

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

Solbello, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 1:25CV267
	)	
ShoreShade, LLC,	)	
	)	
Defendant.	)	
_____	)	

PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE J. RANDAL HALL
UNITED STATES DISTRICT COURT JUDGE
FRIDAY, MAY 8, 2026; 9:53 A.M.

FOR THE PLAINTIFF:

Christopher A. Cospers, Esquire
Hull Barrett, PC
801 Broad Street, 7th Floor
Augusta, Georgia 30903-1564
(706)722-4481

Joseph A. Schouten, Esquire
Ward and Smith, PA
751 Corporate Center Drive, Suite 300
Raleigh, North Carolina 27607
(919)277-9100

FOR THE DEFENDANT:

Craig Killen, Esquire
Jonathan D. Todd, Esquire
One Wells Fargo Center
Nelson, Mullins, Riley & Scarborough, LLP
301 S. College Street, 23rd Floor
Charlotte, North Carolina 28202
(704)417-3127

Lucas A. Westby, Esquire
Megan Walker Burton, Esquire
Nelson Mullins Riley & Scarborough, LLP
201 17th Street NW, Suite 1700
Atlanta, Georgia 30363
(404)322-6007

OFFICIAL COURT REPORTER:

Lisa H. Davenport, RPR, FCRR
Post Office Box 5485
Aiken, South Carolina 29804
(706)823-6468

1 (Call to Order at 9:53 a.m.)

2 THE CLERK: The court calls case number CV125-267.
3 Solbello, Inc. v ShoreShade, LLC. Joseph Schouten, Christopher
4 Cospers for the plaintiffs. Craig Killen, Jonathan Todd, Lucas
5 Wesby, and Megan Burton for the defendants. Here for a hearing
6 on a motion for preliminary injunction.

7 THE COURT: Good morning.

8 (Group responds simultaneously.)

9 THE COURT: We've been here before so I just want to
10 make sure that when we were last involved with this issue it
11 seems that the parties as it relates to element four had agreed
12 on a claim construction which was at least one rib specifically
13 designed to rotate to the mast. Is that still correct?

14 MR. SCHOUTEN: Yes, Your Honor.

15 THE COURT: It is. Okay. So that's out of the way.

16 MR. SCHOUTEN: I should say for purposes of ---

17 THE COURT: Of this motion.

18 MR. SCHOUTEN: Correct.

19 THE COURT: Yes. All right. So it seems to me that
20 really what's underlying this today is the doctrine of
21 equivalents; correct? You're not really asserting literal
22 infringement. This is really more of a doctrine of equivalents
23 argument.

24 MR. SCHOUTEN: You are correct, Your Honor.

25 THE COURT: All right. Well, let's hear from you. Go

1 ahead.

2 MR. SCHOUTEN: Thank you again to the Court and
3 everybody here for hearing us on a very short turnaround. As I
4 mentioned last time, we appreciate that because this issue is
5 very important to Solbello. The issue as it relates to this
6 hearing I think as Your Honor identified is very important to
7 Solbello because at the last hearing the last time we were here
8 ShoreShade made a number of representations both in their
9 pleading, their filings, and to the Court about a supposedly
10 new product that was coming out that would obviate the need for
11 any injunctive relief.

12 Now that the new product is actually out -- the
13 allegedly new product is actually out -- we know that the
14 representations that ShoreShade made in their filings and here
15 at the hearing last time, they're simply not true. Those
16 representations critically surrounded the issue of whether the
17 product would self-rotate with the wind. We have received the
18 new product. We've tested the new product, and it rotates with
19 the wind in exactly the same fashion as the old product did,
20 and what's worse is as soon as ShoreShade started selling this
21 new product, we immediately began receiving complaints from
22 customers who had purchased a ShoreShade product and thought,
23 in fact, that they had -- mistakenly thought they had purchased
24 a Solbello product. So that's why we felt compelled to come
25 back here again today to address the issue that Your Honor, I

1 think, has very rightly highlighted as the key issue here:
2 Element four as analyzed under the doctrine of equivalents.

3 Before I get to that, and, again, like last time
4 subject to any questions from Your Honor, I plan to focus on
5 that issue -- likelihood of success. I can, of course, talk
6 about others.

7 THE COURT: No, but I think that's the key today.

8 MR. SCHOUTEN: All right. So just a little bit of
9 reset in terms of the background and how things have developed
10 since the last time we were here. Now the last time we were
11 here I talked just a bit about the Solbello development
12 process. It was a long, extended development process -- a lot
13 of time, a lot of effort, and a lot of money, but it was a
14 family affair and that's shown on the first slide here --
15 pictures of Mr. James working on prototypes testing out what
16 worked, testing out what didn't work, and doing it with his
17 sons. It was literally a labor of love -- emphasis on both the
18 labor and love. It was a lot of work, but it was fun time
19 spent with his family.

20 Then as they developed the product there were hiccups.
21 The initial shipment that came in -- \$30,000 worth of
22 product -- it didn't work exactly as it was supposed to work so
23 we had to go back to the drawing board and kill \$30,000 worth
24 of product. So this was a very expensive, long development
25 process that got us to a first-of-its-kind sunshade and so

1 Solbello, to protect that investment, got a patent. Lots of
2 money spent getting that patent. So that just in a nutshell --
3 and it's really short-circuiting a whole bunch of things that
4 started in 2019 -- was the Solbello development process.

5 So what was the ShoreShade development process? Very
6 very, different. Essentially, the development process for
7 ShoreShade was to ride the Solbello coattails. We can see that
8 three years after the development process of Solbello started,
9 ShoreShade, evidently having seen the product in the
10 marketplace, one of ShoreShade's principals orders a Solbello
11 sunshade from Solbello, gets the sunshade. This was before
12 ShoreShade was even formed.

13 A short time later ShoreShade is formed and a short
14 time later ShoreShade has a product that looks exactly like the
15 Solbello product and performs exactly like the Solbello
16 product. So we have a competitor on the market. So they've
17 taken our innovation, taken our work, and are riding our
18 coattails, and not only that, they're using substandard
19 materials. They have, therefore, an inferior product. So
20 customers are complaining, but the price is lower and so we're
21 having to deal with that.

22 We're also having to deal with ShoreShade's
23 advertisements of its product. They claim in their
24 advertisements when they were selling their product repeatedly
25 that their shade was innovative, was revolutionary when it was

1 just, in fact, copied from the true innovation and the true
2 revolutionary work that Solbello did. Now ShoreShade is going
3 to tell you today that our shade is not innovative, is not
4 revolutionary, but they're calling the copycat product -- when
5 they're talking to the public they're calling the copycat
6 product innovative and revolutionary.

7 This is what we were dealing with on a constant basis
8 and this is what prompted the filing of the first lawsuit and
9 the first preliminary injunction motion. So we get here and we
10 have the preliminary injunction hearing that we all remember --
11 some maybe wish we could forget -- but there was key
12 representations. There were key representations leading up to
13 that hearing and then at the hearing.

14 I think Your Honor asked maybe three or four times:
15 "So the new product is not going to rotate; right?" And every
16 time the answer was, "No, the new product is not going to
17 rotate". We see in the next slide, Your Honor, about -- I
18 don't know how many; one, two, three, four, five, six, seven --
19 maybe eight different examples of where ShoreShade
20 unequivocally represented to the Court that they had a new
21 product coming out that would prevent rotation, and it was this
22 representation that they -- they said to the Court, "You don't
23 need to do an injunction. We don't need to worry about this.
24 We have this new product coming out that will solve
25 everything."

1 Well, the new product is now out and the new product
2 is not a new product at all. It operates and it works exactly
3 as the old product did in all material ways. What is our first
4 evidence of this? Let's look to ShoreShade's website. You can
5 see the pictures of the old product and the pictures of the new
6 product -- strikingly similar, maybe identical, maybe the same
7 picture. We don't know for sure, but there is no difference in
8 appearance. Putting appearance aside ---

9 THE COURT: Of course, that doesn't show the end cap
10 in the sand.

11 MR. SCHOUTEN: Sure. Correct. You're right about
12 that.

13 THE COURT: Which is the big difference.

14 MR. SCHOUTEN: Well, we would say it is not a big
15 difference, but ---

16 THE COURT: Well, I know, but I am just saying the
17 difference is that end cap in the sand with the fins --

18 MR. SCHOUTEN: Absolutely.

19 THE COURT: -- which is -- I mean, yeah, I agree it
20 looks the same to me, but it doesn't, obviously, show the end
21 cap.

22 MR. SCHOUTEN: You are correct.

23 THE COURT: Okay.

24 MR. SCHOUTEN: You are correct, Your Honor, and we'll
25 look at the end cap as we go on today, but what's most

1 important, end cap or not, frankly, is the way that the product
2 works and the product works in the same way in all material
3 respects as the old product does. And now in this next slide
4 we have -- we prepared a video for the Court. This next slide
5 I think is a somewhat truncated version of that, but it shows
6 our test and you will see the end cap in this version and how
7 the end cap is, essentially, not functional and we can roll the
8 slide.

9 We start with the instructions to show that we read
10 them and we followed them and then you'll see the product there
11 and here is Mr. James on the beach digging a hole as the
12 instructions require and then you can see the sunshade and
13 there -- that little green on the bottom, that's the end cap as
14 Your Honor was mentioning absolutely was not present on the
15 prior product and is present on this, but, importantly, does
16 that end cap prevent it from rotating? Absolutely not.
17 Rotates exactly like the old product did.

18 THE COURT: But he had to move it.

19 MR. SCHOUTEN: Well, you're doing that so that the
20 wind -- it rotates with the wind. It won't rotate
21 automatically by itself.

22 THE COURT: No, I understand, and they argued this in
23 their response, but when you physically move that pole are you
24 not undermining the whole operation and function of that cap?

25 MR. SCHOUTEN: No. You're just like recreating what

1 would happen in nature if the wind were to shift.

2 THE COURT: Well, I'm not sure. But, anyway, go
3 ahead. I am not sure I buy that.

4 MR. SCHOUTEN: Well, and you can see here ---

5 THE COURT: If you move it physically then you are
6 causing the shaft to move and the wind may not have the same
7 effect as a physical moving of the shaft.

8 MR. SCHOUTEN: And we watch right here, though, and
9 you can see it's still moving. It's still rotating as the wind
10 moves it.

11 THE COURT: Right, but after it's been undermined by
12 moving it physically like that.

13 MR. SCHOUTEN: I don't -- I don't believe -- okay.

14 THE COURT: I am just asking. All right. Go ahead.
15 Okay.

16 MR. SCHOUTEN: So the bottom line is that the
17 ShoreShade product rotates and the product self-rotates with
18 the wind in exactly the same way that the old product did and
19 let's look at why this end cap does not make any difference.
20 It does not impact rotation. So if we go to the next slide we
21 have a slide showing the end cap and you can see here that the
22 end cap is miniscule. It is insignificant. It is millimeters
23 and centimeters long and wide and the ShoreShade -- the
24 ShoreShade itself, over six feet tall and the sail extends out
25 over eight feet.

1 So what the suggestion is that an end cap that is that
2 miniscule, that insignificant would stop a product that is six
3 feet tall and has an 8-foot sail from moving in the blowing
4 wind when the version without that moved very, very freely and
5 Mr. James testified in his declaration that nobody who has
6 experience designing and developing these types of shades would
7 expect an end cap of that insignificant size and proportion to
8 the relative apparatus to stop or prevent or change the way it
9 rotates. That's why it is rotating -- not because of any
10 manipulation, but because the end cap doesn't stop it, and if
11 you look at the way that the old product works relative to the
12 new product, there is just simply no change.

13 So the critical point is that the product rotates with
14 the wind and with that we can move on to the discussion of the
15 likelihood of success on the merits. We start with the claim
16 as Your Honor has indicated and as we talked about the last
17 time and as Your Honor alluded to at the outset, six of the
18 seven elements are clearly present in the ShoreShade product.
19 No dispute about that.

20 So we're really looking at this fourth element and,
21 also, even when it comes to this fourth element -- and this is
22 relevant, I think, for the doctrine of equivalents -- is that
23 the entire first clause of that element they acknowledge is
24 present in their product. So even when we're talking about the
25 fourth element here, 12 of the 20 words in that element are

1 clearly met according to concession. So we can make that
2 language green as well.

3 So we're really looking at whether it rotates --
4 configured to rotate relative to the supporting surface which
5 as Your Honor alluded to for purposes of this proceeding we're
6 looking at rotate relative to the mast and does it do the
7 equivalent of that, and the answer to that is a resounding yes.

8 So we look at doctrine of equivalents and the test for
9 Doctrine of Equivalents as we outlined last time is really
10 pretty straightforward for all of the issues that we deal with
11 that are complicated patent law. We're just asking does the
12 product perform substantially the same function in
13 substantially the same way to achieve the same result and we're
14 looking at the rotation element when we're doing that analysis.
15 We're doing it on an element-by-element basis, but I do think
16 that there is some very important context that needs to be
17 considered when we do this element-by-element analysis.

18 As we talked about last time there is no dispute that
19 they ordered our product. They don't really dispute that they
20 sent it to get copied. They don't dispute that it has the
21 exact same size, dimensions, everything else, et cetera. They
22 don't dispute it has the exact same hardware, same number of
23 nuts, same number of screws, same number of washers. It's
24 effectively all of the same parts and when we do look at
25 doctrine of equivalents on an element-by-element basis we can

1 use our common sense and our common sense tells us that when
2 two products are that similar, the difference being this
3 miniscule, insignificant end cap, that they're going to operate
4 in substantially the same way and do substantially the same
5 function to achieve substantially the same result.

6 So let's actually view the doctrine of equivalents
7 analysis here and we'll see when we do it that we're looking
8 first at whether it performs substantially the same function in
9 terms of the rotation and when we play the video we can see
10 that they absolutely do that and we're treating the Solbello
11 shade -- because it won't rotate without that movement to put
12 it opposite the wind either, we're treating the Solbello shade
13 exactly the same as we're treating the ShoreShade shade.

14 THE COURT: Except the mast is not moving on the
15 Solbello because the rib is rotating at the top.

16 MR. SCHOUTEN: That's correct.

17 THE COURT: Right.

18 MR. SCHOUTEN: That's correct.

19 THE COURT: Okay.

20 MR. SCHOUTEN: But the movement for Mr. James to push
21 it in a direction opposite the wind is what is necessary to
22 cause it to rotate effectively in the same way as the Solbello
23 product and you can see, again, they do it in the same way.
24 There is one single vertical access and then there is a
25 horizontal -- the shade itself rotates horizontally to the

1 ground from a vertical access, and, again, Your Honor made a
2 difference about -- the question is not whether they do it
3 exactly the same way. The question is do they do it
4 substantially the same way and we see that the parts -- the big
5 pieces are all the same: A vertical access and a horizontal
6 sail rotating around the ground substantially the same way.

7 The fact that one rotation starts up here and one
8 starts down there is insignificant. That is an insubstantial,
9 immaterial difference in the product, and that's the whole
10 point of the doctrine of equivalents is to capture things like
11 this, and so then we move on to the easiest part, I think, of
12 the doctrine of equivalents test is do they achieve the
13 substantially -- excuse me -- the same result and we can see
14 that they achieve the exact same result here, again, treating
15 the shades the same, moving and rotating the wind and they end
16 up in the same place.

17 Now we've talked a lot about -- and I was alluding to
18 this earlier. We talked a lot about the *Shibumi* case here and
19 we think, obviously, the *Shibumi* case is a strong roadmap for
20 application of the doctrine of equivalents in a preliminary
21 injunction matter and applies very forcefully to this case, not
22 only the legal reasoning and the logic in the fact that the
23 defense into doctrine of equivalents and that case were similar
24 to the one here, but it's also from the same industry, and what
25 I think we can see from that case is that in this industry

1 there's a first mover to the market that puts all of the effort
2 in developing and then there are copycats that come along and
3 try to run off the coattails of the first mover and they change
4 a little thing here and they change a little thing there and
5 then they try to say, well, yeah, it rotates, but it doesn't
6 rotate up here; it rotates down here; and they try to ride the
7 coattails without adding to the art, without adding anything
8 significant by just making a minor tweak here, minor tweak
9 there that effectively does not impact the way that the product
10 rotates.

11 So that's -- basically, we're in the same situation as
12 Shibumi. Shibumi is a competitor, but we followed them down
13 the similar path of innovating, developing our own shade, and
14 now we have all of these copycats. I believe on Amazon we've
15 shut down maybe 12 copycats already in the last year or so that
16 are doing very similar things, frankly, to what ShoreShade is
17 doing.

18 THE COURT: Now when you say you've shut them down,
19 how have you done that?

20 MR. SCHOUTEN: Amazon has a process called an APEX
21 proceeding where it is kind of an accelerated proceeding where
22 an independent person looks at a claim of infringement and the
23 seller of the accused product has a chance to respond. If they
24 don't respond or if the response is not satisfactory, Amazon
25 will remove the Amazon listing.

1 THE COURT: Okay.

2 MR. SCHOUTEN: Now ShoreShade to our knowledge does
3 not sell on Amazon so that's not really a relevant opportunity
4 or option as it relates to them, but I think, again, this is
5 all indicative of a market where so much is invested in the
6 initial product and the initial product is protected and then
7 people buy that product, try to copy it with making
8 insignificant and, frankly, to the extent they're doing
9 anything, they're making the product worse but not ultimately
10 changing the way it functions or does anything, and then
11 creating problems for us that we have to deal with when
12 consumers buy the worst product at a cheaper price.

13 So that's exactly the kind of thing that doctrine of
14 equivalents is designed to protect against and it doesn't and
15 we don't -- again, it doesn't have to be exactly the same. It
16 accounts for these situations where copycats do something
17 that's substantially the same and that's exactly what's
18 happened here.

19 Your Honor mentioned about their claims about the test
20 and how it was manipulated allegedly, but, frankly, if
21 ShoreShade wants an example of somebody who cooked the books
22 with respect to the testing, it's ShoreShade. It's not
23 Solbello. For example, this slide in the upper right-hand
24 corner, you see these are the ShoreShade instructions for how
25 to use their product and dig the hole. They take great issue

1 with how Mr. James dug the hole, but if you look at the example
2 that in the last -- that circle there -- the tool to dig the
3 hole is at less than a 90-degree angle. It's at a slant.
4 That's what they're complaining he does -- he has it at a
5 slant -- but you'll watch and just ask who is digging the hole
6 in a manner more consistent with the directions? You'll see
7 that Mr. James digging -- again, it's -- I don't see any
8 different than what's required by the instructions.

9 MR. KILLEN: Can I ask a question? I hate to
10 interrupt. Do we have this video? The one you're showing
11 right now?

12 MR. SCHOUTEN: I'm not sure. No, apparently not and I
13 apologize for that. I did not know that.

14 MR. KILLEN: Okay.

15 MR. SCHOUTEN: In any event, that's Mr. James digging
16 the hole for the ShoreShade in a manner that complies with the
17 instructions. Now if we look at the other video we can see how
18 ShoreShade does it and it's not consistent ---

19 THE COURT: Let me ask a question. Their argument is
20 their tool is designed to dig a hole that is narrower than the
21 end cap and so when I watch that hole being dug, I mean, there
22 is some movement around the hole, but when it goes in it's
23 already loose.

24 MR. SCHOUTEN: And I think that that's their tool.

25 THE COURT: It's already loose.

1 MR. SCHOUTEN: But that's the way the product is
2 designed. That's not an absence of following the instructions.

3 THE COURT: Okay.

4 MR. SCHOUTEN: That's -- that's the way the product
5 operates when you do follow the instructions.

6 THE COURT: Okay.

7 MR. SCHOUTEN: And I think you can see from the
8 example of ShoreShade's video that they do it differently than
9 the instructions indicate. You see that he digs straight down
10 and pulls straight up. He does not tilt the tool at a less
11 than 90-degree angle like the instructions tell the consumer to
12 do and so he's coming straight up and straight down unlike what
13 the instructions say whereas Mr. James -- again, and you can
14 say that's wrong, but you cannot say that Mr. James did not
15 follow the instructions when he was doing that because that
16 step one -- Mr. James is doing it exactly as he should be doing
17 it.

18 That's not the only way that the ShoreShade test is
19 not really replicating the true experience of the product. The
20 ShoreShade test put the shades in -- it's evident they put the
21 shades -- first of all, you notice the wind is not blowing
22 significantly on that day which makes a difference. Secondly,
23 the shades are placed in sand that is essentially
24 concrete-like. How can we tell that? We watch the individual
25 performing the test try to penetrate the sand with the Solbello

1 auger which is typically a very, very easy task and, obviously,
2 the gentleman performing the test is a physically fit
3 individual and he is taking more than a minute to vigorously
4 and rigorously trying to get that hole dug and so when you
5 place the product in, essentially, concrete which ShoreShade
6 did, it's going to operate differently than when you place it
7 in a beach -- in a true beach setting. They have not
8 replicated the situation.

9 We have -- our videos show tests from three different
10 beaches all operating in regular sand, normal beach conditions
11 with a person digging a hole like they're instructed to do,
12 like they're most likely to do, and they have not shown that.
13 I mean, we, obviously, just got the videos yesterday, but ---

14 THE COURT: But you say a normal beach setting. I
15 mean, this is Hilton Head. I know where this is. My condo is
16 100 yards down the beach from there so I know what that sand is
17 like. I mean, that's Hilton Head. I mean, it's not like
18 they're not on the beach. I mean, that's a normal beach
19 setting, is it not?

20 MR. SCHOUTEN: I would say it's a normal beach setting
21 but to the extent their criticism is there is a manipulation of
22 conditions in our videos to show rotation, there is
23 similarly -- I don't agree that there is a manipulation. I
24 think the only manipulation to show non-rotation, they go to
25 one location and it is a location where -- they picked a

1 location where it's most likely to not rotate as much as it
2 would in numerous other locations. I think that's the point,
3 Your Honor, whereas we picked a variety of locations to
4 replicate kind of the broadest spectrum of beach experiences,
5 so to speak, and so for that reason I think we believe our test
6 more accurately reflects what actual consumers will do with the
7 product and how the product is intended to operate.

8 With that, Your Honor, I think -- again, our point is,
9 you know, you see the product in action. You see it rotate.
10 You see it rotate with the wind. It rotates substantially the
11 same way. It functions with respect to the rotation in
12 substantially the same way and it achieves the exact same
13 result, and, frankly, their videos are not sufficient to show
14 anything different, and, I mean, you can, obviously, make it
15 not rotate if you want to make it not rotate, but I think what
16 we come down to and what we come back to is, ultimately, let's
17 just look at the product and let's look at the full panoply of
18 videos that we have and with the idea of we know how the last
19 product operated and we know that the only change is that
20 insignificant, miniscule end cap and that miniscule,
21 insignificant end cap is not going to stop a huge sunshade from
22 rotating in the wind and for all of those reasons we think we
23 have a clear case of infringement under the doctrine of
24 equivalents and are, therefore, likely to succeed on the
25 merits.

1 THE COURT: Okay. Thank you.

2 All right. Mr. Killen, who is going to argue?

3 MR. KILLEN: Craig Killen, Your Honor. Thank you.

4 Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. KILLEN: Craig Killen for ShoreShade. Some of
7 the -- I have a slide presentation. Some of the slides are
8 unnecessary, I think, in view of the colloquy between the Court
9 and the opposing counsel at the beginning of his presentation,
10 but I do have a few points I'd like to make. Mr. Schouten
11 spent a lot of time casting aspersions on ShoreShade, you know,
12 none of which is really -- none of which is really relevant to
13 the issues to be decided here today and so I won't go in
14 detail, you know, disputing those on an item-by-item basis.

15 I would say one thing that Mr. Schouten said that's
16 just factually incorrect and easily disproven and he said that
17 -- he said it in the previous hearing as well as I recall --
18 that ShoreShade ordered the Solbello product even before it was
19 formed as an entity and that's just not true and that's easily
20 shown by the records of the Georgia Secretary of State.
21 ShoreShade was formed, I believe, in June of 2021 and that
22 product was ordered, I think, in October of 2022. So over a
23 year later.

24 Go ahead and go to the first slide. Yeah, I'll skip
25 over this one about patent infringement. Okay.

1 One of the things that I think was conspicuously
2 absent from any commentary by opposing counsel was the
3 invalidity argument we make in our response. All we have to
4 show to defeat a preliminary injunction motion is that there is
5 a substantial question about validity and in this case there is
6 a substantial question about validity. I would say it is
7 dispositive, but it is certainly a substantial question.

8 The European patent office, when considering an
9 identical claim to the claim that's being asserted here, has
10 held it to lack novelty in terms of two references. European
11 law is, of course, not exactly the same as U.S. law. It is --
12 on the question of novelty, it is pretty much the same, but you
13 know, we're not relying on that. We're relying on our own
14 evaluation. That was merely -- you know, seeing those
15 references and seeing that European action caused us to look at
16 those references ourselves and make our determination as to
17 whether we thought that was a correct argument under U.S. law
18 and it absolutely is.

19 Claim 44 would not withstand scrutiny under the
20 novelty standard of Section 102 of the patent statute over
21 either of the two references that we list there. The first one
22 is the Neal reference. That's a U.S. published patent
23 application from 2031 -- I mean 2013 -- and the second one is
24 this German reference.

25 Opposing counsel has also agreed to the claim

1 construction of the, I guess, element four we're calling it and
2 if I guess that -- they're not trying to extend the scope of
3 that claim beyond what's disclosed in the specifications so
4 I'll skip over the 112 argument.

5 Go to the next slide.

6 And, of course, we believe the claim is invalid and
7 there is no literal infringement or infringement under the
8 doctrine of equivalents for a number of reasons. All right.
9 So, again, I mention Neal and the German reference. The
10 novelty requirement says that the claim is invalid if all the
11 limitations of the claim are disclosed in a similar reference
12 and we've submitted invalidity claim charts as Exhibit 2 to our
13 response that detail how each of those elements is shown in
14 each of those two references.

15 And just looking quickly -- this is Neal. I won't
16 belabor the point here in the hearing because it is all in the
17 written materials that we've submitted, but, I mean, it can
18 easily be seen that this device of the Neal reference -- it has
19 a mast. The mast is configured to extend upwardly from a
20 supporting surface. It has a top end and a bottom end. It has
21 at least one rib located approximately top end of the mast and
22 the rib is configured to rotate relative to the supporting
23 surface. It has the sail.

24 The Solbello patent uses the term "sail" and, you
25 know, this is a flag. A flag is just another form of a sail

1 since the sail is not defined in any other way, you know, and I
2 know that most sails are -- based on the limited amount of
3 sailing I've done in my life, most sails are mounted vertically
4 with respect rather than horizontally --

5 THE COURT: Right.

6 MR. KILLEN: -- as the devices are here and when
7 unfurled the sail and the rib are adapted to rotate together in
8 the direction of the blowing wind. That clearly happens here.

9 Let's look at the German reference now.

10 THE COURT: Is that a sunshade, though -- the Neal?

11 MR. KILLEN: It is ---

12 THE COURT: It says flag, but is it designed to be a
13 sunshade?

14 MR. KILLEN: It -- let's go back to that one. It is a
15 flag.

16 THE COURT: It is truly a flag.

17 MR. KILLEN: It is truly a flag. It's a flag, but the
18 term sunshade only appears in the preamble of the claim so it's
19 not limiting the scope of the claim. The sail limitation just
20 says sail. It doesn't say sunshade and a flag would naturally
21 provide some shading from the sun depending on its orientation
22 and that's what the European examiner determined and this is a
23 similar device here. This is the device of the German
24 reference. I won't say it's a similar device, but it similarly
25 has all the elements of Claim 44.

1 If you go to paragraph 45 of the German reference it
2 describes this device of figure two in detail and it can be
3 seen in paragraph 45 that each of those limitations of Claim 44
4 are satisfied by the German reference.

5 Element three there which is one of the horizontal
6 beams that goes off to the right is the flag holder. Other --
7 the flag drapes down from that. You know, it is a banner that
8 extends down vertically from that flag holder which rotates
9 around the mast. In that way it's similar to the Neal
10 reference.

11 We can skip this one. We can skip this one. Skip
12 this one.

13 No literal infringement which has been agreed to here
14 today for purposes of this motion. So now we get to the meat
15 of the infringement argument and that is the doctrine of
16 equivalents. You know, as we pointed out in our written
17 materials that we submitted to the court, the Doctrine of
18 Equivalents is the exception to the rule. It's not, you know,
19 a magic incantation that can be used in every case where
20 there's no infringement to ensnare an alleged infringer, and
21 the doctrine of equivalents as has to be applied on a
22 limitation-by-limitation basis. That's the all elements rule.

23 It's unavailable if it would vitiate the relevant
24 limitation. For example, if it does the antithesis of what the
25 claim construction calls for. If it would cover a structure

1 that is specifically excluded from the claim or ensnare prior
2 art.

3 All right. Getting to the question of whether or not
4 the ShoreShade product does the same or substantially the same
5 function or result as the Solbello product or as the Solbello
6 patented design, you know, we would say that it absolutely does
7 not and the agreed-upon claim construction says that the ribs
8 rotate relative to the mast. So if you -- if you try to cover
9 the device where the ribs are fixed with respect to the mast
10 and the ribs and mast somehow rotate together, then that
11 vitiates the claim limitation, the agreed upon of the
12 agreed-upon construction that says that the ribs have to rotate
13 relative to the mast because it absolutely does not do that,
14 and they disparage in their patent -- in the Solbello patent
15 disparages, you know, the rotation of a mast relative to the
16 ground and they say that it can cause failure of the assembly
17 and so they contend in their patent that they developed an
18 improvement because the mast is stationary and the ribs rotate
19 around the mast. That's improvement over another design that
20 they now claim infringement under the doctrine of equivalents,
21 but by their own arguments and their own statements in their
22 patent they're not equivalent.

23 And this shows the instructions that were shown for
24 the ShoreShade device that were shown in part in opposing
25 counsel's presentation. I would like to point out here under

1 step one as I understood Mr. Schouten's argument he was saying
2 that the image there on the right -- the third image on the
3 right under step one -- teaches somehow that you're supposed to
4 stab the ground at an angle and that is absolutely not what
5 that is showing. That's showing after -- well, the first image
6 shows that you insert the sand tool vertically. The second
7 image shows that the vertically inserted sand tool is twisted
8 and then is removed from the ground, and then what the third
9 image shows is how you fling the sand away. So you fling the
10 sand that is captured in the sand tool -- fling it onto the
11 beach. It's not -- that's not insertion of the sand tool at
12 all. That's after the sand tool is removed. You fling it so
13 that the sand is removed and then you repeat the process until
14 the handle is flush with the ground and at that point the hole
15 is nearly a foot deep. The hole is smaller in outer diameter
16 than the outer diameter of the end cap and the end cap is
17 pushed into this deep sand and the sand, you know, a foot below
18 the surface is tightly packed and will be -- I would say will
19 be in every situation that you would expect to find on a beach.

20 THE COURT: But -- and you may not agree with me, but
21 if I am on the beach and I have just purchased this product and
22 I'm looking at those instructions, that third view almost
23 suggests some angling back. I know you said that's designed to
24 show the flicking, but the first one shows pushing straight
25 down. The second one is twisting and I'm thinking if I'm

1 installing, well, does this mean I am supposed to pull it back
2 up at an angle or is that -- or am I supposed to pull it
3 straight up? I am not sure that that instruction is very clear
4 for a user. I'm just telling you as a potential consumer if I
5 were to buy the product I am not sure I would understand
6 exactly what that meant, but, anyway, which I think is what
7 they're arguing.

8 MR. KILLEN: I understand that to be part of their
9 argument, Your Honor, but it does not show the sand tool being
10 pushed into the ground ---

11 THE COURT: At an angle. I understand.

12 MR. KILLEN: Yeah. And it also shows the sand tool
13 completely outside of the hole before ---

14 THE COURT: True.

15 MR. KILLEN: My co-counsel also pointed out to me
16 that, you know, the relevant location for the -- or the end cap
17 would be located at the bottom of the hole.

18 THE COURT: Right.

19 MR. KILLEN: And so that's almost a full foot under
20 the ground. So this image doesn't really show anything about
21 what's going on down there.

22 And here are some images of our tests and we've
23 submitted the videos to the court that show in each case
24 included a wind strip to show the magnitude and direction of
25 the wind and the wind was vigorous that day as the wind strip

1 demonstrates and the videos show very clearly that even if the
2 ShoreShade device -- this is shown in the left photograph
3 here -- even if the ShoreShade device is intentionally mounted
4 and Your Honor was correct in questioning opposing counsel
5 about the Solbello test that showed the insertion of the
6 ShoreShade device and then rotating it to bore out the hole.
7 That is absolutely not the way the ShoreShade device is
8 supposed to be installed because that does increase the
9 diameter of the hole and loosens it and, you know, to some
10 extent would defeat the purpose of the end cap, and so what we
11 did is we installed the device correctly according to the
12 instructions. We pushed it down and you'll see in the video
13 that some effort is required to push it down.

14 Mr. -- our client who was inserting it into the
15 ground, you know, he is a very fit man and he was using two
16 hands and pushing firmly and that was to displace sand so that
17 it was around the end cap, and when it's done that way as can
18 be seen the ShoreShade device will remain at an angle relative
19 to the direction of the wind, you know, basically, forever
20 until it's removed. We ran the test for, I think, 12 minutes
21 and 15 minutes and it never moved at all. The Solbello device
22 that we had up also as a point of comparison -- it was shifting
23 around with changes in the direction of the wind, but the
24 ShoreShade device stayed in the same orientation the whole
25 time.

1 And this photograph on the right simply shows that
2 even when you pull the device out you can see the grooves that
3 were made by the fins and, you know, those -- if the device had
4 been rotating around in that hole those grooves wouldn't be
5 there.

6 And this slide here is merely talking about what we
7 believe are the flaws in the Solbello test. He stabs the --
8 using the sand tool he stabs the ground at different angles,
9 seems to be intentionally trying to create a hole that's bigger
10 than what would be created if the instructions were followed.
11 He rotates the entire device after he puts it in. In the video
12 I saw he's holding the device with one hand and almost kind of
13 drops it in the hole and, obviously, if the hole were the
14 correct size he wouldn't be able to just drop it in. He would
15 have to use two hands to push it down or push it down with some
16 significant, you know, with effort. And he didn't align the
17 shade with the wind before inserting it as is per the
18 instructions. So we believe that testing is flawed and doesn't
19 reflect, you know, the real world conditions under which the
20 product would be used.

21 I'd also like to emphasize, Your Honor, that we think
22 the whole discussion about the videos, the videos -- in order
23 to prevail on this motion as the Court knows the plaintiff has
24 got to run the table. You know, they've got to win on
25 validity. They got all these -- all the factors, they have to

1 win on every single one of them, and all the defendant has to
2 do is show a substantial question on any one of these things.
3 We think that the videos that show the operation of the new
4 design if used properly are merely one more reason why there is
5 no infringement, but we also believe that there are other
6 reasons.

7 We didn't believe that the original design infringed
8 either because we think the claim very clearly cannot be
9 covered -- cannot be read so broadly under the doctrine of
10 equivalents to cover a design where the ribs rotate relative to
11 the mast or the beam rotates relative to the pole, whatever
12 terminology is used, and we also think there are substantial
13 validity issues here that, you know, render the claim very
14 likely invalid.

15 THE COURT: All right.

16 MR. KILLEN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 All right. Mr. Schouten, you want to reply?

19 MR. SCHOUTEN: Sure and thank you, Your Honor. Just
20 to state a few points. First, on the formation of the LLC
21 relative to the order, I apologize if I got that wrong. What
22 is absolutely not wrong is that ShoreShade did not have a
23 product on the market before they ordered the Solbello product
24 and that's the pertinent reference there.

25 With respect to the digging, I was not saying -- I

1 think you more accurately characterized our argument. We were
2 saying that not that you stab at an angle but that you pull out
3 at an angle and flick at an angle, and I don't agree that that
4 instruction shows that the tool is clearly removed from the
5 hole before you make that angle and if you want -- my point was
6 when watching their video he does not flick at an angle. He
7 pulls straight up and once it's out, flicks. He does not do
8 that kind of flick as it comes out. That was the point that we
9 were making on their test.

10 With respect to the videos and the suggestion that
11 Mr. James manipulated things by pulling or moving the shade,
12 well, the wind is, of course, going to move the shade anyway.
13 So that's going to happen if the wind is strong enough and if
14 the wind shifts. So it is just recreating what would happen in
15 nature and if that makes the hole bigger, nature is going to
16 make the hole bigger, too, and that same thing is going to
17 happen.

18 Here we do have a video in direct response to that
19 where Mr. James does not touch or impact the direction of the
20 shade after it is put in the hole, and, again, you can see it
21 rotating there. That's what it was doing before there was any
22 impact from Mr. James on it and that's how it is going to
23 operate in the real world. In short, they are essentially
24 depending on the consumer to perfectly execute an instruction
25 that is not clear and for the wind conditions to remain perfect

1 so that it doesn't shift the apparatus and thereby naturally
2 make that hole bigger -- do the same thing -- and they're
3 relying on a perfect set of conditions to avoid infringement,
4 not how this thing is actually going to be used, not how it's
5 actually going to operate in the marketplace.

6 And I want to go back to something that we talked
7 about with respect to the original product and I think during
8 the last hearing Your Honor identified that product isn't going
9 to work very well; right? It's not stable. It's not -- it is
10 just going to fall over; right? So they needed to redesign
11 their product so it wouldn't fall over, not so it wouldn't
12 rotate, and I think when you really look at what this design
13 around was accomplishing, it was designed to make it less
14 likely to fall over but not to stop the rotation. There is no
15 way that those -- those fins, those tiny fins -- would stop
16 rotation on something so massive.

17 Counsel alluded to the validity points that they
18 raised. Of course, those were raised for the first time in the
19 brief that we got yesterday. Those same references were
20 available to them last time when we were here and we didn't
21 hear a word about them. So if they're so clear, we probably
22 should have heard about them last time. I do have some quick
23 comments on those.

24 THE COURT: Sure. Let me hear them.

25 MR. SCHOUTEN: And if appropriate I'd appreciate the

1 opportunity to put that in writing then as well, but we have a
2 slide on the validity points, and I think as we talk about
3 validity it is important to remember context once again. So
4 the fact of the matter is and there was talk about what
5 happened in the EU and whether EU law may or may not be
6 different or whether it's kind of the same. Remember, it is
7 their burden to create a substantial question of validity and
8 that's because our patent has a presumption of validity and
9 that's because a U.S. examiner -- as a matter of fact, two
10 examiners through the course of the original and reissue --
11 viewed our patent under U.S. law, viewed our claims under U.S.
12 law, conducted an exhaustive prior art search, and found that
13 the two references that they're talking about here were not
14 even support -- did not even find those references or view them
15 important enough to cite or important enough to search for. So
16 ShoreShade has the burden of creating a substantial question
17 and this burden has to be viewed as the federal circuit says
18 taking into account the presumption that Solbello's patent is
19 valid.

20 Now with the two references that were cited I think
21 Your Honor hit exactly on the right point. They are flag
22 poles. How many times has anybody said "I need to get in the
23 shade; I am going to stand next to the flag pole"? Nobody
24 ever. Anybody looking to design a sunshade assembly, they're
25 not going to look to flag poles. I mean, to counsel's point

1 and to your point, the flag is going to be vertical. The whole
2 point of a sunshade assembly is to have protection from the
3 sun. So they tried to hand wave by that important aspect and
4 that important flaw in the analysis here by saying, "Well, the
5 sunshade assembly is in the preamble. It's not a real element
6 of the claim." Well, we've always treated it as an element of
7 the claim. The slide we showed last time and at the last
8 hearing, that was claim element number one. There was no
9 discussion or no objection to that being an element of the
10 claim back then and preamble -- a preamble can, in fact, be a
11 limitation and we have some law on that right here. It says
12 "if the claim preamble" -- we do read a preamble is limiting
13 when "if the claim preamble when read in the context of the
14 entire claim recites limitations of the claim or" -- and this
15 is the important part -- "if the claim preamble is necessary to
16 give life, meaning, and vitality to the claim".

17 So you look at the entire spec and the entire thing
18 here unlike, for example, the Neal reference which is talking
19 about a flag pole and, frankly, a variety of other things, the
20 entire point of the specification here, the entire point of the
21 patent is to make a better sunshade, a better sunshade
22 assembly.

23 In a case very much like this one where we were
24 talking about limiting preamble or where the court was, the
25 federal circuit said that the trial court correctly discerned

1 that the preamble "sit on top kayak" should be understood to
2 limit all the claims to a category of watercrafts. So just
3 flip the words out. The trial court directly discerned that
4 the preamble sunshade assembly should be understood to limit
5 all the claims to a category of sunshades, and if it is, Neal
6 is gone; the German reference is gone because, admittedly, they
7 are not sunshades.

8 So the key question in terms of their validity
9 argument is whether the preamble is limiting, and in this case
10 it is, and because it requires a sunshade assembly and because
11 Neal and the German reference do not involve sunshade
12 assemblies, there is no validity question here or no serious
13 substantial question of validity considering the fact that the
14 -- that we have a valid -- presumed to be valid U.S. patent.

15 I will say, again, with respect to the comments of the
16 EU examiner, it's not a final rejection. Those are very
17 preliminary in nature and frequently examiners reverse
18 themselves on positions like this so we, frankly, don't know --
19 and I understand not relying on the examiner as dispositive on
20 this issue, but that may very well and we expect the examiner's
21 position on that particular issue will be changed as the patent
22 is prosecuted.

23 So the anticipation arguments that they've made do not
24 raise a substantial question of validity and this, I think,
25 next slide just shows throughout the specification the

1 importance of the sunshade assembly and it is the essence of
2 the patent is a sunshade assembly and so when it's in the
3 preamble it has meaning. It means something and, again, we
4 can, of course, submit further response to the validity
5 arguments, but that's the gist of it, Your Honor.

6 THE COURT: All right. Okay.

7 MR. SCHOUTEN: Thank you.

8 THE COURT: Anything else you want to say?

9 MR. KILLEN: Yes, Your Honor. I would like to respond
10 briefly to what Mr. Schouten said. I wish we had known about
11 the German opinion was issued by -- I mean, the European
12 opinion was issued by the European examiner. I believe it was
13 in November around November 10 or something. Yeah, it was
14 before the hearing, but it was during that time that we were
15 preparing for the hearing -- the initial hearing back in early
16 December -- and we just didn't find it then. You know, we had
17 to -- we found it this time because we continued to do
18 additional digging and looked at what happened with
19 corresponding patent applications that Solbello filed overseas
20 and we found it, and, like I said, it just issued at that time
21 and we missed it, but we found it this time and we do think it
22 is highly relevant.

23 There is no evidence that either one of those two
24 references were cited to the U.S. patent office. There is no
25 evidence that the U.S. examiner was aware of them or their

1 significance. So, you know, we don't know -- I think the
2 examiner in the U.S., if he had seen them and, particularly, if
3 he had the benefit of the European examiner's analysis, he
4 would have reached the same conclusion.

5 Can we put Claim 44 back up, please?

6 THE COURT: But it didn't exist when he was reviewing
7 the Reissue Patent?

8 MR. KILLEN: Exactly. He apparently ---

9 THE COURT: So the European patent process was, I
10 guess, in early stages or whatever it was, but he didn't have
11 access to it because it didn't exist.

12 MR. KILLEN: Well, he didn't have access to the
13 European examiner's opinion.

14 THE COURT: Right.

15 MR. KILLEN: That is correct, Your Honor, but the
16 references themselves were prior art and they could have been
17 found by the examiner. He apparently didn't. You know, he
18 didn't find them in his searching.

19 THE COURT: Do we know that or are we speculating that
20 he didn't?

21 MR. KILLEN: There is nothing in the record to
22 indicate that he found them.

23 THE COURT: One way or the other.

24 MR. KILLEN: That's right. That's right. Yeah, the
25 patent lists the references on the face of it, the references

1 that were considered by the examiner and neither one of these
2 were on there. I do want to speak briefly on this issue
3 about ---

4 THE COURT: I am just asking couldn't that suggest
5 that he was aware but didn't consider them worthy of
6 consideration?

7 MR. KILLEN: That's one possibility, Your Honor.

8 THE COURT: Yeah, I am just saying so the fact that it
9 may not be listed isn't absolute proof that he missed it is my
10 point.

11 MR. KILLEN: Correct.

12 THE COURT: Okay.

13 MR. KILLEN: Correct. He may have missed it. He may
14 have reviewed it and decided --

15 THE COURT: We don't know.

16 MR. KILLEN: -- it wasn't -- we just don't -- we don't
17 know. So I think any argument -- you know, I agree with that,
18 Your Honor.

19 THE COURT: Okay.

20 MR. KILLEN: I can't say that the examiner missed it,
21 but Mr. Schouten can't say that the examiner saw it and
22 considered it to be not relevant either. So I think that's an
23 open question.

24 THE COURT: We just don't know.

25 MR. KILLEN: We don't know.

1 THE COURT: Okay.

2 MR. KILLEN: So Claim 44 of the patent which is the
3 only claim at issue is reproduced here and I wanted to talk a
4 little bit about this -- the preamble question. Normally,
5 when -- for a preamble to be listed, you know, I think the
6 language from the case law is to breathe life into the claim --
7 life, meaning, and vitality to the claim -- and what that
8 normally means is the preamble language is referred to in the
9 text of the claim that follows the preamble -- so everything
10 that follows the colon.

11 If there had been repeated references to "the shade"
12 or something like that, but for some reason they chose not to
13 use the word "shade" in the bottom or "sunshade" in the body of
14 the claim. They used "sail". And, you know, my speculation on
15 that is they were trying to ensnare a larger class of potential
16 products using the term "sail" rather than "shade" and it
17 doesn't say that the shade -- it says "sail". It doesn't say
18 the sail is horizontal. It just says "a sail having a
19 proximate edge secured to a rib". You know, they could have
20 put all of those limitations in the claim. They chose not to
21 and I think as a result of that the term "sunshade assembly" in
22 the context of this claim is basically meaningless. It's not a
23 limitation of the claim.

24 THE COURT: Well, but let me ask you -- all right.
25 The first sentence says, "a sunshade assembly comprising" and

1 then moving down to the third one, "a sail". Isn't that, in
2 fact, what it is? It is a sunshade assembly that comprises a
3 sail that, basically, is operated horizontally.

4 MR. KILLEN: They used the word ---

5 THE COURT: I mean, is that a more correct description
6 of the sunshade assembly is it consists of a sail?

7 MR. KILLEN: I think a flag is just as much of a sail
8 as what is described in their patent. I mean, one difference
9 between a flag and a shade -- a flapping shade as is shown in
10 their patent -- is that the flapping shade, you know, might be
11 horizontal, but they don't say that in the claim. They don't
12 -- you know, they have written a claim that's too broad and now
13 they kind of want to have their cake and eat it, too. They
14 want to accuse ShoreShade of infringing the claim, but then
15 when we attack the claim based on the scope that they've
16 asserted, then they say, "oh, well, no, you know, it's more
17 limited than that."

18 THE COURT: Okay. Okay. Thank you. Anything else?
19 I want to take a brief recess and go back here and go over my
20 notes with my law clerk and we'll be back shortly.

21 (A break is taken.)

22 THE COURT: All right. The new videos that were shown
23 today, can those be filed?

24 MR. SCHOUTEN: Yes, sir, Your Honor.

25 THE COURT: Okay. I just want to be sure that for

1 purposes of this motion we are focusing entirely on doctrine of
2 equivalents. Literal infringement is not being considered by
3 the court or argued by you; correct?

4 MR. SCHOUTEN: That's correct.

5 THE COURT: All right. Do you agree with that?

6 MR. KILLEN: I do, Your Honor.

7 THE COURT: Okay. We have everything we need. We
8 will get out an order on this next week. I know it's the
9 season and how important it is to get an answer for both of
10 you, but we will have -- we will issue an order, file an order
11 next week. Give us a few days to get ready.

12 MR. SCHOUTEN: Thank you, Your Honor, and we'll submit
13 those videos today.

14 THE COURT: You'll submit the videos today. Anything
15 else you feel like you need to submit or are you standing on
16 what you already filed?

17 MR. KILLEN: I don't think so, Your Honor. I think --
18 we don't intend to submit anything.

19 THE COURT: All right. Thank you. We'll get you an
20 answer very quickly.

21 (The hearing is concluded.)
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CERTIFICATE OF REPORTER

I, Lisa H. Davenport, Federal Official Reporter, in and for the United States District Court for the Southern District of Georgia, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically-reported proceedings held and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.



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