

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DR. SQUATCH, LLC,
Petitioner,

v.

THE PROCTER & GAMBLE COMPANY,
Patent Owner

IPR2024-01498
Patent 11,844,752 B2

Record of Oral Hearing
Held: January 27, 2026

BEFORE: JOHN G. NEW, SHERIDAN K. SNEDDEN, and
SUSAN L. C. MITCHELL, Administrative Patent Judges.

IPR2024-01498
Patent 11,844,752 B2

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The above-entitled matter came on for hearing on January 27, 2026,
commencing at 9:30 a.m.

P R O C E E D I N G S

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JUDGE SNEDDEN: Starting with Petitioner, please introduce yourself and who you have with you today.

MR. OLIVER: Your Honor, Justin Oliver from Venable, on behalf of the Petitioner, Dr. Squatch, and it will just be me today. Thank you.

JUDGE SNEDDEN: Okay. Welcome.

MR. MAIORANA: Good morning, Your Honors. On behalf of Patent Owner, David Maiorana from Jones Day. I'm joined by my colleagues Andrea Jeffries and Marlee Hartenstein, and also Mr. Jason Kemp (PHONETIC) from Procter & Gamble. And I want to thank Your Honors for your flexibility in converting this to a remote hearing -- saved our side a lot of nightmare travel. So thank you very much for that.

JUDGE SNEDDEN: Yeah. You're welcome for that. Okay. So per our order granting this oral hearing, each party will have 60 minutes of total time to present its arguments. Petitioner will open the hearing with its presentation and then Patent Owner will have a chance to respond to Petitioner's argument. And each side may reserve time for rebuttal. Just a reminder, we, the judges, have the electronic versions of your slide decks, and we'll take the -- this opportunity to remind you that -- to please speak the slide numbers as we move through the presentation for both the benefit of the record and for the judges who are also appearing remotely.

With that, we'll begin with Petitioner. You may begin when you're ready. And will you be reserving any time for rebuttal?

1 MR. OLIVER: Yes. Fifteen minutes, Your Honor.

2 JUDGE SNEDDEN: Okay. You may begin when you're ready.
3 I'll keep the time here.

4 MR. OLIVER: Thank you, Your Honor. Good morning and may
5 it please the Board. The '752 Patent claims basic formulations for natural
6 deodorants, which have been well-known since before the critical date. For
7 instance, the idea of excluding ingredients such as aluminum and silicone
8 was a known industry practice as the patent itself admits. And the hardness
9 range recited in the claims is not only the range the prior art described as
10 typical for deodorants, but substantially matches the applied prior art, the
11 Bianchi-254 reference.

12 While P&G argues that the claim's explicit identification of the
13 ASTM D 1321 standard should be understood not to indicate that standard,
14 instead hoping to read in a modified test. That argument does not comport
15 with the plain language of the claims or the disclosure in the specification.
16 Ultimately, the prior art provides clear teachings on basic deodorant
17 components recited throughout the claims. For these and other reasons we'll
18 discuss today, the challenged claims are unpatentable.

19 With that, I'll direct the panel's attention to Slide 3 of the
20 demonstratives, which sets forth the grounds at issue here. There are 9
21 grounds across the 19 claims. They fall into three categories: first are the
22 Lesniak-Bianchi grounds; second is the Native-Bianchi grounds; and finally,
23 we have a Squatch-Sturgis ground that applies to Claims 15 through 19.

24 I'll touch upon a few key arguments. As the panel is aware, there
25 was a prior hearing on related IPRs. Many of these issues are the same as
26 were addressed before. And for that reason, I'll keep it short on some of

1 those overlapping issues. However, with that said, with respect to the
2 Lesniak grounds, as we will discuss today, Lesniak does describe
3 antiperspirants, which are deodorants and Lesniak's compositions had no
4 stability issues.

5 Furthermore, with respect to P&G's argument that a person of
6 ordinary skill would not modify a complete formulation, that simply
7 conflicts with the facts of this case and the accepted legal standards. With
8 respect to the hardness test, the ASTM D 1321 test -- which I'll refer to as
9 the 1321 standard for shorthand -- Bianchi does describe a substantially
10 overlapping range. And as we'll discuss here, the standard test is the one
11 that should be used as it is called for in the claims and specification, not the
12 modified test that P&G argues for.

13 With respect to Slide 6 of the demonstratives with respect to the
14 Native grounds, many of the same arguments are being presented again, one
15 that a POSA would never modify a complete formulation, and that one
16 would not swap out baking soda for magnesium hydroxide, issues similar to
17 those addressed before, as we'll discuss today.

18 And finally, with respect to the final ground, the Squatch grounds,
19 that ground applied against Claims 15 through 19 challenges the right to
20 priority based on those picture claims reciting a combination of deodorant
21 ingredients that were not adequately described in the priority application,
22 which thus makes both Squatch and Sturgis prior art.

23 I think one important point to keep in mind with respect to those
24 grounds is that the arguments made by P&G, with respect to priority, create
25 a impossible catch-22 with respect to the obviousness grounds with
26 -- applied by Native and Lesniak. Specifically, with respect to priority, P&G

1 argues that a POSA could easily select among a list of ingredients in a
2 priority application and select from among a number of different options for
3 those ingredients so as to arrive at what is claimed.

4 However, given the heightened standard for the written description
5 requirement, if that is true, then it would also have to be true that under the
6 lower obviousness standard, a POSA could do the same when looking at the
7 prior art, namely select the known ingredients to provide in a combination as
8 claimed. Those two arguments cannot exist together and thus Claims 15 to
9 19 would have to be unpatentable under at least one of those options.

10 With that, I'll talk about the representative claims. Quickly
11 looking at Slide 8 of the demonstratives. As we can see, Claim 1 here,
12 which is the broadest of the independent claims, recites basic components of
13 deodorants, for instance, an antimicrobial, a structurant -- in this case, stearyl
14 alcohol -- and that the stick is free of aluminum salts and silicones. And
15 then additionally, we have the hardness of 80 to 140, which we'll also
16 discuss. Other than that broad independent Claim 1, there are the picture
17 claims, which a representative one is shown on Slide 9 of the
18 demonstratives. The picture claims -- the independent picture claims are 15,
19 18, and 19. 18 is representative in that all three of those picture claims are
20 essentially identical but for slight changes in the recitation of the triglyceride
21 -- here, it's recited to be a capric triglyceride.

22 But other than that, the components here are what are typically
23 found in deodorants, specifically a carrier oil -- in this case, triglyceride; a
24 starch -- starch is being known to absorb moisture, moisture being the food
25 that microbes that cause odor feed on; a structurant -- in this case, stearyl
26 alcohol; there are two antimicrobials, magnesium hydroxide and triethyl

1 citrate; and then there are simply emollients -- which were known to soften
2 the skin, and those include shea butter, coconut oil and sunflower seed oil.
3 And then again, we have the same hardness range recited.

4 Now, with respect to how those ingredients were known, I would
5 just draw some contrast or context from Slide 10. Specifically, the '752
6 Patent acknowledges comparative examples that were available in the
7 marketplace before the critical date, where those comparative examples
8 included all of more than 25 percent of capric triglyceride, a starch, stearyl
9 alcohol as the structurant, an antimicrobial, shea butter, coconut oil, and
10 we're aluminum and silicon-free. And this, I think, gives a little context to
11 the rather generic recitation of known ingredients recited in even the picture
12 groups.

13 With that, directing the panel's attention to Slide 12 of the
14 demonstratives, I'll go over a little bit of background of the technology.
15 However, because the background is generally similar to what was presented
16 and argued in the prior IPRs, I'll keep it short so as not to repeat myself too
17 much.

18 Again, looking at Slide 12, some standard ingredients are carrier
19 oils, structurants, antimicrobials, fragrances. We could also add in there
20 emollients and starches. But looking at what we have here, I think the one
21 point to take away from this slide is, with respect to deodorant sticks, the
22 carrier oils instructions, or specifically, the ratio between those two was
23 what was known to provide the hardness of the stick -- more structurant,
24 harder; more carrier oil, softer.

25 And I'll note -- I'll skip ahead to Slide 14 -- this was acknowledged
26 back in the 1970s in a P&G patent, which acknowledged that if you wanted

1 something that was softer or harder and more brittle, you simply adjust the
2 amount of wax that you use, the wax being the structurant. And that could
3 easily allow someone to make or adjust the hardness of a stick.

4 And then going back to Slide 13, again, all antiperspirants are
5 deodorants. Antiperspirants are simply a subcategory of deodorants where
6 there is an active ingredient that provides some sort of ability to help block
7 or otherwise inhibit sweat pores. These are typically astringent, such as
8 aluminum, zirconium, and zinc, as established in the record.

9 And then finally, on background, looking at Slide 15, natural
10 deodorants, as that term has been used in this field, generally indicated a
11 formulation that excluded ingredients that were undesirable to consumers.
12 And typically, those included aluminum and silicon. Again, the '752 Patent,
13 in its first or second opening paragraph, acknowledges that that was already
14 known in the field.

15 With that, I'll turn to hardness on Slide 18 of the demonstratives.
16 For context, the hardness arguments here -- but for one very minor issue that
17 is unique to this case -- substantially overlap the arguments that were
18 presented in the earlier IPRs. I will, for completeness in this record, touch
19 upon some of the main points here. Some of the other points I'll leave to the
20 briefing.

21 But for context and clarity, the typical -- well, the typical test that
22 was used for cosmetics, whether it be a lipstick or a deodorant, was
23 borrowed from a previous test used for testing the hardness of petroleum
24 waxes, and that is the 1321, the ASTM standard. It was used to measure
25 hardness. And since the 1990s, it was known that the typical deodorant
26 hardness, as measured by that standard, was about 7 to 14 millimeters.

1 In the claims at issue here, that is provided in millimeters to the
2 10th. So it's actually stated as 70 to 140. But also, as noted at -- on this
3 slide, it was well known since the (INDISCERNIBLE). If one were to stray
4 -- if the formulator here were to stray outside the typical range, the
5 acceptance by consumers typically dropped. So this is usually the general
6 range in which deodorants have been made for a long time.

7 And then turning to Slide 19, the language here is really not much
8 different than what was seen in earlier cases. The values are slightly
9 different here. The value is 80 to 140. But the highlighted language is the
10 same, as measured by penetration with the ASTM D 1321 needle.

11 And this, again, is a standard protocol provided in Exhibit 1087,
12 which uses a penetrometer and a needle so as to measure the penetration of
13 the stick so as to determine hardness, measured in millimeters based on the
14 depth that the needle goes into that. A 50-gram weight is added to the
15 needle and plunger, specifically mounted on the plunger, during the testing,
16 which is not in dispute.

17 Other issues not in dispute, that the applied reference here for
18 hardness Bianchi-254, describes a range of 80 to 150 measured under the
19 DIN standard, which is undisputedly the same as the ASTM standard. So
20 under the 1321 standard noted in these claims, there is here a substantial
21 overlap in values.

22 With respect to Slide 21, P&G's position remains the same here
23 and that is that some -- that one should read into the claims an additional
24 limitation of a 50-gram total force. And, really, what that does is try to
25 exclude from the standard the use of the 50-gram weight mounted on the
26 shaft.

1 First and foremost, again, with respect to Phillips, where there is a
2 plain term used in the claim, it should not be -- nothing should be read into
3 the claims, absent an express disclaimer or redefinition of that term, which
4 we simply do not have here. As I understand, the panel accepted under
5 similar circumstances in earlier cases.

6 Looking at Slide 22, the argument, again, by P&G is based on the
7 periodic calibration discussion in the '752 Patent. Specifically, the '752
8 states that under periodic calibration, the weight of the shaft and needle
9 should total 50 grams. Well, that matches what is in the standard, as we can
10 see from that first block quote. The standard actually calls from that, so it's
11 not a deviation. However, as we can see from the block quotes on the
12 bottom, the standard goes on to say that during testing, a 50-gram weight is
13 mounted on that shaft -- or also referred to as the plunger.

14 I think the easiest response for simplicity here is provided on Slide
15 23 of the demonstrative, and that is the contradiction between P&G's
16 argument for how a POSA would understand the specification of the '752
17 Patent and how a POSA would understand the specification of Bianchi.
18 With respect to the '752, that specification does not explicitly discuss the use
19 during testing of the 50-gram weight. And in that case, P&G's position is
20 that a POSA would understand that to be an exclusion.

21 However, Bianchi also does not explicitly call for the addition of
22 the weight, yet there, P&G argues that that would lead a POSA to include
23 the weight because of the mere mention of the standard. And that can be
24 seen by P&G's expert's quotes on the bottom of Slide 23 on the left,
25 acknowledging that there's the standard and simply a mention of the needle
26 that is used, and then on the right saying, now I then go to the DIN method

1 and actually follow there what is recited as to the total weight. Those two
2 positions can't exist simultaneously. And for that reason, we believe the
3 hardness argument fails and the standard hardness is the correct one to use
4 with respect to the claims.

5 I won't spend much time on Slide 24. Again, P&G tried to make
6 other arguments as to novel testing being read into claims in a prior case, the
7 Conopco case, and the argument I -- we believe should similarly fail here.

8 I'll also note that with respect to Slide 25, this argument by P&G,
9 we believe should fail for the reasons that are addressed and the standard
10 should be used. However, I will note for clarity in the record that even
11 accepting P&G's argument for a modified standard, that does not change the
12 outcome because P&G requires a second argument to be accepted -- and that
13 second argument is with the modified standard.

14 According to its expert, Dr. Lochhead, there would be no overlap
15 at all between the hardness range using the standard and the modified
16 standard. However, that statement by P&G's expert was provided with no
17 citation, no corroboration whatsoever, and that naked statement simply
18 cannot be accepted. And in response to that statement, Dr. Squatch
19 performed hardness testing to show that the statement was demonstrably
20 false, and therefore, the position lacks credibility.

21 This has been addressed in the briefing so I won't spend a lot of
22 time on it, but as we can see on Slide 26, you could take one thing -- in this
23 case, a deodorant -- test it under both standards -- or that the standard and
24 P&G's proposed modified standard -- and the same sample will fall within
25 both ranges under the two different tests. That demonstrates that there is
26 overlap and that the statement by P&G's expert is simply not correct. I'll

1 also -- notice -- note that the Native product is highlighted here. The Native
2 product is a P&G product that is marked with a '752 Patent, yet only falls
3 within the scope of the claims if one uses the standard 1321 test, not the
4 modified test, further rebutting the arguments made by P&G.

5 I won't spend time on routine optimization. It's set forth in our
6 briefing. I will touch upon one argument made by P&G that is different than
7 those made in its prior briefs, and that argument can be found on pages 11
8 through 13 of its sur-reply. And I just want to make this clear for the record
9 because I believe there's a an error that needs to be set straight.

10 P&G argued in prior cases that while Dr. Squatch's experts set
11 forth testing to be performed under P&G's proposed modified standard that
12 it didn't actually do it properly. And I won't get into the whole details of
13 that. It can be found in the briefing. But the argument presented by P&G is
14 that under the modified test, the sample should not have been removed from
15 their original containers and put in the brass cylinder called for in the
16 standard. And according to P&G -- and this is shown on Slide 25 of its
17 demonstratives -- that wasn't done properly.

18 P&G attempts for a gotcha moment in this case and makes a
19 unique argument. And that is, if you were to look at the image from Exhibit
20 1079, which is a picture of the testing equipment, you will see a digital
21 readout of 75.1. P&G's argument is that, well, 75.1 as a hardness
22 measurement must correspond to the modified test. But we see brass
23 cylinders in this test. And therefore, the test wasn't performed properly.

24 There's a very simple answer to this that P&G overlooked in its
25 zeal to make a new argument and that is, what P&G is pointing to in that
26 figure -- on Slide 25 of its demonstratives that has a digital reading of 75.1

1 -- is not a penetrometer. It is a thermometer. It is an RTD laboratory
2 thermometer that's measuring 75.1 degrees Fahrenheit. Why is that?
3 Because if one looks at the standard for ASTM, which can be found in
4 Exhibit 1087, specifically on page 5, one will see that under the standard
5 test, the test has to be performed in a water bath that measures exactly 75.1
6 degrees Fahrenheit.

7 The argument that is made by P&G simply confuses the
8 thermometer shown in the image with the penetrometer, which is the analog
9 circular dial shown separately -- not only in this image, but throughout
10 Exhibit 1079. And also, an image of a penetrometer can be seen in the
11 standard itself, which is Exhibit 1087.

12 So I wanted to make that clear for the record, as it was an
13 argument raised in sur-reply. And I wanted to make sure there was no
14 confusion on it. Absent any questions on that point, I will move on from the
15 hardness issues, and I'll turn to the grounds at issue.

16 And I'll start with Lesniak, and I'll specifically start with Slide 29
17 of the demonstratives. Looking at Slide 29, we can see that Lesniak
18 discloses formulation -- specifically deodorant formulations as well as they
19 can be used for other purposes -- that are aluminum and silicone-free, that
20 have an antimicrobial, a structurant, a carrier oil in the form of capric
21 triglyceride, starch, shea butter, coconut oil, and sunflower oil, which
22 essentially covers most everything recited throughout the independent and
23 many of the dependent claims.

24 Looking at Slide 30, Bianchi-254 is combined for two reasons, one
25 is it shows that the hardness that is claimed was well known. Since I've
26 discussed hardness already, I won't go into that more. But the second reason

1 Bianchi is combined with Lesniak is that while Lesniak indicates a
2 structurant may be particularly a fatty alcohol, it does not specifically
3 address or call out stearyl alcohol as one option for a fatty alcohol.

4 Bianchi-254 indicates that stearyl alcohol was a structurant for
5 deodorants of particular interest. And because Lesniak calls for fatty
6 alcohols but doesn't specifically name this one, but Bianchi calls that it
7 should be of one of particular interest, a person of ordinary skill in the art
8 would have found it more than obvious to use as the fatty alcohol called for
9 in Lesniak stearyl alcohol. And the combination is really that simple.

10 Looking at Slide 31 of the demonstratives, P&G makes its stability
11 argument again, which we believe is wrong on the law and the facts on the
12 law. Enablement is only in relation to what is actually claimed. And neither
13 the claims of the '752 Patent, nor the '752 Patent itself, provide any stability
14 requirements and therefore, the stability argument simply has no legal
15 relevance to the discussion here.

16 I'll also note, looking at Slide 32 of the demonstratives, that the
17 argument is wrong on the facts because Lesniak, in fact, did show stable
18 formulations. Lesniak was directed at providing a stable formulation at very
19 high temperatures. And it compared its formulation to ones that were not
20 stable at very high temperatures but there's no requirement of any specific
21 high temperature stability. And as we can see on Slide 32, Lesniak achieved
22 its goal simply by adding a secondary structurant, which is of a high melting
23 point, and that is castor wax. So Lesniak, in fact, was stable.

24 And also Lesniak, as seen on Slide 34 of the demonstratives,
25 shows non-aluminum compositions. Again, as addressed in the briefing, a
26 reference need not state a feature's absence in order to disclose a negative

1 limitation, as set forth in the Almirall case. Lesniak's compositions do not
2 recite aluminum, and instead use an alternative to aluminum, namely zinc,
3 which was known to be an active ingredient as an alternative to aluminum.
4 So there's simply no basis here to read aluminum into Lesniak.

5 I'll turn now to Slide 36 of the demonstratives. Again, a similar
6 argument there, or another argument that was made prior that I'll just touch
7 on very briefly, was that Lesniak should not be understood to be a deodorant
8 because it has 11 to 20 percent of its antimicrobial. However, the '752
9 Patent itself makes clear that antimicrobials may be present in weights up to
10 30 percent. And therefore, that argument simply does not comport with
11 what is called for in the specification.

12 With respect to Slide 37, P&G, again, makes the argument that the
13 Lesniak deodorant formulation was complete. And therefore, a person of
14 ordinary skill in the art would not ever modify it. We believe this is wrong
15 on the facts as P&G's own expert, as we can see here, indicated that there
16 would be a motivation to modify and make deodorants better,
17 notwithstanding the fact that they were complete. And we also know that
18 this issue was wrong in the law, as noted in the Conopco case cited in earlier
19 related decisions.

20 And finally, based on the DyStar case, which says there does not
21 need to be a specific motivation in the reference itself for a person of
22 ordinary skill in the art to improve, modify, or what have you. And that
23 DyStar case is cited in our briefing, as well as on Slide 45 of demonstratives.

24 Now, that combination of Lesniak and Bianchi covers Claims 1
25 through 13, leaving one additional claim of the first set of claims before the
26 picture claims, and that is Claim 14. Slide 38 shows the second ground,

1 which actually combines Phinney with Lesniak and Bianchi. Phinney is a
2 ground presented previously. And my understanding from earlier decisions
3 is that the applicability of Phinney has already been accepted. We believe
4 that the arguments and facts and law here are the same and therefore should
5 result in a similar decision.

6 But I will just note here, with respect to the basis for combining
7 Phinney, Lesniak is a zinc-based deodorant formulation and Phinney simply
8 teaches that because zinc was not a highly effective antimicrobial, that one
9 should combine magnesium with it -- or magnesium hydroxide with it
10 because the combination of the two had synergistic effects. So it's really a
11 hand-in-glove reason for the combination and that addresses Claim 14.

12 With that, that would bring us to the application of the Lesniak-
13 Bianchi combination against the picture claims, Claims 15 through 19. And
14 there, there's the addition of Anconi. Anconi is relied upon simply because
15 it describes the use of triethyl citrate in deodorant formulations.

16 And the petition establishes that there are two primary reasons for
17 combining triethyl citrate with deodorant formulations. The first is that it
18 was a known antimicrobial, and antimicrobials are a common ingredient in
19 deodorant formulations. Secondly, and importantly, is that it was known
20 that triethyl citrate prevented degradation of triglyceride oils when used in
21 cosmetic formulations.

22 And because Lesniak was a triglyceride-containing deodorant
23 formulation, a person of ordinary skill in the art would understand that
24 triethyl citrate would prevent its degradation therefore improving its overall
25 lifespan or shelf life. For that simple reason -- or those two simple reasons,
26 a person of ordinary skill in the art would have had a reason to further

1 combine Phinney and use triethyl citrate.

2 And then finally, looking at Slide 40 of the demonstratives for the
3 last of the Native grounds, there is the addition of arrowroot powder, as
4 described in Easy Homemade. With respect to the basis for this
5 combination, it is, again, I believe, very simple, and that is that Lesniak
6 explicitly calls for, or gives the explicit disclosure, that one would
7 understand that you could also add starches to its formulations. However,
8 Lesniak does not indicate which starch to use.

9 Starches, as I mentioned already were known to be using
10 deodorants because they absorb moisture. Lesniak says that that can be
11 added to its formulations. What Easy Homemade provides is that arrowroot
12 powder was a known starch used in deodorant formulations, and therefore a
13 person of ordinary skill in the art looking to find a starch, as called for in
14 Lesniak, would look for what has been used before, in this case, arrowroot
15 powder.

16 With respect to P&G's argument that Easy Homemade was not
17 publicly accessible, this issue was argued by P&G before and there's no
18 different arguments here. The Voter Verified case we believe still applies,
19 and that is addressed thoroughly in our briefing. That concludes the Native
20 grounds, which go against all of Claims 1 through 19.

21 And with that, I'll move on to the -- excuse me, the Lesniak
22 grounds. With that, I'll move on to the Native grounds, starting at Slide 43
23 of the demonstratives. With respect to the first set of claims, and that covers
24 Claims 1 and 4 through 14, the combination is just Native and Bianchi.

25 And for context, Native is a printed publication in the form of a
26 website that was established by the Wayback Machine. And it is a website

1 for a particular deodorant where the website provides the ingredient list for
2 that deodorant, where the ingredient list is provided or listed in order of
3 weight percents, with the first list of ingredient being the highest weight
4 percent, in this case, capric triglyceride, the carrier oil. It also has stearyl
5 alcohol, baking soda, as well as other relevant elements.

6 Bianchi, here again, is relied upon simply for the hardness range
7 -- which we've already discussed, and I won't get into again -- but also for
8 the quantitative amounts of the ingredients. Again, this is like baking. If
9 one were to have a recipe for a cake that listed that flour should be used,
10 eggs should be used, milk, butter, and sugar, but didn't list the specific
11 amounts, one would consult other recipes to find out, well, how much flour
12 should I use?

13 Similarly here, Native does not say how much of the triglyceride to
14 use, only that it is the highest weight percent used. What Bianchi provides is
15 that it was known to use carrier oils in amounts greater than 25 percent when
16 making deodorants, and that would provide guidance to a POSA on how
17 much of a carrier oil to use.

18 The arguments presented by P&G, looking at Slide 44 of the
19 demonstratives, are that because Bianchi describes the use of -- in addition
20 to natural oils, such as triglycerides, silicone oils, that a person of ordinary
21 skill in the art would not -- and also discloses aluminum-containing
22 formulations -- that a person of ordinary skill in the art would not consult
23 Bianchi at all. However, this '752 Patent itself incorporates references that
24 use aluminum-containing and P&G's own expert, Dr. Lochhead, admitted
25 that with respect to looking at earlier aluminum-containing formulations,
26 that's what a POSA does.

1 And we believe, therefore, there is just some -- no support in the
2 record for that position. And furthermore, Native already achieved a
3 silicone an aluminum-free deodorant, making that issue moot.

4 Turning to Slide 45 of the demonstratives, P&G makes the same
5 argument it made earlier, that because the Native formulation was complete,
6 there would be no reason to modify it whatsoever. Again, I noted reasons
7 that that should not be accepted with respect to the same argument presented
8 on Lesniak, and those arguments apply here, and we have the DyStar case
9 that I noted.

10 With that, there is the next combination that gets to Claims 2 and 3
11 of the '752 Patent, and those claims require baking soda not be used. Baking
12 soda is listed in Native. However, Easy Homemade, as the panel has
13 understood from the earlier cases, was known to be substituted out for
14 magnesium hydroxide. Specifically, Easy Homemade describes that some
15 people found baking soda to be an irritant to their skin, and it was known to
16 substitute magnesium hydroxide as an alternative antimicrobial. So what we
17 have here is a simple substitution of one known ingredient for another. And
18 that's addressed in our briefing, and it's throughout the earlier cases so I
19 won't spend too much time on it.

20 With respect to the -- before getting to the last set of grounds, I
21 have not provided slides here. We have not provided slides here on Ground
22 7 and 8, which also are Native-based grounds, but I'll just touch on them
23 very quickly. With respect to Ground 7 -- and Ground 7 and 8 apply to the
24 picture claims, Claims 15 through 18.

25 With respect to Ground 7, which applies to Claims 15 and 17
26 through 19, that further combines Anconi and Stoia. Anconi is combined for

1 the same reason it is used with respect to Lesniak -- its teaching of using
2 triethyl citrate, which was known to help prevent the degradation of
3 triglyceride oils, which are also used in Native. And Stoia, which describes
4 the use of sunflower seed oil as being particularly notable for its use of
5 enhanced tocopherols which provide antioxidant properties.

6 And essentially here, sunflower seed oil is an emollient. The
7 Native formulation uses emollients such as coconut oil. And as described in
8 Stoia, a person of ordinary skill in the art would have been able to substitute
9 out one known ingredient for another because while coconut was a known
10 emollient, sunflower seed was not only known to be very good as an
11 antioxidant, it was also, as described in Stoia, as being a low cost alternative.
12 So we simply have, again, swapping out one known ingredient -- which was
13 less expensive -- for another, which provides a basis for the combination.

14 And that leaves the last ground, Ground 8, which applies only to
15 Claim 16, and that's the modification -- or the combination with Millet.
16 Millet simply teaches that it was known to use tapioca starch, an issue that
17 was addressed in earlier decisions and the related cases. The arguments here
18 are the same, and therefore I won't ask any questions on Millet. I won't
19 spend time on that particular combination.

20 With that, that brings us to the Squatch grounds. And I'll direct the
21 panel's attention to Slide 48 of the demonstratives. The combination in this
22 ground -- and I should say Squatch ground, that's a single ground that
23 applies to Claims 15 through 19 -- combines Squatch with the Sturgis
24 reference -- the Sturgis reference being an earlier application in the '752
25 Patent family. And the reason those are -- references are applied is because
26 Claims 15 through 19 are not entitled to their priority date.

1 Looking at Slide 48 of the demonstratives, the reason for this, as
2 set forth in the briefing, is that the '752 Patent does not -- or the earlier
3 patents to which it claims priority -- do not provide the specific combination
4 of ingredients recited in Claims 15 through 19. Instead, the specifications
5 provide a list of 25 different emollients, 25 different antimicrobials, 25
6 different structurant with no blaze marks as to provide guidance to a person
7 of ordinary skill in the art as to which ones to select and combine from those
8 groups.

9 Absent such blaze marks and given such laundry list disclosures,
10 there isn't support for a specific combination of ingredients as set forth in the
11 picture claims. And for that reason, the '752 Patent is simply not entitled to
12 its priority date. With that, both Squatch and Sturgis become prior art.

13 JUDGE NEW: Excuse me. If we can just go back one slide?

14 MR. OLIVER: Yes.

15 JUDGE NEW: Doesn't the Federal Circuit tell us that it doesn't
16 have to -- the prior art -- or excuse me, the specification of the contested
17 publication -- application here or prior patent -- does not have to tell us the
18 exact combination. All it has to do is stake out boundaries of that set of
19 possible combinations. It provides a fence mark around it.

20 And 25 and 25 and 25 does not strike me as excessive in that
21 regard. It seems to set out a fairly well-described set of emollients,
22 antimicrobials, and structurant. And why isn't that -- in view of what the
23 Federal Circuit has told us in a number of cases -- sufficient to provide
24 adequate written description?

25 MR. OLIVER: I would say that on taking any one on their own,
26 25 is not a large amount of any one thing. However, when you have 25 and

1 25 and 25 and you're not just selecting necessarily one from each group, but
2 selecting sometimes multiple from each group, the number of possible
3 combinations becomes very large, very quickly.

4 So in that, it's not simply, oh, I can pick between -- if it was a
5 claim that just said a starch, and one of -- this one emollient and a person of
6 ordinary skill in the art was reading the specification saying, okay, I know
7 I'm supposed to use starch, and I know I'm supposed to use an emollient,
8 they pick this one out of 25, it would be a selection out of one of 25. And in
9 that particular limited situation, I would agree with Your Honor that that's
10 fairly straightforward.

11 However, when you're multiplying out 25 times 25 and 25, and it's
12 not just one from each, but potentially one or more from each, the number of
13 combinations grows so large so quickly that it doesn't provide blaze marks
14 for the specific combination here. That would be the position I would take
15 on that, Your Honor, as far as whether or not it really provides guideposts
16 for the entire combination.

17 But to put another point on that, I'm going to skip ahead to Slide
18 51. And I believe that position that you're suggesting, Your Honor, brings
19 us to, I think, the biggest part of Claims 15 to 19, and that is there is a
20 impossible catch-22 here. If one accepts that there is sufficient written
21 description to pick from one or more of these 25, one or more of these 25,
22 and one or more of another 25 -- in addition to the other ingredients listed
23 -- at the higher written description standard -- because we know written
24 description is a higher standard than obviousness -- if that is accepted, P&G
25 has a problem here, that if someone could do that from the list of ingredients
26 that are in the specification, someone can do that from disclosures of the

1 ingredients that are in the prior art.

2 Specifically, as noted on Slide 51, it's P&Gs position that a POSA
3 would be able to do so based on nothing more than their background
4 knowledge. If that is the case, then the same would be true of the Native and
5 Lesniak grounds applied to Claims 15 and 19. In that case, if we have
6 enough for written description, we have enough for obviousness. And
7 therefore, the claims would have to be obvious under at least those Native
8 and Lesniak grounds.

9 Our position is that there's not enough for written description. And
10 therefore, they're obvious under all three grounds. But given that the
11 competition between those arguments for written description and the impact
12 it has on obviousness, it can't be that they survive one and the other. They're
13 going to have to fail under at least one of the Native and Lesniak groupings
14 or on the priority issue.

15 And for that reason, we believe that ultimately, it doesn't change
16 the outcome on the patentability of Claims 15 to 19. That was a long-
17 winded answer to your question. I hope it was helpful.

18 JUDGE NEW: Thank you. It was.

19 MR. OLIVER: Okay. I'll just go back and just tee up the
20 combination. The combination here, I won't go into too much detail, it's set
21 forth in the briefing. But the combination itself is really not any different
22 than the Bianchi -- excuse me, the Native-Bianchi combination in theory,
23 and that is Dr. Squatch is a printed publication that shows a list of
24 ingredients in their order of weight percent -- again, capric triglyceride being
25 the highest amount and going downhill from that.

26 But it is -- it does not describe specifically the hardness or the

1 weight percent of the triglyceride -- and Sturgis provides that. So in that
2 regard, it's kind of almost the same theory as the Native-Bianchi
3 combination. We're basically saying, okay, we have the ingredients, how
4 much do we use?

5 Well, we look to the past -- what was being used before, and we
6 see Sturgis -- and what's the hardness, and we see Bianchi that says, look,
7 you're going to make these things 80 to 150, generally speaking. And it's
8 really a simple combination once the priority issue is resolved.

9 Now, other than the written description priority issue that we've
10 already discussed, the only other challenge that P&G makes to this is
11 whether or not Dr. Squatch qualifies as a printed publication. And what we
12 have here is a affidavit or declaration by Mr. Pinto, who had first-hand
13 knowledge of these images being available on the website at the time, as
14 supported by corroborating evidence, such as quality assurance records,
15 repository of marketing photographs that were stored, Shopify records,
16 website visitor traffic showing before their relevant date, 12 million views,
17 which establishes a showing, that this was publicly or a printed publication
18 that was publicly accessible to those of interest. P&G's argument is that it's
19 simply that you should --

20 JUDGE SNEDDEN: Counsel, please let me interrupt and let you
21 know that your time is up, and if you continue, just you will be entering into
22 your rebuttal time.

23 MR. OLIVER: Certainly. This is my last point, so I'll just make it
24 quickly. The argument is that the declaration should not be accepted and
25 that it's biased. However, there was not even a deposition of Mr. Pinto, or
26 any specific evidence to alleged bias. And under the GoPro case cited here

1 on Slide 50 and discussed in our briefing, where a Patent Owner fails to
2 cross examine the employee and doesn't provide any other evidence of
3 reason for there to be biased, there is simply no proper rebuttal to the
4 declaration. And therefore, based on GoPro, Squatch qualifies as a printed
5 publication.

6 With that, absent any other questions, I'll reserve the rest of my
7 time for rebuttal.

8 JUDGE MITCHELL: Can I ask you a couple of quick questions?
9 So on the Squatch grounds, am I right that in the record, there's no
10 reproduction of a website that shows Dr. Squatch being sold and, you know,
11 the ingredient list that you provide, right?

12 MR. OLIVER: That's correct. And the reason for that is, Your
13 Honor, that not all -- a lot of websites shouldn't go back on the Wayback
14 Machine and find it. But the Wayback Machine had to have actually picked
15 up on that. In this case, the Wayback Machine simply didn't pick that up.

16 The analogy I would give here is we know the old poster board
17 cases that someone could have put a poster board at a symposium, and it had
18 an abstract and images on it, and those will, under certain circumstances, be
19 accepted as a printed publication. And it might be that you don't have the
20 poster board as it was assembled, but you have all the abstract and pictures
21 that were on that poster board in a file, and someone would testify to this is
22 what appeared on that poster board. It's not, I don't have the poster board
23 anymore because I didn't store it.

24 And that's what we have here. We know that there was a website
25 and these are the things that actually appeared on that website. And
26 therefore it's really no different than any other declaration as to what would

1 have been in a library, what would have been on a poster board at a
2 symposium. But we don't have the full page, but we're not relying on the
3 full page. We're relying on this thing we know was part of the printed
4 publication. And we believe --

5 JUDGE MITCHELL: So those photos that you have in the record
6 that are attached to Mr. Pinto's declaration, those -- and maybe I just wasn't
7 reading it carefully, but those are the actual photos that would have been
8 uploaded to the website is what the test --

9 MR. OLIVER: That were uploaded to the website.

10 JUDGE MITCHELL: Okay.

11 MR. OLIVER: And he had personal, firsthand knowledge of that.
12 So it's almost like if you had a book in the library --

13 JUDGE MITCHELL: Okay.

14 MR. OLIVER: -- but part of one page was torn out, you said, well,
15 at least I know this page was in the book. That would be no different than
16 what we have here. That is what was there. We just don't have a picture of
17 everything else that was on that page. We know that image was on the
18 website page --

19 JUDGE MITCHELL: Okay.

20 MR. OLIVER: -- and that's what he's testifying to.

21 JUDGE MITCHELL: Thank you. And one other quick question
22 -- because I know we see in the record a lot of substitutions of different
23 emollients or any microbials in a particular deodorant stick. Is there any
24 evidence that any of those would interfere with each other that a POSA
25 would be worried about? Oh, if I'm switching out these ingredients, I got to
26 worry that it might be affected by another ingredient I already have in there.

1 MR. OLIVER: No, Your Honor. There's no evidence to that fact.
2 And actually, I would say the evidence is to the contrary. The evidence is,
3 for instance, magnesium hydroxide with zinc was known to have a
4 synergistic effect. And the evidence suggests that a lot of these things were
5 interchangeable, such as their explicit statements of baking soda, magnesium
6 hydroxide being interchangeable. The same thing with emollients. There's
7 indications that here are all the ones you could select.

8 And I would say the '752 Patent itself supports that, because it lists
9 a whole bunch of emollients, a whole bunch of antimicrobials. And P&G's
10 position is you can pick any one of these emollients, any one of these
11 antimicrobials, and use them in any order that you want. So their written
12 description support for priority is fundamentally based on what is shown in
13 the record, which are these things are easily interchangeable.

14 JUDGE MITCHELL: Okay. So it sounds like the only evidence
15 is it might have a better effect, might have a synergistic, but there's no
16 negative effect --

17 MR. OLIVER: It's either synergistic, or sunflower oil is less
18 expensive, or -- you know, there are reasons for each one, but there's no
19 indication as to any problems in combining certain ingredients with others.

20 JUDGE MITCHELL: Okay. Thank you very much.

21 JUDGE NEW: Mr. Oliver, I have another question. I'd like to
22 circle back to the written description question that I asked you earlier and
23 your response to it. If I understand correctly, your argument is that, well,
24 yes, the individual constituents are fairly well circumscribed in terms of
25 emollients or -- excuse me -- structurants, et cetera, that are fairly small
26 number, say 25. But the problem is, when you put them together, there's so

1 many possible combinations that there isn't sufficient written description.

2 But in cases -- it seems to be that in cases like Ariad and AbbVie
3 and Centocor and Carnegie Mellon, what the Federal Circuit is telling us is
4 it's not the full claim. It rather is whether each limitation is adequately
5 supported, is adequately fenced in, is adequately defined by the written
6 description of the specification.

7 And it seems to me that isn't what's really salient in this question is
8 whether each limitation is adequately blaze marked or fenced off, which I
9 think is released by AbbVie, such that a person of ordinary skill would
10 recognize that, well, okay, we've got 25 fairly commonly used structurants
11 and fairly 25 -- 25 fairly commonly used emollients. These are all standard
12 in the art. Wouldn't that be, really, more fulfilling of what this Federal
13 Circuit has asked us for than -- rather depending that, well, this and this and
14 this and this, this limitation, this limitation, this limitation, have to be
15 supported, not in and of themselves by the specification, but altogether. Is
16 that what the Federal Circuit has asked us?

17 MR. OLIVER: I think the case law is clear, that it is the specific
18 combination. And that the case law is very clear about the problem with
19 laundry lists. If you have a whole bunch of lists of potential ingredients but
20 you don't provide guidance on how to combine them, those laundry list
21 ingredients have been indicated as a problem. And it most often comes up in
22 the case law in the context of chemical compounds that could have
23 substituent groups.

24 It is quite possible that the substituent groups are well-known, it's a
25 carbon or a hydrogen or a hydroxide or a ketone. They're well-known
26 individual things but when you have multiple substituents, you can have so

1 many different possible combinations that it doesn't provide guidance by
2 simply listing, saying, here is a carbon and on it you can have on this place,
3 you know, another carbon or hydrogen or whatever. It starts to get in, well,
4 what is the thing you were actually describing as your invention? And here
5 what is purported to be described or claimed is a specific combination of all
6 those things.

7 And while we were talking here, Your Honor, I just sort of quickly
8 did a calculation of if we take 25 times 25 times 25, that is over 15,000
9 possible combinations. And actually, that's a low-ball number because what
10 is being proposed here is not selecting one from the group, but in some
11 cases, selecting more than one from the group. So that is going to
12 significantly increase the number of possibilities.

13 And the question here is, does the specification and the case law
14 here, really, provide guidance for that if you just list 25 and 25 and 25, that
15 you can claim 16, or in this case, more, because of the possible combinations
16 -- 100,000 it could get up to -- possible formulations? Is that really
17 something that you can say you invented? I think the case law would say,
18 no, that's -- you have not invented tens of thousands of different things
19 because you haven't given us clear guidance on what's the thing that you
20 believe is your invention.

21 JUDGE NEW: I think what you're saying is absolutely true with
22 respect to an obviousness analysis and in terms of motivation to combine.
23 But can you point me to a case that says that's also true in terms of whether
24 it's adequate written description support -- descriptive support in a ancestor
25 patent or application that does to which priority is claimed by the present
26 claims.

1 MR. OLIVER: I believe that is addressed in -- looking at Slide 48,
2 we've cited the Purdue Pharma case and the in re Ruschig case, and I believe
3 both of them support that -- the -- what I've discussed here today.

4 JUDGE NEW: All right. Thank you very much.

5 MR. OLIVER: Thank you.

6 JUDGE SNEDDEN: Okay. Mr. Maiorana, I'll let you begin. Will
7 you be reserving any rebuttal time?

8 MR. MAIORANA: Ten minutes, Your Honor. Thank you.

9 JUDGE SNEDDEN: Okay. Very well. And we had a few
10 questions at the end. So in the interest of fairness, I'll add seven minutes to
11 your presentation, should you need it. And we'll reserve 10 minutes for you.

12 MR. MAIORANA: Thank you, Your Honor.

13 JUDGE SNEDDEN: And you may begin when you're ready.

14 MR. MAIORANA: May it please the Board. My name is David
15 Maiorana from Jones Day, on behalf of the Patent Owner, The Procter and
16 Gamble Company. I was prepared to argue today regarding the '752 Patent
17 IPR, consistent with our briefing. We have read the final written decisions
18 in both the '999 IPR that was issued on January 21st and the '915 IPR that
19 was issued last evening. We respectfully disagree with the panel's decisions,
20 and we reserve all of our rights to seek review of those decisions. But in
21 view of those decisions, it appears to Patent Owner that it's unlikely that this
22 panel is going to agree with Patent Owner's arguments in the '752 IPR. And
23 in respect to the panel's time today, we don't intend to present substantive
24 argument on the '752 Patent. We will stand on the position set forth in our
25 briefing, including our motion to strike, as well as our demonstratives.

26 I wanted to let the panel know, I reached out to Petitioner's

1 Counsel yesterday morning, seeing if they were interested in canceling this
2 hearing in view of what I just said, and they indicated that they wish to
3 proceed so we're here today, as we had requested. I am prepared to answer
4 any questions that the panel has. But our position today is that Patent Owner
5 is going to stand on its briefs for this IPR.

6 JUDGE SNEDDEN: We had a few questions at the end of
7 Petitioner's presentation there. And I wouldn't mind hearing a little more
8 referencing Judges -- Judge Mitchell's question regarding -- you know,
9 related to the combination of some of these ingredients. If you can just
10 speak to the general sense that all -- that a person of ordinary skill in the art
11 could have taken these known ingredients and used them for the known
12 purposes and achieve -- achieved the claimed deodorant stick. And if you
13 could just provide your argument on that topic, that might be a little helpful
14 for us today.

15 MR. MAIORANA: I believe back in October, when I was arguing
16 the other four IPRs in this group of five, I had mentioned that the evidence
17 showed, in our view, that these types of compositions are finicky, and that
18 these -- all of these ingredients can interact with each other and that they all
19 have an impact on the stability. We stand by those arguments set forth in the
20 prior argument. And we repeated those arguments in our briefing for this
21 IPR, the '752, Your Honor.

22 JUDGE SNEDDEN: Very well. Thank you. All right. I don't
23 believe we have any further questions.

24 MR. MAIORANA: Thank you very much for your time today,
25 Your Honors.

26 JUDGE SNEDDEN: You're welcome. All right. Mr. Oliver?

1 MR. OLIVER: Given the statements by my colleague, I don't
2 know that there's much to rebut, but I'm happy to answer any questions that
3 may have been raised by what was said.

4 JUDGE SNEDDEN: Okay. I don't believe we have any further
5 questions. And so with that, I guess we'll go ahead and conclude the hearing
6 for today.

7 (Whereupon, the above-entitled matter went off the record at 10:32
8 a.m.)

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