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Paper 41
Entered: February 24, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UATP IP LLC,
Petitioner,

v.

SLICK SLIDE LLC,
Patent Owner

PGR2024-00054
Patent 11,998,854 B1

Record of Oral Hearing
Held: January 21, 2026

Before MITCHELL G. WEATHERLY, KRISTINA M. KALAN, and BRIAN D. RANGE, *Administrative Patent Judges*.

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The above-entitled matter came on for hearing on January 21, 2026, commencing at 11:00 a.m.

P R O C E E D I N G S

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JUDGE WEATHERLY: Good morning, everybody. Thank you for being here in person. This is a hearing for PGR2024-0054 regarding U.S. Patent No. 11,998,854, between Petitioner UATP IP LLC, and Patent Owner Slick Slide LLC.

Each side has 60 minutes to present their argument total. Total 60 minutes each side. Each side may reserve a rebuttal period. The rebuttal period is not to be used to present argument for the first time.

Petitioner will go first because it bears the burden of proof. I'm here -- I forgot to introduce my colleagues. I'm here with Judges Range and Kalan, who are attending remotely.

I'd like to -- I see that there are a number of people in the room. I'd like to get an idea of who's attending for whom. So if Petitioner's Counsel can introduce who we have on their side, and then I'll have Patent Owner do the introduction.

MR. RENNER: Thank you, and good morning, Your Honors. Karl Renner on behalf of Petitioner. Joined by Co-Counsel and colleagues Tom Rozylowicz and Craig Deutsch, as well as Steve Polozola from the UATP IP company, our client.

JUDGE WEATHERLY: Thank you. Patent Owner?

MR. SCHATZ: Good morning, Your Honors. Brett Schatz and Louis Sitler on behalf of Patent Owner, Slick Slide. Thank you.

JUDGE WEATHERLY: Excellent. Petitioner, how much time would you like to reserve for your rebuttal period?

MR. RENNER: Fifteen minutes, Your Honor.

JUDGE WEATHERLY: Okay. So I've guessed correctly. I'll be keeping the time. I think I still know how to do it. The timer up above me, behind my head, please try to keep it in mind. If you want to extend into your rebuttal period you're free to do so, but I am going to end up keeping track of how much time you burn, you know, in the main argument.

So, with all those introductions out of the way, Petitioner, the floor is yours. And when you're ready I'll start the clock.

MR. RENNER: Good morning, Your Honors, and may it please the Board. Karl Renner on behalf of Petitioner. Just a few words before I ask my colleagues, Craig Deutsch and Tom Rozylowicz, to walk through the details of the slides we've got here for your consideration.

Today, we think we have, effectively, the case of a buyer's remorse, to some extent. We see in our claim construction theories that we're facing is, we think, introduction of limitations, which is more properly cast as an amendment.

You can see this in a mesh layer term, which Craig will be detailing in a few moments. But, with respect to that term, just to highlight and to foreshadow, mesh layer becomes a layer of mesh, per the Patent Owner. But it doesn't stop there. It starts out -- or continues with something that adds "characterized by open spaces between threads." This is more the makings of an amendment than it is a construction.

Even if it were permissible to amend through construction, which we know it is not, you'd see problems with state of mind that are discussed in the record, that will be talked about today, as well as contradictions with the express disclosures that are found in the patent itself. And that is both

with respect to this mesh layer as well as the coefficient friction.

And this is why you see Patent Owner appeal to secondary considerations, because it leaves us with combinations in prior art that meets the claims squarely where they live, as they are articulated. But its appeal to secondary considerations, it fairs no better. Coextensiveness is not established. The products, there is no product that is coextensively shown with the patent claim. Even if it were, the evidence of praise is nothing more than praise that's generated by the Patent Owner for the Patent Owner's own sake.

And as to commercial success, what you see is reliance on the commercial records, the actual profits of the company itself, not tethered to a specific product, certainly not one that's been shown to be coextensive with the claim.

So we see praise and commercial success both lacking in the record. And this is important because, of course, with secondary considerations, we're looking for evidence that would otherwise derail an obviousness showing. Something that would tell us that even though the record tells us about the obviousness of the claims and what led to the prior art -- or the combinability, as it may be -- that we would look past that for secondary considerations because the evidence is so compelling that there were secondary considerations. There was commercial success or praise. But, here, there is none.

And that leaves us, finally, with enablement. My colleague, Mr. Rozylowicz, will take us through enablement. But we'll talk about the lower end of the range, a part of the claim that has been talked about quite a bit in the record, the .03 coefficient of friction. And we'll see that the Patent

Owner, it just hasn't taught the world how to achieve that kind of coefficient of friction, that low coefficient of friction --

JUDGE WEATHERLY: And how is that concept of coefficient friction relevant for the enablement issue?

MR. RENNER: Oh, thank you, Your Honor. That's a great question. So they claim that they -- the claim in it actually indicates that the apparatus will perform --

JUDGE WEATHERLY: As I understand it, enablement is asserted against a group of claims, Claims 8 through 13.

MR. RENNER: Mm-hmm.

JUDGE WEATHERLY: I don't see any limitation based on coefficient of friction in any of those -- well, I take it back.

MR. RENNER: Yes, Your Honor. The .03 end of the range is the issue.

JUDGE WEATHERLY: Claim 9 looks like an independent claim at first glance, but it's not.

MR. RENNER: So, Your Honor, we believe that the problem is that the description in the specification just isn't getting us the kind of detail that you need to know how to make and use an apparatus to form --

JUDGE WEATHERLY: Okay. What throws me off, I guess, is, you're talking about a failure to enable the coefficient of friction limitation?

MR. RENNER: To enable the apparatus to perform at that range of performance. That's right.

JUDGE WEATHERLY: Then why isn't enablement asserted for Claim 1? The lack of enablement.

MR. RENNER: I'll allow my colleague to spend more time with

you on that, if it's okay with Your Honors. That's Mr. Rozylowicz.

JUDGE WEATHERLY: Okay. All right.

MR. RENNER: But we believe that to be a concern for the full complement of claims, but we've got it here in particular in the subset.

And, with that, I'll ask my colleague, Craig Deutsch, to talk about the issues other than enablement. Unless, we can start with enablement, Your Honors, since you seem to be interested --

JUDGE WEATHERLY: No, I mean, I'm interested in all of it. I mean, one of the things that's very challenging about this case is that there are maybe a dozen rabbit holes to fall into.

MR. RENNER: And this is why I wanted to do an introduction of this type. I thought there are some that are critical. There's a variety of things that we wanted to make sure we were addressing, and you'll hear from Mr. Deutsch, primarily, on many of them.

But there are a few primary concepts, like the fact that the claim constructions they've offered are not tenable. And then when you turn to secondary considerations, it, too, has massive problems with respect to what the praise is, what the commercial success is, as well as coextensiveness.

JUDGE WEATHERLY: Okay.

MR. RENNER: And then enablement is another theory of --

JUDGE WEATHERLY: So how many Counsel are going to be presenting?

MR. RENNER: All three of us. I'll be finished up here until we get to the point where we're in rebuttal. But Mr. Deutsch and then Mr. Rozylowicz.

JUDGE WEATHERLY: All right. Great. Thank you, Mr.

Renner.

MR. RENNER: Thank you, Your Honors.

MR. DEUTSCH: Thank you, Your Honors. This is Craig Deutsch on behalf of Petitioner. And, with that, I'd like to start with Slide 7, digging into the claim construction issues that Mr. Renner noted.

There's two terms that Patent Owner has proposed constructions for: mesh layer, coefficient of friction. I'll take those in turn. And I'll note just briefly at the outset, as to the WN0400 grounds, Ground 1B, for example, there's no dispute that that provides a mesh layer. And so, even adopting Patent Owner's narrow construction, it's not dispositive as to those grounds.

Patent Owner's construction is shown at the top of Slide 8. And as we heard, that proposal recites that mesh layer means a layer of mesh. Again, repeating those terms. And then everything that follows is additive to that: "material which is characterized by open spaces."

JUDGE WEATHERLY: So is it Petitioner's position, then, that mesh refers really to a structure that's woven?

MR. DEUTSCH: So, Your Honor, I think the concern here is that what the '854 Patent talks about it, how it describes it, is interstitial openings between the threads of that woven material. And so when you have a woven material, even if it's relatively tightly woven and threads are together, there's still interstitial openings in many woven materials like that. That --

JUDGE WEATHERLY: I guess it's a matter of magnification.

MR. DEUTSCH: It can be. And so there's -- I can --

JUDGE WEATHERLY: I mean, the specification definitely describes a mesh, though. I mean, this language about open spaces doesn't

come out of nowhere, right? I mean, it's --

MR. DEUTSCH: That's right. So the language of open spaces between threads, that particular language comes from the Fairchild dictionary of fabrics that Patent Owner cites.

The '854 Patent, if we jump ahead, one excerpt is shown here on Slide 10, in the middle right, where it talks about, "may include a plurality of interstitial openings." And we see, Your Honor, much discussion about that, of course, in the '854 Patent where it steps through various examples of thread size, thread density.

JUDGE WEATHERLY: I mean, there's a very -- Rabbit Hole Number 1 is mesh layer, and how to tell the difference between a mesh and a not-mesh.

MR. DEUTSCH: Exactly.

JUDGE WEATHERLY: Did the parties ever get to a point where there was a dividing line between those? Did they have different dividing points? And, if so, what are they?

MR. DEUTSCH: Yeah, yeah. So the Patent Owner has proposed a dividing line, and it turns on that "characterized by" language. And so, according to Patent Owner, it's --

JUDGE WEATHERLY: Yeah, but that doesn't do it for me.

MR. DEUTSCH: Exactly.

JUDGE WEATHERLY: Because what does open spaces mean? I mean, you know, at the atomic level, even single atoms have mostly open space. So what does that even mean?

MR. DEUTSCH: Exactly. The problem with Patent Owner's construction is that it's subjective. It's based on a state of mind. And we see

--

JUDGE WEATHERLY: What do you mean by it's based on the state of mind?

MR. DEUTSCH: So, Dr. Rust, we asked Dr. Rust, you know, based on the institution decision's instructions of, you know, what is that lower bound, when is it no longer become a mesh, we asked Dr. Rust about this. St a certain point, is it too small to become a mesh? And he said it's not about the size at all; smaller, larger, that's not what's determinative, according to Patent Owner's interpretation.

What it means is -- and this is the bottom left of Slide 8 -- it means that the material is characterized by openings. And that means that there is a technical specification that indicates the size of the opening or the percent of open area.

And we see further explanation of that from Dr. Rust excluding materials that, there's no dispute, has open spaces between threads. But, based on how it's characterized by someone, or characterized in a technical specification, they would exclude that from being a mesh layer. And so that's just not workable. It's based on --

JUDGE WEATHERLY: So the need for a person to characterize a fabric using open area to describe its nature, that is the state of mind that you're talking about?

MR. DEUTSCH: Right. And you can see the problem with that, right? You can have two materials that have the same construction, the same material construction, same type of thread, same open area, but because there's a technical specification characterizing those open spaces for one, according to Patent Owner, that would be the mesh layer.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And the other material having the same characteristics would not be.

JUDGE WEATHERLY: So, Phillips -- Phillips is the primary reference relied on for, really, all of the prior-art-based challenges.

MR. DEUTSCH: That's correct.

JUDGE WEATHERLY: And Phillips does a relatively, let's just say, passing -- provides a passing description of its materials for its ride vehicle that includes nylon and sailcloth, I think, are the two that had gotten the most play from your side. If I'm wrong, feel free to correct me.

And because those two materials are woven materials -- or someone might read them as woven materials; someone might read them otherwise -- but that's the basis of your contention, Petitioner's contention that Element 1b-iii.

I'm going to say "three" even though it's iii. By the way, I don't like your notation.

(Laughter.)

MR. DEUTSCH: Understood, Your Honor.

JUDGE WEATHERLY: Just as a tip.

MR. DEUTSCH: So I'm happy to --

JUDGE WEATHERLY: I'm looking for, are you really pressing the anticipation argument, or is it there so that I can give you something -- I can give the Patent Owner something, but have you win on the single reference 103 argument. It feels strained to me, the anticipation.

MR. DEUTSCH: Understood. And, no, we think it's still anticipated. We also present Phillips alone obvious based on those teachings

and the corroboration of what a POSITA would understand about sailcloth being not only woven, but being permeable, consistent with the ASTM definition of fabric mesh, and even the Fairchild Dictionary. And so we think --

JUDGE WEATHERLY: I mean, there are forms of nylon that are -- the problem with Phillips, right, is that it's described as a membrane. Or the word "membrane" is what's used. And then examples are provided. Sailcloth, nobody's -- I don't think anyone's going to read that as, like, a closed membrane, or a continuous membrane, I guess, maybe. But --

MR. DEUTSCH: Right. And so, to answer your question, Your Honor, we still think, based on a proper construction of mesh layer, that that's valid. But that's far deep in -- you know, we have obviousness based on Phillips --

JUDGE WEATHERLY: So proper interpretation is the key. And implied in what you said, I believe, is that a mesh layer -- a mesh refers to any fabric that's woven of filaments in a weft and warp kind of form.

MR. DEUTSCH: I don't know that we need to go that far.

JUDGE WEATHERLY: Well, I need you to draw a line, too. You know, I'm going to -- you'll see, when the Patent Owner gets up, we'll play with them also about where the line gets drawn. You're not really drawing a line, either, so --

MR. DEUTSCH: Right. So the line -- I mean all of these, the extrinsic evidence in the '854 Patent, we think are in harmony in that it's not only woven, there's permeability caused by interstitial openings --

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: -- between those threads. And so --

JUDGE WEATHERLY: Permeability, like gas permeability?

MR. DEUTSCH: It could be, yeah, air flow, water vapor. There's testimony in the record from Dr. Rust --

JUDGE WEATHERLY: I mean, osmotic membranes will permit water to go through, but not air.

MR. DEUTSCH: Through the openings, right, not through the fiber material itself. And so --

JUDGE WEATHERLY: In other words, listen, if we're going to be pedantic, which, you know, patent attorneys love to be, then I'm going to press you, you know, go to the mat, or try to make sense out of this in a way that we can decide and not come across as equally pedantic. So, that's my challenge, and that's why I'm pressing as hard as I am.

MR. DEUTSCH: Yeah. And, you know, the "properly construed" encompasses woven materials that are permeable through interstitial openings. And that's consistent --

JUDGE WEATHERLY: As is so often the case. I've got parties here in front of me telling me what -- not telling me what something is fully, but whether it covers or doesn't cover the prior art. This beautiful, implied interpretation --

MR. DEUTSCH: And that's the problem with our --

JUDGE WEATHERLY: -- strategy that we all fall into. Okay.

MR. DEUTSCH: Right. That's the problem with this "characterized by," where it's arbitrary based on who's --

JUDGE WEATHERLY: Well, I've got problems with your side, too.

MR. DEUTSCH: And I can -- lastly on this point -- and again this

doesn't impact the WN0400 combination, which there's no dispute is a mesh layer under any interpretation. But, again, just going back to the examples given in the '854 Patent --

JUDGE WEATHERLY: Is it WNO or WN0400?

MR. DEUTSCH: I'm sorry. I think it's WN0400.

JUDGE WEATHERLY: Okay. And that's just like a fabric specification, right?

MR. DEUTSCH: It is.

JUDGE WEATHERLY: For a specific nylon fabric.

MR. DEUTSCH: It's a Monofilament Nylon 6 woven mesh fabric. And I can turn to that combination as well.

So, the Ground B combination, based on Phillips, as you noted, Your Honor, which gives us the slide system, lubricated slide surface, and the ride vehicle having a low-friction durable material on the bottom. As you noted, includes particular materials for that bottom, including nylon, Teflon, sailcloth, among others.

In that list I'll note, just based on our earlier discussion, that list includes things that are not sheeting, that Dr. Rust acknowledges are not sheeting. So Phillips isn't limited to this idea of a membrane or sheeting the way that Patent Owner is referring to.

And what WN0400 provides is an example nylon mesh to implement Phillips' ride vehicle bottom, and to do so in a way that promotes the express objectives that Phillips talks about of low friction, highly durable. And we see the material itself is described as having excellent resistance to wear, it's durable, which, again, is consistent with what a POSITA would understand about those common materials.

And we see on Slide 20 more discussion about this motivation to implement the slide system using a nylon mesh like WN0400. Dr. Wang spoke to this and, again, how it promotes the low friction, high durable objectives of Phillips. And that's supported by significant documentary corroborating evidence. And I'll step through some of that as well.

We see one example on the bottom right, Exhibit 1011, again talking about the characteristics of PTFE and nylon that were known to a POSITA and consistent with Phillips' express disclosure of these materials.

Turning to Slide 21, again, Phillips already recites some example materials, nylon, sailcloth, and selecting a looser or more coarse weave was something that would have been obvious to a POSITA. Because, specifically, open weaves were known to promote lower friction.

And this is something that was laid out in the petition describing the motivations to combine. Dr. Wang spoke to this at length. And we see, on the left, his original testimony on this point, which is supported by, again, corroborating documentary evidence, like Exhibit 1009 talking about the impact of mesh coarseness was known and, specifically, that coarser mesh tended to promote lower coefficient of friction.

And we see the data in the bottom. You can see in the box Group 4. There's three types of mesh, with 13 being the finest, 15 being the coarsest. And then the resulting coefficient of friction data that was reported in Exhibit 1009 is shown at the left.

And we can see, across three different scenarios in six data sets, in every case, the coarseness is the lowest coefficient --

JUDGE WEATHERLY: How do you get that disclosure of coefficients of friction into the range that's in the claim, Claim 1?

MR. DEUTSCH: Yeah. Thank you, Your Honor. So the -- you know, of course, this is used to corroborate the use of a looser mesh. The combination is based on nylon and Teflon. And so that --

JUDGE WEATHERLY: When you say the combination of nylon and Teflon, tell me more details about what that is. Are you talking about a nylon fabric that's treated with Teflon? Or a nylon fabric --

MR. DEUTSCH: Yeah, I'm sorry. The slide surface has a Teflon --

JUDGE WEATHERLY: No, I know what the claim says.

MR. DEUTSCH: In the combination. So, Phillips talks about, in its discussion, first, the ride vehicle bottom can be made of a number of materials. And so in the combination it's a nylon ride vehicle bottom having characteristics suggested by the WM0400 reference. And that's interacting with the slide surface that Phillips teaches to use a Teflon material.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And so we have an interaction between a nylon mesh --

JUDGE WEATHERLY: Okay. But these coefficients of friction in Exhibit 1009 really don't correlate at all to nylon on a Teflon surface. Correct?

MR. DEUTSCH: Right. So, the purpose of that exhibit is highlighting the phenomenon of coarser mesh tends to provide lower coefficient of friction. And so if we --

JUDGE WEATHERLY: And none of the values that are in that exhibit are as low as the highest level that is in the claimed range.

MR. DEUTSCH: So, I don't know that that's the case, Your

Honor. So, in the exhibit -- again, this isn't part of the combination, and we're using different materials. But if we look at the bottom right, for example --

JUDGE WEATHERLY: Yeah.

MR. DEUTSCH: -- that's an example of, you know --

JUDGE WEATHERLY: Bottom right on Slide 21, you're talking about. Right?

MR. DEUTSCH: Exactly.

JUDGE WEATHERLY: Yeah.

MR. DEUTSCH: Coarse mesh nylon fabric interacting with a metal. And that achieves .2.

JUDGE WEATHERLY: .225.

MR. DEUTSCH: .225. The claim goes to .2

JUDGE WEATHERLY: The claim is a range of between about 0.03 to about 0.2. The specification says that "about" means plus or minus 10 percent. I read that as -- and maybe there's false precision here -- a range of 0.027 to 0.22.

I don't know how finely we're going to cut this. I know how finely, I think, Patent Owner wants to cut it, from some of the arguments they've made in their papers. They won't even give you credit for .225, as being described in Exhibit 1009. But Exhibit 1009 isn't part of the combination directly, either, though, so.

MR. DEUTSCH: That's right. It corroborates what happens with mesh coarseness across --

JUDGE WEATHERLY: It just provides a trend that a person of skill in the art, you assert, would know about. Bigger mesh, lower friction.

MR. DEUTSCH: That's right. And we see that -- and Dr. Wang --

JUDGE WEATHERLY: Back to my original question. How is it that you're getting this prior art to get inside this range?

MR. DEUTSCH: Yeah, that's a great question. And so there's a number of other pieces of evidence that, again, corroborate the materials of the combination, which are a nylon mesh having characteristics like WN0400, and then Teflon. Exhibit 1021 is an example of that, where it reports interaction between Teflon and nylon as .05, which is well deep into that range. And the --

JUDGE WEATHERLY: Yeah. But, so, Exhibit 1021 doesn't really have anything to do with the fabric that's described in WN0400, does it? I mean, other than it's not -- we're talking about nylon monofilament mesh.

MR. DEUTSCH: Right. And so what we have is, we have this value between nylon and Teflon, both recognized to be low friction, and then what happens when we're using a nylon mesh, for example, of a certain coarseness instead of something else. And that --

JUDGE WEATHERLY: So, here's the problem I'm having. And tell me why I shouldn't be having this problem if I shouldn't be. WN0400, the reference, and Phillips, the reference that's part of this combination, don't provide specific details about coefficient of friction.

Your expert testifies about how an ordinarily skilled artisan understands nylon fabrics to behave, and you have evidence of record to support his opinion about that. But your argument, I believe, presupposes that nylon is nylon is nylon is nylon. That they're all the same. Or that everybody, all skilled artisans, would know that they're going to be low

friction, it's going to evidence low friction.

Am I misunderstanding the approach?

MR. DEUTSCH: Yeah, I mean, I don't think we're relying on, you know, this idea that, oh, it's nylon, it's always going to be the exact same coefficient of friction. There can be variation that occurs. But our starting point is .05. And from there, you know, we have Dr. Wang --

JUDGE WEATHERLY: Your starting point as established by your expert saying, hey, experts understand that woven monofilament nylon meshes on a Teflon surface might have coefficient of friction as low as .05.

MR. DEUTSCH: Well, I mean, I guess I was approaching it a little bit different, where, just looking at nylon and Teflon generally, 1021 tells us the coefficient of friction is .05. And so that's, you know, from -- that's the evidence without any modifications or changes from Dr. Wang.

And then, from there, it's, you know, the evidence and testimony that's saying use of a mesh like WN0400 is actually going to promote coefficient of friction, promote low coefficient of friction.

JUDGE WEATHERLY: By promote it you mean lower.

MR. DEUTSCH: Lower. And that's, you know, where things like Exhibit 1009 come in. And I think it's telling -- not to dwell on 1009 numbers, because that's not materials in the combination. But if we look at that .225, it's a mesh on metal.

JUDGE WEATHERLY: Yeah.

MR. DEUTSCH: And it's almost at the top of the range. We would say it's at the range when you say it's plus or minus 10 percent.

JUDGE WEATHERLY: It's very close.

MR. DEUTSCH: And now we're using a Teflon surface, Teflon

slide surface, rather than the bare metal that 1009 has. And so there's just nothing to suggest --

JUDGE WEATHERLY: I know. I mean, I get all that. I get all that. And, you know, it's just that anticipation is a picky standard, as you know. So --

MR. DEUTSCH: I'm sorry, Your Honor. Say that again?

JUDGE WEATHERLY: It feels like there are holes in the anticipation argument, to me, because of how stringent the standard for proving anticipation is. Which I presume is why you have all of these backup --

MR. DEUTSCH: Yeah, I mean, I think -- right. And I think it's right there on anticipation. But, even if not, then when we talk about obviousness, there's really little question.

JUDGE WEATHERLY: Yeah, the weakness, though, is that there's nothing expressed in the references about what the coefficient of friction is. There just isn't, is there?

MR. DEUTSCH: Well, there's -- there --

JUDGE WEATHERLY: Other than how a skilled artisan understands nylon to behave on a Teflon surface.

MR. DEUTSCH: So, there's a few things. Right, we have those pieces of evidence telling us, with numeric values, what you would expect from nylon and Teflon. The things we've talked about in 1009.

There's a couple of other pieces. I mean, if you look to the Fallgatter reference, that provides a corroboration of these grounds. And also we included it in a later ground, just because it gives a specific numeric value that a POSITA would have been seeking when making the

combination.

And so, you know, in both Ground 1B, Phillips, WN0400, and the Fallgatter grounds, there is obviousness rationale that's set forth explaining why a POSITA would seek that range particularly, and they're equipped to do that with everything that was known in the art about nylon and Teflon materials.

And so I think if there's any concerns around anticipation or Phillips and WN0400, that gives us an additional express teaching of a value that a POSITA would be motivated to achieve.

And, you know, on that point, just kind of as a legal matter here, you know, in terms of the expectation of success that's required, it's one of reasonable expectation of success. And we saw in the institution decision, for example, it cited the Pfizer decision, which talked about the law on this point. And that decision goes on to say, you know, that an otherwise prima facie showing of obviousness isn't overturned by some level of unpredictability.

And so here, you know, it's not just assumption about how these materials will behave. It's they're behaving consistent with their known properties, and there's data to show that. And I think --

JUDGE WEATHERLY: I feel like I've consumed too much of your time by pestering you about this.

MR. DEUTSCH: This is a good topic to talk about.

JUDGE WEATHERLY: Yeah. There are only 16 minutes remaining, believe it or not, in your -- in the opening argument.

MR. DEUTSCH: Right. And I'll just briefly -- you know, I can turn to any other aspects of the combination, Your Honor, that are on your

mind. There's a couple of things that I would also talk about briefly, including the concerns that were raised about attaching the mesh layer to the ride vehicle bottom in the combination. And that I'll just touch on briefly.

And there are- -- Patent Owner argues that you have to use an adhesive based on Phillips' teaching, and if you use adhesive that becomes a friction-bearing surface, and that's problematic. And so there's two mistakes with that argument.

One is that it assumes the petition, in the combination, was limited to adhesive attachment of the mesh, and it's not. You can see that on page 38, where the combination is set out.

And then, second, it assumes that Phillips is limited to adhesive attachment. And that, too, is not. And Phillips talks about appending generally gives adhesive as an example. And so there's just any number of ways that a POSITA would have attached the mesh layer that Dr. Wang speaks to.

And even if attaching with adhesive, you know, this issue of wicking was known to a POSITA; how to control the adhesive to avoid wicking was known to a POSITA. And so these problems just don't impact a POSTIA's ability to make that combination.

And if we jump to Slide 28 briefly. We've been talking about motivation to combine, particularly using a mesh layer. And one of the things that I think is worth pointing out, this construction of a ride vehicle having a bottom with a woven material with open spaces, that's something that was in the art. That construction is not new, the material construction. There's no dispute that ride vehicles had plain weave, open construction fabrics that were used. And so, again, it's corroborating the combination.

And I'll point out here, Your Honor, this is also corroborated by Patent Owner's own prior art, but also pre-dates the patent by more than a year.

JUDGE WEATHERLY: Are you talking about the Slick City slide system from early 2022?

MR. DEUTSCH: No, no. The Sky Zone. It's the same launch slide. It was sold at Sky Zone in the 2020 timeframe.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And so, you know, those, we know from the inventor that those ride systems use a woven mesh bottom, and so, again, this is corroborates a POSITA's knowledge about materials to use, how to attach them, that are set forth in the combinations.

And so, Your Honors, just briefly going back to Element 1c again. There are these pieces of data that demonstrate what type of coefficient of friction would be achieved. And then, further, again, on Slide 38, an explanation of an additional obviousness rationale of why a POSITA would have sought that, and why they would have had a reasonable expectation in doing so. Given there's no dispute that there's a motivation to achieve low friction, there's no dispute about what it means to be low friction. Even prior art slides were in the .15 range. And, again, the tools to do it.

And so there is a reasonable expectation of success in achieving, you know, that range, given the values that are typical of Teflon and nylon and the effect of mesh coarseness on that.

And again, lastly on that point, the materials here align very closely with what we see in the patent itself, which also talks about a Monofilament Nylon 6 mesh, a PTFE slide surface. And so there's really no

question in that regard, either, when the construction is aligned with what we see in the patent itself. And so it's just asking for something that goes beyond what the patent provides.

So, with that, in a couple minutes I can talk about secondary considerations, Your Honors. And, as we noted at the outset, you know, the purpose of this is to guard against hindsight, right? If there's praise and success against something that might otherwise seem obvious, it might not be if there's praise from third parties or commercial success, because why would that be celebrated if it was something mundane or not new.

But praise directed to something that's not new would not reveal anything. It wouldn't speak to non-obviousness. It would speak to misguidedness about what was in the art. And that's what we have here today.

There's no dispute, turning to Slide 53, about the prior art status of the earlier launch slides. And we know from the sole listed inventor of the '854 Patent that those slides include, "the core inventive components of its recreational slide system, including the lubricated slide surface and a woven mesh bottom surface."

And this is something that Mr. Schmit explained again in deposition when questioned by his own Counsel, in the excerpts at the bottom right. Without the technology claimed in the '854 Patent, the slides would not function. And we see --

JUDGE WEATHERLY: So the key here to this testimony is "those slides" refers to slides that existed in 2020 and 2021. "Those slides" in the testimony at the bottom right of Slide 53. Without the technology claimed in the '854 Patent having been incorporated into "those slides." That

refers to the slides that pre-date the earliest priority date.

MR. DEUTSCH: Yeah, I mean, all of his testimony, there's no distinction between those earlier slides and the later slides. And that's something Patent Owner might dispute. And I wouldn't be surprised to hear from them, oh, yeah, it's only talking about 2022, post-2022 slides. And we know that's not the case.

You know, paragraph 43 is excerpted here. We can see in that discussion --

JUDGE WEATHERLY: Right. And we're caring about this topic only to decide whether the Patent Owner is unpersuasively relying on prior art items as the basis for establishing a nexus between its commercial success and the claims.

MR. DEUTSCH: No, Your Honor. So, there's issues at each level of the secondary considerations analysis. And so this is a problem overarching all of the secondary considerations. The Federal Circuit tell us they need to be attached to something new and unique in the claims.

JUDGE WEATHERLY: Right.

MR. DEUTSCH: Not the prior art. And that's not only in the context of if there's coextensiveness and proving of nexus -- or no extensiveness and proving of nexus. That applies regardless.

And so this is an overarching fatal flaw. If we look at coextensiveness, it fails both prongs --

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: -- both prongs of that. And I'll turn to that momentarily. And I just want to show this again. This is the prior art slide.

JUDGE WEATHERLY: Slide 54?

MR. DEUTSCH: Slide 54. And again --

JUDGE WEATHERLY: Record hygiene. That's all I'm saying that for, to make the record clear.

MR. DEUTSCH: Thank you. Thank you. And so it's not a question of you know are we talking about 2022 slides or prior slides. If a slide wouldn't work, it wouldn't work, and we'd see what the prior art slides do.

And so just briefly stepping through the analysis, we have, on the coextensiveness front --

JUDGE WEATHERLY: Slide 57?

MR. DEUTSCH: Slide 57. This is an excerpt from FOX Factory. And there's two sides of this, right? Is each of the claim elements embodied in the claims? And is there nothing more that's significant? And, here, both sides fail.

So, starting with is everything in the claim, Your Honor, the only evidence that Patent Owner relies on for Element 1c is test data, Exhibit 2039. And there's nothing tethering that test data to any particular sample, and certainly not an alleged embodying product.

And we asked Dr. Spiegelberg what was the material, where were the samples from. He didn't know. And so there's just nothing tying that evidence to the embodying products.

And then, if we look at the other side of the analysis, there's additional features that are missing. Or, excuse me, that are unclaimed but that are included in the product. And the importance of this is that it's not an ancillary feature; this is an oil lubricant that goes directly to coefficient of friction that we're talking about, directly to slide performance.

We see, on the left, representatives from Patent Owner --

JUDGE WEATHERLY: Slide 59 now.

MR. DEUTSCH: Slide 59, thank you. "If we see a slide performing slower, we can use a special oil; we call it slick sauce." And so this is an oil lubricant designed to lower coefficient of friction and, in their own words, remedy a slow-performing slide. So this is an additional --

JUDGE WEATHERLY: And there's no evidence of record about whether that -- what was is called? Slick sauce?

MR. DEUTSCH: Correct.

JUDGE WEATHERLY: Meets the limitations that are recited in some of the dependent claims about the lubricant? In other words, not even any evidence that that oil constitutes a dry lubricant?

MR. DEUTSCH: No. I mean the evidence is --

JUDGE WEATHERLY: It doesn't.

MR. DEUTSCH: It doesn't. Right. It's a liquid. It's a liquid --

JUDGE WEATHERLY: Well, they've all been liquids at some point, right? Even the dry lubricant is applied as a liquid and then it hardens. If I understand the patent specification, anyway, so.

MR. DEUTSCH: Right. And this is actually in the patent specification, but unclaimed. And so it --

JUDGE WEATHERLY: Oh, the oil. Yeah, that's right.

MR. DEUTSCH: An oil. So, "an oil" is there.

JUDGE WEATHERLY: Right.

MR. DEUTSCH: And it's unclaimed. And, right, there's nothing in the record to suggest that it becomes part of the dry lubricated surface, for example.

JUDGE WEATHERLY: But are there details in the record of what the slick sauce is?

MR. DEUTSCH: No. No, there's not. In terms of the composition, that was something we had asked about.

JUDGE WEATHERLY: So we really don't know what it is. We don't know if it's silicone oil; we don't know if it's just a wet version of what becomes a dry lubricant. It's just something they put on the slide that makes the --

MR. DEUTSCH: It's a liquid oil. We know it's --

JUDGE WEATHERLY: -- dry vehicle slippery again.

MR. DEUTSCH: You're right, Your Honor. It's a silicone oil. It's a liquid silicone oil.

JUDGE WEATHERLY: That is of record?

MR. DEUTSCH: That is of record.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And the only evidence in the record is Dr. Wang explaining how that would impact coefficient of friction performance.

JUDGE WEATHERLY: Let me ask you a different question of the record. Is it of record from the Patent Owner? Or is it of record because your expert says it's silicone oil?

MR. DEUTSCH: We can pull the cite for that, Your Honor..

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And just lastly on this point, and before I turn it over for enablement, you know, in terms of where the record stands on this --

JUDGE WEATHERLY: I fear that you're not enabling your Co-

Counsel to do his enablement argument in only three minutes. But we'll see. We'll see how he does.

MR. DEUTSCH: And we'll use a couple of minutes into our rebuttal.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And just lastly on this point, I want to just, in terms of what the record is, where we're left with, this is the entirety of discussion from Patent Owner of this oil lubricant. And they don't dispute its significance. They don't dispute how it operates in the slide system.

And so, when we're looking at coextensiveness and the comparison between the claims and the --

JUDGE WEATHERLY: Slide 60.

MR. DEUTSCH: -- embodying product -- thank you, Your Honor -- there's just nothing from Patent Owner that even engages with this coextensiveness piece of the analysis. They're looking at a different piece of the analysis.

And so coextensiveness fails because of both of those things. And there's, yeah, additional features that are relevant. The fact that a rider is launched, which Mr. Smith explains the significance, and the --

JUDGE WEATHERLY: Slide 61.

MR. DEUTSCH: Slide 61.

JUDGE WEATHERLY: It would be much smoother if you announced the slide yourself.

(Laughter.)

MR. DEUTSCH: Thank you, Your Honor. So, with that, I'll turn to Slide 64, briefly talking about nexus.

JUDGE WEATHERLY: Excellent.

MR. DEUTSCH: There's deficiencies there as well. And moving quickly to Slide 65, praise. Here again, what we see is not industry praise. What we see is praise from Patent Owner itself, its PR and marketing group. There's two examples on Slide 65.

And then if we look at the content, further, of those materials, Slide 67, on the left is an example, again from Exhibit 2045, talking about extensive analysis, MIT, NASA. And what does the sole inventor say about that, the founder of Slick Slide? He says, "seems like a little bit of fluff to me."

And so this is what we're talking about when we're talking about praise. And, again, that's balanced with the evidence of praise to the prior art product.

And just to walk through briefly on Slide 55, Mr. Schmit testified to the performance going all the back to the beginning of the first sales, the prior art sales to Sky Zone, the praise that that received. And that was actually the genesis for everything that we see in Exhibit 2045. And that's discussed in the top right excerpt of 55, which led to the creation of Slick City.

And so, again, there's no distinction between --

JUDGE WEATHERLY: If my memory is correct, Exhibit 2045 is one of those exhibits -- I'm stopping the clock because this shouldn't be on you -- that I think -- yeah.

Patent Owner, page 7 of Exhibit 2045 didn't render correctly, at least in the record. I know you submitted Exhibit 1050, I think to try to fix that. You found another copy of this article.

MR. DEUTSCH: Yeah. Right.

JUDGE WEATHERLY: Off the record.

(Whereupon, the above-entitled matter went off the record at 11:49 a.m. and resumed at 11:50 a.m.)

MR. DEUTSCH: And so I'll close in the secondary considerations just with the same set of issues we see on the commercial side, where the sales encompass prior art products, global sales, internal sales between -- to themselves, essentially.

And there's a unique issue we see here about a honeymoon period that is typical in Mr. Schmit's analysis, that we don't know where that is going to drop off to, where the revenues are going to plateau. And so it's just not the type of evidence that demonstrates commercial success.

And so, with that, I'll pause and we'll talk briefly about enablement, with a few minutes going into our rebuttal time.

JUDGE WEATHERLY: Okay.

MR. ROZYLOWICZ: Thank you, Your Honors. And perhaps before we get started, in order to ensure that we answer all of the questions, would it be possible for both sides to be granted an additional five minutes?

JUDGE WEATHERLY: We'll decide when we get close to the end of the clock whether we have additional questions that need to be answered.

MR. ROZYLOWICZ: Thank you, Your Honor. I believe you asked one question on enablement during my colleague's introduction. And that is, are there other questions about enablement as it relates to Claims 1 through 7?

And, Your Honor, I'd say there are concerns. But I'd note that

Claim 1 doesn't recite the use of materials. And, for example, Claim 9, as shown here on the upper left-hand side, speaks to the particular --

JUDGE WEATHERLY: We're on Slide 75. Right?

MR. ROZYLOWICZ: Yes, Your Honor. Thank you. On Slide 75. And as we'll see from the record, and what we're about to discuss, I think it makes clear that these materials are unpredictable and, as such, the enablement concerns really come to the forefront when dealing with Claims 8 through 12.

JUDGE WEATHERLY: So is the enablement problem really -- does it creep in at Claim 9 because of the percentages by weight that are recited? Or are you saying that it creeps in at Claim 8 because of the four different types of materials that are specified?

MR. ROZYLOWICZ: Yes, Your Honor. I think it creeps in also with -- I think perhaps it's best exemplified with Claim 9, although it certainly is present in Claim 8. Because, as we'll see in this record, use of lubricants, particularly as we're approaching the theoretical limit of these materials, is unpredictable. I would go so far as to say wildly unpredictable.

JUDGE WEATHERLY: Okay.

MR. ROZYLOWICZ: So, Your Honor, I call your attention to Slide 76. And here we see testimony -- I think it was one of the rare areas for agreement, where Dr. Wang, Mr. Schmit, and Dr. Spiegelberg all spoke to the same factor, which is, for example, Dr. Spiegelberg noted that there are, and I quote here shown in the upper right-hand side, "there are at least ten different factors that influence the coefficient of friction data."

Again, reading Mr. Schmit's testimony, shown in the lower right-hand side. And, again, he notes that there's just, again, there's just so many

variables that come into play when you're dealing with different materials.

When asked during his deposition, shown in the lower left-hand side, Mr. Schmit noted, am I correctly understanding that if you change one thing that could affect one of the other variables. His answer: absolutely.

JUDGE WEATHERLY: I'm sorry for the interruption, but I'm sure you can tell that I'm sort of chasing this challenge a little bit. So it's not only that Claim 8 specifies that the dry lubricant must include four separate types of material -- resin, lubricant, thermal conductor, and hardener -- but also whatever combination you make of those four substances has to result in a coefficient of friction between .03 and .02 -- or zero -- yeah, 0.03 and 0.2.

MR. ROZYLOWICZ: Right. Thank you, Your Honor. Let me clarify. Our large concern is particularly that they haven't enabled the low end of this range. Right? The record establishes that they are at the very theoretical limits of these materials at .03, which I believe is shown in the record to be "ice on ice" is the very limit.

The other materials that we see in the record are things that the Patent Owner offers that don't even approach .03, are things such that really aren't in dispute in this record. Materials like diamond-like carbon, for example, I think are one of the materials that are mentioned.

JUDGE WEATHERLY: So your argument is also dependent upon enabling the entire range, not just the upper end.

MR. ROZYLOWICZ: Yes, Your Honor. Again, particularly -- the question before us is not whether or not they've enabled a -- taken a potato sack down a 50-year-old slide, which I think the record shows, these slides go back 50 or 100 years.

JUDGE WEATHERLY: Okay.

MR. ROZYLOWICZ: But the question is whether or not these systems have been enabled to operate -- and, again, approach the theoretical limit of operating at a .03.

JUDGE WEATHERLY: Okay. So it's really a matter of, the claims have to enable the entire claimed range.

MR. ROZYLOWICZ: Yes, Your Honor.

JUDGE WEATHERLY: Or the spec has to enable the entire claimed range. And the problem is with the lower end of the range.

MR. ROZYLOWICZ: Right.

JUDGE WEATHERLY: Okay.

MR. ROZYLOWICZ: And, Your Honor, right here, so, the test data doesn't get you there, right. Their test data right there shown in the lower right-hand --

JUDGE WEATHERLY: Which slide is this?

MR. ROZYLOWICZ: Sorry, Your Honor. On Slide 75. Their test data, shown on Slide 75 reveals four different test runs, none of which go below .04. So their test data doesn't get you there. Instead, Your Honor, I believe their relying on the knowledge of a POSITA would, in fact, enable the lower end of the range.

And, Your Honor, again, as noted earlier, we'd submit that those lubricant arts aren't predictable. And what's shown here in the upper right-hand side of Slide 79, when we track the coefficient of friction, shown in red in the upper right-hand box, as we add increasing amounts of lubricant as we go from left to right, while the coefficient of friction initially decreases, it increases beyond a certain amount.

And what Dr. Wang has said there is that you cannot predict when this has become an increased coefficient of friction. As he says here in the lower right-hand side, he said that a POSITA would have understood that such an appropriate amount cannot be determined theoretically and can only be determined with significant experimentation.

And he talks about why this is the case, shown on the lower left-hand side, in paragraph 25. He says that a POSITA would have understood if the addition of fillers for the purpose of improving tribological performance can have unexpected consequences on the characteristics of the compound, such as decreasing mechanical hardness or flexural strength related to the unfilled epoxy.

JUDGE WEATHERLY: I don't know if it's necessary for your expert to use the word "tribological." But if it's not, I wish he wouldn't.

(Laughter.)

MR. ROZYLOWICZ: Yes, Your Honor. Your Honor, turning to Slide 81, their inventor walked us through how much experimentation was required. For example, on Slide 81, he noted that -- and I'll quote from the upper left-hand portion -- he said, "I experimented with hundreds of different materials over many, many years."

And then turning to the middle portion on the left-hand side, we said, when did you arrive at the slide surface that you thought would be effective? He said, "Gosh, I don't know that time period. It's such a long evolution and failure after failure after failure." And, proceeding to the lower portion, he then noted, "it was continual failure after failure, back to the drawing board, that went on for many years."

And why did he experience all this difficulty? Mr. Schmit is

simply acknowledging the unpredictable nature of the extreme portion of this range of the coefficient of friction. And he gives us context in the upper right-hand side. He said, "With so many variables, that's why it's hundreds of different combinations." He then notes, shown in the box in the middle right-hand portion, he noted, there's just too many list -- speaking of the factors. He then said, and I quote, "I mean, it goes -- obviously, I'm seeking out low coefficient of friction materials and combining the two and experimenting and failing and experimenting and failing and just kept going." When asked --

JUDGE WEATHERLY: So, I guess I'm back to one of my original questions about this enablement theory. And that is, why you all didn't argue that Claim 1 was not enabled. If the really -- the magic -- or the failure of enablement is that it required too much experimentation to get down to .03 as the coefficient of friction, then it really doesn't matter.

MR. ROZYLOWICZ: Your Honor, I would submit that there are enablement concerns that also apply to Claim 1, but I think, in the context of, for example, these particular materials, which we know from the record establishes that it's wildly unpredictable --

JUDGE WEATHERLY: Okay. I think I understand better now. So it's not really just reaching .03, the lower end of the bound; it's doing it with the four materials that are specified in Claim 8.

MR. ROZYLOWICZ: Yes, Your Honor.

JUDGE WEATHERLY: Okay. And thank you for bearing with me as I catch up to the argument.

MR. ROZYLOWICZ: And, Your Honor, earlier I think in your remarks you spoke to the word rabbit hole. And I think the word rabbit hole

certainly is the operative term for today.

JUDGE WEATHERLY: I think you're right.

MR. ROZYLOWICZ: When Mr. Schmit was asked whether he was using commercial off-the-shelf solutions or his own formulations he noted, and I quote, "the list goes on."

JUDGE WEATHERLY: We're on Slide 83.

MR. ROZYLOWICZ: Yes, Your Honor. On Slide 83.

JUDGE WEATHERLY: Okay.

MR. ROZYLOWICZ: And his words describe on the composition, he noted that he used, and I quote, "Hundreds over the years. There's things that go wrong, like temperature, velocity, wear and abrasion. There's just many. There's so much room for error and it just -- it takes a lot when you start going down the material science rabbit hole."

JUDGE WEATHERLY: See, and I didn't even realize that rabbit hole is already in the record.

MR. ROZYLOWICZ: Very prescient remarks, Your Honor.

JUDGE WEATHERLY: Okay.

MR. ROZYLOWICZ: Now, again, Your Honor, I pause on these last four words. Material science rabbit hole. Your Honor, when the inventor characterizes the amount of work that needs to be done as a material science rabbit hole, that, by definition, is undue experimentation. It fails to satisfy the enablement requirement.

JUDGE WEATHERLY: That's a great advocate's line, but I'm not sure I can write that in a decision. That's okay, though.

You've gone 10 minutes into the rebuttal time. That leaves five minutes for rebuttal. I'll take your request for additional time under

advisement. We'll see how it goes. Okay?

Anything further from Petitioner on the opening? No? Okay. So I've got five minutes officially remaining.

Mr. Deutsch, I see you back at the podium. That implies that you want to say something further.

MR. DEUTSCH: I'm sorry, Your Honors. I didn't --

JUDGE WEATHERLY: I mean, you can if you want to. There's five minutes remaining.

MR. DEUTSCH: No, Your Honor. I apologize.

JUDGE WEATHERLY: Oh, you're just getting the computer. All right. Well, that's what I get for not watching every move.

Okay. Patent Owner, whenever you're ready. How much time would you like to reserve for rebuttal?

MR. SCHATZ: Thank you, Your Honor. Just 10 minutes.

JUDGE WEATHERLY: Ten minutes. Okay. Give me a moment and you can begin whenever you're ready. Take your time.

MR. SCHATZ: Thank you, Your Honors. And as part of my presentation I might be referring to Patent Owner's demonstrative exhibits. And I understand that you have an electronic copy in front of you for those.

JUDGE WEATHERLY: We do. We do.

MR. SCHATZ: Thank you.

JUDGE WEATHERLY: And if you're really skilled at keeping the record hygienic by referring to the slide that you're on, then I won't need you to put it up on the display next to you.

MR. SCHATZ: Thank you, Your Honor.

I'm going to dive quickly into the claim construction issue after a

few points, because I know Your Honor is very interested in that topic. But I want to hit a couple of highlights first of all.

With regard to the Phillips study and the WN0400 combination, there is no evidence whatsoever about the coefficient of friction for WN0400.

JUDGE WEATHERLY: And by that statement I take you to mean there's no express statement in either Phillips or WN0400 about a coefficient of friction. There's no value provided.

MR. SCHATZ: That is the case. But, in addition, there is no exhibit that would demonstrate the coefficient of friction for WN0400 in any of the exhibits presented by Petitioner. Let me explain.

JUDGE WEATHERLY: And by WN0400 you're referring not only to the exhibit, but, I take it, to the fabric that's described in the exhibit?

MR. SCHATZ: Yes. That's right, Your Honor.

JUDGE WEATHERLY: So Petitioner didn't buy the fabric and test it on a Teflon surface and say, here's the coefficient of friction that resulted?

MR. SCHATZ: That's correct, Your Honor. And so there's a fundamental failure of proof in terms of a combination which requires a mesh layer and the claimed range of coefficient of friction. And that's very important because all of the experts in the case concede -- and, in fact, Petitioner's expert advocated for this fact in the petition -- that coefficient of friction data is heavily dependent upon a multitude of factors. One of which, importantly, is the morphology of the material.

So when you take, for example, Kothari, which is Exhibit 1009, that is the only evidence of record that discloses a coefficient of friction for

mesh. Now, it doesn't disclose the coefficient of friction for W0400 (sic), but it does -- it only discloses coefficient of friction data for a mesh.

JUDGE WEATHERLY: For a nylon mesh, at least, right?

MR. SCHATZ: Well, more specifically, it's a nylon bolting fabric. And that's an important point. And just to be more clear, Kothari, Exhibit 1009, is referred to by the Petitioner with regard to Group 4 fabrics. Those are three meshes, but they are described as nylon bolting fabric. And there has been no suggestion, there is no evidence in the record, that WN0400 is a nylon bolting fabric.

There's another problem when you look to Kothari to demonstrate some type of coefficient of friction data in the grounds asserted by the Petitioner. And that is the columns of data are three fold. There's fabric to fabric, fabric to leather, and fabric to metal.

And I deposed Petitioner's expert on this point, and Petitioner's expert testified that none of those three scenarios are applicable to a ride vehicle on a slide. And so there is no evidence connecting the coefficient of friction data for WN0400 in the record. None. But even if there is, it doesn't fall within the claimed range.

Now with that opening comment I'm going to dive right in to claim construction if that's okay.

JUDGE WEATHERLY: Sure.

MR. SCHATZ: Because I know that's going to be of interest to Your Honor.

Your Honor, in your questioning for the Petitioner, you made the comment that open spaces doesn't come from nowhere, correct? And Your Honor is absolutely right. In the record, the industry resource that is referred

to by persons of ordinary skill in the art is the Fairchild Books Dictionary of Textiles. And that resource in the record provides the definition of mesh. And that is any fabric which is characterized by open spaces. That's Exhibit 2006, and I'll also reference --

JUDGE WEATHERLY: Also you know, I prefer to focus on intrinsic evidence first when interpreting claim language.

MR. SCHATZ: Very good.

JUDGE WEATHERLY: It gets me in less trouble on appeal.

MR. SCHATZ: The reason why I focused in on the Fairchild Books Dictionary of Textiles is because the '854 Patent is entirely consistent with what a person of ordinary skill knows about the definition of mesh from this industry-accepted resource.

The '854 Patent specification repeatedly references the purpose of the warp and weft threads to form, quote, to form a plurality of interstitial openings. That's Exhibit 1001.

JUDGE WEATHERLY: Right. It's column 5, or not column 5. Column 10 discussing Figure 5.

MR. SCHATZ: That's exactly right Your Honor.

JUDGE WEATHERLY: There are claims that limit mesh that way. And other claims in the patent are also among the things that I have to consider when interpreting mesh. And so for Claim 1 the focus is on the coefficient of friction not on, for lack of a better way of saying it, the degree of openness or the size or the diameter of the weft and warp fibers which is a different way of describing perhaps a characteristic of quote unquote openness.

These claims are different. They have different scope. They have

different scope in connection with mesh. Why shouldn't I be interpreting mesh as it's recited in Claim 1 in a way that's more akin to the way Petitioner is arguing?

MR. SCHATZ: Well there's several reasons why. First of all, in the petition and in the Petitioner's reply to Patent Owner's preliminary response, Petitioner repeatedly represented that mesh layer need not be defined.

What we have now, too late in the game, is a suggestion which is more an attempt to invoke a new claim construction based on a woven material. So first of all, it's too late.

JUDGE WEATHERLY: But listen, I mean, when I was questioning Petitioner I was very hard on them about the sort of breadth or the inability to put my finger on a dividing line between mesh and not mesh.

Claim 22 for example says that the open area of the mesh layer is between 35 percent and 50 percent. I'm paraphrasing. I presume that that is a fairly unclear way of specifying that the amount of open area divided by the total area is a percentage, 35 to 50 percent.

But let's say for example that you have a woven fabric where the open area is one percent. Would that meet mesh as it's recited in Claim 1?

MR. SCHATZ: It depends. Because the industry standards --

JUDGE WEATHERLY: Okay.

MR. SCHATZ: The industry standards define mesh as any fabric that is characterized by open spaces. Does a person of skill in the art, knowing that definition --

JUDGE WEATHERLY: How open does it need to be?

MR. SCHATZ: A person of skill in the art has to refer to that

material by its open spaces. Dr. Rust gave an example --

JUDGE WEATHERLY: Frankly that argument comes across like -- as nonsense to me. You're telling me that a way a random person would describe the material like, does anyone say that a material is one percent open area and therefore it's a mesh?

MR. SCHATZ: Look at WN0400 as an example. On the website in which that was located by Petitioner, it is identified as a 45 percent open material.

JUDGE WEATHERLY: Okay. So it's definitely a mesh.

MR. SCHATZ: It is. And so --

JUDGE WEATHERLY: As Claim 1 and Claim 22 claim mesh.

MR. SCHATZ: That's exactly right.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: It is a mesh. And that's how the persons of skill in the art characterize it --

JUDGE WEATHERLY: Right.

MR. SCHATZ: -- or refer to it --

JUDGE WEATHERLY: Right.

MR. SCHATZ: -- by its open spaces.

JUDGE WEATHERLY: No, I see that people of skill in the art refer to materials by their percentage of open area. And they use that characteristic when discussing meshes. But I just am having a difficult time accepting that that is the thing that distinguishes a particular material as it sits on my desk in front of me as mesh versus not mesh, merely how someone might describe it. When you are advocating that it just merely has to have open spaces. Right?

So one percent open space means there are open spaces, yes?

MR. SCHATZ: Respectfully no, that is not Patent Owner's position.

JUDGE WEATHERLY: Twenty percent?

MR. SCHATZ: It depends on whether or not the person of skill in the art would refer to that material. As an example, burlap for example --

JUDGE WEATHERLY: Yeah.

MR. SCHATZ: -- may have open spaces.

JUDGE WEATHERLY: Uh-huh.

MR. SCHATZ: But a person of skill in the art does not refer to, does not identify a burlap that it wants by way of its open spaces. It refers to it or characterizes it by its weight. And that is why burlap, even if it does have open spaces, is not a mesh. And that is pursuant to --

JUDGE WEATHERLY: Isn't the amount of open space something that is just an intrinsic property of the material that you can measure? I mean, who cares whether someone puts that label on it?

If you put a piece of burlap down in front of me, I can measure how much open space there is, right?

MR. SCHATZ: The person -- yes. But --

JUDGE WEATHERLY: And if there is open space -- so if you're telling me that if someone were to use a burlap sack that is 40 percent open area and slide down a slide that otherwise meets every limitation of Claim 22, that combination is not infringing.

MR. SCHATZ: It --

JUDGE WEATHERLY: Because no one calls burlap mesh.

MR. SCHATZ: Yes. That's exactly right.

JUDGE WEATHERLY: I think that's ridiculous.

MR. SCHATZ: Respectfully, you have to look at what the persons of skill in the art would define it as. And that's --

JUDGE WEATHERLY: I guess I should say, respectfully I find that to be ridiculous.

MR. SCHATZ: I appreciate that.

Your Honor again, we look to what is the evidence of record.

JUDGE WEATHERLY: Sure.

MR. SCHATZ: And persons of skill in the art refer to mesh as any fabric that's characterized --

JUDGE WEATHERLY: I'm not saying they don't.

MR. SCHATZ: -- by its open spaces.

JUDGE WEATHERLY: I'm not saying that they don't do that. I agree with you. They might -- they very well may do that. And the problem I'm having is that materials that are woven like this have inherent characteristics. And no matter what somebody calls it, if the concept that distinguishes mesh from non-mesh is whether it has open areas, I can see with my own eyes if there are open areas.

And you're asking me to do a claim interpretation that's based on some sort of subjective, extrinsic concept. Or subjective, I may have said objective. I don't know that I'm allowed to do that that way frankly, as a decision maker.

MR. SCHATZ: That's why Your Honor, when you said you have to look to the intrinsic record, the specification repeatedly refers to mesh by way of its open spaces.

JUDGE WEATHERLY: Right.

MR. SCHATZ: And Your Honor if I may, look to Claim 14.

JUDGE WEATHERLY: Uh-huh.

MR. SCHATZ: That claim requires a woven mesh. And so we know that woven cannot be the definition --

JUDGE WEATHERLY: I think that Claim 14 says weave of threads formed of monofilament synthetic fibers.

MR. SCHATZ: And maybe I have the wrong claim Your Honor, I apologize. But there is a claim that calls for a woven mesh. And therefore mesh cannot be defined as --

JUDGE WEATHERLY: That's Claim 22.

MR. SCHATZ: I apologize, thank you Your Honor.

JUDGE WEATHERLY: And Claim 25.

MR. SCHATZ: And that's why not only is Petitioner's very late suggestion that mesh should be defined in terms of any woven material is inappropriate because it's contradictory to the claims.

JUDGE WEATHERLY: So let me ask you this then. It almost -- you directing me to other claims -- and recognize I have to write a decision about all of these claims. And all the claims, all the independent claims use the word mesh.

Two of the independent claims call that mesh a woven mesh, and they don't mention anything -- Claim 22 and Claim 25 mention nothing at all about coefficients of friction. They instead talk about physical characteristics of the woven mesh layer, Claim 22 being directed to how much open area exists, and Claim 25 being directed to the diameter of the thread used to make the woven mesh layer.

I think I hear you arguing essentially that mesh means three

different things. And it's not the same between Claim 1, Claim 22, and Claim 25.

MR. SCHATZ: I respectfully don't agree. Again, a mesh layer is a singular defined thing, and it is objectively known by a person of skill in the art --

JUDGE WEATHERLY: How do I know that the one that's -- that the mesh that's recited in Claim 25 is a mesh? There's no evidence, there's nothing in that claim that talks about open area, or the degree of open area. And you're saying that that's the key that a person of skill is going to refer to that material by how much open area there is. Yet this claim, 25, which recites a mesh reads on things that are defined merely by the diameter of the threads.

MR. SCHATZ: Well no, there's a requirement of the mesh in the claim itself, and therefore it has to be a material that is characterized by its open spaces. It just means that the amount of open spaces is not critical for that claim.

JUDGE WEATHERLY: It's going to take me a bit to unravel the argument. I'm having a great deal of difficulty with your position. I'm not saying it's a loser, but it sure feels like one as I'm sitting here right now.

MR. SCHATZ: Yeah. And again Your Honor, the only thing we can do is look to the specification where it repeatedly defines mesh in the context of its open spaces.

JUDGE WEATHERLY: Not always. Sometimes it defines it in terms of what the thread size is.

MR. SCHATZ: Well, there is a reference to some embodiments talking about thread sizes, but throughout the specification mesh is designed

to form interstitial openings. And so the specification is very --

JUDGE WEATHERLY: And that can be done without saying anything at all about how much open space there is.

MR. SCHATZ: The amount of open spaces, correct. But it still has to be characterized by its open spaces.

JUDGE WEATHERLY: Creative argument. I'll give you that.

JUDGE KALAN: Counsel, I have a question about the claim construction argument as it relates to your POSITA slides. The claim construction, you seem to be proposing, uses a POSITA as a gatekeeper as to what is a mesh or not. And then in your slides you talk about the experts on your slides, I think 12 through 14.

What is the significance of the expert arguments on the role of the POSITA in your claim construction? Are they -- are you saying that Petitioner's experts are not qualified to opine on this and therefore you win, or you prevail in your claim construction arguments? Or is there a different position being presented in those demonstrative slides?

MR. SCHATZ: Thank you, Your Honor. I think there's two points to be made. First of all, we are not suggesting that Petitioner's expert should be excluded. What we are suggesting is that Patent Owner's experts are much more qualified in both the area of fiber science and the area of coefficient of friction. And therefore their testimony, their declarations should be given more weight.

In fact, Petitioner's expert testified that a person that has superior education in fiber science is going to have superior, or a greater depth of understanding of the materials, the chemical structure, and morphology. And that's at Exhibit 2029, the exhibit of Petitioner's expert at pages 20 to

21, pages 25 to 28, and page 80.

So you have Petitioner's expert testifying that someone who has superior education in fiber science has a superior understanding of these issues which are clearly involved in this case.

And what do we know about Patent Owner's expert? Patent Owner's expert has a Master of Science in fiber science and has a PhD in fiber and polymer science. That's Exhibit 2027.

What do we know about Petitioner's expert? No Master of Science in fiber science, no PhD in fiber or polymer science. And so that answers the first question, Your Honor, as you posed it.

The second issue is this, is that a person of skill in the art is well-versed in these issues. They know about the Fairchild book, about how persons of skill in the art characterize mesh by its open spaces. And someone that has that requisite skill, which is how the claim term must be defined, persons of skill in the art objectively know what is a mesh and what is not.

Case in point, all the experts in this case have testified that a person of skill in the art knows the difference between what is a sheeting, which is not characterized by its open spaces, and a mesh, that is characterized by its open spaces.

And I'm not speaking simply of Patent Owner's expert. Petitioner's expert testified that as a person of skill in the art he knows what is a mesh, and he knows what is not a mesh. And so that is an objective test, and it depended upon whether it is characterized by open spaces.

So again, Petitioner's own expert -- and this is the second point Your Honor, is that the level of skill of a person of skill in the art in this case

renders the definition of mesh, not only objective but clearly definable, especially in the context of the specification, where you're repeatedly referring to the mesh as forming, intending to form the open spaces, the interstitial openings.

So thank you for your question, Your Honor.

JUDGE KALAN: Sure. I'm still trying to be clear that on who or what you look to when you are putting forth -- when you're trying to decide if something is a mesh or not. Do you have to ask an expert and say do you consider this a mesh? Or can you measure something objectively without the input of an expert or one of ordinary skill in the art's eye and call it a mesh as a result of that.

MR. SCHATZ: The answer is, a person of skill in the art, if they refer to it or characterize a material as a mesh by its open spaces then it is a mesh. It is not simply the measuring of open spaces.

And here's another case in point. A soccer goal. A soccer goal has open spaces. But no one would refer to that soccer net as a mesh.

JUDGE WEATHERLY: That is a very bold statement.

MR. SCHATZ: It is not --

JUDGE WEATHERLY: And I don't know that that holds up to any scrutiny whatsoever. No one would call it a mesh?

MR. SCHATZ: No one --

JUDGE WEATHERLY: I --

MR. SCHATZ: A person of skill --

JUDGE WEATHERLY: I don't need to argue with you about it.

MR. SCHATZ: Okay.

JUDGE WEATHERLY: I'm just saying for you to stand in front

of me and say that someone would look at a soccer goal and no one would call that a mesh without evidence is frankly astounding.

MR. SCHATZ: A person of skill in the art would not refer to it in that way.

JUDGE WEATHERLY: By the way, I'm looking at your -- the Patent Owner response, and I'm trying to tease out what your proposed level of ordinary skill is. And it seems like it's quite high. Am I --

MR. SCHATZ: I think it is relatively high. But --

JUDGE WEATHERLY: Is there a -- I mean, I'll end up -- we'll review these in enough detail, these papers in enough detail to tease out exactly what the proposed definition is, and whether there's even a dispute about it.

But how does a very high level of skill affect the obviousness analysis in your view?

MR. SCHATZ: I think a high level of skill in the art indicates that a person of skill in the art is going to understand that for example, Kothari cannot be used to interpret any data on behalf of WN0400. That would be one example. Because --

JUDGE WEATHERLY: Yeah, but doesn't it also mean that the person is going to have a very keen understanding of what kind of coefficient of friction exists for a nylon mesh and in particular, a nylon mesh in combination with a solid surface that's lubricated with polytetrafluoroethylene?

MR. SCHATZ: Yes, but keep in mind that none of the grounds assert --

JUDGE WEATHERLY: Well see, here's the thing. You know, to

some extent the Petitioner's case doesn't really rely on express statements other than Fallgatter which kind of gets into the part of the claimed range for coefficient of friction.

But certainly for Phillips and WN0400 you're correct, there isn't any express, you know, listing of a coefficient of friction. But on one hand you're arguing that the level of skill, ordinary skill is very, very high. And on the other hand you seem to be arguing that a person of that level of skill isn't going to know anything about nylon mesh sliding on Teflon-coated surfaces.

MR. SCHATZ: Respectfully --

JUDGE WEATHERLY: Or isn't going to know that those are going to be low friction scenarios that are going to be somewhere inside the claimed range.

MR. SCHATZ: I think a person of skill in the art with a high level of skill is going to know that the WN0400 is absolutely not going to have a low coefficient of friction.

JUDGE WEATHERLY: You don't have evidence to that effect. The best you have is that Petitioner hasn't made out an affirmative case that it does. You're right about Exhibit 1009 and critiquing it from the perspective of the coefficients of friction that are listed in that table aren't directly applicable to the scenario that's set forth in the claim which is a coefficient of friction between a mesh layer and a slide surface that has a dry lubricant applied to it.

Again, you know I'm asking you about this really just to have a conversation about it. And you'll probably both leave here wondering just what in the heck is this panel going to do with this case. And I wish I knew

right now.

JUDGE RANGE: This is --

JUDGE WEATHERLY: You can't really have it both ways though. You can't tell me that a person of skill, ordinary skill is a very high level of skill, PhD level knowledge and then that that person doesn't really know anything about the materials that are described in the prior art.

MR. SCHATZ: And if I may --

JUDGE WEATHERLY: But you --

MR. SCHATZ: -- dwell on that just for another minute, Your Honor.

JUDGE WEATHERLY: Sure. Of course.

MR. SCHATZ: And I think there was going to be another question from Your Honor.

JUDGE WEATHERLY: Right. From Judge Range.

MR. SCHATZ: But if I may, Judge Range, comment quickly. Thank you.

JUDGE RANGE: Please, yeah. My question is a little different, so.

MR. SCHATZ: Okay. Thank you.

A person of skill in the art having high skill is going to understand the petition and the materials that have been presented. And a person of skill in the art is going to know that they have not demonstrated the coefficient of friction of the grounds which require the combination of a mesh within the claimed range. And the evidence is simply not there. And it would be understood by a person of skill in the art. A person of high level of skill.

JUDGE RANGE: So this is Judge Range. My question was about

this construction for mesh. And I think, I've been thinking about it here, and I think the problem I have with it is it's a little bit reductive. Because you could construe any claim term that way.

Like if someone had a claim directed to a widget you could just say well, widget is whatever persons of skill in the art, whatever objects in reality that persons of skill in the art call widgets, right?

And the thing -- the problem with that is it's not helpful. It's not helpful to us to compare the prior art that way. Like, we're looking for some sort of you know, physical metes and bounds, if that makes sense.

MR. SCHATZ: Absolutely, Your Honor. And that's why, it's kind of why I started off my presentation on this issue with the Fairchild book, is that is the accepted resource in the industry. In your hypothetical with the widget, you don't have that evidence of what persons of skill in the art treat a widget as.

But if there was, then that would be a proper definition of widget. And it would also provide a line of demarcation between what is and what is not within the claimed -- inside the claim. Does that answer your question, Your Honor?

JUDGE RANGE: Yes, that makes sense. Thank you.

MR. SCHATZ: Thank you.

Judge Weatherly, during the Petitioner's presentation you, I believe jokingly, said well, Petitioner you're just suggesting that nylon is nylon is nylon. And I think Your Honor picked up on the fact that that is absolutely not the case. All the experts --

JUDGE WEATHERLY: I don't know. I'm certainly not a person of ordinary skill.

MR. SCHATZ: And this is why I wanted to comment on this point. Is again, it was Petitioner's expert in connection with the petition that identified the fact that coefficient of friction data is radically different when you change different features of the material. Especially morphology.

And so the only other exhibits in the petition that relate to, that provide a coefficient of friction is Exhibits 1021, 1026, and --

JUDGE WEATHERLY: When you say morphology, what exactly do you mean?

MR. SCHATZ: It's the structure of the material. In other words, is there robust waviness associated with the topology of the material or is it a strictly flat material. But that type of morphology has a dramatic impact on coefficient of friction data.

And all the experts agree that if you have a different morphology, amongst other things, coefficient of friction data cannot be relied upon to suggest that would be comparable to a material of different morphology.

JUDGE WEATHERLY: I think what you really mean to be saying with more precision is that coefficient of friction data for one shape of nylon doesn't necessarily tell you anything about a different shape of nylon.

MR. SCHATZ: You're exactly right, Your Honor. And not only did the experts testify to this, but we have actual proof. Because Petitioner wants to rely upon nylon is nylon is nylon based on Exhibits 1021, 1026, and 1027. But when you change to a mesh, Kothari provides coefficient of friction data that is well outside the range claimed.

JUDGE WEATHERLY: That you argue is not representative for nylon on a Teflon-coated slide.

MR. SCHATZ: That's correct.

JUDGE WEATHERLY: But that's not really the issue I think that I'm struggling with. The issue is whether the Petitioner has established that a person of ordinary skill, an extraordinarily high level of skill apparently from your perspective, wouldn't understand or know that the combination that they've proposed results in a low friction interaction between the nylon, WN0400, if that nylon is applied to the slide that's described in Phillips. Or not the slide, the riding vehicle. Excuse me.

And it never surprises me that mechanical cases like this turn into this kind of a dispute. I'll just put it that way. Go ahead.

MR. SCHATZ: To respond to your comment, Your Honor, a person of skill in the art with a high level -- and this is from Patent Owner's experts -- would understand that Kothari teaches that any kind of mesh, even if it was applicable to WN0400 would not provide a low coefficient of friction.

JUDGE WEATHERLY: I guarantee you that if I had your expert sitting right in front of me, and I had ten minutes to ask him questions, I could disprove what you just said.

MR. SCHATZ: You mean --

JUDGE WEATHERLY: And I know that I can't do that. And I know that I've got to live with whatever's of record. And to be blunt, I haven't been able to dive in super detail into the record because there've been so many places for me to dive. But I've got plenty of time on my hands after we finish this hearing.

MR. SCHATZ: Yeah.

JUDGE WEATHERLY: So I can promise you that dive I will.

MR. SCHATZ: Thank you, Your Honor. I appreciate that you'll do that. And you know --

JUDGE WEATHERLY: I'm skeptical though, about that statement. If you can't tell already, I'm skeptical.

MR. SCHATZ: There's no need to be skeptical.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: And the reason is, we can look at Petitioner's expert's own testimony. When asked about the goal of -- the goal of the '854 Patent is to have speed. That's the primary objective trying to be solved by persons of skill in the art in this case.

And I'm referring to Slide 7 of Patent Owner's demonstratives.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Okay. I asked, the goal of the slide is going faster. And he said, actually it's the primary objective. It is the primary objective according to Petitioner and Petitioner's expert.

And so a person of skill in the art is going to look to materials that have a coefficient of friction at least lower than 0.2. Yes. In addition I asked, and so a person of --

JUDGE WEATHERLY: So this is the Petitioner's expert testifying about the goal of the '854 Patent?

MR. SCHATZ: That's exactly right, Your Honor.

JUDGE WEATHERLY: Why would the Petitioner's expert have any qualification to talk about the state of mind of the inventor or the person who wrote the '854 Patent?

MR. SCHATZ: It's not the state of mind, the '854 --

JUDGE WEATHERLY: The goal.

MR. SCHATZ: The '854 Patent itself indicates that the goal is faster because faster equals more threads.

JUDGE WEATHERLY: Okay. So where is that in the patent?

MR. SCHATZ: I can get that for you, Your Honor.

JUDGE WEATHERLY: I only ask you because I presume you know this record much, much more deeply than I do at the moment.

MR. SCHATZ: Yes.

JUDGE WEATHERLY: I could probably just search for speed and find that.

MR. SCHATZ: Yeah. Pardon me, Your Honor. I apologize. First of all at column 1, this is Exhibit 1001 of course, the '854 Patent. Column 1 line 26 through 29. A fast slide speed is more -- I'm sorry, I'll quote it accurately. Quote, a fast slide speed, i.e. a fast rate of descent down the slide, is more thrilling, dot, dot, dot, and therefore is more desirable.

JUDGE WEATHERLY: Okay. So that, the location in the patent implies that that's always been the goal for all slides.

MR. SCHATZ: It has. And just look to the petition.

JUDGE WEATHERLY: Including the Phillips slide.

MR. SCHATZ: Yes. And so look to -- well, Phillips is a little bit different. Phillips is a deformable, deflatable slide which has a completely different impact on coefficient of friction. Phillips is directed toward a durable, low friction slide system that can be moved, deflated and moved.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Okay.

JUDGE WEATHERLY: But I mean, this column 1 passage is talking about prior slides, dry slides, water slides. For most riders fast slide

speed is more thrilling compared to a slow slide speed.

A decent part of Petitioner's argument is based on that motive being the key to why someone looking at Phillips would pick materials that would result in a low friction, faster slide.

MR. SCHATZ: Yes. And that's precisely why a person of skill in the art would not look to WN0400. Because there's no demonstrated coefficient of friction --

JUDGE WEATHERLY: Oh, come on.

MR. SCHATZ: Your Honor.

JUDGE WEATHERLY: You don't know. You don't know what WN0400's coefficient of friction is.

MR. SCHATZ: That's --

JUDGE WEATHERLY: That's what you're complaining about, the Petitioner's case being insufficient for that reason.

MR. SCHATZ: That's exactly what we're saying.

JUDGE WEATHERLY: So you can't say on one hand that Petitioner hasn't shown what it is, and then on the other hand tell me it's too high, that you know it's too high.

MR. SCHATZ: Well, you know, that's a correct distinction Your Honor. There is no evidence of record of what the coefficient of friction is.

JUDGE WEATHERLY: Yeah. So don't tell me that it's too high. You don't know.

MR. SCHATZ: I don't think I said it's too high, but your distinction is well said. Yes. Understand.

Your Honor if I may, I'd like to talk briefly about secondary considerations.

JUDGE WEATHERLY: Sure.

MR. SCHATZ: And reserve a little bit of my time, I will go into my rebuttal just a little bit if that's okay with Your Honors.

JUDGE WEATHERLY: Okay. No, it's your presentation. Thank you.

JUDGE RANGE: This is Judge Range. I'm interested in enablement also.

MR. SCHATZ: Yes. I was going to get -- Your Honor, would you like me to do that first? Because I was going to do both.

JUDGE RANGE: Yeah, I would prefer enablement first.

MR. SCHATZ: We'll do that first. Thank you.

So you know there was a lot of talk about how challenging it was for Mr. Gary Schmit to invent.

JUDGE WEATHERLY: Is that because he's not a person of ordinary skill?

MR. SCHATZ: I don't know. That wasn't indicated. What I'm saying is --

JUDGE WEATHERLY: No, I'm asking. Is the inventor a person of ordinary skill here?

MR. SCHATZ: When he started his work probably not. And the answer, I would say no he's not a person of skill in the art. Because he doesn't have the qualifications on education, nor does he have the extensive experience required on coefficient of friction analysis.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Going back then to the enablement issue is, there's been a lot of discussion about how it was so hard for him. You know, that's

true for a lot of inventors. It is difficult, especially when there is no evidence in the prior art of how a solution which solves problems exists. And so yes, it took a long time for Mr. Schmit to invent the ride system which includes a mesh layer, and this claimed range.

But in terms of what the '854 Patent discloses, is it discloses in great detail that dry lubricant material is an anti-friction or friction-reducing material. That's at column 7 of Exhibit 1001. The '854 Patent describes commercial silicone and epoxies suitable for slide coatings. That's also at column 7.

And the patent also discusses the inclusion of a thermal conductor, for example copper, in the dry lubricant coating as addressing any detrimental effects of thermal heat on the coefficient of friction.

And so Patent Owner's coefficient of friction expert is of the opinion that there is plenty enough information here to achieve the entire claimed range based on those examples given in the specification.

Does that answer your question, Your Honor? Your Honor Range?

JUDGE RANGE: Yes. It seems like this may be a bit of a battle of the experts. Because I -- like, let me just ask you, what's the best evidence of record that a person of ordinary skill in the art would be able to reach this lower coefficient of friction value, 0.03 given the disclosures in your specification?

MR. SCHATZ: Well it's the opinion of Dr. Spiegelberg, who has decades of experience in coefficient of friction measurements.

JUDGE WEATHERLY: Did Dr. Spiegelberg identify any particular combination of materials for the dry lubricant or mesh

characteristics that would hit that 0.03 coefficient of friction level?

MR. SCHATZ: The thrust of Dr. Spiegelberg's analysis was his extensive experience in the art, but also the examples given in the specification itself.

JUDGE WEATHERLY: Which example did he identify as meeting that coefficient of friction requirement?

MR. SCHATZ: Well, it's -- I'm sorry. I think I now understand your question in a little more detail.

The specification provides commercial epoxies, examples of that in the specification in column 7.

JUDGE WEATHERLY: Did he do any testing to verify anything about coefficients of friction? Did he formulate anything based on the teachings in the patent and say here's one that meets, that hits that target?

MR. SCHATZ: No. But what he did do, is he did analyze Patent Owner's commercial embodiment and demonstrated that that embodiment does in fact meet the claimed range.

JUDGE WEATHERLY: I got distracted by a comment from one of my co-panelists. Could you repeat that please?

MR. SCHATZ: Sure. Dr. Spiegelberg, no, he did not do his own creation of a formulation and then test it. What he did test is Patent Owner's commercial product, and that does fall within the claimed range.

JUDGE WEATHERLY: Well, but that's not the question for enablement. Right? That it falls in -- that the patent enables some of the range. I think the Petitioner's argument is that the patent doesn't enable the entire range.

MR. SCHATZ: You know, in that respect --

JUDGE WEATHERLY: Do they even to -- does the patent even have to enable the entire range in your view?

MR. SCHATZ: It does, Your Honor.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Absolutely. And Dr. Spiegelberg testified through his extensive experience that through the examples given in the specification there's enough information there to enable the entire range.

JUDGE WEATHERLY: Okay. But he didn't provide any particular example from his study of the specification that this one, this combination of resin and lubricant and thermal material and hardener, coupled with this type of nylon mesh on the ride vehicle, that would result in a coefficient of friction of 0.04.

MR. SCHATZ: He did not give that specific example.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: No, Your Honor.

JUDGE WEATHERLY: Or something akin to it. Something that gets close down to the bottom, the bottom of the range is the issue that I think Petitioner is putting their finger on.

MR. SCHATZ: Yeah. Dr. Spiegelberg's focus was on the disclosures in the specification itself. And frankly, some of the materials that Petitioner raised, which indicate that it is known to adjust lubricants, it is known to adjust epoxies to get a lower coefficient of friction.

JUDGE WEATHERLY: Okay. So all the struggle that Mr. Schmit had with getting inside the range, you want to chalk up to him not being a person of ordinary skill?

MR. SCHATZ: I wouldn't necessarily say I would put it that way.

But Mr. Schmit is not a person of skill in the art in terms of how we've defined it. And it was challenging for him, but he was able to accomplish it.

JUDGE WEATHERLY: Yeah. I mean, we haven't decided on what the level of ordinary skill in the art is just yet. So, I'm playing around with it in my mind, sort of out loud.

MR. SCHATZ: Sure. If I might, I'll spend a minute on secondary considerations and then maybe reserve just a minute or two in rebuttal if that's okay with Your Honors.

JUDGE WEATHERLY: Absolutely.

MR. SCHATZ: Thank you. As a preliminary matter or first issue is the only products that are involved in Mr. Schmit's declaration are products from 2022 going forward.

His declaration makes it very clear that he is only addressing products from 2022 going forward.

JUDGE WEATHERLY: When in 2022? At one point I think he says early 2022.

MR. SCHATZ: Sure. Early 2022.

JUDGE WEATHERLY: How early?

MR. SCHATZ: I -- we haven't presented when, but we know it's in 2022.

JUDGE WEATHERLY: Before November 1st?

MR. SCHATZ: It could be.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Sure. The products --

JUDGE WEATHERLY: Does it matter if he's analyzing things that were -- that would fall within the scope of prior art?

MR. SCHATZ: It does because then that would invoke a problem with the tie to commercial success. Because again, when Mr. Schmit was asked about well, do these products incorporate the technology claimed in the '854 Patent, he was referring to the products in his declaration, not anything prior to that time.

So those slides, which is referenced during his deposition are the slides that are subject of his declaration, not prior art slides.

JUDGE WEATHERLY: Not the slides that were depicted on the image, I can't remember Petitioner's slide number.

MR. SCHATZ: That's exactly right. And it's kind of unfortunate that Petitioner --

JUDGE WEATHERLY: So I asked specifically, the Petitioner about that. What those slides refers to. And they seem to be saying something different.

MR. SCHATZ: Yeah. It's unfortunate that Petitioner presented in that way. Because what they did is, they presented Mr. Schmit's declaration and his testimony -- his declaration aligned with those images.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: But he was being asked about what is in his declaration. So the commercial success that is the subject of Mr. Schmit's declaration is not prior art slides from 2020, 2021.

JUDGE WEATHERLY: But they are slides from early 2022.

MR. SCHATZ: The declaration, yes.

JUDGE WEATHERLY: Yes.

MR. SCHATZ: I don't have the date from his declaration, but I know he limited his analysis to products from 2022.

JUDGE WEATHERLY: Do you happen to --

MR. SCHATZ: I'm sorry, Your Honor. I do know. The products are from Slick City, not Sky Zone.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: And that's very clear. That's the line of demarcation. So products that are Sky Zone-related were not the subject of his declaration. And that's true in his declaration.

So it's very unfortunate, thank you, this is the line of demarcation that was concerning to me with Petitioner's presentation is, they're presenting information about Sky Zone slides which was not the subject of Mr. Schmit's declaration.

Mr. Schmit's declaration again is solely limited to Slick City slides. And there's a distinction because there is no evidence whatsoever of what the ride vehicle of the Sky Zone slides is.

JUDGE WEATHERLY: Are we talking about the Slick City location in the Denver metro area?

MR. SCHATZ: Perhaps, Your Honor. I'm not sure of the exact location. But I know it's a Slick City location, not a Sky Zone location. And in that respect it's unfortunate that Counsel for Petitioner indicated that the slides in Sky Zone facilities, 2020, 2021, have a mesh ride vehicle. That's unfortunate that that representation was made because there's no record, there's no evidence of that fact.

JUDGE WEATHERLY: I think it depends on how you review the -- how you read the evidence whether there's no evidence of record.

MR. SCHATZ: Fair enough.

JUDGE WEATHERLY: I would say it's a fact that's in dispute at

the moment.

MR. SCHATZ: And that's fine. But one thing's for sure is that Mr. Schmit's declaration solely relates to Sky Zone, or I'm sorry, Slick City slides which practice the claims according to Dr. Spiegelberg.

JUDGE WEATHERLY: Right. And I'm trying to tease out when that happened.

MR. SCHATZ: I don't know when the line of demarcation between Sky Zone and Slick City is. All I know is --

JUDGE WEATHERLY: Paragraph 32 of his declaration says, since its founding, Slick City has experienced rapid and sustained growth, period. In 2022, Slick City opened its first indoor slide park location. So that to me specifies the year of when Slick City opened its location.

So in your view, when he's talking about those slides in his deposition, he's referring to slides installed at Slick City.

MR. SCHATZ: And Your Honor, I see I'm over time. May I answer your question?

JUDGE WEATHERLY: Absolutely.

MR. SCHATZ: Thank you. That's exactly right.

JUDGE WEATHERLY: Okay. We just haven't put our finger --

JUDGE RANGE: Counsel, this is --

JUDGE WEATHERLY: -- on exactly when that is. Go ahead, I'm sorry Judge Range. Go ahead.

JUDGE RANGE: And I know you're out of time, but I wanted to have you address the slick sauce, and whether that causes problems for the objective indicia analysis.

MR. SCHATZ: Thank you, Your Honor. It does not, and here's

why. There's no evidence that what Dr. Spiegelberg tested had any oil. The products tested by Dr. Spiegelberg fell within the scope of the range without any oil.

JUDGE RANGE: But when people are actually at the park using the slides they use oil sometimes. And isn't it possible that the oil contributes to the commercial success to some degree?

MR. SCHATZ: It's possible. And here's where the important is the presumption of where we are. Dr. Spiegelberg having analyzed the products and determined that they fall within the claimed scope, and Mr. Schmit as the Patent Owner representative connecting the success to that technology. The presumption shifts to Petitioner.

And Petitioner has made attorney argument about oil potentially contributing to commercial success. But there's no analysis of how, when, or to what extent oil somehow contributes to commercial success. And in fact, it's questionable because the slides without the oil fall within the scope of the claims.

JUDGE RANGE: Okay. Thank you, Counsel.

MR. SCHATZ: Thank you. I am way over time.

JUDGE WEATHERLY: Well I have you three minutes over. That leaves you with seven minutes for rebuttal unless we decide that we need to take more time if you want it. I mean, I'm not measuring things down to the micro-second here. I take it to mean you want to reserve the rest of your time for your rebuttal.

MR. SCHATZ: If there's more time, I'll reserve it Your Honors.

JUDGE WEATHERLY: I've got you down for seven minutes remaining.

MR. SCHATZ: Thank you kindly.

JUDGE WEATHERLY: All right.

And Petitioner, I have you with five minutes remaining. Who is it that's going to handle the presentation in the rebuttal?

MR. DEUTSCH: Thank you Your Honor, I will. This is Craig Deutsch.

JUDGE WEATHERLY: Okay. Are you going to ask me for more than five minutes you think?

MR. DEUTSCH: I'll move as quick as I can.

JUDGE WEATHERLY: I'll put five minutes on the clock, we'll see how it goes. How about that?

MR. DEUTSCH: Yeah. We're happy to answer questions on any of these topics.

JUDGE WEATHERLY: And I'm happy to ask them, if it's not already apparent.

MR. DEUTSCH: One moment. So Your Honor, I'll start going back to claim construction, the mesh discussion that we had earlier and just note that mesh encompasses woven material.

And you know, we're trying to abide by the case law cited in the petition, Wellman for example, in real time explaining there's not a need to go further to resolve issues of validity here. And that's you know, consistent with the '854 Patent itself and the extrinsic evidence that we're seeing here when viewed that way. Those are in harmony.

And again, going back to the Slide 7, the -- or excuse me, Slide 8. The construction that Patent Owner proposes, again, it recites mesh layer means a layer of mesh. And then there's addition after that. That's

something, that's a subject of amendments, not claim construction, when it repeats the language and then continues on.

We also discussed the coefficient of friction values itself. And I'd like to just briefly revisit the numeric values in Exhibit 1009 on Slide 24. And again, there are a set of values that are shown -- I'm sorry, Slide 21 Your Honor.

And again, when we look at this evidence that's corroborating the known trend that a POSITA would expect with respect to mesh coarseness, we see even with these materials a monofilament mesh material reports .225. The patent range stops at .2.

And looking you know, again at the significant digit that's recited in the claim itself, we're right there. It's .2. And it only gets better from that number.

JUDGE WEATHERLY: How does the mesh of WN0400 compare in this set -- to this set of data about coefficients of friction? Where does it fall? Is it a fine mesh, a medium mesh, a coarse mesh? Which row should I be looking at to be most representative?

MR. DEUTSCH: Yeah. So there are, the range of meshes that Exhibit 1009 give are slightly different in terms of the thread diameter and density and those parameters. So we're not suggesting that there is you know, alignment --

JUDGE WEATHERLY: Which one's best.

MR. DEUTSCH: -- from this. The coarse mesh. And again, that's why we're looking at the you know, the open area --

JUDGE WEATHERLY: And I can study this exhibit to see whether I agree with you or not. But help me not have to study it so hard by

telling me what I should look at.

MR. DEUTSCH: Right. Well and so just to -- I want to make sure I'm answering the question. And so I'll say it another way. And that is you know, again what we're looking at is a trend. And so any of these -- there's no --

JUDGE WEATHERLY: My question specifically is, you're talking about a trend, and Exhibit 1009 you know, reveals a trend. Coarser is lower friction.

MR. DEUTSCH: Yep.

JUDGE WEATHERLY: And I'm trying to get a sense of, is there a way for me to peg the reference that you're proffering --

MR. DEUTSCH: Yeah.

JUDGE WEATHERLY: -- in that trend somewhere.

MR. DEUTSCH: Yeah. And I don't have an excerpt. There is some discussion of the tightness of the weave, you know, when we look at the fine mesh, that is specifically talking about that tightness. And so tying it to the combination, we're starting with something like a sailcloth, something that in Phillips has a tighter weave.

And that's what we're comparing to. And we see as we move --

JUDGE WEATHERLY: I have to tell you that the relative non-responsiveness of your answer dictates to me that you don't know the answer. And I'm just going to have to study these references to see if there's a way for me to put the mesh from WN0400 on this, somewhere on this table.

MR. DEUTSCH: Yeah. I --

JUDGE WEATHERLY: I was hoping you'd be able to you know,

put your finger on it right off. But --

MR. DEUTSCH: Yeah. I mean --

JUDGE WEATHERLY: It's okay.

MR. DEUTSCH: Thank you, Your Honor. And partially for that reason. Like there's not, I mean that's not the basis for our use of this as corroborating the evidence --

JUDGE WEATHERLY: Well --

MR. DEUTSCH: -- when you're moving from a --

JUDGE WEATHERLY: I hope the reason I'm asking the question is apparent.

MR. DEUTSCH: It is. It is, Your Honor.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And --

JUDGE WEATHERLY: The challenge of having to decide.

MR. DEUTSCH: And I can, you know, in terms of the interaction again wherever we're at in this range it gets better when --

JUDGE WEATHERLY: Yeah, but I don't know where --

(Simultaneous speaking.)

MR. DEUTSCH: -- with Teflon.

JUDGE WEATHERLY: -- the reference that you've produced falls in the range. In the range of this reference.

MR. DEUTSCH: And I --

JUDGE WEATHERLY: If you're telling me it doesn't matter where it falls, okay. I think I can understand that.

MR. DEUTSCH: Right. Because I mean, what we're talking about here is the use of a mesh on the bottom of a ride vehicle. All of these

options are obvious. There's a range that we believe the evidence shows would fall within --

JUDGE WEATHERLY: That's an interesting statement. All of these options are obvious, yet --

MR. DEUTSCH: Or said another way --

JUDGE WEATHERLY: One could argue that all of the options that you, in this Exhibit 1009 don't meet the limitation of the claims. So obvious about what is a -- you know, obvious to put on the bottom of a ride vehicle? Okay.

MR. DEUTSCH: A POSITA -- yeah. I mean, there's the open area, it's WN0400 happens to have 45 percent. That's not the only solution that would work. You could have a range of mesh and --

JUDGE WEATHERLY: So WN0400 is really great for you guys because it talks about the open area in that specifically, and it reveals a certain kind of thread diameter if my memory is correct. And that handles Claims you know, 22, 25 really well.

It doesn't say anything directly about coefficient of friction, which the Patent Owner has argued I think correctly is true. And that's the challenge for that combination which I suppose is why we have the triple combination with Fallgatter which does expressly mention, at least mention a coefficient of friction. I think that squeaks into the range if my memory is correct.

MR. DEUTSCH: Yeah. One of the numbers that they recite.

JUDGE WEATHERLY: Yeah.

MR. DEUTSCH: .21. But again, you're going down from there with the use of the Teflon --

JUDGE WEATHERLY: Yeah.

MR. DEUTSCH: -- slide surface.

JUDGE WEATHERLY: So my proclivity for asking questions has taken you two minutes past your time. If there's something else that you really want to get to, I'm not -- I don't want to stop you from doing it. I think the last time we all were together on the phone I said that my goal was to make sure that parties got every chance to put every argument that they wanted to into the record. That remains my goal, so.

MR. DEUTSCH: Just a couple quick comments, Your Honor.

JUDGE WEATHERLY: Sure.

MR. DEUTSCH: If it's helpful and again, happy to answer any questions on this point. You know, we heard briefly about secondary considerations and a distinction being made about post-dated products and earlier products.

And I think in short I would say, you know look at Mr. Schmit's declaration, the passages above and below, the same with the transcript. And it becomes clear what we're talking about.

He was speaking to launch slides since the first installations. He acknowledged what is the first installation, it's at Sky Zone. There's no dispute that that happened in 2020.

JUDGE WEATHERLY: Yeah.

MR. DEUTSCH: And then functionally we see why that's the case --

JUDGE WEATHERLY: I think the concept of sort of, I refer to it as record hygiene is going to -- the times I've had to remind you to tell me what slide you're on, for example -- the transcript will be what it is. I mean,

we'll have to look at it and see since there's a battle over what was Mr. Schmit testifying about when he referred to, quote unquote, those slides. I hope the transcript is clear.

MR. DEUTSCH: I think it is.

JUDGE WEATHERLY: I'd like it to be clear, so I don't have to guess. That's really why I hope it's clear. But if it's not clear it's not clear and Petitioner bears the burden, so.

MR. DEUTSCH: Right. And you'll see you know, on Slide -- I'm sorry -- Slide 72 for example, there's talking about the scope of sales. And the sales numbers they raise include things that go back again to the earliest launch slide.

And so you know, it's even substantively on these topics that there's no distinction in slick slide sales.

JUDGE WEATHERLY: Okay. I think what I hear you saying is that the data provided for sales definitely sweeps in prior art periods of time for the company. It's not limited purely to the time beginning with the installation of slides at the Slick City location in Colorado.

MR. DEUTSCH: That's right. And that's just one example.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And there's discussion again, Slide 55 -- it's looks like it's not sharing -- but Slide 55 is talking again specifically about Sky Zone and what happens. And like we talked about earlier, the genesis, the purported praise of those prior art products that lead to creation of Slick City.

JUDGE WEATHERLY: Okay.

MR. DEUTSCH: And so there's really no dispute there.

JUDGE WEATHERLY: Yeah. Slide 55 is where I got this notion of Slick City opening in Denver in early 2022. Okay.

MR. DEUTSCH: And then I guess, two quick last points. Patent Owner, I think we heard from them about the Fairchild dictionary and kind of elevating that to the authority. There's no evidence of that in the record. It's an extrinsic piece of evidence.

And again, you know we're -- we think if it's in harmony with everything else --

JUDGE WEATHERLY: At this point I interpret that as, maybe it's a way of describing a mesh, but it's not the only way. It's not the thing that distinguishes mesh from not mesh. But that's a preliminary thought on my part.

MR. DEUTSCH: And then lastly Your Honor, we heard about the POSITA definition of level of skill in the art, whether Dr. Wang has certain qualifications. Our briefing set forth discussion of the POSITA, and I would note just on Slide 89 briefly there's a whole set of qualifications from Dr. Wang.

And so even if this, you know, inappropriately high POSITA definition is applied Dr. Wang meets that as well.

So with that I'll close, Your Honors, but happy to answer any other questions that you have.

JUDGE WEATHERLY: Great. I don't have any further questions.

Judge Range, Judge Kalan? No?

JUDGE RANGE: No further questions. Thank you.

JUDGE WEATHERLY: Thanks very much.

MR. DEUTSCH: Thank you, Your Honors.

JUDGE WEATHERLY: So I have you having gone five, six minutes over. I'm going to add six minutes to Patent Owner's time which takes them to 13 minutes. No obligation to use all those minutes if you don't want to, but feel free to use them if you do.

MR. SCHATZ: Thank you, Your Honors. Just a few points. I do not intend to use the entire time.

JUDGE WEATHERLY: Sure.

MR. SCHATZ: In the last discourse there was a comment about Fallgatter. And the trifecta that is, the combination of we're going to take some from Phillips, we're going to take some from WN0400, and we're going to take some from Fallgatter.

The problem with that is the coefficient of friction -- well the problem with that originates that Fallgatter, and the coefficient of friction disclosed therein is for the Fallgatter system. Fallgatter does not speak to a mesh ride vehicle. And therefore, the coefficient of friction data for Fairchild, as disclosed in Fairchild is not applicable to a combination that has a different morphology, that is the morphology attributable to WN0400. That is the first point I would make as to that trifecta combination.

JUDGE WEATHERLY: You said Fairchild. Did you mean to say Fallgatter?

MR. SCHATZ: I apologize. I meant Fallgatter. I was hoping to avoid Fairchild again.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: We discussed that plenty earlier on.

JUDGE WEATHERLY: Fair enough.

MR. SCHATZ: The second point I would say is again, touching briefly on the secondary considerations. Mr. Schmit's declaration specifically and only talks about Slick City products. So any discussion from him relates to those products.

But let's assume for the moment that there is some indication that some of the commercial success has come from products prior to that time.

JUDGE WEATHERLY: Okay. Which time?

MR. SCHATZ: Before Slick City. The Sky Zone time for example.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Okay. I'll make two points there.

JUDGE WEATHERLY: Let's assume -- I really wish we had better evidence other than early 2022 what the, quote unquote Slick City time is.

MR. SCHATZ: And to answer that question, Your Honor. The reason why the commercial success in Mr. Schmit's declaration is only directed toward Slick City is because prior to that time the products did not practice the invention.

JUDGE WEATHERLY: I know that's what you want to say now.

MR. SCHATZ: And I want to -- well, I want to make the point that there is no evidence regarding the products prior to Slick City, and what ride vehicle was used.

JUDGE WEATHERLY: I understand.

MR. SCHATZ: Okay.

JUDGE WEATHERLY: And I think Mr. Schmit's testimony about those slides using the technology that's described in the '854 and they

wouldn't work if they didn't. If he's talking about slides that existed in early 2022, then I think he's talking about slides that existed before the earliest priority date of the patent at issue.

MR. SCHATZ: Yeah. I think on that point we have Dr. Spiegelberg's analysis --

JUDGE WEATHERLY: Dr. Spiegelberg doesn't have any personal knowledge of anything about when Slick City slides were installed or not installed.

MR. SCHATZ: Oh, no. Agreed.

JUDGE WEATHERLY: Or what they were or weren't.

MR. SCHATZ: The point I was trying to make is that Dr. Spiegelberg analyzed the Slick slide products and determined that they fall within the scope of the range, that is current products.

JUDGE WEATHERLY: The ones that exist today.

MR. SCHATZ: Yes.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: Okay.

JUDGE WEATHERLY: I don't know how that bears on what existed before November 1, 2022 at the Slick City location in Denver.

MR. SCHATZ: It bears on the presumption of proof. Dr. Spiegelberg's analysis demonstrates that the products fall within the scope of the claims, therefore there's a presumption. The burden shifts to Petitioner, and there is no evidence of pre-Slick City products.

JUDGE WEATHERLY: No evidence of pre-Slick -- there's lots of evidence of pre-Slick City products. Whether the pre-Slick City products practiced the claimed invention, maybe there's no evidence about that. But

there appears to be evidence about the first Slick City installation practicing the technology described in the patent.

MR. SCHATZ: I don't think there's a dispute that the Schmit declaration relates to the Slick City installation.

JUDGE WEATHERLY: Yeah. Yeah.

MR. SCHATZ: Yeah.

JUDGE WEATHERLY: And one of those, if it came before November 20 -- November 1, 2022, that could be a problem for you.

MR. SCHATZ: It could be a problem --

JUDGE WEATHERLY: -- and your client's interests.

MR. SCHATZ: It could be a problem in that at least in this context it could show that some sales are not attributable to the patented invention. But what you have is at a minimum --

JUDGE WEATHERLY: It could break your attempt to establish nexus between the claims and all of the evidence that you've put in. At least the presumption of nexus.

This area of the law is one of my least favorite by the way, and I feel like the Federal Circuit has done an excellent job of turning it into a chaotic mess. But separate and apart from that it's my job to sort through it. And I'll do my best and explain it as clearly as I can once we get it on the record.

MR. SCHATZ: Yeah. I think the final point here is that, at a minimum there is a massive amount of commercial success demonstrated by products that fall within the scope of the claims.

JUDGE WEATHERLY: Okay. Fair enough.

MR. SCHATZ: And that's all --

JUDGE WEATHERLY: Which may bear on, you know, a showing of nexus in fact, as I like to refer to it sometimes.

MR. SCHATZ: Fair enough.

JUDGE WEATHERLY: Okay.

MR. SCHATZ: I don't have anything else to present. Thank you Your Honors for your time. If there are any remaining questions I'm available of course.

JUDGE WEATHERLY: I don't have any further questions.

Colleagues?

JUDGE RANGE: No further questions.

JUDGE WEATHERLY: Okay. Judge Kalan? I don't know if we -- we maybe even lost you. That would be unfortunate. Are you back? Do you have any questions?

JUDGE KALAN: No other questions.

JUDGE WEATHERLY: Okay. Great.

Just in case it's not immediately apparent, I really, really like being back in person for these. I really appreciate the work that everyone has put into this case to be able to respond to the concerns that I've got as I sit up here today.

I promise you that we'll do our best to consider the record as studiously as possible and render a decision that you'll understand. I know that at least one of you or both of you are going to be upset no matter what I decide, or we decide. So I've long since gotten over trying to please people with a decision.

Thanks very much for appearing and we're adjourned.

MR. SCHATZ: Thank you, Your Honors.

(Whereupon, the above-entitled matter went off the record at 1:16 p.m.)

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