

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KUBOTA NORTH AMERICA CORPORATION.,
Petitioner,

v.

VERMEER MANUFACTURING COMPANY,
Patent Owner.

IPR2025-00167 to -00169 (Patent 9,321,386 B1)
IPR2025-00170 (Patent 9,975,750 B2)
IPR2025-00171 (Patent 10,202,266 B2)
IPR2025-00381 (Patent 11,465,891 B2)
PGR2025-00016 (Patent 12,098,063 B2)

Held: March 19, 2026

BEFORE: MEREDITH C. PETRAVICK, ANNETTE R.
REIMERS, and ERIC C. JESCHKE, *Administrative Patent
Judges.*

The above-entitled matter came on for hearing on March 19, 2026,
commencing at 9:00 a.m., via video teleconference.

IPR2025-00167 to -00169, IPR2025-00170,
IPR2025-00171, IPR2025-00381, PGR2025-00016

IPR2025-00167 to -00169, IPR2025-00170,
IPR2025-00171, IPR2025-00381, PGR2025-00016

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P R O C E E D I N G S

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JUDGE PETRAVICK: Good morning. We are here for oral argument in seven proceedings. It's IPR2025-00167, 168, 169, 170, 171, IPR2025-00381, and PGR2025-00016. We'll have appearances now for the Petitioner.

MR. O'DELL: Yes. David O'Dell will be appearing for the Petitioner.

JUDGE PETRAVICK: And is there somebody with you today?

MR. O'DELL: Yeah. Today with me is Kelly Lyle.

JUDGE PETRAVICK: Welcome. And for Patent Owner?

MR. BROPHY: Good morning, Your Honors. Richard Brophy. Also with me is my colleague Marc Vander Tuig. My other colleague, Sydney Johnson, that will be on the phone, our in-house counsel (INDISCERNIBLE).

JUDGE PETRAVICK: All right. Thank you. So today we have 90 minutes total of argument for each side. As we discussed on the phone previously, we will have a confidential portion where the public line is closed. That will occur approximately at the two-hour mark, depending on how things go. But you feel free to take extra time out of that if you want to. I have set the clock for 90 minutes total, so whatever you finish at

1 the end will be your rebuttal time and the time for the confidential
2 portion.

3 I'm Judge Petravick. With me on the bench is Judge
4 Reimers and Judge Jeschke. We are all here for you in person
5 today. We will get started. I don't believe -- we don't need to do
6 any of the telework -- remote stuff today. We do have your slides
7 in front of us and we do have the entire record in front of us, so
8 that is helpful. We have projections on the screen.

9 When you approach the podium, please speak into the
10 microphone so everything comes across clearly. At the end of the
11 hearing, please stick around and provide the court reporter with
12 any spellings and names that she may need. All right. So
13 Petitioner, it is your burden, so you get to go first.

14 MR. O'DELL: Thank you, Your Honor. May it please
15 the Board, my name is David O'Dell, with me is Kelly Lyle, and
16 we represent Kubota North America. Kubota North America is a
17 U.S. company located and headquartered in Grapevine, Texas,
18 where they have their corporate and R&D facilities. There is an
19 ongoing litigation that's been stayed for these IPRs and PGR. And
20 the accused device -- and that is the Kubota SCL1000 loader,
21 which is manufactured in Kansas. Kubota North America employs
22 3,500 people, with manufacturing facilities not only in Kansas but
23 also in Georgia.

24 Turning to Slide 1 of my presentation, this is a
25 consolidated hearing. And as Judge Petravick just said, there's the

1 seven IPRs that are being discussed. And I think her introduction
2 is plenty, so I will move at a brisk pace where available. Moving
3 to Slide 2, I'll start with an introduction, with a brief description of
4 the patent and a portion of the prosecution history.

5 In Slide 3 -- the figures on Slide 3 are taken from the
6 patent and show a compact tool carrier. I'd like for everyone to
7 know that throughout the day and throughout the briefing, the
8 parties also refer to these as mini skid steers, mini track loaders,
9 and compact loaders or compact utility loaders. And the parties, I
10 believe, are not contesting the use of any of those terms.

11 Turning to Slide 4, the compact utility loader at issue
12 today uses a loader configuration called vertical lift, as shown in
13 this 1971 patent from Beltrami. On the right, there are two basic
14 configurations for loaders. One is a radial lift, where the loader
15 arm is attached to the mainframe by a single pivot point and the
16 loader arm moves radially like the hands of a clock. At the lower
17 portion of the figure on the right, there is such thing as a vertical
18 lift loader. The vertical lift loader, also called a four-bar
19 mechanism by the experts, has multiple pivot points and in so
20 doing allows the bucket at the end of the loader arm to move in a
21 vertical up and down direction as opposed to the radial lift.

22 Moving to Slide 5, Claim 1 of the '386 Patent is
23 representative for the -- at least for this first part of the discussion.
24 And it recites a compact tool carrier, which out of habit I will keep
25 calling a compact utility loader or CUL. And the elements

1 illustrated in blue are directed to what the parties agree to be the
2 vertical lift. There's no question that these elements are describing
3 a vertical lift, for the purposes of this proceeding.

4 Turning to Slide 6, the picture on the left of this slide is
5 taken from the patents at issue. And during prosecution, the
6 claims of the patents at issue were previously rejected by the office
7 by the combination of references, such as the Komatsu patent,
8 which shows a full size loader with vertical lift and the Dingo
9 patent on the far right which shows a compact utility loader with
10 radial lift. The examiner said it would be obvious to combine
11 vertical lift onto a compact utility loader.

12 These rejections by the office were overcome by
13 secondary considerations of nonobviousness. Specifically, the
14 Patentee, Vermeer, argued and showed to the examiner that they
15 were the first to invent a compact utility loader with a vertical lift
16 and that it met the requisites of secondary consideration. The
17 examiner allowed the claims in light of this argument of secondary
18 considerations.

19 Turning to Slide 7, Vermeer was not the first to invent a
20 compact utility loader with vertical lift. Unlike the prior art that
21 was before the office in the prior examination, the present IPRs
22 and PGR rely on KR996. This is a Korean published patent prior
23 art reference, and it's undisputed that KR996 teaches and discloses
24 a compact utility loader with a vertical lift.

25 Turning to Slide 8, I have here a listing of the summary

1 of the grounds. And it's important to recognize that KR996
2 anticipates many of the claims that are at issue today and also
3 renders prima facie obvious many other claims at issue today.
4 KR996 is a very strong reference and it changes everything about
5 the examination or consideration of this patent -- I know this is not
6 an examination, but the consideration of this patent. For the prima
7 facie obviousness claims, there were certain features that were
8 suggested as either inherent or prima facie obvious which are not
9 contested. So many claims are proposed as being unpatentable by
10 the single reference KR996.

11 Instead of talking about vertical lift and compact utility
12 loaders, what we're going to talk about today is whether it was
13 obvious for construction equipment to include such things as
14 tracks, as engine brackets, and its low pivot points. Those are the
15 middle three grounds on this chart that are contested. The last
16 three grounds on this chart are not contested by the Patent Owner.

17 Turning to Slide 9, so our agenda today is first we're
18 going to talk about mainframe. And as the Board may recall, we
19 pre-briefed the construction of the term brain frame -- mainframe
20 before the institution decision. And the Board construed that term
21 and applied that construction in making its institution decision.
22 And then we're going to talk about the three grounds that are
23 obvious combinations and that is whether it be obvious to combine
24 or modify the KR996 reference to include tracks, to include engine
25 brackets, and to include low pivot points. Separately today, we

1 will talk about secondary considerations, but that will be after the
2 break.

3 Turning to Slide 10, Claim 1 of the '386 Patent recites a
4 mainframe for supporting the loader. As I said, we have briefed
5 this, the Board has construed this term as a primary supporting
6 structure, and both parties agree with that construction.

7 I want to point out, as shown on Slide 11, that not every
8 claim uses the term mainframe. Some claims use the term loader
9 support. Some claims use the term rigid frame. But the parties
10 have argued exclusively the term mainframe. I suggest that that
11 mainframe is the most narrow of these three terms; and that if
12 KR996 teaches a mainframe, it teaches all three of these. And
13 that's the way the briefing and the discussion between the parties
14 has gone.

15 Turning to Slide 12, after the pre-institution briefing, the
16 Board construed and the parties agreed and adopted that
17 mainframe is a primary supporting structure of the loader. The
18 Board also construed the term that it did not require a unitary
19 construction or lack of separability. Also in the institution
20 decision, the Board recognized that Fixture 41 of the KR996
21 loader, that when it is configured as a loader, it is part of the
22 mainframe. The picture on the right of this of this slide is a picture
23 from KR996 with the mainframe shown in blue, and that includes
24 frame portion 11 which is on the vehicle portion of the device of
25 the machine and Fixture 41 which is on the loader portion of the

1 machine.

2 Turning to Slide 13, the Board's ruling is consistent with
3 the petition, which identified that when the KR996 machine is
4 assembled as a loader, its mainframe is a one piece providing
5 support for the loader. The Petitioner reply also discussed that the
6 mainframe includes both the Body 11 and the Fixture 41, and the
7 fact that these two components can be assembled at the job site
8 prior to the device being formed as a complete loader does not
9 negate the fact that both the Body 11 and the Fixture 41 are the
10 primary supporting structures for the loader.

11 Turning to Slide 14, the Patent Owner tries to argue that
12 the Fixture 41 is not a part of the primary supporting structure but
13 is instead a part of a secondary supporting structure. They came
14 up with the term secondary supporting structure. In so doing, the
15 Patent Owner presents the argument that a primary supporting
16 structure has two requirements, that it includes only components
17 that are fundamental, and that are always present during all aspects
18 of the loader operation.

19 I submit today that even under this definition, this
20 expanded definition being provided by the Patent Owner, the
21 frame portion of the KR996 meets this definition. And we believe
22 that Patent Owner's expert, Dr. Fleming, agrees with this. We
23 asked him -- Fleming states that when the KR996 is configured for
24 operation as a loader, then the loads go through the fixture. So he
25 said the Fixture 41 is critical, which we equate with fundamental.

1 Claim 2 of the patent further talks about the mainframe,
2 and it says that the mainframe incorporates a single weldment.
3 There are other claims in the patent that similarly recite this, but
4 Claim 2 is representative.

5 Turning to Slide 16, the Petitioner provided what we
6 believe to be the plain and ordinary meaning of this phrase
7 "incorporates a single weldment." And that is that the word
8 incorporates is open ended, such as the word includes.
9 Specifically, the petition presents that the case -- that it would be
10 obvious for one or more portions of the mainframe of the KR996
11 loader to be a single weldment. The petition also pre-considered
12 that the Patent Owner may argue this meaning and also described
13 that in an alternative argument that the mainframe -- if the Patent
14 Owner argues that the mainframe must consist entirely of a single
15 weldment that that would be obvious too. But that is not what we
16 believe to be the plain and ordinary meaning of this phrase. In fact
17 --

18 JUDGE JESCHKE: Mr. O'Dell, I have a question for
19 you. Mainframe KR996, is there anything in the record that shows
20 whether that is a unitary body or a single weldment or whatever
21 term you want to use?

22 MR. O'DELL: No. In KR996, the word -- it does not
23 have the word weld. But we did, as I've showed --

24 JUDGE JESCHKE: Is there any testimony then from the
25 experts as to whether -- looking at the figures or some other

1 evidence to show that that is a unitary body? And I know that term
2 is different than single weldment, I understand that. But I'm taking
3 unitary as one unitary structure, one single structure.

4 MR. O'DELL: Okay.

5 JUDGE JESCHKE: So is there anything in the record
6 about that?

7 MR. O'DELL: So yes, in the record but not in KR996.
8 The KR996, the Body 11, Fixture 41 are separate components.

9 JUDGE JESCHKE: I understand that.

10 MR. O'DELL: We presented in our petition that it would
11 be obvious to make these a unitary structure.

12 JUDGE JESCHKE: And what is "these?" When you say
13 "these," do you mean --

14 MR. O'DELL: I'm sorry. Thank you. Body 11 and
15 Fixture 41 as -- together as a unitary structure.

16 JUDGE JESCHKE: So welding Fixture 41 to main Body
17 11?

18 MR. O'DELL: Yes.

19 JUDGE JESCHKE: Okay.

20 MR. O'DELL: We say that this is obvious. And let me
21 --

22 JUDGE JESCHKE: I'm sorry to ask one more question.

23 MR. O'DELL: You bet.

24 JUDGE JESCHKE: But on Slide 16, the top box that
25 you have there where it starts, POSITA would have found it

1 obvious, is that what is intended by that phrase in that box? In
2 other words, welding Fixture 41 to main Body 11 in KR996, is that
3 at least included --

4 MR. O'DELL: No. What we promote as the plain and
5 ordinary meaning of this claim is that a portion of the mainframe,
6 such as Body 11 or Fixture 41, would be a single welded
7 component, a unitary, that not the entire mainframe would be
8 component. If I can move to Slide 17, I think this addresses some
9 of that as well.

10 In the '063 Patent, there are different dependent claims.
11 One of the dependent claims, Claim 3, recites where in the
12 mainframe is a single weldment. We think that means that the
13 entire thing is a unitary structure. Dependent Claim 7 says where
14 in the mainframe incorporates a single weldment. We think that
15 means it includes -- at least a portion of which -- as being a single
16 weldment. And I've cited some of the claimed construction rulings
17 from the institution decisions that suggest, when we're looking at
18 claims, that we interpret them -- when they use different words,
19 that we interpret them differently.

20 Judge Jeschke, I have some more comments directed to
21 your point. First of all, we are arguing that it would be -- KR996
22 does not describe welding. But we are saying it's obvious that the
23 Body 11 would be welded and that the Fixture 41 would be
24 welded. And we provided the prior art JP705 that suggested
25 welding portions of a mainframe is well-known in the art.

1 JUDGE JESCHKE: I'm sorry. Can I ask -- I just want to
2 unpack what you just said. You said that Fixture 41 would be
3 welded and that mainframe -- or main Body 11 would be welded.
4 In other words, individually --

5 MR. O'DELL: Yeah.

6 JUDGE JESCHKE: -- like different pieces, like steel
7 -- I'm assuming this is all steel structures that make up main Body
8 11 would be welded, such that main Body 11 is made of multiple
9 pieces of steel. You're not saying welding main Body 11 to
10 Fixture 41, correct?

11 MR. O'DELL: Right at this moment, I'm -- correct.

12 JUDGE JESCHKE: Okay.

13 MR. O'DELL: I'm not saying -- but I'm about to say --

14 JUDGE JESCHKE: It's an alternative.

15 MR. O'DELL: Yes.

16 JUDGE JESCHKE: Got it.

17 MR. O'DELL: I'm about to say that. So looking at the
18 first alternative, which we believe to be the correct and plain and
19 ordinary meaning of this term, we asked the Patent Owner's expert,
20 Dr. Fleming -- here on Slide 18 -- is it likely that main Body 11 is
21 welded. And he said it is. We also asked is it likely that the
22 Fixture 41 is welded together, and he said it is.

23 The truth is, you know, welding is a very common
24 practice when you're building machinery. So I believe, under this
25 first -- what we believe to be the plain and ordinary meaning of

1 this claim term, that there's no question that it's obvious and in fact
2 likely that Body 11 is a single weldment and that Fixture 41 is a
3 single weldment.

4 Now, to get to your second question which -- so the
5 alternative question, what about -- is it ever obvious for the entire
6 mainframe of KR996, which would include both the Body 11 and
7 the Fixture 41, is it ever obvious -- would it be obvious to a
8 POSITA to weld that all together to form a single weldment?
9 That's the alternative for a second claim construction. It's the
10 claim construction the Patent Owner is promoting.

11 And I'm going to turn to Slide 21. First of all, we want to
12 point out that KR996 teaches a loader. It would be obvious for a
13 loader -- as shown in Figure 9 of the patent -- to be welded that
14 that was common practice in the loader. And in fact, the examiner
15 during examination discussed these dependent claims and said
16 wouldn't it be obvious to weld the mainframe. And actually, he
17 didn't ask the question. He said it would be, and it wasn't
18 contested by the Patentee.

19 JUDGE JESCHKE: Are you all challenging Claim 3 of
20 the '063, which is in the PGR?

21 MR. O'DELL: No.

22 JUDGE JESCHKE: You're not. Okay.

23 MR. O'DELL: Wait, is that -- that's the claim that says
24 it's a single weldment?

25 JUDGE JESCHKE: Right.

1 MR. O'DELL: No. We're not challenging that one.

2 JUDGE JESCHKE: Okay. I'm just wondering.

3 MR. O'DELL: I'm going to jump back to claim -- to
4 Slide 20 now. I'm happy to do this, but I've jumped out of -- let
5 me catch up with my notes here. We understand that the Patent
6 Owner will argue or has argued in the briefing that if you weld the
7 Body 11 and Fixture 41 together, KR996 will no longer have this
8 ability to be interchangeable. And that is KR996 describes a
9 feature that allows the machine to be interchangeable between a
10 loader and an excavator, and that if you welded those two pieces
11 together you would basically have a dedicated machine. And that
12 would be inconsistent with the principle of operation of KR996.
13 That is an argument that they make strongly in their briefs.

14 But I would like to respond to that. We responded to that
15 in our briefs as well, and I'd like to respond to that today. Both
16 experts have read and understand KR996 and the
17 interchangeability function that it provides, that it can go between
18 a loader and an excavator. Yet both experts said despite that, there
19 are benefits or advantages of welding it all together to form a
20 dedicated machine.

21 Here on the Slide 20, we have testimony from
22 Petitioner's expert. Well, a dedicated machine has all these
23 benefits. If you welded it all together -- these two pieces together
24 to form a single weldment, they have benefits. And we asked
25 Patent Owner's expert -- when we were talking about KR996, we

1 asked is it ever -- are there any advantages to having a dedicated
2 machine instead of this interchangeable machine. And he said,
3 yes, there can be. So both experts recognize that there are benefits
4 to having a single weldment for KR996, even though KR996
5 would lose its interchangeability.

6 And this is exactly what's described in *Medichem*, which
7 is also cited in *Allied Erecting*, which we talk about a lot in our
8 briefing and so does the Patent Owner. And in that case, there was
9 also an appeal of an *inter partes* reexam and -- for construction
10 equipment. And the primary reference was a Caterpillar reference.
11 And the Board ruled, although modification of the movable blades
12 may impede the quick change functionality -- sounds very similar
13 to this case -- a given course of action may have benefits and
14 detriments and that a POSITA would recognize this.

15 And this is quintessential *KSR*. And both experts
16 recognize that there are benefits to having a dedicated machine, a
17 single weldment. And I understand that KR996 describes the
18 interchangeable functions, but that doesn't mean there's not
19 benefits to welding the entire mainframe together. And both
20 experts agree to that fact.

21 Turning to Slide 22, I'm now going to move into the
22 grounds that are based on combinations of references for tracks,
23 engine brackets, and low pivot points. Some of the dependent
24 claims refer to -- or some of the claims refer to the compact utility
25 loader, including tracks. Some of them refer to a drive sprocket.

1 We in our briefing and our discussion, both parties have
2 collectively just referred to this as tracks. A drive sprocket would
3 be a sprocket that turns a track. So when we go forward, when we
4 talk about tracks, we're including both tracks and drive sprockets.

5 Turning to Slide 24, the petition provided reasons to
6 combine or modify KR996, which has wheels, to include tracks.
7 And the reasons are listed on this slide. The reasons are provided
8 in the petition. I think the reasons are pretty straightforward. The
9 tracks provide benefits over wheels. Lots of benefits. And these
10 benefits are not contested. The benefits of putting tracks on a
11 machine are not contested. And in fact, tracks are commonly used,
12 not always used but commonly used on construction equipment
13 like this.

14 Instead the Patent Owner has argued that the KR996 was
15 only used indoors and thus would not want tracks. But this is not
16 correct. As the petition points out, KR996 explicitly describes
17 -- this describes indoor uses, of course. But it also describes road
18 maintenance, snow removal, towing, fruit farming, gardening, and
19 landscaping as potential uses of the machine. And this latter group
20 would most likely be outdoors. And second, I want to point out
21 that interior demolition produces debris and that would benefit
22 from using tracks instead of wheels.

23 Turning to Slide 26, the Patent Owner makes a second
24 argument about tracks. And this is the beginning of a series of
25 arguments that the Patent Owner makes throughout the briefing

1 about bodily incorporation. And so here's what happened, so the
2 Patent Owner took the pictures from the KR996 patent, which they
3 had previously called in their POPR cartoon figures. But they took
4 those pictures and they made a CAD drawing, and that's on the top
5 right of this slide.

6 And then from this CAD drawing, Dr. Fleming, Patent
7 Owner's expert, superimposed the tracks from Bares. Bares is a
8 compact utility loader with tracks that we use in combination with
9 the KR996. And he put it on top of his CAD model here. And I
10 asked Dr. Fleming, Patent Owner's expert, Dr. Fleming, are you
11 bodily incorporating or do you just -- you're just putting the
12 photocopy of the tracks directly on your CAD model that you had
13 made from KR996? And he said yes, that's what he did.

14 And then this discussion is continued on the next slide.
15 On the next slide, Slide 27, Dr. Fleming said, look, the tracks
16 actually touch or interfere with this tank structure -- in green on the
17 figure -- which he believes -- and probably it is -- a hydraulic fluid
18 tank. I asked him, well, did you try to just move the hydraulic tank
19 or make a smaller hydraulic tank or something? And he said, I did
20 not try. Dr. Fleming bodily incorporates throughout his expert
21 declaration and does not try to do any type of effort to make
22 something work -- what we would consider routine engineering
23 -- what Dr. Velinsky, our expert, considers routine engineering.

24 And turning to Slide 28 -- I apologize because I know
25 you know this, but bodily incorporation is not the test. This

1 citation is taken from the *Allied* case, which we discuss frequently
2 because of the similarities between it in our case -- in our papers.
3 But it is not necessary to -- for two references to be physically
4 combinable to render a claim obvious. In fact, whether one
5 reference can be incorporated into another reference is basically
6 irrelevant. And that's from an en banc Federal Circuit -- basically
7 irrelevant.

8 The test is not whether the references can be bodily
9 incorporated but whether would a skilled artisan be motivated to
10 combine the teachings of the references. You must allow for some
11 type of basic engineering or design to make the combination work.

12 Turning now to Slide 29, even more bodily
13 incorporation, the Patent Owner discusses that the machine
14 requires wheels and more specifically, tires and more specifically,
15 rubber tires to engage with its bogie. The bogie is the cart in
16 which the loader attachment sits when it is separated from the
17 main vehicle prior to its assembly.

18 This bodily incorporation also fails on its face. For one,
19 KR996 does not require wheels on its loader at all. In fact, KR996
20 has many claims that do not recite or refer to the wheel or loader
21 wheels at all. In fact, wheels don't come up until Claim 12 of
22 KR996, which means -- I interpret it that Claims 1 through 11 of
23 KR996 are open ended and that they could cover both tracks and
24 wheels. It's not until Dependent Claim 12 that wheels come in.

25 Secondly, KR996 describes a mechanism to

1 accommodate different drive mechanisms. It's called these
2 adjustable liners 39, which Dr. Velinsky discussed both in his
3 declaration and in his deposition. But of these are adjustable and
4 they allow, or can accommodate, different type of drive
5 mechanisms, i.e., wheels or tracks.

6 And I understand that the Patent Owner, when he comes
7 up -- his representative comes up -- is going to have this contrived
8 story about tires and expanding when they're compressed. None of
9 this is in the KR996 description. The KR996 spec does describe
10 pulling in the bogie to engage the fixture with the body. But it also
11 just simply describes inserting the bogie into the body portion of
12 the vehicle.

13 Turning to Slide 30, an interesting point here is that when
14 we met with -- when we deposed Patent Owner's expert, Dr.
15 Fleming, we first talked about his patent, the Vermeer patents
16 -- not his patent -- it's not his patent, that was a mistake. And the
17 Vermeer patents show tracks on their compact utility loader. But
18 there's a sentence or two in there -- it says you could exchange
19 those for wheels. And we asked Dr. Fleming, your patent doesn't
20 describe how to exchange them for wheels. And Dr. Fleming
21 recognized, oh, that's something -- that's a -- it's readily known
22 how to change between wheels and tracks. But when he comes to
23 the KR996 patent, in converting between wheels and tracks, we
24 asked him, so you did not design or engineer or make any
25 modification and attempts to make it work? He said, I did not try.

1 Turning to Slide 31, the next question is whether it's
2 obvious to use engine brackets on the mainframe of the KR996.
3 And at Slide 32, we provided the benefits of using engine brackets.
4 The petition provided, and the expert backed up, that there are
5 many benefits of providing engine brackets on the frame to hold
6 the engine to the frame -- got to hold it somehow. These benefits
7 are never contested.

8 Instead -- turning to Slide 33 -- the Patent Owner again
9 makes a bodily incorporation argument and he -- saying, oh, the
10 brackets on JP705 -- which we used as the example, a reference
11 that showed engine brackets are known in the art and would be
12 obvious to combine them on the KR996 machine. He said, yes,
13 but -- the Patent Owner said, yes, but those are big brackets
14 because that machine's a full size loader, not a compact utility
15 loader, and they wouldn't fit. They're too big for a compact utility
16 loader.

17 Well, we have a lot of responses to that. First of all, I
18 don't believe that JP705 says that it's a full size loader. It may be,
19 but even if it is, just make them a little bit smaller to fit the KR996.
20 What we're saying, it would be obvious to use engine brackets, not
21 obvious to use the exact same size engine brackets on JP705 to
22 KR996. Neither of those two patents are drawn to scale so we
23 don't know what the scale of either of those two. But our expert
24 shows that engine brackets are well known -- are common
25 features. I would say they are fundamental features of attaching an

1 engine to a frame.

2 Turning now to Slide 34, the claims that -- there are
3 many claims in the patents that recite pivot points and they have
4 dimensions D1, D2, D3. And the petition discusses each of those
5 claims individually, at length. I think it's about 30 pages. In the
6 briefing, we do not argue those claims individually. We argue
7 them as a general concept, that whether or not it would be obvious
8 to have low pivot points on the KR996.

9 If you turn to Slide 35, there's some quips from the
10 Patent Owner's briefing that they constantly refer to as low pivot
11 points. And so I suggest that these claims are not stand or fall
12 together, and under the idea of whether it would be obvious to
13 have low pivot points because the Patent Owner has not contested
14 -- some of the claims say D1 is less than something or D2 is less
15 than something. We never briefed or discussed that except for in
16 the petition, which goes in depth why that would be obvious.
17 Instead the Patent Owner says, well, it would not be obvious to
18 move the KR996 points -- pivot points to be lower.

19 So turning to Slide 36, there are actually many reasons
20 presented in our petition for having lower pivot points. And two
21 reasons that I can just state quickly off the top of my head, one is
22 having the pivot points low lowers the center of gravity of the
23 entire machine, which helps to prevent tipping. And also, having
24 the pivot points low -- the pivot points attached to the mainframe,
25 having them low means your mainframe can have less material.

1 Look, your mainframe is made of steel, which can be expensive
2 and heavy. And having the pivot points low means you don't have
3 to have as high of a mainframe to accommodate the pivot points.

4 These benefits of having low pivot points are not
5 contested. Instead, before I go there, on Slide 37, Beltrami
6 -- which is basically I believe to be the oldest case that talks about
7 vertical lift loaders back in 1971 -- Beltrami also talks about the
8 desire to have these pivot points low. And what Beltrami
9 describes is having these pivot points low are result-affecting
10 variables, that lowering the pivot points lowers your center of
11 gravity.

12 And so it's a general desire to have a low center of
13 gravity and Beltrami says lower pivot points is a variable that
14 achieves this. So not only does Beltrami suggest the low pivot
15 points, it explains that having the low pivot points helps you to
16 achieve the low center of gravity.

17 JUDGE JESCHKE: Well, can we talk about that? I'm
18 very interested in that section. And I know what you're talking
19 about is the column 3, 35 to 45, roughly. But that part says that the
20 pivot points can be kept in such a low position. To me, that's a
21 little different than can be moved or something like that. So can
22 you talk about why it can be kept in such a low position supports
23 you all?

24 MR. O'DELL: So Beltrami talks about -- so Beltrami is
25 going from a radial lift loader to a vertical lift loader. I believe

1 keying off the word kept in such a low position, the vertical lift -- I
2 mean, the radial lift loader will have a relatively high pivot point
3 because of the arm -- like a clock. The pivot point on a clock is
4 kind of the center of the clock wherein in a four-bar mechanism
5 that's used for vertical lift, the pivot points can be kept low.

6 I don't believe that -- I don't know that -- I think he's
7 saying it can be kept in such a low position on the vehicle that no
8 supporting frame is needed. So what in a vertical -- in a radial lift
9 machine, you would often have supporting frames to support that
10 higher pivot point, and he's saying it would be kept in the lower. I
11 don't believe it's any more than that.

12 JUDGE JESCHKE: Okay.

13 MR. O'DELL: But I would like to go back that there's
14 -- to Slide 36 that there are certainly uncontested, undisputed
15 benefits of having low pivot points. Our point is that Beltrami also
16 supports our expert.

17 JUDGE JESCHKE: I understand that. So I'm looking at
18 Slide 36. And the second box says low center of gravity. And you
19 cite to that same passage in column 3, 35 to 45 of Beltrami. And
20 I'm trying to understand why that -- to me, I don't know what part
21 of that -- I know it uses the term low position but I don't see that
22 passage as showing there's a benefit to a lower center of gravity.
23 And I understand that Dr. Velinsky talks about -- it looks like at
24 paragraphs 163 to 165. And I'm not addressing that issue. I'm just
25 talking about the second cite that you have there is Beltrami

1 column 3 and I'm trying to unpack why that passage supports you,
2 that's all.

3 MR. O'DELL: I think if we look at the next slide, we
4 were talking with Patent Owner's expert, Dr. Fleming, about this.
5 This first box is Dr. Fleming's answer to a question about center of
6 gravity. And he says, "Well, like I said, when you have all of your
7 support structure, your pivot points down low, then you just have
8 to design the mainframe to support it down low and then your
9 support is lower, so you should lower the center of gravity so
10 hopefully have a more stable machine." So Beltrami may not say,
11 and thus make a more stable machine, but a lower center of gravity
12 provides a more stable machine. And that's explained by the
13 Patent Owner's expert.

14 There's more to center of gravity than just being low.
15 There's also forward and backward movement of the center of
16 gravity. Not only do you not want it low - prevents it from tipping
17 side to side, which is important -- but low forward and backward
18 also prevents it from tipping forward and backward when you're
19 lifting things. All of those are valid concerns. But having low
20 pivot points certainly lowers it to prevent the side-by-side teaching
21 -- tipping, I'm sorry. Patent Owner's expert, Dr. Fleming, says that
22 having a low center of gravity is a fundamental principle of design.

23 Turning to Slide 39, the Patent Owner also raises another
24 bodily incorporation argument. And on this slide, Patent Owner's
25 expert, Dr. Fleming, again refers to his self-generated CAD

1 drawing and argues that you can't lower the pivot points for
2 KR996 because there's stuff in the way. This argument fails for
3 many reasons.

4 But before we get into bodily incorporation, I think I see
5 plenty of gray on this figure that you could lower that pivot point
6 and be just fine, but that's just me looking. But there's other
7 reasons this argument fails. First of all, if you're using tracks, you
8 don't even have some of this component. Dr. Fleming said that
9 pink cylinder is a motor and if you have tracks, the motor won't be
10 there. The motor will be on a drive sprocket.

11 Second, Dr. Velinsky said it's common that designers are
12 able to accommodate these kind of things. And he said you can
13 have a chain to -- the motor can be driven -- drive the wheel with a
14 chain -- so you wouldn't even have to have the motor there. All of
15 this to say is that a designer can find a place to lower the pivot
16 point on KR996.

17 Turning to Slide 40, there's been some discussion about
18 what are called kinematic diagrams. The Petitioner's expert, Dr.
19 Velinsky, provided a kinematic diagram -- and that showing the
20 KR996 compact utility loader with low pivot points and said -- and
21 had a little simulation. These are stick figure drawings and had an
22 example that looks as if this can work with lower pivot points. It
23 still does the vertical lift with the pivot points all arranged in a line.

24 And Patent Owner's expert, Dr. Fleming, took that
25 -- what he said was that same stick figure drawing, that kinematic

1 diagram -- and he ran it and he said, hey look, the bucket hits the
2 front wheels when it's all the way down, and the back of the arms
3 are over there by the user. Well I think all this says is that Dr.
4 Fleming was able to come up with an arrangement of components
5 that doesn't work. He refused to try to make anything work.

6 Finally, on Slide 41 -- it's going backward -- not only is
7 the 1971 Beltrami patent evidence that vertical lift loaders were
8 known in the art, Dr. Fleming states that prior to 2015, there was a
9 wide variety of full-size skid steers or loaders with vertical lift on
10 the market. Dr. Velinsky, Petitioner's expert, provides similar
11 testimony, that four-bar mechanisms, as used to implement vertical
12 lift, were introduced early in his undergraduate classes at Cal
13 Davis.

14 So there's a reasonable expectation of success of having
15 low pivot points with four bar -- on a four-bar vertical lift
16 mechanism would be successful. In fact, it was very commonly
17 used in other machines. And if there's no more questions, I will
18 reserve the rest of my time for rebuttal. Okay. And am I correct?
19 There's 41 minutes I have for rebuttal?

20 JUDGE PETRAVICK: Yes. It's 41 minutes and 39
21 seconds.

22 MR. O'DELL: That's the whole hour and a half or just --

23 JUDGE PETRAVICK: I started at -- the clock at 90
24 minutes.

25 MR. O'DELL: Okay. So that's for --

1 JUDGE PETRAVICK: That is your rebuttal --

2 MR. O'DELL: And that includes the secondary
3 considerations?

4 JUDGE PETRAVICK: -- and your secondary
5 considerations.

6 MR. O'DELL: Okay. Thank you.

7 MR. BROPHY: Good morning.

8 JUDGE PETRAVICK: Good morning.

9 MR. BROPHY: I guess my timer starts now. Very nice
10 to see you all. My name is Richard Brophy. I'm the attorney for
11 Vermeer. And I guess my colleague started with a little
12 introduction about his client so I'll do the same for mine. Vermeer
13 is a company that has been in business in the United States for a
14 very, very long time. Their base of operations is in Pella, Iowa.
15 They manufacture, much like Kubota, large construction
16 equipment, drilling equipment, and so forth. We employ lots of
17 people in the United States -- I know that's an interest these days.

18 I want to start by kind of zooming out and framing this
19 issue a little bit. My colleague's presentation talked a lot about
20 kind of known things: tracks, loader arms, four-bar linkages. But I
21 would submit that the question that you're here to resolve today is
22 not whether those things are known generically, or even whether
23 they could be plopped together in a Mr. Potato Head style format
24 -- which I submit is what my colleague is suggesting -- but rather
25 following exactly what they're arguing in the grounds of their

1 petitions, which is to take KR996 with all of its teachings and
2 modify that machine -- the teachings in that reference -- in the
3 ways that they're suggesting to result in the claims of our patented
4 device. That's the real question.

5 We don't dispute that tracks are known in the industry.
6 We don't dispute that a four-bar linkage was known in the
7 industry. What we dispute here is whether some skilled artisan, at
8 the time of the filing of our patent applications, would have been
9 motivated to take KR996, with all of its teachings, and result in a
10 machine-- by combining it with Bares, combining it with Beltrami
11 result in a machine that actually satisfies the limitations of our
12 claim.

13 There's a lot of material here. I spent a lot of time trying
14 to figure out how to succinctly describe what the issues are and
15 what our position is on them. So I'm going to do my best to do
16 that today.

17 I think there are three fundamental things that Kubota
18 needs to prove here. One of them is, does the KR996 machine
19 itself and the disclosure of KR996 teach a mainframe that has
20 linkages and actuators attached to it? Does it teach that or not?
21 And a subsidiary question there is, of course, what does a skilled
22 artisan think a mainframe is and what isn't it? That's question
23 number one.

24 Question number two, is there a motivation to combine
25 KR996 with Beltrami in the manner described by the Petitioner?

1 And my colleague spoke about this a little bit. More specifically,
2 whether that combination, even if someone would be motivated to
3 do it and even if they had a reasonable expectation of success,
4 would they have done it in a way that yields the specific
5 requirements for distances that are specified in our claims? It's not
6 enough to just say, move the things down. They have to show that
7 the specific ratios that are claimed in our patent are actually
8 satisfied and that some skilled artisan would have necessarily had a
9 machine that resulted in that outcome.

10 And you heard my colleagues say they didn't address the
11 claims individually. It is their burden to address those claims
12 individually, and they did not. It is not enough for them to say,
13 just move everything down. So that's the second one,
14 KR996+Beltrami.

15 The third fundamental issue is, what about
16 KR996+Bares? And Bares is the reference that deals with tracks.
17 You've heard about tracks being known and they're
18 interchangeable with wheels. Generally speaking, yes, compact
19 utility loaders can use both wheels and tracks. But that's not the
20 question here. The question is, what about KR996? Because
21 KR996 is not your typical compact utility loader. It has this
22 complicated mechanism which it touts as the key innovation. It is
23 imbued with that key innovation -- that detachability.

24 And the question really is, would a skilled artisan be
25 motivated to combine that reference with that teaching, that

1 detachability and how it works with tracks? And would they be
2 reasonably successful -- have a reasonable expectation of success
3 in doing so? That's the real question. We don't dispute that tracks
4 are known.

5 So I'm going to go into each of those three in detail.
6 Before I get there though, I want to talk a little bit about Kubota's
7 expert. There's a lot of information about this expert in our
8 briefing, and I think it bears repeating here, because everything
9 that you heard from my colleague about what a skilled artisan
10 would do is coming either from that expert, or in many instances,
11 from just the attorneys.

12 A peculiarity, at least from my perspective in this case, is
13 that Dr. Velinsky didn't ever react to any of the expert testimony
14 given or the expert declaration given by our expert, Dr. Fleming.
15 So they put forth their petition, they put forth a declaration from
16 Dr. Velinsky. Our expert reacted to all that stuff, talked about
17 motivation to combine, likelihood of success, took on the designs
18 that Dr. Velinsky presented. It suggested our Dr. Fleming did that
19 himself. He was merely modeling what Dr. Velinsky put forth as
20 the result of his combinations.

21 But none of that material that Dr. Fleming prepared and
22 none of the testimony that he gave, Kubota ever even gave to its
23 expert. So you have zero testimony -- zero -- from Dr. Velinsky,
24 the Petitioner's expert, relating to any of the opinions -- any of
25 them -- provided by our expert, Dr. Fleming. He is 100 percent

1 unrebutted.

2 So what you did hear from Dr. Velinsky is this. The
3 application of the construction of mainframe that he applied was
4 overly broad. What he adopted for his analysis is the construction
5 of mainframe that admittedly, Vermeer forwarded in prior
6 litigation against Toro. The Board, in its institution decision,
7 rejected that construction and adopted a different construction for
8 the term mainframe.

9 Dr. Velinsky has never applied that construction in this
10 case. Everything you have from him is based on an interpretation
11 of mainframe different from the one that the Board has indicated is
12 the correct one. He said in deposition under oath that he used our
13 prior definition, the one that was rejected, and that he used it
14 throughout all of the opinions that he assessed in this case. So you
15 have zero opinion testimony from a skilled artisan applying the
16 mainframe definition that the Board has asserted in this case
17 -- zero -- from the Petitioner.

18 In his deposition, just to demonstrate the breadth of that
19 interpretation, I gave him a figure from the KR996 reference. And
20 that's what's on the slide in front of you, Slide 50. And I asked him
21 to take a pen and identify with that pen which portions of this
22 disclosure he considered to be the mainframe. And he highlighted,
23 I think, what we would all expect to see -- see on the left, there's
24 some scribbles around the actual main body of the machine, 16, as
25 it's designated in the patent. But then he also scribbled on the

1 Fixture 41, which we contest is not part of the mainframe for
2 reasons I'll discuss. But in addition to that, he even highlighted,
3 pardon me, the bogie that the loader attachment sits on when it's
4 not being used.

5 That is the breadth of the construction of mainframe that
6 their expert applied for all of the opinions he expressed in this
7 case. Now, during his deposition, I confronted him with this and
8 said, wait a minute, the Board gave this other definition. He said,
9 yeah, yeah, it's all the same, it wouldn't change anything. All the
10 definitions are the same. Is that meaningful testimony from an
11 expert on the issue of mainframe?

12 Let's switch to talking a little bit about Velinsky's
13 obviousness analysis, the methodology that he applied. Now,
14 KR996, the key inventive feature of KR996 is this detachability,
15 the concept that you used to have individual machines. You got a
16 breaker and you also have this compact utility loader. It's
17 cumbersome. It's expensive. You've got a machine sitting in the
18 corner while another one's being used. Let's put them together and
19 have one machine that can do both things. That is what KR996
20 describes and invented.

21 When Dr. Velinsky is proposing all of these changes, one
22 of the things he needs to do to conduct a proper obviousness
23 analysis is determine whether that key inventive feature that a
24 skilled artisan would understand from KR996 is going to be
25 retained in whatever combination he supposes could occur. And

1 there is a bevy of case law that says at a bare minimum, you need
2 to weigh what you're giving up in exchange for what you're getting
3 when you put obviousness combinations together.

4 Did Dr. Velinsky do that weighing? Absolutely not. He
5 didn't even consider in all of his obviousness combinations
6 whether this core inventive feature of KR996 would even be
7 retained. I have his deposition testimony on the screen here, Slide
8 45. I asked him whether he considered, in light of his motivation
9 to combine assessment, whether the device would retain the
10 connect-disconnect feature. And he said, I haven't really
11 considered that. That's the core feature of the KR996 reference.
12 He's not bothered with that. He doesn't care if it comes or goes.
13 That's not a proper obviousness analysis.

14 What about when he considered the obviousness of
15 combining KR996 with Bares? Bares is the tracks. And the
16 question is, would some skilled artisan be motivated to combine
17 KR996 with tracks like those taught in Bares? Now, of course,
18 again, one of the key features of KR996 is this interchangeability.
19 And the KR996 reference teaches that a necessary element of that
20 interchangeability is this bogie and the guardrails at the bottom
21 that interface with the wheels and tires of the machine. Did he
22 consider whether the tracks would be compatible with that bogie
23 and that guardrail system? No, he did not.

24 I'll submit that before the deposition started, he didn't
25 even know there were guardrails and didn't even know there were

1 liners. You heard my colleague say in his declaration that he
2 addressed the liners and guardrails, not true. The word liner does
3 not appear in his declaration. The word guard does not appear in
4 his declaration. The word rail does not appear in his declaration.
5 He didn't look at this and yet he's submitting a declaration and
6 Kubota is arguing that someone would have obviously combined
7 these two references. He didn't even look to see whether the
8 combination would work to achieve the fundamental purpose
9 undergirding the KR996 system. He didn't even look at it. Sorry
10 for all the text on the screen. It's a lot of deposition testimony.

11 What about his analysis of Beltrami? Beltrami is, what
12 my colleague say, a 1970s article about four-bar linkages. When
13 Dr. Velinsky was assessing whether you would combine KR996
14 with that Beltrami reference, did he look to see whether moving
15 pins around on KR996 would frustrate or complicate or destroy
16 that key fundamental connect-disconnect feature of KR996? No,
17 he did not. He admitted in testimony he didn't even design the pin
18 locations. He didn't even look at where they could go or how they
19 might interface with the various internal components of the
20 machine. He let Kubota's attorney decide where the pins would
21 go. He let Kubota's attorney decide where there might be conflict
22 with internal parts on the machine and then let Kubota's attorney
23 design the linkage and the articulation of it.

24 This is his testimony on that -- Slide 43 of our
25 presentation. Ms. Lyle is the individual who did this work. And

1 my question was, did you discuss the other components of the mini
2 skid steer that would need to be accommodated by those new pivot
3 points? And by other components, I'm referring to engines,
4 hydraulic pumps, motors, things of that nature. He said, nope, I
5 left the specifics to the person who was moving the points around.

6 That's the expert's job, to decide whether the points are
7 going to be moved. It's the expert's job to know what's in the
8 machine and where there might be conflicts between those new
9 pivot points and the elements of the machine. Kubota's attorneys
10 don't know that stuff. You have zero testimony from a skilled
11 artisan from Kubota's side addressing whether those pin locations
12 are in the right place, whether they could be moved, how they
13 might interface with various components inside the machine. You
14 have zero testimony from them on that issue. That is not a proper
15 obviousness analysis.

16 You don't have any expert testimony on whether
17 someone would be truly motivated to combine it and also whether
18 there would be any expectation of success, because no one has
19 looked at whether you could move these things down and retain
20 the detachability feature of KR996 or whether you could move
21 them down and get around all the other parts that are necessarily
22 inside these compact utility loaders. Zero testimony on that issue.

23 Now, one of the reasons that you didn't hear from Dr.
24 Velinsky on these things is because he doesn't know anything
25 about these compact utility loaders. I asked him in his deposition,

1 did you inspect any of these machines? No, he did not.

2 JUDGE PETRAVICK: Counsel?

3 MR. BROPHY: Yes, ma'am.

4 JUDGE PETRAVICK: What was the definition of a
5 PHOSITA that you proposed?

6 MR. BROPHY: So there have been -- I think it's
7 consistent throughout both this case and the Toro case. But
8 essentially, it's an individual -- going from memory here, but an
9 individual with an engineering degree and two years of experience
10 in the field.

11 JUDGE PETRAVICK: In the field, but not two years of
12 experience with a compact -- a particular compact loader as
13 opposed to a loader?

14 MR. BROPHY: I'd need to look at the specific definition
15 to answer that question.

16 JUDGE PETRAVICK: So if I was looking at the record
17 and it seemed, I recall, that both parties sort of agreed on the same
18 level of ordinary skill in the art, are you arguing that Petitioner's
19 expert Velinsky is not a PHOSITA -- does not meet that definition
20 of a PHOSITA?

21 MR. BROPHY: We do not take issue with his -- well, let
22 me back up and say that a little differently. The reason that, in my
23 view, he's not a PHOSITA is because one of the things that a
24 person with an engineering degree and two years of experience
25 would be able to do is, for example, CAD drawings.

1 JUDGE PETRAVICK: So you're now modifying the
2 definition of a PHOSITA to include a person experienced with
3 CAD drawings and a person experienced with specific compact
4 loaders like the mini ones. But you didn't propose that in your
5 definition. Isn't that slightly contradictory?

6 MR. BROPHY: Our position on this is anyone who has
7 an engineering degree and two years of experience in the field
8 would be proficient in CAD. You learn CAD in your
9 undergraduate engineering classes.

10 JUDGE PETRAVICK: So is Dr. Velinsky -- not have
11 two years' experience in the field?

12 MR. BROPHY: He has two years of experience in the
13 field --

14 JUDGE PETRAVICK: And the engineering degree?

15 MR. BROPHY: -- and he has an engineering degree.
16 But his engineering degree is so old he never used CAD.

17 JUDGE PETRAVICK: I'm sorry. It seems like you're
18 now modifying your definition of a PHOSITA and putting
19 something that's different than what's in the paper.

20 MR. BROPHY: Yeah.

21 JUDGE PETRAVICK: And your arguments seem to go
22 to Velinsky doesn't have things in excess of the PHOSITA
23 definition that you proposed.

24 MR. BROPHY: I think that's a very fair criticism.
25 Here's how I would react to that. These are kind of a yin and a

1 yang. If the PHOSITA is so simple, doesn't have CAD experience,
2 and someone like Dr. Velinsky satisfies those requirements, then
3 the reasonable expectation of succeeding in making the changes
4 that they would propose does not exist because the person who is
5 undertaking that challenge isn't up to the task.

6 JUDGE REIMERS: Well, Dr. Velinsky is testifying as
7 to the time the invention is made, correct?

8 MR. BROPHY: Yes.

9 JUDGE REIMERS: Right. And these CAD drawings
10 that are in this record are not from that time period, right?

11 MR. BROPHY: It depends on which ones we're talking
12 about. The ones that Dr. Fleming created certainly were not.
13 However, any engineer undertaking to either make one of these
14 machines from whole cloth or to design a machine informed by
15 KR996 and informed by any of these other references would 100
16 percent use CAD to do that.

17 JUDGE PETRAVICK: And where is the evidence of
18 that?

19 MR. BROPHY: Of what? I'm sorry.

20 JUDGE PETRAVICK: That 100 percent would use
21 CAD to do that.

22 MR. BROPHY: All --

23 JUDGE PETRAVICK: The PHOSITA, as you've
24 defined, would have 100 percent CAD experience.

25 MR. BROPHY: The --

1 JUDGE PETRAVICK: Actually, in -- like, what's the
2 -- 2015?

3 MR. BROPHY: I think if you look at the record before
4 the patent office in both the original prosecution and the various --

5 JUDGE PETRAVICK: I'm going to need a specific cite
6 to wrap to the record.

7 MR. BROPHY: Some of those --

8 JUDGE PETRAVICK: Maybe you could have one of
9 your colleagues look it up --

10 MR. BROPHY: That would be great.

11 JUDGE PETRAVICK: -- and tell us later.

12 MR. BROPHY: Yes, ma'am. Thank you. I'll do that.
13 So let's see, next -- one of the other things that is necessary for a
14 proper objective indicia analysis -- pardon me, for proper
15 obviousness analysis is assessing the secondary considerations of
16 the objective indicia of nonobviousness. And Dr. Velinsky also
17 testified he did none of that, that he didn't review the vast majority
18 of the objective indicia evidence and that it would have played no
19 role whatsoever in the outcome of his obviousness analysis.

20 Let's see. Let's go now here -- I'm going to go to Slide
21 35. So another aspect of Dr. Velinsky's perspective on this case
22 that I think is very important is his application of even what a
23 compact utility loader is. The patent itself articulates what a
24 compact utility loader is, and it cites to various standards relating
25 to that issue. You can see that highlighted on the screen here.

1 And distilled down, essentially, a compact utility loader
2 is a machine that has an operator station that you can either ride on
3 or walk behind. It has a -- it's self-motivated, meaning it has its
4 own engine and moves on its own. And it has loaders -- it has
5 arms that can have attachments to move things around. Those are
6 kind of the three -- if I could distill it down to those core, its
7 essence, those are the three things.

8 Dr. Velinsky contends he has experience with compact
9 utility loaders. He thinks what I have on the screen now is a
10 compact utility loader. This is not self-powered, this does not have
11 an operator station, you can't ride on it, it doesn't have any loader
12 arms. So his assessment of what a compact utility loader is
13 -- when he put himself in the mindset of a skilled artisan -- is
14 completely different from what the patent teaches is actually a
15 compact utility loader.

16 JUDGE JESCHKE: Counsel, I'm looking at the
17 discussion here about the level of skill in the art. And I believe
18 that your brief said in the design -- two years in experience in the
19 design of machines.

20 MR. BROPHY: Mm-hm.

21 JUDGE JESCHKE: Why is that not a machine -- what's
22 on the slide right now?

23 MR. BROPHY: This isn't really an assessment of his
24 qualifications as a skilled artisan, but rather when he's analyzing
25 whether a skilled artisan would think to combine A with B, what

1 does he understand a compact utility loader is? What information
2 is he pulling in? What skill set does he think that person has?
3 What challenges would they be grappling with? He thinks this is
4 within that field of analysis. And our position is he's off base on
5 what that field is.

6 And the last thing I'll say on this is -- I touched on this
7 earlier, but we're in this odd situation where, in addition to the
8 issues that I've already identified, he didn't have access to Dr.
9 Fleming -- our expert's analysis and never responded to it. He
10 didn't even know that there was a Dr. Fleming -- that Vermeer
11 even had an expert to address these issues. He was completely
12 caught off guard in the last deposition we took of him on that issue
13 after we had issued our expert report.

14 There is a case that I'd like to point out here with respect
15 to that issue, which is the *Juniper Networks* case. We've cited it in
16 our briefing. Essentially, that case stands for the proposition that
17 when the Patent Owner presents expert testimony on something
18 and it is un rebutted by the Petitioner, that that is, quote,
19 "substantial evidence against the Petitioner." And that's the
20 situation that we have here. No evidence from Dr. Velinsky on
21 any of the points made by Dr. Fleming or the arguments put forth
22 in our submissions.

23 I'm going to switch gears now and talk about KR996.
24 We've already talked about it a little bit but I want to focus on
25 some key aspects that are, I think, very germane to the obviousness

1 inquiry that we're all talking about today. As I mentioned already,
2 the key aspect of this invention is the detachability. So as you can
3 see on the screen, my Slide 6, you see you have a main machine,
4 which is on the far left; you have a breaker attachment, which is
5 shown as number 60; and then you have a loader attachment,
6 which is shown as number 40.

7 And this machine has kind of three fundamental different
8 modes of operation. You've got the machine in its naked form
9 where it's just driving around, you have the machine in its breaker
10 form, and the machine in its loader form. The main body of the
11 machine, as it's mentioned in KR996, is highlighted in green here.
12 The main body of the machine is what houses the engine, moves
13 the thing around, what has wheels on it, et cetera. It is also the
14 only part of the machine that is always present during operation.
15 The other portions in white that you can see, both the loader and
16 the breaker are left aside during various portions of the operation
17 of the machine.

18 Another thing that I want to mention up front is this
19 camming -- what I call a camming mechanism for attaching these
20 different attachments. So highlighted in red on my Slide 8 is this
21 camming mechanism, which is part of the main body of the
22 machine. Essentially what happens is this bogie, which is the
23 wheeled contraption on the right that the loader unit is sitting on, is
24 moved into position and is actually kind of pulled in by the
25 machine on the left.

1 So what happens is there are plates which I'll show you
2 here, highlighted in very, very light blue -- there are plates that are
3 drawn into the machine. And those plates have a slight angle to
4 them and it's to help guide this unit into a small opening -- a slot in
5 the actual main body of the machine -- to accept it.

6 And then if I go back to this previous slide, there's a
7 mechanism down here that -- let's see if I can annotate this, just a
8 moment. There we go. There's a mechanism down here which
9 uses this hydraulic ram to actually lock those blue plates I just
10 showed you into place while it's being operated. And then when
11 it's time to switch out a different attachment, the hydraulic ram is
12 moved the other direction, the camming mechanism releases it, the
13 attachment is back on the bogie, and then the other attachment
14 comes in, is installed.

15 Another important aspect of how this works is the actual
16 bogie itself, which I have highlighted in red on my Slide 11. That
17 bogie -- and there are two of them, one for each attachment -- has
18 casters on it. You can see these wheels, for example, 42 on the
19 bottom. And when it's time to install one of these tools on the
20 machine, the machine drives up to that bogie. And as described in
21 the patent, the wheels of the machine interface with these rails that
22 run along the side of the bogie. And the wheels grab that bogie
23 using the sidewall of the tire, grab that guide rail, and pull the
24 bogie into engagement with the main body of the machine.

25 And the patent teaches the importance of these things it

1 calls liners. And the liners are actually inside the guardrails, which
2 are on each side. And the liners allow you to incrementally change
3 the spacing between the guide rails so that it perfectly aligns with
4 the inside wall of the tires so that the tires can properly grip that
5 guide rail. As I've already mentioned, my colleague suggested that
6 Dr. Velinsky assessed this during his opinion. He didn't mention
7 one word about any of this stuff. I submit didn't even know that
8 this was even an operation disclosed in KR996 until the deposition
9 when I directed his attention to it.

10 Why is that important? It's important because it factors
11 into how a skilled artisan would understand what this machine can
12 and would be used for. As we've mentioned in our briefing, these
13 caster wheels are very small. And the type of alignment that we're
14 talking about here is very specific. This was all discussed in Dr.
15 Fleming's report, unrebutted by Dr. Velinsky. But we're talking
16 about very precise interactions between KR996 machine and the
17 bogie and the attachment to be installed.

18 And what happens if you're on grass, let's say? The
19 caster wheels are going to sink into that grass. That's going to
20 cause them not to roll. It's also going to cause them to fall low,
21 which means the guide rails aren't engaging with the wheels
22 anymore and the machine can't pull the bogie in because the caster
23 wheels have sunk. That also means that those light blue brackets
24 on the attachment don't align with the slot and it can't install.

25 You also have similar problems when you're on rocky

1 terrain or undulating terrain. Anything except a hard, flat surface
2 that is even is going to cause these alignment problems. And Dr.
3 Fleming went through this in detail again, un rebutted by Dr.
4 Velinsky. So the only skilled artisan testimony you have at your
5 disposal in this case is Dr. Fleming saying this thing doesn't work
6 anywhere but on a hard flat surface.

7 Now, my colleague pointed to paragraph 2 of the KR996
8 disclosure to suggest that it teaches that the machine can be used
9 for road maintenance or snow removal, or towing, gardening,
10 farming. That's not true. Look at paragraph 2. It says, generally,
11 mini loaders or skid loaders are developed to perform in those
12 areas. It didn't say this invention performs in those areas. It's
13 talking about mini skid steers at large. There is nothing in the
14 patent that says this device can be used on a farm or for snow
15 removal. It talks about deconstruction work in a building, flat,
16 concrete floor. And again, the only evidence you have from a
17 skilled artisan is Dr. Fleming's testimony on this. Dr. Velinsky is
18 silent on these issues.

19 Now, during his deposition -- and we pointed this out in
20 the briefing -- I confronted Dr. Velinsky with these issues and he
21 agreed with me. He said, yeah, the casters would get stuck. Yeah,
22 that is a big problem. We discussed what happens when you
23 operate this machine in a muddy environment. Mud gets caked on
24 everything with these compact utility loaders. And when mud gets
25 caked on the inside of those wheels, it changes the spacing

1 between the wheels, and that fine alignment that we were talking
2 about with the liners and the guardrails goes out the window. And
3 suddenly, the thing doesn't work, you can't change attachments
4 anymore.

5 Kubota asserts, oh, well, you would just change the
6 attachment somewhere else. But that mud is going to be brought
7 to the somewhere else. So this machine is allergic to being around
8 mud. The spacing doesn't work, the guide rails don't work, the
9 liners -- that fine adjustment goes out the window. These issues,
10 which I'll talk about again, relate primarily to motivation to
11 combine and the reasonable expectation of success. When you
12 take KR996 with the specific teachings of these attachments and
13 the necessity that it operates in a hard flat surface, and then you
14 say let's put tracks on it, why would anyone put tracks on it?

15 JUDGE JESCHKE: Counsel?

16 MR. BROPHY: Yes, sir.

17 JUDGE JESCHKE: Is there any reason you can't use
18 tracks inside on a --

19 MR. BROPHY: You can. You can use tracks inside.
20 However, one of the other points that I'll make later is when you
21 put tracks on this machine, there are no longer tire sidewalls. And
22 the tires -- the wheels and tires are what grab onto those guardrails
23 -- or guide rails, rather, and pull the machine in. When you --

24 JUDGE JESCHKE: Well, they don't really grab onto it.
25 They act as four -- or maybe eight, depending on how you're

1 counting, points that as the main Body 11 portion where the user is
2 standing drives up to the bogie into the fixture, they're going to, as
3 you said, use the inside of those tire 14 to align and move under
4 the vehicle. It seems like you're still going to have structure there
5 in the form of tracks.

6 So I'm trying to understand why the necessity for -- I
7 understand how it's, you know, disclosed in KR996 but I'm trying
8 to unpack why there's such a big problem here. You mentioned
9 there's an issue with height and such, but why those tracks from
10 Bares or, you know, that teaching would undermine that alignment
11 issue.

12 MR. BROPHY: If I may, I'll have to find --

13 JUDGE JESCHKE: And you can get to it later. If not --

14 MR. BROPHY: I will.

15 JUDGE JESCHKE: I'm just -- that's something of
16 interest to me as to --

17 MR. BROPHY: Understood.

18 JUDGE JESCHKE: -- why that truly undermines the
19 usage here.

20 MR. BROPHY: Understood. I'll address that and find
21 the citation for it. The one thing I can comment on immediately
22 -- and this is also in our briefing -- is that those caster wheels, you
23 can see, they lift the guide rails up. Necessarily, those guide rails
24 can't be right on the ground. They have to roll. And so when you
25 put tracks on this machine, the tracks go under the guide rails. So

1 there's no track there to guide it, if you will, there's space. And
2 that's what Dr. Fleming testified to. And again, that's unrebutted,
3 skilled artisan testimony on this issue.

4 JUDGE JESCHKE: It seems to me that you're still going
5 to have -- I mean the track's going to go above the top of the guide
6 rail. I understand you're saying that there's going to be less points
7 where the guide rails 38 are going to contact the inside of the tires,
8 let's say. But you're still going to have -- because those tracks are
9 going to go above and below, overall, the bogie 30, you're still
10 going to have at least four points, right?

11 Two in the front, two in the rear, that it's going to
12 -- maybe it won't get all the way back to the rear ones, but at least
13 two points where you're going to have potential alignment. And
14 maybe your argument is that it's going to come in cockeyed and hit
15 the side or something. And I see you're nodding, so maybe that's
16 the position. So if you could unpack that --

17 MR. BROPHY: Yes, please.

18 JUDGE JESCHKE: -- as much as your briefs support
19 the argument, I want to understand why that is an issue.

20 MR. BROPHY: Understood completely. So the one
21 thing I'm going to say right at the outset is it is -- and this is an
22 experience I've had from dealing with these machines and the
23 engineers for years now. And I say this with 100 percent respect
24 for all three of the judges. Unless you're a skilled artisan and you
25 grapple with these issues as an engineer, as a skilled artisan, you

1 don't really appreciate what issues might arise. And I think that's
2 why it's so important to hear from people like Dr. Fleming on this
3 issue, who does work with these machines day in and day out.

4 So I have fallen prey to having a little bit of like a, you
5 know, I can do this, too. And there are some things that I've
6 learned throughout this that were a surprise to me, even that caused
7 problems that I didn't appreciate. But with that said, I think the
8 fundamental thing that I'll say at this point on this issue is when
9 you have treads instead of wheels, the treads, one, they move from
10 side to side. In there -- they have like an alignment rib inside, but
11 they move around.

12 And we've talked about these liners that are a very
13 specific spacing. Those treads don't respect that spacing the way
14 that a wheel does, which is more fixed in place. Also, the treads
15 are lower. Dr. Fleming talked about the fact that it would be under
16 the guide rails. I understand your point, but I would say that I
17 don't think there will be four points of contact.

18 And I think I have a slide on this, if you'll permit me.
19 When you look at this slide, you can see where the guide rails go.
20 They don't go all the way to the back of the machine. It stops
21 before the back of the machine. So maybe there are only two
22 points, which again causes these side to side issues.

23 But I'd like to address your question about whether it's
24 grabbing or whether it's just aligning. I'll get back to that in my
25 next section, if that's okay. I'll also mention that -- pardon me, I'm

1 trying to reorient myself here. So when I asked Dr. Velinsky about
2 this specific issue-- this was the testimony that he gave on Slide
3 46 -- he said, I don't know if it could work or it wouldn't work, I
4 haven't assessed it. I want to make the point that Dr. Fleming has
5 assessed this and said it wouldn't work. Their expert has said, I
6 have no idea.

7 I'd like to switch now to talking about, finally, some
8 specific issues with the references. I'd like to start with a
9 discussion about whether the KR996 reference teaches a
10 mainframe that has linkages and actuators attached to it. And I
11 wanted to start this section by talking about the institution decision
12 that the Board issued and the question that was framed in that
13 decision. The question was whether one of ordinary skill in the art
14 at the time of the invention would have understood Fixture 41 in
15 KR996 to be part of a mainframe. That's the way that the Board
16 has framed this question.

17 I think to answer that question, the first thing we need to
18 do is understand what a mainframe is to a skilled artisan and what
19 the various materials that are before the Board say in that regard.
20 One of the issues or one of the references I think we should look at
21 is the patent itself. And our briefing has guidance about where in
22 the patent this is addressed.

23 For example, the patent talks about a drive mechanism
24 that is attached to the mainframe. It talks about an upper frame
25 where the controls are being attached to a mainframe, talks about

1 an engine and tracks and wheels attached to the mainframe, talks
2 about actuators and linkages attached to a mainframe. So it's a
3 very confined thing. That mainframe is always present when the
4 machine is operating. And that's what the '386 Patent discloses
5 about this.

6 I'm going to bring up, if I may, just a passage from the
7 '386. This is column 2, lines 45 through 50. And it says the
8 compact tool carrier includes a loader, supported by a mainframe
9 10. The loader includes an attachment plate for interchangeably
10 attaching any number of tools. And then it says in this regard such
11 interchangeable tools do not form part of the compact tool carrier
12 unless stated otherwise. So the patent says you've got the machine
13 and then you've got things that attach to the machine, and the
14 machine has the mainframe. The attachments are something else.

15 If we look at prior art, we see the same thing. This here
16 is a U.S. Patent '398 that we cited in our briefing. This is a large
17 full size skid steer machine. You can tell because the operator
18 station's in the middle, the engines behind the operator -- so very
19 different in size and configuration. And this patent teaches the use
20 of a bucket that goes on the front of the skid steer machine.

21 So basically what you're doing -- I can use my little
22 highlighter here -- is you're attaching. You can see the attachment
23 plate 50 here, that's part of the machine. Attachment plate 50
24 hooks into this opening. And this entire thing, the blue highlighted
25 part, the chair, the controls and the bucket, everything is an

1 attachment that latches onto that machine. And in this patent, just
2 like it says in the '386, it also says, hey, there's this mainframe
3 -- that's 16, that's red -- and then you've got a backhoe attachment
4 with a carrier frame. And it calls that thing, that blue highlighted
5 part, something else. It is not part of the mainframe.

6 If we look at KR996 for a moment, which is also prior
7 art, it talks about the main body and then it talks about that Fixture
8 41. It doesn't call Fixture 41 a mainframe or part of the main
9 body. It's something separate.

10 You heard testimony from -- didn't hear it, but you read
11 testimony from Dr. Fleming on this very same issue. He went into
12 length about what a mainframe is and what it isn't. He was
13 deposed on this issue and you've seen some of that testimony as
14 well. His position is exactly consistent with everything that you've
15 seen here. The mainframe is something that, during all phases of
16 the operation of the machine, is present on the machine. You don't
17 leave part of the mainframe and drive away. That's not how this
18 works.

19 I've shown this slide already but just to reinforce the
20 concept, the green part, which is identified as the main body of the
21 machine in KR996 on our Slide 7, is the only part that you are
22 always operating. The parts that aren't highlighted, you sometimes
23 leave aside and drive away from. And no skilled artisan is going
24 to call something you leave aside and drive away from a
25 mainframe.

1 Now we've heard argument from Kubota that when the
2 machine is configured like it is on the left, with the loader
3 attachment installed, suddenly that Fixture 41 becomes part of the
4 mainframe. I would submit to you that that is a violation of the
5 *Panduit* case. And I'm going to read you a citation from that
6 *Panduit* case, a prior patent must be considered in its entirety, i.e.,
7 as a whole, including portions that would lead away from the
8 invention in suit.

9 What Kubota is doing, when it argues that you should
10 only pay attention to the picture on the left, is asking you to put
11 blinders on and not read part of KR996. They want you to assume
12 a skilled artisan would only read the part of KR996 that shows that
13 picture but wouldn't have any understanding about the fact that it's
14 detachable.

15 That is a violation of *Panduit*. You can't pick and choose
16 parts from a reference and ignore the rest. A skilled artisan would
17 read all of KR996 and would understand that that Fixture 41 is
18 removable and that during operation you leave it aside and drive
19 away from it. And based on all the evidence in this case, all the
20 Fleming testimony, the prior art references, the teaching in the
21 '386, everything consistently teaches that that Fixture 41, no
22 skilled artisan would call that a mainframe.

23 I've mentioned maybe a hundred times now that you
24 haven't heard from Velinsky on pretty much anything. Velinsky
25 didn't respond to any of the points that Dr. Fleming made in his

1 report on these issues. He hasn't commented on that prior art
2 machine that has the bucket that attaches to the full size Bobcat.
3 He hasn't commented on any of the citations to the '386 that we
4 identified. He hasn't commented on the distinction between the
5 main body and the fixture in the KR996 reference. He has
6 nothing, zero from him.

7 What you did receive is attorney argument from Kubota's
8 attorneys about what they think a skilled artisan would call a
9 mainframe. That is not evidence in this case. What they cite to
10 -- the attorneys -- is a Bobcat service manual. And it's excerpted
11 -- there are pieces of it in the briefing. In that Bobcat service
12 manual, there's a title at the top of the table of contents that says
13 mainframe and below it there are a list of a bunch of different parts
14 of the machine. And Kubota's attorney's argument is that that
15 means a skilled artisan would understand that the mainframe
16 comprises all those things.

17 There are two problems with that position. One, that's
18 merely attorney argument. Dr. Velinsky does not weigh in on that.
19 And two, when you look at the actual service manual, it internally
20 contradicts what Kubota is asserting. Because that service manual
21 says all these things that are listed under the mainframe heading
22 are actually attached to the frame.

23 So they say things like the tailgate door panel is attached
24 to the mainframe, the reverse stop mechanism is attached to the
25 mainframe. These are all components that are listed under that

1 heading that Kubota's attorneys want you to believe are part of the
2 mainframe. But inside the service manual, it's specifically saying,
3 no, those parts are attached to the mainframe, they're not part of
4 the mainframe.

5 And how do we know that's true? Because one of the
6 things listed there is the loader arm. And of course, they say the
7 loader arm is attached to the frame. Under Kubota's reading, an
8 interpretation of that heading, the loader arm is part of the
9 mainframe, which is of course nonsensical. So that evidence
10 should be thrown right in the garbage. It doesn't come from an
11 expert. It's pure attorney argument.

12 And what you have remaining is Dr. Fleming saying,
13 look at all this evidence about how a skilled artisan would interpret
14 mainframe. So where that leaves us is with the only evidence of
15 record in this case, being that the Fixture 41 of KR996 is not
16 considered to be part of the mainframe. And that means that
17 KR996 does not teach a linkage or actuators attached to a
18 mainframe. It teaches linkages and actuators attached to
19 something else.

20 Earlier in the day, my colleague was talking about the
21 fact that he proposed the question in this case was simply whether
22 you would take the mini skid steer and move the pivots around.
23 But that's not the question that we're here to talk about. The
24 question is whether you would take KR996 -- the teachings of that
25 machine, that reference -- and that reference is imbued necessarily

1 with this detachability feature. That means you can't ignore the
2 fact that that Fixture 41 is separate and is left on the ground when
3 you're deciding whether KR996 teaches a mainframe attached to
4 loaders -- pardon me, to linkages and actuators or not. And it does
5 not teach that.

6 If the Board finds that that is the case, that it does not
7 teach that connection between the mainframe and the linkages and
8 actuators -- because KR996 is a fundamentally different invention
9 with this fundamentally different detachment concept. If you find
10 it doesn't teach it, that is the end of their petition. They're not
11 arguing that you would -- that a skilled artisan would be motivated
12 to remove that detachability feature. They have not presented that
13 argument.

14 Their argument is the detachability feature remains and
15 somehow that mainframe attached to the linkages is satisfied.
16 Those two things are fundamentally incongruent with one another.
17 You can't keep detachability and have that Fixture 41 be part of the
18 mainframe. That kills all their petitions.

19 The last thing I'll say on this before I move on is under
20 Kubota's interpretation of this, where Fixture 41 is part of the
21 mainframe, the mainframe changes all the time. Sometimes, the
22 mainframe is just the machine itself, when it's just driving around
23 without attachments on. Then you put the loader on, and suddenly
24 the mainframe has changed into the main body plus this Fixture
25 41.

1 But then you take that off and you put the breaker on,
2 and now a different part is part of the mainframe. This is all part
3 of the normal operation of this machine. And the mainframe is
4 changing as the machine is operating. That doesn't make any sense
5 at all. That's not how a skilled artisan would review this material
6 and understand what a mainframe truly is.

7 JUDGE JESCHKE: Well, I mean, Counsel, the-- I mean
8 I'm looking at Claim 1 of the '750 Patent and it says a mainframe
9 for supporting the loader. So if the loader's not there, perhaps
10 there just is no mainframe, right?

11 MR. BROPHY: Any machine that is moving around
12 with controls and wheels has a mainframe.

13 JUDGE JESCHKE: But KR996 doesn't call it a
14 mainframe. The part that you're talking about is the main Body
15 11. It doesn't call it a mainframe. So maybe that's not right. I
16 don't know where what you just said is from, but it's not how
17 KR996 describes itself. So perhaps, in view of what the claims in
18 front of us say, which is in part a mainframe for supporting loader,
19 there's kind of a functionality that the -- is required, that the loader
20 has to be present before a mainframe is present.

21 And so, yeah, I guess I'm not sure that somebody would
22 -- I don't know of any evidence from Dr. Fleming or otherwise,
23 that main Body 11, when it's disconnected from the Fixture 41,
24 would be called a mainframe.

25 MR. BROPHY: So here's my reaction to that. I think

1 there are two problems with that line of thinking. One of them is
2 the *Panduit* case. Because the *Panduit* case says you got to take
3 the disclosure in total, and that disclosure includes that this piece is
4 detachable.

5 So if we just assume for a moment, hypothetically, that a
6 skilled artisan buys one of these machines, there's no evidence it
7 was ever for sale or ever made, but let's assume for a moment a
8 skilled artisan could buy one of these and was operating it. It was
9 operating a machine knowing that that Fixture 41 is detachable.
10 There's a button he can push or she can push that says, jettison this
11 thing, and they can push that button and that piece comes off.

12 The skilled artisan, in light of all the evidence that I've
13 shown today, understands that thing can go away. It is detachable.
14 And as a result, it is not part of the mainframe. Even if the
15 machine is only ever operated with that attachment on it, it is still
16 an attachment. The skilled artisan, based on *Panduit*, still
17 understands that the KR996 reference has this detachable part.
18 And it's the fact that it's detachable and that the skilled artisan
19 knows it's detachable is what makes it not part of the mainframe.
20 Even if it's only ever used attached, it is not part of the mainframe
21 because it is inherently detachable. I hope I've articulated that well
22 enough.

23 JUDGE JESCHKE: I think so. I guess what I'm sort of
24 -- my understanding from the briefing and from what's in front of
25 us is that the Patent Owner does not dispute that a mainframe is a

1 primary supporting structure; is that correct?

2 MR. BROPHY: That's correct.

3 JUDGE JESCHKE: Okay. So this detachability aspect
4 that you're now sort of arguing about, that seems a temporal thing
5 that is on top of how we already construed it. So in the
6 configuration -- as is on your Slide 7, on the far left.

7 MR. BROPHY: Yeah.

8 JUDGE JESCHKE: In other words, when the main
9 Body 11 and the Fixture 41 are engaged. What I'm trying to
10 understand is why that fully engaged structure isn't a, you know,
11 primary supporting structure. In other words, main Body 11 and
12 Fixture 41, because they perform that function, you're adding on
13 another thing. It's this negative limitation of a lack of
14 detachability.

15 I understand that, you know, the paragraph that you read
16 in the patents here about the detachability aspect. I'm just trying to
17 understand a undisputed claim construction, where that flows
18 from, this lack of detachability. And I still don't quite understand
19 that.

20 MR. BROPHY: So the only testimony you have from an
21 expert in this case is that applying that construction that you gave
22 to this KR996 system results in a conclusion that that thing that is
23 detachable is not part of the main supporting structure of that
24 machine. So under your proposed construction, the skilled artisan
25 interprets that as not including attachments.

1 JUDGE PETRAVICK: Counsel?

2 MR. BROPHY: Yes, ma'am.

3 JUDGE PETRAVICK: You told us that the mainframe
4 does not have to be a single weldment, right?

5 MR. BROPHY: Correct. Yes.

6 JUDGE PETRAVICK: So that means that parts of the
7 mainframe could be bolted together -- fastened together by any
8 means, right?

9 MR. BROPHY: That's correct, yes.

10 JUDGE PETRAVICK: Right. So when 41 is in the -- in
11 KR996 and 11, they're attached together, you told us, with cams
12 and actuator.

13 MR. BROPHY: That's correct, yes.

14 JUDGE PETRAVICK: Why is that different than if I
15 have a frame that's bolted together?

16 MR. BROPHY: So --

17 JUDGE PETRAVICK: I mean I can undo bolts.

18 MR. BROPHY: Sure. Right. But you don't, when
19 you're normally operating the machine. And that's what --

20 JUDGE PETRAVICK: I see, like, when you're normally
21 operating this loader up and down, you're probably not going to
22 say cams unleash, right?

23 MR. BROPHY: Right.

24 JUDGE PETRAVICK: Like, you're not going to do that
25 because you don't want your loader to fall off.

1 MR. BROPHY: That's correct, yes.

2 JUDGE PETRAVICK: So when it's in the configuration
3 where it's together -- and maybe one person only bought one
4 attachment, and it's attached together by the cams. You seem to be
5 saying that the attachment for the mainframe cannot be an actuator
6 and a cam.

7 MR. BROPHY: So the only expert testimony you have
8 on this is from Dr. Fleming and he says that his interpretation of
9 your construction is that the mainframe is a fundamental part of
10 the machine that's always present --

11 JUDGE PETRAVICK: I mean, I think you've -- the
12 problem is Dr. Fleming seems to be reading more into the
13 construction than what's required. I mean, isn't that he literally is
14 going beyond the construction that you've agreed to?

15 MR. BROPHY: The construction is the -- I'm sorry, I'm
16 drawing a blank on the actual language at the moment. I've got to
17 get --

18 JUDGE JESCHKE: Primary supporting structure.

19 JUDGE PETRAVICK: Primary supporting structure.

20 MR. BROPHY: Thank you. His interpretation of
21 primary supporting structure excludes attachments, which is
22 consistent with --

23 JUDGE PETRAVICK: Some attachments. If they were
24 attached together with bolts, that would be fine. Like, if I took 14
25 and put it, you know -- 41 and put it into 11 and I didn't use cams

1 and actuators to secure it, but I use bolts. And that would make it
2 the primary -- a primary mainframe, right?

3 MR. BROPHY: Because it's not intended to be detached
4 during operation of the machine. That's this --

5 JUDGE PETRAVICK: So this isn't intended to be
6 detached during operation of the machine. You're not detaching
7 this while you're using it.

8 MR. BROPHY: I guess I would respectfully push back
9 on that. And I think that's where we run afoul of *Panduit* because
10 essentially that line of thinking --

11 JUDGE PETRAVICK: See, I don't think we run afoul of
12 *Panduit* because we are considering everything. We're just
13 considering -- like, what you're telling me basically is that I can't
14 -- I would have to look at all embodiments instead of saying this
15 embodiment meets this claim language. That, to me, is not correct.

16 MR. BROPHY: I understand.

17 JUDGE PETRAVICK: Because I can look at an
18 embodiment of this KR996 when the loader is attached and it's
19 being operated -- even though that's not really in the claim
20 language that, you know, it is permanently attached by the bolts
21 and the actuators. Like it's not going to become unattached by
22 itself.

23 MR. BROPHY: Right.

24 JUDGE PETRAVICK: And that's not really different
25 than if I had bolted the two parts together. I could have bolted

1 them. I could have clamped them together. Those are all
2 detachable eventually. But when it's being operated, nobody's
3 going to go and unscrew the clamps and the bolts --

4 MR. BROPHY: Yeah.

5 JUDGE PETRAVICK: -- just like nobody's going to
6 undo the cams and the actuators.

7 MR. BROPHY: Yeah. Understood. I think this is a
8 really helpful dialogue, by the way, so thank you. It's helpful to
9 understand what your perspective is on this. I guess my reaction to
10 that is what's shown on the left isn't an embodiment. All three of
11 these are one embodiment.

12 JUDGE PETRAVICK: But I'm just going to say one
13 thing. This is an apparatus claim. An apparatus claim goes to
14 what the apparatus is, not how it's used. When I look at KR996,
15 when those things are attached, all I have to say is the structure
16 that is attached there, because it's an apparatus claim -- some of the
17 apparatus claims. And it's what the apparatus is, not how it's going
18 to be used. And I'm looking at the structure and I'm saying what is
19 in the claim that requires anything more than this thing that we're
20 calling the mainframe is (INDISCERNIBLE) together at that point
21 in time.

22 MR. BROPHY: So Vermeer's position on this is that,
23 what you see on the screen right now in Slide 7, all three of these
24 different modes of operation are one thing and that the reason I say
25 this runs afoul of *Panduit*, the line of thinking we're talking about

1 here is that --

2 JUDGE PETRAVICK: Well, they can't be one thing
3 because they have different parts in each -- different areas.

4 MR. BROPHY: Yes. However, when we look at just
5 the piece on the left, when it's operating as the loader, it still has
6 that detachable feature. We can't ignore that it has it.

7 JUDGE PETRAVICK: And where does your claim say
8 not detachable?

9 MR. BROPHY: When it says the linkages and the
10 actuator must be attached to the mainframe.

11 JUDGE PETRAVICK: And where does it say that the
12 mainframe must not have other parts -- other detachable parts? It's
13 an open claim, right?

14 MR. BROPHY: The mainframe term itself has to be the
15 primary support. And the, again --

16 JUDGE PETRAVICK: So what you're really construing
17 the claim to mean is it's a primary support that only has -- that is
18 only -- has parts that are attached certain ways as in not a -- you
19 want us to read a negative limitation into the claim that says not
20 cams and actuators, only bolts, screws, welds, or other issues?

21 MR. BROPHY: I think just as the patent says, a
22 mainframe is not attachments. And my point is the KR996
23 discloses that the Fixture 41 is part of an attachment. And so it
24 can't be part of the mainframe because as the '386 Patent itself
25 teaches, that is an attachment and not a mainframe. So it --

1 JUDGE PETRAVICK: So it depends on whether you
2 characterize a certain part, like a bolt or something, to be an
3 attachment or not an attachment.

4 MR. BROPHY: I believe that's correct. And KR996,
5 when a skilled artisan reads it, would understand that Fixture 41 is
6 part of an attachment.

7 JUDGE PETRAVICK: Thank you.

8 MR. BROPHY: Thank you.

9 JUDGE PETRAVICK: You are down to 30 minutes.

10 MR. BROPHY: I'm going to go a little longer, if that's
11 okay. Because I don't think I have as much to say on the secret
12 portion or in the sur-reply.

13 JUDGE PETRAVICK: Okay.

14 MR. BROPHY: But thank you very much for the
15 reminder. I'm going to talk a little bit about the single weldment
16 concept for just a moment. Because I think it kind of bears
17 directly on the conversation we're having here. I think the line of
18 thinking where we would just look at that one mode of operation
19 for KR996 essentially is saying weld it all together. And the
20 problem with that line of thinking is you are destroying the
21 fundamental key novelty or the key aspect of that invention, which
22 is the fact that it can solve this problem.

23 The KR996 said, we don't want separate machines. The
24 whole point is you have one machine that can do all these different
25 things. And if we treat that single mode of operation when it has

1 the loader arm attached as the thing, we are deleting from the
2 disclosure the key aspect of that invention, which is the
3 detachability. So essentially, an argument that when it's being
4 operated as the loader -- it's all one piece -- is like saying you're
5 welding it all together.

6 And I think when we put it that way, when you think
7 about it through that lens, that doesn't make sense. Because when
8 you're talking about obviousness and you're making changes, you
9 have to bear in mind whether you're going to destroy some
10 fundamental benefit provided by that patent. And they have not
11 offered any expert testimony from Dr. Velinsky that would say
12 why someone would be motivated to take away that detachability
13 feature.

14 That's not something that they have argued about or
15 presented evidence for motivation to change. So their position is
16 KR996 has detachability. Now let's talk about what we can
17 combine it with. It is not, let's get rid of detachability and then talk
18 about what we can combine it with. They never make that
19 argument. Detachability is always still there.

20 And I showed you testimony from Dr. Velinsky earlier
21 where he said, I didn't even consider whether detachability was
22 there or not. So they certainly haven't provided expert testimony
23 about why a skilled artisan would be motivated to remove
24 detachability. Their expert hasn't considered detachability at all.

25 So whether you call it welded all together or you call it

1 pretend this thing is a machine that's only a loader, what you're
2 doing is arguing to modify KR996 away from what it actually
3 teaches. *Panduit* says you can't do that. You got to look at
4 everything. And if you're going to go down the path of saying,
5 well, it would all just be welded together or treated as if it's welded
6 all together, you're fundamentally modifying what --

7 JUDGE PETRAVICK: Your claim doesn't require it to
8 be all welded together. Your claim says that it's the primary
9 structure. It doesn't say how it becomes the primary structure. It
10 doesn't say what makes it the primary structure. The claim does
11 -- and you're just telling us here that you can have this -- the
12 structures of the mainframe bolted together, right?

13 MR. BROPHY: Right.

14 JUDGE PETRAVICK: And you're not saying that the
15 mainframe has to have three parts or whatever part. Your claim is
16 broader than that.

17 MR. BROPHY: Correct.

18 JUDGE PETRAVICK: It is broader than that. I don't
19 even have to use bolts. Maybe I can use cams and actuators to
20 keep it together.

21 MR. BROPHY: Yes. I think the fundamental question
22 was would a skilled artisan consider that thing that you're pointing
23 to, to be an attachment, that you leave aside when you're operating
24 it, or whether it's always part of a machine when it's being
25 operated? That's the key question.

1 JUDGE JESCHKE: Counsel, could you go back to Slide
2 7 for a second? Far left, so there's -- as opposing counsel had
3 mentioned, there are some claims here -- I think in the '266 Patent,
4 if I remember right -- that use different terms -- not the term
5 mainframe. Would you agree that main Body 11 and Fixture 41,
6 in that far left embodiment on Slide 7, is -- do those constitute
7 together a rigid frame?

8 MR. BROPHY: If rigid frame is the language from the
9 claim that you're referring to --

10 JUDGE JESCHKE: I believe it is.

11 MR. BROPHY: -- our position has been that all of those
12 different words are synonyms for mainframe.

13 JUDGE JESCHKE: So okay, assuming that they're not
14 -- assuming that the term we talked about at length, about how
15 main perhaps brings with it the term primary, so with those two,
16 although they could be detached, do those two pieces -- in other
17 words, main Body 11 and Fixture 41 -- constitute a rigid frame?

18 MR. BROPHY: In a vacuum -- you're asking me just
19 with that term rigid frame?

20 JUDGE JESCHKE: No. I'm not asking in a vacuum.
21 I'm asking the way that we do claim construction.

22 MR. BROPHY: I see. I don't think that either side has
23 submitted expert testimony on that issue, as to what that would
24 mean to a skilled artisan. The only thing I can say is the parties
25 have treated all those terms the same as mainframe.

1 JUDGE JESCHKE: Okay.

2 MR. BROPHY: I'm sorry if that's a frustrating answer
3 but I think that's the only one I can give, unfortunately. And I
4 think this is just -- I'm going to hammer on this for one more
5 minute. I just think this is a really key point, that because Kubota
6 is not arguing that you would remove the detachability feature, and
7 they have not submitted any expert who says, here's why someone
8 would be motivated to remove that detachability feature. KR996
9 has that detachability feature.

10 And the only question is whether a skilled artisan,
11 understanding that that loader is an attachment and could be
12 removed, does the skilled artisan think that Fixture 41 is
13 nevertheless part of the mainframe, even though it's an attachment
14 that can be removed. Our position is the answer is no. Because no
15 matter what, KR996 treats that as detachable. And the skilled
16 artisan reading KR996 would understand it's detachable and
17 therefore would put into the bucket described in the '386 as an
18 attachment and not part of the mainframe. And that any other
19 alternative conclusion necessarily requires you to go down this
20 path of modifying KR996, which they have not suggested you
21 would do in this way.

22 JUDGE JESCHKE: So Counsel, then -- I'm sorry to
23 keep going back to Slide 7. It's a good one for what we're talking
24 about. So in the far left embodiment, as the term mainframe is
25 used in the claims that are relevant here, what is the mainframe, if

1 any, in that embodiment shown on the left side of your Slide 7?

2 MR. BROPHY: The mainframe is the portion that's
3 highlighted in green.

4 JUDGE JESCHKE: But does it fully support the loader?

5 MR. BROPHY: It does in that all the forces from the
6 loader are transmitted through it.

7 JUDGE JESCHKE: Okay. How then, in the '750 Patent,
8 Limitation 1.3, it says a first linkage pivotally attached to the first
9 side of the mainframe. You're saying that just doesn't -- isn't met
10 here?

11 MR. BROPHY: Here, it's not met because the linkage is
12 attached to Fixture 41, which is part of the attachment.

13 JUDGE JESCHKE: Okay. Yeah.

14 JUDGE REIMERS: Well, Counsel, I have a -- I'm a bit
15 confused here because you said everything in green is designated
16 as the mainframe. Is 41 in green?

17 MR. BROPHY: No. 41 --

18 JUDGE REIMERS: I've blown it up here on my screen
19 so I could get a better look at it.

20 MR. BROPHY: 41 is -- let's see if I can highlight here.
21 Testing my skills with PowerPoint. But 41 is this piece that I'm
22 highlighting yellow. And maybe I can go -- I'm going to go to a
23 different slide for a moment. It's this piece in yellow that you can
24 see here that is at this point sitting on the bogie separate from the
25 machine. So 41, which is what the linkages are -- the linkages are

1 here and here. And those linkages attach to the highlighted yellow
2 component --

3 JUDGE REIMERS: Okay.

4 MR. BROPHY: And that is the Fixture 41, which again,
5 during operation of the single embodiment of KR996, is taken off
6 and plopped on the floor, and the machine drives away without it.
7 And a skilled artisan, in light of '386 and what they know about
8 mainframes, based on Fleming's declaration and testimony, would
9 not understand the yellow thing 41 to be a mainframe, considering
10 you leave it on the floor and drive away from it.

11 JUDGE REIMERS: Thank you for that clarification.

12 MR. BROPHY: I'm going to switch gears here. I'm
13 going to speed up a little bit.

14 JUDGE PETRAVICK: You do realize you're into your
15 sur-rebuttal time too?

16 MR. BROPHY: I do.

17 JUDGE PETRAVICK: Okay.

18 MR. BROPHY: I do.

19 JUDGE PETRAVICK: I just want to make sure that --

20 MR. BROPHY: I do. Thank you. I appreciate that. I'll
21 move along. There are maybe just a few quick points I'm going to
22 make, and I'll do them in rapid fire. You've heard from the
23 Petitioner that we have violated bodily incorporation concepts. I
24 need to address that for a moment. The picture that you see on the
25 screen is not one that Vermeer and its team or expert prepared.

1 This is an image that was prepared by Dr. Velinsky and the Kubota
2 team.

3 So in their petition, they take the tracks of the Bares
4 reference and plop them onto a figure which is in the background
5 here of KR996. So they put the tracks and paste them onto
6 KR996, and then they take measurements from the tracks that they
7 plop on KR996 and say, look, we've satisfied the requirements for
8 D2 being such and such of D5.

9 What we did is looked at what they proposed as a design
10 and said, well, wait a minute, the tracks are conflicting with all
11 these things, that doesn't work. So this proposal of yours -- which
12 you contend satisfies these measurement requirements, is
13 inoperable. So where does that leave us? What evidence have
14 they presented if this doesn't work?

15 And I think they've even backtracked and said, we didn't
16 mean that this is what it would be. Where does that leave us with
17 respect to what evidence they've presented of an arrangement with
18 tracks, with all the components that actually satisfy the ratio
19 requirements of the claims? They proposed it was this.

20 But when we showed that that wouldn't work, they
21 backed off of that. And now there's nothing. There's simply an
22 argument from an attorney saying they'd make the things lower
23 and they'd figure it out, they'd put tracks on it. But there's been no
24 expert testimony about why -- even if you were motivated to put
25 tracks on this -- that would necessarily result in a device with

1 things in the right places to satisfy these ratio claims. There's no
2 evidence of that. The only evidence they submitted is this, which
3 they're saying they didn't mean.

4 This is a 3D CAD drawing that our expert did. But once
5 again, it's just replicating what Velinsky and Kubota asserted in
6 that picture that I showed you previously in Slide 26. So 27 is just
7 an added up drawing of what they've presented as 26. I would
8 guess to sum that up, I would say we're not bodily incorporating,
9 we're simply reacting to the bodily incorporation that Kubota has
10 asserted in this case.

11 Then I'm going to talk about one more thing and maybe
12 be done. I want to talk about Beltrami for a moment. What
13 Kubota does with Beltrami is it says that Beltrami would motivate
14 someone to move the pinpoints. These are the pinpoints that I'm
15 showing on the screen here in Slide 29 of the original disclosure in
16 KR996. And what they contend is that the disclosure in Beltrami
17 would move these things down. Now, again, their expert didn't do
18 this. An attorney did this. Velinsky then took what their attorney
19 did, took these points that are shown in Slide 30 and modeled
20 those kinematically to make them move.

21 There were two different models provided by Kubota,
22 one of them with linkages for a wheeled machine, the other with
23 linkages for a trapped machine. We modeled both of them. And
24 again, this isn't something we created. We're just modeling what
25 they proposed as the combination would result in. And the first

1 model you can see, it doesn't go all the way to the ground because
2 it hits the wheel, the tire. It interfaces it within this way, the other
3 with the tracks.

4 When you kinematically operate it, you can see that as
5 the bucket is lowered, it actually -- the linkages and loader arm
6 come back and get into the operator area, which is a major safety
7 concern. But then as you continue to lower it, the whole loader
8 arm pitches back and actually throws the load onto the operator
9 -- obviously not a viable kinematic setup.

10 Again, this is not something that we did. We're simply
11 showing that what they proposed doesn't work. And so again, I
12 would ask the question -- and they moved these things, by the way.
13 They presented these pivot points to satisfy the ratio claims. But
14 when we modeled what they said would satisfy the claims, we
15 showed it doesn't work.

16 Then they retrenched from that and said, never mind, we
17 didn't actually mean those are the actual pivot points. And then the
18 question is, well, if they're not, what are and what evidence is there
19 that someone would be motivated to combine these two things to
20 result in pivot points that actually satisfy the ratio claims.

21 Kubota wants to just blur all that and say, don't worry
22 about the specific ratios, just assume everything would go lower
23 and check the box. But it's their burden to show that every single
24 one of these ratio claims would be satisfied by that combination.
25 And all the evidence they have is what you see on the screen of

1 Slide 30. And they've retrenched from that once we showed that it
2 wasn't operational.

3 I'm going to take just 10 seconds to make sure I haven't
4 missed anything major and then I'll be quiet. Last thing I'm going
5 to say, this relates to the motivation to combine Beltrami on the
6 one hand with KR996 on the other. And earlier today, Judge, you
7 were asking about the notion of lowering those pivot points.

8 JUDGE JESCHKE: Column 3.

9 MR. BROPHY: Yes. So we have said a lot about
10 Beltrami in our briefing. I'm not going to talk about here because I
11 don't have time, but the CG shifting in Beltrami is exclusively
12 about forward and aft shifting. When you have a machine that is
13 radial, the machine operates like this and when you lift it halfway
14 up, the weight goes further away and the machine wants to tip
15 forward. The CG they're talking about there is that CG -- not
16 moving it up and down. So that doesn't provide a motivation.

17 Secondly, they say, well, but it also teaches the notion of
18 getting rid of the support frame. But again, that teaching is a radial
19 teaching. They say the bad thing about radial arms is you have to
20 have the support frame really high up because to get lift height, to
21 get the bucket up high enough, you have to have that pin halfway
22 up as high as it's going to go. And they say with a four-bar
23 linkage, you don't have that anymore. You can get rid of that
24 whole frame that holds up that high, high pinpoint.

25 KR996 already has a four-bar linkage. So that problem

1 of having that pivot point way up high doesn't exist there. So the
2 teaching to get rid of it is completely inapplicable to KR996. So
3 there'd be no motivation. But even if you were to take Kubota's
4 view that it's talking about getting rid of any support frame
5 -- which we vehemently disagree with -- even if you were to
6 assume that, it's still fundamentally at odds with KR996.

7 And here's why. KR996 teaches the importance of that
8 Fixture 41 -- because that's the detachability thing. Beltrami says
9 get rid of it. Beltrami says, according to Kubota's reading, get rid
10 of any extraneous structure that might add weight or increase the
11 CG of the machine. And keep those pivot points as low as you can
12 on the mainframe. So Beltrami is saying get rid of support 40,
13 Fixture 41 because, one, it's extraneous; and, two, it's a support
14 frame -- get rid of it.

15 And no skilled artisan, looking at KR996 and seeing that
16 that support, that Fixture 41 is necessary to the disconnecting
17 feature of that reference would then reach to Beltrami which says
18 get rid of support frames and combine it because it instantly
19 destroys the detachability feature of KR996. So there's no
20 motivation to combine those two things as a result. Unless you
21 have questions, I'm going to leave my scant time for my next time
22 up here. Thanks very much.

23 JUDGE PETRAVICK: Thank you. So I believe both
24 parties are now ready to talk about the confidential material?

25 MR. O'DELL: I have a short reply.

1 JUDGE PETRAVICK: You have a short reply. Are you
2 going to want a short sur-reply to the main argument, the non-
3 confidential portion?

4 MR. O'DELL: As long as it's okay that I do both at the
5 very end, that should be fine.

6 JUDGE PETRAVICK: Would you like to combine them
7 at the very end too, or would you like to do it now?

8 MR. O'DELL: (INDISCERNIBLE).

9 JUDGE PETRAVICK: Sure. You can approach the
10 podium. Give me a minute to reset the clock. I can't do seconds
11 so I'm going to set it -- put it to 42. Yeah. All right. You may
12 begin when you're ready.

13 MR. O'DELL: All right. This is David O'Dell, again for
14 the Petitioner, and a few points I'd like to make. This has been
15 quite a significant attack on Dr. Velinsky. Dr. Velinsky worked
16 for 25 years as the director of the Advanced Highway Maintenance
17 and Construction department, which that 25-year period centered
18 around the time of the invention.

19 So he's perfectly suited in that time of invention. He's
20 got 180 articles about construction equipment, six patents. The
21 Patent Owner showed pictures of what Dr. Velinsky clearly stated
22 in his deposition was a proof of concept -- a prototype of a
23 compact utility loader which was then later manufactured and built
24 and used by the California Highway Department on the roads.

25 So pointing to that proof of concept prototype does not

1 denigrate Dr. Velinsky's skills as a person of skill in the art way
2 more than what we consider the PHOSITA to be. The Patent
3 Owner also appears to have skipped Dr. Velinsky's second
4 declaration where, in paragraph 2 of which he addresses this
5 Board's construction of mainframe and applies it. And in
6 paragraph 3, he talks about the desirability, even with having a
7 separable component, that it is still desirable to have a dedicated
8 machine with an entirely welded mainframe. So there is
9 absolutely testimony from Dr. Velinsky and there's testimony from
10 Dr. Fleming on that as well. And we have that in our slides.

11 I also wanted to point out that Vermeer appears to
12 suggest that the Board is obligated to defer to Dr. Fleming's
13 opinion just because Dr. Velinsky didn't testify enough in its
14 opposition, or there's some point that was left un rebutted. But
15 that's not the correct standard. The Board is free to credit the
16 testimony of both experts and most importantly, the prior art and
17 that it comes from the case *Fanduel vs. Interactive Games*, 966
18 F.3d 1334 Federal Circuit 2020.

19 And I'm going to quote -- and I'm providing this in
20 response to Patent Owner's arguments made in the sur-reply and
21 here today. And that case said, "It is the Board's duty to
22 independently assess the strength of Petitioner's argument and
23 evidence." And no expert submissions are even required. We
24 have a very lengthy, very long expert declaration. We have expert
25 testimony to declarations. We have expert testimony from his two

1 depositions. We have significant amount of expert testimony that
2 supports our positions.

3 What we don't have expert testimony is when we get into
4 a battle of bodily incorporations. When Dr. Fleming starts saying
5 how would you design this or engineer this? This is getting to a
6 bodily incorporation-type argument which is not required for a
7 finding of obviousness. And so going down that path, it appears
8 that the Patent Owner really wants us to go down that path. He
9 didn't design and engineer the combination in engineering detail,
10 even though their patent doesn't have engineering detail for many
11 of its configurations. Because you leave that to a PHOSITA.

12 Secondly, I'd like to talk about the term assembly -- I
13 mean, attachment. I'm sorry -- attachment. That term is used in
14 KR996 to refer to the portion -- the loader attachment or the
15 excavator attachment, the breaker attachment. But in the art and in
16 the '386 Patent, the attachment is what goes on the end of the
17 loader arm. So you have the loader arm is attached to -- is
18 connected to the mainframe of the loader.

19 And at the end of the loader arm, there is a plate. And on
20 that plate -- that's called an attachment plate in their patent. And in
21 almost all loader art, that's called the attachment plate. And on that
22 plate you hang a bucket or you hang forklifts or you hang spires
23 for picking up hay bales or round bales. That's the attachment.

24 So when the Patent Owner refers to, you know -- that the
25 mainframe is not the attachment in their patent, they're talking

1 about the bucket. They're not talking about KR996's separate
2 attachment, which is part of the mainframe itself. And this is
3 important because the prior art that the Patent Owner is using to
4 describe its definition of the term mainframe, it has on the end of
5 the loader arm -- colored in blue and green, I believe. It has a
6 replacement for the bucket, another machine, and say, hey, that's
7 not the mainframe. Well, that's on the other end of the loader arm.
8 Is this making sense?

9 So you have the loader, you have the loader arm, and
10 then you have the attachment plate on the end of the loader arm.
11 And things on the end of this attachment plate, those aren't part of
12 the mainframe because they're not used to support the loader. It's
13 the items over here on the loader that support the loader -- the
14 loader arm.

15 And let me see if I have anything else. And I do want to
16 reemphasize that this discussion of caster wheels and mud and
17 whether there's rubber tires on KR996, this is all a story that the
18 Patent Owner has added to the KR996. And they chastise our
19 experts saying, oh, you don't know about the mud. Well, mud's
20 not in there. You know, we cast our irons rolling in the mud.
21 Well, that's not in KR996. And so our expert -- I don't know about
22 this.

23 And they've made this scarecrow where you can't use this
24 machine in any dirt -- or KR996 in any dirt or any adverse
25 environment because the alignment guides won't work anymore

1 because it's very highly tuned. But they're discrediting the value of
2 what POSITA knows how to do in this space -- in this old space of
3 technology. And that is all I have.

4 JUDGE PETRAVICK: Okay. I will ask again. Now,
5 are you ready to move on to the confidential portion?

6 MR. BROPHY: I don't mean to be frustrating, but am I
7 allowed to make a response to those points simultaneously in that
8 later portion? I just want to confirm with you.

9 JUDGE PETRAVICK: Is that all right with you?

10 MR. BROPHY: Yes.

11 JUDGE PETRAVICK: Okay. You can do that
12 altogether, given that you have, like, 12 minutes left. All right.
13 I'm going to take a minute and ask, could you please close the
14 public line and confirm that it is closed? I understand the line is
15 now terminated, correct? All right.

16 JUDGE PETRAVICK: Petitioner, you can approach the
17 podium. And you can begin when you're ready.

18 MR. O'DELL: Thank you again. This is David O'Dell
19 for the Petitioner. And now we are going to talk about secondary
20 considerations. Turning to Slide 43 of my presentation, secondary
21 considerations were discussed in the prior examination of the
22 patents and it was a reason the claims were allowed. But KR996
23 changes everything. KR996 was not before the office before these
24 secondary considerations were presented. And it changes the
25 whole secondary consideration analysis.

1 Turning to Slide 44, of course, it is well known that
2 secondary considerations do not apply to anticipation rejections.
3 And that is what we have for many of the claims that were
4 asserted. It also arguably doesn't apply to single reference prima
5 facie obviousness rejections because there's -- it's basically those
6 items were whether KR996 included an engine, although it doesn't
7 say an engine. The parties agreed there were likely -- was an
8 engine there. So it's really just the secondary consideration should
9 be applied to the three grounds in the middle. and that is whether
10 it's obvious to include tracks, an engine bracket, or low pivot
11 points on the KR996 loader.

12 Turning to Slide 46 -- well, before I go there, turning to
13 Slide 45, what I want to point out is that KR996 is so strong in
14 secondary considerations -- one of the first tests of secondary
15 considerations is the strength of the obviousness grounds being
16 presented. How strong is this obviousness argument? And I
17 submit this is very strong. I'd submit that tracks, engine brackets,
18 and low pivot points are fundamental components and obvious to
19 add to a loader. And so that reason, by itself, should overcome any
20 arguments of secondary consideration.

21 Turning now to Slide 46, a second independent reason is
22 that the proposed secondary considerations in this proceeding lack
23 nexus. All of the secondary considerations, all the alleged long-
24 felt need, commercial success, everything, is directed to a compact
25 utility loader with vertical lift. That's what it's all about. And that

1 was successful in the prior examination because that was the
2 combination that was being presented. It was secondary
3 considerations that directly address the combinations being
4 presented.

5 But turning to Slide 47, that is not the case here. KR996,
6 without question, teaches a compact utility loader with vertical lift.
7 And I have a quote here from *Yita*, which we've taken from our
8 briefs. Both parties have talked about it, but I'd like to bring it up
9 today because *Yita* is especially relevant here.

10 *Yita* says that objective evidence of non-obviousness
11 lacks a nexus if it is exclusively relates to a feature that was known
12 in the prior art. And that is well-known case law. *Yita* took it a
13 step further. Because there, the Patent Owner was arguing, well, it
14 wasn't well-known. And the Federal Circuit in *Yita* says it doesn't
15 matter if it was well known. If it was known in the art -- the
16 alleged inventive concept was known in the art -- then there is no
17 nexus to this evidence. And that is what we have here.

18 So turning to Slide 48 -- so that, I've given you two
19 independent reasons why their secondary considerations of non-
20 obviousness should not have traction here today -- to use a loader
21 term, should not have traction. A third independent reason is that
22 their evidence is hearsay. And I know that we have a motion to
23 exclude on hearsay. I want to propose that the first two reasons I
24 mentioned are so strong that you can stop writing after that, that
25 you don't even have to get to the hearsay part. But if for some

1 reason the first two arguments don't win, this argument, this is by
2 definition, hearsay.

3 The evidence they're presenting are declarations and
4 snippets of deposition testimony from another proceeding that are,
5 for the truth of the matter, asserted-- that are being asserted -- for
6 the truth of matter asserted. And the key part is this was in another
7 proceeding. We were not part of this proceeding.

8 We, Kubota, asked to depose these people that gave the
9 declarations and depositions and were denied. In fact, we asked if
10 we could have the whole, and not just the snippets, that they
11 provide of the deposition. They seem to be long depositions, but
12 we were only provided snippets. And we asked for the entire
13 deposition testimony and we were denied that as well. Who
14 knows, maybe there's - the next sentence says not really. We don't
15 know what's said in these deposition transcripts that they're using
16 to support their alleged evidence of secondary considerations.

17 JUDGE JESCHKE: Counsel, these depositions were, I
18 believe, in the -- from the litigation between Vermeer and Toro.

19 MR. O'DELL: That is correct, yes.

20 JUDGE JESCHKE: Whose personnel were being
21 deposed?

22 MR. O'DELL: Toro.

23 JUDGE JESCHKE: Toro's. Okay.

24 MR. O'DELL: I believe the deposition testimony was
25 from Toro engineers that I believe said it was hard to make a

IPR2025-00167 to -00169, IPR2025-00170,
IPR2025-00171, IPR2025-00381, PGR2025-00016

1 compact utility loader with vertical lift. That's the two sentences I
2 saw of the deposition. I don't know what the other hundred pages
3 are about, I just don't know.

4 JUDGE PETRAVICK: But the Patent Owner is citing to
5 the prosecution history, right?

6 MR. O'DELL: The fact that they cited this in earlier
7 examination does not cure this as hearsay.

8 JUDGE PETRAVICK: And it's a bit unusual, right?
9 We're not citing directly to the deposition testimony. We didn't
10 -- don't have the deposition in the record.

11 MR. O'DELL: Right.

12 JUDGE PETRAVICK: For some reason, we're citing to
13 the prosecution history, which then in turn cites to the snippet.

14 MR. O'DELL: Right. And that --

15 JUDGE PETRAVICK: And the snippet is being used to
16 show as the evidence of secondary considerations.

17 MR. O'DELL: Yes.

18 JUDGE PETRAVICK: Do you agree that it would -- it
19 doesn't matter whether the office considered, like -- the fact that
20 the office found those secondary considerations persuasive in that
21 case is not itself evidence of secondary considerations?

22 MR. O'DELL: Thank you.

23 JUDGE PETRAVICK: We go, you have to use the
24 snippet as the evidence. Otherwise, you know, there's not -- what
25 the office considered is not a secondary consideration of itself.

1 Like the examiner's evaluation is not a secondary consideration.

2 MR. O'DELL: Thank you. I agree with that. Yes. And
3 I would like to point out that we actually provide -- in our petition,
4 we provided the entire file history. So, we actually provided the
5 file history. But again, the fact that the examiner thought there
6 were secondary considerations based on these snippets does not
7 mean that you must follow the examiner.

8 JUDGE JESCHKE: Counsel, I had one other question.

9 MR. O'DELL: Yes?

10 JUDGE JESCHKE: Am I right in understanding that all
11 of the objective indicia evidence we have here is from evidence
12 that relates just to the '386 Patent? In other words, not the other
13 four patents that are issued in front of us, or am I wrong?

14 MR. O'DELL: No. I believe that all the evidence that
15 you have is directed to this family of patents. I believe that the
16 way it's being asserted in this here today is that all the evidence
17 applies to all the claims that are being challenged. So all patents.

18 JUDGE JESCHKE: I understand what the argument is
19 from Patent Owner. Maybe this is a question better for Patent
20 Owner, but the evidence from the Toro litigation, I'm just trying to
21 understand whether it involves all five of the patents that are in
22 front of us or it's just the '386, which I believe is the kind of a
23 parent patent of all these.

24 MR. O'DELL: I know it includes the '386. I don't
25 believe it includes the '063.

1 MS. LYLE: Yeah. There's also the (INDISCERNIBLE)
2 the '266 and the '891.

3 MR. O'DELL: So the '266 and the '891 are also -- that
4 were included, but --

5 MS. LYLE: Some of it.

6 MR. O'DELL: So not all of them. There are five patents
7 here today. One of them was actually recently issued, which
8 allowed us to file a PGR instead of an IPR. I don't believe that
9 was subject to the reexamination where this evidence came in.

10 JUDGE JESCHKE: Because it didn't exist yet.

11 MR. O'DELL: Right.

12 JUDGE JESCHKE: Yeah. Okay. I think I understand.
13 Thank you.

14 MR. O'DELL: And there is additional evidence. It's not
15 just the declarations and hearsay. I understand that the Patent
16 Owner -- again, there's a state litigation and in the litigation,
17 Kubota North America provided some confidential information in
18 the form of customer surveys and the like, and that one of these is
19 on Slide 49. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 But that alone, KR996 is a compact utility loader with

1 vertical lift unquestioned. *Yita* is ruling here. I think the strength
2 of KR996 is ruling here. But *Yita* is certainly ruling that if all
3 you're bragging about is a compact utility loader with vertical lift,
4 that is -- was known in the art. And so that will not support a
5 holding of secondary considerations of non-obviousness. I would
6 like to save the rest of my time, if needed, for rebuttal.

7 MR. BROPHY: I don't know if we'll need Slide 7, but
8 there it is.

9 JUDGE PETRAVICK: You have 12 minutes and some
10 seconds, and I'm going to just set it for 13.

11 MR. BROPHY: That's very kind, thank you.

12 JUDGE PETRAVICK: Proceed.

13 MR. BROPHY: Okay. Thank you. First, I'd like to
14 address, Judge, your question about the bogie that you posed
15 earlier and the notion of whether the wheels align or pull in.

16 JUDGE JESCHKE: Mm-hm.

17 MR. BROPHY: I'd like to direct your attention to
18 paragraph 52 of KR996. I'll just read from that quickly. It says,
19 "On both sides of the lower frame of the bogie guide plates are
20 installed. The guide plate contacts the inner side of the wheel and
21 as the wheel rotates in the forward direction, pulls the bogie into
22 the front inner side of the vehicle. And as the wheel rotates in the
23 reverse direction, pushes the bogie away from the front side of the
24 vehicle."

25 So it's not just about alignment, it's also about pulling the

1 bogie in so that attachment can fully seat and then jettisoning the
2 bogie when the attachment is being removed. So the points we
3 made earlier about removing the wheels, the reason this is relevant
4 is that when you get the tracks, you no longer have that pushing
5 and pulling. Fleming says that's the case, and also Dr. Velinsky
6 says that's the case.

7 I'd also direct your attention to Fleming's declaration of
8 paragraphs 102 through 108, where he discusses this issue in more
9 detail. My colleague was talking at the end of the last session
10 about this notion of single-welded mainframes and why they
11 argued that you would have a single-welded mainframe.

12 The problem that we have here is that, for example, the
13 *Henny Penny* case says you've got to weigh the pros and cons. If
14 you're going to jettison parts of a piece of art, you have to
15 understand what you're jettisoning and consider whether the thing
16 you're jettisoning is worth it to get something else in return.
17 There's been no analysis of what you lose.

18 So Dr. Velinsky may have said, oh, sure, you can weld
19 these things together. That's not an obviousness analysis. He has
20 to ask himself, what is the consequence of welding this -- which is
21 removing the detachability feature. There's been no discussion of
22 that, no assessment of that. We don't dispute that you could weld
23 these things. The question is whether a skilled artisan would, in
24 light of what they lose in the process.

25 And Kubota has not answered that question for you. And

1 it's their burden to answer that question. So there's really no
2 explanation at all for why someone would weld all of this together
3 and yield the result that Kubota is proposing. They haven't offered
4 any expert testimony on that or given any articulation of why a
5 skilled artist would be motivated to do that, again, in light of
6 *Henny Penny's* need to evaluate what you lose in the process. And
7 that's their burden to show you that that calculus for a skilled
8 artisan would come out in the affirmative, yes, weld these things
9 together.

10 We talked also about what an attachment is and what
11 isn't. My colleague said, well, the detachability feature, Fixture
12 41, that's not considered an attachment, something else is. Two
13 problems with that. One, if you look at the KR996 reference itself,
14 it calls these two things attachments. Paragraph 3, it says in the
15 second sentence of that paragraph, "The bucket attachment or
16 breaker attachment has a bucket or breaker installed." So that
17 reference itself recognizes that these things are attachments and
18 not part of the main machine.

19 JUDGE JESCHKE: What paragraph is that?

20 MR. BROPHY: That's paragraph 3.

21 JUDGE JESCHKE: Three.

22 MR. BROPHY: Also, if you look at Dr. Velinsky's
23 deposition at page 85, lines 1 through 5 roughly, he calls them
24 attachments for KR996. So even Kubota's expert concedes these
25 things -- the loader and the breaker -- are attachments. So when

1 you look at that in the context of what the '386 Patent teaches,
2 which is distinguishing a mainframe from attachments, everyone
3 agrees these things are attachments. And by that logic, anything
4 that's part of those attachments, including Fixture 41, cannot be
5 part of the mainframe.

6 I'll just touch very briefly on the secondary
7 considerations. We've briefed whether this material is admissible
8 or not. We're going to stand on our briefing on that. I think the
9 one comment I'll make in that regard is this is kind of an awkward
10 situation. We didn't elect not to provide more information. It's not
11 our information to share. We couldn't produce Toro's witnesses.

12 Similarly, we couldn't disclose transcripts that had
13 portions of them that were designated confidential. It's not our
14 material to produce. So in the Toro litigation and in those ex parte
15 reexams, we and Toro agreed on what could be released, and that's
16 what was submitted into the record, so.

17 JUDGE PETRAVICK: So could you clarify, in your
18 secondary consideration arguments, you have very wide and not
19 pinpoint sides to portions of the reexam prosecution history.
20 When I look at -- there's maybe a few words of a snippet from the
21 deposition. Are you relying upon the bulk of the matter from the
22 reexam as your evidence of secondary consideration -- like, as to
23 what was considered then?

24 I believe part of it sometimes is argument from the
25 attorney during the exam, sometimes it's prosecution history or the

1 deposition testimony of the employee itself. Are you saying that
2 the argument that surrounds the snippet is part of the secondary
3 considerations or just the snippet?

4 MR. BROPHY: I want to be careful about how I answer
5 this because there's a -- as you've recognized, there's a lot of
6 material that was in those prosecution histories. And frankly,
7 when we litigated against Toro, you know, one of the frustrations I
8 have here is we had this exact same fight with Toro.

9 JUDGE PETRAVICK: I'm sorry. I just want to know
10 simply whether -- what exactly is the evidence asserted in the
11 petition, the snippet or the -- including the things in your citation
12 of surrounding argument as opposed to the snippets?

13 MR. BROPHY: So our perspective is that every piece of
14 evidence that we submitted to the Patent Office regarding
15 secondary considerations -- not the attorney argument but the
16 actual materials that we submitted, which includes Vermeer's
17 documents, Vermeer's testimony from witnesses, declarations from
18 Vermeer's employees --

19 JUDGE PETRAVICK: So you're talking about that the
20 evidence is the deposition snippet?

21 MR. BROPHY: That is part of the evidence, yes.

22 JUDGE PETRAVICK: And any other evidence that
23 doesn't include the cited attorney argument that went on for it? If
24 what you're saying is that you're trying to incorporate the
25 reexamination argument into these documents, that's against our

1 rules.

2 MR. BROPHY: Right. I'm not suggesting that --

3 JUDGE PETRAVICK: Or are you suggesting, by these
4 wide citations, that the attorney argument is the evidence?

5 MR. BROPHY: I understand your question.

6 JUDGE PETRAVICK: I'm not going to follow the string
7 cites through the - you know, from here into the reexam
8 prosecution and then cite it again. So you're going to have to tell
9 me, you know, is this -- is the evidence that you're relying upon
10 this, what's unclear -- I mean, I don't need the story about why you
11 didn't have it. I just need to know exactly what it is.

12 MR. BROPHY: I understand. I guess the best way I can
13 answer that is, pardon me, we're not relying on the attorney
14 argument that was presented. We're suggesting that that's evidence
15 of objective indicia.

16 JUDGE PETRAVICK: So when I see a cite that is three
17 pages long in the Patent Owner Response and there is quite a bit of
18 attorney argument surrounded by maybe a few words of a quote
19 from a deposition, you're relying on the quote from the deposition
20 --

21 MR. BROPHY: And not the attorney argument.

22 JUDGE PETRAVICK: -- and not the attorney argument.

23 MR. BROPHY: Yeah. That's correct.

24 JUDGE PETRAVICK: So you're not submitting
25 evidence of commercial success, as in the attorney argument that

1 you presented in the reexam, just the deposition testimony?

2 MR. BROPHY: Either the deposition testimony or the
3 record of sales or the public --

4 JUDGE PETRAVICK: So if you have a cite to the
5 prosecution history where it is attorney argument, the sentence is
6 attorney argument referencing the sales --

7 MR. BROPHY: Yes.

8 JUDGE PETRAVICK: -- and there is no quote from an
9 actual document about attorney sales, you would like me to
10 continue on in the prosecution history -- to go and find that actual
11 proof, as opposed to the attorney argument?

12 MR. BROPHY: I don't think it's appropriate for us to ask
13 you to hunt for those materials. However, my understanding --

14 JUDGE PETRAVICK: If the attorney argument says,
15 you know, Toro sold X, Y and Z, and there's no citation to a
16 document afterwards or a reproduction of the document, you're
17 telling me that I need to trust that that attorney said that the sales
18 X, Y and Z are correct?

19 MR. BROPHY: If what we're discussing is an attorney
20 in that proceeding making an argument --

21 JUDGE PETRAVICK: So I'm supposed to believe what
22 the attorney says that the sales are?

23 MR. BROPHY: Our position isn't that you should be
24 taking any attorney argument as evidence of secondary
25 considerations evidence, but rather that the actual documents we

1 submitted are the evidence of secondary consideration.

2 JUDGE PETRAVICK: Okay. But what if you didn't
3 cite the doc? Oh, so anything that is in the -- you do cite multiple
4 pages of attorney argument, right? And so some of the sentences
5 you cite on are, like, Toro has X, Y and Z sales. And then you cite
6 to the attorney argument. And the attorney in the reexam said that
7 there was X, Y and Z sales. But you don't cite to an actual, like,
8 spreadsheet that shows sales. You cite to the attorney argument in
9 the prosecution history.

10 MR. BROPHY: I understand. The secondary
11 considerations evidence that we propose that you rely on are actual
12 documents that were submitted in those proceedings, not attorneys
13 arguing about information.

14 JUDGE PETRAVICK: Do you cite to the actual
15 documents, as opposed to the attorney argument?

16 MR. BROPHY: It's hard for me to answer that globally,
17 but I'll just have to say whatever we've done in the briefing is what
18 we meant in that particular instance. I think there's a variety of
19 different approaches which I think is what you're getting at.

20 JUDGE PETRAVICK: It's very hard to follow your
21 evidence arguments when you cited -- as pinpoint, a cite as seven
22 pages, you know, encompass six pages of attorney argument and
23 nothing else.

24 MR. BROPHY: I understand. I'm sorry about that. Let's
25 see, I'd like to address nexus for just a moment. My colleague has

1 said KR996 already teaches a compact utility loader with vertical
2 lift, and that's what Vermeer's patent is. So all the evidence of
3 objective indicative nonobviousness doesn't apply because KR996
4 swoops in. KR996 does not teach -- and you saw his chart -- does
5 not anticipate the vast majority, even under their arguments of the
6 claims that are at issue in these petitions.

7 So our position is what Vermeer invented is a compact
8 utility loader with linkages and actuators attached to the
9 mainframe, which KR996 does not have, and that those
10 attachments are in very specific locations which is why we have
11 these ratio claims about where those points are. KR996 does not
12 disclose that. That is our invention. And so the information that
13 we submit, which includes Toro's years even after they had a
14 drawing of a compact utility loader with a four-bar linkage on it,
15 years of engineering work to take that and turn it into an actual
16 operating machine, that's secondary consideration evidence of a
17 real team with real work and money being put into making this
18 happen. And it demonstrates how much effort and how
19 challenging it is to do those things. That's what that objective
20 indicia evidence is all about.

21 JUDGE JESCHKE: So Counsel, I had a question about
22 that. I think what Petitioner's response to this is that the statements
23 of reasons for patentability in the reexam state -- this is on, for
24 example, page 34 of Exhibit 2033. It says, "It is further noted that
25 the increase of lift capacity with the claimed vertical lift is

1 unexpected. There's nothing in there, on that statement, about
2 including -- you know, there's 15 lines here of these statements for
3 reason of patentability. Nothing talks about what you just said,
4 which is the mainframes' particular attachments to the actuators
5 and the -- you know, what we're calling the ratio limitations here.

6 MR. BROPHY: Right.

7 JUDGE JESCHKE: So I hope you understand why we're
8 having trouble seeing the linkage between the connection --

9 MR. BROPHY: Is there a pun in there?

10 JUDGE JESCHKE: -- (CROSSTALK) here. The
11 statement that the reexam says is the sort of the source of this, why
12 these are allowed. So what do we do with that?

13 MR. BROPHY: Look at the actual evidence we've
14 identified, rather than what the patent office said about it. The
15 actual evidence goes to the -- over a decade that Toro took
16 grappling with this problem. KR996 --

17 JUDGE JESCHKE: What is this problem?

18 MR. BROPHY: The problem of making a machine that
19 has linkages and actuators attached to a mainframe in the positions
20 that we claim. And the Toro device is that, and the Vermeer
21 device is that. KR996 is not that. And so the amount of work that
22 went into bringing that to fruition. But even more importantly than
23 that, the notion a skilled artisan grappling with the problem of how
24 to increase lift capacity on a compact utility loader, whether they
25 would go to the solution, which is attaching linkages to a

1 mainframe in these locations. That's the question.

2 And all of this evidence shows that, for over a decade,
3 skilled artisans were working on this issue, trying to solve the
4 problem of increasing lift capacity. Toro's engineers designed all
5 kinds of wacky stuff, telescoping arms and shifting weights and all
6 -- you know, machines that stretched. And they didn't go to a
7 compact utility loader.

8 JUDGE JESCHKE: I guess here's my problem with that.
9 I know you're way over, and we're going to give it to the other side
10 here. But I'm looking at claim 1 of the '750 Patent. There's
11 absolutely nothing about lift capacity. It is simply not in these
12 claims. You may argue that, you know, the other set that includes
13 the ratio limitations, as we've called them, implicitly results in
14 some sort of increased lift capacity. But many of the claims that
15 are in front of us -- of which they're probably near 100 have
16 nothing about lift capacity.

17 MR. BROPHY: Yeah, I understand. It's because we've
18 claimed the device, not the result. The result is increased lift
19 capacity. The device that does it is the one we've claimed with the
20 position -- with the pivots, where they are.

21 JUDGE JESCHKE: Okay.

22 JUDGE REIMERS: So my question is then --

23 MR. BROPHY: Yes, ma'am.

24 JUDGE REIMERS: And like my colleague said, we've
25 had hundreds of claims before us here probably. Are some of

1 those of what you're discussing right now provided in the
2 dependent claims in many of these patents?

3 MR. BROPHY: There are, I believe, independent and
4 dependent claims that require those pivot points to be in specific
5 locations.

6 JUDGE REIMERS: Okay.

7 MR. BROPHY: And that those specific locations are
8 what drive this ability to maximize the weight capacity -- lifting
9 capacity of these very small machines.

10 JUDGE REIMERS: Your position is that it is conveyed
11 in a number of those claims, the lift capacity according to these
12 specific locations; is that correct?

13 MR. BROPHY: It's because of the locations that you get
14 the lift capacity. And the patent teaches -- links those things
15 together. This is what makes the magic. And the objective indicia
16 evidence we've supported shows that when the engineers actually
17 did this, they were surprised by how much they could increase the
18 lift capacity using the configurations that are claimed in, for
19 example, those ratio claims.

20 JUDGE REIMERS: Thank you.

21 MR. BROPHY: Thank you very much for your time.

22 JUDGE PETRAVICK: So now we can hear from you as
23 to the secondary considerations. Because I believe you already
24 took your rebuttal time as to the other arguments.

25 MR. O'DELL: In that case, I really have one point to

1 make, and that is that their evidence of having a compact utility
2 loader with vertical lift being unique, long-felt need, what they
3 won awards for, vertical lift loaders have high -- increased lift
4 capacity than radial lift. Beltrami teaches that. I believe that
5 they're trying to scramble back to, well, it's our pivot points that
6 are new and novel. And that's what all this evidence of secondary
7 consideration is directed to, our pivot points.

8 Well, that's not what the evidence is talking about. The
9 evidence says, clearly, it's -- they thought they were the first
10 person to have a compact utility loader with vertical lift and all the
11 benefits that a vertical lift brings. And that's what their evidence is
12 about. And since I cannot address anything else other than
13 secondary considerations, I guess that is all I have.

14 JUDGE PETRAVICK: Great. Thank you.

15 MR. O'DELL: Thank you.

16 JUDGE PETRAVICK: So I believe that concludes today
17 and our arguments. We want to thank you for coming here and
18 sharing this information with us. It's been very helpful while we
19 deliberate. If afterwards, again, you would stay and help the court
20 reporter with any spellings and names that are needed, that would
21 be great. Thank you very much. We are adjourned.

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