

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SOLARIS OILFIELD SITE SERVICES OPERATING, LLC,
AND SOLARIS OILFIELD SITE SERVICES
PERSONNEL, LLC,
Petitioner,

v.

MASABA, INC.,
Patent Owner.

IPR2024-01179
Patent 11,780,689 B1

Record of Oral Hearing
Held: November 13, 2025

Before JAMES A. TARTAL, CARL M. DEFRANCO, and
ROBERT L. KINDER, *Administrative Patent Judges*.

IPR2024-01179
Patent 11,780,689 B1

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The above-entitled matter came on for hearing on Thursday,
November 13, 2025, commencing at 9:29 a.m., via video teleconference.

P R O C E E D I N G S

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JUDGE TARTAL: Okay. Good morning. We are convened for oral arguments in Solaris Oilfield Site Services Operating, LLC and Solaris Oilfield Site Services Personnel, LLC versus Masaba, Incorporated, IPR2024-01179, which pertains to patentability challenges of claims in U.S. Patent Number 11,780,689 B1, which we will refer to as the '689 Patent. I'm Judge Tartal. And I'm joined by Judge Kinder in the hearing room, also appearing remotely is Judge DeFranco.

Let's get started with appearances of both parties for those who will be arguing today. If anyone else is attending remotely, since there is no one else in the room with you, if you could identify anybody on the line, that would be helpful as well, even if they won't be speaking. And we can start with Petitioner.

MS. FLANNERY: Thank you, Your Honor. Elizabeth Flannery here for the Petitioner. I'll be the only attorney arguing. There are a couple of my colleagues that I believe have joined online, but they are all lawyers at Baker Botts.

JUDGE TARTAL: Okay. Welcome. And for Patent Owner.

MR. NYDEGGER: Good morning, Your Honor. Chad Nydegger from Workman Nydegger, representing the Patent Owner, Masaba, Inc. Online, there may be additional people on

1 my side as well, including my partner David Todd, who is with me
2 on the briefs. Also a client representative and potential members
3 of outside counsel for the client in the related litigation, pending in
4 the District Court, they may also be
5 listening in.

6 JUDGE TARTAL: Well, welcome to USPTO's
7 Alexandria office. Today's hearing provides an opportunity for
8 counsel to orally advocate for your positions on the patentability of
9 the challenged claims as raised in the petition. Recording of any
10 PTAB hearing is prohibited. The court reporter will provide a
11 transcript of the hearing that will become part of the record in the
12 proceeding at a later date.

13 We have the demonstratives as well as the briefs and
14 evidence available to us on our computers. To ensure the
15 transcript of the hearing is clear, we ask you to speak directly to
16 the microphone when talking and to identify specific slides,
17 numbers, number in figures when referring to the demonstratives.

18 Please note that public access to this hearing has been
19 provided to enable public attendance. We understand certain
20 information was filed with a motion to seal. If parties wish to
21 discuss confidential information, please notify us before discussing
22 anything confidential that's been filed as confidential under seal.
23 We issued a hearing order as Paper 37 in this proceeding, which
24 granted the parties joint request that each party be provided a total
25 of 60 minutes to present arguments in this case.

1 Petitioner will open the hearing with argument and may
2 reserve rebuttal time, which may not exceed more than half a
3 Petitioner's total argument time. Petitioner may also address
4 during his argument time its motion to exclude. That's still
5 pending. Similarly, Patent Owner may then respond to
6 Petitioner's arguments and may reserve surrebuttal time, also not to
7 exceed half of Patent Owner's total argument time. And Patent
8 Owner may also address its pending motion to strike during its
9 argument time.

10 We ask that the parties not interrupt each other. Instead,
11 hold any objections regarding a party's arguments until it is your
12 time at the podium. The only exception possibly being if
13 something confidential arises you feel is being disclosed without
14 necessary precautions, please let us know.

15 We will maintain a clock, and we'll try to provide a
16 warning as we approach the end of your time available for
17 argument. We also have a visible timer that includes a light that
18 changes to yellow when you are nearing the end of your time and
19 to red when you have run out of time. Petitioner, do you wish to
20 reserve any rebuttal time of your 60 minutes?

21 MS. FLANNERY: Yes, Your Honor. I'd like to reserve
22 20 minutes.

23 JUDGE TARTAL: And at this time, do you intend to
24 address any confidential information during your argument?

25 MS. FLANNERY: I do not, Your Honor.

1 JUDGE TARTAL: Okay. So I will set the clock at 40
2 minutes to begin with, and it will just give you some indication as
3 to when you're approaching the end of that 40-minute period of
4 time. And did you have any questions?

5 MR. NYDEGGER: Yes, a question, briefly. Thank you.
6 The hearing order also mentioned that any objections to
7 demonstrative exhibits should be raised at the hearing. Would you
8 like us to raise those objections before we begin or during our
9 time?

10 JUDGE TARTAL: During your time, if there's any
11 objections to the slides that the opposing party uses. Typically, I
12 think objections can be filed ahead of time as well. Were any
13 objections filed or --

14 MR. NYDEGGER: No, they weren't. It was interesting
15 actually. We specifically looked at that in prior hearing orders.
16 There was an instruction to file objections before the hearing. In
17 this hearing order, there was not such an instruction. It just said to
18 raise them at the hearing.

19 JUDGE TARTAL: Okay.

20 MR. NYDEGGER: So following the order, we did not
21 file objections in advance.

22 JUDGE TARTAL: Okay. I would suggest that if there
23 are objections, that you raise them during the portion of the time
24 that you have available for argument. It would also be helpful to
25 the degree that -- I know there are a number of slides that often are

1 provided ahead of time but aren't used during the hearing. So you
2 may want to note if a slide was actually presented during the
3 hearing and that's the slide that you're objecting to, as opposed to
4 something that might be in a slide deck that wasn't relied on or
5 raised.

6 We also note, typically, when objections are raised ahead
7 of time, we do note to the parties that demonstratives are not
8 evidence in the hearing and won't be relied upon by the panel,
9 which is why we ask that you include citations, references on the
10 -- on any kind of demonstrative exhibit directing us to the record
11 where that argument was raised, where that piece of evidence is
12 shown. And that tends to alleviate too many concerns with
13 whether there's a new argument or new issue being raised in
14 demonstratives. But you're certainly welcome to raise those issues
15 during the argument time that you have available. And we'll take
16 them under advisement and deal with them in the final decision.

17 MR. NYDEGGER: Thank you, Your Honor.

18 JUDGE TARTAL: Okay. Thank you. You are set for
19 40 minutes. And you can begin when you are ready.

20 MS. FLANNERY: Thank you, Your Honor. May it
21 please the Board. Again, my name is Elizabeth Flannery, and I'm
22 here representing the Petitioners in this proceeding. I got my
23 demonstratives up and I want to go to Slide 2, provide a quick
24 roadmap of where I intend to argue in this proceeding.

25 First, I'll give a quick overview of the claims of the '689

1 Patent, summary of the grounds, and the disputed issues in the
2 IPR. Then I'll first delve into the first dispute, which is an issue
3 over the definition of the level of skill of a person of skill in the
4 art, or POSITA as we call it. And then I'll move to disputes on a
5 number of the grounds that are at issue. I will be leaving a couple
6 of the disputed issues to the briefs, in the interest of time, and I'll
7 try to note while we're doing that.

8 So moving to Slide 5, we'll start with the overview of the
9 '689 Patent. And all of the independent claims of the '689 Patent
10 have three sort of common groups of elements, and those are
11 illustrated here with regard to Figure 1A from the '689 Patent. The
12 first group is what's called the base assembly, and that's indicated
13 in red in the figures. Claims 1 through 17 claim the base assembly
14 a little bit differently from Claims 18 through 25. But I don't
15 believe that there are any disputes between the parties with regard
16 to those differences between the claims. So Claim 1, you know, is
17 representative with regards to that issue.

18 The second group of common elements is the aggregate
19 elevating assembly, which is shown in yellow here on the figure.
20 The aggregate elevating assembly includes two basic components,
21 what's called an elevating conveyor or a bucket elevator, as we
22 refer to it in some instances as well as a deployable frame that
23 surrounds that bucket elevator.

24 The final group of common elements is shown in blue,
25 and it is the conveyor extension assembly with an articulated or

1 pivotal conveyor that has an inboard and an outboard pivot.
2 You can kind of think about this like sort of as your arm, your
3 shoulder being sort of the inboard pivot, then you have a segment
4 of your arm, and then your elbow is sort of the outboard pivot of
5 your arm that allow -- that can pivot independently as well.

6 Now, moving to Slide 6, each of the independent claims
7 of the '689 Patent adds something else in addition to those
8 common elements -- and those are summarized here on the slide.
9 The first three bullets and the claims that are addressed there all
10 add elements around that extension conveyor assembly. So for
11 example, stating that that pivot, the outboard pivot, pivots in a
12 substantially vertical axis or that it pivots in a substantially
13 horizontal plane. So it just further specifies that. All three of
14 those sets of claims are addressed in Ground 1.

15 And then the last two bullets on the slide, noting that
16 Claims 12 through -- and 25 add a landing leg and a kingpin and
17 Claim 13 add a lift arm structure. Those are addressed in Grounds
18 3 and 4 in the petition.

19 So I want to move to Slide 9, which provides a summary
20 of the grounds in the petition. All of the grounds use the Waldner
21 reference as the base reference. And all of the grounds also use the
22 Dynatek reference. The Dynatek reference was not of record
23 during prosecution of the '689 Patent. I've indicated, on this Slide
24 9, references that were not of record in red. And so because all of
25 the grounds include Dynatek, all of the grounds include at least

1 one reference, sometimes two, that was not already of record
2 before the Patent Office during prosecution.

3 The Sleeman reference is a reference that has a
4 somewhat similar disclosure to Waldner. It has slightly different
5 mechanisms for moving. It's what we read on the extension
6 conveyor. The grounds that apply, the Sleeman reference are
7 indicated with an A, so 1A, 2A, 3A. We are going to leave those
8 grounds to the briefs. We're not dropping them, but we're not
9 going to spend significant time on them during the argument
10 today. And then of course, as I mentioned, Grounds 3 and 4 add
11 other references, some of which were not of record as well.

12 And moving to Slide 10, Patent Owner does not dispute
13 that the references qualify as prior art and that Waldner discloses
14 the base and aggregate elevating assemblies of the '689 claims. To
15 note, this is fully in line with what the examiner did during
16 prosecution. The examiner used Waldner as the base reference
17 and then the claims -- the independent claims that we see here,
18 were allowable dependent claims that got written -- rewritten in
19 independent form.

20 There's also no dispute that Dynatek discloses an
21 extension conveyor with that inboard and outboard pivot that we
22 talked about. So no dispute there. The other disputes are
23 summarized -- the disputed issues are summarized there on the
24 slide. I'm going to address all of them except for the issue
25 regarding Dependent Claim 4 and Waldner's disclosure of a

1 conveyor. I'm going to leave that to the briefs here. But we'll
2 address -- we'll work to address the other issues during today's
3 argument.

4 So moving to Slide 12, the initial dispute that I want to
5 address is the definition of the level of skill in the art. We have the
6 parties' competing definitions here on Slide 12. Patent Owners
7 wants -- the first definition is that they want to treat electrical
8 engineers differently. They want to require more experience
9 -- more work experience for electrical engineers as to -- as
10 compared to other engineering disciplines.

11 The reason Patent Owner wants to do this is because they
12 want to exclude our primary expert, Dr. Durham. He is an
13 electrical engineer and so that's why they've chosen to do that. We
14 know this is cherry picking because when we look at -- there's no
15 logic to singling out electrical engineers and, for example, treating
16 petroleum engineers differently. Petroleum engineers don't have
17 any more experience in designing mechanical systems than
18 electrical engineers do, so why would they be treated differently?
19 It just clearly demonstrates that this is a distinction without
20 support.

21 The other distinction that Patent Owner draws is that they
22 require specific experience. They require experience, quote,
23 "directly related to engineering," what they call building or
24 designing these mechanical systems as opposed to working with
25 their use -- working in an industry that involves exposure and use

1 to those systems. The problem with that additional requirement is
2 that it's not supported by the '689 Patent.

3 Now, if we look at Slide 14, this highlights how the
4 patent repeatedly refers in several columns of the text to aspects of
5 the disclosure, a moniker for the -- aspects of the present invention
6 that involves setting up the apparatus, deploying the apparatus, and
7 operating it. This is every bit as much a part of the invention as
8 building and designing it.

9 And we see on Slide 15 that the patent itself states its
10 field very broadly. The disclosure relates to material handling
11 apparatus. And in fact, the only application that's mentioned is for
12 filling silos that are used to source sand or proppants, as you might
13 hear it referred to, for hydraulic fracturing operations in the oil
14 field. Those types of applications are squarely within Dr.
15 Durham's expertise. There's no dispute about that. So he clearly
16 has expertise in the stuff that the patent talks about being the
17 invention.

18 JUDGE TARTAL: Can you highlight what expertise it
19 is that you're referring to that you feel is most pertinent to his
20 experience and relates to the invention being disclosed?

21 MS. FLANNERY: Yes. And so that is summarized on
22 Slide 16. Certainly, Dr. Durham has -- first of all, with his
23 education, he's got not one but two advanced degrees in
24 engineering management, not limited to electrical engineering.
25 Certainly, he described the coursework that involves basic

1 mechanical engineering-type courses.

2 And then he described his work experience. He has
3 actually work experience designing mechanical systems. And he
4 talked about that in his supplemental declaration, Exhibit 1110 at
5 paragraphs 19 through 20. As part of his PhD work, he was in
6 charge of designing mechanical aspects of a solar vehicle. So he
7 worked on that for -- I believe he said it was a year of his
8 education. He's also worked on designing -- and even if not
9 designing and building, but designing, investigating, failure
10 analysis, things like that, associated with mechanical systems
11 throughout his career. And that's addressed in his original
12 declaration, Exhibit 1003 at paragraphs 5 through 15.

13 He's worked in the oil field industry for more than 20
14 years. And so he's at least been around and seen these types of
15 equipment used in hydraulic fracturing for really the entire
16 duration of that career.

17 JUDGE KINDER: Hi. This is Judge Kinder. Real quick
18 follow up to that. When you say he's been around these type of
19 systems, has he been the person on the dotted line responsible for
20 designing any of these systems or evaluating their operation or
21 anything that puts him in charge of overseeing these things, or just
22 walking around it?

23 MS. FLANNERY: So he testified in his deposition that
24 he had been responsible for designing systems that were used for
25 conveying coal -- it was conveying coal or some other aggregate.

1 He talked about that at length in his deposition. So I know he was
2 responsible for design aspects of that particular system. I think the
3 project lasted several months to a year or something like that.

4 But then certainly with the rest of his experience, he's
5 been in charge of designing not the systems that are disclosed in
6 this application but mechanical systems that are used in oil field
7 hydraulic fracturing. He's been involved in designing those types
8 of systems.

9 JUDGE KINDER: Thank you.

10 MS. FLANNERY: Sure. Now, again, we believe Dr.
11 Durham is a POSITA under any proper definition. But in an
12 abundance of caution, we also provided the declaration of Mr.
13 David Smith, who is undisputedly a person of skill in the art under
14 either definition. And he just confirmed Dr. Durham's positions.
15 He didn't change any grounds or theories. He just confirmed what
16 Dr. Durham said. And he also responded to new arguments that
17 Patent Owner had raised. Their new POSITA definition, new
18 claim constructions of the conveyor, alternative modifications of
19 the prior art that their experts said would be obvious, he responded
20 to all of those things.

21 And as we see on Slide 18, the Board and the Federal
22 Circuit have specifically condoned this type of practice in the
23 Infineum case. That case, I'd urge the Board to read it; had very
24 similar circumstances to this situation. The Patent Owner had
25 urged a definition of a POSITA that required experience, quote,

1 "directly formulating engine oils," so very analogous to what
2 Patent Owner is doing here. The Petitioner presented a new expert
3 with that direct expertise with his -- with their reply. And the
4 Federal Circuit said that was acceptable, particularly because that
5 new expert was responding to modifications of the prior art that
6 Patent Owner suggested would have been more obvious
7 alternatives. Again, exactly what Petitioner has done -- what
8 Patent Owner has done here.

9 So with that, I'd like to move to the next dispute, the first
10 dispute on the grounds themselves, which is the rationale to
11 combine Waldner and Dynatek. So to Slide 20, just as a quick
12 overview, the Board will remember, in the petition, we argued two
13 different ways of combining Dynatek and Waldner.

14 First, a person of skill in the art would have -- could have
15 applied Dynatek's teachings of an articulated arm and conveyor to
16 Dynatek -- to Waldner's discharge chute. Or a person of skill in
17 the art could have physically substituted the Dynatek
18 EconoLoader, the system that it describes, for Waldner's
19 telescoping chute. Either of those is sufficient to support Ground
20 1.

21 And on Slide 21, we provided three independent reasons
22 why a person of skill in the art would combine Waldner and
23 Dynatek. Again, any one of these three is sufficient to support
24 Ground 1. The Patent Owner argued that the things that we argued
25 in our reply weren't these. They argued that they were new

1 somehow. I do want to step through some of the stuff in the
2 petition that shows that this is clearly what we have been talking
3 about since the very beginning of the proceeding.

4 I'll address the first one first, the -- that a POSITA would
5 combine these references to increase the reach and range of motion
6 of Waldner's chute. On Slide 22, I have the language from the
7 petition itself where we noted that the movement of particles
8 through Waldner's discharge chute depends on gravity and the
9 angle of the chute. And so because of that, the ability to adjust the
10 position of the disputes -- of the discharge chute's outlet would be
11 limited. We clearly said that in the petition.

12 And then moving to Slide 23, at Dr. Durham's
13 deposition, when he was asked about exactly this section of his
14 declaration, he explained that because the angle of the chute
15 affects the discharge rate, that's going to limit where you can put
16 the outlet of the discharge chute. If you want it to go out further,
17 that angle has got to be flatter. And so the relationship between
18 those two things limits the reach and range of motion of Waldner's
19 discharge chute.

20 Now, moving to Slide 25, this is the reply declaration.
21 This doesn't present a new argument. This just explains that basic
22 geometry. This is basic high school triangle geometry, that
23 because you have to have that angle theta, the angle of repose, as
24 our experts refer to it, then that's going to limit the lateral reach of
25 Waldner's discharge chute. Again, not complicated math. The

1 reply just explains the geometry that a POSITA would recognize.

2 Now moving to Slide 26, the petition also points out
3 another way that Dynatek increases the reach and range of motion
4 of Waldner's discharge chute. In the petition, as you can see here
5 on the left, we cited paragraph 118 of Dr. Durham's declaration,
6 Exhibit 1003. And that text from his declaration is shown on the
7 right. And what he says, what Dr. Durham says, is that the
8 combination of Waldner and Dynatek uses a known technique of
9 using two pivotal sections instead of telescoping sections to
10 increase the range of motion of the discharge point. So clearly
11 stated in the petition in the paragraphs that's cited.

12 The reply declaration just explains -- just gives some
13 examples of why that is so, and this is on Slide 27. The examples
14 here illustrate that because the telescoping chute or conveyor can't
15 fully double back on itself, it can't reach a silo that is closer to the
16 bucket elevator than its collapsed length. It can't contract any
17 more than that, you know, initial telescoping segment. With
18 pivoting sections, however, it actually can double back on itself. It
19 can do that. So again, the reply just explained this phenomenon a
20 bit further.

21 By the way, one point I do want to make on the Slide 27,
22 you'll see the sort of configuration of silos that we have here. It's a
23 six -- you know, an array of six silos. This is the array that
24 Petitioner Solaris provided to Patent Owner before they started
25 their work. So this is a situation where we said we have to reach

1 all six silos in our preexisting system.

2 That was in fact the reason that Patent Owner came up
3 with the combination. This is kind of a unique set of facts for an
4 IPR because we've not only cited this as a reason the person of
5 skill in the art would improve Waldner, but it is actually the reason
6 that Petitioner has provided to the Patent Owner in doing their
7 work. So it completely lines up with those facts.

8 JUDGE TARTAL: Counselor, can you just explain for
9 the record what you mean by Petitioner provided it to Patent
10 Owner? You're referring back to what?

11 MS. FLANNERY: So let me skip ahead a little bit
12 because I think I have an email that shows this very clearly. So
13 this is an email admittedly from the inventor on the '689 Patent,
14 but this is reflecting his discussions.

15 JUDGE TARTAL: Slide?

16 MS. FLANNERY: Oh, yes, sorry. Slide 51. Thank you.
17 This is reflecting his discussions with Solaris about why they were
18 using the Dynatek design. He said we were specifically doing it to
19 have a range of motion and positions and allow it to reach all six
20 silos without modifying the silo port. Again, that was something
21 that -- there's no dispute that six-silo arrangement preexisted what
22 Masaba was doing. We came to them with that design. And so
23 this is an email where Masaba directly acknowledges that's the
24 thing they're aiming at. That's exactly what they were trying to do.

25 JUDGE TARTAL: And the context is this is pre-IPR,

1 pre --

MS. FLANNERY: Pre-filing, pre everything.

2

JUDGE TARTAL: Pre-litigation. So there was a

3

4 relationship that you referred back to --

5 MS. FLANNERY: Yes.

6 JUDGE TARTAL: -- prior to litigation?

7 MS. FLANNERY: Correct. Yup. All right.

8 JUDGE DEFRANCO: Ms. Flannery, this is Judge

9 DeFranco. Just really briefly, the EconoLoader that was referred
10 to in that email on -- what was it?

11 MS. FLANNERY: Yup.

12 JUDGE DEFRANCO: Slide 51, is that the Dynatek
13 reference?

14 MS. FLANNERY: Yes. In fact, the highlighted
15 attachment, there was this EconoLoader belt design data that's at
16 the top, that is the Dynatek reference that we refer to.

17 JUDGE DEFRANCO: Okay. Thank you.

18 MS. FLANNERY: Yup. I'm going to briefly talk about
19 the two other independent reasons why a person of skill in the art
20 would combine Waldner and Dynatek. The second independent
21 reason we gave is that it would increase the discharge rate through
22 Waldner's chute. Again, in the petition, here on Slide 29, we noted
23 that the rate of flow of -- the rate or speed at which particles flow
24 through the chute is limited by the angle of the chute. And so a
25 person of skill in the art would look for ways to move the particles

1 independent of that without having to rely on gravity.

2 And Dr. Durham explained in his declaration -- this is at
3 Exhibit 30 -- that Dynatek discloses one way of doing that using
4 belt conveyors. It describes a wide array of different rates that you
5 can achieve using belt conveyors. And so a person of skill in the
6 art would consider that an improvement.

7 Now, Patent Owner's response to this is that, well,
8 because you can't increase the discharge rate of the overall system,
9 because there's a bottleneck essentially at the base of the conveyor,
10 there's no reason to increase the rate of the extension conveyor at
11 the top. But as we can see on Slide 33, that's not true. In Dr. -- in
12 Mr. Smith's supplemental declaration as well as Dr. Durham's
13 supplemental declaration, here on Slide 33, we noted that a faster
14 conveyor at the top will actually reduce the weight -- you know,
15 reduce the amount of particulates sitting on the conveyor at any
16 one time. And so that reduces the weight at the top.

17 Patent Owner's own arguments support this. Remember,
18 they argued that a person of skill in the art wouldn't combine the
19 Dynatek EconoLoader with Waldner because it's too heavy,
20 because the weight at the top of that is too high. So if that's true,
21 then obviously the weight of particulate on the chute must be
22 relevant as well. And so that's a reason a person of skill in the art
23 would look to increase its discharge rate.

24 The third independent reason that we talked about for
25 combining Waldner and Dynatek is to enhance the mechanical

1 control of Waldner's discharge chute. And here, again on Slide 34,
2 we've got language directly from the petition where it talked about
3 how Dynatek teaches a conveyor with, quote, "articulated motion,"
4 segments that pivot. And that based on these teachings, a
5 POSITA would modify Waldner to do several things, including
6 enhance its mechanical control.

7 And, you know, Patent Owner again argues that this
8 wasn't clear from the petition, but apparently its own expert
9 understood that. This is Slide 35, testimony from Mr. Anderson's
10 deposition. In paragraph 48 of his declaration, Exhibit 2004, he
11 stated he was talking about Dr. Durham's discussion of enhanced
12 mechanical control, and he interpreted that as referring to the
13 number of control points of the chute. So he understood that.

14 And then he went on in his deposition to actually confirm
15 that Waldner's discharge chute only has one point where you can
16 control the horizontal movement, basically, the inboard pivot, the
17 shoulder. And so there's no dispute that Dynatek adds that second
18 point of horizontal control, therefore enhancing the mechanical
19 control, as Mr. Anderson understood it.

20 Now moving to Slide 36. One of Patent Owner's attacks
21 on all of these motivations is that, well, Waldner would work just
22 fine. And so, you know, there was no problem with Waldner's
23 reach and range of motion. And so for that reason, a person of
24 skill in the art wouldn't seek to modify Waldner. The Federal
25 Circuit has specifically shot down this particular kind of -- this

1 analysis in the Unwired Planet case. The Federal -- it was cited
2 here on the slide, just for the record, it's 841 F.3d 995, pincite 1002
3 to 04.

4 Following KSR, I will note this is an art -- this is a case
5 that was not cited in our brief. But this is just an extension of
6 KSR, which is binding precedent on this Board. The Federal
7 Circuit held that you don't need to show a problem with the prior
8 art to modify it, so long as a skilled artisan would recognize the
9 improvement, that's enough to establish a motivation to combine,
10 to modify.

11 And the Federal Circuit is also noted in the DyStar case
12 here. This is cited on Slide 37 -- again for the record, F.3d 1356,
13 pincite 1368 -- that the desire to improve a product, making it
14 faster, lighter, more efficient is universal and just common sense.
15 So again, when Patent Owner says even if Waldner would work,
16 you know, for some applications, reducing the weight of sand on
17 its extension conveyor, making it effectively lighter in that
18 circumstance, or making it faster or making it more flexible to be
19 able to reach more locations in its reach and range of motion, those
20 are just common-sense improvements that a POSITA would make
21 even if Waldner indeed would work.

22 Now, Patent Owner's other attack on these motivations is
23 that, well, there would be other ways, alternative ways that a
24 person of skill in the art would modify the prior art, such as
25 making Waldner's chute longer or making the bucket elevator taller,

1 things like that. The law tells us -- and this is cited on Slide 38
2 -- in the in re Fulton case, that the existence of alternative solutions
3 does not defeat obvious. This is because the proposed
4 modification doesn't have to be the, quote, "most obvious
5 solution," it just has to be one that a person of skill in the art would
6 consider.

7 The other problem with Patent Owner's alternative
8 solutions -- and this is summarized on Slide 40 -- is that those
9 alternative solutions would have problems of their own. As we
10 talked about in our reply, a taller bucket elevator would make the
11 system longer and heavier, that makes it more difficult to transport,
12 to maneuver, and to deploy. And a longer or wider discharge
13 chute is going to be longer, heavier, harder to control, and it's still
14 going to have that problem of being dependent upon gravity.

15 The point here is that any modification of Waldner,
16 whether it's ours, the alternatives that Patent Owner proposed,
17 they're going to have trade-offs. But those trade-offs do not defeat
18 obviousness. They don't say that a person of skill in the art
19 wouldn't consider making the modification. It just means,
20 ultimately, they may not do it in a particular circumstance where
21 the trade-offs are too high. But none of that defeats obviousness.
22 That's the Corephotonics case that's cited in our briefing as well.

23 Now on Slide 41, I want to address a couple of issues
24 Patent Owner raises that relate to physically substituting the
25 Dynatek EconoLoader into Waldner. Remember, we had two

1 ways of combining the references, either physically combining the
2 EconoLoader into Dynatek -- into Waldner or just applying the
3 teachings. Patent Owner, in their briefing, did not use any of these
4 arguments to combat the issue of applying the teachings of
5 Dynatek. So this only applies to the physical substitution theory.

6 None of them defeat obviousness either, for two reasons,
7 one, all of these issues, belt mistracking, transport height, the
8 weight of the extension conveyor, all of those involve routine
9 modifications that a person of skill in the art would make. Again,
10 in the ICON Health & Fitness case shown here on Slide 41, we
11 know that a POSITA doesn't ignore routine modifications that they
12 would make, resizing components, making them fit, but that
13 doesn't defeat obviousness.

14 The other issue -- and this is on Slide 42 -- is that, you
15 know, things like requiring more permitting or maybe having wind
16 problems and high winds, again, that just involves trade-offs,
17 things that a person of skill in the art would understand. Well,
18 maybe I won't be able to use, you know, the combined system in
19 high winds. It might have a lower wind rating. I might have to get
20 some additional permits. But those again are all trade-offs that a
21 person of skill in the art would understand, but that wouldn't defeat
22 the obviousness of the modification itself.

23 In the interest of time, I want to skip to Slide 48. The
24 other argument that Patent Owner makes about this combination is
25 that a person of skill in the art wouldn't have used Waldner as a

1 starting point, they say, because of what they call evidence in the
2 real world, skepticism about the use of bucket elevators in the
3 industry. There are several problems with this argument.

4 The first one is a legal problem. They cite no case law
5 supporting this notion of disregarding a primary reference because
6 of skepticism in the industry. There's no case law that supports
7 this. And in fact, the Federal Circuit has specifically rejected that
8 logic. We cited the SynQor case in our briefing, which addressed
9 that issue with regard to secondary considerations.

10 The Auris Health case, which is cited here on Slide 48,
11 for the record, 32 F.4th 1154, pincite 1159, this also confirmed
12 that, well, if you have skepticism about the specific combination of
13 elements, that maybe that can suggest non-obviousness. But when
14 you're talking about general skepticism about a field or an element
15 that's known in the prior art, that doesn't defeat obviousness.
16 Certainly, the examiner thought Waldner was a fine starting point
17 and the examiner didn't present any argument about that in
18 prosecution.

19 The other problem with Patent Owner's argument -- and
20 this is summarized on Slide 49 -- is that it --

21 JUDGE DEFRANCO: Ms. Flannery --

22 MS. FLANNERY: Yes, sir.

23 JUDGE DEFRANCO: -- this is Judge DeFranco again.
24 Was Waldner the starting point for the examiner as well?

25 MS. FLANNERY: Yes. It was the primary reference in

1 the rejections of the original claims. Correct.

2 JUDGE DEFRANCO: Okay. Thank you.

3 MS. FLANNERY: Sure. But not only Waldner. We
4 cited at least five other references. All of these are cited in our
5 petition at pages -- it's either page 13 or 28, it's one of those two.
6 All of these references disclose using bucket elevators, Sleeman,
7 Pham, Campbell, which is Exhibit 1022; Grimes, which is Exhibit
8 1028 or 1036, I'm not sure; and then the Foresite system, which is
9 Exhibit 1038 and 1039. All of these things existed. And so plenty
10 of POSITAs thought that bucket elevators were a fine starting
11 point for their systems.

12 And once again, as long as we're talking about real world
13 evidence, let's remember what the inventors of the '689 Patent
14 actually did with the prior art. Mr. Jason Brenden, the lead
15 inventor on the '689 Patent, knew about bucket elevators, found
16 the Dynatek reference, and just like that, he could reach the range
17 of motion that Solaris needed. And what he said they were going
18 to do was to put something like the EconoLoader in Dynatek at the
19 top of the bucket elevator, and that would allow them to reach all
20 six silos.

21 Now, there's no dispute that Masaba did some
22 engineering to make that work. They had to, you know, create
23 some additional things. But none of those things defeat the fact
24 that Masaba used the teachings of Dynatek. They applied that
25 teaching of that structure to the -- to a system having a bucket

1 elevator at the top, no dispute about that.

2 So fundamentally, the question on Ground 1 really does
3 come down to this question, would a person of skill in the art use a
4 conveyor like Dynatek's with a bucket elevator? And when you
5 look at all of the evidence that's presented here, it is not a close
6 call. The only evidence saying no is Patent Owner's hired expert,
7 Mr. Travis Anderson.

8 We brought you two experts that said that it would be
9 obvious, Mr. Smith and Dr. Durham. We also have Mr. Jeremy
10 Weinstein. He is an engineer at Solaris, has 20 years of
11 mechanical engineering experience in his own right, and his
12 declaration testified about how he thought that making this
13 combination would have been obvious at the time. And as we just
14 saw in that prior email, even Mr. Jason Brenden sought to put
15 something, quote, "like Dynatek," at the top of a bucket elevator to
16 solve these issues. All of this evidence clearly proves that Ground
17 1 -- as is stated in Ground 1, it would have been obvious to
18 combine Waldner and Dynatek.

19 All right. Moving on to Slide 53, next disputed in our
20 roadmap, Ground 3, which adds Auld to address Independent
21 Claims 12 and 25. So moving to Slide 54, it's a summary of Auld,
22 undisputed that Auld is a system that is used for batching
23 aggregate, cement, and other materials to form concrete.

24 There's some debate over whether or not cement is an
25 aggregate. I'm not actually sure that matters because Auld

1 specifically does talk about using its system to dispense aggregate.
2 So I don't think there's any dispute that Auld actually does talk
3 about aggregate.

4 But even if it's not, it still qualifies as analogous art. And
5 that's addressed in Slide 55 here. As the Board well knows, there's
6 a two-prong test for -- you know, two options for proving
7 analogous art. One is that you're in the same field of invention as
8 the patent at issue or that you have art that is relevant to the same
9 problem.

10 Patent Owner argued at page 17 of their sur-reply that we
11 were only arguing the same field of endeavor. That's clearly not
12 true because of the petition language that we have here on Slide
13 55. The petition clearly states that Auld is relevant to the problem
14 of handling and storing material in a vertical transportable silo.
15 That is the problem that '689 purports to solve. And we never
16 withdrew this. I mean, this has been in the petition the whole time.

17 This also distinguishes the In re Clay case. I think the
18 Patent Owner cited in that -- they cited that for this, again, field of
19 endeavor prong, but they didn't cite it for anything having to do
20 with addressing the same problem that was at issue.

21 Patent Owner focuses in our reply -- on a statement in
22 our reply noting that Auld system is sufficiently analogous to
23 Waldner to combine teachings. And they say, oh, that would be
24 error, because it's not about whether Auld and Waldner are
25 analogous, it's whether Auld and the '689 Patent are analogous.

1 We still have what's here in the petition. This is the argument that
2 we're trying to make.

3 We're not suggesting that the Board can substitute, you
4 know, Waldner in that analysis. What we were noting in the reply
5 is that Waldner is, in fact, relevant to this same problem as well. It
6 is also a system that is used for storing materials in a vertically-
7 oriented silo and a means of raising and lowering the vertical
8 component. All of them, Waldner, the '689 Patent and Auld, are
9 all related to that issue. That fact actually distinguishes the Sanofi-
10 Aventis case that Patent Owner also cited in their sur-reply where
11 there was error found.

12 JUDGE TARTAL: Counsel, can you just remind us
13 what Auld is being relied upon for?

14 MS. FLANNERY: So Auld is being relied upon for the
15 kingpin and the landing leg that is added in the dependent claim.
16 So the kingpin, it's a little hard to see, it's element 57, it's up at the
17 top of the silo. And the landing leg is 61. So those are both sort of
18 sticking out to the right on that figure there on the right. And so
19 when the silo is laid down, the kingpin and the landing leg will
20 both be, you know, facing towards the ground. That was on Slide
21 54, by the way.

22 I want to move to Slide 59 to see what Waldner actually
23 discloses about the trailer hitch that's disclosed in that reference.
24 Waldner discloses what's called a gooseneck connection, and this
25 is on Slide 59, shown in yellow in the figure on the right. And so

1 that gooseneck connection is what connects to a trailer. Waldner
2 expressly states that other hitch types alternatively may be
3 employed in an alternative to that gooseneck connection.

4 Moving to Slide 61, in the petition and Dr. Durham's
5 declaration, we explained the benefits of using a kingpin and
6 mounting that kingpin on the bucket elevator instead of this
7 gooseneck connection. Removing that gooseneck connection and
8 attaching the kingpin to the bucket elevator frame would reduce
9 the trailer material that's needed and reduce the length of that
10 trailer, making it a little bit shorter. And so that would provide a
11 reason that a person of skill in the art would consider it, in addition
12 to that sort of express teaching, you know, consider alternative
13 hitch types.

14 Now, Patent Owner doesn't really dispute that these
15 benefits would happen. Their disputes are a few different things.
16 In their sur-reply, they argued that, well, Auld doesn't teach that
17 the purpose of its configuration is to shorten the trailer. This
18 doesn't matter under the case law. Again, following KSR, the
19 Court and the Federal Circuit and Outdry Techs., 859 F.3d 1364,
20 pincite 1370, noted that a motivation to combine doesn't have to be
21 in the references themselves as long as a person of ordinary skill in
22 the art would recognize it.

23 Another attack Patent Owner makes is that they point out
24 a number of differences between Auld and Waldner, you know,
25 that Auld is a cementing plant and that Waldner isn't, and things

1 like that. We're not disputing that there are differences, but the
2 fact that there are different contexts doesn't mean that a person of
3 skill in the art wouldn't use them. In fact, KSR tells us the
4 opposite, on Slide 63, that even solutions in different contexts, a
5 person of skill in the art would be able to fit those together like
6 pieces of a puzzle.

7 And finally, Patent Owner complains that, well, this
8 modification would require more than just, you know, switching a
9 kingpin for a trailer. And that's true. But again, remember in the
10 ICON Health & Fitness case, this is cited on Slide 64, we don't
11 ignore the modifications that a person of skill in the art would
12 understand to make. If they would understand that mounting that
13 kingpin on the bucket elevator frame would reduce the length of
14 the trailer, that's a modification that they would know how to
15 make.

16 Moving on to the next dispute in our roadmap, Slide 65,
17 talking about the McIver reference -- this is in Grounds 4 and 4A
18 that are applied to Claim 13. There's some argument by Patent
19 Owner, again, as to whether or not we were clear in the petition on
20 what we were reading on this lift arm structure. We've got the
21 language from the petition that makes that very clear. Quote, "A
22 POSITA would have understood" -- this is on Slide 66, "A person
23 of skill in the art would have understood that rocker arm 204, arm
24 206, and flipper mechanism 210 provide a lift arm structure." I
25 don't see how Patent Owner can argue that they didn't have notice

1 that we were relying on all three of those elements for the lift arm
2 structure.

3 On the next slide, Slide 67, they seem to be quibbling
4 with a statement that Dr. Durham made about the rocker arm being
5 articulated and whether he was talking about rocker arm 204 or the
6 rocker arm structure. He stated here that he was talking about the
7 rocker arm being articulated between first and second ends of the
8 arm structure, again, 204, 206 and 210, the mechanism he just
9 talked about in the preceding sentence. So I think the notice is
10 very clear here. We've not moved to a different theory. This is all
11 in the petition.

12 The other dispute regarding these grounds relates to the
13 rationale to combine. And I want to focus on the Friesen
14 reference, this is on Slide 69, that provides that motivation to
15 combine. Friesen teaches using an articulated lift arm to lift a
16 conveyor for filling a silo. McIver, as you can see from the
17 figures, is actually lifting a silo itself. And Friesen is lifting a
18 conveyor that is used to fill silos. And so Friesen connects
19 Waldner and McIver together. Sure, there are differences in what's
20 shown here. We're not applying this as the thing that reads on the
21 claims, but this is the bridge.

22 This is what provides a person of skill in the art
23 motivation and a reasonable expectation of success, to combine
24 what's shown in McIver with Waldner. And Patent Owner doesn't
25 really dispute that other than pointing to differences between the

1 references. But again, that doesn't defeat that a person of skill in
2 the art would fit these together, again, under KSR, like the pieces
3 of a puzzle.

4 The final dispute I'd like to address in my first portion of
5 my time here is the grounds that deal with Claim 6, so this is a
6 dependent claim. And on Slide 72, we have the language of that
7 dependent claim, a conveyor support frame supporting the
8 segments of the extension conveyor on the aggregate elevating
9 assembly.

10 Now, Patent Owner, in their reply -- in their response
11 sort of construes this claim. The first argument they make is, well,
12 the only thing that the specification refers to as a conveyor support
13 frame is this element 154, which is shown in red here. They don't
14 make any sort of means plus function analysis. They don't make
15 any analysis that that's the only thing that the conveyor support
16 frame can be, so I don't think that construction is appropriate.

17 They also argue that that truss frame, which is shown
18 here in green in the '689 Patent, that also can't be a conveyor
19 support frame. The reason they care about that is because Dynatek
20 discloses a truss frame just like that. And so if that's a support
21 frame, then we meet this element. They argue that this isn't a
22 conveyor support frame because, again, the patent doesn't refer to
23 it as that. But then also because they say it's not on the aggregate
24 elevating assembly.

25 Both of our experts, Dr. Durham and Mr. Smith, applied

1 the plain meaning of the language, and they said that in their view,
2 this is on the aggregate elevating assembly. So if we have a
3 disagreement, you know, the experts -- our experts -- both of our
4 experts applied the plain meaning, not some sort of narrowed
5 construction, and they found that it was disclosed.

6 But even if you agree with Patent Owner that that's not a
7 conveyor support frame -- and this is on Slide 75 -- Pham does
8 disclose this, and this is Ground 2 and 2A in the petition. Pham is
9 another one of these bucket elevator systems for filling a silo. And
10 there's no dispute that Pham discloses a conveyor support frame,
11 which is shown here in green on the slide, that is mounted on the
12 mast assembly 608, so that's the vertical bucket elevator frame, and
13 that it supports these extension auger conveyors when they are
14 moved up and down. No dispute that this provides movable
15 support for Waldner's chute, as it -- that it would provide a
16 movable support for moving Waldner's chute up and down.

17 The only argument Patent Owner makes about this -- and
18 this is on Slide 76 -- is that, well, Waldner already has this
19 functionality to move its chute up and down. But again, remember
20 what we talked about, there doesn't have to be a problem or a
21 deficiency in Waldner in order for a person of skill in the art to try
22 to improve it. That's the DyStar case that's cited here. But that's
23 also just basic KSR law, that a person of skill in the art, if they
24 would see an opportunity to improve Waldner, to provide more
25 support for that chute or conveyor moving up and down, perhaps a

1 heavier belt conveyor is what's in the modified system, then a
2 person of skill in the art would make that modification.

3 JUDGE DEFRANCO: Ms. Flannery, why do you need
4 Pham or why do you need even to construe that particular
5 limitation? Because it seems like Waldner already has some sort
6 of a support for the arm, doesn't it?

7 MS. FLANNERY: I agree, Your Honor, and in the
8 interest of time, I'm leaving those arguments to the briefs. I don't
9 agree with the construction. I think that under a proper
10 construction, Waldner and Dynatek both disclose conveyor support
11 frames. This is just in the event that you agree with Patent
12 Owner's construction, Pham still supplies it.

13 JUDGE DEFRANCO: Yeah. Well, my point is if we do
14 agree with Patent Owner's construction, that it's simply that
15 element -- what is it -- 54 or 154 doesn't Waldner have something
16 like that as far as the arm 266 supports?

17 MS. FLANNERY: So that's --

18 JUDGE DEFRANCO: The --

19 MS. FLANNERY: Yes, that's true. I'm sorry. I didn't
20 mean to interrupt you -- a little lag. On Slide 74, yes, we do point
21 that out that there's a combination of elements, the brackets, pins,
22 and links that Waldner discloses. I mean, they're also a conveyor
23 support frame also meet that definition. There are disputes on that
24 issue that I'm going to leave to the briefs. But again, you're
25 correct. Waldner does disclose something that is in the exact same

1 position, operates in a very similar way to what's element 154.

2 JUDGE DEFRANCO: And just to be clear, you make
3 that argument in your briefs?

4 MS. FLANNERY: Yes. That is made in the briefs.

5 JUDGE DEFRANCO: Okay.

6 MS. FLANNERY: It's made the -- we cite the reply
7 argument here, but that application is provided in the petition as
8 well.

9 JUDGE DEFRANCO: Okay. Thank you.

10 MS. FLANNERY: I see that amount of time. I am
11 going to address secondary considerations in my rebuttal. The
12 only point that I would make to Your Honors is that when you hear
13 about the secondary considerations, ask two questions, one, has
14 Patent Owner provided the nexus that they need to show to support
15 those secondary considerations? And for things like copying, have
16 they actually shown evidence that Solaris copied Masaba's system?
17 We believe the answer to both of those questions is no. I'll go into
18 that in further detail on rebuttal. Thank you.

19 JUDGE TARTAL: Thank you, Counsel.

20 JUDGE DEFRANCO: One last question, Ms. Flannery.

21 MS. FLANNERY: Yes.

22 JUDGE DEFRANCO: As far as the reason to combine
23 Waldner and Dynatek, I think you give a number of reasons, any
24 one of which, you know, we can rely on, but one of them was for
25 purposes of dust control. Have you given up on that reason?

1 MS. FLANNERY: I think we'll leave that to the briefs,
2 Your Honor. I mean, I think there's valid points made that, you
3 know, that there's dust control issues already addressed and -- well,
4 not that it's already addressed, but that Dynatek wouldn't
5 necessarily solve those issues because Waldner's chute is closed. I
6 mean, I think if you do an open conveyor, you're going to have a
7 dust control issue. And so there's going to be reasons to use what
8 Dynatek discloses instead of just an open conveyor. But I
9 understand Waldner's discharge chute on its own may provide
10 better dust control than what Dynatek does.

11 JUDGE DEFRANCO: Okay. Thanks.

12 JUDGE TARTAL: Okay. Thank you, Counsel. I have
13 you having used about 42 minutes.

14 MS. FLANNERY: Okay.

15 JUDGE TARTAL: -- we're not going to be sticklers to
16 it, but that would still leave you around 18 minutes for your
17 rebuttal.

18 MS. FLANNERY: Thank you. I'll make that work.

19 JUDGE TARTAL: Counsel, how much time did you
20 want to save for your surrebuttal?

21 MR. NYDEGGER: Ten minutes, please.

22 JUDGE TARTAL: I will start you off with 50 minutes
23 of total argument time.

24 MR. NYDEGGER: Thank you.

25 JUDGE TARTAL: And did you intend to disclose any

1 confidential information in your arguments?

2 MR. NYDEGGER: No, Your Honor.

3 JUDGE TARTAL: Before we get started, did you want
4 to begin to at least identify what slides you had objections to? And
5 can I just confirm, did you -- I did go back and look briefly at the
6 hearing order which indicated the parties should have conferred to try
7 to resolve any issues over objections to demonstratives
8 beforehand. Did that occur and --

9 MR. NYDEGGER: Yes. We did meet and confer. We
10 were able to resolve several of the objections to the Petitioner's
11 exhibits, but not all of them. And yes, I would like to raise some
12 of those.

13 JUDGE TARTAL: Do you want to at least tell me what
14 slides you're --

15 MR. NYDEGGER: Yes. So Slides 18, 36, 37, 38, 48,
16 62, 76. Each of those slides raises new arguments based on cases
17 not cited in the briefings. And you'll note that there's no citation to
18 the record for those cases provided on those slides. And then also
19 Slide 52. Slide 52 was the exhibit where -- or demonstrative
20 exhibit where the Petitioner put Mr. Anderson on one side, saying
21 that a POSITA would not have combined, and then list Dr.
22 Durham, Mr. Smith, Mr. Weinstein, and Mr. Brenden on the other
23 side, saying that a POSITA would have seen Dynatek as obvious.

24 And Mr. Weinstein is not an expert, has not been
25 designated an expert. He cannot testify as to what a POSITA

1 would or would not have done, and the same thing with Mr.
2 Brenden. They are not experts. They cannot offer testimony on
3 what a POSITA would have done in the case. And so that we
4 object to Exhibit 52 on that ground.

5 JUDGE TARTAL: And then just in terms of the other
6 exhibits, is your issue related to citing cases that had not been cited
7 previously?

8 MR. NYDEGGER: Yes.

9 JUDGE TARTAL: Okay.

10 MR. NYDEGGER: And the arguments, obviously,
11 based on those uncited cases are new.

12 JUDGE DEFRANCO: You understand, Mr. Nydegger,
13 that we have to follow the law. And so the law is what it is. And
14 we're always going to keep in mind cases that may not have been
15 cited in the briefs. You understand that, correct?

16 MR. NYDEGGER: Yes. I do understand that, Your
17 Honor. I understand that the Board is bound to follow the law, and
18 we are confident the Board will do so. However, we also
19 understand that the Petitioner has an obligation to disclose its
20 arguments and cases and the things that they are going to argue
21 before oral argument, and so that's the grounds for their exclusion.
22 Of course, the Board will follow the law, I'm certain.

23 JUDGE DEFRANCO: Judge Tartal?

24 JUDGE TARTAL: I'm sorry, I was going to say, were
25 there -- have you had an opportunity to or were there additional

1 cases that you wanted -- cases referring to cited precedent, Federal
2 Circuit cases that you wanted to draw our attention to, that you
3 haven't had the opportunity to yet, or identify the cases that you're
4 relying upon?

5 MR. NYDEGGER: No. We don't raise any new cases.

6 JUDGE TARTAL: But are there any new cases that you
7 would like to draw to our attention that you didn't already identify?

8 MR. NYDEGGER: No, Your Honor.

9 JUDGE TARTAL: Okay. Judge DeFranco, did you
10 have any other questions on --

11 JUDGE DEFRANCO: Yes. So Mr. Nydegger, are you
12 aware of any cases that preclude Petitioner from citing new law or
13 even the Board from citing law in their final decision that hasn't
14 been cited in the briefs? Are you aware of any cases that preclude
15 that?

16 MR. NYDEGGER: No. Certainly, Your Honor, the
17 Board is free to cite the case law that it believes is pertinent to the,
18 you know, case at hand. And as I mentioned before, certainly the
19 Board is bound to -- and we have confidence will follow the
20 controlling law. Once again, it's still not proper for the Petitioner
21 to be making new arguments on new cases. If they wanted to
22 make those arguments, they should have. And so certainly, the
23 Board will follow the law. And certainly, the Board can cite new
24 cases and frequently does cite cases that are not raised in the
25 briefs, which is perfectly fine. But the ambush approach of the

1 Petitioner is just not appropriate.

2 JUDGE DEFRANCO: I think they're just citing cases
3 that support their position. They're not making new arguments.
4 They're just citing cases, other cases that support that argument
5 already made.

6 MR. NYDEGGER: Well, anyway --

7 JUDGE DEFRANCO: Go ahead, Mr. Nydegger. I don't
8 want to take -- waste much more time on this issue. But that's your
9 sole dispute with those particular slides, is the new case law that's
10 cited by Petitioner?

11 MR. NYDEGGER: Yes, Your Honor.

12 JUDGE DEFRANCO: Okay.

13 JUDGE TARTAL: Sorry about that. We'll take the
14 objections under advisement and address them as necessary in the
15 final decision.

16 MR. NYDEGGER: All right.

17 JUDGE TARTAL: I have you set at 50 minutes for your
18 initial argument, and you can begin when you are ready.

19 MR. NYDEGGER: Yes. Thank you, Your Honor. May
20 it please the Board. Chad Nydegger, once again, on behalf of the
21 Patent Owner Masaba. And before we dive into the merits, I think
22 a little bit of context is helpful in this case. The '689 Patent, as was
23 mentioned earlier, it pertains to an aggregate transferring system.
24 It's a system that receives aggregate from trucks on the ground, it
25 elevates that aggregate, and then deposits them at an elevated

1 location, such as the inlet for a silo.

2 Now, how did we get here? Well, back in 2013, the
3 Petitioners, they were using pneumatic systems. These were
4 trucks with pneumatic systems on the trucks to fill these silos at
5 the rate of about a thousand pounds per minute. Well, in early
6 2020, the Petitioners, even though they have an internal design
7 team that was led by Jeremy Weinstein, an Engineer with over 20
8 years of experience, they tasked Mr. Weinstein to find a system
9 with a fill rate that was tenfold what they currently had, 10,000
10 pounds per minute.

11 And the record shows that Mr. Weinstein, he'd been
12 considering this problem for seven years. Twenty years'
13 experience, he's been thinking about this problem for seven years.
14 He has a complete design team at his disposal, and he didn't have a
15 solution. So the Petitioners hired Masaba. So Masaba was hired
16 to design a transportable top fill system with this 10,000 pounds
17 per minute capacity that the Petitioners are looking for.

18 In July of 2020, the Petitioners, they asked Masaba to
19 design a system that uses a belt conveyor with a steep incline -- so
20 they want a steep incline to minimize the footprint on the ground,
21 and then they want this belt conveyor to be able to go up and
22 deposit the aggregate into the silos. So --

23 JUDGE DEFRANCO: Mr. Nydegger --

24 MR. NYDEGGER: Yes.

25 JUDGE DEFRANCO: -- my understanding of the

1 timeline here is that Solaris was already working with Mike
2 Stanton from another entity?

3 MR. NYDEGGER: So Mike Stanton was a middleman.

4 JUDGE DEFRANCO: Okay.

5 MR. NYDEGGER: So Solaris -- yeah. Solaris hired
6 Anchor, and Anchor hired Masaba. And so Mike Stanton, who
7 was with Anchor, he was the middleman between Masaba and
8 Solaris. And so Anchor did no design work on this system. They
9 designed a different -- completely -- I believe they designed a
10 mixer or something for Solaris. But Anchor did not have the
11 ability to design this aggregate transferring system. And so
12 Anchor subcontracted that out to Masaba. So essentially, Solaris
13 hired Masaba through Anchor, and Masaba was the only party that
14 worked on the design of this invention. Does that answer your
15 question, Your Honor?

16 JUDGE DEFRANCO: Yes. Thank you for clarification.

17 MR. NYDEGGER: Sure.

18 JUDGE TARTAL: Counsel, just as a reminder, if you
19 could refer to the slide numbers.

20 MR. NYDEGGER: Oh, yup, thank you. So we're on
21 Slide 4. So on Slide 4, we have August 2020, where Masaba
22 presents a design that uses a belt conveyor as Solaris asked. So
23 they're working on this -- they're trying to work out this belt
24 conveyor concept.

25 In October 2020, the Petitioners, they provide a

1 specification sheet based on that belt design, that initial belt design
2 system that Masaba had come up with. And the specifications
3 state -- it's what you would expect. It says, we want it to move
4 10,000 pounds per minute, we want it to be below a certain height
5 when it's transportable; so it can go down the highway, we want it
6 to weigh so many pounds, we want the -- and so forth. So it
7 provides the specifications, but no instruction on how to achieve
8 those specifications.

9 Then in November 2020, the Petitioners, they're really
10 pushing Masaba to get this system designed and built. They're
11 stating that this project is the most important project to the
12 company at this time. They're losing market share, they need to
13 regain back market share, and so they're really pushing Masaba to
14 push this design through. Masaba has pulled engineers off of other
15 projects and is -- you know, they're pressing to try and get this
16 project for Petitioners as soon as possible.

17 Then we have the time frame of November 2020 to
18 January 2021, Masaba presents additional designs -- and these are
19 all in the brief. They present three or four different modifications
20 of designs, all using a belt conveyor. Well, they're not getting the
21 belt conveyor to work. They can't get a belt conveyor down to the
22 -- to meet the specifications that the Petitioner wanted, Solaris
23 wanted.

24 And so in January 2021, Masaba decides they need to
25 look at something else. And so they looked at going to a bucket

1 elevator instead of a belt conveyor, and they float that idea to
2 Solaris. And the response they get back is that bucket elevators
3 are not -- they're frowned upon in the industry. And opposing
4 counsel said, well, look, we have all these other prior art references
5 that talk about using bucket elevators to fill silos. Well, yeah,
6 that's exactly why they were disfavored is because there were other
7 products out there that were -- that used bucket conveyors to fill
8 silos, and they had problems.

9 And so that's the origin of the skepticism that Solaris
10 expressed, when this idea of using a bucket elevator was first
11 floated. Solaris said, no, we want you to keep working on the
12 conveyor belt design, even if that reduces the capacity. We're
13 willing to take a lower capacity and stay away from bucket
14 elevators. So Masaba continues to work on now simultaneously
15 kind of both designs. And eventually, they come back and they're
16 not getting the conveyor to work. They can't get it down, they
17 can't get it to fold right, they're having issues.

18 And so, once again, they present a more complete design
19 with a bucket elevator to Masaba -- or to Solaris. And Solaris
20 says, okay, let's move forward with the bucket elevator. And at
21 that point, they set the conveyor concept aside and they move
22 forward, full bore, with the bucket elevator.

23 So in June 2021 -- sorry, Solaris visits Masaba, and they
24 indicate that they are very excited about this bucket elevator
25 system. They expect this to change their business and even change

1 the industry. So they are very excited to get this new system as
2 now Masaba has presented them.

3 Then we get to July -- to August 2021, Solaris goes out
4 to Masaba, they test the product, and they're ecstatic about it.
5 They love it. They see how well it performs. They see how
6 -- they see the transfer rate, everything. And there's extreme
7 excitement by Solaris about this new system that Masaba has
8 invented. But Mr. Weinstein learns that the unit's patent pending,
9 and he's not happy about that. And this is a foreshadowing
10 because as we'll see later, what Solaris ends up doing is they end
11 up patenting the design themselves so -- but that's down the road a
12 little bit.

13 So we get to October, Masaba delivers their first
14 completed unit to the -- to Petitioners. They get it out in the field
15 and put it into service immediately as soon as it arrives. At that
16 point, they begin touting this invention to their investors. And
17 their earnings calls every quarter, as shown in the brief. Their
18 earnings calls talk about how great this system is, how this new
19 system is increasing their profits, it's -- this is the bee's knees, this
20 is the best thing since sliced bread. And they tout that every single
21 investor meeting, there's a focus on this new system and how
22 successful it is.

23 So in late 2021, Masaba begins work on a second unit
24 ordered by the Petitioners, but they stop work because Petitioners
25 want a price that's not attainable. And so they can't agree on price,

1 and so the work stops. Well, in 2022 and 2023, Masaba learns that
2 Solaris has copied the system. There are virtual copies out there.
3 And they are -- they took the first unit, they took delivery of the
4 first unit, and then they began making copies of it.

5 And during deposition testimony, Mr. Weinstein, I asked
6 him straight up, did you copy this invention? He said, well, that's
7 our design, we own that design. So it's his view that, hey, yeah,
8 we copied it because we own it, it's ours. And so they began
9 making replicas of it and putting those in the field and continued to
10 tout this in each of their investors, informing the investors how
11 profits were growing, how their fleet was growing.

12 And so we get a litigation filed in Wyoming for patent
13 infringement. That brings us to the IPR. But Petitioners didn't just
14 stop at copying the new invention of Masaba. In May 2023, Mr.
15 Weinstein, as the inventor, he files a patent application on
16 Masaba's design. He had nothing to do with this design. We
17 asked him about it in deposition. This is in the record. The only
18 thing he said is, we gave him that specification sheet. So did you
19 tell them how to meet those specifications? Well, we gave them
20 the specification sheet. So Solaris goes, files its own patent
21 application, and gets that patent issued in January -- on January
22 2nd, 2024.

23 And if you look at Claim 6, which we cite in our briefs of
24 that patent, it is even broader than the claims at issue in this case.
25 And so we have Solaris that hires Masaba to design this new

1 system. They love it so much. Then they cut Masaba out, they
2 copy it, they go file their own patent application, don't disclose to
3 the patent -- to the PTO that Masaba was the actual inventor of it.
4 And then they come around and they turn around and they come
5 here, after telling the PTO that this invention is patentable and
6 actually getting a patent on it.

7 They come to the PTAB and say, oh, this invention is
8 obvious. It was obvious all along. We couldn't do it, but it's
9 obvious. It was hugely, commercially successful for us, but it was
10 obvious. Mr. Weinstein, our 20-year experienced engineer,
11 couldn't think of the solution, but it's obvious. We filed and
12 obtained a patent on it ourselves, even though we didn't invent it,
13 but it's still obvious.

14 That is not what this Board is for. That is not what these
15 types of proceedings are for. They are not to be used to perpetrate
16 the sort of dishonesty and fraud that has gone on in this case by
17 challenging a patent as obvious with these kinds of facts and
18 circumstances.

19 So let's now get to more of the merits of the case. So the
20 Petitioners filed their petition, and they filed an expert declaration
21 by Dr. Durham. Dr. Durham is not an expert in this field. So first
22 of all, Mr. Durham -- or Dr. Durham is -- he is not a POSITA. If
23 we could switch over to the ELMO, please. So this is on the
24 ELMO and -- do we have that switch, please? Thank you. Okay.
25 There we go.

1 So this is paragraph 27 of Mr. Anderson's report where
2 he states the standard for a person of skill in the art. He says that
3 they would have a degree in mechanical, electrical, petroleum, or
4 civil engineering with at least two years of experience working in
5 an industry or field that involves handling a particulate matter, so
6 that's Dr. Durham.

7 And then Mr. Anderson responds that that's not correct.
8 A POSITA in the '689 Patent would have a degree in mechanical
9 engineering or perhaps petroleum or civil engineering. And he
10 goes on in his deposition to explain that would depend on the
11 coursework to get those other two degrees. And with at least two
12 years of experience engineering, the structural and/or mechanical
13 aspects of the aggregate transferring equipment.

14 Those years of experience of the mechanical and
15 structural aspects of the equipment. They're critical because
16 Section 103 states that a person of ordinary skill in the art to which
17 the claimed invention pertains. And the Petitioner, they want to
18 focus on, well, the patent talks about how to use it. These are not
19 methods of use claims. These are not use claims. These are
20 structural claims. And so the claimed invention is how to design
21 and how to construct this kind of equipment. And it's clear that
22 Dr. Durham has virtually no experience in this.

23 And so could we go back to the PowerPoint? Going to
24 Slide 9, so Dr. Durham, he says he has these degrees in electrical
25 engineering, technical management, and engineering management.

1 And he talks about -- they -- Petitioner talks about his coursework.
2 Well, before I get -- I'll come back to the coursework in a moment.
3 He says that -- well, actually, let's do that now. Can we go back to
4 the ELMO?

5 So this is the deposition testimony of Dr. Durham. And
6 in his -- during his testimony, I wanted to know, I was curious to
7 know what kind of coursework he had pertaining to this specific
8 area. He says, well, I had statics courses, so this is in his
9 undergraduate degree. I said, okay, well, how many statics courses
10 did you have? Here, as we see on page 7 of his testimony, statics
11 course, one course. He says, okay, but I also had instrumentation
12 courses.

13 JUDGE DEFRANCO: Right.

14 MR. NYDEGGER: Judge DeFranco, are you talking?

15 JUDGE DEFRANCO: Ah, yes. Mr. Nydegger, how
16 many courses in statics would he have needed to become a person
17 of ordinary skill in the art? It seems like we have many engineers
18 here in the room, including the judges as well as counsel, I
19 presume. And before you could take electrical engineering
20 courses, you take basic engineering courses. And I'm sure that
21 that's what Dr. Durham has taken. And that's what he's talking
22 about, as far as his coursework goes, not necessarily the course
23 specific to electrical engineering but the courses leading up to
24 those other electrical engineering degree and courses.

25 MR. NYDEGGER: Oh --

1 JUDGE DEFRANCO: So I'm just confused why he
2 wouldn't be able to understand the simple mechanics of this
3 particular invention.

4 MR. NYDEGGER: Well, it becomes apparent, Judge
5 DeFranco, when we start to look at his actual opinions, that he did
6 not understand the nuances involved with these kinds of systems as
7 he made numerous mistakes in his opening declaration, which he
8 then goes back and he either abandons the argument altogether.
9 For example, you asked about dust control. He argued that a
10 reason to combine Dynatek with Solaris was to control dust. That
11 was completely, 100 percent, wrong. He made that --

12 JUDGE DEFRANCO: Okay. But I'm assuming right
13 now the Petitioner has given up on that argument. I mean, they
14 haven't said it in so many words, but I'm pretty sure that that's not
15 -- they're not relying on that as a reason anymore. So that's kind of
16 out of the case. So to the extent you want to point out errors, as far
17 as the other reasoning, I'm sure that's what you need to get into.

18 MR. NYDEGGER: Yes, Your Honor, it is out of the
19 case, but it's still relevant to the case because if you do allow Dr.
20 Durham's expert declaration to come in, then it becomes an issue
21 of credibility. Do you believe Mr. Anderson who had 20 years of
22 experience with this specific equipment in this specific field, or do
23 you believe Dr. Durham who does not have that experience? His
24 education, as we see, he had one undergraduate course in statistics,
25 one, maybe two, in instrumentation. Those are the only three

1 courses that he could identify in his entire education that related to
2 this.

3 JUDGE DEFRANCO: And he also -- I think Petitioner
4 also identified experience.

5 MR. NYDEGGER: And we'll get to that next. And so --

6 JUDGE DEFRANCO: I think your point is you want us
7 to throw out Dr. Durham's declaration over one error that you've
8 pointed out as far as this dust control goes. I mean, I'm not sure
9 that that's a valid argument.

10 MR. NYDEGGER: Well, it certainly is. If Mr. Durham
11 is not qualified to testify, then his testimony should not be
12 considered. And that's -- I mean, the Board has refused to consider
13 expert testimony when they're not an expert in the field. And Dr.
14 Durham simply isn't. And as I said, even if you allow it in, then it
15 becomes one of credibility. Do you believe Dr. Durham, or do you
16 believe Mr. Anderson?

17 And so Dr. Durham's mistakes that highlight his
18 inexperience with this field, and then he's not qualified at the
19 minimum, that goes to credibility. And his testimony is simply not
20 credible at that point because he doesn't know --

21 JUDGE DEFRANCO: Well, I understand your weight of
22 the testimony argument, as far as credibility and the appropriate weight
23 to be
24 given. But we make those determinations on an everyday basis,
25 and we can determine which expert is more persuasive.

MR. NYDEGGER: Well -- and that's what we're

1 arguing. We're arguing, number one, that he should not be
2 considered at all because he's just not qualified; and number two,
3 even if considered, that he should be given no credibility. And so I
4 mean, you look at -- his opening declaration was so deficient that
5 the Petitioners brought in a second mechanical engineer with their
6 reply. And they submitted an entirely new expert declaration
7 because Dr. Durham's declaration was so deficient and had so
8 many problems.

9 Dr. Durham, he submits also a reply declaration. They
10 submit 118 pages of expert declaration with the reply, trying to fill
11 the gaps and correct the mistakes of Dr. Durham's initial
12 declaration. And that's concerning. It should be concerning, at
13 least to the Board. And so --

14 JUDGE DEFRANCO: Let me ask Mr. Nydegger, what's
15 your response to the Federal Circuit case law that Petitioner cites
16 saying a second declaration is permissible?

17 MR. NYDEGGER: It can be permissible. But we don't
18 think that it is permissible in this case. And the reason that it's not
19 in this case, Mr. Smith's declaration is directly contrary. He
20 directly contradicts Dr. Durham on certain points. Certainly, that
21 is not a permissible use of a supplementary declaration or a
22 supplemental expert on reply, to contradict your first expert
23 witness's declaration.

24 JUDGE TARTAL: Counsel, do you have a slide that
25 you want to direct us to that addresses the argument that they had

1 contradictory opinions in reply?

2 MR. NYDEGGER: I do. Could -- well, I'll point it out
3 when we get there, if that's okay.

4 JUDGE TARTAL: Sure. Just so you're aware, you have
5 about 30 minutes left in your initial argument.

6 MR. NYDEGGER: Yes. We're going to have to move
7 ahead here. So just going to some of the mistakes that Dr. Durham
8 made, we talked about the dust control. He thought that Waldner,
9 the chute was open. It's clearly not. And he admitted that. And the
10 Petitioners abandoned that because he was wrong on that point.

11 Petitioner continues to confuse, based on Dr. Durham's
12 opening testimony. He said, well, Durham would increase the
13 discharge rate. Well, Durham would not increase the discharge
14 rate of the system. The discharge rate is how much is the volume
15 over a period of time going into the silo. You cannot change -- it
16 is impossible to change that with the extension conveyor going
17 into the silo. You can only put in to the silo as much material as is
18 coming in at the inlet. And he confused the concept of discharge
19 speed with discharge rate because he just doesn't understand the
20 nuances of play here, with these systems.

21 And that's actually one point where Mr. Smith, he
22 directly contradicts Dr. Durham. And that's actually shown on the
23 Petitioner's Slide 33. On Petitioner's Slide 33, Smith says that,
24 "This would not increase the discharge rate." That's a quote from
25 Mr. Smith, directly contrary to what Dr. Durham argued. Dr.

1 Durham argued that Waldner chute had to collect -- had to be
2 disassembled, had to be detached in order for it to collapse down
3 in the transport position. That's also incorrect. That was his
4 motivation for going to Sleeman. But it's simply not correct. He
5 also said that -- and Counsel touched on this --

6 JUDGE DEFRANCO: Mr. Nydegger --

7 MR. NYDEGGER: Yeah.

8 JUDGE DEFRANCO: -- let me ask, in Waldner, it's a
9 chute, okay? And if you make that chute flatter, isn't that going to
10 decrease the rate at which the particulate is discharged, as opposed
11 to if you make it steeper -- at a steeper angle, it's going to have a
12 higher discharge rate; do you agree?

13 MR. NYDEGGER: No, Your Honor. I do not.

14 JUDGE DEFRANCO: Why?

15 MR. NYDEGGER: Because you have matter that's
16 coming into the system. That matter will flow out of the system at
17 the same rate that it's coming in. If the matter -- you can't
18 discharge it faster than it's coming in because the matter is not
19 there. If you put one pound of sand into it, you can't get more than
20 one pound of sand out of it. And so the discharge rate, the rate that
21 that volume flows over time, is fixed at the inlet.

22 Now, if you change the angle of the chute, the speed at
23 which it flows will increase as the slope increases, but the volume
24 remains the same. It's just that -- and this goes to Petitioner's slide
25 that they showed where you have less weight on the conveyor, and

1 they say that's a reason to combine Dynatek. And it showed they
2 had the top picture with a lot of sand on the conveyor, then the
3 bottom picture with a little bit of sand. The volume coming off
4 that conveyor is the same, the rate is the same. And it's the same
5 thing with Waldner's chute. The rate the volume comes out is the
6 same.

7 Now, will it be a thinner volume flowing faster at a steep
8 angle? Yes. Will it be a thicker volume that flows down at a
9 slower speed? Yes. But the actual volume coming off the end of
10 the chute is the same regardless of the angle. And this gets to the
11 motivations that they provide to Dynatek -- they provide for
12 combining Dynatek. If you look at their motivations for why they
13 combine Dynatek, when you start to actually think about them,
14 they actually don't improve Waldner, they really don't. And let's
15 go to their next, because --

16 JUDGE TARTAL: Can I just ask you on your last
17 argument? Doesn't the rate at which it's discharged have an impact
18 on the volume and adjusting the volume that can be, you know,
19 transported at the start of the slide? It seems like you're assuming
20 that there's no change in the volume at the beginning, so it doesn't
21 matter how fast it gets conveyed because you're rate-limited by the
22 volume at the beginning of the conveyor or the slide. Isn't that just
23 ignoring the fact that you can change the volume at the beginning
24 based on how quickly it's transported?

25 MR. NYDEGGER: So yes, Your Honor. But you have

1 to understand that that applies to every system. Every system has
2 what we call an envelope of operation. It has a maximum volume
3 that it can carry, and it has a maximum reach that it can service at
4 the top. So these systems are designed so that the volume that can
5 flow out at the top is slightly higher than the volume that can be
6 put in at the bottom. They're intentionally -- and this is -- Mr.
7 Anderson talks about this in his declaration extensively. They're
8 intentionally designed that way because you don't want to have
9 buildup in the system. If you have buildup in the system, then you
10 get spillage, then you have all kinds of problems.

11 And so when you design these systems, they have this
12 envelope of operation. And part of that envelope of operation is
13 the maximum rate at which they can take in sand. And that
14 maximum rate at which they can take in sand is going to be
15 slightly less than the maximum rate that they can get the sand out.

16 And so you can say the exact same -- you can make the
17 exact same argument with the Dynatek, with the Dynatek-Waldner
18 combination. Dynatek-Waldner combination has the same issue.
19 It can only -- there's a maximum rate at which it can handle to
20 move the sand. And the conveyor at the top, it does no good to
21 make that compare at the top, be able to move a lot more sand than
22 what you can take in at the bottom. And they're designed that way.

23 And that gets us to -- they say, well, Dynatek increases
24 the range of motion and it increases the reach. Well, that sounds
25 nice, but in application, it's meaningless because every system has

1 an envelope of operation. Every system has a maximum reach. It
2 can only go so far.

3 And they say, well, longer is better. No. No, longer is
4 not better. Longer is only better if it's useful length. And they
5 have not provided any evidence of any system anywhere that could
6 not be reached by Waldner alone. In fact -- I've gotten away from
7 my slides here. Let me see if I can find it here quickly.

8 JUDGE DEFRANCO: While you're doing that, Mr.
9 Nydegger, I think Petitioner pointed out a slide that had a six-silo
10 arrangement and that the Waldner chute could not reach the closest
11 silo.

12 MR. NYDEGGER: Yes, Your Honor. That's a
13 hypothetical that they -- that's a self-serving hypothetical that they
14 constructed. They had a six-pack silo and they say, well, this
15 Waldner configuration wouldn't be able to work. But we
16 specifically asked Dr. Durham during his deposition, would
17 Waldner be able to reach all six silos in Solaris' six-pack, in a six-
18 pack configuration of silos? The answer was unequivocally yes, it
19 was. So here's the Slide 18, this is the testimony from Dr. --

20 JUDGE DEFRANCO: Do you have a deposition?

21 MR. NYDEGGER: Yes. It's on the slide right now.

22 JUDGE DEFRANCO: Oh, okay. Great.

23 MR. NYDEGGER: Slide 18, question was, "It's your
24 opinion that Waldner's system could reach all six silos in a six-
25 pack configuration, correct?" Dr. Durham, "If it was configured in

1 such a way that it had the proper height and length of chute, and
2 perhaps in some cases a drop chute coming off that, then it could if
3 it was configured properly, sure." "And a POSITA would know
4 how to configure Waldner properly to reach all six silos in a six-
5 pack, correct?" "I would say that, yes. I can agree with that."

6 And so this self-serving hypothetical that they construct,
7 it's not real-world evidence. It's just that -- it's a self-serving
8 hypothetical. In the real world, they have not identified a single
9 configuration of silos that exists that cannot be reached by
10 Waldner. So when they say that to extend the reach is a reason to
11 combine Dynatek with Waldner, it's fabricated.

12 Well, you could say, well we could extend the reach to
13 go, you know, 100 yards. Well, longer is not better. That just
14 makes it more expensive and more unwieldy. It doesn't actually
15 -- there aren't silos 100 yards away that you need to serve. And so
16 extending the reach is only an improvement if it allows you to -- if
17 it's actually useful, if you can actually use it to fill silos. Well,
18 Waldner already fills all the silos that are in the record. And so
19 extending the reach is not a real reason to combine.

20 And the same thing goes for extending the range of
21 motion, they say, well -- or the mechanical control of the chute.
22 They say, well, we could have finer control over the movement of
23 it. Well, yeah, you could employ robotics that are used in remote
24 surgery and get the controls down to accuracy within a thousandth
25 of an inch. Would you do that? Would a POSITA do that? No.

1 Why? Because it's not useful. It doesn't improve it. It just makes
2 it more expensive and more complicated and more complex, which
3 are all bad things because then it's more prone to maintenance and
4 breakdown and that sort of thing.

5 So Waldner is already -- it has sufficient controls. What
6 do -- you have to get it within a foot. You don't need to get it
7 within a thousandth of an inch. And so they say, well, it enhances
8 mechanical control. But they don't actually cite a benefit that that
9 provides. They just throw out this generalized, yeah, it would be
10 good to do this, without tying it to the actual industry and what
11 actually is perceived by a person of skill in the art to be an
12 enhancement or a benefit.

13 JUDGE TARTAL: Counsel, do you concede that an
14 obviousness combination doesn't need to be better to be obvious?

15 MR. NYDEGGER: Well, the case law -- and we can
16 actually look at some of the slides that we've moved to exclude by
17 Petitioner. So they cite case law that says, well, you don't have to
18 have a problem for a reason to combine. But if you go and you
19 look at each of those cases, every single one of those cases and the
20 quotes that Petitioner has on their slides, every single one of those
21 cases talks about either an improvement or a benefit.

22 And so to have a reason to combine, you may not need to
23 have a problem that you're solving, or you don't have to know
24 about the problem that you're solving. But you do have to have
25 some reason to combine, which is some benefit, some

1 enhancement or benefit that confer -- that is conferred. And they
2 haven't identified any enhancement or benefit that Dynatek would
3 bring.

4 So I would like to also hit a few other points. The
5 conveyor support frame - Judge DeFranco, you asked if Waldner
6 has its own conveyor support frame and so that term really doesn't
7 need to be construed or interpreted. That's not correct, Your
8 Honor, and here's the reason why. So here's the conveyor support
9 frame identified in the '689 Patent. And this conveyor support
10 frame is not just a conveyor support frame, stop. It is a conveyor
11 support frame that has particular functionality that is not present in
12 the -- what you identified as a potential conveyor support frame in
13 Waldner.

14 So here on Slide 22, we have the picture of Waldner
15 which identifies what you, Judge DeFranco, said could potentially
16 be a conveyor support frame. Well, the conveyor support frame
17 -- and notably, the Petitioner identifies three different parts
18 combined together as a conveyor support frame, and they're
19 colored here in cyan, orange, and green. Those are the three parts
20 that they say is a conveyor support frame.

21 But the conveyor support frame has to move with respect
22 to the deployable frame when the extension conveyor moves
23 between the lowered position and the raised position. And these
24 parts don't do that. They don't meet that functionality. That cyan
25 part that is permanently affixed where it is on the deployable

1 frame. The deployable frame, that's the frame of the bucket
2 elevator. And so those cyan parts, they are not at all movable with
3 respect to the deployable frame.

4 Now, you say, well, what about 266? Well, that's only a
5 component. And that also -- that only moves the chute in the
6 horizontal frame -- in the horizontal direction, not in the vertical up
7 and down direction. And so what the Petitioner has identified as a
8 conveyor support frame in Waldner does not meet the functionality
9 required by the claims. And so it's not just a conveyor support
10 frame, it's a conveyor support frame that does these specific things.
11 And they have not identified that in the prior art.

12 And so they also -- they want to say that, well, the truss
13 frame is a conveyor support frame. Well, that's not a conveyor
14 support frame either. When you look at it, the patent identifies the
15 conveyor support frame 154, which we saw in Slide 20, and that's
16 the conveyor support frame. The patent separately identifies the
17 truss frame. The truss frame is -- I believe it's 142. No. I'm not
18 seeing the number immediately. But the specification specifically
19 identifies this as a different structure. The truss frame is a
20 different structure, separate and apart, and has a different function
21 than the conveyor support frame. And so the trust frame is simply
22 not a conveyor support frame.

23 JUDGE DEFRANCO: Mr. Nydegger, which limitation
24 exactly are you talking about with respect to the support
25 -- conveyor support frame?

1 MR. NYDEGGER: I'm sorry, your question again, Your
2 Honor?

3 JUDGE DEFRANCO: Yeah. Which limitation in Claim
4 1 are you speaking to with respect to this conveyor support frame?

5 MR. NYDEGGER: So are you asking, like, 1L or --

6 JUDGE DEFRANCO: Right. Yes.

7 MR. NYDEGGER: You know, I'm sorry, Your Honor, I
8 don't have that nomenclature in my notes, so I don't have that at
9 the tip of my tongue.

10 JUDGE DEFRANCO: Well, just point me to the text of
11 Claim 1.

12 MR. NYDEGGER: Sure. So it's the conveyor support
13 frame, and you find the language on Slide 22. The conveyor
14 support frame that is "movable with respect to the deployable
15 frame of the aggregate elevating assembly, when the extension
16 conveyor moves between the lowered position and the raised
17 position." That's the language from the claim.

18 JUDGE DEFRANCO: Oh, then explain to me why 266
19 doesn't meet that limitation.

20 MR. NYDEGGER: Well, first of all, because they argue
21 that the entire conveyor support frame is three -- is -- are all three
22 of those colored parts, not just 266. Okay. So that's the first --

23 JUDGE DEFRANCO: Well, I understand. But 266
24 moves, right?

25 MR. NYDEGGER: 266, it moves the -- it moves

1 horizontally, not between the raised and the lowered position. You
2 can see how it's angled at a 90-degree angle out, away. So it
3 moves the conveyor, the chute, like this, not coming down to the
4 transport position. See, you see that vertical axis, the vertical axis
5 that it's rotating about? That is in the red dotted line on Slide 22.

6 And once again, these other -- the cyan brackets and the
7 orange brackets, what they say is the conveyor support frame,
8 those don't move relative to the frame when it goes to the -- when
9 it -- when the chute moves from the operational position down to
10 the transport position. Those are permanently affixed as they are
11 relative to the deployable frame.

12 JUDGE DEFRANCO: Now, I understand that. B u t my
13 question is about 266.

14 MR. NYDEGGER: Yes, Your Honor. And have I
15 answered your question?

16 JUDGE DEFRANCO: Yes. You gave me your position.

17 MR. NYDEGGER: Okay. So they also point to actuator
18 270. And that also -- that moves -- so I may have misspoken, 266
19 may move it vertically because actuator 270 of Waldner moves it
20 horizontally. But --

21 JUDGE DEFRANCO: That's where my confusion --

22 MR. NYDEGGER: Yes.

23 JUDGE DEFRANCO: That's where my confusion lies
24 because (INDISCERNIBLE).

25 MR. NYDEGGER: I understand now, Your Honor.

1 JUDGE DEFRANCO: (INDISCERNIBLE).

2 MR. NYDEGGER: I understand that, Your Honor. And
3 so I think I've still stated our position even though the 266 does
4 move it vertically. It does not -- the actual movement of 266 is
5 opposite of what the claim calls for. The claim says that when it
6 extends, it moves it one direction; and when it retracts, it moves it
7 the other. And 266 actually does the opposite of what the claim
8 requires. And so that's an additional reason why 266 does not
9 meet the claim elements.

10 I am almost out of time, and I do want to hit a few
11 additional points here. With regard to Auld, this is Slide 27 and
12 Ground 3, they argue that Waldner is analogous art because it
13 deals with aggregate. But if you look at Slide 27, you have the
14 silo, and that holds cement. Well, where's the aggregate? The
15 aggregate is not in the silo. The aggregate is in that part to the left
16 of the silo, in that hopper.

17 And the problem that was being dealt with in Auld was
18 getting the right proportions of all the ingredients when mixing the
19 cement. It was not how to store it; it was not how to transfer it. It
20 was about ratios, getting the right cement. And it talks about
21 aggregate separate from the cement. So you have the aggregate
22 coming in, the cement coming in, and it's working on how to get
23 the right ratios to get your cement correct.

24 JUDGE TARTAL: Counsel, can I just interrupt?

25 MR. NYDEGGER: Yes.

1 JUDGE TARTAL: Because the features that Petitioner
2 is relying on in Auld are -- I believe, was identified in our
3 argument before. But, for example, isn't it the hitch or the base of
4 the hitch portion --

5 MR. NYDEGGER: Yes. They're pointing to the kingpin
6 57 and the landing leg 61, and that's what they rely on.

7 JUDGE TARTAL: So I guess the question is to what
8 degree do these arguments about whether it's a cement mixer or
9 other features, how does that relate to the actual features they're
10 relying upon as to why that isn't something a person of ordinary
11 skill in the art would have looked at to solve a similar problem,
12 regardless of whether Auld is dealing in a concrete context, for
13 example?

14 MR. NYDEGGER: So we don't dispute that the
15 elements are taught in Auld. What we dispute is that a POSITA
16 would have never gone to Auld in the first place. So a POSITA
17 would not have found Auld because it's not analogous art.

18 And additionally, if they were looking at Auld, why
19 would they go to a cement batching if they were trying to -- if they
20 were looking for alternative hitches? Because this argument for
21 Petitioner hinges on Waldner's teaching that other types of hitches
22 may be used. And so I don't have a slide of that, but they say that
23 other types of hitches may be used. Well, if you're looking for
24 other types of hitches that could be used with Waldner, why are
25 you looking at a cement batching plant? That doesn't talk -- that's

1 not solving a hitch problem. It's not talking about a hitch problem.

2 It happens to have a hitch problem.

3 This is your classic hindsight. They saw the claims, they
4 saw that the kingpin has to be attached directly to the conveyor
5 instead of to a trailer, and so they used the hindsight, they went
6 and they found Auld. They searched hitch and they found Auld.
7 And this is a classic hindsight problem that you get --

8 JUDGE TARTAL: Isn't that how you would identify
9 relevant art is by looking at other hitches if you're looking for a
10 mechanism involving a hitch. And so the question isn't so much
11 what application is the hitch being applied to, but rather what's
12 known about hitches across a variety of different applications and
13 whether or not that can be a teaching that can be applied in the
14 context in which the claims are being raised.

15 MR. NYDEGGER: Right. Remember, you approach
16 this from the perspective of a person of skill in the art. And a
17 person of skill in the art, they say, we start with Waldner and
18 would read and say other hitch types are applicable. And so a
19 person skill in the art is going to read that and say, okay, they have
20 a gooseneck hitch. I could take off that gooseneck hitch and I
21 could put a kingpin on it because, yeah, that's another hitch type.
22 Or I could put a ball hitch on there because that's another hitch
23 type. Those are other hitch types. Those are the kinds of
24 modifications that a POSITA would make based on Waldner
25 -- based on reading Waldner and what Waldner teaches.

1 And even in Auld, it doesn't teach, okay, I'm not just
2 going to change the hitch type. I'm going to remove the hitch
3 altogether. I'm going to cut the trailer off. And then I need a new
4 place to attach the hitch. Where would I attach the hitch now that
5 I've cut the trailer -- the whole front of the trailer off? Oh, well, I'll
6 put it on the conveyor, and I'll put it directly on the conveyor
7 which in Waldner is not even centered and so wouldn't work.
8 Something that they now concede, that putting the trailer hitch on
9 Waldner's conveyor is problematic because it's so off-centered that
10 you would -- it wouldn't pull straight, you would wear the tires out,
11 you would have all these additional problems.

12 And so in their reply brief, they come back and they say,
13 oh, well, Sleeman has a centered hitch trailer. Well, you should
14 have brought that in the petition. And they say, well, a POSITA
15 would have modified Waldner to move the -- to move it to be
16 centered. They're making all sorts of modifications that are not
17 shown in the prior art. And in fact, they try and fix this problem
18 with their reply declaration of Mr. Smith. Mr. Smith brings in,
19 like, six new references showing a hitch connected directly to a
20 conveyor.

21 Well, that is certainly inappropriate. They should have
22 brought that in the prima facie case. You can't bring in six new
23 references now showing what they failed to show in their petition.
24 And it's just not in the art. It's not in Auld. It's not taught in the art
25 presented with the petition that you would cut the trailer off and

1 put the hitch directly on the conveyor.

2 I would like to get to -- in my last few minutes, I would
3 like to get to the real-world evidence. Because the real-world
4 evidence here is very telling, particularly because we're talking
5 about an obviousness attack and not an anticipation attack. So
6 here on Slide 34, so we talked about in the beginning that the
7 Petitioners had this long-felt but unmet need for an aggregate
8 transferring system that would move aggregate at faster than 1,000
9 pounds per minute, which was -- that's what they were doing back
10 in 2013.

11 And like I said, Mr. Weinstein testified he'd been
12 thinking about this problem and how to get more -- how to
13 increase that rate for seven years. And even after thinking about it
14 for seven years and with 20 years of experience, what was his
15 proposal? His proposal was, let's use a conveyor -- not a bucket
16 elevator, a conveyor elevator. And that's what they actually
17 mandated from the beginning. And the first time a bucket elevator
18 was brought up, Mr. Weinstein said, no, we don't want to go the
19 bucket elevator route. Continue to work on the -- if you have to
20 reduce the capacity, that's fine, stick with the conveyor.

21 JUDGE TARTAL: Counsel, just to clarify that, though,
22 the obviousness analysis isn't from Mr. Weinstein's perspective, it's
23 from a person of ordinary skill in the art. So arguably, he could be
24 completely wrong. And he's not the person that we're looking to,
25 like, to make an evaluation of what you could have understood from

1 the art that --

2 MR. NYDEGGER: Yes. But see, I don't disagree, Your
3 Honor. But this is the skepticism that the Federal Circuits have
4 you -- the Board is required to consider the objective evidence of
5 non-obviousness. Because what happened in the real world -- I
6 mean, it's difficult to go back and do the person of skill in the art
7 analysis on obviousness and not use hindsight. It's just a difficult
8 mental task to do.

9 JUDGE TARTAL: Well, it's -- that's why they refer to it
10 as impermissible hindsight as opposed to --

11 MR. NYDEGGER: Exactly.

12 JUDGE TARTAL: The question now is what are we
13 -- where is that threshold? What line is being crossed in here?

14 MR. NYDEGGER: Well, see, and that's what the
15 objective evidence informs. The objective evidence of non-
16 obvious informs where that line is and why -- what they've done
17 here is use this impermissible hindsight to go back, cherry-pick
18 elements from here and there and arrive at their obviousness
19 attack.

20 So we had the skepticism, we have the long-felt need; it
21 was felt for years. It was by Mr. Weinstein, an engineer, 20 years'
22 experience, and he still proposed a conveyor. Skepticism, when a
23 conveyor -- when a belt elevator was first proposed, they said no,
24 stick with the conveyor belt because bucket elevators, they are
25 disfavored in this industry. And so we have that.

1 Then you have copying. They say, well, they haven't
2 presented evidence that we copied. We absolutely presented
3 evidence of copy. We have side-by-side pictures. They cite a case
4 that says, well, the picture isn't enough because in that case, the
5 Board couldn't discern whether the claimed elements were in the
6 pictures. But this is a structural claim. And you can clearly see,
7 looking at the pictures, that they are the same and that all the
8 structural elements are there. They also --

9 JUDGE DEFRANCO: Mr. Nydegger, where do you
10 make all these arguments in your opening brief? Because I'm
11 looking at pages 70 and 71 that you have cited on this slide, and I
12 just see conclusory statements with set -- with string cites. Where
13 are you -- where is Mr. Weinstein's name mentioned in these two
14 pages?

15 MR. NYDEGGER: So it's in the --

16 JUDGE DEFRANCO: Where is the
17 explanation?

18 MR. NYDEGGER: This is all in the evidence cited at
19 the --

20 JUDGE DEFRANCO: Yeah. But the problem with the
21 -- with what you're saying is you give these cites to the evidence
22 but now you're filling in with the explanation now during the
23 hearing as opposed to putting Petitioner on notice by making these
24 explanations in your opening brief. That's my problem with what
25 you did -- what you're doing now compared to what you did in

1 your opening brief.

2 MR. NYDEGGER: I respectfully disagree, Your Honor.
3 We certainly put the Petitioner on notice that there was a long-felt
4 need. We certainly put the Petitioner on notice that there was
5 skepticism in the industry.

6 JUDGE DEFRANCO: I know. I'm not disagreeing, Mr.
7 Nydegger, that you didn't use those buzzwords, but you can't just
8 use the buzzwords for objective evidence. You have to actually
9 explain what that evidence is and then establish a nexus --

10 MR. NYDEGGER: Well --

11 JUDGE DEFRANCO: -- of that evidence to the claimed
12 invention.

13 MR. NYDEGGER: Well, Your Honor, we believe that
14 we did establish a nexus. We get the presumption of the nexus
15 because the product is covered by the patent claims. And so
16 there's the presumption of nexus that applies in this case. We have
17 pointed out -- you know, we cite the claim chart in the exhibit or in
18 the exhibit to the complaint, where --

19 JUDGE DEFRANCO: My problem here, Mr. Nydegger,
20 is how do you tie the skepticism, the long-felt need, the copying to
21 the claimed invention, even if there is a presumption of
coextensiveness?

22 MR. NYDEGGER: Well, if you look at the sur-reply
23 brief, we talk about this also in the sur-reply brief at pages 25 to 26
24 and that -- so the Petitioners, they argue that, well, this success and
25 this stuff, the secondary evidence related to just being able to

1 accept sand from belly dump trucks and -- no, that's not correct.
2 It's not just accepting sand from belly dump trucks. You have to
3 be able to get that sand up into the silo at the rate that the belly
4 dump truck can unload it.

5 And the only way that happens is through the
6 combination of the claimed invention. You have to have the
7 combination of the base assembly that accepts it, then you have to
8 have the bucket elevator that can move it up. That was the
9 problem with the belt conveyor that was rejected. It couldn't get
10 the sand -- it couldn't elevate the sand fast enough. And so that's
11 why we went to the bucket elevator. And so then you get to the
12 bucket elevator and then you have to also be able to discharge that.
13 And so it's the combination of the elements of the claimed
14 invention that allows the system to be able to accept the sand from
15 belly dump trucks and gets that 10,000-pound per minute rate that
16 they were looking for, as compared to the 1,000-pound per rate of
17 the pneumatic system.

18 And so there is a nexus, it's presumed, it's been shown.
19 And only through the combination of the elements in the claims
20 can you get these benefits. And the real-world evidence shows
21 that this invention was anything but obvious. It was successful --

22 JUDGE DEFRANCO: You agree Waldner discloses a
23 bucket elevator, correct?

24 MR. NYDEGGER: Absolutely, Your Honor. We don't
25 deny that.

1 JUDGE DEFRANCO: Okay. So what was the
2 skepticism about using bucket elevators?

3 MR. NYDEGGER: It was precisely because of systems
4 like Waldner in the field that had not functioned well that there
5 was skepticism, that they --

6 JUDGE DEFRANCO: It wasn't not functioning well
7 because of the bucket elevator. I think your arguments are that it
8 wasn't functioning well because of the discharge rate of the chute.

9 MR. NYDEGGER: No. That's the Petitioner's
10 argument. The Petitioner argues that you would have gotten rid of
11 the chute because of the --

12 JUDGE DEFRANCO: But --

13 MR. NYDEGGER: But there was no problem with the
14 chute in Waldner, according to -- you know, from the Patent
15 Owner's perspective. The chute was not a problem. In Mr.
16 Anderson's declaration, he talks about how the chute could handle
17 it. It wasn't -- you could design -- easily design the chute to have
18 the capacity needed and which is another reason why there was
19 really no motivation to go and combine Dynatek. I see that I am
20 into my rebuttal time.

21 JUDGE TARTAL: You are. You're about three minutes
22 over, so you have around seven minutes left. But if you have
23 issues you need to raise in rebuttal, we're not going to cut you off.
24 But if you want to wrap up your initial argument --

25 MR. NYDEGGER: Okay.

1 JUDGE TARTAL: -- it would probably be more
2 important.

3 MR. NYDEGGER: Well, I will save the rest of my time
4 for rebuttal. We urge the panel to look closely at the evidence.
5 And Judge DeFranco said, well, you say that you have
6 this evidence of secondary considerations that you -- and then he
7 comments that perhaps they're not explained well enough. We
8 disagree with that.

9 But that is precisely what the Petitioners have done with
10 all of their reasons to combine the prior art to arrange this
11 invention. They give these reasons to combine. They don't
12 explain them in their petition. They try to come back and fill in
13 those gaps in their sur-reply -- or in their reply brief and with 118
14 pages of reply declaration. But even then when you look at it, the
15 reasons to combine, they just aren't there. They just don't enhance
16 or benefit the system at all. And so we urge the Court to deny the
17 petition. And I'll save the remainder of my rebuttal time.

18 JUDGE TARTAL: Okay.

19 MR. NYDEGGER: Thank you.

20 JUDGE TARTAL: Thank you, Counsel. You have 20
21 minutes remaining, for Petitioner; is that correct? 18?

22 MS. FLANNERY: And before my time begins, would it
23 be okay if I addressed one of the objections? I believe Patent
24 Owner wasn't counted against their time in discussing objections.

25 JUDGE TARTAL: Yes. I suppose if you have limited

1 comments --

2 MS. FLANNERY: Yeah.

3 JUDGE TARTAL: -- to respond to the issue over the
4 demonstratives. If you'd like to address that first before I start
5 your rebuttal time.

6 MS. FLANNERY: Yup. And I just want to talk about
7 one of the slides. So just briefly to address Patent Owner's
8 objection to this slide, I think they objected because of the listing
9 of Mr. Weinstein and Mr. Brenden because they are not experts.
10 Mr. Weinstein, we weren't offering here in this slide suggesting
11 that they had testified to the ultimate conclusion of obviousness.

12 We actually talked about this slide. This is one of the
13 ones that we revised in our meet and confer. We specifically
14 revised that language to, would a POSITA use a conveyor like
15 Dynatek with a bucket elevator? True, that's certainly one of the
16 basic questions of the obviousness inquiry. But we didn't ask Mr.
17 Weinstein or Mr. Brenden to look at all the prior art
18 (INDISCERNIBLE). It's just that one question.

19 And so we think that this is totally appropriate. This isn't
20 misleading in any way because we're not saying that they opined
21 on the ultimate issue of obviousness. We're just saying would they
22 have sought to use a Dynatek -- a conveyor like Dynatek's with a
23 bucket elevator? And Mr. Weinstein testified on that fact. Mr.
24 Brenden's email is evidence on that fact. So that is all we are
25 asserting here. We're not asserting them as experts or anything

1 like that. It's just that fact.

2 JUDGE TARTAL: Okay. Thank you, Counsel.

3 MS. FLANNERY: Okay. All right. So starting with my
4 rebuttal argument, that is actually a nice segue into one point that I
5 want to make. Patent Owner talked a lot about how Dr. Durham
6 isn't a POSITA, and so therefore he's not an expert in this case. I
7 would note that Patent Owner did not move to exclude Dr.
8 Durham's testimony under Federal Rule 702, which is what
9 actually governs whether or not somebody is an expert. And that
10 standard does not actually require that an expert be a person of
11 ordinary skill in the art. And so to the extent they want to argue
12 that he doesn't meet the federal rules requirements for an expert,
13 they've waived that argument because they didn't file that motion.

14 Even if you adopt -- well, here, let me move on. So he is
15 a qualified expert. And this is why I pointed out so much of what
16 we talk about in this case, about the obviousness inquiry, is about
17 the use of the systems. And there's no dispute that Dr. Durham has
18 sufficient expertise to talk about the use of the systems, even if he
19 hasn't put pen to paper and nail to hammer in actually building
20 these things. He does know how they are used. And that is
21 relevant to some of the arguments that we're going to get to when
22 we talk about -- when I'm responding to the motivations to
23 combine.

24 JUDGE KINDER: Can I ask a quick question? I don't
25 want to take up too much of your time.

1 MS. FLANNERY: All right.

2 JUDGE KINDER: And it goes to the kind of the
3 qualifications and persuasiveness of the expert testimony we've
4 been talking about, with Mr. Durham. Are you familiar with the
5 director's October 1st decision in Interactive Communications
6 versus Blackhawk?

7 MS. FLANNERY: I'm not.

8 JUDGE KINDER: It's where the Director basically said,
9 after a final written decision that we issued, the Board issued, the
10 director reversed that decision and decided that the expert
11 testimony was so unreliable that termination of the proceeding was
12 proper. You're not familiar with that decision?

13 MS. FLANNERY: I'm not, although I certainly don't
14 think that we have that --

15 JUDGE KINDER: I was going to ask you, you know,
16 what facts that you might have that would differentiate that
17 decision where the -- I think there was a single expert in that case
18 and the expert -- and the director determined that the testimony
19 was faulty and not credible as to multiple material aspects.

20 MS. FLANNERY: Yeah.

21 JUDGE KINDER: So for example, if we would find
22 something like that for Mr. Durham here, how would your case be
23 different?

24 MS. FLANNERY: Well, this is different primarily
25 because I think Mr. Smith, our other expert, who undoubtedly

1 meets whatever definition of a person of ordinary skill in the art,
2 confirms the things that actually matter to the grounds. I know
3 there are a number of errors that they point -- alleged errors that
4 they point out, saying that they think that Mr. Smith and Dr.
5 Durham disagree. But those don't relate to the primary
6 motivations to combine the references.

7 They were talking about the discharge rate of the system.
8 We are not talking about the discharge rate of the system. We are
9 talking about the discharge rate of the chute. That's what we
10 talked about in our petition. Dr. Durham wasn't incorrect about
11 that. So I think that distinguishes that issue.

12 Another point that I would make in trying to resolve this
13 issue that may distinguish that case, I would point out the Federal
14 Circuit has acknowledged that a less sophisticated level of skill
15 actually favors a determination of non-obviousness, whereas a
16 higher level of ordinary skill favors obviousness. Another way of
17 putting it, if something was obvious to a layperson, then it would
18 clearly be obvious to somebody who has more experience in the
19 field.

20 So here, if the Board were to go with Patent Owner's
21 definition requiring more expertise, then that POSITA is more
22 likely to find the claims obvious than Dr. Durham, who they say
23 has less experience in that field. So at the end of the day, and the
24 result of this case, I'm not actually sure that it goes the way Patent
25 Owner says. Even if Dr. Durham is not a POSITA, again, he's not

1 being excluded as an expert. It's just saying that the level of skill
2 might be higher, but that actually favors a finding of obviousness.
3 That's the Innovention Toys case, 637 F.3d 1314, pincite 1324,
4 that's Federal Circuit 2011. So at, at the end of the day, the effect
5 on this case, I actually don't think favors Patent Owner in any way.

6 JUDGE KINDER: Thank you.

7 MS. FLANNERY: No problem. So I want to move to
8 secondary considerations. I'm going to skip ahead. And
9 remember what I told you about the evidence of secondary
10 considerations. Patent Owner hasn't shown nexus and they haven't
11 shown evidence of the things that they want to say they have
12 secondary considerations of. And that comes out in spades.

13 As was discussed with Judge DeFranco, Patent Owner
14 doesn't meet their burden to show nexus. They point to
15 photographs. They say, oh, the Board can make this determination
16 itself. I think Patent Owner cited the Nuna Baby case in their sur-
17 reply, saying that the Board can make this determination. That is a
18 very different case. In that case, the claims I think had two
19 elements and there was a user guide that lined up the elements to
20 that -- those claims. Here, we've got some claims that are over a
21 column long, so a more complicated analysis of does a product
22 actually meet those claims.

23 I would also urge the Board to look at the result in the
24 Nuna Baby case. Even though the Board found nexus, the Board
25 still found that the praise in that case was not limited -- was not

1 actually linked to the patented combination, again, the combination
2 of elements. So in the end, the Board considered, said, yes, there's
3 evidence of secondary consideration, but found that it didn't
4 overcome the strength of the prima facie case. So keep that in
5 mind if you're being asked to look at the evidence yourself. You
6 still have the ability to say that's weak evidence, doesn't overcome
7 the prima facie case of obviousness.

8 Particularly important here, because a lot of what they
9 point to with Mr. Weinstein, they say, oh, he'd been working on
10 this problem for seven years, couldn't come to this solution.

11 There's no evidence that Mr. Weinstein was aware of Waldner,
12 Sleeman, any of those other systems that had bucket elevators.

13 And also, his skepticism had to do with not would they
14 work, but did they dissipate heat well. That was his concern.
15 That's not actually -- there's no elements in the claims that require
16 heat dissipation. There's no elements in the claims that require
17 particular discharge rates. They said that was a big deal, that's
18 what that Masaba was working so hard to meet, that it was so hard
19 to get to that, I think it was 20,000 pounds per hour or something
20 like that. I'm probably getting the numbers wrong.

21 But the point is none of that is claimed. So even if there
22 was work required to get to that discharge rate, that doesn't have
23 nexus to the claims either. And so any sort of skepticism or, you
24 know, need for that type of system doesn't support the non-
25 obviousness of the claims that are at issue in this case.

1 And when you look at that evidence of praise -- and this
2 is on Slide 82. I was talking about Slide 81 before, sorry, about
3 the nexus. On Slide 82, the very evidence that they rely on lays
4 out this point. When there's praise about how great Solaris' system
5 was, it talks about it's because of the belly dumping features,
6 which is what Waldner not only discloses a bucket elevator, but it
7 specifically discloses being able to get at this hopper bottom truck.
8 So it gets at that exactly.

9 Now, Patent Owner in their sur-reply, and this is on Slide
10 83, they argue -- and I think Patent Owner just argued here a
11 second ago, that because the top fill -- that Solaris' system because
12 it needs both the bucket elevator and the articulated belt conveyor
13 to meet that belly dumping, then that's what shows the nexus. I
14 would note on the left-hand side of this Slide 83, no citation to any
15 evidence either from us or from them that highlights this
16 combination as being important to the benefits. They just make
17 that argument. It's bald attorney argument that doesn't provide
18 nexus.

19 Another thing they try to argue in their sur-reply is they
20 try to use Petitioner's motivations to combine the prior art to fill
21 this gap. They say, well if there would have been a reason, you
22 know, to increase the discharge rate to a POSITA, then therefore
23 that fills the nexus need. They're conflating two very different
24 questions, under obviousness law. The motivation to combine is
25 whether a person of skill in the art would have a reason, any

1 reason, to think about making that combination. We have clearly
2 showed the answer to that is yes.

3 The nexus question is a causal question. It's a question
4 as to whether or not that reason actually produced the commercial
5 success. And as you can plainly see from their own briefing, they
6 have no evidence tying that combination to the praise and
7 commercial success, the fact that Solaris was so impressed with
8 how it worked. Solaris wasn't necessarily impressed because they
9 combined Dynatek with Waldner. And there's no evidence that
10 that's the reason.

11 I want to move to this issue of Solaris' patents. So this is
12 on Slide 85 that I'm on now. They argue that, well, Solaris went
13 out and got a patent on this that has even broader claims -- this was
14 just argued, that has even broader claims than what Patent Owners
15 and what the '689 Patent is. There is zero analysis by their expert.
16 There is zero analysis in their briefing comparing the scope of the
17 claims of Solaris' patent, the scope of the claims of the '689. The
18 patentability of those two things are not connected in any shape or
19 form with regard to the evidence.

20 They show a few figures. They say that the figures from
21 our patent look similar to the figures in their patent. That's not
22 enough to show nexus to that we somehow copied or tried to
23 patent the same invention that's defined in the claims. I don't have
24 to tell this Board that the claims dictate the scope of the patent.
25 They've done zero analysis of that. And so again, no nexus tying

1 the Solaris patent as evidence of the non-obviousness of the
2 claimed invention of the '689.

3 Moving on to Slide 86, Patent Owner also makes an
4 argument that Solaris copied the Masaba system. They cite Mr.
5 Weinstein's deposition testimony as really the only thing
6 suggesting that there was copying. But as the Wyers versus
7 Master Lock case that we cited in our briefing talks about copying
8 doesn't just mean similarity. Copying actually requires evidence,
9 internal company documents showing that copying occurred,
10 evidence of reverse engineering. We got none of that in this case.

11 The only thing that they point to is Mr. Weinstein's
12 testimony that there were elements -- what he said is that they
13 thought they owned the design. That's not an admission of
14 copying. He also stated -- I think this was discussed in Patent
15 Owner's brief -- that, yes, we used elements of Masaba's unit.

16 There's two problems, two reasons that that doesn't
17 indicate copying. The first is another legal problem. Again,
18 similar to that nexus issue that we talked about, Patent Owner
19 hasn't shown that the Solaris patent practices the claims of the '689
20 Patent. They also don't show that their own system practices all
21 the claims of the '689 Patent. They made those same conclusory
22 statements about Solaris, Masaba, oh, yes, they all practice the
23 claimed elements, zero analysis whatsoever.

24 So even if Solaris did take elements -- and then there's no
25 dispute, by the way, we didn't know about Masaba's patent before

1 it issued because it wasn't published. So we weren't looking at
2 their patent, we couldn't have been doing that. Even to the extent
3 we took Masaba's unit and copied it, there's no evidence that that
4 unit reflects the '689 Patent claimed invention. So again, you've
5 got the same nexus problem with regard to copying of their unit
6 that they delivered to us.

7 The other problem with that evidence, when they talk
8 about Mr. Weinstein saying that there were elements of Masaba's
9 system that we also used, most of those elements were known in
10 the prior art. Again, a bucket elevator, the combination of having
11 this inboard and outboard pivot known in Dynatek. So even if we
12 use some of those components that also existed in Masaba's
13 design, that doesn't mean we copied Masaba's design. We just
14 used some of the same elements that were in the prior art that both
15 parties were provided with.

16 And finally, with regard to the similarity, I think one of
17 their declarants, Mr. Brinkman, pointed to -- again, put two figures
18 up the Solaris drawing and the Masaba drawing and said, oh look,
19 these look different -- these look similar, excuse me. They have
20 similar dimensions, similar reach. But the reason for that is, again,
21 remember, the height that you needed to reach, that was dictated
22 by Solaris' silos, the specifications that we gave them.

23 So you had Masaba designing one system for that
24 specification and you had Solaris designing their system for that
25 specification. Of course, they have the same height, of course they

1 have the same, you know, length of extension conveyor because
2 they were aiming at the same thing. But again, that doesn't mean
3 that Solaris copied. That just means that Solaris was also
4 designing to its own specifications. So again, none of that
5 evidence establishes what Patent Owner wants it to. At most, it's
6 weak evidence of secondary considerations that doesn't overcome
7 the strong prima facie case.

8 I want to move to a couple of other points that Patent
9 Owner raised in their argument. First of all, they were talking
10 about this distinction of the rate versus the speed. Again, Dr.
11 Durham was not talking about the overall discharge rate of the
12 system. As we saw in the petition, he was talking about the
13 discharge rate off of the chute. And I don't think there's any
14 dispute. Simple physics, that if you're just measuring the amount
15 of particles that come off of a chute in a certain period of time, just
16 like a slide, the amount of particles that come off of that chute is
17 directly affected by the -- in a given period of time, of course, is
18 dictated by gravity. It's dictated by the gravity of the chute. I don't
19 think that's been rebutted in this circumstance.

20 So the errors that they talk about are not really errors.
21 They like to misconstrue what Dr. Durham says and respond to
22 that. Those are the straw man that we talked about in our reply
23 brief.

24 Another point that Patent Owner makes is that they talk
25 about how well Waldner already works and they point to that

1 testimony from Dr. Durham about how well Waldner would work
2 to fill all six of Solaris' silos. Of course it would, if you made the
3 bucket elevator tall enough, if you made the discharge chute long
4 enough. But again, we talked about how those are problems, those
5 are trade-offs, those would force a person of skill in the art to think
6 about other ways that they wouldn't have to make that bucket
7 elevator so tall.

8 They also ignore that Dr. Durham says, well, yeah, you
9 might be able to place that bucket elevator right up next to the silo
10 and reach all of the silos. But in Mr. -- in Dr. Durham's -- in his
11 supplemental declaration, this is Exhibit 1110, paragraphs 35
12 through 36, he talked about how, you know, at some of these well
13 sites you can't always park that bucket elevator right up next to the
14 silos as close as you can so that you can reach all of them.

15 This is why, again, use of these systems is so important
16 to understanding the grounds in this case. So even if Patent Owner
17 wants to say that's not enough to meet the level of person -- the
18 POSITA level of skill, that person still has to understand how it's
19 going to be used. And because these well sites are frankly
20 crowded, uneven, all sorts of problems, then you may not be able
21 to reach all six silos in one shot. Dr. Durham explained that in his
22 declaration. That testimony is undisputed.

23 So of course there would be a reason for a person of
24 ordinary skill in the art to try to make Waldner's system more
25 flexible. Even if it would work in some possible situations, you

1 want the flexibility so that when you're at the well site, you don't
2 have to park it right up next to the silos.

3 One just minor clarification on -- I think this is on Claim
4 6. I think there may have been some confusion over whether
5 actuator 260 or 270 -- I'm sorry, 266 or 270 was applied to the
6 conveyor support frame language. On Slide 78 I've got here, in the
7 petition, we applied both. We specifically said actuators 266 and
8 270 are what move that conveyor support frame up and down. It's
9 the combination of those two actuators that move Waldner's
10 support frame. I just wanted to make sure that that was all very
11 clear.

12 The final point I want to address is the argument about
13 Auld and the argument about how, well, if you were going to -- I'm
14 looking for a good figure here. Yeah. If you were going to attach
15 Auld's kingpin to the Waldner or bucket elevator frame, it would
16 be off-center. This is squarely within the confines of the
17 Corephotonics case that we talked about. Again, routine -- I'm
18 sorry, not the Corephotonics case, this is the routine trade-offs
19 case.

20 JUDGE TARTAL: Which slide is this?

21 MS. FLANNERY: Oh, that was Slide 61, where we
22 were showing the figure from Waldner, excuse me, of how the
23 bucket elevator was attached.

24 The ICON Health & Fitness case, which is on Slide 64,
25 talks about how, again, sizing the spatial orientation of different,

1 you know, elements is something a person of ordinary skill in the
2 art would be able to modify. We cited Sleeman as an example of
3 that. We weren't necessarily relying it on for the grounds, but our
4 experts undisputedly testified that a person of skill in the art would
5 know how to slide a piece of equipment over along the way, the
6 width of a trailer so that it's centered.

7 That is the basic kind of modifications that a person of
8 skill in the art under KSR and under the ICON Health & fitness
9 case would be assumed to know how to make. So the combination
10 with Auld and Waldner is not beyond the level of ordinary skill in
11 the art.

12 I see I'm beyond my time. Does the Board have any
13 further questions for me before I sit down?

14 JUDGE DEFRANCO: I do not, no.

15 JUDGE TARTAL: Okay. So no additional questions.
16 We can move on to Patent Owner. And we appreciate your
17 arguments.

18 MS. FLANNERY: Thank you for your time. Appreciate
19 it.

20 JUDGE TARTAL: Thank you. I think we have
21 reserved 10 minutes. I think you have less than 10 minutes left, but
22 I will just start the clock at 10 minutes. And if you don't need all
23 the time, then you can conclude when your arguments are
24 complete.

25 MR. NYDEGGER: Thank you, Judge.

1 Your Honors, so I'm going to start with the argument that
2 was made concerning the discharge rate of the chute. This
3 argument represents how Dr. Durham's mistake has permeated the
4 Petitioner's arguments because there is no difference between the
5 discharge rate of the chute and the discharge rate of the system.

6 I have on the ELMO Petitioner's Slide 33. Here, you can
7 see they show that, well, with the conveyor, when it moves slowly,
8 you have a lot of material on the conveyor that's moving slowly.
9 And when the conveyor in the bottom figure, when the conveyor
10 moves quickly, you have less material that is on the conveyor at a
11 time because it's moving quickly.

12 But the point is, the discharge rate between the two is
13 exactly the same. The volume of material flowing off of the
14 conveyor is exactly the same in both regards. There is no
15 difference between the discharge rate of the system and the
16 discharge rate of the chute. This goes back -- Dr. Durham
17 introduced all this confusion because he didn't understand it
18 himself because he just isn't in this field.

19 And so when you have a slow-moving conveyor, you get
20 the sand coming off slowly. But it's stacked higher, so you get the
21 same volume. When the conveyor is moving quickly, the sand
22 comes off faster, but it's still the same volume because it's coming
23 off faster. And so there is no difference in the discharge rate of the
24 chute compared to the system. And Dr. Durham is just simply
25 wrong. And his motivation to combine, relying on this, is simply

1 wrong.
2 I'd like to go to Petitioner's Slide number 83. This is

3 Petitioner Slide number 83 citing the Ecolochem case saying that,
4 well, there's no nexus because the commercial success is based in
5 part on the fact that it's -- not all the features are claimed or some
6 of the features are in the prior art. But if you read this case and
7 you see the quoted portion there by Ecolochem, if you read two
8 sentences after the quoted portion here, this is what it states, quote,
9 "Consequently, the District Court erred in finding that Edison met
10 its burden of proving that success of the invention was due to
11 factors not claimed in the patented invention."

12 The holding in this case is actually the opposite of what
13 Petitioner is arguing. Petitioner is arguing that, well, because
14 some of the benefits are not the claimed invention, there's no
15 nexus. No. The burden of Petitioner is to prove that all the benefit
16 was from unclaimed features. And they haven't done that. And
17 the Ecolochem case that they actually cite holds that proposition.
18 You just have to read two sentences further beyond what they
19 quote.

20 Going to slide -- Petitioner Slide number 86. So they say
21 that this is the type of evidence that you have to show to show
22 copying. Well, ironically enough, this is exactly the evidence that
23 we have in this case. If you look at the last bullet point, it says that
24 access -- evidence showing access to the patented product
25 combined with substantially -- with substantial similarity to the

1 patented product. There is no dispute at all that Solaris had access
2 to the patented product. That was the first system that was
3 delivered to them.

4 That is the reason why Solaris says, we own this design.
5 And so there is no dispute that they had access. There is also no
6 dispute that their product is substantially similar to the patented
7 product. They pointed out that -- the only thing they came back
8 with in their reply of what was missing, they came back with one
9 structure, a ramp.

10 JUDGE DEFRANCO: Mr. Nydegger --

11 MR. NYDEGGER: Yes.

12 JUDGE DEFRANCO: -- so I understand you're saying
13 access to the patented product. Where do you show that the
14 patented product is what was -- what Solaris had access to? Where
15 is the comparison?

16 MR. NYDEGGER: If you're asking where is a claim
17 chart to the -- you know, comparing, mapping the elements of the
18 claims to the Masaba product, there's not a claim chart, if that's
19 what you're looking for, Your Honor. But there is no -- that
20 -- there's been no dispute that it is -- that Solaris or the Masaba
21 product was the patented product.

22 JUDGE DEFRANCO: Well, I think there is a dispute
23 because I think what Solaris said in some of the briefing, as I
24 recall, is that, you know, the photos that you rely on in some of
25 these exhibits that you cite that you don't explain, but nonetheless,

1 those photos, they just show something sitting in a yard, but they
2 don't actually -- we -- there's no way to discern whether that's the
3 patented product. Sure, it may have the elements of the patented
4 product, but it's not the entirety. Where do you show that it's the
5 entirety of the claimed invention?

6 MR. NYDEGGER: Well, I mean, the pictures that we
7 cite to and the evidence that we cite to does show the product in its
8 entirety. And it's clear that all the structural elements are there.
9 We did not provide an element-by-element analysis of the patented
10 product, and we don't believe that that's what's required.

11 And, you know, getting back to the Petitioner's argument,
12 when they were faced with this in their reply brief, like I said, they
13 came up with one element that was missing. They said the ramp.
14 They said, because, you know, there was a side-by-side picture
15 -- if you look at the Patent Owner slide, it's the last slide in the
16 deck, which is I believe Slide 39 -- Slide 38, if you look at Slide
17 38, we reproduce these pictures for in our briefs, they say, oh,
18 well, that picture doesn't show a ramp. And that's the one and only
19 one element they said that their product was missing was the ramp.

20 Well, first of all, not all the claims require a ramp. So
21 that doesn't get them out of the nexus because not all the claims
22 require that. And second, if you look at the other -- the actual
23 photographs of their pictures that we cite in our brief, the other
24 evidence, they do have ramps on them. It's just not in this
25 schematic drawing.

1 And so they haven't shown that there are any elements
2 missing from their product, substantially similar, they had access,
3 they admitted that they believed it was their own design and so
4 used it. And so there is a nexus to --

5 JUDGE KINDER: So I have a quick question. Whose
6 burden is it to show, though? You keep saying the Petitioner
7 hasn't shown that there's elements missing. Is it their burden to
8 show elements missing, or is it your burden, first and foremost, to
9 establish all the elements are there?

10 MR. NYDEGGER: Well, Your Honor, what our
11 position is that we've shown -- we've provided sufficient evidence
12 to give rise to the presumption of a nexus. And once that
13 presumption arises, at that point, there's a burden shifting. That's
14 the function of a presumption. And so with that burden shifting
15 based on the presumption, then it is the Petitioner's burden, which
16 they have not met.

17 If the Board has additional questions, I'm happy to take
18 them. If not, I know that I'm over my six minutes of rebuttal time.

19 JUDGE TARTAL: Hearing no additional questions from
20 the panel, I think that concludes our argument for today and we
21 appreciate your time and attention and certainly find the arguments
22 provided by counsel to be helpful in addressing our concerns and
23 questions and resolving the issues.

24 We thank you for appearing today and we will take the
25 case under advisement and issue our decision in due course. We

1 are adjourned.

2 (Whereupon, the above-entitled matter went off the

3 record at 11:50 a.m.)

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