

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TOMMY JOHN, INC,
Petitioner,

v.

PACKAGE APPAREL, INC.,
Patent Owner.

IPR2024-01163
Patent 10,834,974 B2

Record of Oral Hearing
Held: October 9, 2025

Before: BARRY L. GROSSMAN, JAMES A. TARTAL, and
ROBERT J. SILVERMAN, *Administrative Patent Judges*.

APPEARANCES:

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P R O C E E D I N G S

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JUDGE SILVERMAN: Good afternoon. Everyone hear me?

MR. LUMAN: Yes.

MR. RAFFETTO: Yes, Your Honor.

JUDGE SILVERMAN: I'm Judge Silverman. I'm appearing remotely. And I'm joined on the panel by Judge Grossman and Judge Tartal, who are in the hearing room. We're here for the oral arguments in IPR2024-01163, Tommy John, Petitioner v. Package Apparel, Patent Owner. Let's start with the parties' appearances. In addition to identifying attorneys who will be arguing today, please identify anyone else attending in person or remotely, even if not presenting. And please spell the names for the benefit of the court reporter.

Who's here for the Petitioner?

MR. RAFFETTO: Your Honor. This is Joseph Raffetto, R-A-F-F-E-T-T-O, from Hogan Lovells, on behalf of Petitioner. And with me is my colleague, Scott Hughes, also from Hogan Lovells.

JUDGE SILVERMAN: And is there anyone else joining you today?

MR. RAFFETTO: No, Your Honor.

JUDGE SILVERMAN: And for the Patent Owner, who's here?

MR. LUMAN: Your Honor, on behalf of Package Apparel, this is John Luman, L-U-M-A-N, the Law Firm of Daniels & Tredennick. And with me is Heath Novosad.

JUDGE SILVERMAN: Very good. Anyone else joining you

1 today?

2 MR. LUMAN: No, Your Honor.

3 JUDGE SILVERMAN: Very good. The video presentation of this
4 hearing is available to the public. I do not expect that any confidential
5 information is going to be discussed. But if anything is going to come up,
6 please let us know beforehand. Although the panel is not aware of anything
7 confidential in the record, if the parties intend to address any confidential
8 information, please notify the panel before doing so, and we'll decide how
9 best to proceed.

10 I want to remind you that recording of any PTAB hearing is
11 prohibited. The court reporter will provide a transcript of this hearing that
12 will become part of the record in the -- in this proceeding at a later date. To
13 ensure that the transcript of this hearing is clear, please speak directly into
14 the microphone and identify specific slide numbers, numbers and figures,
15 and any other pertinent information when referring to demonstratives or any
16 portion of the record.

17 The judges before you today take our role very seriously in
18 deciding this dispute. To prepare for your oral arguments, we have
19 familiarized ourselves with the record and with the issues in the case. We
20 have the briefing and the evidence available to us on our computers. We
21 have received a set of demonstrative exhibits from Patent Owner, which
22 we've had available to us for reference. Our role as judges on the panel is to
23 assess your arguments and evidence and weigh those in accordance with the
24 burdens established by our rules and the precedential authority.

25 We remind the parties that Petitioner has the ultimate burden of

1 establishing unpatentability by a preponderance of the evidence. Please
2 remember that your arguments today should be limited to only those things
3 that were mentioned previously in your briefs. Please make it clear which
4 challenges and claims you are addressing at all times. We ask the parties
5 hold any objections regarding any party's arguments until it is your time at
6 the podium to note any objections and to speak. I apologize in advance if
7 we interrupt your presentations with questions. Please bear in mind that we
8 do so to assist our resolution of the issues.

9 I also want to mention, before we get started, that we're aware of
10 Petitioner's concern regarding Patent Owner's demonstratives. And we've
11 reviewed Petitioner's objections filed the other day. We are aware that
12 demonstratives are not evidence in this proceeding. Further, insofar as
13 anything included in the demonstratives is not already part of the record, we
14 will disregard it. It's likely that we will address Petitioner's concerns in our
15 final written decision. However, we'll inform the parties if we determine
16 that any further input from the parties is needed.

17 We're going to follow the procedure today that's set forth in our
18 oral argument order. Petitioner will present first. We then plan to take a
19 short break. And when we resume, Patent Owner will present. Next,
20 Petitioner will have an opportunity for rebuttal argument. And finally,
21 Patent Owner will have an opportunity for sur-rebuttal argument. Petitioner
22 will have up to 75 minutes total time to present, some of which may be
23 reserved for rebuttal. Patent owner will also have up to 75 minutes total, and
24 some of that time may be reserved for sur-rebuttal.

25 Our hearing room has a timer that will be set up for each party's

1 requested time allotment. The light on the clock changes to yellow when
2 you are nearing the end of your time, whether opening a rebuttal, a sur-
3 rebuttal. And when the light is red, you have run out of time.

4 Petitioner, do you wish to reserve any time for rebuttal?

5 MR. RAFFETTO: Yes, Your Honor. We'd like to reserve about
6 15 minutes.

7 JUDGE SILVERMAN: I'll ask the Patent Owner prior to the
8 beginning of their statement if they want to reserve any sur-rebuttal time. I'll
9 just ask you now, just in case we -- I forget later on. I'll allow you to change
10 it, if you think it's necessary. But just so we have it in our minds, do you
11 wish to reserve any time for sur-rebuttal?

12 MR. LUMAN: Yes, Your Honor, 15 minutes, we believe.

13 JUDGE SILVERMAN: Very good. Do we have any questions
14 from anyone before we begin? From Petitioner?

15 MR. RAFFETTO: No, Your Honor.

16 JUDGE SILVERMAN: Patent Owner, do you have any
17 questions?

18 MR. LUMAN: No, Your Honor. Thank you.

19 JUDGE SILVERMAN: Petitioner, you may begin whenever
20 you're ready.

21 MR. RAFFETTO: Your Honor, if it may please the Board. My
22 name is Joe Raffetto from Hogan Lovells, and I'm here to present arguments
23 on behalf of Petitioner Tommy John. For today's presentation, we'll start
24 with an overview, a brief overview of the patent and relevant part, along
25 with the key prior art references Kitsch and Carrillo. And then we'll talk

1 about some disputes from our perspective that are more central for the
2 Board's awareness; and we've listed them out here. And then at the end,
3 we'll talk about a handful of other more minor disputes.

4 So starting with the overview, the '974 Patent is directed to a male
5 garment with a pouch defined between a stretch panel and the front of the
6 garment. And the stretch panel being elastic and attached to the front
7 portion of the garment while it's stretched, that helps gather the material of
8 the front portion and helps to form the pouch. Now, there's only one
9 independent claim in the patent, that's Claim 1, which we've shown here.
10 And there are three basic elements.

11 The claim itself is directed to a male garment, like men's
12 underwear. There's a body with a front and leg openings, a waistband, and a
13 stretch panel. And there's no dispute that the prior art discloses the male
14 garment has a body with front and leg openings and a waistband. So our
15 presentation today will really focus on the stretch panel, which is where the
16 disputes lie.

17 JUDGE GROSSMAN: Mr. Raffetto, let me ask a quick question,
18 as we get started, to clarify the question in my mind. This stretch panel, is a
19 pouch that stretches when it's in the bag or in the drawer or not being worn,
20 or does it require -- does it stretch only when it's on a user wearing the
21 underwear?

22 MR. RAFFETTO: It would stretch while it's on the user wearing
23 -- while the user's wearing the underwear. While it might lie in a drawer, it
24 would -- it might still be taut a little bit, but it would stretch as you put on
25 the underwear and as you move side to side, for example.

1 JUDGE GROSSMAN: Does that make a difference in how we
2 construe it? Is the claim written so it is only -- we interpret it as someone's
3 wearing it so it's being stretched, or do we interpret it as if it's in a drawer
4 and unstretched?

5 MR. RAFFETTO: No. I don't think this specific issue makes a
6 difference in terms of the patentability issues that we'll talk about today. I
7 think here the stretch panel itself is -- it's just an elasticized fabric. So I
8 think that's kind of the core of the issue and then how it's sort of attached,
9 which we'll get into more later on.

10 JUDGE GROSSMAN: Thank you.

11 MR. RAFFETTO: Absolutely.

12 JUDGE TARTAL: Counsel, just as a quick reminder, if you could
13 identify the slide that you're referring to for the record.

14 MR. RAFFETTO: Yes, Your Honor. Thank you. Yes.

15 JUDGE TARTAL: We won't be able to tell when you say "this."

16 MR. RAFFETTO: Yes, Your Honor. So we're looking at Slide 6
17 now of Petitioner's demonstratives. So I mentioned that the stretch panel
18 can be various materials, and the patent describes it pretty broadly. It can be
19 any elasticized fabric. And it doesn't require that it has a particular
20 construction. It can -- or that it can be formed from a plurality of pieces of
21 fabric seamed together. And you can see that on the bottom right-hand
22 corner.

23 In addition, the stretch panel doesn't have to be continuous. So we
24 can have openings around the periphery, such as at the bottom or the top.
25 And you can see that, for example, at column 7, lines 58 to 64.

1 Now, the '974 Patent, again, it describes that the stretch panel is
2 stretched as it's attached to the front. And as a result, in its relaxed
3 unstretched condition, the panel causes the front portion to be gathered
4 together and form that genital pouch. We have two core invalidity grounds:
5 one is based on Kitsch, in view of Brocks; and one is based on Carrillo in
6 view of Brocks primarily. And then for a couple of dependent claims, we
7 also talk about Kitsch as well.

8 So let's turn to Kitsch, and this is Slide 9 of Petitioner's
9 demonstratives. Kitsch discloses boxer-style briefs -- so men's underwear
10 -- which you can see on the left-hand side. And this underwear has a body
11 with front and leg openings and a waistband. And the underwear is
12 modified by adding interior side panels, 12, to the inside. And these panels
13 are an elasticized, breathable mesh fabric and isolate the genitalia in pouch
14 compartment, 18.

15 If we turn to Slide 10, we can see that this results in underwear
16 with a three-dimensional pouch in the front that looks pretty much the same
17 as the '974 Patent, same waistband, same pear-shaped pouch, same seams
18 around the pouch, same leg openings and leg bands.

19 Turning to Slide 11, Carrillo discloses male underwear with a U-
20 shaped elastic garment that has a tear-shaped opening and is attached to the
21 inside of the front of the underwear. And this elastic garment is sewn to the
22 inner front part of the underwear so as to gently pull the genitals forward to
23 achieve separation from the groin.

24 And here on Slide 12, we have a view of the inside of Carrillo's
25 underwear and the '974 Patent's underwear. And as we can see, they're near

1 identical. Both have similarly shaped elastic garments sewn in the crotch of
2 the underwear with similar openings.

3 The last reference we'll talk about today is Brocks. And Brocks
4 discloses men's underwear with a defined genital pouch as well, and that
5 pouch is created by attaching elastic material to a front portion while in a
6 stretched condition. And as Brocks teaches -- and you can see this here in
7 the quote -- that causes the stitched material to be gathered together and,
8 thereby, define a genital pouch when the stretching force is released.

9 So turning to Slide 14 in Kitsch Dispute 1, that's why there Kitsch
10 discloses a stretch panel attached to the body inside the front portion. So
11 Kitsch discloses a stretch panel in the form of interior side panels, 12. And
12 these are annotated in red on the right. And these panels are for the purpose
13 of isolating the genitalia into pouch compartment, 18. And these side panels
14 stretch because they're made from an elasticized breathable mesh fabric or
15 weave.

16 And Kitch's side panels, turning to Slide 16 now, these side panels
17 are seamed together at the waistband seam, which you can see in green, and
18 also at seam 30a near the perineum, which is shown in blue there. And
19 again, these two side panels work together to help form the pouch and
20 support the genitalia. And if there was only one side panel or there was only
21 empty space between them, Kitsch wouldn't work. There wouldn't be an
22 opening into the pouch to isolate the genitalia.

23 Now, Patent Owner argues, turning to Slide 17, in significant part
24 that Kitsch never uses the word "stretch panel." You can see this quote from
25 the Patent Owner response on the left-hand side. And then at deposition,

1 their expert, Bernard Kahn, was actually asked, is it your opinion that for a
2 prior art reference to disclose the stretch panel of Claim 1 -- see, it actually
3 has to use the words -- exact words, stretch panel. And he said, yes. But
4 this is a fundamental misunderstanding of patent law. The prior art doesn't
5 actually have to use the exact same words as the claim. And this is legal
6 error that infects Mr. Kahn's declaration and a lot of his opinions.

7 Turning to Slide 18, Patent owner also argues that, well, look,
8 Kitch's side panels are just different. In the '974 Patents, the stretch panel
9 separates the genitalia from the body and keeps the genitalia in an enclosed
10 pouch, while Kitch's side panels don't. But first, nothing in Claim 1
11 specifically requires that the genitals be kept separate from the body or be
12 enclosed in a pouch.

13 But in any case, that's what Kitch's side panels do, they keep the
14 genitalia in an enclosed pouch separate from the body. And you can see this
15 in the quote from Kitsch here, paragraph six, where it specifically says "it
16 provides a specifically shaped, breathable pouch, and the side panels isolate
17 the scrotum and phallus from the legs to wick away moisture and provide
18 superior comfort."

19 JUDGE GROSSMAN: Mr. Raffetto, does the statement on your
20 slide, nothing in Claim 1 requires it? Or is there anything in the dependent
21 claims that requires it?

22 MR. RAFFETTO: There is a dependent claim, Your Honor, that I
23 think talks about support. So, yeah, I think there might be a dependent claim
24 that touches on that issue. But as you can see here, in any event, Kitsch does
25 disclose this concept of an enclosed supporting pouch.

1 So turning to Slide 19 in Kitsch Dispute 2, this is whether Kitsch
2 discloses elastically resilient, four-way stretch material. And this is an
3 element in Claims 1(d). And then we show that on the top, the stretch panel
4 comprising a sheet of elastically resilient four-way stretch material. And
5 then it's also recited similarly in Claim 1(f), where it says the stretch panel
6 being resiliently elastic in a direction between top and bottom edges and in a
7 direction between side edges.

8 So we'll start with Claim 1(d), elastically resilient four-way stretch
9 material. And four-way stretch just means that the stretch panel can be
10 stretched in both width and in length, right? And Kitsch discloses that its
11 side panels are formed from a four-by-four stretch weave and can be Nylon
12 and Spandex.

13 And Petitioner's expert, Ms. Robin Wagner, testified that this
14 means the material in Kitsch stretches up and down and side to side. And
15 this makes sense when we think about how Kitsch is used. It's used in the
16 crotch area of underwear and gets pulled up and down and stretched from
17 side to side as the wearer moves.

18 Now, Patent Owner doesn't dispute that Kitsch's side panels are
19 elastically resilient and can stretch in four directions. What it seems to be
20 arguing -- and we're looking at Slide 21 now -- is that the side panels are just
21 made from a different material than the '974 Patent's stretch panel. And you
22 can see that in the Patent Owner response. And what they say specifically is
23 that, look, the '974 Patent's stretch panel has to be a knit fabric with a tricot
24 construction. But those words are found nowhere in the '974 Patent, let
25 alone a requirement of the patent.

1 And sort of related to this in the second bullet on the left-hand side,
2 you can see they say four-way stretch can only be achieved by a knit fabric,
3 not a woven fabric. And what they're trying to do is say, well, Kitsch talks
4 about having a woven fabric. But if you look at their dependent claims, such
5 as Claim 14, it specifically says that the stretch panel is formed from a
6 woven fabric.

7 And then they argue that the '974 Patent stretch panel has to stretch
8 in length and width equally, so it has to have symmetrical stretch. But that's
9 also contradicted by their patent because the claims of their patent, like
10 Claim 2, specifically says that the stretch panel has to have asymmetric
11 stretch in the dependent claim.

12 JUDGE SILVERMAN: Now, Counsel --

13 MR. RAFFETTO: Yes, Your Honor.

14 JUDGE SILVERMAN: -- this Judge Silverman on the screen
15 here. There seemed to be some discussion between the party's experts about
16 the meaning of four-by-four stretch weave, the term that's used in Kitsch.
17 What does that mean?

18 MR. RAFFETTO: That means that the -- there's four yarns over
19 four yarns. I believe that's how Ms. Wagner described it. And remember,
20 Kitsch is talking about things like Nylon and Spandex. So I think it talks
21 about how the weave is done. And as Ms. Wagner testified, that results in it
22 being able to stretch in four directions. I don't think that Patent Owner
23 necessarily disputes that Kitsch's material can stretch in four directions. It
24 seems to be the core of what they're saying is that it's just a different
25 material, and the '974 Patent specifically requires knit tricot.

1 JUDGE SILVERMAN: Thank you.

2 JUDGE GROSSMAN: Mr. Raffetto, in our decision to institute,
3 which was our preliminary decision, we didn't construe any terms in the
4 claim. I think we said that at that stage of the proceeding, it would be the
5 ordinary and reasonable construction. Do we need to construe stretch panel
6 or four-way stretch in order to -- in this final decision establish what it is?
7 Because while we've talked about the plain and ordinary meaning, nobody
8 -- neither party has really defined for us what is that plain and ordinary
9 meaning.

10 MR. RAFFETTO: I don't think a full construction is necessary,
11 Your Honor. And I think that's why we didn't propose one. I think all the
12 Board needs to do, as it properly did at institution, was -- with the stretch
13 panel limitation, for example, is reject Patent Owner's attempt to narrow or
14 read specific things into the claims that aren't there.

15 JUDGE GROSSMAN: If you've got the patent, this '974 Patent
16 conveniently available, I want to ask you a question related to that in terms
17 of -- it's in column 6, down at about line 32. And it's talking about the
18 stretch panel 22 in the patent.

19 MR. RAFFETTO: Column 6, line 32, Your Honor?

20 JUDGE GROSSMAN: And when it's talking about stretch panel
21 22 it says that it's stretched in both width and length. And then in a
22 parenthetical, it says, that's four-way stretch. Is that a definitional term then
23 in the patent itself, telling us what they mean by four-way stretch, that it just
24 has to be able to stretch in width and length?

25 MR. RAFFETTO: I think they are explaining what it means there,

1 yes. And I don't think there's a specific dispute between the parties on that.
2 I think the focus is more on whether the '974 Patent, when reciting this term,
3 it specifically requires a certain type of material. And so if the Board rejects
4 that interpretation, similar to what it did with the term stretch panel at
5 institution, I think that's all that's needed; a full construction isn't required.

6 JUDGE GROSSMAN: And I think the Claim 1 specifically refers
7 to four-way stretch is my recollection.

8 MR. RAFFETTO: Yes, Your Honor.

9 JUDGE GROSSMAN: And so when Claim 1 says four-way
10 stretch, would it be reasonable for us to interpret it to be what is at column 6,
11 line 32, that four-way stretch means stretched in both width and length?

12 MR. RAFFETTO: Yes. Relative to the front portion, yes. That's
13 what it says there, it says stretched in width and length relative to the front
14 portion. So you stretch side to side relative to the front of the underwear and
15 top to bottom relative to the underwear.

16 JUDGE GROSSMAN: Thank you.

17 MR. RAFFETTO: So turning to Slide 21 now, Patent Owner
18 argues that Kitsch focuses on breathability, while the '974 Patent focuses on
19 elasticity and comfort. So kind of similar to the other argument, they're just
20 different for different purposes. But if you actually look at Kitsch in the
21 '974 Patent -- and we've lined them up on the right-hand side -- you can
22 actually see that the things that Patent Owner says are differences -- first of
23 all, they're not claimed features to begin with.

24 But second of all, there are commonalities between the prior art
25 and the patent, not differences. Both of the references talk about how their

1 panels are elasticized, breathable, comfortable, and how they both use -- can
2 use Spandex. So it's the same material they're contemplating.

3 Now, Claim 1(f), I just want to briefly touch on this, Kitsch's side
4 panels are resiliently elastic in both directions. And we do think that they
5 stretch in these directions, as we've explained. And in addition, the fact that
6 the side panels sort of mold to the scrotum, as Kitsch teaches, and allow for
7 resiliently supported relative movement further confirms this, that as the
8 wearer pulls the underwear on and off, or moves from side to side, the
9 stretch panels can stretch in those directions. And then when they return to a
10 relaxed state, say, standing straight up or resting, the panels might return
11 -- would return to their original position.

12 The next dispute is, turning to Slide 24, whether Kitsch discloses a
13 top edge, bottom edge, side edges, and an opening. You know, Patent
14 Owner, turning to Slide 25, disputes this. But we think it's pretty clear,
15 Kitsch discloses top edges, bottom edges, and side edges. And you can see
16 them labeled in the annotated figures on Slide 25. It discloses upper ends,
17 bottom edges, and then side edges for the side panels. And the dispute that
18 Patent Owner raises on these limitations appears to be based largely on
19 whether words like top edge and bottom edge are found verbatim in Kitsch.
20 But as we talked about, that's actually legal error. That's not a requirement
21 for invalidity.

22 Turning to Slide 26, Kitsch discloses an opening to receive the
23 wearer's genitals. It describes, for example, how the side panels are laterally
24 spaced apart and form upwardly from the perineum towards the waistband,
25 and the spacing allows them to snugly engage the sides of the scrotum and

1 then isolate the genitalia into the pouch compartment. So you can see there's
2 a clear opening between them. Patent Owner, again, disputes this based on
3 the exact word, opening, not being used in Kitch. But that's not how
4 invalidity works.

5 JUDGE SILVERMAN: Counsel, can you go back a slide for a
6 second? Thank you. This is Judge Silverman again. It seemed to me that
7 Patent Owner was advocating for essentially a claim construction, that the
8 stretch panel of Claim 1 has to be a unitary element as opposed to two
9 separate elements. Can you address that claim construction issue?

10 MR. RAFFETTO: Yeah. We've talked about it a little bit earlier,
11 Your Honor. And that that's right, that is something that the Board
12 addressed at institution. And you know, as we said, one, it can be formed
13 -- '974 Patent is clear, it can be formed from a plurality of pieces of fabric
14 seamed together. And then two, the stretch panel is pretty clearly described
15 as not having to be continuous. I mean, it specifically says at column 7,
16 lines 58 to 64, that it can have openings around the periphery such as the top
17 or the bottom. So I don't it's proper to limit it to a single, unitary piece of
18 fabric.

19 JUDGE SILVERMAN: Well, those are good points, Counselor.
20 I'm thinking about not just that it might be several pieces connected together
21 directly, but that it seems that what's in Kitch's is really two separate
22 elements that are not connected except for some intermediary piece between
23 them.

24 MR. RAFFETTO: Mm-hm, yeah. And I think our interpretation
25 of the patent, Your Honor, is that when it says seamed together, that just

1 means joined by a seam. And our expert explained that. I think I would add
2 that, in addition to that, you can see in this quote here, it talks about how,
3 you know, for example -- this is at the bottom right-hand corner of Slide 6, if
4 we just flip back through -- how the stretch panel may be formed from three
5 pieces of fabric, two of which extend vertically along the sides of the
6 opening and then one across the bottom of the opening.

7 If you actually look at other places of the patent, such as column 3,
8 lines 43 to 45, it describes how that bottom portion actually may be -- that
9 it's optional. It just says the stretch panel may have a bottom portion
10 connecting the opposing side portions. So I think that's just saying it's
11 permissive but not required. Does that answer your question, Your Honor?

12 JUDGE SILVERMAN: It's helpful. I guess I'm thinking about
13 what the meaning of that phrase, seamed together, I mean is that broad
14 enough to include -- I don't know if that's in a -- I know there's a dependent
15 claim that addresses something like this. I don't know if it uses that phrase
16 or not. But certainly, what's shown in the '974 Patent is a piece of stretch
17 panel that is -- that isn't bifurcated in some way. I mean, you can say that
18 the Kitsch side panels are seamed together, but there's a space where that
19 -- between them where that seam exists, so they're not directly seamed
20 together. They don't touch each other.

21 MR. RAFFETTO: In the example, in the figures in Kitsch, that is
22 correct. But the two side panels of course do work together to perform the
23 functionality of isolating the genitalia into the pouch compartment. So they
24 are sort of a piece that provides a single functionality. And I do think it is
25 informative that column 3, lines 43 to 45, where it just says you may have a

1 bottom portion, so not necessarily required.

2 And then also, there are other places in the patent as well that sort
3 of described the panel broadly. If you look at column 7, line 43 to 52, where
4 it says a panel is any component which performs the function of the
5 described component, including components which are not structurally
6 equivalent. So I think the patent did contemplate it pretty broadly from a
7 public notice perspective.

8 JUDGE GROSSMAN: Mr. Raffetto, I didn't mean to interrupt --

9 MR. RAFFETTO: No, no, please, Your Honor.

10 JUDGE GROSSMAN: -- your answer. Judge Silverman, did you
11 have a have a follow-up? Because I didn't want --

12 JUDGE SILVERMAN: I don't have a follow-up at this moment.
13 Please go ahead.

14 JUDGE GROSSMAN: But I want to talk about the "seamed
15 together." My understanding of Kitsch is that the two pieces are not sewn
16 together. They're not stitched together. They don't touch each other at any
17 point. And at the deposition testimony of the Patent Owner's expert, I think
18 you or -- I forget who took that that deposition, but -- asked several times
19 about whether they were sewn together. And the answer was repeatedly, no,
20 they're seamed together.

21 And I think with that, my understanding is that means that both of
22 those pieces in Kitsch are sewn to the elastic waistband, and that's where
23 they're seamed together. That's how they're connected in terms of operating
24 together. But at no point are they physically sewn together, are they
25 touching each other in the way they're sewn between the waistband and

1 whatever is on the bottom they're sewn. Is my understanding correct that
2 when you -- when we're talking about that those Kitsch panels are seamed
3 together, that does not imply that they're touching each other?

4 MR. RAFFETTO: In the figures in Kitsch, it is describing them
5 sharing a seam, so being joined at the seam. And I think about it often more
6 on the perineum area as opposed to the waistband. But there's that seam at
7 the bottom that sort of joins them together so that they can provide that
8 functionality of isolating the genitalia together into the pouch compartment.

9 JUDGE GROSSMAN: And so they're -- well, I'm trying to find a
10 good figure of Kitsch. Maybe it's --

11 MR. RAFFETTO: Maybe this one, Your Honor, Slide 26? I don't
12 know if that helps.

13 JUDGE GROSSMAN: Yeah. Okay. Let me go to your Slide 26.

14 MR. RAFFETTO: Yep.

15 JUDGE GROSSMAN: So in Slide 26, at the top, you've got a
16 dotted circle. Oh, I'm sorry, I'm looking at 25.

17 MR. RAFFETTO: Okay.

18 JUDGE GROSSMAN: If we -- at that Figure 8, it doesn't -- is
19 there a stitching at the bottom which might be in the groin area or -- where
20 those two red panels are actually physically connected and sewn together?

21 MR. RAFFETTO: Yeah. There is a common seam. I think the
22 number is -- I'd have to double check. I can't remember the exact number.
23 But it's along the bottom, and you can kind of see it extending from one leg
24 opening to the other. And they're connected together via that seam. They're
25 seamed together. And in that way, they sort of function together to perform

1 the purpose of supporting the genitalia and isolating it into the pouch
2 compartment.

3 JUDGE GROSSMAN: Is that different than on the top or are they
4 -- they're just each sewn separately to the waistband?

5 MR. RAFFETTO: They are sewn to the waistband at the top as
6 well, yes.

7 JUDGE GROSSMAN: All right. Thank you.

8 MR. RAFFETTO: Okay. So turning back to Slide 27 -- and this is
9 Kitsch Dispute 4 -- whether Kitsch in view of Brocks renders obvious Claim
10 1(g). Now, Patent Owner doesn't dispute that Brocks discloses the
11 additional elements in Claim 1(g). Brocks teaches the -- that its general
12 pouches formed by attaching elastic strips in a stretched state to the front of
13 the underwear, and this causes the stitched material to be gathered together
14 and thereby form a pouch. And you can see this in direct quotes on the
15 right-hand side, where Brock is specifically saying the way that it's stretched
16 and then released, it causes the gathering to define a genital pouch.

17 And turning to Slide 29, this works because the elastic strips are
18 stretched in the length-wise and width-wise direction relative to the front
19 portion when being attached, and the unstretched width and strips -- length
20 and width of the strips is smaller than the length and width measured along
21 the front portion after attachment. And again, there's not a dispute about
22 that.

23 Turning to Slide 30 -- and this is where the core of the dispute
24 really lies -- it's whether it would have been obvious to apply this teaching
25 from Brocks to Kitsch. And we submit that it would so that when one

1 attaches Kitsch's side panels, it'd be stretched up and down and side to side
2 to help create a gathering to form the pouch. And to be clear, we're not
3 installing Brocks' side panels in Kitsch's underwear or installing Kitsch's
4 panels in Brocks, as Patent Owner argues. We're just applying this narrow
5 teaching, right, of stretching an elastic material to two points that are longer
6 to help gather or form a pouch, that's it.

7 And there are lots of rationale for this. And you can see it on the
8 right-hand side, as some examples, still looking at Slide 30. And you don't
9 really have to go much beyond Brocks, to be honest, because it includes an
10 expressed motivation. Attaching elastic material in a stretched state has the
11 benefits of assisting in gathering, which is the exact claim language, the
12 material to which it's attached to form the pouch. And that's not hindsight;
13 that's just in Brocks.

14 And Brocks isn't doing this in another context. It's not doing this
15 to create bras or puffy shirts or something like that. It's doing this to
16 specifically form a genital pouch, just like is taught in Kitsch. And so when
17 applying this teaching to Kitsch, you wouldn't need additional materials, and
18 it would just add to the formation and supportive nature of the pouch.

19 And what Patent Owner seems to be arguing is that no matter
20 what, no patent can ever be obvious based on a combination of two
21 references. When they're when their expert, Mr. Khan, was asked at
22 deposition whether -- well, looking at prior art references in determining
23 whether a claim of a patent may be obvious, is that hindsight, he said yes.
24 And that's improper. And he said that at page 49, lines 2 to 8 of his
25 transcript.

1 And then he went even further when he was asked on cross-
2 examination if claims of a patent can be found obvious over a combination
3 of prior art references, which is the core of what this entire IPR is about, he
4 said no. And that's at page 50, lines 12 to 16. So this is another clear legal
5 error in Patent Owner's papers.

6 JUDGE GROSSMAN: Page -- excuse me, Mr. Raffetto, is that
7 page 50 of the deposition transcript?

8 MR. RAFFETTO: Yes, Your Honor.

9 So turning now to Slide 31 -- and this is Carrillo Dispute 1,
10 whether Carrillo discloses elastically resilient four-way stretch materials per
11 Claim 1(d). So Carrillo discloses a U-shaped elastic garment in male
12 underwear, which is made of elastic material. It's shown as a single sheet.
13 It's sewn to the front part of the underwear in the crotch area and attached to
14 the elastic of the waistband. And it's provided in such a way that it gently
15 pulls the intimate parts forward. And those are all disclosures, expressed
16 disclosures, in Carrillo. And you can see it on the right-hand side.

17 And as we explained in our papers, a POSITA would have
18 understood from these disclosures that Carrillo's elastic garment has four-
19 way stretch, that it stretches up and down and side to side. Again, it's used
20 in the crotch of underwear. And as it teaches, it's accommodating wearers of
21 different sizes and shapes. And these people would move up and down and
22 side to side, like we've talked about. And this confirms that the panel would
23 stretch in all directions.

24 You can contrast this with something like a waistband, right, where
25 it would only really need to stretch side to side. Now, if the elastic panel

1 didn't stretch in four directions, it would cause the underwear to rip or tear as
2 it stretched, and it couldn't achieve that purpose of gently pulling the
3 genitalia forward.

4 We do also want to flag for the Board that while we think Carrillo
5 discloses Claim 1(d), it also renders it obvious based on the disclosures that
6 we talked about on the previous slide. And there are only really two options
7 here, right? And a POSITA would have found it obvious for the elastic
8 garment to stretch in four directions, based on what Carrillo talks about.
9 And Patent Owner didn't actually dispute that in its Patent Owner response
10 or it's sur-reply.

11 JUDGE SILVERMAN: This is Judge Silverman again. There's
12 nothing in Carrillo that specifically talks about stretching side to side and up
13 and down; is that right?

14 MR. RAFFETTO: Carrillo doesn't use the word four-way stretch,
15 that's correct. But I think the disclosures, you know, when you look at them,
16 it is teaching that it would stretch in four directions, just based on the
17 material being elastic, the location of where it is, how it's sewn into the
18 underwear, and how it sort of gently pulls the intimate parts forward.

19 JUDGE SILVERMAN: Couldn't that be accomplished -- all that
20 be accomplished with just side to side stretching?

21 MR. RAFFETTO: I think, you know, as we explained in our
22 petition, as Ms. Wagner testified, what would happen if it only stretched in
23 two directions and not the other, if you think, like, the waistband, that could
24 end up causing the underwear to tear. Because in the crotch area, you do
25 need more flexibility because you have more -- you're pulling the underwear

1 up and down and also side to side. So what we're submitting is that that's
2 how somebody would interpret Carrillo, based on its disclosures. That's the
3 natural reading of Carrillo. And on top of that, it's obvious too. But we do
4 think it's a natural reading of Carrillo.

5 JUDGE GROSSMAN: Mr. Raffetto, does Carrillo tell us what
6 fabric it is without this -- talking about stretch? Do we know whether it's a
7 Lycra or a cotton or some other?

8 MR. RAFFETTO: It doesn't expressly say what the material is. It
9 of course does say that the stretch panel itself is an elastic, a U-shaped
10 elastic garment. And it's saying that it's used in underwear. But it doesn't
11 say it's Lycra, for example.

12 JUDGE GROSSMAN: Thank you.

13 MR. RAFFETTO: So turning to the other dispute for Carrillo.
14 And there's only two real disputes with Carrillo on the independent claim,
15 and that's whether Carrillo, in view of Brocks, renders obvious Claim 1(g).
16 Carrillo, again, it discloses an elastic garment that has an opening into a
17 pouch area and allows a user to insert their genitals into the opening and
18 have them pull forward so they're sort of supported and separated.

19 And Brock says we've talked about it also discloses a male
20 undergarment that includes a general pouch. And we're looking at Slide 35,
21 to be clear. And that pouch is formed by attaching elastic strips to the
22 underwear while stretched and then releasing them to create a gathering.

23 And so, like Kitsch, turning to Slide 36, the accommodation is to
24 apply Brocks' teachings to stretch Carrillo's elastic garment when it's being
25 sewn to the front of the underwear, that's it. It's not using Carrillo's elastic

1 garment in Brocks' underwear or using Brocks' elastic strips. In Carrillo's
2 underwear, it's a lot narrower than that.

3 And again, there's plenty of rationale for this. It's not hindsight.
4 It's just what Brocks teaches. And Patent Owner's arguments against
5 Carrillo, Brocks, just like it's arguments against Carrillo, Kitsch, Brocks, it
6 boiled down to this idea that two references can't be combined to find
7 obviousness. But that's wrong, that's a legal error.

8 Turning to Slide 37, Patent Owner argues that Carrillo doesn't
9 disclose supporting the genitals from underneath, and that pulling on male
10 genitals is -- as in Carrillo, is different than the genital support in the '974
11 Patent. Claim 1 doesn't specifically talk about supporting genitals from
12 underneath. But in any event, Carrillo discloses that because it talks about
13 how the U-shaped elastic garment doesn't just pull, it gently pulls the
14 genitals forward when they're inserted into the opening, thus supporting
15 them from underneath.

16 Patent owner also argues, turning to Slide 38, that Carrillo doesn't
17 have a pouch because its U-shaped garment is essentially congruent with the
18 inside of the underwear and forms a pocket, not a pouch. But Carrillo never
19 uses any of that terminology. It never describes its U-shaped elastic garment
20 as essentially congruent. It doesn't use the term pocket, which is pretty
21 similar to a pouch in any event. But it doesn't use that term. And it does
22 describe a pouch, and it specifically does that in the abstract.

23 I think it's also worth noting that Patent Owner contradicts this
24 argument later on in its papers here, it says Carrillo has no pouch. But later
25 it argues that because Carrillo has a pouch effectively, there's no need to

1 modify it to include a different style of pouch from Brocks. So it uses that
2 -- an argument that Carrillo basically has a pouch to try to argue there's no
3 reason to combine it with Brocks.

4 Turning to Slide 39, Patent Owner also argues Carrillo doesn't
5 disclose the gathering and the elastic garment in Carrillo is effectively
6 baggy. But Carrillo never suggests that its elastic garment is baggy. And it
7 can't be baggy. Because if it was, then it wouldn't gently pull the genitals
8 forward to separate them. I mean, that's what Carrillo says it does. And
9 that's also not what we're arguing in any event. That's an argument against
10 individual references, not against the combination, right? We're relying on
11 Carrillo in view of Brocks for gathering the front portion to form a pouch.

12 Turning to Slide 40, Patent Owner also argues that combining
13 Carrillo and Brocks would result in underpants that include an elastic
14 garment from Carrillo, plus a pouch created by elastic material surrounding
15 leg openings, as taught in Brocks. But that's a misreading of the
16 combination. We never suggested we're incorporating Brocks' strips around
17 the leg openings in Carrillo's underwear. We're just using the narrow
18 teaching of Brocks about stretching to create a gathering and applying that to
19 Carrillo's U-shaped elastic garment to stretch it before sewing it to create a
20 gathering, as expressly taught by Brocks.

21 So that brings us to a handful of other disputes that we wanted to
22 touch on, and we'll --

23 JUDGE SILVERMAN: Counsel, I'm sorry, before you leave
24 Carrillo, is it your argument that the sort of the front portion material of
25 Brocks would be added to Carrillo? Because Carrillo doesn't have that front

1 portion that defines the pouch like the '974 Patent does. Or maybe I'm
2 misunderstanding it, but I could appreciate your explanation.

3 MR. RAFFETTO: Yeah. What we're arguing, Your Honor, is that
4 when you sew -- when you attach Carrillo, right, when you sew it in, before
5 you do that along the seams that you're sewing it into, you sort of stretch it
6 out. And then that causes the front of the underwear to sort of bunch up. So
7 no, we're not taking a pouch from Brocks and putting it into Carrillo. That's
8 not what we're doing.

9 JUDGE SILVERMAN: Okay. So where is the front portion in
10 Carrillo?

11 MR. RAFFETTO: You can see it right here on --

12 JUDGE SILVERMAN: I'm sorry, what are you mapping to the
13 front portion?

14 MR. RAFFETTO: Well, this is showing, I guess, the inside of the
15 underwear. But it would be the -- yeah, this would be the front portion of
16 the underwear. So you'd be -- there would be a front and a back to the
17 underwear, right? You're just stretching out the U-shaped elastic garment
18 and -- when you sit -- before you sew it in, and then you're sort of releasing
19 it to cause the front of it in the area of the crotch, specifically where it's sewn
20 in, right, to bunch up.

21 JUDGE SILVERMAN: Okay. Does Carrillo explain where that
22 red zone is sewn to the underwear? I mean, where are the seams?

23 MR. RAFFETTO: It says it's sewn -- oh, sorry, Your Honor,
24 please go ahead.

25 JUDGE SILVERMAN: Where the stitching occurs, right, is what

1 I'm trying to figure out.

2 MR. RAFFETTO: Yeah. It says it's sewn to the front part of the
3 underwear and attached to the elastic of the waistband. That's what Carrillo
4 is disclosing. So inside the underwear.

5 JUDGE SILVERMAN: Okay. And this view is from the inside?

6 MR. RAFFETTO: Yes, Your Honor.

7 JUDGE SILVERMAN: Okay. So we don't know whether the
8 Carrillo -- or do you have a position as to whether Carrillo is stitched on the
9 outside of that red shape or on the inside of the red shape or both?

10 MR. RAFFETTO: What do you mean by the outside or the inside?

11 JUDGE SILVERMAN: Well, the outer perimeter of that red piece
12 or the inner part that's sort of teardrop shaped that's on that --

13 MR. RAFFETTO: Yeah. I think that -- yes, I understand what
14 you're saying, Your Honor. I think it's along the perimeter of the teardrop
15 shape. So I guess on the outer boundary of it in particular. So it would be
16 kind of stitched along the outside of it. But as we're saying, you know, when
17 you apply the teachings of Brocks, you would stretch it out when you are
18 stitching it, and then you would release it to cause a bunching inside of that
19 area that the opening is going into.

20 JUDGE SILVERMAN: Okay. Our language may have gotten
21 crossed a little bit. But the sort of the portion on the outside is sort of linear
22 and angular, and the inner part is sort of rounded of this red piece in your
23 Slide 32. So is the stitching on the straight and angled part or is it on the
24 round part or both?

25 MR. RAFFETTO: I think it could -- so it's definitely on the

1 outside, right, because that's where the -- that's what creates the gathering
2 when you stretch it on the outside. I mean, it's possible it could be stitched
3 on the inside as well. But I think our primary position is it's the outside.

4 JUDGE SILVERMAN: On the straight --

5 MR. RAFFETTO: Yes, on the straight -- and for the record, we're
6 looking at Slide 32 and the figure of Carrillo.

7 JUDGE SILVERMAN: Thank you.

8 MR. RAFFETTO: So turning to some of the other disputes, we
9 just wanted to touch on a few of the dependent claims, the first of which is
10 Claim 2, which recites the stretch panel having asymmetric stretch, right?

11 JUDGE SILVERMAN: Mr. Raffetto, I would just -- I'll interrupt
12 you for a second, just to give you a sort of a sense of your time. You've got
13 about 15 minutes before you hit your rebuttal.

14 MR. RAFFETTO: Thank you, Your Honor. Thank you.

15 So we've talked a little bit about this claim earlier, because Patent
16 Owner was interpreting Claim 1 to require symmetrical stretch. But here,
17 we can actually see the asymmetric stretch. And as we argued in our papers,
18 both Kitsch, Brocks and Carrillo, Brock renders this as obvious. And there's
19 a specific teaching in Brocks that talks about how material used in
20 underwear can have asymmetric stretch, so that it stretches more easily
21 along the waistband then at right angles to the waistband.

22 And so what we argued is that it would have been obvious to apply
23 this teaching of using material with asymmetric stretch to the stretch panel
24 of Kitsch. And, you know, we include various rationale on the right. We're
25 looking at Slide 43. And Patent Owner's only arguments really against this

1 -- and I think this is important -- were that Kitsch and Carrillo don't disclose
2 asymmetric stretch. But that's not our position, and that sort of misses the
3 point. It's Brocks that's disclosing this. And we're saying it would have
4 been obvious to apply this teaching that's in Brocks to Kitsch and Carrillo.

5 So turning to Slide 44, this is Claims 3 and 16. We grouped these
6 together, focused on the rectangular limitation, that the stretch panel has to
7 be rectangular. Now, Patent Owner doesn't dispute that Carrillo discloses a
8 rectangular stretch panel, but it does argue that Kitsch's side panels are not
9 rectangular and that there's no opening between them.

10 Now, the '974 Patent, I think it's pretty clear that the stretch panel
11 doesn't have to be a perfect rectangle. It just has to have generally straight
12 sides that extend perpendicular to the waistband. And you can you can see
13 this from the figures in the patent, right, Figure 3 and Figure 9. I think the
14 patent specifically describes these as a rectangular -- generally rectangular
15 stretch panel. And it actually looks a little bit like a boomerang.

16 And if we turn to Slide 45 you can see -- and we've got the '974
17 Patent on the left, and we just inverted the figure to give it the same
18 orientation as Kitsch. You can you that the '974 Patent -- I mean, Kitsch is
19 even more rectangular than the '974 Patent is. So we think Kitsch clearly
20 has that.

21 Turning to Claims 4 and 5, which recite that the stretch panel has
22 at least 30 percent stretch. You know, as we argued in the papers, both
23 Kitsch, Brocks and Carrillo, Brocks render these claims obvious. You
24 know, there's a formula in the '974 Patent for how to calculate the stretch of
25 a material, what it's claiming. And then Brock specifically teaches that the

1 elastic strips are two-thirds the length of the opening.

2 And so if you use the formula, you get 30 percent -- at least 30
3 percent stretch. And so our argument is it would have been obvious to use a
4 stretch panel having at least 30 percent stretch in order to gather the fabric to
5 form a pouch with sufficient volume. Patent Owner doesn't really raise any
6 arguments against that combination.

7 The last dependent claim we wanted to touch on in a little detail
8 was Claim 8, the opening width has a width in excess of 2 centimeters.
9 Now, Kitsch discloses that it's opening between its side panels allows the
10 genitalia to be inserted into the pouch compartment and that the width of the
11 opening optimizes a maximal volume of the pouch.

12 And so as we explained in our papers and as Ms. Wagner testified,
13 a person of ordinary skill would have understood from these disclosures and
14 the figures in Kitsch that the opening would be at least 2 centimeters more
15 than that. And if it weren't, then the genitalia couldn't be inserted into the
16 pouch.

17 Now, Patent Owner doesn't really dispute that part of it. What they
18 say is that Kitsch just doesn't disclose an opening at all, right? And so that's
19 obviously wrong. We also want to flag for the Board that in addition to
20 Kitsch disclosing this claim element, as we argued in our papers, we believe
21 this claim element is rendered obvious by Kitsch. And Patent Owner didn't
22 dispute this point in their papers.

23 Turning to Slide 48, this is Carrillo as to Claim 8, and the issues
24 are similar for Carrillo. It also discloses that the genitalia are inserted into
25 the opening and then gently pulled forward. And a POSITA would have

1 understood from these disclosures in Carrillo that the opening would be
2 greater than 2 centimeters. Otherwise, the wearer couldn't get their genitals
3 into the opening, which is the entire point of Carrillo.

4 And Patent Owner doesn't present evidence to the contrary or
5 explain how Carrillo could work if it were so small that the genitalia couldn't
6 fit through the opening. It just argues that Carrillo doesn't disclose the exact
7 width of the opening. But what matters is not the exact words used in
8 Carrillo, it's what a POSITA would have understood from its disclosure.

9 And again, we also argued that Carrillo renders this claim element obvious
10 on top of this, based on the disclosures of Carrillo. And Patent Owner didn't
11 dispute that in their papers.

12 Turning to Slide 49, we just listed out some of the other dependent
13 claims. They do dispute a lot of them. But as the Board can see, a lot of
14 them just rise and fall with the issues we've already talked about. They just
15 either say because Kitsch and Carrillo -- sorry, Kitsch, Brocks and Carrillo,
16 Brocks fail to render obvious Claim 1, they don't render dependent claims
17 obvious. So it's a lot of the same issues, as you work through the dependent
18 claims.

19 I want to touch on one last issue, and we're looking now at Slide
20 50. And that's Patent Owner's attacks on Petitioner's expert, Ms. Wagner. In
21 the Patent Owner response in particular, Patent Owner spent a lot of time
22 arguing that Ms. Wagner is not credible and repeated -- and in doing so, they
23 repeatedly misrepresented or mischaracterized what she said.

24 And we explained this in our reply. But we thought it would be
25 helpful to put together a chart for the Board so they could see on the one side

1 what they say she says, and then on the other side what she actually said.

2 Because we think it's stark and shows that they're really grasping at straws
3 here.

4 To take two examples, you know, the first, they say Ms. Wagner is
5 just a hired gun to invalidate patents. What she actually said at her
6 deposition was that she's testified in two IPRs in her entire career, including
7 this one. She is a consultant doing apparel design in LA; she's not a
8 professional witness. So that's just not true. So what they're saying is not
9 what she actually said.

10 The other the other issue is on the bottom right there. You can see
11 it where it says -- and I think Patent Owner will talk about this in their
12 presentation. Ms. Wagner didn't know if Kitsch disclosed an opening. If
13 you actually look at the line of questioning that Patent Owners is talking
14 about, what they trying to do was see if Ms. Wagner could remember, across
15 many references, whether you know, she could do Control F in her head and
16 determine if specific words were found verbatim in the prior art. And she
17 was just saying she wasn't sure about that without having a searchable copy
18 in front of her, I mean, she is giving testimony under oath.

19 When they actually asked her, you know, does Kitsch describe that
20 the space between the side panels is an opening; she says, yeah, Figure 8
21 shows an opening. So she did know if Kitsch disclosed an opening, and she
22 specifically said it.

23 And with that, unless the Board has any questions for me, I will
24 reserve -- I will turn it over to Patent Owner and reserve my remaining time.

25 JUDGE SILVERMAN: If I could just take a moment, one of the

1 claim limitations in, I think, independent claim is it talks about the U-shaped
2 opening. Do you have a construction for that term?

3 MR. RAFFETTO: Yes. We don't have a construction for it per se.
4 I think you're talking about this here. I think our position was that if you
5 look at the Kitsch -- I think it's Claim 3, Your Honor. This is the shape of a
6 U. And you can kind of see it on the outside in Kitsch Figure 1. It is shaped
7 like a pear, right? It comes down like a U. And the opening is going into
8 that pouch and sort of tracks that, right, because the side panels are stitched
9 along that compartment, along the seams of that compartment. And so that
10 that creates sort of a U-shaped opening when you consider that positioning
11 of the panels.

12 JUDGE TARTAL: Mr. Raffetto, just for the transcript, I think
13 you're talking about your Slide 45.

14 MR. RAFFETTO: Yes, Your Honor. Thank you.

15 JUDGE SILVERMAN: So is the U-shape -- does the garment
16 have to be in any particular configuration for the U-shape to occur? Does it
17 have to be worn? Does it have to be laid out flat?

18 MR. RAFFETTO: I think that the -- well, it certainly would mean
19 that the panels are installed, right? I think that's how you would view it. So
20 in that sense, there is a configuration. It's the panels in the underwear, right,
21 so that you have the actual opening. But I don't think it's -- I mean, just
22 looking at Figure 3, for example, it seems to be just sort of a loose diagram,
23 similar to the way it's shown in Kitsch Figure 8, still looking at Slide 45.

24 JUDGE SILVERMAN: The Figure 8 of Kitsch --

25 MR. RAFFETTO: Yes, Your Honor.

1 JUDGE SILVERMAN: -- it seems like this is sort of looking
2 downward at the garment from in -- looking at the inside. It seems like the
3 opening area between the two stretch panels is sort of angular at the bottom,
4 which isn't usually what I think of as U-shaped. I think of U-shaped sort of
5 as having a curved bottom.

6 MR. RAFFETTO: I do think U-shaped -- it is just saying U-
7 shaped, so I don't -- and I don't think the patent is saying it has to be, like,
8 extremely strict type of shape. I also do think of a U-shape as it could have
9 sort of sharp edges as it sort of comes around. That's still a U that is U-
10 shaped.

11 JUDGE SILVERMAN: Okay. Thank you.

12 MR. RAFFETTO: Thank you, Your Honor.

13 JUDGE GROSSMAN: Mr. Raffetto, you'll have 18 minutes and
14 41 seconds for rebuttal.

15 JUDGE SILVERMAN: So thank you. Thank you, Judge
16 Grossman. We're going to take a short break now. How does 10 minutes
17 sound? So we'll -- so it's just after 2:00, so I guess at 2:15 we'll start up
18 again.

19 MR. LUMAN: Okay.

20 JUDGE SILVERMAN: Let's go off the record. Thank you.

21 (Whereupon, the above-entitled matter went off the record at 2:03
22 p.m. and resumed at 2:15 p.m.)

23 JUDGE SILVERMAN: All right. I seem to be back. Can
24 everyone hear me?

25 MR. LUMAN: Yes.

1 JUDGE SILVERMAN: Thank you for bearing with me during
2 that technical glitch. So we were just about to begin with Patent Owner's
3 argument. And I apologize again. I think you established, Judge Grossman,
4 the amount of time you wish to reserve for sur-rebuttal. 15 minutes?

5 MR. LUMAN: Yes, Judge, that's correct.

6 JUDGE SILVERMAN: Very good. Thank you very much. You
7 can begin whenever you're ready. Thank you.

8 MR. LUMAN: Good afternoon, may it please the Board. I'm John
9 Luman, along with Heath Novosad, on behalf of Package Apparel. We're
10 from the Law Firm of Daniels & Tredennick. I want to give you a little
11 background here. This is background material. Package Apparel, they're
12 known by BN3TH in the marketplace. Back in 2010, the inventors and a
13 group of folks at BN3TH, they didn't have underwear. There was no -- in
14 the active men's underwear space. There was nothing out there that
15 supported the genitalia, relieve pressure or prevented chafing and had to
16 shift in order to feel comfortable. That was nowhere to be found in the
17 marketplace.

18 So these guys took it upon themselves to go out, ride bikes, go
19 swimming, go running to try to get the right feel, the right fit. And so what
20 they did was they came up with? The Original 3D Pouch. There was
21 nothing in the marketplace like this before they came along. So in 2010,
22 they've come up with this, and they start their company. They've been
23 manufacturing and promoting this for years. I'm on Slide 2 of our slide
24 deck.

25 And then they become very successful. They're out there in the

1 marketplace. They're winning awards. They won the 2021 iF Design
2 Award for outstanding design. They were on the 2022 ISPO Award for
3 innovative sports products. They came up with this design, which you see
4 on the screen. It's got a stretch panel that protects. And there's a prop in
5 there. There's a couple of eggs preventing and helping keep the scrotum
6 away from the body with support that doesn't require adjusting. And it
7 allows you to put on your underwear and put on this sports product without
8 having to adjust, without having to manipulate. You just open it up, you
9 drop in, and you're off and running. So you didn't have to manually do
10 anything on this.

11 The product, BN3TH's product, is sold all over. It's in the States,
12 it's in foreign countries. They've licensed in foreign -- in Canada. The
13 patent equivalents to this '974 Patent. They've been successful. They're not
14 somebody that's out there just came up with a patent and is, you know, living
15 in the marketplace. So if you look at the patent --

16 JUDGE TARTAL: Sorry to interrupt you for a moment.

17 MR. LUMAN: Sure.

18 JUDGE TARTAL: Is there any evidence of secondary
19 considerations of non-obviousness tied to commercial success?

20 MR. LUMAN: Those would be those. We didn't put them in as a
21 as a non-obviousness and secondary consideration.

22 JUDGE TARTAL: You had to take that into consideration,
23 correct?

24 MR. LUMAN: The way it's briefed, you cannot.

25 JUDGE TARTAL: Right.

1 MR. LUMAN: But I'm giving you background for the for the
2 benefit of the Board.

3 JUDGE TARTAL: Thank you.

4 MR. LUMAN: The '974 Patent, as you can see on Slide 4, they
5 perfected their design. They filed their application on December 31, 2010.
6 And now we're here on this IPR over this because there is a lawsuit. There's
7 a lawsuit that's pending in New York. It started in Texas, moved to New
8 York, and we're here on the IPR for the patent claims. Petitioner doesn't
9 dispute that the claims of the '974 Patent are novel and not anticipated. They
10 allege that they're obvious. And you've heard their art.

11 I want to talk about some of their art in the background, sort of
12 background situation. The Kitsch reference, as we've talked about -- or
13 you've heard them talk about, that's Trent Kitsch. He's well known to us in
14 the marketplace. He's got a different set of underwear than we do. And his
15 have those side panels, like we've talked about. The side panels are parallel.
16 They never come to meet at the front or the back, and they were designed to
17 keep the scrotum from touching the thighs. That was his issue. That's what
18 he came up with. That's what he thought about. That's what he went out and
19 did. They're a completely different style of underwear than the BN3TH
20 product.

21 He filed the patent application. That's the Kitsch reference that
22 we're dealing with in this case. And as you can see in -- on Slide 6 -- if you
23 see Slide 6, this is slide -- or the Figure 3 that has been colored. I think
24 Petitioner colored it for everybody, and we used it in our papers. So you can
25 see the side panel, the red side panel, and Figure 3 of the Kitsch reference.

1 And you can see where -- it's harder to see, but you can -- when you read the
2 text, it's pretty evident.

3 In fact, you can even see this on Figure 3 here, you've got the side
4 panel that comes down in red. They've got a green outline. It's curious that
5 they say there they're parallel side panels. I'm curious that they say that
6 they're connected in the back, yet they don't show it. Here, you can actually
7 see the seam, the perineum seam in the back. I think it's identified as 24. So
8 Kitsch, from his reference, from the Kitsch reference, says this, it's --

9 JUDGE GROSSMAN: Mr. Luman, just on that slide, the figures
10 on the right, where are they from?

11 MR. LUMAN: If we go back one, just one, go back to Slide 5,
12 Trent Kitsch is right here on the right-hand side. It's on his website. And
13 Trent Kitsch put this figure, this -- it's sort of a blowup of his men's
14 underwear. It's on his website. So we went to the website, saw it. It's like
15 -- let's give the let's give you all the background on this. And one of the
16 reasons is, if you saw during the deposition testimony of Bernie Kahn, our
17 expert, they asked him if he had seen something, and he did. He had seen a
18 pair of these. And so it's only fair, I think, for everybody to see what we're
19 talking about.

20 JUDGE TARTAL: Can you point elsewhere where you find the
21 evidence? This is where the slides are objected to, correct?

22 MR. LUMAN: Sure.

23 JUDGE TARTAL: You've introduced them during the trial
24 proceedings as the demonstrative, not evidence in the hearing. For what
25 purpose?

1 MR. LUMAN: So it's in the marketplace. It's background
2 material. I'm not using it as evidence at all. I'm using as a demonstrative to
3 what's in the background, what's out in the marketplace. And so if you -- if
4 we go back to Figure 6, I specifically spoke about everything on the left,
5 which is part of the patent. That's what I did here. I didn't reference the
6 stuff on the right. I specifically talked about Figure 5 -- I'm sorry, Figure 3
7 on Slide 6.

8 JUDGE GROSSMAN: Is there any evidence that ties the figure on
9 the right of Slide 6, the actual product, to the patent drawing? I mean, is
10 there any testimony from anyone or other evidence that says that the
11 illustration in the patent is the same as the commercial product shown on the
12 right?

13 MR. LUMAN: Other than the previous slide where Kitsch says it's
14 patented, I don't have that tied together with these two. But Kitsch in the
15 slide before, on Slide 5, says this is our patented product.

16 JUDGE GROSSMAN: Do we have testimony to that effect --

17 MR. LUMAN: We do not.

18 JUDGE GROSSMAN: -- on the record?

19 MR. LUMAN: We do not.

20 JUDGE GROSSMAN: Would you agree that we should ignore
21 that? I understand you're presenting it as your background, but it's -- if we're
22 looking for evidence on which we can rely, that is not it.

23 MR. LUMAN: I wholeheartedly agree with you. Correct. I'm just
24 giving it as background. That's all I'm doing.

25 So let me talk about Kitsch. In the Kitsch reference, Exhibit 1007,

1 at paragraph 28, he says, the side panels, 12, form a pair of generally parallel
2 fences which extend upwardly from and along seams 20 -- so down low -- as
3 so as to extend their uppermost edges, 12, upwardly, substantially, and
4 completely into the crack or fold between the lateral outsides of the scrotum
5 and the top of the inner thighs, that is along the fold of skin where the top of
6 the inner thighs join the top of the scrotum along the lowermost aspect of the
7 abdomen of the user. That is from Exhibit 1007, at paragraph 28, that's
8 what's being described in Figure 3.

9 If we go to the next slide, Brocks, we didn't find that in the
10 marketplace. We don't know if it exists in the marketplace or not. We don't
11 know, never seen it. Brocks is -- according to Brocks, it's a classic jockey
12 short, sort of whitey-tighties knitted underwear. And he was concerned
13 over, you know, the embarrassment factor of the scrotum falling out the leg
14 holes. Because whitey-tighties and knits, that kind of get all, you know,
15 worn out over time.

16 So he came up with and he got a patent on putting -- as you can see
17 here, 76 and 78, on the left-hand figure on the face of the patent, number 7,
18 Slide 7, he came up with putting 76 and 78 elastic around your leg to prevent
19 that from happening. And you can see what he did on the other figure
20 -- excuse me, the figure to the left on the face of the patent. When he did
21 that, there is a pouch underneath. And that was to hold everything in. And
22 so he squints the legs and trapped everything inside, trapped it to his body.
23 And that was his design.

24 Next slide, Slide 8, Carrillo is not -- it's called an accessory. We've
25 not seen it in the marketplace. Carrillo is a one-figure drawing. The

1 abstract, which is on the slide here, on page 8, the abstract provides that it's a
2 hygienic garment. It's sewn to a classic underpant to reduce contact and
3 friction between the testicles and the groin. The garment can provide relief
4 for many individuals who suffer from itching, eczema, rash, et cetera caused
5 by perspiration and friction. That's Carrillo. That's what Carrillo, his
6 invention, was all about.

7 Let's go on to Slide 9, talk a little bit about Slide 9. Slide 9 is the
8 patent, face of the patent. The three references that we just talked about -- or
9 I just talked about were all cited or listed on the front page of the -- well,
10 under the U.S. patent documents and the foreign patent documents. You can
11 see them, they're highlighted, Brocks, Kitsch. And the one that's WO, that is
12 Carrillo. This patent issued on November 17, 2020. And like I said, it was
13 filed -- the priority date is back on December 31, 2010. There's a
14 grandparent and a parent that have also issued. They're not at issue here.
15 We've talked about the prosecution history in our preliminary patent
16 response.

17 If we go to Slide 10, we talk talked about Claim 1, it's the only
18 independent claim. We're going to talk a little bit about -- actually, what
19 we're going to focus on is -- are the two big paragraphs. And really, after
20 listening to Petitioner and the questions, we're going to really hone in on just
21 a couple of aspects in this claim that's found in the stretch panel, a stretch
22 panel and the stretch panel paragraphs.

23 Let's see, moving on to the features of the '974 -- just to give you
24 some background -- as a pouch, a stretch panel, and support under the
25 scrotum. We're on page 11, Slide 11. And if you move over to -- and there's

1 -- it's kind of work in conjunction, the next three slides. But on Slide 12,
2 which is -- it's the face of the patent -- on the very face of the patent, and I
3 think it's Figure 5. The pouch is called out as number 20. And the pouch, if
4 you're looking at Figure 6 here, the pouch is in the front. You can see the
5 opening is number 30, and then the stretch panel is number 22.

6 So earlier -- and I can show you the text, and I'll read you the text.
7 I believe it was Judge Grossman who asked whether -- in the drawer,
8 whether the stretch panel bunches the front or if it lies flat. And so I wanted
9 to point out the text in the patent where it says it's non-flat, it's bunched in
10 the drawer. So when you throw it in the drawer, that stretch panel has
11 tightened it and created that three-dimensional pouch. Because that's what
12 that's the stretch panel does, it creates that three dimensional pouch in the
13 front of the underwear.

14 So you had focused, if I remember correctly, on column 6, line 28
15 or line 30, if you continue reading in that paragraph, from column 6 all the
16 way down to 41, so 30 -- 28, to 41, you can see at the very end of that
17 sentence -- or the end of that paragraph that they're talking about the stretch
18 panel. And it says, this builds volume in pouch, 20, especially when taking
19 in combination with the shaping of the front portion, 18. That's the front of
20 the underwear. That's the front of the underwear is 18. So you've got a pair
21 of underwear. You pull this in the back, and it creates the pouch. And it
22 says, e.g., by front seam, 19, which makes front portion, 18, non-flat. So in
23 the drawer, it's non-flat.

24 So we've got the pouch in the front. We've got the -- and the text
25 that we have cited to y'all -- I know you all have very good familiarity with

1 this based upon the questions that you've asked, and I'm happy to read the
2 text that we have cited to describe this in greater detail. But in short, if you
3 look at the second portion that's highlighted, it describes the stretch panel is
4 contracted and pulled away from the front area so as to provide a three-
5 dimensional pouch, 20, between stretch panel and the front portion, 18.

6 So we have a stretch panel. You know, we've got the shorts, if you
7 will, put the stretch panel on, tighten things up, and now we have support.
8 We've got -- because of the stretch panel, when you put them on, the
9 opening is open. You don't have to manipulate anything to get the scrotum
10 into there. The opening is open. And then -- and you provide support -- the
11 stretch panel provides support for the scrotum as well. So that's slides 12
12 through 13.

13 I'll go slowly here. Let me look at 13 here. We've -- I've heard -- I
14 think it was you, Judge Silverman, that asked whether the U-shape, if you
15 will, is in the drawer -- that's my sort of way of shortening it up -- or on
16 paper. If you look at Figure 3 and then Figure 9, Counsel used Figure 9 on
17 Slide 44 of his presentation. If you look at that, you can see that the U-shape
18 is when it's -- before sewing in, and you sew it in. So if you look at stretch
19 panel, 22, it's highlighted on Figure 3 here on Slide 13, that stretch panel
20 goes all the way down to that first seam. It's not even called out. Yeah, it is,
21 called out as 26. It's just seamed all the way down there. But it's a stretch
22 panel all by itself.

23 You could hold it up in this courtroom, and there it is. It's a stretch
24 panel that's one piece. It could be two. You could sew them together. You
25 know, you could sew them together if you wanted to do it at the bottom. But

1 it's then sewn into the underwear. And then the back seam, the 27, I believe
2 that's the perineum seam. I think that's what they call it. You can see in the
3 text that's on the screen; we've got a crotch panel. So I'm reading in the very
4 first paragraph, the crotch panel, 25, joined by seams, 26 and 27. So the
5 crotch panel is 25. So that's on the bottom side before you even attach the
6 stretch panel. So that's the stretch panel.

7 And then there's support under the scrotum. That was important.
8 And it's there. It's this -- and that's on Slide 14. There's a whole bunch of
9 texts there that we've provided -- it's in our papers as well -- providing
10 support. If you look in the third block, it says the elastic nature of stretch
11 panel, 22, to gently support the wearers genitalia from below. So that's what
12 the guys went out to do. They went out and rode bikes, drafted this patent
13 application, and the patent issued as the '974.

14 Kitsch in view of Brocks, Slide 15, that's where we're going to go.
15 And what I'm going to do here is based upon the testimony or the
16 presentation earlier, I'm shortening this to hone in on just a couple of aspects
17 of Kitsch. I'm happy to answer other questions. But if you look at the claim
18 language that they have broken out -- and so if you go to Slide 17, and we're
19 going to focus on 1[e][iv], an opening for receiving the wearer's genitals.

20 But before we do that -- because there's a debate over opening
21 -- let's look at the claim language sort of in its entirety. A stretch panel is
22 introduced in 1[c]. It goes -- the stretch panel sort of starts the whole claim
23 language on the stretch panel. 1[d] says the stretch panel, "comprising."
24 That's the next thing. And then it goes on to at the end of [d], "having."
25 And now, the stretch panel has to have all these elements. Kitsch does not

1 have an opening. And so if there is no opening in Kitsch, this can't be
2 obvious because they haven't alleged that Brocks has an opening. There is
3 no opening.

4 So let's go through that a little bit. Let's go to Slide 30. So we
5 went from -- I'm sorry, 17 to 22, my bad. Slide 22 of a single element of the
6 claim is absent from the prior art, claim is not obvious. Let's go from there
7 to Slide 30. Here's what I was talking about. We're going to focus on an
8 opening for receiving the wearer's genitals. If you go to Slide 31, please. I
9 just talked about this slide -- or this figure in a different context. You can
10 see number 22 has got the opening, 30. And we've seen that before, it's
11 throughout the patent. We've talked about it a lot.

12 The next slide, 32, if we look at the figure here, Figure 3 and
13 Figure 8 of Kitsch, okay, Kitsch uses parallel fences. They use parallel
14 fences. By definition, parallels don't meet. Kitsch -- the red called out there
15 are the parallel fences. There's no connecting them at the bottom. There's
16 no connecting them at the top. They are parallel. They're designed to keep
17 the scrotum from touching the thighs. That's what they're designed to do. If
18 you see the left figure, Figure 3, the colored figure, that's exactly what they
19 do. And we've talked about that -- or I talked about that a little bit ago.

20 So now, in fact, if you go to Slide 32 -- we are there, sorry -- it
21 says the two - the text of the patent at Exhibit 1007 at 28 -- and I read this
22 testimony before; I read this text before, I should say -- the two side panels,
23 12, form a pair of generally parallel fences that extend upwardly from and
24 along seams, 20, so as to extend their uppermost edges, 12a, upwardly,
25 substantially, and completely into the crack or fold between the laterally

1 outer sides of scrotum, 14, and the top of the inner thighs. They don't have
2 an opening. The side panels do not have an opening. No openings
3 discussed.

4 In fact, if they had an opening, it probably would defeat the
5 purpose of Kitsch. Because Kitsch says, I don't want the scrotum touching
6 the thighs. So there is no opening, but Petitioner claims there is an opening.
7 And if you would go to Slide 26 of their presentation, thank you. Slide 26
8 colors the area between the two side panels and calls that an opening. That's
9 not an opening. We saw the text of the patent; it's a stretch panel that has an
10 opening. The stretch panel does not have an opening. They've identified an
11 opening or a area between two stretch panels or between two side panels.
12 They're not seamed together at the back end.

13 In fact, here, 24 is the back end. And if I this right, that's the
14 -- what they call the perineum seam. They're seamed together. So back
15 when I showed you the patent, the '974 Patent, when we sew in the U-shaped
16 panel -- you got to sew it to something, and we sew it to the front seam.
17 This seam here, the 24, is a perineum seam, so you have to sew these in
18 somewhere. You're not connecting the back ends of them. So Kitsch
19 doesn't have an opening in its side panels.

20 If we go to the testimony -- in fact, it's kind of interesting, if you
21 took away one of the side panels, so you only have one, I don't know if
22 there's an opening or not. There's an area, but I don't know if there's an
23 opening because it -- logically, it doesn't make sense to put an opening
24 between two side panels -- I mean, an opening between them because the
25 claim calls for an opening in one of them.

1 JUDGE GROSSMAN: Just on that point, I think in your response,
2 not the preliminary response but in the Patent Owner response, you said
3 there were no terms that needed to be construed specifically.

4 MR. LUMAN: Correct.

5 JUDGE GROSSMAN: Do we need to construe what things like
6 opening mean? And because if we -- your position, as I understand it, is that
7 Kitsch has two panels that are spaced apart, and there was a space -- and the
8 space is for the purpose of holding the genitals. And so the question is then,
9 is two parts -- two panels spaced apart defining a space where the genitals
10 can be inserted? It's different than an opening in a single panel? And you're
11 saying the answer to that question is yes, that the claim requires a single
12 panel with an opening, not two panels that are spaced apart.

13 MR. LUMAN: Correct. The claim language specifically says that.
14 That's why we don't need a claim construction. That's why we didn't ask for
15 one. Because it says a stretch panel, the stretch panel having. And it goes
16 through and it says the stretch panel has to have an opening. And the stretch
17 panel, as you can see from the text of the '974 Patent, to give context, that
18 stretch panel does have an opening. It's sewn in. There's the opening.

19 Here, they want the side panels to function as a couple different
20 things, it sounds like, really. They want the side panels to be the stretch
21 panel. Well, if the side panel is a stretch panel, then it needs to have an
22 opening.

23 JUDGE SILVERMAN: And -- I'm sorry, go ahead. I didn't mean
24 to cut you off. Please go ahead.

25 MR. LUMAN: And so their side panel clearly doesn't have an

1 opening. So they're trying to create something -- it's like driving down the
2 road and you got fences on both side of you, you're not driving in an
3 opening. You're driving on the area between two fences.

4 JUDGE GROSSMAN: Judge Silverman, I'm going to just follow
5 up with a quick question before we go to yours.

6 JUDGE SILVERMAN: Sure, go right ahead.

7 JUDGE GROSSMAN: I had some questions for the Petitioner's
8 counsel about whether Kitsch was sewn and where or how it was seamed
9 together. And there was testimony from the cross-examination of your
10 witness about being seamed together. And I thought I understand that at the
11 bottom of that Figure 8 on Slide 26 of the Kitsch patent -- the figure from
12 the Kitsch patent -- I thought I understood that it was sewn at the bottom, in
13 the groin area underneath, kind of where the bottom comes apart. And then
14 at the top, it was both panels were sewn to the elasticized waistband. So
15 they started out spaced from each other, sewn independently to the
16 waistband, and then they met at the bottom and were sewn together.

17 MR. LUMAN: Right.

18 JUDGE GROSSMAN: So they're together at the bottom. And
19 what you're saying is that's still not one piece. That's two pieces that are
20 sewn together?

21 MR. LUMAN: They are not sewn together at the bottom. At no
22 point do these parallel fences get sewn together at the bottom. You have to
23 have some place to sew them in. And so that, they have picked out as line
24 24. They're not sewn together. In fact, I was about to quote some testimony
25 from their expert that says they're not sewn together. So they're not sewn

1 together. So you could put one in. And for whatever reason, you don't put
2 in the other one. And you still don't have a stretch panel with a hole in it or
3 an opening. You've got a side panel. That's all you have. And it's -- I don't
4 know what's parallel to at that point, it's probably between the scrotum and
5 the thighs, but there's no parallel. There's no opening at that point.

6 JUDGE GROSSMAN: There's some testimony from your expert,
7 the Patent Owner's expert in deposition testimony, where he was quite
8 insistent in referring to it as being hemmed together, I think was his phrase.

9 MR. LUMAN: Sure.

10 JUDGE GROSSMAN: That they were hemmed together, that the
11 two panels were hemmed together. And can you explain to me exactly what
12 you think he meant when he said they were hemmed?

13 MR. LUMAN: Sure. And I didn't mean to talk over you there.
14 Yeah, what he was getting at is, look, the underwear is put together in
15 several different pieces and there has to be hem lines and seam lines. And
16 what was going on is everyone was kind of -- the Petitioner's expert was
17 getting a little bit, hey, they're seamed together. Because she knows they're
18 not connected. And so she used that word. They're really attached to a
19 seam; they're not coming together at the seam.

20 And so he was saying, look, it's a hemline. It's a seam. It's a
21 hemline. They're not coming together at any point in time at that line 24,
22 that's -- at the perineum side of it. That's all the way to the back. They're
23 not coming together. You have to make underwear somehow. You got to
24 put things together. But they're not coming together.

25 JUDGE GROSSMAN: I think that your experts may have used

1 that word "seamed," right? I think I might -- may have misspoke when I
2 called it hemmed together. I think the testimony was seamed together.

3 MR. LUMAN: I believe you did use that. Hem was -- I'm not sure
4 who used the word "hem." But he did, he said they come together at a seam.
5 But they don't come together. And so you got to be really careful with that.
6 They're not at the very bottom. So here they are, parallel. They're not by
7 anatomy. You know, the anatomy down there, they have to somehow get
8 closer. They're still parallel, and they have to be sewn in somewhere.

9 But they're not sewn together to create the elastic -- the stretch
10 panel. Under no circumstances does that happen. Their patent doesn't even
11 talk about that. And so they show where they come together to make the
12 underwear, but it's not seamed together to have sort of your U-shaped stretch
13 panel to put in underwear.

14 JUDGE GROSSMAN: Thank you.

15 JUDGE SILVERMAN: Counselor, Judge Silverman here, why
16 can't the stretch panel limitation be met by a divided stretch panel?

17 MR. LUMAN: So if we -- is that the end of your question? I
18 didn't mean to --

19 JUDGE SILVERMAN: Yes.

20 MR. LUMAN: Yeah.

21 JUDGE SILVERMAN: I'll put a question mark there. Yes.

22 MR. LUMAN: Sure. Would you ask it again? I'm sorry. I got
23 cross-wised over --

24 JUDGE SILVERMAN: Sure. Why can't the limitation of a stretch
25 panel be met by a divided element?

1 MR. LUMAN: So if you -- the patent actually mentions this. The
2 stretch panel itself, which has to be -- we're going to get to the next part of
3 this down in Claim [g] where we've talked about it, where the stretch panel
4 gathers and stretches from side to side and top to bottom. So the patent does
5 contemplate that that stretch panel can be sewn together in multiple parts. It
6 mentions that the stretch panel doesn't have to be one piece -- or it has to be
7 one piece.

8 JUDGE SILVERMAN: If I may, I'm thinking about a construction
9 where the -- it's divided such that there are two elements that don't overlap in
10 any way. They don't spatially overlap? Why can't that satisfy the stretch
11 panel limitation?

12 MR. LUMAN: Well, if the stretch panel limitation is very -- if we
13 go back to the claim language -- if you go -- would you go back to that?
14 There we go. So at the very end, we're talking about 1[e][iv], we're talking
15 about the stretch panel going all the way across. It's got a top edge, a bottom
16 edge, side edges that attach to the body at side seams, extending
17 substantially and continuously along either side of the front portion and an
18 opening. So these are attached to the front portion, as we talked about
19 earlier, to create the pouch.

20 And so if you have the stretch panel that can do that across the
21 front to create the pouch, it can be in two pieces, as long as they're -- you
22 know, functionally, they're sewn together. And that they're sewn together to
23 make those two pieces, to make that stretch panel across the front portion.

24 JUDGE SILVERMAN: My question is, why can they not be a
25 divided element? Why do they have to be sewn together or overlap in some

1 way? Is there something in the claim language that dictates that?

2 MR. LUMAN: So --

3 JUDGE SILVERMAN: I realize it says a stretch panel.

4 MR. LUMAN: No. Right.

5 JUDGE SILVERMAN: Why can't a stretch panel be made of two
6 elements that are spaced apart and call it a stretch panel?

7 MR. LUMAN: Because that's -- and maybe -- and I apologize for
8 this. I may be misunderstanding your question. I don't see how if you've got
9 two parallel elements and binding -- which don't bind together at all become
10 the stretch panel of 1(e), 1, 2, and 3. Because they don't create an opening.
11 They don't create an opening through the stretch panel. They created --

12 JUDGE SILVERMAN: They have an opening at the space
13 between them.

14 MR. LUMAN: But that's not what the claim calls for. It calls for a
15 stretch panel having this. And so they're using the term side panel as stretch
16 panel. And so you can't really have it both ways. It's either a side panel or
17 it's a stretch panel. It's got to be a stretch panel. And so the stretch panel has
18 got to have a hole.

19 JUDGE SILVERMAN: The word that we use to call it is not all
20 that important. There was a famous decision many years ago -- I know
21 Judge Grossman remembers this -- that says words are made for the sake of
22 things, things aren't made for the sake of words. So the label that's on it or
23 the word that's on it is not really material. What I'm talking about is the
24 structure. And if I have a structure that has -- that's divided, why can't that
25 satisfy the limitation in this case of a stretch panel? I realize stretch panel,

1 the word is singular, but why can't it satisfy it? Is there something in the
2 claim language that would preclude that from being met by a divided
3 element?

4 MR. LUMAN: I believe there is. As we go through the stretch
5 panel claim language, when you say divided element, you mean that they're
6 parallel and somehow those two function to create an opening. But that's not
7 what the claim language calls for.

8 JUDGE SILVERMAN: If you could point to me what it is that
9 would preclude that configuration from being within the scope of the claim.

10 MR. LUMAN: I think 1[c], 1[d], and then the top edge -- and I'm
11 reading from 1[e]. And you go across and you see it's got to have a top
12 edge, a bottom edge. At the bottom location, side edge is attached to the
13 body at side seams. So this is describing sort of tying it to the front portion
14 to create this pouch. And now you come down to the opening -- and where
15 is that stretch panel going to get the opening in the -- if you've got them too
16 that are parallel to one another?

17 JUDGE SILVERMAN: I don't see a limitation in Claim 1 that
18 requires the stretch panel to be an undivided element.

19 MR. LUMAN: Well, I think that the claim language -- and maybe
20 -- again it calls out what the stretch panel does. And we keep going through
21 it, further down we're going to talk about, you know, gathered from side to
22 side and all that. That's a different element. But in this situation where the
23 -- to receive an opening, how do you create -- in the context of this clam
24 language, how do you create the opening through the stretch panel?

25 JUDGE SILVERMAN: I understand your position.

1 MR. LUMAN: Okay.

2 JUDGE SILVERMAN: I won't belabor this. I appreciate your
3 explanations. You can continue.

4 JUDGE TARTAL: Counsel, Judge Tartal here (CROSSTALK) --

5 MR. LUMAN: Sure.

6 JUDGE TARTAL: The limitation refers to a stretch panel. But it
7 further explains that it's a stretch panel "comprising," which is an open-
8 ended term, "a sheet of elastically resilient four-way stretch material." So I
9 think some of them say the primary function is not limited to a single sheet
10 of elastically resilient material. The opening doesn't need to be in the sheet
11 of elastically resilient material in terms Claim 1. Is that what it says?

12 MR. LUMAN: I don't -- maybe I'm misunderstanding the claim
13 language. But the stretch panel has to have the opening.

14 JUDGE TARTAL: It -- sure it does. But the sheet of elastically
15 resilient material is only one part and only one part comprising the totality of
16 what the stretch panel is in the claim language, right?

17 MR. LUMAN: So the stretch of the elastic -- I'm sorry, let me
18 read through, the elasticity -- four-way stretch material having -- the stretch
19 panel comprising a sheet of elastically resilient stretch material having. So
20 the stretch material, the four-way stretch material, that makes up the stretch
21 panel has to have the opening.

22 JUDGE TARTAL: Looking at that sentence, the stretch panel
23 comprising a sheet of elastically resilient material, so it's the stretch panel,
24 not the -- not just the sheet of elastically resilient material that has to have
25 the opening.

1 MR. LUMAN: Correct. So the stretch -- right. And maybe I
2 -- no, so the way I understand the claim language is the stretch panel has to
3 have the opening.

4 JUDGE TARTAL: Correct. I agree.

5 MR. LUMAN: Okay.

6 JUDGE TARTAL: That includes elements other than the elastic
7 material, other than the one sheet of elastic material, other than the -- a sheet
8 of the elastically resilient material.

9 MR. LUMAN: Where the open-ended, which is -- the comprising
10 part of it, correct, it can have some -- it can have other things.

11 JUDGE TARTAL: With that mind, couldn't the hem connecting
12 the portion of the elastic material be part of the stretch panel?

13 MR. LUMAN: No. I don't believe they can. Because when you
14 have the Kitsch and what's described in Kitsch, they come down and they
15 -- they're sewn in. So they're not ever a stretch material. They're never a
16 stretch panel.

17 JUDGE GROSSMAN: Mr. Luman, continuing on that same issue,
18 understanding that stretch panel is a single piece with an opening, and what
19 you're saying is the reference doesn't disclose that. What should we do with
20 the disclosure in the '974 Patent that's at the top of Column 8?

21 MR. LUMAN: I didn't hear you, column what?

22 JUDGE GROSSMAN: Column 8, it starts at about line 5 and goes
23 down to about line 10 or so. And it says that stretch panel, 22, may
24 optionally be formed from a plurality of pieces of fabric seamed together.
25 For example, it may be formed from three pieces of fabric, two of which

1 extend vertically, and then the third one horizontally. So the patent tells us
2 that this term, stretch panel, may be a single piece of fabric. But
3 alternatively, according to the disclosure, that it may be formed from as
4 many as three pieces of fabric that are sewn together in some way.

5 MR. LUMAN: Correct. That are sewn together to create the
6 stretch panel itself.

7 JUDGE GROSSMAN: They're seamed together.

8 MR. LUMAN: Or seamed together.

9 JUDGE GROSSMAN: Seamed and sewn and hemmed. Maybe I
10 may have confused that a little bit, but the disclosure says seamed together.
11 And your expert was pretty emphatic that it was -- they were seamed
12 together, when he testified about whether Kitsch had two pieces that were
13 seamed together.

14 MR. LUMAN: I think context is important within the patent itself.
15 When it says they're seamed together and that -- you can make two or three
16 pieces and you seam them all together to create Figure 9. And Figure 9 has
17 got the one stretch panel. And they're talking about, you know, having -- I
18 don't know what they're talking about specifically with that. Maybe the two
19 verticals across the bottom, you create your stretch panel with. So it's more
20 -- it looks more like the one piece is now, you know, three pieces that are
21 sewn together to create that -- what we'll talk about later, the U-shape to put
22 in there. In the context of the patent, that's what they're describing.

23 And so they're not describing, nor do they disclose anything that
24 runs it all the way down to the perineum and not be secured -- you know, not
25 be seamed together, two sides being seamed together. Whether they're made

1 out of two pieces or three pieces, it's one U-shaped thing that is sewn into
2 the brief.

3 JUDGE GROSSMAN: Thank you.

4 MR. LUMAN: Let's see, we were on their Slide 26. Now, on our
5 Slide 33, so I did ask Mrs. Wagner -- or Ms. Wagner, their expert, about an
6 opening. She was unfamiliar at the beginning. And then later on, I asked
7 her some more specific questions. And I asked her if the hole -- was there a
8 hole in the side panels. And she said no. She said there's not. And she said
9 that the blue opening is what she's calling -- the blue part found in their
10 exhibit, Slide 26, is the opening that she's talking about. So there's --

11 JUDGE GROSSMAN: Mr. Luman, you've -- the slide on the
12 screen, what number is that?

13 MR. LUMAN: Go back one there or had one -- that's 33. And so
14 if we -- like I said, I subsequently asked her a bunch of questions about
15 whether there's a hole in the side panels. She said no. It's in our papers.
16 Her testimony is on -- there's no hole in the side panels. They're found in
17 her deposition, at page 80, line 24 through page 81, line 5. And then she
18 said that the blue area is the opening, and she said that in her deposition at
19 page 79, column 21 through page 80, column 3.

20 And I want to make sure that -- I'm glad we talked about Mr. Khan
21 here. Mr. Khan, our expert, have his testimony -- I don't have it line for line.
22 But in -- on Slide 34, he says in his declaration, "The Kitsch's side panels are
23 not seamed or stitched together. They are parallel; they never meet. So they
24 not include any opening. And Kitsch is clear on that." I mean, Kitsch is
25 clear that there's no opening. So they're parallel, they never meet, it's not an

1 opening. They don't have element 1[e][iv]. And as we'll talk about in a
2 minute, they certainly don't allege that Brocks has it as well.

3 So let's go to 1[g]. So Petitioner admits that Kitsch doesn't
4 disclose 1[g][i] through 1[g][iii]. They never say that Kitsch does. Kitsch
5 doesn't have this. And in particular, I want to focus on 1[g][iii], where it
6 says the front portion is gathered from side to side and top to bottom by the
7 stretch panel and defines a three-dimensional pouch. Remember, that stretch
8 panel defines the pouch. The stretch panel goes across, 18. And for lack of
9 a better way, it just puckers it up, creates the pouch.

10 So the front portion is gathered from side to side, top to bottom by
11 the stretch panel and defines a three-dimensional pouch between the stretch
12 panel and the front portion for receiving the wearer's genitals and holding
13 the wearer's genitals while the garment is being worn. Kitsch doesn't have
14 that, Kitsch doesn't disclose that, and Kitsch doesn't even imply that. And so
15 Kitsch is missing the opening, and it's missing 1[g][i] through 1[g][iii], if
16 you will. And specifically, it doesn't have the top -- the gathering from side
17 to side and top to bottom.

18 So if we look at Slides 38 and 39, we've talked about this earlier. I
19 just actually went through it, without having these slides in front of me, with
20 respect to Figure 5 and how the stretch panel is created. It creates the pouch
21 20 by being sewn across the backside and creates the three-dimensional
22 pouch. So Kitsch -- going on to Slide 40 -- or 39 to 40, Kitsch discloses side
23 panels, they're parallel, doesn't disclose gathering, doesn't disclose
24 stretching. Kitsch's side panels are orthogonal to its pouch. Well, it doesn't
25 allow for gathering. So it doesn't have those elements.

1 Moving on to Brocks, so now they don't have those elements. So
2 it's not anticipatory. It's not even obvious because they don't have it. They
3 don't have that. So they bring in Brocks. So if you go to Slide 42, Slide 42
4 has the claim language - back to the claim language. And Petitioner doesn't
5 allege that Brocks discloses any of these elements, not 1(3) -- not 1[c]
6 through [g]. It doesn't disclose any of those. In fact, if you go through their
7 papers, it says Kitsch discloses 1[a], 1[b], [d]. They go through that by
8 saying Kitsch discloses.

9 When they get to Brocks, they never say Brocks discloses any of
10 these claim elements. So they bring Brocks into the mix. There's no
11 opening in either Brocks nor Kitsch. There's no front portion gathered from
12 side to side by the stretch panel in Brocks. If you go to Slide 43, we talked
13 about slide -- the contents of Brocks before, the classic jockey short.
14 They're putting hem -- you know, elastic around their legs to bunch it up, to
15 keep everything secured in the bottom so it doesn't slide out the leg holes.

16 JUDGE TARTAL: Counsel, it's Judge Tartal. Can I just ask
17 -- can you give any sort of definition for opening that would inform what it
18 requires structurally? How one would discern whether an opening exists or
19 doesn't exist? And I guess I have in mind the idea of where one would draw
20 the line between, you know, material that is flat and has no opening and
21 material that is somehow structured to form an opening.

22 MR. LUMAN: So I don't -- I think based upon -- I don't think a
23 claim construction is necessary for the word opening. I think when you look
24 at the '974 Patent and how it's described and it shows you the opening, I'm
25 not sure we have a disagreement over what a stretch panel has in the way of

1 opening and whether two stretch panels running parallel on one another, you
2 know, is in the claim language. But I think in opening, it's to put your -- it's
3 to put the scrotum and the male parts into the pouch. So it supports it and
4 moves it forward into the pouch. It's supported. So I think an opening
5 doesn't need a claim construction. I was using the term opening with respect
6 to Brocks as the leg holes.

7 JUDGE TARTAL: On what slide was that?

8 MR. LUMAN: We're at 43.

9 JUDGE TARTAL: And I'm sorry, you were referring to the leg
10 -- what did you say? I didn't follow what you had just said, the --

11 MR. LUMAN: Sure. When I started talking about Brocks again, I
12 was talking about the fact he took some elastic and put it around the leg
13 holes to stretch it -- I'm sorry, to effectively clamp down on the leg so your
14 scrotum doesn't fall out the bottom.

15 JUDGE TARTAL: Right. But how does that tie into the meaning
16 of opening?

17 MR. LUMAN: It doesn't -- and I what I said was I was talking
18 about opening -- I used the term opening when I started talking about
19 Brocks, and that's when your question arose. And I wanted to be clear that I
20 was talking about the leg openings of Brocks, as opposed to the opening in
21 the stretch panel. And so that's why I don't think the opening in the stretch
22 panel needs to be construed at all based upon the clam language and the '974
23 Patent. And Brocks doesn't need a claim construction opening either.

24 JUDGE TARTAL: Okay. Thanks.

25 MR. LUMAN: So he asked -- he added elastic to the leg holes to

1 prevent -- and I'm talking about Brocks, Slide 43. And so if you look at
2 Slide 43, on the left-hand side is Figure 4 with respect to the patent. And
3 then the other patent, the figure right next to it, is the elastic at 76 and 78.
4 And you can see it in profile, in Figure 4, what happens is it creates this
5 space underneath to make sure that the scrotum doesn't fall out the leg holes.

6 So Brocks doesn't have -- we'll go to Slide 44, Figure 5, which isn't
7 talked about in Brocks at all, other than to say it's an exploded view. That's
8 all it says. And that's why I've got it here so you can see the different parts
9 and. It simply added elastic, the leg holes of the underwear. It prevents the
10 scrotum from slipping out. It doesn't have a stretch panel. It never talked
11 about a stretch panel. It traps the genitals to the body. That's the whole
12 thing is to make sure they don't come out. It doesn't -- there's nothing to pull
13 them away from the body. It doesn't separate the genitals from the body.

14 So now, as we move on to Slide 45, the Kitsch in view of Brocks,
15 there's elements missing from both. No opening on Kitsch, no stretch panel,
16 you know, stretching side to side, top to bottom on Kitsch. And now Brocks
17 doesn't have either of those either. It doesn't have an opening --

18 JUDGE TARTAL: Counsel, just because of the time -- they're not
19 contending any of those features are taught by Brocks. I thought from the
20 Kitsch --

21 MR. LUMAN: So --

22 JUDGE TARTAL: -- that it's very narrow what Brocks was being
23 relied on, which was the teaching of using elastic to create that.

24 MR. LUMAN: So let's go to -- sorry, I didn't --

25 JUDGE TARTAL: Just so -- you're addressing arguments that

1 they're not making, it seems like.

2 MR. LUMAN: But I think it's important, and I think -- here's why
3 I think it's important. There's no motivation to combine. If we go to Slide
4 49, there's no motivation to combine Brocks with Kitsch. If you did that, if
5 you combine those two, you look at those two, what do you get? You get
6 Kitsch that's got the side panels, and now you've got the elastic around the
7 leg. So that's what the -- if you're a person of ordinary skill, that's what you
8 combine because those are the two references that you see.

9 Their argument, which is effectively this, we're not doing that.
10 What we're doing is we're stretching those side panels a little bit more. And
11 they're already stretching.

12 JUDGE SILVERMAN: As I understand it, Counselor, it's not that
13 they're adding an element from Brocks to Kitsch. It's that the gathering
14 technique, which is shown in Brocks to make a more defined pouch, could
15 be applied to the pouch design of Kitsch. So they're not -- they're using that
16 teaching. They're not adding a piece of Brocks to Kitsch.

17 MR. LUMAN: So in effect, what they're doing is they're saying
18 Kitsch renders it obvious. And here's why, Kitsch without Brocks. Kitsch
19 side panels are already elastic. They're already sewn in there; they're elastic.
20 So we don't know how tight they are, how loose they are, anything like that.
21 We know the pouch is below on Kitsch, just like it is in Brocks. It's not out
22 front those. Those side panels, that's what they are, they're side panels and
23 they're elastic. So now, what you're doing is you're doing a hindsight
24 reconstruction.

25 And even that, you're not getting to the '974 Patent. What they're

1 saying is, hey, we're going to tighten those. We don't we know how much
2 we need to tighten them. We don't know anything about that because we
3 already have Kitsch in there. We already have Kitsch's side panels, and so
4 therefore it's obvious. That's what they're saying when I read these two.
5 When I read that argument, that's what it comes out as. It doesn't say that
6 there's -- it's biasing the pouch in the front open. It's not doing any of that.
7 All it's doing is pulling orthogonally, just, you know, pulling the front of the
8 underwear back and -- on the back and front. But they're already doing that
9 in Kitsch.

10 Remember, the Kitsch side panels are already -- they're already
11 elastic.

12 JUDGE SILVERMAN: Are you saying that the Kitsch reference
13 on its own teaches the gathering of the fabric to make a more defined pouch?

14 MR. LUMAN: No, not at all.

15 JUDGE SILVERMAN: Oh.

16 MR. LUMAN: No, not at all.

17 JUDGE SILVERMAN: That was my understanding, too, which is
18 why I thought Petitioner applied that gathering technique that's taught by
19 Brocks and used it in the Kitsch design, not in exactly the same location that
20 it's used in Brocks but applied it to the design of Kitsch.

21 MR. LUMAN: What I understand their argument to be is we're
22 going to apply the concept of tightening things up with Brocks. We're going
23 to use that in Kitsch. And that's what they -- that's their argument. But
24 Kitsch already has elastic. It already has elastic side panels.

25 JUDGE SILVERMAN: But not the gathering, right?

1 MR. LUMAN: Correct.

2 JUDGE SILVERMAN: So it seemed to me that -- and I'm looking
3 at -- or sorry, I'm looking at Brocks in column 2, it says the elastic strips are
4 each -- this is around line 10 -- stretched to the length of each of the concave
5 leg opening arches of the front panel, causing the stitch material to be
6 gathered together, and thereby define a general pouch in the form of shirring
7 where the stretching force is released.

8 So it's using the shirring gathering technique -- this is Brocks -- to
9 make a more defined pouch. And it's using that improved pouch technique
10 in the Kitsch reference is what I understand their position to be. Granted it's
11 already as a stretchy material, but it -- Brocks teaches that you can make a
12 more defined pouch by using the gathering technique. That's what I
13 understood their argument to be.

14 MR. LUMAN: So I understand you -- I understand what you've
15 said, that is somewhat of their argument. Here's the issue with that, Kitsch
16 already has a pouch. It already has one. So you're not doing anything new
17 with Kitsch. It already has a pouch. It has a pouch below it. And if you
18 look at Slide 49 --

19 JUDGE SILVERMAN: If you're saying that Kitsch doesn't have a
20 gathering, then you are doing something different. You're using the
21 gathering to make it a more defined pouch and improved in terms of what
22 Brock is saying.

23 MR. LUMAN: So you're taking the elements which are not
24 connected at all and you're moving it and saying, hey, I'm just going to
25 tighten this up to create -- and again, it's not the same as the '974 Patent, it's

1 not even close to tighten up the side panels to make the pouch go down a
2 little further. I mean, you can look at Figures --

3 JUDGE SILVERMAN: I wouldn't -- I don't think that the
4 Petitioner uses the term "take the element" from Brocks. I think they're
5 -- often in this -- in patent law, we talk about using the teaching that's in one
6 reference. So it's that technique, if you will, of gathering a fabric with a
7 -- with an elastic member to make that sort of bunched up effect and makes
8 it a more defined -- as Brock says, a more defined pouch.

9 MR. LUMAN: And again -- go ahead, sorry.

10 JUDGE SILVERMAN: And again, that's my understanding of
11 what Petitioner is arguing.

12 MR. LUMAN: So in Figure 7, we see on Slide 49, Kitsch has the
13 lower pouch. And shoring that up to make more of a pouch is not something
14 that these two -- combining these two references to create a greater pouch
15 underneath. It does not render the '974 Patent obvious at all. If you create a
16 -- because now, you've got --

17 JUDGE SILVERMAN: We got that limitation, yeah, at least with
18 that -- with respect to that limitation.

19 MR. LUMAN: Well, with respect to that, there's no -- so the
20 pouch below on Figure 7 of the Slide 49, the pouch already exists. Now
21 you're coming in and you're taking -- you're sort of taking the concept of
22 tightening up the elastic. That already is probably in Kitsch. Because
23 Kitsch is elastic -- side panels are elastic.

24 JUDGE SILVERMAN: But you've already said you don't think
25 it's applied to the side panels in this way, in Kitsch.

1 MR. LUMAN: Well, Kitsch is silent on it, that's for sure.

2 JUDGE SILVERMAN: Well, so therefore Brocks is making it
3 manifest by proposing that, by showing that technique that could be used in
4 Kitsch.

5 MR. LUMAN: Yeah. I think -- I hear what you say. I still don't
6 see that there's a motivation to combine those two as to why they do that.
7 And I don't think that they -- the why and the how. So I think what they've
8 done is they've taken the '974 Patent and looked at it and said, well, we're
9 going to create some shirring somehow. We're going to create this gathering
10 somehow. Let's go find something else and drop it into Kitsch. And now, lo
11 and behold, we're saying the '974 Patent is now obvious in light of what
12 we've put together. And that's using the '974 as a roadmap for these others.

13 JUDGE SILVERMAN: Well, it's a question of whether or not the
14 -- there's a satisfactory reason to do that combination or modification.

15 MR. LUMAN: Right? And Petitioner --

16 JUDGE SILVERMAN: So I mean, Petitioner says that there is
17 such a reason provided in the references. And your position is that it's not.

18 MR. LUMAN: That's correct. I am running out of time, so if I
19 may go over on this part of it. And I'll --

20 JUDGE GROSSMAN: You're into your rebuttal. You're welcome
21 to use it as you wish.

22 MR. LUMAN: Thank you.

23 JUDGE GROSSMAN: You can. Or if you want to save it for
24 later, you've got 13:35 left of rebuttal time on the yellow light. And so you
25 can, as I said, continue if you'd like and use that time or save it for rebuttal.

1 MR. LUMAN: Let me forge ahead here and talk about Carrillo
2 and Brocks. So if you look at Slide -- let's go to Slide 71. Carrillo does not
3 disclose the front portion gathered from side to side and top to bottom in this
4 -- it doesn't disclose anything in 1[g] actually. But I'm reading from
5 1[g][iii]. As we go through -- and Petitioner admits that Carrillo doesn't
6 render Claim 1 obvious by itself. It doesn't have all the elements. It doesn't
7 have this 1[g] -- all the elements in 1[g].

8 So just remember, Carrillo is sewn to classic underpants. It's got a
9 vertical hole. It requires manipulation to get your scrotum into that hole.
10 Because it's just sewn, it's like having a pocket on a pair of jeans in the back.
11 It's sewn to the front, on the inside of the underwear of -- like jockey shorts.
12 It creates a pocket, the -- there's no implied pouch. There's nothing there
13 that talks about having a pouch, and there's nothing there to support the
14 scrotum. Again, that -- while the scrotum part is not called out, it is called
15 out at the very end of 1[g][iii].

16 So if you would go forward to Carrillo and Brocks, let's go to that
17 slide that goes all the way -- we know what Brocks discloses. So now we go
18 to Carrillo and Brocks, which is Slide 78. Again, their argument is,
19 effectively, look at the '974 Patent, look at Carrillo, and now let's take
20 Carrillo and create the '974 Patent out of it. That's what they're doing here.
21 There's nothing here to support taking the Brocks and moving it up into
22 Carrillo. You know, Brocks prevents the scrotum from falling out the leg
23 holes. Carrillo's effectively just moving the scrotum forward away from the
24 abdomen.

25 They don't create the 3D gathering of the pouch. There's

1 -- effectively, they've taken the '974 Patent and said, let's just stretch this like
2 the '974 Patent calls out and, here we go, we've got the '974 Patent. So I
3 raced through that because I want to save a little bit of time. In short,
4 Petitioner fails to carry its burden on Carrillo and Brocks, just like it failed to
5 carry its burden on Kitsch and Brocks.

6 Really quickly, to the extent we can get to it, we talked about
7 Claims 3. I want to talk about Claims 3 and 16. If you go to Slide 60
8 -- oops, I'm missing -- oh, my bad. Let's go back, Claim 3, Slide 54, Claim 3
9 depends from Claim 1, wherein the stretch panel is rectangular and the
10 opening is U-shaped. We talked about this claim earlier in respect to
11 -- when Petitioner was up here. Claim 3 depends from Claim 1. So the
12 panel is rectangular and it's -- has a U-shaped opening. When I talk to and
13 deposed Wagner, their expert, she said that that Kitsch's side panels were
14 rectangular.

15 If you move forward to Slide 55, you can see that those side panels
16 are not rectangular. They are boomerang shaped. She agreed with that.
17 They're not rectangular. And there is no there's no U-shaped -- unless the
18 only way you have a U-shape -- and I'm not even sure it's a U-shape, I think
19 it's more rectangular shape opening -- is if you agree with Petitioner's
20 argument that the side panels, the space in between them, the road in
21 between the two ranches, is an opening.

22 Claim 9, look at Claim 9, Kitsch and Brocks do not disclose a
23 scrotum of the wearer of the garment is supported underneath by the stretch
24 panel. If you recall the parallel fences, they go between the thigh and the
25 scrotal sack. They're not there supporting the scrotum from underneath.

1 JUDGE SILVERMAN: Isn't it right that Claim 9 is -- I mean, if
2 those limitations have patentable weight, they're only ever achieved when
3 they're being worn by somebody. It's not something that exists, a product
4 sitting on the shelf.

5 MR. LUMAN: Well, it's the outcome of putting the underwear on,
6 that's for sure, right? So there's --

7 JUDGE SILVERMAN: Right. But it's an apparatus claim is what
8 I'm getting at.

9 MR. LUMAN: It is an apparatus claim. And it's --

10 JUDGE SILVERMAN: I'm just wondering if that language about
11 "whereby in use" and so forth is -- has patentable weight.

12 MR. LUMAN: Well, it does describe what the -- what is going on
13 with the stretch panel and what it's doing, what its purpose is.

14 JUDGE SILVERMAN: Depending on how you use it is my
15 concern. You know about the rectangular shape, if I could just bother you
16 for a moment on that. Is there a showing in the '974 Patent of a stretch panel
17 with a rectangular shape?

18 MR. LUMAN: Yes. If you go to -- I flagged their Slide 44. It's
19 Figure 9, so you can see it. I just flagged theirs. And so that's rectangular
20 on the outside, and then the U-shape is in the middle.

21 JUDGE SILVERMAN: So both Figure 9 and Figure 3, they show
22 a rectangular stretch panel?

23 MR. LUMAN: Yes. And you see in Figure 3, because it's
24 -- you're shooting down on it as in the structure in which it is, it looks less
25 rectangular than when you have a -- you can see there's an L1 and an L2 on

1 Figure 9 when you've got it laid out on a table.

2 JUDGE SILVERMAN: I understand what you're saying. To my
3 eye, it might not be perfectly geometrical in terms of a rectangle. But I
4 understand what you're saying. What about the U-shape, do you have a
5 construction for U-shaped?

6 MR. LUMAN: I don't think we need a construction for a U-shape.
7 I think -

8 JUDGE SILVERMAN: What does it mean then?

9 MR. LUMAN: Well, the definition of a U? I mean, I look at
10 Figure 9 and --

11 JUDGE SILVERMAN: Can it be angular at the bottom? It's what
12 it comes down to, really, for this case.

13 MR. LUMAN: I mean, could it --

14 JUDGE SILVERMAN: Could it be curved at the bottom, curved
15 in a upward concavity?

16 MR. LUMAN: Well, I believe that there's many different ways to
17 write a U. And so I would say at the bottom, if that was squared, as -- you
18 know, if it came to perfectly 90 degree angles instead of a -- you know, sort
19 of a U, if you will, like a Cyrillic U, then it would still be a U. Because we
20 write the U in all different formats. And so, you know it, like, you're
21 looking at it, and that's a U. So I don't think there's a -- I don't think a
22 construction is necessary.

23 JUDGE SILVERMAN: Thank you.

24 MR. LUMAN: I'm going to reserve the rest of my time for a sur-
25 reply.

1 JUDGE SILVERMAN: You have four minute -- five minutes for
2 it left in your time. And for Mr. Raffetto's time, it's 18 minutes and 41
3 seconds.

4 MR. RAFFETTO: Thank you. So I just have a few points in
5 rebuttal, and I'd like to start at Carrillo and just touch on one issue. If we
6 could jump to Slide 11 so that we can see a figure of Carrillo. And this is
7 Petitioner's demonstratives.

8 So Judge Silverman, before I sat down, was asking about Carrillo
9 and the front portion. And I just want to make sure the record is clear there.
10 So the claim says a body, including a front portion, and then a stretch panel
11 attached to the body inside the front portion. And so here, you can see that
12 inside of the underwear in Carrillo -- inside of the front of the underwear,
13 that's what we're looking in, right, there's the front of the underwear. And
14 inside that front portion, attached inside is the U-shaped elastic material.
15 And that material creates a pouch based on it being attached inside the front
16 portion. So I just wanted to be very clear on that for the record.

17 So if we could bring up now their demonstratives, and I just want
18 to touch on a few of them.

19 JUDGE TARTAL: Counsel, can I just ask while you're on Slide
20 11 how you --

21 MR. RAFFETTO: Yes.

22 JUDGE TARTAL: And if I'm mistaken in what I'm saying, please
23 just clarify. But I presume you're saying that that also describes an opening?

24 MR. RAFFETTO: Yes.

25 JUDGE TARTAL: Can you explain why?

1 MR. RAFFETTO: Why there's an opening?

2 JUDGE TARTAL: Right. And sort of to my question to counsel
3 for Patent Owner, just what's -- what kind of definition or meaning can we
4 give to the to the claim term opening in the context of any kind of structural
5 feature?

6 MR. RAFFETTO: I think an opening it's just this -- as the claim
7 recited and as Your Honor was pointing out, it's just an opening in the
8 stretch panel. And so here, it's just space in the stretch panel at some point
9 along the stretch panel.

10 JUDGE TARTAL: So the parties disagree on whether there's an
11 opening in Carrillo, correct?

12 MR. RAFFETTO: I can't remember if they disputed opening
13 specifically for Carrillo. I know the disputes for Carrillo were narrower. I
14 think with Kitsch their dispute is just because there's two side panels it can't
15 be a stretch panel. There's no --

16 JUDGE TARTAL: Right.

17 MR. RAFFETTO: There's also no opening as a result of that.

18 JUDGE TARTAL: That I understand. That's what I was trying to
19 understand for the Carrillo grounds.

20 MR. RAFFETTO: Yeah. For Carrillo, I think it's pretty
21 undeniable that there's a space or an opening in the middle of the stretch
22 panel that leads to the inside of the front portion of the pouch.

23 If we could jump to Slide 5 of their demonstratives. And I
24 understand the Board commented before -- at the start of this hearing. But
25 just for the record, you know, we do object to the new evidence and

1 arguments cited on this slide, as well as Demonstrative 6. And I do want to
2 state for the record that a prior art patent is not limited to a commercial
3 product. So assuming they're -- the product they're showing is a commercial
4 embodiment of Kitsch, which there's no evidence to support, it doesn't
5 actually limit Kitsch's disclosure. The prior art isn't the product; it's the
6 patent and the -- and its disclosure. And Kitsch's disclosure is relevant for
7 all that it teaches. So I just wanted to formally lodge the objection on the
8 record, and then, you know, state our position on that issue.

9 If we could also jump to Slide 2, Mr. Hughes. You know, Patent
10 Owner talked about their commercial products. That also doesn't define the
11 scope of the claims. Patents serve a public notice function and was -- what
12 matters is what the patent itself and the claims say. The patent can't be read
13 to require features of the commercial product that aren't in the claims or
14 even the patent. And Slide 3, if we turn to that, you know, it mentions
15 they've got multiple awards. But assuming that's even true, it's not relevant.
16 You know, as Your Honors pointed out earlier, they didn't raise secondary
17 considerations. So that issue is not before the Board.

18 Jumping to Slide 9, they briefly showed this slide and highlighted
19 Brocks Kitsch, and Carrillo on the face of the patent, kind of suggesting that,
20 look, the examiner already considered these references, so the invalidity
21 issues before the Board have already been addressed. But as the Board's
22 aware, the examiner never commented on these references, and the Board
23 rejected this issue at institution and were past institution. And as the Board
24 pointed out at institution, what's key is that the specific combinations that
25 are at issue here were not considered and that, critically, the examiner never

1 considered the key gathering feature taught in Brocks as applied to Kitsch or
2 Carrillo. And that's what this -- the core of this dispute is.

3 Jumping to Slide 32, I just have this point and I think one more.
4 I'm not sure they actually ended up getting to the slide, although they did
5 talk about it at points. But this does really underscore our point that they're
6 trying to do a word matching exercise, you know, saying that, look, the
7 words top edge or bottom edge aren't used, and so as a matter of law or
8 -- just that just means that Kitsch can't disclose these things. But that's not
9 the standard. As I said a number of times prior, it doesn't need to use the
10 same words as the claims.

11 And I do think it's worth noting that Kitsch actually does use a lot
12 of the same terminology. I mean, for example, it says its side panels have
13 uppermost edges, which is almost the exact same as top edge. And you can
14 see this at paragraphs 10 and 28 of Kitsch, for example.

15 One more point for the for the Board at Slide 46. They also didn't
16 touch on this, but I do just want to make sure that this is correct for the
17 record. At the bottom of the slide, they said that Petitioner concedes, and
18 Patent Owner agrees that the level of ordinary skill is low. And I think what
19 they're trying to just say is, look, it should be really difficult for us to show
20 obviousness here because there's a allegedly a low level of skill.

21 We never agreed that the level of skill is low. The level of skill is
22 an undergraduate degree in apparel design or a similar discipline, along with
23 at least a year of industry experience, particular to apparel design or
24 manufacturing or textile or fabric engineering. So I wouldn't call that low.
25 And even if this were a low level of skill, that doesn't negate that. I think

1 we've shown here that the challenged claims are obvious.

2 So with that, unless the Board has any further questions for me,
3 that concludes my presentation.

4 JUDGE GROSSMAN: Thank you.

5 JUDGE SILVERMAN: Thank you.

6 MR. LUMAN: And unless the Board has any questions of me, I
7 have no sur-reply, if you will. So I'm going to relinquish my five minutes,
8 unless you all have questions for me.

9 JUDGE TARTAL: I have none.

10 MR. LUMAN: No questions. Okay.

11 JUDGE GROSSMAN: Judge Silverman?

12 JUDGE SILVERMAN: None here. But to both counsel, thank
13 you for appearing today and answering our questions. This matter is
14 submitted, and we'll take the case under advisement and issue our decision
15 in due course. We are off the --

16 (Whereupon, the above-entitled matter went off the record at 3:22
17 p.m.)

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