
15 cure deficiencies in Tse or Tseng, but those additional references don't cure
16 those deficiencies. And besides that, there's problems with the Petitioner's
17 motivations to combine as well.

18 And with that, I'll reserve for the remainder of my time. Thank
19 you.

20 JUDGE OBERMANN: Can I just ask a question --

21 MR. ISRAELSEN: Yes.

22 JUDGE OBERMANN: -- and we won't count this towards your
23 time.

24 MR. ISRAELSEN: Sure.

25 JUDGE OBERMANN: Is your position that both of these experts

1 qualify as persons of ordinary skill in the art?

2 MR. ISRAELSEN: So, Your Honor --

3 JUDGE OBERMANN: Have you suggested that at all?

4 MR. ISRAELSEN: Yes. The record is clear. In the response, we
5 pointed out that Mr. Cook does not qualify under our definition of what a
6 person of skill in the art is. And we did ask him about his qualifications
7 fairly extensively in his deposition from --

8 JUDGE OBERMANN: I've read that. I've read that. Your friend
9 has said that your expert has similar non-professional experience in these
10 fields. Can you point us to anything that makes your expert qualified?

11 MR. ISRAELSEN: Yes, Your Honor. So, both experts have
12 submitted their CVs here, and in Dr. Klopp's experience, he has extensive
13 experience working with optics and designing devices that use optics that he
14 understands how light moves through materials. We asked Mr. Cook what
15 his experience with optics were and in his deposition, page 57, line 18, it
16 effectively was that in electronic devices that have indicator lights on them,
17 the fact that they have those indicator lights are what he has -- his
18 experience, he says. So, line 18, "So, your experience with optical products
19 includes electronics that use optics for communications or indicator lights?
20 Is that right? Correct. Anything else? No, that covers it."

21 And so, Mr. Cook, he has experience with network switches,
22 routers, modems, that sort of thing that have lights on them, but just having a
23 light on a router isn't what -- the optical experience that we're talking about
24 here, where obviously, a lot of the dispute is, how is light going to move
25 through a material, and is it going to be reflected, or is that material going to

1 work -- act as a light pipe or not?

2 JUDGE OBERMANN: Okay. And your expert does have
3 experience with that?

4 MR. ISRAELSEN: Yes, Your Honor.

5 JUDGE OBERMANN: Where do we find that? I guess I can
6 look. I'll find it.

7 MR. ISRAELSEN: Yeah. In his curriculum vitae, he explained
8 his experience with optics, and I'm happy to point you to some more --

9 JUDGE OBERMANN: If you could just tell us the paragraphs.
10 You don't have to read them into the record, but if you tell us the paragraphs,
11 that might help.

12 MR. ISRAELSEN: Yes, Your Honor. So, in his declaration,
13 starting on page 3, he talks about his qualifications and experience. And
14 specifically paragraph 6, he talks about his experience with optics, and that
15 goes on in some of these following paragraphs as well.

16 JUDGE OBERMANN: Okay, that's fine. Thank you very much,
17 Counsel.

18 MR. ISRAELSEN: Thank you.

19 JUDGE MURPHY: Counsel, I had one more follow-up for you.
20 This is Judge Murphy. Petitioner's Counsel, during his argument, said there
21 is no dispute that Tse's disclosure of a semi-transparent material includes the
22 translucent light pipe claim limitation. Is it in dispute or not?

23 MR. ISRAELSEN: So, Your Honors, with respect to Tse's
24 discussion, we did not focus on that in the briefing, that was an issue during
25 the preliminary phase, but once the proceedings started, we didn't focus on

1 that. But that's not necessary because Tse has plenty of other deficiencies
2 that we did point out.

3 JUDGE MURPHY: So, it's not in dispute?

4 MR. ISRAELSEN: It's not in dispute that Tse describes a semi-
5 transparent material, and we didn't dispute that that would -- as Petitioner
6 alleges, refer to a translucent material.

7 JUDGE MURPHY: All right, thank you.

8 MR. ISRAELSEN: Thank you, Your Honor.

9 JUDGE INGLESE: Okay, Mr. Herman, you have 15 minutes for a
10 rebuttal. You can begin when you are ready.

11 MR. HERMAN: Thank you, Your Honor. Now, just as it did in
12 its briefing, during its presentation today, Patent Owner repeatedly intends to
13 negate and change the prior art's disclosure and read limitations into the
14 claims. So, I'll begin with -- like I did in my initial presentation with the
15 Tseng reference, and Patent Owner's assessment of Tseng is representative
16 of all of this.

17 So, during his presentation, Patent Owner contended that the
18 petition does not address and is silent on how Tseng's embodiments
19 interrelate and work together. Respectfully, that's wrong. As Your Honors
20 noted during Patent Owner's presentation, on page 15 of the petition, the
21 petition specifically noted that the three embodiments overlap and share
22 features, thus all of the embodiment's discussion needs to be considered to
23 understand how they operate. And Mr. Cook said the same thing in his
24 declaration, that's Exhibit 1003 at paragraph 92.

25 Next, the art here is clear. Tseng says that its faucet is to be made

1 from translucent material. Tseng also says that its faucet's light conductor
2 includes components that extend out the sides of the faucet to enhance its
3 ability to transmit and emit light. So, paragraph 98 of Tseng is exemplary of
4 that. That paragraph is referring to an intentionally-designed light conductor
5 that is intended to emit light not only downwards but also out the sides of
6 Tseng's faucet.

7 In an answer to one of your questions that you directed to Patent
8 Owner, Mr. Cook did specifically testify that that passage, found at
9 paragraph 98 of Tseng, means that light is coming out the sides of Tseng's
10 faucet. You could see that in Exhibit 1003 at paragraphs 174 through 175.
11 There, Mr. Cook specifically correlates Tseng's discussion, in paragraph 98,
12 and concludes that that means that light is coming out the side of Tseng's
13 faucet.

14 JUDGE MURPHY: Yes, but why? He doesn't explain why he
15 concludes that.

16 MR. HERMAN: So -- because that's the intent of the design. The
17 intent of the design is for light to be coming out of the sides. That was
18 Tseng says, and --

19 JUDGE MURPHY: No, it doesn't.

20 MR. HERMAN: So, respectfully, Your Honor, it does. That
21 paragraph says that the purpose of that annular protrusion is to enhance light
22 transmission, not just shine light downwards, but to do something different.
23 But -- and the --

24 JUDGE MURPHY: But your question -- no, the question, as I
25 understand it, that counsel's raising, is that the enhancement of the light

1 transmission is downward not outward. That's their point. And we're trying
2 to grapple with what the record provides to help us decide which party is
3 right. Is it enhancing light transmission in a downward direction or simply
4 by the fact that it's shaped in an annular protrusion? Is that sufficient to
5 enhance light outwardly, away from the housing or in a perpendicular
6 direction from the longitudinal axis?

7 MR. HERMAN: So, putting aside that Mr. Cook testified that
8 that's exactly what happens in Tseng. There are two things that I can point
9 Your Honor to that I believe constitute admissions and resolve this particular
10 issue. The first is the 870 --

11 JUDGE OBERMANN: You can't admit away the disclosure of the
12 prior art though.

13 MR. HERMAN: But you can say things that significantly impact
14 the credibility of both what you say and what your experts say. And I
15 believe that that has happened here --

16 JUDGE OBERMANN: Okay, show us. Show us.

17 MR. HERMAN: -- reasons why that's happened here. The first
18 reason is, that Patent Owner, and it's expert, alleged that that '874 reference
19 that's in Tseng -- that 874 reference that's in Tseng, according to both Patent
20 Owner and Patent Owner's expert, is fundamentally important to
21 understanding how Tseng operates. And what does that '874 Patent say? It
22 unambiguously says that light comes out, not just the bottom, but also the
23 sides of the light conductor. There are --

24 JUDGE OBERMANN: Can you please refer us to the record?

25 JUDGE MURPHY: Yeah, I'm not following you with the

1 reference to the '874 Patent.

2 MR. HERMAN: Sure. I have it on our demonstratives, Your
3 Honor.

4 JUDGE MURPHY: Okay.

5 MR. HERMAN: And if you look on Petitioner's demonstrative
6 Slide 19, Petitioner's demonstrative Slide 19, at the beginning, at the top of
7 the slide is paragraph 170 from Patent Owner's expert declaration, where it
8 says you have to look at this '874 reference. And the figures on the bottom
9 are a figure from the '874 reference, that's Figure 2, and the passage from the
10 '874 reference. And what does the '874 reference say? It says that light may
11 also be output from the outflow pipe 50 in the region of the exposed outer
12 surface area 72. And what's the outer surface area 72? It's --

13 JUDGE OBERMANN: This is not in your grounds. I'm confused.
14 Why are we looking at this to interpret the paragraph from the reference that
15 is actually in your ground?

16 JUDGE MURPHY: The '874 Patent is what? Is that a reference in
17 any of your grounds?

18 MR. HERMAN: It's referenced in Tseng. And the reason I'm
19 pointing Your Honors to this is because this undermines the credibility of
20 both Patent Owner's expert and the arguments that Patent Owner is
21 presenting you with today. Patent Owner is saying that one of ordinary skill
22 of the art would understand Tseng's only emitting light downward. But the
23 very prior art on which Patent Owner is relying to say other things about
24 how Tseng operates says the opposite. It says that, no, light is not emitted
25 only downwards, light is also emitted outside of the sides. So, this is a

1 credibility issue. This goes to the credibility of Patent Owner's arguments
2 and the credibility of Patent Owner's expert.

3 Other references say --

4 JUDGE MURPHY: And --

5 MR. HERMAN: -- the exact opposite of what Patent Owner and
6 Patent Owner's expert are trying to tell you today.

7 JUDGE MURPHY: No, understood. And I understand the point
8 you're making. Is there a reference to the '874 Patent, which is Exhibit 2009,
9 right, on your slide?

10 MR. HERMAN: Yes.

11 JUDGE MURPHY: You said it's referenced in the Tseng
12 reference?

13 MR. HERMAN: Yes, it is, right. So, Patent --

14 JUDGE MURPHY: Where is that?

15 MR. HERMAN: In Tseng reference?

16 JUDGE MURPHY: Yes, where does Tseng reference '874,
17 please?

18 MR. HERMAN: In its background. Just give me a moment, Your
19 Honor.

20 JUDGE MURPHY: Sure, take your time.

21 MR. HERMAN: It's in paragraph 3.

22 JUDGE MURPHY: I see. So, and you invoked this, according to
23 your slide in your reply at eight and nine?

24 MR. HERMAN: Yeah. So, Patent Owner injected this particular
25 reference into the proceeding. So, Patent Owner argued that this particular

1 reference is important to understand how Tseng operates. So, the reason
2 why I pointed to this in our reply, and the reason why I'm pointing to this
3 today, is because it contradicts Patent Owner's interpretation of how Tseng
4 operates. This reference says, unambiguously, that light comes out, not only
5 the bottom, but also the sides of a light conductor that is configured exactly
6 like Tseng's light conductor.

7 JUDGE MURPHY: All right. Thank you.

8 MR. HERMAN: I told Your Honors that there's two things that
9 Your Honors can focus on, and the second is Patent Owner's preliminary
10 response. And I'd like to direct your attention to a demonstrative figure
11 that's on page 29 of Patent Owner's preliminary response. That figure
12 characterizes Tseng's operation, and it is effectively the opposite of what it's
13 saying today.

14 In his preliminary response, Patent Owner said and drew Tseng's
15 figures in a way that showed lights coming out of the LEDs in all directions.
16 It did not draw light as going only downwards. And that --

17 JUDGE OBERMANN: Which page of the -- I'm sorry, which
18 page of the response are you looking at, please?

19 MR. HERMAN: Twenty-nine of the preliminary response, Your
20 Honor.

21 JUDGE OBERMANN: It's not in the response?

22 MR. HERMAN: (CROSSTALK) --

23 JUDGE OBERMANN: They don't -- there's no waiver of
24 argument of anything they say? The preliminary response doesn't bind them
25 to anything?

1 MR. HERMAN: I recognize that it does not bind them from
2 anything. But the point I'm trying to make, Your Honor, is that they
3 characterized Tseng is operating one way in their preliminary response, and
4 now they're saying that Tseng operates in completely the opposite way
5 today.

6 So, again, this is a credibility issue. In their preliminary response,
7 they drew Tseng's LEDs as emitting light up, to the sides, and down. Today,
8 and in their post-institutional response, they characterized Tseng as emitting
9 light only downwards. In their preliminary response, they drew and
10 characterized Tseng as having light moving perpendicularly through that
11 annular region 383. Today, and in their post-institutional response, they
12 drew light as going only downwards. The issue with this is that they're
13 taking inconsistent positions. They're manufacturing arguments in an effort
14 to distinguish the claims from the prior art. Petitioner submits that these
15 types of contradictory and internally inconsistent arguments are not entitled
16 to any weight.

17 Finally, as I noted during my opening remarks, and contrary to
18 Patent Owner's argument, the petition did not propose modifying Tseng's
19 second and third embodiments. The Petitioner argued that those
20 embodiments themselves rendered the claims obvious. And given that no
21 modification was made, extensive discussion of motivations to combine or
22 modify is not and was not required, and that's the holding of the Federal
23 Circuit's real-time data decision, which is cited on page 12 of Petitioner's
24 reply.

25 So, moving on to Tse, I'd like to remind Your Honors that, as

1 Patent Owner noted, that there's no dispute that Tse teaches a translucent
2 material. But the arguments that Patent Owner does make ignore not only
3 Tse, but also what the claims require. For instance, Petitioner explained at
4 length why it would have been obvious simply to make Tse's cover thicker
5 to more uniformly emit light, doing so would further Tse's own goals. It
6 would increase visual enjoyment and ensure that all of the water coming out
7 of the shower would be colored instead of just some of that. And you can
8 see examples of that on Slide 29 of Petitioner's demonstrative. What does
9 Tse say? It teaches that if showerhead is designed to increase the visual
10 enjoyment of a user's shower, so it's designed to be better-looking.

11 There's no dispute in this proceeding that a POSITA would have
12 considered uniform diffuse light to be desirable. So, what else does Tse say?
13 It says, that it's showerhead is structured to make all the water coming out of
14 its shower have the same color. So, rather than spots of color, it emits
15 uniform colored water. So, designing Tse's cover in a way that ensures more
16 diffuse uniform light, meshes with Tse's goals, uniform water color and
17 increased visual enjoyment. So, Patent Owner, however, is proposing
18 implementing Tse in the worst possible way, making its cover is super thin,
19 such as the light emitted is spotty and not uniform.

20 So, Patent Owner's other argument, that the claims require that all
21 water outlets must be surrounded by a light pipe also lacks merit, so nothing
22 about the claims actually requires that. There's no special definition of a
23 water outlet anywhere in the specification. Nowhere does the specification
24 say that that is anything other than what it says on its face, the hole that
25 water comes out of.

1 As shown on Slide 30, the claims mention only "a water outlet,"
2 so, only one water outlet must be surrounded for purposes of the claims.
3 That's exactly what Tse discloses. There are multiple water outlets within
4 the loop formed by its light pipe. Further, Claim 19 is a comprising claim.
5 It's open to the presence of other elements. So, as long as one water outlet is
6 surrounded by the light pipe, the claim is satisfied. The presence of other
7 water outlets outside the light pipe does not move Tse outside the scope of
8 the claims.

9 So, I'll briefly address the dependent claims. So, the dependent
10 claims have also been shown to be obvious. Here, as elsewhere, Patent
11 Owner just fixated on portions of the prior art. So, yes, Tseng includes
12 features that help protect electrical wiring, but it never says that the wiring is
13 required. And all the hoops that Tseng jumps through to protect this wiring
14 serves to motivate a person having ordinary skill of the art to consider other
15 solutions, including Mizuno's generator, and Schneider's temperature control
16 and controller.

17 So, yes, Schneider includes an example of an implementation
18 where it uses the temperature sensor to change the color of its display. But,
19 of course, a person of an ordinary skill in the art would not consider its
20 teachings to be so limited. A temperature sensor and controller, like that in
21 Schneider can, of course, be obviously employed in other situations.

22 Now, I'll very briefly conclude by addressing Mr. Cook's testimony
23 regarding his experience with light pipes. And I'll note that on page 56 of
24 Mr. Cook's deposition, starting at line 18, Mr. Cook noted not only that he
25 worked with electronics that employ indicator lights, but that he actually

1 designs electronics that employ fiberoptic communications and light pipes.

2 And with that, I believe my time has expired, but I'd be happy to
3 answer any further questions Your Honors may ask.

4 JUDGE MURPHY: Yeah, I have a question for you. On Mr.
5 Cook's experience, in his deposition, he seemed to acknowledge that he did
6 not have any experience with kitchen, bath, or other types of lighting
7 fixtures, other than, I guess, in his personal real estate business.

8 MR. HERMAN: Yes, Your Honor. So, Mr. Cook does have
9 experience with plumbing fixtures, so pipe lines and dishwasher drains in a
10 professional capacity. But when it comes to specifically kitchen and bath
11 fixtures, his experience there relates to his own personal experience. And
12 again, that level of experience is equivalent to what's possessed by Patent
13 Owner's expert. His --

14 JUDGE MURPHY: But that's not the way both parties defined the
15 level of skill for a POSITA. Both parties included two years of professional
16 level experience in these types of kitchen, bath, and plumbing fixtures.

17 MR. HERMAN: So, I believe our definition said that the level of
18 experience had to be with plumbing fixtures as opposed to any type of
19 plumbing fixture specifically.

20 JUDGE MURPHY: Okay.

21 MR. HERMAN: Which is consistent with what the '363 Patent
22 itself teaches. The '363 Patent explains that it's directed to plumbing
23 fixtures. Yes, it includes examples in the context of a pull down faucet and a
24 shower sprayhead, but those are examples. More generally, it's directed to
25 lighting plumbing fixtures, and the claims would embrace a variety of

1 plumbing fixtures, not just those intended for use in the kitchen or in the
2 shower.

3 JUDGE MURPHY: Well, but the dispute is over the light pipe.
4 What experience does Mr. Cook have either in his CV, his dec or his depo
5 with regard to optics --

6 MR. HERMAN: So --

7 JUDGE MURPHY: -- light is transmitted, and shaped and
8 directed?

9 MR. HERMAN: So, as noted on page 56, he's explained that he's
10 designed -- page 56 of his deposition, which is Exhibit 2005, starting at line
11 18, he's noted that he's designed many electronics that either use fiberoptics,
12 and fiberoptics are an example of a light pipe, moving light from one place
13 to another, or have lots of indicators on them, and those indicators are not
14 just lights, they employ LEDs, and light pipes, and things like that,
15 according to Mr. Cook. So, he's designed electronics that employ light
16 pipes, either for communication, or for illumination purposes, and indication
17 purposes.

18 JUDGE MURPHY: Anything in the record, other than his
19 deposition page 56?

20 MR. HERMAN: His CV is also in the record. But looking at it,
21 Your Honor, I don't --

22 JUDGE MURPHY: No, no, no. I'm referring to his experience
23 with optics.

24 MR. HERMAN: I don't believe his CV specifically references
25 optics beyond what he discussed at his deposition.

1 JUDGE MURPHY: All right. Thank you, Counsel.

2 MR. ISRAELSEN: Thank you, Your Honors. I just want to touch
3 on a few brief points. And the first is that I promised Your Honors to have a
4 more specific reference in the '363 Patent for how the light would be
5 reflected to transmit radially outward on the side, and that is in the
6 specification on column 4, lines 1 through 10. And in contrast to Tseng, in
7 paragraph 102 of his declaration, Dr. Klopp talks about the annular
8 protrusion in Tseng and how it would enhance light transmission in the
9 downward direction like we were talking about earlier. I'd like to touch
10 briefly on the '874 Patent.

11 JUDGE MURPHY: Counsel?

12 MR. ISRAELSEN: Yes, Your Honor.

13 JUDGE MURPHY: This is Judge Murphy. Let me stop you there.
14 So, you referenced on the top of column 4 --

15 MR. ISRAELSEN: That's right.

16 JUDGE MURPHY: -- of the '363 Patent? This is what Judge
17 Obermann was asking you about earlier?

18 MR. ISRAELSEN: Yes, that's right.

19 JUDGE MURPHY: So, the proximal portion, 180 extends radially
20 outwardly from the distal portion 178 within a gap or opening between the
21 housing the cap. Am I --

22 MR. ISRAELSEN: That's right.

23 JUDGE MURPHY: -- reading the correct statement?

24 MR. ISRAELSEN: Yeah. And then, in the next line it says for
25 transmitting light radially toward an outer illumination surface.

1 JUDGE MURPHY: Right. So, other than the shape and
2 positioning of that -- I'll call it the proximal portion 180, that's part of the
3 annular ring that protrudes outwardly?

4 MR. ISRAELSEN: Yes.

5 JUDGE MURPHY: What else -- and you have the LED line
6 shining upwardly in that longitudinal direction, or parallel to the longitudinal
7 axis. That's all it says. And your argument was that with the way it's shaped
8 it has a reflecting angle?

9 MR. ISRAELSEN: That's right. This is the part of the spec that's
10 described in the figure. And so, if you read the specification in tandem with
11 what the figures depict, that's right. That's how somebody of ordinary skill
12 would understand looking at those angles, and these other surfaces, that the
13 light would otherwise contact when shining upwardly and be deflected in an
14 outward direction.

15 JUDGE MURPHY: All right. So, with that in mind, what's your
16 response to Counsel's argument regarding the '874 reference that was cited
17 in the background of Tseng that has this type of annular protrusion without
18 an angle, but discusses having the light directed radially outwardly?

19 MR. ISRAELSEN: Yeah, Your Honor. The '874 Patent, just to be
20 clear about how it came into the record is we were not actually pointing to
21 the '874 for understanding how Tseng operates. What the '874 provided was
22 (CROSSTALK) --

23 JUDGE MURPHY: Well, no, no. No, hang on. That's -- that may
24 not be what you used it for, but that is what they used it for in their reply.

25 MR. ISRAELSEN: Oh.

1 JUDGE MURPHY: So, I want to know what your response is to
2 their argument.

3 MR. ISRAELSEN: Understood, Your Honor. So, if you look at
4 Tseng, and I think Figure 2 is illustrative here -- or excuse me, not Tseng. If
5 you look at the '874 Patent at Figure 2, Tseng doesn't have this closed-loop
6 structure that goes all the way around the bottom. And so, even if the '874 --
7 I mean, that might be why they didn't use it in the ground, I can't speculate
8 why they didn't include it in the petition, but Tseng is a totally different
9 structure altogether. So, it might be that light would move through it
10 differently. We don't have any expert testimony in the record to explain how
11 a light would move through Tseng from either side because that wasn't part
12 of the proceeding.

13 Certainly, if they had included in their petition, we would have
14 asked our expert to help us understand how light would move through it.
15 But Mr. Cook explained that he had never seen this reference before his
16 deposition, and he didn't provide a declaration with the reply. And so, we
17 don't have any testimony from Mr. Cook about how light would move
18 through the '874's light conductor, and so it's just not part of the proceeding.

19 But ultimately --

20 JUDGE MURPHY: Well, wait, whoa, whoa, whoa, whoa. You
21 can't just say it's not part of the proceeding. It is part of the proceeding.

22 MR. ISRAELSEN: Well, okay. Let me come (CROSSTALK) --

23 JUDGE MURPHY: We need to come to grips with this.

24 JUDGE OBERMANN: Yeah, we don't need expert testimony to
25 tell us what the text of '874 tells us, because we were directed to a disclosure

1 that is completely at odds with the position that you've taken here, and what
2 do we do with that?

3 MR. ISRAELSEN: Well, Your Honor, as the Patent Owner, we
4 can only respond to what the Petitioner put forward in the petition, and then,
5 even further than that, what they put forward in the reply. And it's a closed
6 universe for us. It's an open universe for them, when they file a petition,
7 they can look at whatever they want.

8 But let me caveat what I said earlier. It's part of the proceeding in
9 that what Tseng describes is a motivation for -- sorry, what the '874
10 describes is why Tseng would have been motivated to maintain a powered
11 wire as part of the faucet. And Tseng, in the background, it says, the '874
12 was out there, it has this electrical wire, when the sprayhead is moving
13 around, it gets pulled down, just spray the dishes, and it goes back up in.
14 And after 10,000 pulls down and up, maybe that wire breaks because it gets
15 lots of bending. And so, Tseng redesigns this faucet sprayhead so that it will
16 better protect the wire. And even the Petitioner, in the reply, admitted that
17 Tseng aims to protect the wire. And so --

18 JUDGE MURPHY: Counsel, let me stop you there. The argument
19 that the Petitioner is making, which is on their slide -- their presentation
20 Slide 19 --

21 MR. ISRAELSEN: Yes, sir.

22 JUDGE MURPHY: -- right, they're citing -- they made this
23 argument in their reply on pages 8 and 9. Did the Patent Owner respond to
24 that at all in the surreply?

25 MR. ISRAELSEN: Let me make sure I'm following you. On

1 Slide 19? So, our surreply did fully address every issue that was raised in
2 their reply. But looking at the direction that this light moves, there's -- I
3 think there's two things --

4 JUDGE MURPHY: No, I want to know where, in your surreply,
5 you responded to this argument?

6 MR. ISRAELSEN: Okay. Let me get my printout here.

7 JUDGE INGLESE: Counsel, I believe it's on page 7 of your
8 surreply.

9 MR. ISRAELSEN: Thank you, Your Honor. I was looking at the
10 Table of Contents. So, yeah, I would point to page 7 of the surreply, where
11 we repeated what I -- we said what I effectively just said, that there's no
12 expert testimony to explain how those differences in Tseng's structure,
13 which there's certainly differences in the structure, because the whole point
14 of Tseng is to improve the structure so that that light doesn't -- it's so that
15 that wire survives bending; how the different design would impact light
16 movement.

17 And so, even if it were part of the ground, which it's obviously not
18 as Your Honors noted, there's just no testimony in the record to understand
19 how the light would move through the '874 Patent's light conductor.

20 JUDGE MURPHY: So, your argument in response is on surreply
21 page 7?

22 MR. ISRAELSEN: That's right. And, Your Honor, I'll just say,
23 the fact that in the rebuttal time, the Petitioner chose to focus on the '874
24 reference, which isn't even part of any of the grounds, that speaks volumes
25 about the insufficiency of the petition here. And the same issue rises with

1 the Petitioner is focused now on the Patent Owner's preliminary response.
2 Those arguments weren't even in their reply. Of course, the Patent Owner's
3 preliminary response is not part of this proceeding. One the institution came
4 in, then the Patent Owner's response is what's relevant.

5 But we had the benefit of an expert. We didn't submit an expert
6 declaration with the preliminary response. We talked to our expert. We
7 understood more about the references, and those are the positions that we put
8 forward in the response, and those are certainly what are relevant here.

9 One final point I'd like to make about Tse. And again, the
10 Petitioner is confusing this difference between a water outlet and an outlet
11 opening. Of course, an outlet and an opening are different words, and they
12 have different meanings. And they have different meanings in the '363
13 Patent. As I referred to earlier, on column 6, lines 3 through 5, the
14 specification refers to water outlet openings, and the claim, of course, is to a
15 water outlet.

16 And you can see another illustration of this in Figure 2 of the '363
17 Patent, there's a number of elements depicted, but one of those elements is
18 the spray outlet 142. And what you can clearly see in Figure 2 is that that
19 spray outlet 142 has multiple openings where the water would be coming
20 out. And so, if you take that distinction in the '363 Patent specification
21 itself, which distinguishes between a water outlet and a water outlet opening,
22 and then read the patent claim, which requires a water outlet to be
23 surrounded, then Tse certainly doesn't have that. Tse only surrounds some
24 water outlet openings, but it doesn't surround the water outlet itself.

25 Finally, the Petitioner referred to a Schneider combination. And

1 this, again, this is -- he had another instance where the Petitioner is relying
2 on hindsight. And what the Petitioner would have in the petition is to say
3 that there's -- Schneider has a temperature sensor, it has a controller, it has
4 red and blue LEDs, and a person of skill in the art would have moved only
5 those colored LEDs into the sprayhead itself, and Schneider just doesn't
6 suggest that.

7 And Petitioner tries to fault us for saying, well, we're responding
8 to -- or you're proposing a different combination. But what we're doing is,
9 we can only respond to the combination that -- we can respond to the
10 combination that's put forth. And the point is, the combination they're
11 putting forth, they don't provide any explanation or motivation why
12 somebody of skill in the art would have taken Schneider's disclosure of
13 having a temperature sensor and lights at the base of the faucet and move
14 those to the sprayhead itself, that when combining those references without
15 any explanation, it's Petitioner's burden to provide that explanation.

16 And here again, the petition was just silent. And so, without any
17 explanation, what we said was a person of ordinary skill who is looking to
18 put Schneider's temperature sensor, and controller, and colored lights into a
19 faucet, would do what Schneider says to do, which is to put those into the
20 base.

21 And it's possible that Petitioner wants to speculate that maybe
22 there would have been some reasons to move, only that colored light, the
23 blue and the red LEDs, from the base into the sprayhead, but they didn't
24 explain that. They didn't provide an explanation of what that motivation
25 would have been, and that's the problem here, that the petition is silent, and

1 so they haven't met their burden. And so, absent them providing that
2 explanation, then the only reason that somebody would combine them in the
3 way the Petitioner suggests is hindsight.

4 Absent any other questions from Your Honors, we'd like to leave it
5 there. We believe that the references are deficient here in -- the Petitioner's
6 explanation for those references was deficient, and that confirms the
7 patentability of these claims. Thank you, Your Honors.

8 JUDGE INGLESE: Thank you very much. On behalf of the
9 panel, we would like to thank you for attending, and for your presentations.
10 The information that you presented has been very helpful, and we really
11 appreciate the level of preparedness by counsel for both parties, you served
12 your clients well today.

13 So, this matter is now submitted to the panel for determination and
14 preparation of a final written decision, and the hearing is adjourned.

15 (Whereupon, the above-entitled matter went off the record at 12:19
16 p.m.)

IPR2024-00700
Patent 10,393,363 B2

PETITIONER:

K. Herman
Alyssa Caridis
ORRICK, HERRINGTON & SUTCLIFF
P52ptabdocket@orrick.com
A8cptabdocket@orrick.com

PATENT OWNER:

David Cavanaugh
Scott Bertulli
Jungyeon Kim
Ronald Gregory Israelsen
WILMERHALE
David.cavanaugh@wilmerhale.com
Scott.bertuli@wilmerhale.com
John.kim@wilmerhale.com
Greg.israelsen@wilmerhale.com