UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WABCO HOLDINGS INC. AND LAYDON COMPOSITES LTD.,
Petitioner,

v.

TRANSTEX COMPOSITES INC.,
Patent Owner.

IPR2018-01319
Patent 8,449,017 B2

RECORD OF ORAL HEARING
Held on October 29, 2019

Before BART A. GERSTENBLITH, TIMOTHY J. GOODSON, and BRENT M. DOUGAL, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

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The above-titled matter came on for hearing on Tuesday, October 29, 2019, commencing at 1:00 p.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE GERSTENBLITH: Good morning everyone. We are here for oral argument in IPR2018-01319, Wabco Holdings and Laydon Composites Limited versus Transtex Composites Inc.

I am Judge Gerstenblith, and let's see, surrounding me on multiple screens are Judge Goodson on the left side of the screen, and Judge Dougal on the right side of the screen.

Judge Goodson is appearing remotely from California, and Judge Dougal is appearing remotely from Denver. And, I understand according to a report from him this morning that it's a good thing that we're here now in Alexandria because they are in the midst of a big snowstorm in Denver.

Starting with Petitioner, if you would please step up to the podium and enter your appearance for the record.

MR. MUELLER: Good afternoon, Your Honors. Wesley Mueller from Leydig, Voit & Mayer in Chicago representing the Petitioners, Wabco and Laydon Industries. With me here today is Mr. Michael Minnae, Chief IP Counsel for Wabco America; Mr. Michael Hartmann, Attorney in Charge; and my partner, Paul Filbin. Thank you.

JUDGE GERSTENBLITH: You're Welcome. And, for Patent Owner please.

MR. RICHEY: Good afternoon, Your Honors. For Patent Owner, Scott Richey.

JUDGE GERSTENBLITH: Thank you.

MR. RICHEY: Thank you.

JUDGE GERSTENBLITH: I wanted to note for the record that on Monday, October 21, 2019, a prehearing conference call was held with counsel for the parties and the panel, and the panel authorized Patent Owner to be represented at this hearing by Mr. Richey, who is backup counsel, without requiring the presence of lead counsel, Mr. Caracappa, who I understand is currently at trial in another location.

MR. RICHEY: Thank you, Your Honor.

JUDGE GERSTENBLITH: Absolutely. And if either party brought paper copies of its demonstratives for the Court Reporter, if you have not already handed them up to him, please do so.

I do not need a paper copy unless you really want me to have one because they are filed, and I have it in front of me here as well.

MR. RICHEY: For the Court Reporter.

JUDGE GERSTENBLITH: Sure. Thank you. Also, before we begin, let me just confirm -- I'll start with Mr. Mueller, you'll be presenting the argument?

MR. MUELLER: Yes, Your Honor.

JUDGE GERSTENBLITH: Okay. So, I'll start with you just to be clear. There are no pending motions at this time, is that right?

MR. MUELLER: No pending motions.

JUDGE GERSTENBLITH: Okay. And do you concur?

MR. RICHEY: Yes, Your Honor.

JUDGE GERSTENBLITH: Okay, thank you. We set forth the procedure for today's hearing in our order granting the parties' requests for an oral hearing, which is Paper Number 20. Each party will have 60 minutes of total argument time.

We will begin with Petitioner who will start with its case in chief. Petitioner may reserve time for rebuttal. After Petitioner presents its opening arguments, it will be Patent Owner's turn to respond to those arguments, and Patent Owner may also reserve time for rebuttal.

After Patent Owner's argument, Petitioner will have whatever time it reserved to respond to Patent Owner's arguments, and thereafter, Patent Owner will have whatever time it reserved to respond to Petitioner's rebuttal arguments.

I have a timer here that I can set for whatever amount of time you would like. So, when it's your turn at the podium, if you want to reserve a certain amount of time, you can tell me, and I can put whatever time you want. It'll count down and go to yellow when that time is up.

I won't forcibly stop you or anything like that. So, you're welcome to go into your rebuttal time, but that is the reminder that you have crossed that threshold, so to speak.

If you are planning to use demonstratives, which I think both sides are, please remember -- and I know this is often tricky to remember -- to call out the slide number, and if there is a figure that we're looking at in the demonstrative, to please call out that number, so that not only is the transcript clear, but also the Judges appearing remotely can follow along with ease. Starting with Mr. Mueller, do you have any questions about the procedure for today?

MR. MUELLER: No, Your Honor.

JUDGE GERSTENBLITH: Okay. Mr. Richey?

MR. RICHEY: No, Your Honor.

JUDGE GERSTENBLITH: Okay. With that, Mr. Mueller, I give you the floor.

MR. MUELLER: Good afternoon, Your Honors. May it please the Board. We've put up Slide 3 of the presentation, which simply identifies the institution grounds in this IPR.

At the prehearing conference on October 21, the Board asked the parties to address what it considered to be any differences between this case, IPR2018-01319, involving the 017 Patent, and the earlier IPR, in which a final decision was rendered, concerning the 471 Patent.

Petitioners believe that there are no significant differences between the claims in the two patents. They are material in all respects, and the claims that were determined to be unpatentable in the first trial should also demonstrate that the claims here are unpatentable.

This patent issued from essentially the same specification, which was in the same chain of applications that led to the 471 Patent. The same prior art references that were applied in the first trial are also at issue here.

There's largely the same arguments and the same evidence that are before the Board, with some slight differences, but those differences would not lead to any different conclusion from the conclusion reached in connection with the final decision regarding the 471 Patent. And importantly, the Patent Owner here provides no reason to depart from the decision and the underlying fact findings that were made in the first trial.

So, Petitioner believes that the principles of claim preclusion should actually apply here to avoid the possibility of inconsistent decisions in this second trial on very closely related patents involving claims that are materially indistinct.

I'd like to go to the 017 Patent and take a look at the claims at issue and take a look at the claim language. If we can turn to Slide 6 --

JUDGE GOODSON: Mr. Mueller, are you aware of any Board decision applying claim preclusion in one IPR based on a final decision in a related IPR between the same two parties?

MR. MUELLER: Your Honor, there is the *Max Linear* Federal Circuit decision, which indicates that claim preclusion is appropriate when it is applicable.

We are aware -- although we haven't briefed this issue to this Board, certainly -- we are aware of an IPR decision -- I don't recall if it was a final decision -- in which the Board indicated that claim preclusion would not apply until there was an exhaustion of appeal rights. So, either the Patent Owner had appealed the case and there was a decision from the Federal Circuit, or it decided not to appeal its decision.

Now, that case is actually in conflict with law in, I believe, the Third Circuit, and perhaps the Fourth Circuit, which allows for claim preclusion after a final decision is rendered.

So, right now if we apply the decision that was made in the prior IPR decision, we are in a time period in which the Board would consider that there is not a final decision with a loss of any rights to appeal.

So, it would be unclear that -- or, at least under the legal analysis applied in the prior decision coming from the Board -- claim preclusion would not actually attach until there was either an appeal, and/or exhaustion of appeal right.

JUDGE GOODSON: Do you have the name or case number of the IPR decision you are referring to?

MR. MUELLER: We can get it, Your Honor, perhaps when I step back up in my rebuttal, we can give you the name of the case.

JUDGE GERSTENBLITH: Great, thanks.

MR. MUELLER: We acknowledge that the *Max Linear* decision, and the issues of claim preclusion perhaps haven't been as developed in the case law, either by the IPR or the Federal Circuit. So, it's not entirely clear what the Board needs to apply, and when it needs to apply it.

Petitioners, however, certainly do not waive their right to apply collateral estoppel to the second case. But, even on the record in this second case, the Board should conclude, again, that the claims at issue in the 017 Patent are unpatentable.

And, if we look at the claim limitations at issue highlighted in yellow, we've got a resilience strut, that's the same that was in the --

MR. FILBIN: This is Slide 6, Your Honors.

MR. MUELLER: Yes, Slide 6 of our presentation. We have a resilient strut again. Again, we have a skirt panel that moves away from -- it reduces the drag of the trailer, and it contacts a foreign object, and can recover to its original configuration. The strut is adapted to sustain elastic deformation; that's the element that's in green.

Here we have slightly different wording in which the strut includes a longitudinal shape variation which is adapted to change a mechanical strength of the resilient strut; and we'll get to that. That's also shown in the Layfield prior art. And so, these are essentially the elements of the independent claims in the 017 Patent that we are looking at today.

Let me go on and talk briefly about the Layfield reference. Again, we've talked about this at length. If I can turn to Slide 13.

The starting point for Layfield is that there is disclosure of a skirt panel that is flexible. And that's set forth at various portions of Layfield, including at Exhibit 1004, which is the Layfield reference, Column 5, Lines 51 through 55; a relatively flexible side panel is disclosed there.

If we go to Slide 14 in the deck, which is another passage from the Layfield disclosure, which is found at Exhibit 1004, Column 12, Line 67 through Column 13, Line 4; which, again, is talking about the sufficient flexibility of the skirt panel so it can avoid objects such as curbs and railway tracks, etc., loading docks.

If we go next to Slide 15, which talks about the material used in the flexible side panel in Layfield. We've got thermoplastic materials which include ABS, HMW, polyethylene, PP, or TPO.

If we move forward to Slide 16, we are also talking about -- let me just make sure that's the right slide -- yes, Slide 16, we're talking about an advantage of using injection molding which provides a greater flexibility of the skirt panel as it passes over road objects, etc. So, this is the correct starting point to consider the Layfield Patent.

The Layfield prior art reference discloses a skirt panel which is resilient in that it moves either inwardly or outwardly when contacted by a foreign object, such as a curb, railroad track, or loading dock.

Now, what we wanted to point out particularly in connection with this IPR, and we acknowledge that we may not have been as clear as we could have been in the prior IPR, is that Petitioners are arguing that when you look at what is expressly disclosed in Layfield -- and, again, the test for anticipation is, what a person skilled in the art would understand or infer

from the reference -- we would submit that there is express disclosure of a resilient strut in Layfield as well.

And that is because in Layfield, when a person skilled in the art considers that we're using the same material for this strut as we're using for the resilient skirt panel -- and Mr. Tres talks about that at paragraph 75 of his initial declaration, which is Exhibit 1010 -- he indicates that we're using the same material, and when we look at the structure of the strut, the structure would have been understood by a person skilled in the art, based on the material being used, to provide flexibility along with the skirt panel.

So, we would submit that this case -- and while each case is decided on it's own merits, and we can't look at cases for what they hold, but we have to look at the reasoning behind the holding -- we would submit that this case is similar to the REG Synthetic Fuels case versus Nestle; that's 841 F.3d 954, a Federal Circuit case from 2016.

And we cited that, I believe, in our Reply Brief. Let me just make sure. We cited that at Page 18 in our Reply Brief.

But, in the *Synthetic Fuels* case, the Federal Circuit said, "you're dealing with an issue of expressed disclosure when the information contained in the reference is simply used by the expert in a way in which he interprets what is being said in order to satisfy the limitation of the claim."

In other words, this is not a case of inherency. This is not a case where we're looking at an intermediate component that's being created by a complicated chemical reaction where nobody would understand that the component is actually present, or the intermediary is actually present.

But instead, what we are considering is a case in which a person skilled in the art would understand that a resilient strut is expressly disclosed

by virtue of the disclosure of the characteristics of the material as well as the particular design that's set forth in the Layfield Patent.

So, we would submit that this case is an anticipation case based on express disclosure of a resilient strut in the Layfield Reference.

JUDGE GOODSON: So, Mr. Mueller, you're asking us to depart from the analysis that we had in the previous IPR, but you started by telling us the previous IPR's final decision was preclusive.

MR. MUELLER: Your Honor, we would submit that certainly to the extent that the Board is willing to consider further argument and evidence, and decide that the prior decision is not preclusive; that we would preserve, at least, our argument of anticipation because, with all due respect, we believe that the Board looked at the evidence and the law in the original decision incorrectly as to the particular issue of whether a resilient strut is expressly disclosed in the Layfield Reference.

So, to the extent that collateral estoppel does not apply, we would ask that the Board consider the evidence and argument that is made in this case, under the rubric that we are arguing about express disclosure of a resilient strut in the Layfield Reference, and determine that that element is satisfied by the Layfield Reference.

JUDGE GOODSON: Okay, I think I understand your position. Correct me if I'm wrong, your initial position is that the previous final decision is preclusive under collateral estoppel doctrines, but that if we determine that collateral estoppel doesn't apply, then we should modify the anticipation analysis.

MR. MUELLER: Correct, Your Honor.

JUDGE GOODSON: Okay. But, is it correct that there's no briefing on the application of collateral estoppel in the record here?

MR. MUELLER: That's correct. There is no briefing on the issue and, again, we are in this nebulous time period where the Patent Owner still has time left in which to decide whether to appeal the final decision in the 417 case, and so it is unclear whether they will avail themselves of their appeal right, and whether we would then have to, perhaps, wait until collateral estoppel actually applied when the final decision, or disposition, by the Federal Circuit occurred, assuming that there was affirmance of the Board's decision.

In the prior decision -- let me move on to the second grounds for rendering the claims unpatentable. And this is the combination of Layfield and Rinard. And I'll move to Slide 29.

So, the record in this case -- which is virtually identical or very close to the record in connection with the 471 case -- indicates that Rinard contains disclosure of a resilient strut.

And for the same reasons -- very similar reasons, if we move to the next slide, Slide 30 -- a person skilled in the art would have been motivated to combine Rinard with Layfield to provide a strut that is, we would suggest, even more resilient that the Layfield strut, but certainly a resilient strut that meets all of the limitations of the claims at issue in connection with the 017 IPR.

So, for those same reasons as decided in the 417 case, we would submit that the independent claims in the 017 case are also unpatentable by virtue of anticipation, or at least, by virtue of obviousness based on Layfield and Rinard.

I would like to talk about, first of all, the limitation that we saw in blue. If we can go back to slide --

MR. FILBIN: Slide 6.

MR. MUELLER: Slide 6. We have 1.e, and this is a limitation that perhaps we haven't seen before but is certainly present in the Layfield disclosure. And this is a resilient strut including a longitudinal shape variation adapted to change a mechanical strength of the resilient strut and influence a stiffness of the resilient strut.

And if we look at the structure of the Layfield strut, it clearly has a shape variation.

If we can go to Slide 26. I'm now jumping to Slide 26 which is a reproduction of material that's provided both in our briefing and in Mr. Tres's declaration.

So, if we look at the structure of the resilient strut of Layfield -- or at least the strut when combined with Rinard to yield a resilient strut -- we see that there is a longitudinal shape variation. The strut is actually tapering from the top to the bottom, which is providing greater flexibility toward or near the bottom of the strut. So, there is a shape variation certainly, which is affecting the stiffness of the strut.

And if that's not good enough, the strut also includes a U-shaped cross section, or cross members, it's got hollow openings; so, any shape variation -- if we take the words as they're presented to us in the claims -- is going to affect the stiffness of the strut.

Well, we would submit that the shape is, in fact, made in connection with the Layfield strut to provide greater flexibility at the bottom than at the top where it's going to be fixed to the I-beam.

And so, we would submit that Limitations 1.e, 11.g, and 17.f, which go to the shape variation, are satisfied with the Layfield strut.

In that regard, I'd like to point out quickly Element 11.g on Slide 7. If we look at that language you kind of scratch your head because it says in blue, 11.g, "the resilient support including a shape defined therein adapted to influence the stiffness of the resilient support."

Well, any shape of the support is going to influence the stiffness, but leaving that aside, the strut configuration in Layfield certainly provides a shape that is influencing the stiffness with its cross members and tapering along from top to bottom of the strut, that adds increased flexibility.

I'd like to talk briefly about the dependent claims of the 017 Patent, where those claims are also not patentable as either anticipated or as obvious based on Layfield in combination with Rinard.

So, if we can look then at Slide 32 of our deck. So, Claims 2 and 12 have very similar language and they call for the strut to define a U-shaped section.

So, the issue here is whether a Block-U is the same as a U with a curved base between its two legs, because if you look at Layfield's strut -- which is the next slide, Slide 34 -- I'm sorry, is that 34, or 35 -- yes, Slide 34 -- you can see by the indication in red that if you consider a Block-U to also be a U, then Layfield meets the limitation in Claims 2 and 12.

There is a U-shaped section. There's nothing in the patent specification, which is requiring a U to have a curvature in it. And, oh by the way, Figure 9B of the 017 Patent, which is the patent at issue, is the first time in which the applicants disclosed what they meant by a U-shaped configuration.

While it is true that prior to that time the chain of applications had the words "U-shaped configuration," there was no indication in patent drawings, or in any other text, what was meant.

So, nonetheless, the Layfield structure discloses a U-shape, if you consider a Block-U to be a U.

JUDGE GERSTENBLITH: Counsel, let me just clarify.

MR. MUELLER: Sure.

JUDGE GERSTENBLITH: The figure that you have on the slide, and that was in the papers, is showing a red annotation that it seems to be directly on top of, or commensurate with, 162, the horizontal piece?

MR. MUELLER: It does not include the horizontal piece. If it's above or below the cross member, which is a piece of plastic that's a cross beam, you have a U between the two sides and the end of the strut.

JUDGE GERSTENBLITH: Thank you.

JUDGE GOODSON: Why did the Petitioner make that annotation right where that divider is? That seems confusing and misleading if the portion you're relying on is the areas of the cross section in between those dividers; to me, it makes the challenge a little bit unclear when you have this annotation that points specifically at the divider plate.

MR. MUELLER: Yes, and that's a good question. And I hadn't even noticed that. But the papers plainly talk about a three-sided shape. And the issue here -- and the only point that was disputed by the Patent Owner -- is that the base of the U has to be curved. And that's similar to the argument that they make with the concave section.

So, the only item which is at issue is whether a U can be block shaped, or whether it can also -- the issue is whether the U can also include a block shape, including two sides and an end.

JUDGE GERSTENBLITH: Counsel, I never like to disagree with a characterization of another parties' argument, but I did not personally get from Patent Owner's position a disagreement from them based on whether it's curved, the U is curved or not.

What I understood, and particularly from Pages 48 to 49 of Patent Owner's response, I don't know if you have that there.

MR. MUELLER: Yes.

JUDGE GERSTENBLITH: But, what I understood is that they're looking at the same spot, same location on Figure 10 of Layfield, where Petitioner has it's annotation, and at the bottom of Page 48 of Patent Owner's response, there is an annotation added by Patent Owner to show that, hey, this spot that Petitioner is pointing to, this has a rectangular cross section, not a U-shaped cross section.

MR. MUELLER: Yes. So, certainly the argument that was presented in the Petition is that the U-shaped section was two sides and an end. The counter-argument, and why we're contending that the Patent Owner is saying the U-shape requires a curvature, is in its claim construction where it's talking about the U as being a U-shape with curves.

In our Reply Brief, we specifically argue that the Layfield strut has a three-sided open box construction that constitutes a U-shape section. So, to the extent that it was unclear by the iteration, or by the drawing of a red line which appears to be coplanar with the cross member, that was not what we

were intending to demonstrate; but that we were demonstrating a three-sided open box construction which defined a U-shape section.

So, if we move to Slide 35, Claims 3 and 4, and Claims 13 and 14 are talking about a concave portion adapted to increase the stiffness of the strut. That's Claim 3, and similarly Claim 13, contains language which talks about the concave portion being adapted to increase stiffness. And then Claim 4 is discussing the concave portion as being uneven along the resilient strut. Similarly Claim 14 has language that is similar.

Again, this is a limitation that's found nowhere in the patent specification, but if we turn to Page 37 of our demonstratives, the concave portions are the hollowed out portions which in this case the arrows plainly show that we're not talking about the cross member, but the area in between the cross member.

So, the dispute here is not in the context of claim construction because as with the other items or claim limitations in this patent, the Patent Owner has contended that no claim construction is necessary; that the issues don't revolve around a claim construction.

But again, the argument is that the portion is not a concave portion because it needs to have some sort of curvature in it. And, we would submit that the portions in between the cross members of the Layfield strut qualify or satisfy the concave elements of Claims 3, 4, and 13 and 14.

JUDGE GOODSON: Mr. Mueller, could you help me understand what it being claimed in Claim 3? When I look at the 017 Patent, is there a part of it, or figure or some description in here that could help me understand what is meant by, "a substantially rectangular section including a concave

portion," because it's hard for me to understand how something could be both substantially rectangular and also include a concave portion.

MR. MUELLER: We agree, Your Honor; that's less than clear. But I believe that if you look at Figures 9A and 9B of the 017 Patent, which I can't put up on the screen, but it you have them in front of you.

JUDGE GOODSON: I have them, mm-hmm.

MR. MUELLER: And understand the prosecution history of this patent, and again, this was a very long chain of patent applications; there were reexaminations and some of the applications there was an attempt to cover what was going on in the industry many years after the original application was filed.

As originally filed, the patent application, which preceded -- so the parent or grandparent of the 017 -- only had Figure 9A, which is showing a rectangular cross section for the strut. However, we do concede that the specification said, "oh, in addition to the strut having a cross section, it can also be U-shaped to add stiffness."

So then when the 017 application was filed, the applicants added Figure 9B showing what appears to be a U to the figures as a new figure in the patent, and presumably claiming as support the description, which said that there could be a U-shaped section.

And just for fullness of what was going on in the prosecution, the original specification -- and when I'm talking about the specification, it's Column 10, Lines 28 through 37, or 38 -- that Column, or that disclosure, was contained in the original application at large extent; however, there was no picture showing what a U-shaped section was. So, if you look at the disclosure at Column 10, it talks about a U-shaped section.

But alternatively, you could have an embossed section. And so, to fill the gap for the embossed sections, the applicants added their fanciful artwork on new Figure 4.

If you look at Figure 4 of the 017 Patent, that figure is different than the prior figures in that it's got an hour glass, and a tear drop; it's got little elements that are shown in connection with the strut.

JUDGE GOODSON: Okay, so you're saying that the designs that are marked with Reference Number 42 in Figure 4, those are illustrating embossed portions?

MR. MUELLER: I believe so, Your Honor. I believe that is what it was intended to show embossed portions.

JUDGE GOODSON: Okay, but getting back to Figures 9A and 9B --

MR. MUELLER: Yeah.

JUDGE GOODSON: The strut, which is 42 in these figures, right.

MR. MUELLER: Yes.

JUDGE GOODSON: It's just Reference Number 42, it looks rectangular in Figure 9A, but I don't see how that is rectangular in Figure 9B.

MR. MUELLER: Well, again, we can't challenge indefiniteness of these claims or we may be arguing something else here. But I think what it's saying is that it was substantially rectangular, and we added this U-shape.

So, if you consider everything else for the strut 42, apart from the U-shape, that's rectangular. So, I submit -- and maybe the Patent Owner wants to elucidate what was being shown and what they're getting at -- but I would submit that it's substantially rectangular if you consider those aspects or

those parts of this rectangular piece of plastic sheet, which now has a U formed in it.

JUDGE GOODSON: Okay, thanks.

MR. MUELLER: If we look at Claims 5 and 15 on Slide 39, these claims go to the embossed portion.

And so, again, the specification indicates that there can be an embossed portion. It doesn't talk about any methodology for creating embossed portions. The additions to Figure 4 showed up in this application for the first time. But under, certainly its broadest reasonable construction, embossed simply means a portion that is standing out in relation to another portion.

So, we cited as Exhibit 1022 the definition of embossed, which was, "to carve or mold a design on a surface so that it stands out in relief." So, the embossed portions of Layfield, if we look at Slide --

JUDGE DOUGAL: (Inaudible).

MR. MUELLER: Yes.

JUDGE DOUGAL: Can we go back to concave for just a second?

MR. MUELLER: Sure.

JUDGE DOUGAL: Before we get to embossed.

MR. MUELLER: Sure.

JUDGE DOUGAL: I'm having a little difficulty understanding what is concave here. You raised argument about the U-shaped cross section. You mentioned how it's block-shaped, so basically flat surfaces. So, you're saying just the fact that the flat surfaces and the side walls is that it's concave?

MR. MUELLER: Yes, if you look at Slide 37. So, because it is hollowed out -- if we consider the broadest reasonable construction of concave, it includes to hollow out -- the sections defined by the U are certainly hollowed out as compared to a block of material. So, those are concave sections of the strut, in the same way that the U-shape is a concave section on the strut shown in Figure 9B.

JUDGE DOUGAL: So, would any hollowing or hole in a member be concave then?

MR. MUELLER: Well, certainly we would submit that the hole shown in Figure 10 is a hollowing out. I would have to consider whether any hollowing out would qualify as a concave member.

JUDGE DOUGAL: But your claim construction does require a hollowing out, right?

MR. MUELLER: Yes.

JUDGE DOUGAL: Okay.

JUDGE GERSTENBLITH: Do you have Exhibit 1056 there?

MR. MUELLER: Which is?

JUDGE GERSTENBLITH: Which is the definition of concave.

MR. MUELLER: Yes.

JUDGE GERSTENBLITH: So, it says, "hollowed or rounded inward like the inside of a bowl." Should we not be taking the "like the inside of a bowl" to also apply to hollowed?

MR. MUELLER: Right, I would read the definition as it's written is "hollowed," or "rounded inward like the inside of a ball," in which case the rounded inward like the inside of a bowl would connote some sort of curvature.

And, to be sure, there's going to be some amount of curvature in the hollowed out portions of the Layfield strut because you're not going to get -- you know, there's going to be a radius where the sides meet the end.

So, there's going to be some curvature, but the way in which this definition is set forth is "hollowed" is one part, or "rounded inward like the inside of a bowl." That's how the definition reads in its plain language.

JUDGE DOUGAL: Do we have any evidence of what the inside looks like? Or that it necessarily would be curved?

MR. MUELLER: Of that there would be a radius? Is that the question?

JUDGE DOUGAL: Yes.

MR. MUELLER: There's no evidence of record. That's how it would be manufactured for sure. You couldn't get two perpendicular sides butting up against each other, if you're using a molding process, without a curvature. It would be impossible to mold.

If we can go on to Slide 39, which is now indicating that the resilient strut includes an embossed portion thereon. So again, the specification as it was originally presented just said there could be an embossed portion. It didn't indicate what it was.

So, if we look at Layfield, and under its broadest reasonable construction, if an embossed portion is simply required to stand out in relief as compared to another portion, then the screw points would qualify as embossed portions, including the one on the bottom, the two at the top, the reinforcing lattice at the top of the Layfield strut, number 170, and the cross members --

MR. FILBIN: This is Slide 41, Your Honors.

MR. MUELLER: Would all qualify as embossed portions.

JUDGE GERSTENBLITH: How is the lattice embossed?

MR. MUELLER: Because it stands out in relief as compared to the base of the strut, the one at the end wall.

JUDGE GERSTENBLITH: Okay.

JUDGE GOODSON: Could a skilled artisan form a structure like the Screw Point 166 using an embossing technique?

MR. MUELLER: In what sense "using an embossing technique?"

JUDGE GOODSON: It seems to me when I look at Figure 10, it looks like this is kind of an irregular surface, the screw point 166. It's not just a flat raised surface. It looks like there's a thin portion that's attaching a rounded portion.

And when I think of -- just from a layman's perspective -- when I think of something that's been embossed, usually it's just a raised surface, a simple raised surface, without an inset or an irregular cross section like that.

So, this looks to me like something you would form through a different manufacturing technique like injection molding or attaching this screw point 166 in some other fashion.

MR. MUELLER: So, it probably could be manufactured with an embossing technique, but we cited the case in the invalidity analysis, and in the obviousness, and anticipation analysis, the *Purdue Pharma* case, which is 811 F.3d 1345, where we look at the resulting product, and not the process by which the product was made in order to determine invalidity.

So, while it is possible to envision a technique that would create that section, or that screw point, through embossing, we submit that it wouldn't be proper to require embossing as part of this claim if the overall structure,

at the end of the day notwithstanding the process being used, resulted in a relief, a raised portion, with respect to a different portion.

JUDGE GOODSON: So, on this *Purdue Pharma* case, I understand your point that you don't have to show that this structure was actually made by embossing in order to make your case on this claim, but would you agree that you do have to show that the structure could be made through embossing? That's it capable of being made through embossing.

MR. MUELLER: Well, again, if we look at the definition of emboss, it means to carve or mold a design on a surface that stands out in relief. So, under that definition of emboss, I would submit that, yes, it could be made with an embossing technique.

JUDGE GOODSON: That just seems like maybe an overly broad definition of embossing. I mean, if you take that literally, that means Michelangelo's David is embossed because it stands out in relief from its pedestal. Any form whatsoever that stands out against a lower surface is embossed, under that understanding.

MR. MUELLER: But there's a slight narrowing which would perhaps distinguish from a painting in which the design is molded, so you were molding a design in order to meet the definition of embossed, it includes molding a design on a surface.

And so, this, we submit, could be created with an embossing technique, albeit not, you know, the embossing technique one might think of when stamping a piece of leather to make a design on it for a belt.

JUDGE GERSTENBLITH: Counsel, I'll just note that you're at 45 minutes in right now.

MR. MUELLER: Okay, thank you, Your Honor. Let me just quickly go to angularly extending, which is Claim 7 of the 017 Patent. And let's go to Slide 44.

And so, the issue here is whether -- I believe that the Patent Owner would accept that the top portion of the Layfield strut angularly extends from whatever the intermediate portion might be that's set forth in their claim. But they disagree that the bottom screw point is angularly extending from the intermediate portion.

And what Page 44 is actually showing, it's not only showing a deflection along the face of the strut, but it's also an outward deflection. So, the screw point is angularly offset outwardly from the face of the strut as well. Finally --

JUDGE GERSTENBLITH: Counsel, let me just make sure I understand that. So, we should be understanding that green arrow -- this is Slide 44 -- the green arrow is meant to be coming out of the page?

MR. MUELLER: As well as off set, so it's in three dimensions.

JUDGE GERSTENBLITH: Okay.

MR. MUELLER: Yes. And then finally, Claims 19 and 20 on fiber reinforced polypropylene, and Claim 20, a skirt panel with a polypropylene component and a woven component.

Our expert sets forth -- and this is on Slide 46 -- that the Layfield disclosure discloses both the requirements of Claim 19, which is a fiber reinforced polypropylene, as well as the polypropylene component and woven component of Claim 20, as that was a well-known way to manufacture polypropylene.

JUDGE GERSTENBLITH: Where does Mr. Tres explain why -- for example Claim 19 -- why does one understand that glass reinforced polypropylene constitutes fiber reinforced polypropylene?

MR. MUELLER: He says the glass is a type of fiber that would be used.

JUDGE GERSTENBLITH: Does he say that? Is that -- we're at Paragraph 185? I'm happy to take your response when you come up next.

MR. MUELLER: Yes, I'll address that in my reply. Thank you, Your Honor.

JUDGE GERSTENBLITH: So, I have you as using 47 minutes.

MR. MUELLER: Okay, thank you.

JUDGE GERSTENBLITH: You have 13 left. Mr. Richey, if you would like me to use the timer, just let me know how much time to set.

MR. RICHEY: Yes, Your Honor. I would like to reserve 10 minutes.

JUDGE GERSTENBLITH: 10 minutes, okay.

MR. RICHEY: Thank you.

JUDGE GERSTENBLITH: You can start whenever you're ready.

MR. RICHEY: Thank you. I'd first like to address the claim preclusion issue raised for the first time here. Claim preclusion is inappropriate. It was not briefed. It was not even raised at the prehearing conference on October 21st.

Further, all appeals have not been exhausted. And, are there similarities between the claims? Yes, but there are differences too.

Each claim has to be analyzed on its own. In fact, all issued claims being considered in District Court are given a presumption that they are different inventions. So, claim preclusion simply doesn't apply here.

Now, the claims of the 017 Patent include a shape variation, the Independent Claims 1, 11, and 18 include a shape variation. And, if we can look at Claim 1 for a moment. Claim 1 at the end of the claim requires a longitudinal shape variation adapted to change a mechanical strength of the resilient strut and influence a stiffness of the resilient strut.

Now, Petitioner points to two things. One, they say embossing. The vertical slats are a shape variation, but that is not a variation of the elongated box shaped strut that they describe throughout their Petition.

The shape of the box shaped strut is box shape. The internal lattice, whether embossed or not, are not shape variations. In addition to that, the Layfield strut does not taper.

Petitioner's entire reliance for their taper argument is Figure 10 of the Layfield Patent. But, Figure 10 is not described anywhere in the specification as tapering. Neither is any other description of Strut 58.

And there's no indicia -- which would be required, indicating in the figures themselves -- any measurements. There's nothing showing specifically that the Strut 58 is tapered.

And Figure 10 is an isometric view, which you would expect to have aspect and ratio, so we cannot draw any inferences as to whether or not the Layfield strut is tapered. It's not. That's something that Petitioner has made up out of whole-cloth.

JUDGE GOODSON: I mean, you say made out of whole cloth. The figure teaches what it teaches just from looking at it. Is there any discussion in Layfield that runs counter to the understanding that the strut is tapered?

MR. RICHEY: There's no discussion of a taper at all in Layfield.

JUDGE GOODSON: Is there any discussion that is straight sided?

MR. RICHEY: I don't recall any discussion in Layfield about the specific measurements of the strut. I don't believe there is any discussion.

JUDGE GOODSON: Okay.

JUDGE GERSTENBLITH: Counsel, where does Patent Owner argue that the strut is not tapered?

MR. RICHEY: Pardon me one second. So, at Page 23 of the Patent Owner response, Patent Owner adopts Petitioner's description that the struts are box shaped.

JUDGE GERSTENBLITH: I'm sorry, what page are we on?

MR. RICHEY: Page 23 of the Patent Owner response.

JUDGE GERSTENBLITH: Okay, thank you.

MR. RICHEY: And I apologize, Your Honor. I am not seeing.

JUDGE GERSTENBLITH: I'll tell you what, if you want to look in between.

MR. RICHEY: Thank you.

JUDGE GERSTENBLITH: You can let me know because I'll just note that -- as you look, if you look at Patent Owner response Page 44, Patent Owner says, "this is in responding," so, Page 44 of Patent Owner's response, responding to a different point, but Patent Owner says, "to the contrary, support strut 58 of Layfield are tapered to be thicker at the mounting point where they will experience a higher stress concentration. This taper actually strengthens, dot-dot-dot."

So, I don't see Patent Owner arguing that there's no taper, and in fact, it appears that Patent Owner agrees that they're tapered.

MR. RICHEY: Yes, Your Honor. So, I think that may have not been stated with as much clarity as I would have liked. The top of the Figure 10

strut shows a boot shape, which I think, perhaps, I made a slip of the tongue where I call it tapered.

But what I'm referring to there, or what Patent Owner is referring to there, is the boot shape which is the connecting clamp at the top of the strut. The strut itself is box shape, an elongated box. So, I understand the question and I will endeavor to find you an answer.

JUDGE GERSTENBLITH: Thank you.

JUDGE GOODSON: What about the bottom of the strut, the bottom-most portion of Figure 10 that looks like it's even more tapered. Do you disagree that that's showing a taper?

MR. RICHEY: So that's the panel connecting portion of the strut. And while that is narrower, that portion doesn't affect the stiffness of the strut itself.

Similarly, the boot portion -- which I call taper on Page 44 -- that does not affect -- neither end affects the stiffness or rigidity of the strut, except that the clamp, boot shaped portion would, or course, be stiffer than the strut itself. But the intermediate portion is entirely box shaped and elongated.

And, if you look again at Claim 1, you have a longitudinal shape variation adapted to change a mechanical strength of the resilience strut. So, the elongated box portion has to be able to flex, and that's the portion that requires a shape variation. So, I'd like to talk briefly about the dependent claims --

JUDGE GERSTENBLITH: I apologize for taking you backwards, but can I just ask you about what you mentioned about Claim Element 1E?

MR. RICHEY: Yes.

JUDGE GERSTENBLITH: I think you were saying that there's a specific part of the strut that this is supposed to be referring to. So, in other words, not the -- we'll just go with the boot shape part, you know, up by where the lattice is -- I think you were saying that it's not supposed to be that. Is that what you were saying?

MR. RICHEY: Yes, Your Honor, because in Layfield there's a clamp connecting portion and panel connecting portion. The strut itself is the portion in between those. And that's an elongated box; that's what I'm trying to say.

JUDGE GERSTENBLITH: So, just looking at Figure 10, we're talking about 58, right?

MR. RICHEY: Yes.

JUDGE GERSTENBLITH: Which runs all the way -- I don't like to say up -- but it runs toward the lattice portion where 68 and 170 and all that is located. And 58 appears to be a contiguous piece that then branches into, and goes at an angle, to where it was originally going.

So, if there's a question in what I'm saying, it's when Claim Element 1E says, "the resilient strut, including the longitudinal shape variation adapted to change in mechanical strength of the resilient strut and influence a stiffness," that doesn't, to me, say, I'm only looking at the middle or intermediate portion of the strut; it just says the strut.

So, I can influence strength of the strut at the top, the middle, or the bottom, and I still have influenced to the strength of the strut. Where am I to draw a line to say where I'm cutting the strut off, or should we not be drawing a line?

MR. RICHEY: Whether we draw a line or not, I think that the answer is that nothing in Layfield discusses changing the shape to affect the strength or rigidity or flexibility of the strut.

So, whether we draw a line at the clamp I-beam connecting portion, or at the bottom portion, is irrelevant because nothing in Layfield teaches changing the shape to affect the strength or rigidity or -- specifically with respect to Claim 1 -- the mechanical strength of the strut.

JUDGE GERSTENBLITH: Okay.

MR. RICHEY: It's just not a discussion in Layfield or Rinard for that matter.

JUDGE GERSTENBLITH: Okay, so if it's not in the reference, but we have expert testimony from Mr. Tres saying that this design with having what they're pointing to as a shape variation, takes care of that function that's recited in the claim?

MR. RICHEY: I don't believe that Mr. Tres is suggesting that the bottom portion with the bolt hole, or the boot shape portion itself, changes the flexibility, with the ability to flex, of the strut.

I believe what he's pointing to are what they call the embossed portions, the horizontal slats and the overall taper of the strut -- which there is no overall taper. The taper, which I've used again, is only at the two connecting portions. That taper is not intended to affect the flexibility of the strut.

JUDGE GERSTENBLITH: Okay. Thank you.

MR. RICHEY: I'd like to turn to the dependent claims.

JUDGE GERSTENBLITH: Okay.

MR. RICHEY: For the reasons we discussed in the brief, Layfield does not anticipate the independent claims. It also does not anticipate the dependent claims, but I'd like to focus on obviousness.

Petitioners bear the burden of obviousness for each and every challenged claim. But for many of the dependent claims, Petitioner has put forth no reasons whatsoever why those claims are purportedly obvious beyond a conclusory incorporation of their anticipation argument.

That incorporation is legally deficient because obviousness, the obviousness analysis, is a different analysis from anticipation, and Petitioners invite the Board to fill in the gaps of this legal error.

Petitioners don't articulate any reason, for example, why Claim 2 would have been obvious. Rather that, again, they just incorporate their anticipation argument with respect to Layfield.

This can be seen in the Petition at Page 63. Similarly, Mr. Tres in Exhibit 1010, his declaration at Paragraphs 215 to 225, and 262 to 263, incorporates the anticipation analysis in his obviousness argument without the additional obviousness analysis.

Petitioners apply none of the *Graham* factors to the dependent claims, or *KSR* analysis. The Petition is silent as to whether it would be have been obvious to try to modify a resilient strut to make it a U-shape or have a U-shape section.

Similarly, the Petition is silent whether modifying a U-shaped strut to be a resilient strut in combination with Rinard would have been predictable or otherwise obvious. There's no evidence of record that any of this analysis exists.

However, there is analysis of record that Claim 2 is not obvious, for example, Dr. Micklow's declaration, which is Exhibit 2001 at Paragraphs 242 to 243, and the Patent Owner's response at Page 22.

Petitioners did not respond in the reply, which can be seen where they discuss dependent claims in the reply at Pages 25 to 27. They don't respond to the obviousness arguments for dependent claims at all, really. Nor did Petitioners' declarant, Mr. Tres.

Similarly, Claims 3 through 5, 7, 12 through 15, 19 and 20, lack any obviousness analysis.

So, I'd like to look briefly at Claims 2 and 3 specifically because there were some questions about U-shape and embossing. On the slides, at Slide 7, and you know, I only have a paper copy, if that's okay.

JUDGE GERSTENBLITH: Yes.

MR. RICHEY: At Slide 7 we have Figure 4 and Figure 7 from the 017 Patent, and these have been modified to add color to highlight what I'm going to talk about, which are the struts and the embossed portions 42.

And you can see that in -- actually, if we'll go to Slide 8 -- sorry about that -- Slide 8 we have Figure 9B, which has a U-shaped portion, and there was a question about how can there be a U-shape and a rectangular shape.

Well, on the next slide, Slide 9, we have the rectangular shape, it's substantially rectangular and, yes, in Slide 8 Figure 9B, a U has been added but this is clearer, I believe, on Slide 7, which has Figures 7 and 4, that show the substantially rectangular struts having an embossed portion.

So, part of it is U-shaped, part of it is substantially rectangular. But the initial shape, as Petitioner was describing, I think, was substantially correct; it's the shape of the strut is substantially rectangular and it's

embossed to have a shape variation, and the various shape variations are shown in Figure 4.

JUDGE GOODSON: Which one is U-Shaped in Figure 4?

MR. RICHEY: I can't say specifically based on -- because again, there's no indicia of measurements or specific descriptions with respect to Figures 4-7, which is U-shaped, but any of them could be U-shaped. The point is there's embossed portions that change the shape of the strut. And specifically, they change the shape of the strut to increase or decrease the rigidity or resilience, the flexibility, of the struts.

JUDGE GOODSON: So, you don't know which of these struts that are shown in Figure 4 are U-shaped?

MR. RICHEY: Any of them can be. I apologize if that's what I said. What I meant was any of them can be U-shaped, or they could be concave. The strut itself is substantially rectangular and then there's an embossed portion, 42, which if you look at Figure 7, you can see I've highlighted in yellow the embossed portion.

So, the embossed portion can run most of the length of the intermediate portion of the strut. Or, for example, in the middle strut there's a portion at the top that's embossed, and a portion at the bottom that's embossed.

JUDGE GOODSON: Okay, when you say that it's substantially rectangular, how do you mean that it's substantially rectangular? Is it in the view where we're looking at it in Figure 4, it's rectangular because the outer perimeter is rectangular? Is that what you mean?

MR. RICHEY: Yes, the blue portion is rectangular.

JUDGE GOODSON: Okay, and then you said that any of these could be U-shaped, and I'm trying to figure out which portion you would be looking to determine whether it's U-shaped or not.

MR. RICHEY: Sure. If we look at the two struts on the right hand of Figure 4, the blue portion would be substantially rectangular, and then the yellow portion would be molded or impacted to have a U-shaped embossing, which would be the yellow portion. That would be the portion that is U-shaped.

JUDGE GOODSON: So, it's coming out? In that yellow portion in the instance where it's U-shaped, is that added on to the strut?

MR. RICHEY: No, I think during manufacturing. If you look then at Figure 9B, you can see what the final shape would be of the yellow portion.

So, looking at Figures 4 and 9, Slide 7 and 8, perhaps I should have used blue on the sides of Strut 42, and yellow in the U portion, which Reference 41 is pointing to.

JUDGE GOODSON: Yeah, I mean, my problem is it's hard for me to envision how it's both rectangular and U-shaped. I mean, I see your point that it's rectangular, the outside perimeter is rectangular. But then it seems like you're changing dimensions when you point to how it's U-shaped.

MR. RICHEY: Claim 2 only has U-shaped. It does not have a requirement that the strut be substantially rectangular. And then Claim 3 -- which does not depend from Claim 2 -- Claim 3 has a substantially rectangular section including a concaved portion adapted to increase stiffness.

And so, Figure 3 certainly does not require a U-shaped portion, but it does have substantially rectangular **and** a concave portion. So, the strut

overall is substantially rectangular, like in Figure 4, the blue portion. But there is a section that is also concave; Yellow 42.

JUDGE GOODSON: Okay, but if the way that you arrive at what we're seeing in Figure 4 is by, I think you said "impacting" it, then you're taking the material that was flat before and you're pushing it out so that it's concave, as we see in Figure 9B. Is that right?

MR. RICHEY: You do not have to do that at all because embossing is a separate claim limitation. It could be manufactured substantially rectangular, and then through a press you create a concave portion of the strut, or U-shape portion of the strut. Or, it could be that the mold itself is that shape.

I'm sure there are other ways, but I don't want to get too far afield with speculation as to how you might create a concave portion. But certainly, it does not have to be a two-step process where you take a rectangular strut and then create a concave portion. It could be part of the molding process.

JUDGE GOODSON: Okay.

MR. RICHEY: So, I'd like to skip to Claim 20. Claim 20 requires a polypropylene component and a woven component.

JUDGE GOODSON: Could we go to Claim 5 before you go to Claim 20, and that's the resilient strut includes an embossed portion thereon.

MR. RICHEY: Yes, Your Honor.

JUDGE GOODSON: When we look at Layfield, could that screw point 166, be made through embossing?

MR. RICHEY: Not to my layman's thinking. To me, the definition of embossing is fairly clear. It's a portion that's carved or molded or stamped that stands out.

If we adopt Petitioner's position -- I believe Your Honor offered up Michelangelo's David as an embossment. That's not what we think of when we think of embossing. The Statue of Liberty stands out from the bay in New York, that's not -- she's not embossed. It's a sculpture.

Embossing is, for example, what you get from a notary. When paper is stamped, there is an embossment, it's a slight pushing up or pushing down from the substantially flat surface, which is exactly what is shown in Figures 4 and 7, and 9B.

JUDGE GOODSON: Okay, but I think the definition the Patent Owner has offered of embossing includes molding, and I think the one you just mentioned includes molding. Is that right?

MR. RICHEY: It does include molding, but embossing is -- I can't think of any way that embossing would include a complex three-dimensional object like the screw holes at the bottom of Strut 58. If those qualify, then Michelangelo's David does as well, but that's just far afield from the common understanding of embossing.

JUDGE GOODSON: Right I understand your point, but I guess my trouble with Patent Owner's position is that the construction they've offered for embossing includes molding, and I think Layfield describes its entire strut as being formed through injection molding.

MR. RICHEY: Well, in that sense the entire strut itself could be considered an embossed thing. But that just doesn't comport with the common understanding of what embossing means.

JUDGE GOODSON: Okay.

MR. RICHEY: Lastly, jumping to Claim 20 if that's okay, I'd just like to point out that it requires a polypropylene component and a woven component. There's no discussion in Layfield or Rinard of a woven component.

Mr. Tres guesses that recycling plastic would lead to some kind of weaving. It's unclear how that would be a woven component. Dr. Micklow responds that it would not, and we discussed that at Patent Owner's sur-reply, Pages 24 to 25. And if there are no other questions --

JUDGE GERSTENBLITH: I wanted to ask you about concave for Claim 3, and specifically the definition. Is there anything that you wanted to add about how we should understand the definition, which this particular definition does say hollowed or rounded inward like the inside of a bowl.

To whatever extent we or whoever may have in their mind that concave is synonymous with a curved surface, how do we handle hollowed being there?

MR. RICHEY: Well, there's no comma in that definition. It doesn't say hollowed, "comma", or curved like the inside of a bowl. Like the inside of a bowl describes hollowed in and curved.

I think the common understanding for concave would be curved, both definitions that Petitioner put forth discussed curved. Curve's mentioned several times in both entries for concave. And I think that's just the natural meaning.

JUDGE GERSTENBLITH: Okay. Thank you.

MR. RICHEY: Thank you, Your Honors.

MR. MUELLER: Thank you, Your Honors. Let me address the arguments and then I will address Your Honors' questions, or I can do that first.

I believe you asked in connection with Claim 19, where, in Tres, does he discuss that glass reinforced polypropylene constitutes fiber reinforced polypropylene, and he does that in Paragraph 185 of his opening declaration, which is Exhibit 1010. There was also a discussion by Patent Owner --

JUDGE GERSTENBLITH: Before you do, is this moving to a different topic?

MR. MUELLER: Yes.

JUDGE GERSTENBLITH: Okay, so before that, Paragraph 185 is effectively the exact same thing that's in the Petition. So, it does not explain. My specific question is, how do we go from glass reinforced to fiber reinforced? What is the connection between the two?

In other words, I would be looking for somebody to be saying, "glass is a fiber or has some synonymous, synonymity, for lack of a better word.

MR. MUELLER: (Laughter), you're really putting it to us, Your Honor. I appreciate the issue. So, I understand it and as I'm going through the rest of my argument, we will look for a portion in Mr. Tres' declaration where he's talking about glass being a fiber that's reinforced.

JUDGE GERSTENBLITH: And the same question would be for Claim 20.

MR. MUELLER: Yes. I understand.

JUDGE GERSTENBLITH: Thank you.

MR. MUELLER: And for Claim 20, to shorten, Mr. Tres was explaining that when polypropylene is recycled or reclaimed the manner in which it is produced is by first putting down a woven mat.

So that's -- a person skilled in the art would understand that the disclosure of polypropylene would include disclosure of polypropylene being placed on a woven mat in order to manufacture it from its recycled state; and so, he provides that explanation. I could get you the paragraph number, but that's his explanation of Claim 20.

Now, there was significant argument about shape variations and Figure 10, and if we could just show that again, Paul, that would be Slide -- we can just show Slide --

MR. FILBIN: Slide 26.

MR. MUELLER: 26 is fine. So, this is Figure 10. Mr. Tres from the very beginning indicated that the strut has a taper construction such that it flexes from top to bottom. We can all see the figure.

I don't believe Dr. Micklow ever argued, or ever opined that what is shown in the figure is not a tapered beam construction, because that's not what is being shown.

Now, let me talk about the obviousness analysis, which Patent Owner stressed in his argument. In this case, Mr. Tres has gone into excruciating detail why it would have been obvious to use the teachings of Rinard in order to arrive at a resilient strut by modifying the Layfield strut as appropriate, either to modify its material choice and/or its construction. That was for the independent claims; he went through a detailed analysis.

So that same analysis also applies to the dependent claims here which add differences which are not material to patentability; differences such as

U-shaped cross sections, and embossed portions and concave portions, which don't add any significant -- are not patentably significant in and of themselves.

And certainly, the obviousness analysis-- and Mr. Tres sets us for it as set forth in the papers -- the obviousness analysis which applies to the independent claims also applies to the additional items shown in the Layfield strut.

The same combination of Rinard's resilient materials would have been understood by a person of ordinary skill in the art that those could have been or would have been combined with the teachings of Layfield to result in the independent claims, as well as the additional items in the dependent claims.

JUDGE GOODSON: Is there any evidence in the record that you can emboss something that's plastic? A plastic component?

MR. MUELLER: I don't know if there's any evidence in the record that you could emboss a plastic component as such.

The evidence is that embossing would include molding, which I think we now are in agreement that molding qualifies as a manner in which to emboss. So, from that standpoint, a plastic component can be embossed because it is a molded component.

JUDGE GERSTENBLITH: Did Petitioner argue in the papers that these additional limitations from the dependent claims don't add to patentability?

MR. MUELLER: We argued that with respect to Claim 20 for sure. I'm not sure that that specific argument was made with respect to, for example, Claim 2, the U-shape and the concave portions.

Lastly, Your Honors, I just point out with respect to the definition of concave that if it's hollowed out, a bowl could be rounded, or it could have substantially flat side surfaces. There are many different types of bowls. So even if we say that, "hollowed out in the shape of a bowl," we could still envision a structure such as the concave structure in the Layfield strut. Are there any more questions?

JUDGE GERSTENBLITH: Any from Judges Goodson or Dougal?

JUDGE GOODSON: No thank you.

MR. MUELLER: My colleague informs me that glass fibers and glass are used synonymously in this context, which is essentially what Mr. Tres is saying.

So, while he didn't use the word glass fiber is the same as glass, a person skilled in the art would understand that those are the same thing.

JUDGE GERSTENBLITH: Okay, thank you.

MR. MUELLER: Thank you, Your Honors.

MR. RICHEY: Your Honor, I said I would look for where we argued that the strut is not tapered, I haven't been able to find it.

JUDGE GERSTENBLITH: Okay.

MR. RICHEY: There's no evidence of record that glass and fiber are synonymous. And lastly, I'd like to point out, Petitioner argues that it's enough to analyze an independent claim for obviousness and then say that the same analysis applies for all dependent claims.

That is not the law. It was not okay when I was an Examiner, it's not okay in District Court, it's not okay here. Every claim must be analyzed according to the Graham factors, and motivation analysis must be done for

each and every claim, and there is no such analysis for the dependent claims in this case. I have nothing else, if there are no further questions.

JUDGE GERSTENBLITH: Anything else, gentlemen.

JUDGE GOODSON: No thanks.

JUDGE GERSTENBLITH: Thank you very much.

MR. RICHEY: Thank you.

JUDGE GERSTENBLITH: All right, thank you all very much for coming. I hope you have a safe trip back to wherever you came from. This case is submitted, and we are adjourned. Thank you.

(Whereupon, the proceedings at 2:32 p.m. were concluded.)

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