Paper # 74 Date: September 19, 2022

## UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TEKNI-PLEX, INC., et al., Petitioner

v.

CONVERTER MANUFACTURING, LLC, Patent Owner.

IPR2021-00916 (Patent 9,908,281 B1) IPR2021-00918 (Patent 10,189,624 B2) IPR2021-00919 (Patent 10,562,680 B2)

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Record of Oral Hearing Held: July 28, 2022

Before GRACE KARAFFA OBERMANN, JAMES A. TARTAL, and AVELYN M. ROSS, *Administrative Patent Judges*.

#### **APPEARANCES:**

#### ON BEHALF OF THE PETITIONER:

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#### ON BEHALF OF THE PATENT OWNER:

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The above-entitled matter came on for hearing on Thursday, July 28, 2022, commencing at 10:00 a.m. at the Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P-R-O-C-E-E-D-I-N-G-S 1 (10:02 a.m.) 2 JUDGE ROSS: Okay, let's go on the record. Good morning 3 everyone. We're here for the hearing in IPR 2021-00916 concerning U.S. 4 Patent No. 9,908,281, IPR 2021-00918, concerning U.S. Patent No. 5 10,189,624 and IPR 2021-00919, concerning U.S. Patent No. 10,562,680. 6 I'm Judge Ross and I'm joined today by Judge Obermann and Judge Tartal. 7 We're conducting this hearing in person, but as you can see I'm joining 8 remotely. There may be a delay or lag in the audio or video feed. Please 9 make every effort to speak clearly and avoid speaking over each other, to 10 assist the court reporter. 11 Also when referring to materials from your demonstratives, it's 12 helpful if you provide the page number on the slide. That will improve the 13 clarity of the record. Hearing no objection from the parties, we authorize a 14 public audio line, so just be aware that there may be members of the public 15 listening in. As we mentioned in our July 11th hearing order, each side will 16 have 90 minutes to present their arguments, and because Petitioner intended, 17 indicated they intended to use a LEAP practitioner, Petitioner has an 18 additional 15 minutes. 19 We see a lot of overlap in the issues and the arguments between the 20 three cases, so we are hopeful that you all won't need the entirety of the time 21 we've allotted. Because the Petitioner bears the burden, Petitioner will go 22 first and may reserve up to half of its time for rebuttal. Patent Owner will 23

then have a chance to respond. We will keep time and try to update you on

the remaining time as the hearing proceeds. We do plan to take a short
break during the hearing likely before rebuttal arguments begin.

We noticed that both parties filed motions to exclude, and I believe the Petitioner included a slide deck on it. We intend to take the motions to exclude under advisement, but should the parties decide to address one or more of the motions to exclude, that argument must take place within your allotted time. When you begin your argument, please introduce yourself as well as all of those in your party. Also, let us know how much time for rebuttal that you need. With that, we'll begin with the Petitioner.

MR. FISHER: Well, thank you Your Honor. Michael Fisher of 10 Dechert, LLP representing the Petitioner Tekni-Plex, Inc. Also here from 11 Dechert on behalf of the Petitioner are Kevin Flannery and Luke Reilly. In 12 the audience we have David Waxman, who is the chief legal officer of 13 Tekni-Plex and connected remotely we have Kenneth Giannantonio, who's 14 the vice president and deputy general counsel of Tekni-Plex. We'd like to 15 reserve 30 minutes for rebuttal, and we anticipate likely up to 15 minutes for 16 our arguments with respect to Patent Owner's motion to exclude. 17

JUDGE OBERMANN: Could you hold on for one second Mr.
Fisher. I'm going to set the clock. So you do have a LEAP practitioner,
that's right?

21

MR. FISHER: That is correct.

JUDGE OBERMANN: So that means that you have an hour and a 45 minutes total, and you're reserving 30 minutes. So I'm going to put 75 minutes on the clock. Whoops, if I can.

1	MR. FISHER: Just to clarify, Your Honor, we are reserving the 30
2	minutes for everything other than for our extra time for the LEAP
3	Practitioner, so I guess that ends up being a total of 45 minutes in reserve.
4	JUDGE OBERMANN: Oh, so you have 45 minutes in reserve?
5	MR. FISHER: Yeah.
6	JUDGE OBERMANN: So I should give you an hour, is that right?
7	MR. FISHER: Yes.
8	JUDGE OBERMANN: Okay. I've got it set and I'm going to start
9	when you begin.
10	JUDGE ROSS: I think that might be a little too much time, is that
11	right? They should have 105 minutes total.
12	MR. FISHER: Yeah, I think that is right. So it would be an hour
13	and 45 minutes total.
14	JUDGE OBERMANN: And you're reserving 45, so I should put an
15	hour on the clock?
16	MR. FISHER: Yeah. I think that's I think that's right.
17	JUDGE OBERMANN: Is that right, Judge Ross?
18	JUDGE ROSS: Correct.
19	JUDGE OBERMANN: Okay. I'm going to start the clock.
20	MR. FISHER: Okay, all right. So why don't we, if we could please,
21	flip to Slide 2. This is an overview of the subject matter that we'll be
22	covering today. I will be addressing the arguments with respect to Portelli
23	and also the introductory material and the meters reference. Mr. Flannery
24	will be addressing the arguments with respect to the Long reference, and Mr.
25	Reilly will be handling our arguments with respect to the motion to exclude.

Please turn to Slide 4. So as discussed, there are three challenged
patents. There is a petition. There's an IPR pending against each challenged
patent. We are asserting multiple grounds of invalidity, including
anticipation of every single challenged claims, plus some obviousness
grounds. We have shown that every element of every challenged claim is at
least discussed and illustrated in the cited prior art.

Please turn to Slide 5. Now Patent Owner doesn't have a genuine
dispute as to the presence of the claim elements in the prior art, so their
primary argument is that none of the prior art is enabling because according
to them, thermoforming is an unpredictable art, and they also are asserting
that all of our prior art is inoperative and even possible to live with.

Now the problem with that argument is that thermoforming has been around for a very long time, at least 70 years. It's not a sophisticated or complex concept. You have a sheet of plastic. You heat the sheet to soften it. You bend it into shape and you let it cool to harden into the desired shape. We have provided and cited numerous textbooks describing the exact same methods that Patent Owner's claims couldn't be done or would be beyond the reach of a POSITA.

Not only that, in addition to the wealth of authoritative textbook
material, we have actual trays that have been made and manufactured on a
commercial scale by the very methods that Patent Owner claims wouldn't
work.

Please turn to Slide 7. All right. So Slide 7 shows you the basic
idea behind the challenged pattern. The problem that the inventor sought to
solve is when you have thermoformed plastic tray it often ends up with a

sharp edge at the edge of the plastic. That edge can cut the wrapping, the
plastic wrap that meat processors usually use to put over their product when
wrapping the tray, and it can also cut people's fingers when they pick up the
tray. So it's a bit of a hazard.

5 So the purported invention is very simple. It's just you take that 6 sharp edge and you bend in inward so it's out, so it's within -- it's not at the 7 periphery of the tray, so it's not going to damage that overwrap and it's not 8 going to cut people's fingers when they pick up the tray.

Please turn to Slide 15. So I'm not going to go through Slides 15
through 17 in great detail. It just lays out our invalidity grounds, only except
to note that we have multiple anticipation grounds against each patent, and if
you look at the list you'll see that most of the claims are actually anticipated
several times over. For the '281 patent, we have independent anticipation
grounds by our primary references, *Portelli, Long* and *Meadors*.

Slide 16, the same thing with the '624 patent. Three anticipation
grounds, most claims appearing in both lists for anticipation. With the '680
patent, we have two individual, two independent anticipation grounds based
on *Portelli* and *Meadors*.

Now please turn to Slide 19. Now I'm not going to go through the entire claim chart that runs from Slides 19 through 23 here, because the claim elements are of course laid out in detail in our petitions. This is an exemplary claim though. It's Claim 1 of the '680 patent, and I would like to direct your attention to Slide 23 in particular. Just to make the point that if you actually look at the claim elements in Patent Owner's claims, many of them are exceedingly simple geometric shapes.

You have, as illustrated here on Slide 23, you have a bend region. You have a bent portion. These terms are so extremely broad that they can be applied to almost any bend in a piece of plastic or almost any portion of the bend. As a result, we have applied these elements in multiple different ways. We have multiple examples of each element appearing in the respective prior art references.

Now Patent Owner has taken this as some kind of evidence that
thermoforming itself is an unpredictable art. Not true. The fact that we are
able to apply the claim elements in multiple different ways has nothing to do
with any unpredictable, unpredictability in the art of thermoforming itself. It
has everything to do with the exceeding breadth of the terms that patent
chose to put into its patent.

Please turn to Slide 27. Now in terms of the individual claim 13 elements, Patent Owner doesn't dispute the presence of the majority of the 14 claim elements in the prior art, but they do make the argument that with 15 respect to *Portelli*, a claim can't be anticipated unless you can find every 16 single feature of that claim in a single drawing in the reference. For 17 example, Patent Owner contends that if you look at the flanges illustrated in 18 Figures 8 and 13 of Portelli, and again these are just flanges; they're just part 19 of the tray, Patent Owner contends that you could not put together with the 20 trays illustrated in Figures 14 through 16. 21

That makes no sense at all. As I said, Figures 8 and 13 show flanges. Figures 14 through 16 show the overall shape of the tray. In fact, if you look at Figures 14 and 15, those are the only drawings in the entire *Portelli* reference that show the whole tray, that really show you the rounded

rectangular shape of that tray. So they're just aren't any other trays for the
flanges in Figures 8 and 13 to go with. They have to go with the trays in
Figures 14 and 15, and even Figure 16.

Now another one of Patent Owner's arguments is that you can't take
any portion of Figure 8 and combine it with Figure 13, and vice-versa. But
as the Federal Circuit explained in the *Kennametal* case, you can -- if you
have features from different portions of a reference, they can be combined
for anticipation. This is not just for obviousness; this is even for anticipation
if a person of skill in the art reading the reference would at once envisage the
claimed arrangement or combination.

And also I think it's important to take this in context. We're not 11 talking about rocket science here. We're talking about extremely simple 12 geometric elements. A bent portion, a bend region, the so-called spacer in 13 Patent Owner's claims, if you look at it in cross-section is nothing more than 14 a short line segment. So these elements are as simple as can possibly be, and 15 that's why when our expert, Mr. Glenn May looked at Portelli and analyzed 16 it, he came to the conclusion that a POSITA, a person of ordinary skill in the 17 art, viewing Portelli in its entirety would immediately understand that the 18 flanges in Figures 8 and 13 are just examples, and they are intended to go 19 with the trays in Figures 14 through 16 and once more that the hypothetical 20 POSITA would immediately envision taking an element here or there from 21 Figure 8 and putting it into Figure 13 and vice-versa. 22

I would also remind Your Honors that we have not just anticipation grounds based on *Portelli*, we actually have obviousness grounds which I

can get into later on. But part of our argument is that, you know, you've got
 these drawings in the same reference and they're also obvious to combine.

JUDGE TARTAL: Counsel, if I could just ask you. What is your
 argument legally when an asserted ground falls under obviousness and not
 anticipation when you are combining elements from a single reference?

6 MR. FISHER: I'm sorry Your Honor, can you repeat that question? 7 JUDGE TARTAL: Sure. What is your position on sort of a legal 8 basis of when under the grounds being asserted, a combination of elements 9 from a single reference falls under obviousness and not under anticipation?

MR. FISHER: I think, Your Honor, that it can fall under both, okay. Anticipation is obviously a higher bar. You have to meet the immediately envisage language in the *Kennametal* case. On obviousness, you know, it has to be something that a person of ordinary skill in the art would consider the combination obvious. There are factors such as motivation to combine. There's actually another case that we cited with respect to obviousness that I can point out to you, which is on Slide 109. Sorry, I guess that would be --

(Pause.)

17

MR. FISHER: Sorry, my mistake. That's actually Slide 111. So this is the *Boston Scientific* case, in which the Federal Circuit recognized that if you have two embodiments disclosed adjacent to each other in a single reference, in a single prior art patent, it does not require a leap of inventiveness to combine those. So again with respect to obviousness of embodiments in a single reference, it's not -- it really doesn't take much of a leap for a person of ordinary skill in the art to look at that single reference

and say "Hey, I can mix and match simple elements from one drawing into
 another," especially since these figures are understood only to be examples.

JUDGE TARTAL: Does counsel, does counsel concede that the various figures in the reference are directed to different embodiments, or do you have a position on that it's the single embodiment showing features disclosed in each embodiment, or alternative ways of performing the certain features? How would you address the idea of how many embodiments are shown in the reference?

9 MR. FISHER: I think that if you -- you could construe Figures 8 10 and 13 as being different embodiments. You also could interpret them as 11 our expert did, as just being examples of various shapes that can be included 12 in the overall trays illustrated in *Portelli*. You know, as I mentioned, if you 13 actually look at the entire -- at the entire tray which is illustrated in Figures 14 15, there are flanges that clearly go with those trays.

So because of the fact that you have only a limited number of 15 examples of trays in their entirety which don't show as much detail of the 16 flange, and then you have separate drawings with flanges, our position is 17 that you could very well interpret those flanges as just examples of shapes 18 that could go with the overall larger trays illustrated in Figures 14 and 15. 19 But even if they are interpreted as different embodies in Figures 8 and 13, 20 again our expert Mr. May looked at *Portelli* and concluded that a POSITA 21 would immediately envisage combining simple shapes from one drawing to 22 -- with another. 23

All right. Can we please turn to Slide 35? All right. So here's where we get into Patent Owner's non-enablement and inoperability

arguments. So the first thing they argue is looking at *Portelli's* method of
taking a heated die, a curved heated die, and engaging the flange of a
thermoformed tray, according to Patent Owner and their expert, the flange
would become so soft that it would just get destroyed. It would immediately
buckle and collapse, and they also contend that *Portelli's* flange would stick
to the die. Please turn to Slide 44.

JUDGE TARTAL: Counsel, before you get into the details, is there 7 agreement between the parties as to what enablement requires in the context 8 of the references and the claims that you relied upon, the references 9 challenged -- the claims challenged and the references being relied upon, 10 particularly as much as it's directed to an article of manufacture? What is it 11 that you contend or what do the parties contend and what is the dispute, if 12 there is any, as to what the enablement requirement legally is, not so much 13 the details, but --14

MR. FISHER: Well, I'm actually glad you asked that, Your Honor. 15 I don't think there necessarily is agreement. Our position is that if you can 16 make the shapes, and remember these are product claims, okay, as Your 17 Honor pointed out. They are not process claims. They are articles of 18 manufacture. They are product. If you look at the claim elements, they 19 simply recite the shapes. They recite the geometric shape of the tray in 20 question, and it's our position that if you can make those shapes without 21 undue experimentation, that that meets the requirement of enablement. 22

We've seen a lot of material in Patent Owner's briefing that tries to raise the bar. They talk about high speed manufacturing. Part of their argument as to non-enablement is that well, there might be some defects that

would appear in a certain percentage of the trays coming off the
manufacturing line. This particular process, they focus a lot on the
processes, this particular process wouldn't be suitable for high speed
manufacturing. But I think it's important to note that there is no claim
element which requires high speed manufacturing.

So it does seem that Patent Owner has gone above the usual bar of 6 undue experimentation and is really focusing on not just the manufacturing 7 process, but whether that process would specifically be suitable for mass 8 production, and would result in a high percentage of non-defective articles. 9 We don't agree with them that there would be defects, but they seem to be 10 taking the position that if there are a few defects that creep into a 11 manufacturing run, that that means the whole piece of prior art is not 12 enabled. 13

But that makes no sense to us, because again we're talking about claim elements which are geometric shapes, and have nothing to do with the manufacturing process. So to answer your question, I don't think we have agreement on what the standard is.

JUDGE ROSS: So then let me interrupt for a second. So then from
 Petitioner's standpoint, what is the standard for enablement of an
 invalidating prior art reference?

MR. FISHER: The prior art reference is enabled if a person of ordinary skill in the art can make and use the relevant features in that piece of prior art, which in this case is the features that meet the claim elements, without undue experimentation. It's not -- the standard is not any experimentation; the standard is undue experimentation, which actually

raises another issue that Patent Owner has repeatedly emphasized, that if you
look at some of their materials and the evidence they have submitted, there
is discussion of well, maybe something could go wrong during
manufacturing, and because a person with skill in the art would have to do
something, anything to fix that problem, that that means the prior art
reference is not, is not invalidating.

But we're talking about real manufacturing in a real world setting where problems do arise. There might be occasionally a part that sticks to the die. But as, as I'll point out later, there are easy solutions for that which don't require any significant experimentation at all. There is coating the die with no-stick coating such as Teflon. That's appeared in numerous textbooks as a well-known, a well-known method for like the past 30 years.

We're talking not just decades but even longer before the Patent 13 Owner even filed his earliest, its earlier application. So we're not talking a 14 lot of experimentation. But again, Patent Owner seems to be raising the 15 requirements. They want a process that's number one, suitable for high 16 speed manufacturing, number two produces no defects, number three works 17 immediately. They're not willing to allow any experimentation at all. So 18 they've gotten away from the undue experimentation standard. Were there 19 any other questions about that point? 20

21

JUDGE ROSS: No, thank you.

MR. FISHER: All right, thank you. So why don't we slip to Slide 44. Again, Patent Owner is arguing that using a hot die to rim, to roll the rim of a tray simply wouldn't work. You would just destroy the edge. That edge is just going to buckle and collapse, and so there are a number of

reasons why that makes no sense. First of all, it's the same as Patent
Owner's own process. If you look at Slide 44, to the left you see *Portelli's*heated die, Item 25, and you can see it's got that curl to it, and you can see
it's about to engage the edge of that tray. It engages that edge and it rolls it
in.

On the right side, you see the analogous drawings from the 6 challenged patents. They're calling their heated die a ram, Item 300, but it's 7 the same thing. It even has basically the same shape. So it's, you know, 8 when Patent Owner filed their patent application, they represented to the 9 Patent Office that it met all the legal requirements including enablement. So 10 we have to assume that the patent and based on the Patent Owner's own 11 representations, by the act of filing their patent, that their patent we presume 12 13 --

We assume is enabled, and it just is not credible for Patent Owner to come forth and say well, we have this process. It requires a heat die. It's going to roll the edge of that tray, but guess what? It only works for us. Only works for us. If anyone else tries the same method, oh that's just not going to work. It's not going -- it's going to destroy the edge. It works for us, but magically it doesn't work for anyone else. Therefore, it's not going to work for *Portelli*.

21 So I submit to you that it's just not a credible argument, especially in 22 light of their own disclosure.

I would also point out a passage from the patent itself. I would ask you if you have it handy, to pull up Exhibit 1001 from the '916 IPR, and I'm looking at a passage here that runs from Column 17, the bottom of Column

17 to the top of Column 18. Specifically, Column 17, line 66 through
 Column 18, line 6.

And I quote "For the purposes of the processes described herein, it is 3 substantially immaterial which portions of the deflectable flange are 4 softened and bent, so long as the desired result is obtained. The potentially 5 sharp peripheral edge, 110, is deflected away from the periphery of the 6 article and preferably sequestered as in Figure 8C, where it is very unlikely 7 to contact any easily damaged film or tissue which contacts the periphery of 8 the shaped article." This is the whole point of the --9 10 JUDGE OBERMANN: Let me just interrupt. MR. FISHER: Yes, Your Honor. 11 JUDGE OBERMANN: It took me a while to pull that up. Could 12 you tell me which portion of the '281 patent you were just quoting? 13 MR. FISHER: Yes. It is Column 17, line 66 through Column 18, 14

15 line 6.

16

JUDGE OBERMANN: Thank you.

MR. FISHER: Okay. So here it is in black and white. This is the -this is the entire purpose and point of the alleged invention. You're getting that sharp peripheral edge away from the periphery so it's not going to injure anyone; it's not going to damage that overlap, and they specifically said it doesn't matter which portion of that flange are softened and bent. It doesn't matter how you do it.

So they have acknowledged that their -- they've left it up to the
discretion and sound engineering understanding of persons of ordinary skill

in the art to figure out the detail, okay. And yet when they look at a
 reference like *Portelli*, they claim that it's impossible to get that to work.

If we can please jump back to Slide 36. All right. So another 3 problem with Patent Owner's argument is as I mentioned, thermoforming is 4 a very, very mature art. It's been around for 70 years. Neither party disputes 5 that, and if you look at the methods that we're talking about, it's called rim 6 rolling, okay. You take the rim of a thermoformed article and you roll it in. 7 It's in all the textbooks. It is so old that it was -- it was literally called a 8 classic standard method not just as of the priority date of the challenged 9 patents, but almost two decades earlier. 10

We've cited the Throne textbook here, Exhibit 1049. You can see on Slide 36 we have an image from that textbook which shows the exact kinds of shapes that we're talking about, that Patent Owner claims would be beyond the POSITA. Apparently POSITA's never seen this before. Not true. POSITAs have seen these shapes and have seen the methods for manufacturing them for decades and decades, even before Patent Owner filed this application.

I'd also like -- if you can please turn to Slide 37, I would like to 18 direct you to some statements by Throne himself. And remember, this is 19 something that Throne, the author of a textbook, which by the way we 20 actually found out about Throne from Patent Owner's own expert witness. 21 Throne is a recognized authority. The textbooks, both parties agree that the 22 Throne textbooks are authoritative references. Here is what Throne said in 23 his 1996 textbooks, 19 years from Patent Owner's priority date. And I quote 24 "The classic example of rim treatment of thin-gage parts is the rolled rim." 25

1 Okay. Throne goes on to refer to rim rolling as "a standard method of 2 reinforcing the rim region."

Although Throne acknowledged that it is most commonly done with round parts, he's very explicit in saying it's not limited to round parts. As he says, rim rolling is used on occasion for oval, elliptical or oblong parts with generous corner radii. That's exactly what we're talking about. We have rectangular trays. They're oblong in the sense that they're longer than they are wide, and they don't have sharp corners. They specifically have rounded corners.

10 So that's the oblong part with the generous corner radius that throne 11 referred to almost two decades before Patent Owner filed his first 12 application. So again, these techniques that Patent Owner is claiming are --13 would have been beyond the skill of a POSITA were so extremely well-14 known that that just doesn't have any credibility.

Okay. Can we please turn to Slide 39? So not only do we have a wealth of evidence from the authoritative text proving that these techniques were well-known and well-understood by POSITAs, we have actual trays. We found trays, for example, made by a company called Dexter TM, which is a company in the Netherlands that has been making trays for years and using the exact same methods that Patent Owner claims just wouldn't work, because they would destroy the edge.

Now if you look at Slide 39, we have a comparison of *Portelli's* methods. Those are the images sort of in the middle of the slide kind of toward the bottom. You see excerpts from *Portelli* Figures 7 and 8. Once again you see that heated die coming down, engaging that rim and rolling it,

such that that sharp peripheral edge is again displaced away from the
periphery. That's the purpose of the patent, and so it's not going to cut the
overwrap or cut people's fingers.

In the middle column, we have images from Dexter themselves, okay, showing their process. Again, you've got the heated die approaching and engaging the peripheral edge and rolling it in to once again get the sharp edge away from the outside, away from the periphery. In the lower right corner, the photograph with the green background was taken by our expert, Mr. May. He actually took one the Dexter trays. He cut it to get the profile of it, to get the cross-section of it.

And there it is. You see the tray itself with that peripheral edge, away from the periphery where it's not going to, for example, cut people's, cut people's fingers. So again, it's not just the textbook evidence that we have; it's actual trays that have been made by these same processes. There's just no doubt this process works, so for Patent Owner to say it couldn't work just is belied by the evidence.

JUDGE OBERMANN: Mr. Fisher, I did have one question. In the surreply, they direct us to a 2016 brochure that you yourself put into the record. In that brochure from 2016, they quote a section that says that "rim rolling non-circular thermoformed articles has been impossible until now." So how does that jibe with your argument that they're holding the prior art to a higher standard than the disclosure of their own patent?

MR. FISHER: Frankly, we think that statement is just wrong. We don't know who wrote it, other than it was presumably someone in Dexter's marketing department. We don't know if they had any technical expertise.

We certainly don't know if they read Throne or if they had been aware of the
OMV trays that also existed previously. It's really, it's marketing puffery.
It's the kind of thing that someone writing an advertisement would say just
to sell, sell more product. It is not an authoritative reference, and again we
don't know who said it. We don't know if they knew anything about what
really was being done in the prior art.

Furthermore, they could have just been talking about Dexter. They could have been talking about their own company's product. Maybe what they meant was "well, we haven't been able to do this in the past." But to interpret that statement so broadly as to say that well, nobody ever has been able to rim roll articles that aren't round, if that's what the person meant I would say they just didn't know about all these other trays and non-round articles.

Speaking of OMV, that's another example of actual trays or actual manufacturing processes that have been used on a commercial scale for many years. If you could please turn to Slide 41. Now Slide 41, again the drawings that are kind of more centered on that slide are *Portelli* Figures 7 and 8, and the drawings that are to the right are from OMV. It's from a presentation that actually dates back to 2004.

You can see there is that, again that heated die coming down, engaging that flange. It takes that sharp peripheral edge and rolls it right in so it's no longer exposed to the periphery of the article, where it could otherwise damage an overwrap or cut people's fingers, etcetera.

JUDGE TARTAL: Counsel, does the record show what the shape of the OMV and Dexter containers were?

1	MR. FISHER: Well, we have rectangular trays from Dexter, and
2	I've got to flip back to Slide 40 and show you that, and I think here also is
3	another photograph of the Dexter trays. Let's see if I just flip forward a little
4	bit. Oh there we go. So if you look on Slide 49, there is a set of trade show
5	samples that were distributed by Dexter in 2016. They do have a round cup
6	in there, but as you can see it's also a rectangular tray.
7	By the way, I would also point out that our expert, Mr. May, if you
8	look at Slide 39, if you can flip back to that, what he cut there, that cross-
9	section that he provided in a photograph was from the rectangular article.
10	OMV, we don't have any particular rectangular articles from them, but
11	there's no evidence that that same method of advancing a die. We're not
12	talking about some kind of helical process that like Patent Owner has been
13	talking about.
14	We're talking about simply advancing a die so it engages that rim
15	and rolls it in, and there's no basis for thinking that OMV's process, for
16	example as illustrated on Slide 41, no basis for thinking that that would be
17	any more difficult to do on a rectangular object versus a round object,
18	because it just doesn't involve spinning. That's not even required.
19	JUDGE TARTAL: Can you explain the context of why you're
20	referring to spinning?
21	MR. FISHER: Because Patent Owner has referred to what they
22	consider to be a big difference in the ease with which you could make a
23	round object versus a non-round object. The theory that they're presenting is
24	that well round objects it's easier to roll the rim of a round object because
25	you can just rotate it and it's easier to roll a rim that way. But why that

doesn't apply to these specific examples is that's not the method that Dexter
uses. It's not the method that OMV uses.

What they're doing is they're simply translationally moving a die so it engages the rim and rolls it down. And so Patent Owner's argument that round objects are easier because you can spin them just doesn't apply here, because that's not what Dexter and OMV are doing.

Okay. So can we turn to Slide 43? Patent Owners' expert James 7 Clements did do some simulations. He produced a lot of very pretty images 8 showing what he purports to be the exact heat distribution through a 9 hypothetical tray. While those pictures look good, they miss the most 10 important thing. What Mr. Clements did not simulate is the actual 11 mechanical aspects of what would happen when the -- when a heated die 12 actually engages with the rim of the tray, that his theory that the rim would 13 just buckle and be destroyed is completely unsimulated. 14

So it gives the illusion of a careful analysis, but it's missing the most important part, the part that really matters. What about that mechanical aspect? What about the alleged buckling of the rims? We know he's wrong because we know that that exact process has been used on a commercial scale to produce millions of articles, and is not a problem. The other, another problem with Mr. Clements' simulations of heat flow through a tray is that he leaves out a lot of important factors.

Now remember, Portelli's tray is actually sitting on a metal block
and on a piece of metal tooling. But Mr. Clements completely ignored the
cooling effect that that tooling would have on the rim of Portelli's tray.
Portelli also explicitly talks about other cooling mechanisms and heat-

protected mechanisms. There's heat shielding, there's cooling water. All of
 that stuff is completely absent from Mr. Clements' simulation.

Mr. Clements' tray exists in a fantasy world in which the tray is 3 floating in space and it's literally not touching anything except that heated 4 die. So of course it's going to artificially inflate the temperature that that die 5 achieves. I would also point out that if a POSITA doing normal 6 manufacturing found out that the heating was too much, they could just turn 7 down the heat. This is the kind of thing that people of ordinary skill in the 8 art do every day. It's just routine manufacturing. Again, the standard is not 9 no experimentation; it's undue experimentation. 10

And again like I said, the fact that we have commercial trays made and commercial objects made by Dexter and OMV proves that Mr. Clements' analysis is wrong, which is not surprising considering all the things he left out.

All right. Can we please turn to Slide 47? All right. So this is a zoomed-in excerpt from Figure 8 of *Portelli*, and you can see it's not a high resolution image. If you actually look at the entire image, it's clearly handdrawn. There are imperfections in the drawings and Patent Owner would have you interpret those as puckers in Portelli's tray. Now they focus on, if you look at Slide 47, you can see the arrow that's more sort of to the right and higher up than the other arrows.

That's what they're focusing on, which is really just the draftsperson when drawing the line just overshot a little bit and so it poked out, and it makes it look worse because the extreme pixelation of this drawing. Overshoots that Patent Owner completely ignores are the other ones that I've

illustrated here, which couldn't possibly be puckers because those lines refer
to metal parts. There's not going to be a pucker in a metal part.

So it just doesn't make sense first of all that there would be puckers 3 in the metal part, and also you have to use your common sense here. Portelli 4 doesn't say anything about puckerings or defects in the tray illustrated in that 5 reference. Why would he? You're an inventor. You're not going to 6 highlight defects in the very thing you're trying to patent. So it just doesn't, 7 it makes no common sense that an inventor would intentionally draw defects 8 in what they're trying to patent, unless they were explicitly trying to solve 9 10 the problem and this was like a prior art diagram.

But that's not the case. The fact is *Portelli* makes no mention of defects, and there's no reason to assume, as Patent Owner does, that these imperfections in the drawing actually do represent defects. Our expert, Mr. Clements, if you flip to Slide 48, you can see Figure, a larger portion of Figure 8 from *Portelli*, and you can see that there are imperfections all over this figure, and taken in total it's clear that these are nothing more than that. It's just a hand-drawn drawing and that's it.

As I said, just as a matter of common sense, a Patent Owner's not going to intentionally draw defects in the item they're trying to patent. This is analogous to what the Federal Circuit said just a couple of weeks ago in the LG v. Immervision case, where a prior art reference includes an obvious errors of a typographical or similar nature, such that a POSITA would mentally disregard it. That errant information cannot be said to disclose subject matter.

1 So you can't take minor imperfections in a drawing and say that that 2 discloses something when they're clearly just minor imperfections.

So can we please turn to Slide 49? I'd like to talk about the Patent
Owner's assertion that there's something wrong with using an exemplary tray
from 2016. They make a very big deal about the fact that the Dexter tray
that we're citing is not from before the priority date. It doesn't have to be.
Just to be absolutely clear, I don't think there's any misunderstanding here,
but just to make it clear, we are not using the Dexter tray as prior art.

We're using it to rebut a technical argument, the technical argument that Mr. Clements, Patent Owner's expert made, that the heated die rim rolling method wouldn't work, that it would destroy the rim of the tray. So first of all in general, post-priority date evidence of enablement is permitted, and we've cited the *Amgen* case, which says that the admission of postpriority date data is proper to illuminate the state of the art at the priority date and show enablement.

That's exactly what we have here, and again we're not using the Dexter trays as prior art. We're just -- it's just additional evidence on top of what we already have from the wealth of textbook evidence that -- to rebut Mr. Clements' and Patent Owner's argument that the heated die method couldn't possibly work, that in fact it worked so well that they're producing trays by the millions on a commercial scale using this very method.

I should also point out that Mr. Clements' opinion was not merely that the heated die rim rolling method wouldn't work in 2015. He framed his opinion in the present tense, and I quote "*Portelli's* fourth embodiment method is inoperable, and cannot be practiced without unreasonable amounts

of experimentation." He's framing that in the present tense. He's essentially
saying it could never be done, and we're entitled to rebut that assertion and
that's all we're doing with the Portelli, sorry, with the Dexter trays.

Now Patent Owner might also try to convince you that well because
Dexter's tray came from 2016 and it's after their priority date, that their
patent taught the industry how to do this. Couldn't do it before, but when
their patent came out, everybody knew how to do it. That argument itself
doesn't make sense because their earliest patent application was not actually
even published until 2017. It couldn't have helped Dexter to figure this out.
Dexter figured this out on their own.

I guess one last point on that. I would say that a contemporaneous invention, even if Dexter figured out how to do it roughly at around the same, same time as Patent Owner, that's actually further evidence of obviousness, which is another one of our grounds. Now before I turn things over to Mr. Flannery to address the *Long* reference, I want to make sure that there's nothing else that the panel wishes to ask.

I know that in this case, since Patent Owner did not file a POPR,
Patent Owner's Preliminary Response, the Board hasn't yet had an
opportunity to address Patent Owner's arguments on the individual claims
elements and the like. So I would ask if Your Honors have any questions
about individual claim elements in our petitions that you'd like to discuss
before we move on to the next topic.

23

JUDGE TARTAL: I don't.

24 MR. FISHER: Okay. Thank you, Your Honors.

MR. FLANNERY: Good morning Your Honors. This is Kevin Flannery for Petitioner. I've been sitting here watching the clock tick away and we have some work to do, so we still have some work remaining and we're going to get right to it. So I'm going to talk about *Long*. I'm focused right now on Slide 52. The *Long* trays and Patent Owner's trays are exactly the same. Now they criticize and say well *Long* doesn't show any actual pictures of a tray in the reference.

8 We all know that there's no requirement that you have to put actual 9 pictures of physical samples in a patent. The overwhelming majority of U.S. 10 patents don't have pictures of actual physical samples. There's no legal 11 requirement for that. So let's get right to it.

I'm going to look at Slide 63 please. So you're going to hear a lot -again I'm going to just be very focused here in the interest of time and to see if Your Honors have any questions. But you're going to hear a lot about lack of tooling in *Long*. You're going to hear a lot about -- at least as their slide show, you're going to hear about NDAs. You can't make *Long*. It's all a distraction. You know why? Because their expert disagrees with them.

Looking at Slide 53, here's their expert in his declaration "POSITA would know the design criteria for the mold necessary to thermoform *Long's* precursor." So everything you're going to hear about NDAs and no tooling in *Long* to make it, their expert completely disagrees. He says one with ordinary skill in the art would know how to make it. They seem to have forgot that. But Mr. Clements might have got that part right, but then it falls apart. He got it wrong.

1	He says they could make it, so now I'm looking at Slide 64.
2	POSITA knows how to make it, but he says "but you can't get it off the
3	mold. Impossible." Just like Mr. Fisher was talking about, the present tense
4	term. He didn't say what was impossible until Patent Owner's argument
5	came out. He just says it was impossible. Impossible to get it off because of
6	this undercut. Well as you know, we went out and found millions of trays.
7	Some in 2011 we had them in 2011, evidence in 2016. They say that they
8	have some objections to the 2011 evidence.
9	It doesn't matter. Mr. Naughton testified about trays that he
10	physically witnessed in 2016 following Long make not impossible. POSITA
11	knows how to do this stuff. As Mr. Fisher referenced, the timing doesn't
12	matter. Mr. Clements says it was impossible at all times. We showed no, it
13	wasn't impossible. Millions of these trays have been made.
14	So again in the interest of time, unless Your Honors have any
15	questions on that point, which I think is very critical for the Long piece
16	JUDGE OBERMANN: Are you going to be able to say that it
17	would have been possible at the time of the invention, because isn't that
18	where we're really looking?
19	MR. FLANNERY: No, Your Honors.
20	JUDGE OBERMANN: It's okay if it was enabled after the time?
21	MR. FLANNERY: It's enabled. It's self-enabling. We don't need
22	the evidence of the trays actually being made for it to be enabling. One of
23	ordinary skill in the art can look at the reference and determine that it's
24	enabling based upon the science. We have Mr. May has chapter and verse

description as to how one of ordinary skill in the art would know how tomake it.

JUDGE OBERMANN: If we read -- if we read their expert as
saying it would have been impossible at the time of the invention, what does
that do to your post-invention evidence?

- MR. FLANNERY: He didn't say that, first off. He said it wasn't
  possible. But even if it was impossible to the time of the invention -- well,
  he didn't say that first off, Your Honor. He just says it's impossible.
- JUDGE OBERMANN: One could interpret them to -- him to be
  actually looking at the time of the invention.
- MR. FLANNERY: I still don't think it matters, because it's not impossible. It was made after -- it was made before that. We have evidence of that, and it was made shortly -- well, maybe not shortly after but contemporaneously at the same time. Mr. Naughton was there in 2016-2017 right around the same time, and it was able to be made.
- But again, I want to be very clear. I'm not conceding that that's a reasonable interpretation of what he said.
- 18 JUDGE OBERMANN: I understand that.
- 19 MR. FLANNERY: Yeah.
- 20 JUDGE OBERMANN: I just want to know what's your position if
- 21 this evidence falls out because it post-dates the time of the invention?
- MR. FLANNERY: I don't think it falls out first off, I think, because it's shown as possible.
- 24 JUDGE OBERMANN: I understand then.

1	MR. FLANNERY: But I don't think that we need the evidence of
2	the trays in the first instance. If the trays hadn't been made, I mean the
3	patent might have just issued. The Long reference might have just issued,
4	and then along comes Patent Owner's invention a year later. We don't need
5	to show that there was trays made in the intervening period. One of ordinary
6	the issue is can one of ordinary skill in the art look at Long, read it and
7	know how to make a tray?
8	Doesn't, doesn't matter if they were made. I want to be very clear on
9	that. There's two pieces to our argument. The first is that it's enabling. I
10	don't know if it's self-enabling, maybe that's the term. But one of ordinary
11	skill in the art could read it. Then there's a separate argument. They created
12	this charade about non-enablement because it's impossible to make. We're
13	rebutting that.
14	JUDGE OBERMANN: Okay, okay. Thank you.
15	MR. FLANNERY: Thank you. So I'll finish, again in the interest of
16	time, I see we only have 12 minutes, and go to Slide 82. Again, you're going
17	to hear a lot about the lack of tooling in Long. One of ordinary skill in the
18	art couldn't make any. Again, this kind of goes to the point that we were just
19	discussing. There's no tooling, no tooling discussion in Long. This is their
20	specification. This is the tooling that they disclosed, a body and a ram.
21	They're living in a glass house. They don't want you to look at their
22	specification. It's the same level of description of the tool.
23	JUDGE OBERMANN: Isn't that really what's critical, is that they're
24	holding the prior art to a higher standard on their own disclosure?
25	MR. FLANNERY: Absolutely. Absolutely, Your Honor.

1	JUDGE OBERMANN: And did you argue that somewhere in your
2	reply?
3	MR. FLANNERY: I think it pervades our entire analysis, Your
4	Honor. So unless you have any further questions, in the interest of time I'll
5	stop. Thank you.
6	MR. FISHER: Thank you, Your Honors. I do know we're short on
7	time, so I'm going to skip ahead to just a couple of the things with respect to
8	Meadors, in fact really just one thing.
9	JUDGE OBERMANN: Can I ask just before you start, when are we
10	going to hear from your LEAP practitioner?
11	MR. FISHER: He is going to handle the motion to exclude
12	arguments. That was our current plan.
13	JUDGE OBERMANN: And you have 11 minutes, so when is that
14	going to be?
15	MR. FISHER: We have 11 minutes total including
16	JUDGE OBERMANN: In your primary presentation. You can't
17	bring stuff up in your rebuttal that you didn't address here in your primary.
18	MR. FISHER: Well I mean so Mr. Reilly is going to do the rebuttal
19	of Patent Owner's motion to exclude.
20	JUDGE OBERMANN: Oh I see, I see.
21	MR. FISHER: We're not asserting our motion to exclude anymore.
22	JUDGE OBERMANN: Okay, thank you. Sorry about that.
23	MR. FISHER: All right. So can you please turn to Slide 97?

1	JUDGE TARTAL: Sorry counsel, just to clarify what you just said.
2	Did you say Petitioner has a motion to exclude and you're no longer
3	pursuing the motion to exclude?
4	MR. FISHER: Yes. It's our understanding that Patent Owner has
5	withdrawn the exhibit that was the subject of that motion.
6	JUDGE TARTAL: Okay, thank you.
7	MR. FISHER: So it's become moot. All right. Patent Owner has
8	argued with respect to Meadors that Meadors doesn't disclose a
9	thermoformable sheet. I don't know what to say about that, other than it's
10	right there in black and white. There's this Blank 100. It appears in every
11	drawing of the equipment of Meadors that's used to thermally form that
12	sheet and Meadors says, and I quote "A Blank 100 of flexible material is
13	provided."
14	Going on, "the material may be of any known type, including but not
15	limited to paper or thermoplastic material." So there's just no doubt that
16	Meadors discloses the use of thermoplastic material in the forming of a
17	thermoplastic material into an article. I just don't know what else to say
18	about.
19	Can we please go to Slide 109? Okay. This gets into Patent
20	Owner's non-obviousness arguments. Patent Owner has latched onto a
21	statement in Long which extols its own process as superior for Portelli.
22	They're exaggerating what Long actually says. Long does not say that prior
23	art processes would always produce puckering and distortions. Long says
24	that that would sometimes happen. Of course, Long's an inventor and is

going to talk up his own invention as superior to what went into the -- in the
prior art or as some improvement over the prior art.

At no time did *Long* say that the prior art, much less every prior art process, was inoperable or not enabled. Patent Owner also claims that you can't combine *Portelli* and *Long* because you'd have to modify either *Portelli's* or *Long's* process, thus destroying that reference's principle of operation. But *Long* doesn't actually require -- to produce the claimed geometric elements doesn't require a combination of the *Long and Portelli* processes. Each process can be done by itself.

Either *Portelli's* process can produce those shapes, or *Long's* process can produce those shapes. There is no need to combine the two processes. The principle of operation is that you displace the peripheral edge away from the overwrap. Please turn to Slide 110. Patent Owner also claims that if you were to add a quote, what they call an "elbow" to *Long's* tray, there would be no reasonable expectation of success because the peripheral edge would stick out so far it's going to cut that overwrap.

We know that's not true. We have actual trays made by Alto using *Long's* process. They have a tail on them. That counterband is what Patent Owner's calling an elbow, and this is a photograph taken by our expert of an actual tray, and you can see there's daylight between that peripheral edge and that straight edge, where is where the wrap half would be. So there is a reasonable expectation of success.

Let's flip to Slide 110. I addressed this a little bit. The combination of interchanging features between *Portelli* Figures 8 and 13. Patent Owner claims that that's hindsight. We talked about the *Boston Scientific* case, that

it's two embodiments. Even if you interpret them as two different 1 embodiments, they're right there in the same reference. There's no leap of 2 inventiveness to combine two embodiments from the exact same references. 3 Again, consider the simplicity of the claim elements we're talking 4 about. If you look at Slide 111, we've overlaid those elements onto that 5 example from Throne, again almost 20 years before the priority date, and 6 you can see the simplicity of these elements. The band region, the bent 7 portion, a couple of straight line segments. These are -- it's a standard 8 process that was already well-known decades before Patent Owner filed its 9 application, plus very simple elements. It doesn't take -- it's not rocket 10 science to combine them. 11

All right. Let's go to Slide 114, Objective Indicia. The Patent 12 Owner's managing partner, Jeffrey Maguire, claims that Patent Owner 13 pioneered the first rolled edge recyclable plastic food packaging trays, and 14 literally created the market. They also claim we don't deny copying. Well, 15 they've got their facts wrong. First of all, at least Alto beat them to the 16 punch by six years in terms of rolled rim trays, and we also know that non-17 circular articles were already considered old decades before Patent Owner 18 thought of them. 19

Mr. Maguire, of course he's the managing partner. He's going to say that. His statements should be taken with a grain of salt, and they are trying to -- because we didn't address that particular thing in -- well, let me just say this. It's simply not true that we don't deny --

JUDGE OBERMANN: Did you waive the argument -MR. FISHER: We don't admit it.

1	JUDGE OBERMANN: Did you waive the argument by not
2	responding to it?
3	MR. FISHER: I don't consider the argument
4	JUDGE OBERMANN: How can you stand up here and make the
5	argument if you didn't make it in your brief?
6	MR. FISHER: I guess our I'm not sure where I'm not sure if we
7	made it in the brief. I just don't recall. But I will say that we're certainly not
8	admitting that we copied, and that's really all I can say.
9	JUDGE OBERMANN: Well the rules here if you don't raise it in
10	the brief, it doesn't exist, even if it's in the record somewhere, because we're
11	only going to look at the stuff that you direct us to in your brief, and there is
12	a concept of waiver in our forum. So if you didn't raise it in your brief, I
13	think you've waived it.
14	MR. FISHER: Okay. I understand, Your Honor.
15	JUDGE OBERMANN: Thank you.
16	MR. FISHER: Oh, it's been pointed out to me that we actually the
17	argument is in the record because we made it in our discovery motion as
18	well. So it might not be in the substantive briefs, but we believe that it is in
19	the motion for discovery, in opposition to Patent Owner's motion for
20	discovery that was filed earlier. So the argument is actually in the case if it's
21	not necessarily in our in our reply.
22	JUDGE OBERMANN: Okay, thank you.
23	MR. FISHER: All right. So I guess that's, that's all I have really.
24	I'll take just a few seconds just to conclude that we think all the challenged
25	claims should be found unpatentable for multiple reasons. Every claim

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element is in the prior art. Every claim is anticipated, most of them multiple
times over independently by multiple references. Patent Owner's nonenablement and inoperability arguments are rebutted by a mountain of
textbooks and other literature, massive quantities of commercial products
that prove that the primary references are enabled.

As far as obviousness goes, there is only one solution for the alleged problem, which is to roll the rim away from the periphery, and again these are very simple geometric features that we're talking about. So all of this, in addition to anticipation, makes the challenged claims obvious. Thank you.

> JUDGE TARTAL: Counsel, one last question before you finish. MR. FISHER: Yes.

JUDGE TARTAL: Is there any dispute between the parties over the
level of ordinary skill in the art and what was your position on that?

MR. FISHER: Undue experimentation -- oh, the level of -JUDGE TARTAL: Level of ordinary skill in the art.

MR. FISHER: Sorry, the level of ordinary skill in the art. Level of ordinary skill in the art is fairly low. It's a bachelor's degree and two years of experience or no degree and three years of experience. Patent Owner is trying to carve out a bunch of things that they claim a POSITA couldn't do, such as they couldn't work non-standard equipment, whatever that means. I don't even know what non-standard equipment they're referring to. It doesn't seem like there's anything like that in this case.

Our position is that we should keep that, the definition of a POSITA as simple the way we had it. Again, a bachelor's degree plus two years of experience or no degree and three years of experience, and we don't need all
these carveouts that Patent Owner is trying to assert from the ability of a 1 POSITA. Those don't make any sense to us. 2 Also, I should say that some of the things they're trying to carve out 3 are in fact just routine manufacturing practice. So it would be well within 4 the skill of a POSITA. Is there anything else? Okay, thank you Your 5 Honors. 6 JUDGE OBERMANN: Thank you Mr. Fisher. Thank you. 7 JUDGE ROSS: Okay, I guess we'll hear from Patent Owner now. 8 (Pause.) 9 10 MR. FARCO: May it please the Board, thank you Your Honors for your time today. 11 JUDGE OBERMANN: I just want to set the clock. You have 90 12 minutes. 13 MR. FARCO: Certainly, yes. 14 JUDGE OBERMANN: Is that correct? 15 MR. FARCO: Just one point, Your Honor. Did we discuss the 16 objections to the demonstratives at all, or is that being taken under 17 advisement? 18 JUDGE OBERMANN: I believe Judge Ross mentioned that it 19 would be resolved, you know --20 MR. FARCO: Okay, thank you. I just wanted to make sure. 21 JUDGE OBERMANN: So I'm going to put 90 minutes on the 22 clock. 23 MR. FARCO: I have a surrebuttal of 30 minutes. 24 JUDGE OBERMANN: Okay. So I'll put 60 minutes on. 25

1	MR. FARCO: Thank you.
2	JUDGE OBERMANN: And don't worry, I'm going to wait until you
3	begin speaking before I start the clock, right?
4	MR. FARCO: Okay, thank you very much.
5	JUDGE OBERMANN: So you just take your time, and when you're
6	ready I'll start the clock.
7	MR. FARCO: I'm ready.
8	JUDGE OBERMANN: Okay.
9	MR. FARCO: Great. Thank you Your Honors for your time today.
10	I'd first like to point out that much of what Petitioner is really asking this
11	Board to do is to overlook certain inconvenient truths, which I think Judge
12	Obermann actually alluded to. The record is replete with evidence that, you
13	know, as of the, you know, as of 2015, we know from the Nelson reference
14	that no one could roll the rim of a rectangular thermoformed article. Then
15	we know on August 12th, 2015, literally weeks before the critical date in this
16	matter, which is undisputed by the parties, that the Portelli reference,
17	meaning that it often occurred in pucker, you know, that puckers, distortions
18	often occurred in the lip, and therefore it had to be avoided as a process to
19	pursue, and that was a statement by their reference, Long.
20	So you're saying literally weeks before the critical date, the state of
21	the art at that time was stay away from this double-staged thermoforming
22	technique that was purported to be used by Portelli, because it often
23	puckers often occurred. So to my colleague's point, the whole technology
24	here relates to mass production. I mean frankly if Long was so concerned

about puckers often occurring, and therefore the process should be avoided,
 that speaks to the fact that this technology is for mass producibility.

Now it's inherent in the thermoformed art field that you're going to
mass produce products. That's how the business work. Moreover -- sure.

JUDGE TARTAL: I apologize.

MR. FARCO: Sure.

5

6

JUDGE TARTAL: If you'd pause there for a moment, because 7 we're dealing with the claims that are challenged, not the state of 8 manufacturing or the business operations or anything. So there's a bit of an 9 issue that we -- that I have that is trying to reconcile some of the arguments 10 you make with what's claimed. So just as a hypothetical, if I see this person 11 at a desk with, you know, one sheet of plastic who can form the article, and 12 it meets your limitations in the claim, is that not sufficient if that was, you 13 know, something that was done before your claim, to practice what you're 14 claiming later? 15

MR. FARCO: Well if that -- if that process by which he did it was publicly disclosed, so that a person can make and use without undue experimentation, then that would be -- and can do so, and the person wanted, I guess to answer your question Your Honor, which I will, is that the person of ordinary skill in the art of thermoforming is looking at each of these references about whether the thing that they're looking at, can they put this into a thermoforming equipment to mass produce it on scale.

23 So certainly if someone proposed that method, they may say it may 24 be sufficient for them to do en masse. They could say look, I can get 25 machinery and mass produce it. However, that individual in your

hypothetical did so. Assuming they gave disclosure, if they gave all the
details, which the references do not give, then I would agree with you. Yes,
if they could show that. But I'm saying our expert opined again, consistent
with what the record evidence shows, that individuals in this field look at
mass production and at the end result, the mass producing of the article.

It is true, the claim calls for an article. But the person with ordinary
skill in the art, the lens through which they look at these references, is
whether or not that article can eventually be mass produced, if that's the -that's the basis of thermoforming is to allow these mass productions.
They're not one off and ice sculptures and something that would be done in
sort of a one off.

JUDGE OBERMANN: The claim doesn't require mass production,
 so I don't see how you're getting to that.

MR. FARCO: Your Honor, the claim does not say it's not a process claim. But the point is how a person of ordinary skill in the art looks at the references and analyze them, to say whether or not it's, you know, a teaching. That's our expert's position. In fact, that's I think part of the concern that the industry seems to have is that they -- no one knew how to do this process.

JUDGE OBERMANN: Where in your disclosure do you have anything that teaches the artisan a supposedly impossible task of mass producing thermoplastic?

MR. FARCO: Well, the two-way one pad, for example, at Column 18, lines 22 to 30, does contrast. One of their examples of -- I guess they talk about the spacer there. But there they talk about it's not, it's not as

useful for, you know, in a large scale production or large scale production 1 sense. So the patent alludes to the end, you know, the direction for where 2 you're going to be using this process. But as far as the -- as far as the 3 disclosures, the patents, all challenged patents provide what the molds look 4 like. 5

6

It shows the tool angle. It shows the processing in very, very step by step increments of what --7

JUDGE OBERMANN: I don't see any difference between that and 8 what's disclosed in Portelli. 9

10 MR. FARCO: There's critical differences, Your Honor. First and foremost, Portelli gives you a beginning and it tells you the end. It doesn't 11 show you in fact what happens. It doesn't show you the step by step process 12 of what is to be done, and that's important though Your Honor, because it's 13 easy to show the beginning of when something starts. And the end, the end 14 result is what everyone hoped to achieve. 15

JUDGE OBERMANN: Well, if all you're claiming is the article, 16 why does that matter? 17

MR. FARCO: Because Your Honor, according to the case law, 18 Raytheon and the White Consolidated Industries cases these -- the methods 19 to make and use the embodiment of the claim is critical, dispositive of the 20 enablement issue. These references teach. They don't just show a desired 21 result. They don't say listen, this is what you want to get to, and we gave 22 you some starting point. Go do some extra research and you'll get there. 23

The problem with Portelli is just that. It tells you end results, but it 24 doesn't tell you how to get there. Furthermore, if it actually went all the way 25

through as if you start reading and, you know, *Portelli* mentioned, why
would Portelli say things that would be counted to the alleged, you know,
inventor's intent. We don't know that; I never got to speak to Mr. Portelli.
But the point of the matter is in the *Portelli* at page two, lines 19 and 21,
Portelli does say that it's hoped that its methods solved some of these
problems. It's not even a definitive statement that they do.

The problem, of course, is that that's what Portelli said. Petitioner's 7 now saying it's a statement of fact, that it did achieve those things. The 8 record evidence shows that literally weeks before the filing date, is that 9 another, the other reference that they're relying on, Long, the Alto Group 10 said that it couldn't do that. So this -- and our expert, having done 11 simulations to show -- and by the way, talking of the simulations, Mr. 12 Clements just showed that the very first time in the fourth embodiment, 13 which I believe is the only embodiment that Petitioner contends is shown by 14 these post-critical date protestees that are not the Portelli reference at all. 15

They say that that is going to result in puckers, only because the 16 forming temperature to actually start the -- to even make the plastic mold, 17 that temperature can be felt all through that portion of the tray. Now Portelli 18 doesn't show these things, because it either didn't know or didn't actually test 19 it and put it to work. But certainly the other record evidence, the Nelson 20 reference Exhibit 1009 at paragraph three; Long referenced the Alto 21 prosecution history that we cite, Exhibit 2010. They're all showing at the 22 critical time in 2015, they couldn't accomplish Portelli. 23

If there's any question, let's say we take -- let's take Petitioner at its word, that this Dexter RRIM technology is an analog to *Portelli*, which in

fact there is not any clear evidence other than their expert's *ipse dixit*,
assuming the RRIM technology was an analog to *Portelli*, this same
company said that they couldn't achieve these desired results. And so 2016,
at that junction, even though *Portelli* shows beginning/end, it doesn't show
the increments in between and frankly its methods failed.

Moreover, you know, the patents show the final product. So the 6 person with skill in the art can look at these disclosures, see the 7 methodologies, see the tooling and say that is what we want to achieve. The 8 patent is replete with photographs, actually photos of the things showing. It 9 10 gives a person with skill in the art that's what I'm aiming towards. All we have is we have drawings from *Portelli*, which their expert agrees that they 11 show anomalies and they show pixelations. I mean you can't rely on 12 ambiguous references. 13

I heard today that when Judge Tartal asked my colleagues about the various embodiments, can it be one embodiment, can it be separate embodiments, I understand now that you can construe them as many possibilities in *Portelli*. That's not the standard for anticipation. It also is not the standard for making the reference clear or clear or teaching about what in fact it is saying.

If we say that, you know, the *Kennametal* argument is what Petitioner is using to avoid the fact that their petition. They cited the blocked paragraph from *Portelli* that they allege was interchangeability. That paragraph didn't support them. Their expert was questioned on it. He conceded that there was no support in that blocked paragraph in *Portelli*.

Now they're relying on *Kennametal*, which is an improper reply argument.
 But they make that here, so I just want to make sure it's clear.

It doesn't matter. The missing limitations in Portelli are because the 3 disclosures are these line drawings that are, and it gets cryptic at best 4 according to Petitioner. And so your -- the person of ordinary skill in the art 5 is forced to look at *Portelli* and try to figure out one, what's the anomaly, 6 what's the pixelation? What's the reliable drawing, what's not? Which 7 reference goes with what? To me, the ambiguity that's built around the 8 reference, it takes away from its teaching function which, unlike the patent, 9 shows you. 10

You want to know the mold to make this? It shows you the mold. It 11 shows you the curvature. It shows you the process. It shows you the trays 12 that you make. It shows the tray in the mold and it shows a tray out of the 13 mold. It even shows you the very particular rims. In fact, the figures go into 14 detail about how with each different increment, you could get a different 15 periphery. None of that exists in the prior art. It's all based on speculation 16 and what their witnesses are saying now, what's -- their one witness, Mr. 17 May when it comes to Portelli. 18

If we go beyond when the patent -- by the way, after Patent Owner started selling its product, we'll go beyond there and try to say okay, well the rolled rim technology has now finally accomplished that. Your Honors, I think what's very instructive here beyond *Raytheon* case, which was a case from the Board, where the Federal Circuit had reversed because in fact that question about whether an intermediary material used to make this turbo claim was in fact available at the time.

Their claim was going for the turbo claim, but the material for it was relevant to making and using it. Very analogous here. Yes, they're saying well they showed -- they showed the final end result, but anyone could draw a picture, but can you get the result to get it to happen? That's the question. Now I know the claims aren't directed to it, but nor were they -- the claims in *Raytheon* or in I believe in *White Consolidated*, those claims also required a particular type of translator.

And in that case, the argument was made -- and that case involved a 8 patent that was being challenged for lack of enablement in the White 9 Consolidated Industries case. And in that case, the argument was made well 10 yeah, there were other -- there's other translators out there, and there was 11 translators that existed after the filing date of the patent. That's not, unless 12 you could show that there were known to be suitable or related to what was 13 disclosed, you can't rely on them and say well, because they came after the 14 fact. 15

The point is we tried -- the law requires that the person of ordinary skill in the art be in possession of that which is supposedly available to them in the prior art. If that principle is nullified by Petitioner's musings here, you could transform anything that would have been science fiction before the filing date and then subsequently someone figured out how to do that. That's the antithesis of disclosure; that's the antithesis of what is prior art.

22 So I submit here that there's then a question about the legal standard. 23 You have to show that someone with ordinary skill in the art can make and 24 use the embodiment you're relying on, whatever it may be, before the critical

1	date. Here, it's without dispute, that there are no pre-critical date examples
2	of commercial embodiments and I still haven't found
3	JUDGE ROSS: Mr. Farco, let me stop you there.
4	MR. FARCO: Sure, Your Honor.
5	JUDGE ROSS: Are you saying that our case law requires
6	commercial examples to show enablement?
7	MR. FARCO: Oh no, Your Honor. I apologize if my inelegant
8	that's one of the available portions. It's one of the available factors under the
9	Wands test. It just so happens it just so happens and, you know, I'll go
10	I'll go to that now. It just so happens that, you know, Patent Owner
11	identified five of these Wands factors in there in Patent Owner's response,
12	and Petitioner apparently wants the Board to focus on the two most relevant
13	ones.
14	One is the predictability or unpredictability, and then the presence or
15	absence of working examples. But you're right, Your Honor. There's no
16	requirement of commercialization. We just took it. We were addressing it
17	because Petitioner felt that that was relevant.
18	JUDGE ROSS: Fair enough. I do have another question.
19	MR. FARCO: Certainly.
20	JUDGE ROSS: Because it seems like the Federal Circuit has
21	instructed us, that enablement under 112 and 102 for prior art purposes is
22	different, and specifically the Verizon case and I think it's Bristol-Myers
23	Squibb, say that it is well-settled that neither utility nor efficacy is required.
24	And so this is, I think, what we need your help with.
25	MR. FARCO: Sure.

JUDGE ROSS: What does enablement for this purpose look like? 1 MR. FARCO: Absolutely. 2

JUDGE ROSS: And I asked Petitioner this, and so I'd like to hear 3 from you. 4

MR. FARCO: Certainly. Your Honor, that's a great question. I 5 think in those cases, which I believe you're referring to the prior art 6 embodiment that's under examination doesn't have to be the best, doesn't 7 have to yield the best results. It just needs to meet the claim limitation. 8 What we have here, Your Honor, is a circumstance where the claimants 9 required the formation of a smooth periphery. So in fact there's a union of 10 both the operability, if you will, and the claim limitations. 11

These references do not teach articles that can form smooth 12 peripheries, if they can even be done at all. So the problem, here, and to 13 assure Your Honor, that's where this case, I think, is where you have an 14 overlap in the Venn diagram where the utility, the utility efficacy if you will, 15 you know, obviously I normally analogize with pharmaceutical cases, but 16 you want -- you want a rectangular thermoformed article with a smooth 17 periphery, all about the article. 18

If you don't achieve that, you fail. You fail the claim, but you also 19 fail in terms of the inoperability of the device. So I think here you have that 20 intersection, and that way it is different. Now whether or not Petitioner 21 complains that that's a higher standard, well let's look at -- we've been, you 22 know, everyone says go back to the claims. The claims require a smooth 23 periphery. That's the invention. If you can't achieve the smooth periphery 24 of the thermoformed article, then you're out. 25

1	So when it comes to Portelli all these questions about operability
2	and the fact that they have puckers and distortions, that's very critical
3	evidence because it takes away the fact that you can show that that reference
4	can meet that claim limitation. And it's in that way that the enablement issue
5	here is a little bit different than those ones where you might see a distinction,
6	the divergence between 112 paragraph one and the enablement of prior art.
7	JUDGE OBERMANN: Now you're talking about periphery, and
8	your plan directed us to your own witness' testimony that a POSITA would
9	know the design criteria for the mold necessary to turn to thermoform
10	Long's particular precursor with the periphery shown in Long's figures. So it
11	seems to me that you have a problem here, because your own witness is
12	testifying that that periphery would have been doable.
13	MR. FARCO: I think my colleague might have been a little bit
14	misdirecting the context of what Mr. Clements' other opinions which are -
15	- other paragraphs that you did see.
16	JUDGE OBERMANN: We did see them.
17	MR. FARCO: Correct. But Your Honor, Mr. Clements said that
18	while you can make that article in a mold, you can't get it out, and you also
19	can't cut it the way that Long is telling you to do so. In fact, there's no
20	based on the little, limited vague guidance of that reference, you couldn't
21	figure out how to do it. In fact the parties were at loggerheads about using
22	robots to do this reference. We didn't find out 'til the reply that in fact there's
23	another method that was apparently under lock and seal at Alto, that you
24	know apparently no one can obtain unless you sign an NDA to do this
25	cutting.

1	So in other words, Mr. Clements used the limited information he had
2	and said a person of skill in the art would know this particular mold that
3	would be able to do it, to try and make the precursor. But Long's teaching is
4	not related to the precursor. It's about getting that precursor out and then
5	subsequently cutting it.
6	That aspect of that's a critical distinction that's not being I guess
7	was not being conveyed by counsel, is that while yes, he could come up with
8	a mold, but just like Mr. Naughton testified in his deposition, they came up
9	with molds also where an article that's locked in the mold. In fact, the prior
10	art references that were cited and relied on by Mr. Clements, which
11	Petitioner doesn't dispute at all, the teachings about crimp connections, a lot
12	of people knew how to crimp and lock a thermoformed article in the mold.
13	The problem is <i>Long</i> says that you could somehow take it out.
14	JUDGE OBERMANN: So what about Alto Packaging? Weren't
15	they doing this since 2012, millions of them?
16	MR. FARCO: That's the word from Petitioner's counsel, who aren't
17	witnesses to any of that. No witness has any evidence of what took place in
18	Alto before Mr. Naughton got into their ear in 2016. They have this screen
19	shot that apparently is their linchpin to suggest that apparently things were
20	taking place, but that's it's all based on hearsay. It's unauthenticated. It
21	wouldn't even pass Mr. May's reliability standards, because it doesn't tell
22	you anything else about what date it was sent, what it was referring to. In
23	fact, that tray, if it was referring to a tray at all.
24	JUDGE OBERMANN: Where in your patent does it talk about how
25	to get the thing out of the removing the precursor?

1	MR. FARCO: Well in our patent the two ways of
2	JUDGE OBERMANN: That's the teaching that was missing.
3	Where is this magical teaching that no one know how knew how to do?
4	MR. FARCO: Well, the challenged patents tell the person with skill
5	in the art that you take your you take any thermoformed article, how you
6	make a thermoformed article. A person with skill in the art would make a
7	thermoformed article, take it out and then using the molding and the
8	processes in the patent, you can roll the terminal edge, and by different
9	molding techniques, you can achieve different peripheries.
10	JUDGE OBERMANN: Yeah, and now you're saying that they
11	wouldn't have known how to take it out of the mold. So where is this
12	magical teaching in your patent spec that has this teaching about removing it
13	from the mold, that no one knew how to do at the time?
14	MR. FARCO: The patent, the patent was taking trays that people
15	were already making, and taking at they're trays that people were making
16	already. It takes a standard
17	JUDGE OBERMANN: So they were getting them out of the mold
18	apparently.
19	MR. FARCO: Right, but we didn't require undercuts, Your Honor.
20	We didn't teach an undercut to cause the rounded periphery. That's what
21	Long was teaching. Your Honor, it's a very it's a very important point.
22	Long does not want to do what our patents disclose. We talk about we
23	have it, the way the patents talk about one embodiment's a double-staged
24	thermoforming. We do teach methods where it's cold-formed.

But *Long* says that it's at trimming operation. It's an important distinction, because the only way with trimming, you have to start out with something where you want the final edge to appear, has to already preexist. For them to do that, they have to somehow get the plastic to point away from the periphery. That locking that's caused by that teaching, is what makes the *Long* reference impossible to achieve, only because the way that he disclosed it, he doesn't give any more detail about how to do it.

There's critical pieces missing. So the methodologies that Long 8 chose to use, which Long says -- Long actually said that double-staged 9 thermoforming like Portelli and like some of the embodiments in the patent, 10 should be avoided. So Long does want to do that. Long actually wants you 11 to take the precursor, try to make it so that it's, you know, that the piece 12 that's going to subsequently be cut is out of the periphery, and then cut it out 13 of that space. But what he didn't contemplate was that by not telling people 14 how to -- by not telling people how to get it out, and then subsequently not 15 telling people how to cut it, he left the person of skill in the art in the lurch. 16

That's what Mr. Clements is saying. Taking the reference where you would start at, he shows you what a person with skill in the art would do. He would say, you know, I'm trying to make this precursor, but you're going to get stuck every time. When I asked Mr. Naughton about how would you make this *Long* reference, he said "we couldn't do it. We don't have tooling expertise."

There's stuff missing from *Long*. It left you with a -- it left you with these vagaries about how to -- it told you what you wanted. Again, like *Portelli*, it told you what you want, what you desired, but it didn't tell you

how to get there. That's the *sine qua non* of enabling, is teaching the person
of ordinary skill in the art to make and use. It's not up to say yeah, and a lot
of -- a lot of science fiction is built on that. Here, we now further learned
when Mr. Clements testified that he couldn't come up with the other tooling
assembly that *Long* refers to, now we know why.

Because in order for a tooling, all the tooling designers that were 6 discussed by Mr. Naughton to work on this technology, they had to fly out to 7 New Zealand, sign NDAs and then at that point they learned it, and he uses 8 the word quote "got it." They got it, only after they went to New Zealand. 9 My colleague wants to preempt this a little bit, but it is quite interesting that 10 he would do so, because the White Consolidated case in sum dictum, and 11 again that's the case that involved enabling of a patent. That case stated that 12 -- in that case, if the patent owner, which was Sundstrand, were Sundstrand -13 - and I'm reading from 713 F.2d 788, pin cite 791. 14

So they start by saying first, "Though the language translator by 15 itself is not the claimed intervention, it is an integral part of the disclosure 16 necessary to enable those skilled in the art to make and use the same. Were 17 Sundstrand," now White, again the patent owner, "to maintain Split, the 18 language translator as a trade secret it could, as Judge Cohn noted, 19 'theoretically extend its exclusionary rights beyond the seventh tier like the 20 patent, by controlling access to Split. That's a result inconsistent with the 21 objectives of the patent system." 22

Here, Alto made the conscious choice to maintain its methodology of making the *Long* reference desired results a concept under NDA. That was a choice they made. They're entitled to do so, and I don't profess to

know Australian parallel, whether they even require enablement. The point
is Petitioner's relying on a reference where the record is clear. Other than
Mr. May, everyone is saying that the available tooling that would be needed,
in fact any tooling for that reference is not in that reference at all, and it
wouldn't have ascertainable.

And in fact experts come to different conclusion on what the tooling 6 could possibly be. That is ambiguous reference in the law, as you cannot 7 rely on ambiguous references to anticipate. But I think it's also it's key, I 8 asked Mr. Naughton don't you think it would -- would it defeat the purpose 9 of the NDA if you disclose how to make and use the Long reference, and he 10 said yes. I think his word was that "you're right." But he agreed with me. 11 That to me is -- that to me suggests that there is an implicit -- not only do we 12 know that the tooling is clearly not there. No one could testify. All we have 13 are, you know, extraneous citations to textbooks, many of which can 14 contradict a lot of the same points that Petitioner is relying on them for. 15

But there's nothing to suggest in the record that a person of ordinary skill in the art, looking at the *Long* reference had the necessary teachings to make and use that reference before the critical date at the very least.

JUDGE TARTAL: Counsel, can I just interrupt you? Are you -you're referring to, I understand, the tooling that could make the reference,
could make the reference taught by *Long*. But are you referring to tooling in
a mass production environment, or are you suggesting that under no
circumstances could any individual, just working off a sheet of
thermoplastic, make the shape that's shown in *Long*, which is all your claim
requires?

1	Not that you have the tooling that lets you do a million a minute or
2	allows you to do a cost effective amount or anything else. It's just whether
3	or not a person with ordinary skill in the art could make the shape shown in
4	Long, based on what's shown what's disclosed in Long, under any method
5	of tooling or devices or anything? Isn't it possible, or is there evidence that
6	that's just literally impossible to achieve?
7	MR. FARCO: So Your Honor, to answer your first question, when I
8	asked Mr. Naughton the question, by handing you Long, can your engineer -
9	- well, can you make it? He said no, we can't. We don't have the tooling
10	expertise. So then the question at that point he had, you know, at that
11	point the method to make it had never been framed as whether one or
12	millions. It was just saying he just couldn't make it, unless you wanted to
13	outfill to learn how it was done.
14	When Mr. Clements tried to do it, and again he to try it, he does
1.5	say that to do it in a mass production sanse is even then even more to the

say that to do it in a mass production sense is even, then even more to the
point why he can't do it. But just trying to get one article out of the mold
would be impossible, given what he -- given what the reference shows. All
he had was what the reference showed. He had Mr. May's measurements,
which Petitioner relied upon. He used those measurements, and I'll go to
those in a second here.

So this is slides -- this will be my Slide 109 in our demonstratives. So the relative skill of those in the art, then this factor shows that what a person of skill in the art at that time period would have known about dealing with undercuts in thermoformed articles, it would show that with the available resources to them, and these exhibits are highlighted in blue and

the citations in the record where these exhibits actually were cited, will show
you.

And this is -- you know, I got to Slide 109. Slide 110, this is what 3 the Patent Office was reporting back on some of these same references in the 4 same field, is that you're going to get crimped connections between the 5 thermoformed article once you heat it and it shrinks around the overhang. 6 It's going to lock in place. In fact, these references are all showing 7 applications of locking things into place, because these particular references, 8 Exhibits 2018, Exhibits 2020 and Exhibit 2019, they're talking about skilled 9 artisans that were looking to currently attach articles to one another and 10 there, they were using crimp connections where the overhang was showing 11 again dimensions that were far exceeded by the Long reference. 12

So again, we had -- without knowing much, anything else about the *Long* reference, Mr. Clements followed what Mr. May said were the dimensions, took those dimensions and applied these teachings. And in that case, he came out and found listen, you can't get crimp, for the same reason these artisans here, as being discussed in Slides 109 to 112 and 113, they're going to get locked into place for the same reasons.

Petitioner's only argument is look, I have an article that was made in 202017 and it's -- but there's no proof in the record that what was being done in 2016-2017 was being done in 2011. Mr. Naughton testified clearly that he 2223 wouldn't know, because you have to talk to Alto. They didn't prove any of 2334 these things. They didn't prove that what's being done today was being done 2444 back then. So once again, there's nothing in the record to suggest that the 2555 substitute for this reference, assuming it was even public which all the

evidence points decidedly towards that it was not public, was available to the 1 person of ordinary skill in the art. 2

I think what Petitioner would like the Board to say is look, someone 3 eventually made it, but that's the whole point when you have the enabling 4 requirement. Yeah, Patent Owner made it. Everyone's saying was 5 impossible. I mean Dexter came out -- Dexter. Again, they're relying on 6 Dexter to say that they made *Portelli* or what now are the *Portelli*. I'll touch 7 a little bit on that in a moment. But if everyone's saying that it couldn't be --8 it was impossible until now, Petitioner would like this Board to say well 9 that's marketing puffery. 10

But then all the other -- you know, if that, if you start questioning all 11 of the statements made, it calls into question their entire case, in which they 12 bear the burden of proof. So I'm taking -- you know, I only had these, my 13 expert and our analysis is only based on the record before us. I can't infer 14 what someone meant when they said, you know, I never asked Dexter if it 15 was marketing puffery. But what -- you know, on the topic of that, it's 16 extremely to find that in 2018 when challenged with the Exhibit 2060, when 17 DexterMT's, the hearsay declarant that Mr. May was supposedly telling us 18 what he said, this same individual said that he couldn't make a rolled rim in 19 thermoformed rectangular article without making sharp puffers. If you 20 would permit me, I'll go to that in a moment too. 21

All right, yeah. So I thank Your Honors for the courtesy on that. So 22 the end result that's shown by Mr. Willemse of DexterMT, in 2018 --23 JUDGE TARTAL: Could you just say what slide?

- 24
- (Simultaneous speaking.) 25

1	MR. FARCO: Oh certainly yes, Your Honor. Slide 47, Slide 47.
2	So here, this was using this RRIM technology, and this is what Mr.
3	Willemse stated would happen when they tried to make a rim like the one
4	shown on the left. And then when asked about how just asking Mr. May
5	to consider how does this affect your opinion, he testified nothing would
6	change his opinion. Furthermore, he stated that this Exhibit 26 he had to be
7	irrelevant because of rim height. The claims don't require rim heights.
8	Furthermore, when we got further discovery on this, it was
9	determined that that rim is the patent practicing, industry-acclaimed 3P tray,
10	which going to the objective indicia, Petitioner doesn't dispute any of that
11	and there's no document that they filed in response to say we dispute it. In
12	fact, the objective indicia Mr. May completely ignored.
13	But going back to what I was saying about the Dexter process, this
14	here if this is in 2018 they're having problems making that tray using the
15	RRIM technology, it's hard-pressed for Petitioner to now say yes, you could
16	have done it. We don't know whether any of the articles that they talked
17	about in their papers even are embodiments of the claim. Their expert didn't
18	analyze it, and it might have been out of convenience or what have you.
19	The point is we don't even know whether these articles that they're
20	pointing to post-critical date are actually within the scope of any of the
21	claims. We don't know whether and then when you talk, if we really get
22	down to the granularity of it, you know, the RRIM technology is an in-mold
23	rim-rolling technology that was principally used for cups. How, and I think
24	Judge Tartal you brought it up, how on earth that that could be relevant to
25	Portelli, which is supposed to be talking about a rolled rectangular, rolled

edge rectangular article is to me has not -- I haven't seen the evidence to
make that leap, if you will.

The OMV publication, which we believe is inauthentic, it should be 3 excluded, there's no way to know what that's disclosing. I might blend into 4 this Patent Owner's other, you know, motion to exclude. If any of these 5 documents were received the same scrutiny that Patent Owner's Exhibit 6 2061, 2062, which are CAD drawings mind you in the record, and you can 7 see a portion of it on Slide 47. If Mr. May applied the same rigor that he 8 applied to that CAD drawing to any of the other presentations, which we 9 10 don't know where they came from, we don't know what they're showing, we don't know -- we don't know even what processes they're supposed to be 11 saying or being done or how they're being done, there's no way these things, 12 these unauthentic documents could be relied upon by --13

JUDGE TARTAL: Counsel, you have unlimited stream of thought.
 Can we --

MR. FARCO: Oh I'm sorry, I'm sorry.

JUDGE TARTAL: So can you stop for a minute? I think you're
addressing the motion to exclude?

19 MR. FARCO: Oh sure Your Honor, yes.

20 JUDGE TARTAL: Can you just give us the context of the

documents you're --

16

22

MR. FARCO: Certainly Your Honor.

JUDGE TARTAL: Tell us what they are and then sort of the
arguments of why they should be excluded.

1	MR. FARCO: Right. So we're looking to exclude certain, certain of
2	these photographs that were brought up in the Claimant's declaration, that
3	they were objected to on the grounds of foundation. Petitioner didn't rectify
4	those objections at the time. They claim the objections were only the
5	questions that the in our reply and the motion to exclude, the objections
6	were to the exhibits.
7	But I think what's more important is these their reliance on this
8	screen shot from Alto that Judge Obermann may have been alluding to with
9	the Alto trays. So the proof that Alto had been making these trays before the
10	critical date is premised on two photographs from we don't know how
11	they were made, who took them, when they were made, what they're
12	showing. In fact
13	JUDGE OBERMANN: Can you dispute do you have any
14	evidence that they don't show what they purport to show?
15	MR. FARCO: Certainly. Well so the with respect to the screen
16	shot, there's no there's no evidence there's no evidence what in fact was
17	what it's in fact showing, because Mr. Naughton testified he doesn't know
18	about the marketing practices at Alto. He doesn't know whether there was
19	an actual sale, whether that article was actually what that article was in
20	fact.
21	In the photographs, we don't know the dates. Furthermore, I think
22	the second photograph showing the green machine shows scrap that
23	appeared to the right of it, which Mr. Naughton says is abnormal, and
24	certainly there's no finished article shown ever. All we see are what appears
25	to be, you know, lines of some product, some you know black product, but

there's nothing establishing what in fact it is. And again, all of Mr.
 Naughton's understanding of what's shown in those photographs is all
 hearsay.

Again, there's no detail as to when these were taking place or what 4 they even show frankly. So Your Honors, we have -- there's a lot of 5 questioning, questionable interpretation of these documents that defeat their 6 credibility if there was any to begin with. We don't even know when they 7 were taking place. That screen shot is the only evidence, apparently, of 8 certain dated objects, but the problem is we don't know the date of that 9 10 screen shot, and we also don't know any of the individuals. None of them was put forward as a declarant on this case. So I can't ask them what the 11 context was, what that screen shot even shows. It's all, it's all assumption 12 that Mr. May feels will, you know, that Petitioner believes Rule 703 can 13 cloak and say yeah, you can rely upon it. 14

But Your Honor, I think our Rezulin case and the Riverbed case both 15 stand for the proposition that an expert cannot rely on just inauthentic 16 documents. But for the more important part, which we raise in our reply, is 17 that if this expert already has an established standard for reliability, these 18 same things would never pass muster under his own reliability standards. So 19 703 doesn't act as a "get out of jail free" card if you will. So these photos, 20 they originated in the Naughton declaration, paragraphs 10, 11 through 13, 21 and Mr. May relies on them. 22

So again Petitioner, I don't believe, has any real argument but
hearsay, and that we don't know where they came from. But they seem to
suggest this is the type of material on which an expert would rely. I just

don't think that squares with what Mr. May had argued about Patent Owner's
own exhibits, saying that they were unreliable, particularly these CAD
drawings for a litany of reasons. Not showing material, not showing the
perimeter, not showing a plane view. So not knowing who made them, who
checked them.

6 So the scruples that were applied -- the scrupulous analysis of Patent 7 Owner's own exhibits would suggest to me that if Mr. May was to be honest 8 in applying that same reliability standard, then these same unsubstantiated 9 drawings and screen shots would also be deemed unreliable as well by him.

JUDGE TARTAL: Counsel, does that go to the weight of the testimony, that we give the testimony of the expert, as opposed to outright excluding information the expert purports to have relied upon and considered?

MR. FARCO: Your Honor, the cases in which Petitioner has asked 14 the Board to look at, they did look at whether it goes to the weight. In those 15 cases, I don't believe anybody ever argued whether or not this is the type of 16 material on which an expert would rely, or there was no concrete standard. 17 The opposing party may have just said that's unreliable. But in that way, the 18 Board came to the conclusion that it will go to the weight. Here, all we're 19 suggesting that this would -- what distinguishes this situation from those that 20 are cited by Petitioner is that here, the expert has come out and in fact has 21 stated what he felt were bases for unreliability. If we apply those same bases 22 to the objectionable documents, we reach the same conclusion, that they be 23 excluded. But suffice to say, Your Honor --24

1	JUDGE TARTAL: We can also sorry to interrupt we could also
2	just decide that the weight of his testimony is just diminished, because he's
3	relying on what he's conceded are unreliable
4	(Simultaneous speaking.)
5	JUDGE TARTAL: is not sufficient to address the concerns you're
6	raising, because when you seek to exclude, you're eliminating the record on
7	review, and it becomes more and more of a consideration we have that
8	there's now information out there that is out of the proceeding.
9	MR. FARCO: All right, you know. Your Honor, I didn't mean to
10	do that. I'm sorry. Were you finished Your Honor?
11	JUDGE TARTAL: Yes.
12	MR. FARCO: Your Honor you know, Your Honor, if it was to be
13	given the appropriate weight, I don't think I would have an issue with that.
14	JUDGE OBERMANN: So would you withdraw your motion to
15	exclude all together?
16	MR. FARCO: Well, I think in the interim, I think we'd want to
17	make Your Honor, just out of an abundance of caution, because I don't
18	think even on review, I don't think the Federal Circuit would find any of
19	these references to pass muster under any
20	JUDGE OBERMANN: They're not going to be able to see it if we
21	don't if we exclude it from the record.
22	MR. FARCO: Well Petitioner will likely appeal and have it
23	included, and they could explain to the Federal Circuit why an inauthentic
24	screen shot which no one has any information should have been part of the
25	record in the first place. But as Judge Tartal has pointed out, if that was if

the Board feels it proper to consider and give it, you know, again what we
believe should be no weight, that I guess would be equivalent and could
honestly help the Board in terms of further review.

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I just don't think -- I don't think the cases they cite, and frankly I don't think they're going to find a Federal Circuit case that says these types of unsubstantiated, uncorroborated documents are evidence of anything.

JUDGE OBERMANN: We have cases where an expert comes in
and says look, I know that these things were done on a certain date, and we
give that appropriate weight.

MR. FARCO: Right. But Mr. May doesn't know when these were done. These pictures weren't -- he wasn't privy to any of these pictures. No one knows when they were taking place. It's all based on hearsay, and Mr. Naughton wasn't there. Mr. Naughton didn't come on the scene with Alto until 2016. They don't know for firsthand knowledge of these -- for these references.

In fact all the -- I think all the articles that are relied on by Petitioner,
they acquired them recently this year, in 2022. So you know, it's
questionable whether any of these references, any of these post-critical date
items in fact were made by any of the processes that they're talking about
now.

JUDGE OBERMANN: How about the textbook they cited, Throne?
MR. FARCO: Oh yes, Throne. Let's talk about Throne.
JUDGE OBERMANN: Are you disputing its authenticity?
MR. FARCO: Oh, the Throne reference? No, Your Honor. We're
not disputing the Throne textbook. I think they were citing it not so much --

they were citing that Throne that showed techniques like these existed
before, and Throne's actually kind of duplicative of what our background
section of the patent talks about. I'll explain. In their presentation -- so here,
and Your Honor before I go into this, I just want to make very clear that
when -- you had mentioned this point, it was very important.

In their reply, Petitioner says thermoforming is a mature, particular 6 art field. I think it's on page four of their brief. You will not find any of 7 these citations down here, and this is Slide 36 of the Petitioner's 8 presentation. You won't find those on that paper at all. They don't cite any 9 of it. I objected on that grounds, but it's okay. I just want to make sure the 10 Board's clear that -- so there's actually no -- they don't cite evidence, and 11 furthermore the evidence in our surreply provides why their textbooks show 12 unpredictability. 13

But let me go back to Throne, as Your Honor requested. Throne 14 does talk about these -- they show peripheries again. It's another type of 15 taking it out of context situation, where we look at these 1996 Throne 16 textbook figures on page 36 of their demonstrative, and then we go to page 17 37 of their demonstrative and you see they highlighted, you know, 18 discussing those peripheries. But do you see the unhighlighted sentence? 19 The first unhighlighted sentence, and it says "The standard method of rim 20 rolling is shown in schematic in Figure 7.94." 21

22 So let's go to 7.94, which happens to be on Slide 38, which was 23 skipped over by counsel. Now if you look at the top that's -- I'll submit to 24 you that's Figure 7.94. What is Figure 7.94 showing? Well, if we look 25 closely, this is on Slide 38, a forms cup inventory. Tiny screw and rod

heaters. Your Honor, the background section of the challenged patents, we
 knew that you could roll, you could use a screw to roll objects whose
 peripheries were equidistant from its center.

Now going back to Slide 37, they made much about oval, elliptical,
oblong parts and now the latest stretch is that an oblong part must mean
rectangular. Your Honor, the *Nelson* reference puts this argument to bed. *Nelson* is Exhibit 1009, paragraph three. The person of ordinary skill in the
art knew that you had to have something that was like a cup to be put in the
screw. The way it works it gets pushed up and gradually it's rolled because
it's equidistant.

You could imagine if you were not circular or something close to it, 11 you're going to get jammed because you can't go up. Eventually you're 12 going to hit a spot where it will no longer turn. That is why the problem had 13 always existed for many, many years, decades, of being able to roll the 14 periphery of a rectangular thermoformed article. The fact that Petitioner has 15 stated that Throne suggests that it was done on oblong parts without telling 16 the Board that in fact what that reference was actually talking about was the 17 screw method, which the patent's already talked about. 18

It shows that there -- the reference in these textbooks show you what was standard, again at that time period at least, but what had -- actually it had remained until at least, at least as far as in Dexter's consideration in 2016. Folks were still finding it impossible to roll the rim or rectangular thermoformed articles. It wasn't until Patent Owner had done it that it was achieved.

1	JUDGE TARTAL: Counsel, if I can just get you to pause for a
2	moment, because I think it is somewhat important to your argument. I'm
3	looking at Claim 1 of the '281 patent, which refers to recites a rounded,
4	rectangular tray, and you're directing us to Slide 37 of Petitioner's
5	demonstratives, which says that it was well known or standard enough for
6	oblong parts with generous corner radii. Where do we draw the distinction
7	of, or how can we understand any difference between, a rounded rectangular
8	tray and an oblong part with generous corner radii?
9	MR. FARCO: Well assuming I can understand what Mr. Throne
10	was referring to, I could only infer from this
11	JUDGE TARTAL: So this is sorry. I think that's from the Throne
12	reference
13	MR. FARCO: Right. I'm looking at it's Slide 37, Petitioner's
14	Slide 37. I mean Your Honor, they say they mention these shapes, but
15	then they say the standard method of rim rolling, to which I just earlier
16	referred, is showing schematics. So all I can say is that if the article was
17	able to be rim-rolled and it had a perimeter that was able to be rim-rolled
18	through those screw methods, that would probably be nonrec that would,
19	those would be non-rectangular. The patent distinguishes rim rolling of
20	cups.
21	JUDGE TARTAL: Sorry to interrupt. But does the claim
22	distinguish
23	MR. FARCO: A rectangular
24	JUDGE TARTAL:rim rolling using a screw method versus any
25	other method in what's claimed?

1	MR. FARCO: Oh, oh. Does the claim disclaim the method of
2	making it?
3	JUDGE TARTAL: Does it does the
4	MR. FARCO: I'm sorry.
5	JUDGE TARTAL: There's sort of ambiguity in what I said.
6	MR. FARCO: No problem.
7	JUDGE TARTAL: But again, getting back to the issue of claiming
8	the article versus the method of claiming it, Claim 1 of the '281 patent isn't
9	directed to a particular method of forming the rounded rectangular tray. So
10	the so we can't distinguish that by saying, for example, that any kind of
11	tray made using what Throne is referring to as a standard method involving a
12	screw isn't what is intended to be addressed by what's claimed in Claim 1
13	of the '281 patent. Are you familiar with that premise?
14	MR. FARCO: If I understand what you're saying is that if someone
15	was somehow magically can use screw to make a rectangular
16	thermoformed article with a I as we the record is the record seems
17	clear that you can't use that method to make a rectangular thermoformed
18	article with a smooth periphery.
19	JUDGE TARTAL: So what I'm trying to understand is just how do
20	we distinguish the claim language "rounded rectangular tray" from "oblong
21	part with generous corner radii"? Is there any claim interpretation or
22	explanation or evidence as to what one term means over another and how
23	one of ordinary skill in the art would have distinguished what Throne taught
24	from what is claimed later in the '281 patent?

MR. FARCO: Okay. Well, I wanted just to make sure it's clear for the record that Throne has not been -- has not been and is not relied on as prior art.

4

JUDGE TARTAL: Understood, but just as --

MR. FARCO: Right. So now as far as what I'll -- what all -- Throne 5 is confirmed by the background section and also by the Nelson reference that 6 the screwing tech -- the screw techniques could only -- well in fact Dexter 7 said the same thing. Screw rolling can only work on circular articles. To 8 your point Your Honor, I think a person skilled in the art would, and we 9 10 didn't argue a claim construction, but would understand what a rounded, rectangular article would be, as opposed to what is "oblong with generous 11 corner radii." 12

I guess it's hard for me to understand. I don't know what Mr. Throne 13 meant by that. All I can surmise, Your Honor, is that whatever he was 14 referring to would have also been subject to that standard method that's in 15 7.94. And so we can implicitly infer that whatever he's referring to is 16 something that has a perimeter that is substantially equidistant about all of 17 the -- from the center of the object to allow the screw technique to work. 18 The screw technique works because it's putting it into a cylindrical cavity 19 that would allow heating and rolling. 20

So the problem is if at any point your article doesn't fit the inside the any point of that, then it won't -- it will no longer, it will no longer be able to turn and you'll have jamming, as far as I understand it. So that's the -- and in fact that was part of the problem that everyone in the industry fixed. They

couldn't figure out how -- all they knew was the screw rolling technique, and
it was the only one that people had been using for decades.

And that's why when Patent Owner came along and showed how to 3 do it with a rectangular article, that obviously resulted in Patent Owner 4 having massive amounts of commercial success. They were industry-5 acclaimed by the ILPP, the Ameristar Award. And again, a lot of people 6 thought that you couldn't do this. I mean Dexter thought you still couldn't 7 do it, and *Long* said you couldn't do it and in two weeks, in a little more than 8 two weeks before the priority date, Patent Owner went and did it. They 9 10 apparently were, went against the industry skepticism.

And furthermore yes, there is -- the other, so copying is unrebutted. 11 The evidence of nexus is unrebutted. Petitioner doesn't deny that all the 12 articles that Patent Owner makes are within the scope of all the challenged 13 claims, and they never denied copying. In fact, when they had the time, they 14 had the word count available to them in their reply brief and they said 15 nothing about it. Their expert had the objective indicia available to him and 16 didn't even look at it. And if we're going to talk a little bit about some of the 17 other arguments that my colleagues had raised --18

JUDGE TARTAL: Counsel, feel free to address what you think is
 most important. But I think there's arguments on *Meadors* that I don't think
 you've gotten to yet.

22 MR. FARCO: Oh sure.

23 JUDGE TARTAL: If you wanted to raise.

MR. FARCO: *Meadors*, the reference shows what it shows, and what it depicts in its figures is paper. I mean there's -- I think at this point I

want to be generous and call them silly arguments that it's showing
something else other than that. The point is the reference shows paper in all
of its figures. At this point, Mr. May attempts to try and -- oh, I'm doing my
-- I'm sorry. Let me pull it up for Your Honors so you can have the benefit
of my discussion.

Meadors shows paper. The fact that Mr. May is trying to find ways 6 to do an end run around the Patent Office standard, you know, drawing 7 conventions is to me just grasping at straws. Furthermore, Meadors doesn't 8 show a rounded rectangular article. Again, Mr. May, who claims that he 9 needs to see the perimeter of the final article to determine whether it's 10 reliable, I don't know how he's concluding that the article in Meadors is 11 necessarily a rectangular article. It doesn't show you what the final result is 12 at all. 13

It doesn't show you what the final result is using plastic. It doesn't tell you how to even -- whether or not you have to thermoform these things. It mentions heating, but that alone doesn't mean that there's thermoforming. I'm sorry.

JUDGE ROSS: But does it have to show you a drawing of a plasticarticle?

20 MR. FARCO: Well Your Honor, I mean are you saying does it have 21 to show --

JUDGE ROSS: There are no drawings at all in *Meadors*.

22

MR. FARCO: Well I think the person with skill in the art would be guided by the drawings, and certainly drawings are I think the best way to evidence how you were to achieve their method. In fact, I mean the

comparison which is best represented with using drawings I think in this
 case, one of those technologies where the drawings are, I think are the best,
 the best use of the disclosure.

So in other words Your Honor yeah, I think they needed drawings 4 showing you what -- Petitioner asserts that this reference teaches you how to 5 make it using plastic. The problem is the reference doesn't show you 6 anything with plastic. You juxtapose Meadors with the other non-enabled 7 Long and Portelli references, they talk about those -- they say those things 8 are representations, representations of what's going on with plastic. Well, 9 10 the problem for *Meadors* is it doesn't tell you at all what it is other than paper. So it's just at that point you're speculating as to it what can -- here, I 11 put it on -- this is Patent Owner's Slide 128. 12

Mr. May wants us to interpret this drawing as though it showed that, 13 the legend for plastic. It does not. And Your Honor, Mr. Clements and we 14 identify this in the panel in response. You know, the reaction to heat is very, 15 very different between plastic and paper. The art at the time, Exhibit 2027 I 16 believe, shows this as much. So in fact if this thing was trying -- if this 17 *Meadors* reference was depicting paper, it doesn't show it in a way that a 18 person with ordinary skill in the art would understand, that that -- that is 19 plastic. 20

Indeed the drawings say, you know, the expert will look in the schematics that were available for draftsmen at the time of *Meadors* and say they're showing paper. I mean the latest thing that -- the latest thing is that there's polymer molecules. In *Meadors*, just I don't think it would stand scrutiny. And then furthermore, I'm looking at Slide 132, when asked about

whether or not it disclosed a rounded, rectangular article, you know, Mr.
 May said its capability and possibilities, but it's not necessarily there.

They had to rely on inherency, because it's not actually depicted in 3 Meadors what the shape is. I'm going to turn to Slide 133, and this type of 4 argument, though, applies to all the references in one form or another. So 5 here, Mister -- the Petitioner through Mr. May suggests that certain 6 limitations were present because it's not mentioned or otherwise said 7 otherwise, or it could be this and no one says anything to the contrary. 8 That's not a disclosure and that's not inherency. It could be just as well --9 Petitioner has to show by preponderance of the evidence that the existence 10 of limitations in these references to meet the challenged claims. 11

You can't just say well, it's a possibility it's there. That's completely 12 contrary to the inherency standard. And it's not a disclosure. Again, 13 ambiguous references cannot anticipate. And there's no -- and you know, 14 Petitioner suggests or explains why a person with ordinary skill in the art 15 would find these features to be obvious, for them to say look, you know, in 16 the case of Meadors and Long combination, they just say look, Meadors 17 shows limitations A, B, C; Long shows limitations A, B, C, D; therefore, it's 18 obvious to combine. 19

To me, that falls far below what the level of obviousness analysis that should be done to show, to sustain their burden in an IPR proceeding. That claims all of the various petitions they filed in each of the IPRs. This, I think, I'm going to, you know, also slide in the discussion related to the *Meadors* and *Brown* references. Counsel said at the very beginning that the challenged claims are directed to thermoformed articles. You know, the
applicant had distinguished thermoform from articles that were injection molded or that thermoforming or that thermoforming includes plastic.

The point is that the -- in each of the challenged claims in all of the 3 IPR proceedings, they exclude injection-molded products and they exclude 4 paper. So again Meadors disclosing only paper is not relevant. It's not 5 pertinent to the problem to be solved. Indeed, there's no disclosure in 6 *Meadors* that the problem sought to be removed is this, you know, a sharp 7 peripheral edge, because paper doesn't have the same problem as 8 thermoforming with the plastic. Once it's cut, it will have the sharp edge 9 that you want to keep away from the periphery. 10

And *Brown* relates to injection molding. If you wanted -- in injection molding, if you had a sharp periphery somewhere, it's easy. You create a new mold and you turn the periphery away so it's smooth. It's completely different than dealing with a sheet of plastic, as counsel explained earlier, that you have to heat and get it to fit around a mold.

JUDGE TARTAL: Counselor, if you could just pause for a
 moment.

18

MR. FARCO: Surely.

19JUDGE TARTAL: Because you have to address the express20disclosure in *Meadors*. So *Meadors* says at Column 3, "the material may be21of any known type including, but not limited to paper, e.g. milk carton stock,22thermoplastic material, e.g. acrylonitrile butadiene styrene or other similar23material." So that's, that's the express disclosure we have to work off of. So24you have to -- so we have an argument it's that express disclosure being25sufficient for some basis. What is the -- what is the idea that you have that

*Meadors* only addresses paper, when it has express disclosure of a material
 that it suggests is suitable as being thermoplastic?

MR. FARCO: Well Meadors says that the context of the disclosure 3 right now is in the context of paper and forming dies related to paper. That's 4 also expressed disclosed in Meadors, and the reference could only -- the 5 reference, it can only be used as prior art for what it clearly discloses, and 6 what, the only thing -- well yes, it does. It does have an anecdotal reference 7 to it could be made using thermoplastic. But all the figures, all the drawings 8 show only paper. And when our expert Mr. Clements tried to show what 9 you would do if you were to try to use plastic at all, even though it doesn't 10 show that, it doesn't render the proper result. 11

In fact the dies, I mean there's no teaching of how those dies are to 12 be situated to work and achieve the same sort of periphery that you can 13 apparently get with paper. So the problem with it is well yes, it says 14 anecdotally what it says. But the reference is only for good -- only says 15 what it teaches in ordinary arts, and a person looking at this will not know 16 from *Meadors* what it means by plastic. If we were to say what the figures 17 show in paper could be done in plastic, that's a logically leap that's 18 unsupported in the record that that could be done. There's no evidence to 19 that effect. 20

I want to talk about the *Amgen* case if I could briefly, cited by Petitioner. That *Amgen* case, the fortunate side, that case also involved a patent that was under review that was being challenged for enablement. But what's interesting about what's cited by Petitioner is what portion of the case

really dealt with using data that was made, disclosed in the patent, to try and
show, you know, efficacy or workability.

What I think is notable about that case is all the remainder of the 3 case before that citation by Petitioner that talks about post-critical date, 4 evidence of enablement. What that case actually stood for, in fact that case 5 is on remand for the Federal Circuit, is that if you have post-critical date 6 evidence of failure, that's always to be considered. It doesn't stand for the 7 proposition that somehow you can go into the future and then re-enable that 8 which is shown to be impossible or not doable without undue 9 experimentation in the past. 10

11 So I would submit that *Amgen* actually supports Patent Owner's 12 position, namely with the statements of the Dexter MT's 2016 statement. 13 Furthermore, Mr. Long said it was not possible to be achieved at 2018 to roll 14 that type of -- to get that type of roll around without a sharp point on the end. 15 That to me, that's the type of post-critical date evidence that *Amgen* was 16 talking about, to show lack of enablement. So I think that's actually here in 17 spades.

Moreover, there's no dispute by Petitioner that the first embodiment of *Portelli* that has this cracker box, that one's not enabled. They can't even find a cracker box. No one knows what it is. According to Petitioner's counsel, he said he doesn't understand standardized. That's strange, because standardized equipment was something that came from the testimony of Mr. May. Another one seems to understand that, Mr. Naughton testified that the Alto or Long technology as he called it, is actually not standard. He actually

distinguishes between standard thermoforming equipment and the Long
 equipment.

So anyway Your Honors, at this point I rest my -- I'll reserve the rest 3 of my time, and just say that the record shows quite critically that the 4 objective indicia of non-obviousness are proven out by the fact that none of 5 the art of record was workable to roll a rectangular article. Thank you. 6 JUDGE ROSS: Okay. So I think right now let's maybe take a short 7 break. Does 15 minutes sound good for everybody? 8 MR. FISHER: Yes, Your Honor. 9 MR. FARCO: That's fine for Patent Owner, Your Honor. 10 JUDGE ROSS: Okay, great. Let's go off the record and I'll see you 11 guys back in 15 minutes. 12 (Whereupon, at 12:06 p.m., the above-entitled matter went off the 13 record and resumed at 12:22 p.m.) 14 THE CLERK: All rise. 15 JUDGE ROSS: Please be seated. Okay, welcome back everyone. I 16 guess Mr. Fisher, are we going to hear from you? 17 MR. FISHER: It's going to be Mr. Flannery to start with, Your 18 Honor. 19 JUDGE ROSS: Okay, great. You can start whenever you're ready. 20 JUDGE OBERMANN: I'll just state for the record that I'm putting 21 45 minutes on the clock, and I will start it when you begin, Mr. Flannery. 22 MR. FISHER: Your Honor, one thing we've noticed is that the 23 monitor on the side of the room was active previously, and it seems to have 24 gone inactive. 25

MR. FLANNERY: It doesn't matter to me. We have
demonstratives.
JUDGE OBERMANN: Yeah, we have demonstratives. Just could
you tell us the page that you're on? We can move to it.
MR. FLANNERY: Okay. We'll start at 63. I'm ready, Your Honor,
thank you. So Your Honor, Judge Obermann you asked about where's the
magical teaching regarding tooling in their patent specification, and you
asked that 20 minutes into counsel's presentation. So he had 40 minutes to
answer your question. He had people here. He didn't provide a single cite,
not a single column or line number in the specification.
It's because it's not necessary. This is tooling. People who know
one of the ordinary skill in the art knows how to do these things. So they
say that you can't make Long. Their expert says you can. They've
completely walked away from that. Then they say well maybe you can
make Long, but you can't get it off the mold. He says it's impossible. This
goes to your point, Judge Tartal, about experimentation.
This is a mass production. Somebody could figure out how to do
this. This person of ordinary skill in the art has three years of experience.
That's quite a lot to be able to sit down and explain and tinker around, and
figure out how to do it. One of ordinary skill in the art knows how to do
these things. Mr. Clements, his sole basis for saying it's impossible to get it
off the mold is his simulation that he ran. He just made one simulation. He
did no experimentation. The test is undue experimentation. He had all the
thermoforming resources in the world available to him through the Patent
Owner. He didn't do any experimentation.

1	Judge Tartal, they could sit down and try to figure this out. He ran
2	some computer model and said it's impossible. That's belied by all the
3	evidence. All the scientific evidence in this case shows one of ordinary skill
4	in the art how to make these products, how to get them off the mold. They
5	didn't provide any special teaching in their patent specification. One of
6	ordinary skill in the art knows what to do.
7	JUDGE TARTAL: Counsel, can you address the differences in the
8	methods that are being employed by not only the references but also
9	Throne? It seems like there's some distinctions being made to what Throne
10	refers to as a standard procedure that involves spinning the apparatus. I
11	think hot air to form a rounded edge versus it seems like a more stamping
12	oriented method that the patent discloses involving dies that alter the shape
13	of the edge. What relevance is it in our analysis as to how any particular
14	reference or even a reference to standard operating standard procedures in
15	the context of spinning a blank? How does that relate to our analysis on the
16	anticipation side, or on the obviousness side as well?
17	MR. FLANNERY: I don't think that there is spinning here, Your
18	Honor, with respect to making these random rectangular parts. These are
19	molds that come in and shape it. So the well-known this is standard
20	technology which is
21	JUDGE TARTAL: Sorry to interrupt counsel. Does that mean
22	Throne is irrelevant, which says that
23	MR. FLANNERY: No, it's very relevant.
24	JUDGE TARTAL: Well known. My understanding is, and going to
25	the questions that I've asked counsel for Patent Owner before where I

don't have the language in front of me. But the plain language, directed to I
believe it's a rectangular tray, versus Throne's reference to an oblong shape
with large, rounded sides? How does the shape of the article that's being
manufactured tie into the method that's being used to make it, and how is a
disclosure that Throne, for example, may have in the context of a shape
that's rounded, have any relevance to a claim that's limited to a shape that's
rectangular?

MR. FLANNERY: I think it goes to what the knowledge of one who has ordinary skills in the art is for making a tooling to make these rolls. So it was there, it was available. Throne teaches that rim rolling was wellknown, standard technology. You can do it for oblong parts. Oblong's pretty close to rounded rectangular that we have here. It's not spinning. It's just making an oblong part, and what he's telling is that one of ordinary skill in the art knows how to make these molds.

We tend to think of it as matched metal. These are dies, a punch and a die, or a punch -- they're referring to just a ram and a core. Or I'm sorry, a ram and a body. That's their tooling. This is just two machines that come together to stamp out the part, Judge Tartal, as you said.

JUDGE TARTAL: That's -- if you look at your own demonstrative
at page 38, is there any difference in terms of how the rolling tool depicted
in this figure operates and how the die that's depicted in the challenged
patents operate?

MR. FLANNERY: I'd like to defer that question to Mr. Fisher if I
 may Judge Tartal, and he can answer --

JUDGE TARTAL: He can do it now quite frankly. I don't mind 1 you guys switching off if that would be more helpful than going back to it. 2 MR. FISHER: Yes Your Honor, we did sort of split up the subject 3 matter, and that was what I was talking about. So while it's true that Throne 4 does provide one example of a helical process used for round parts, there is 5 just no dispute that Throne talks about oblong parts with generous corner 6 radii. These are objects, they have corners. Otherwise, Throne wouldn't 7 have been talking about corner radii. 8

So it's an object with corners that has generous corner radii, and it's 9 oblong. It has to be a rounded, rectangular tray. While Throne -- while the 10 example given in the Throne drawing that Patent Owner cited does refer to a 11 helical process, we know what Throne is talking about, for example because 12 we know Dexter and OMV did it, okay. We know that they don't use 13 spinning; they just have the heated die and it comes down in a translational, 14 just a linear way, and it comes and it rolls that, and it rolls the flange in that 15 matter so -- in that manner. 16

17 So although Throne didn't specifically lay out the details of the 18 methods that were -- that were used by companies like Dexter and OMV, we 19 know what Throne was talking about because of the subsequent examples 20 that we were able to come up with. So the helical process that Throne is 21 referring to is just an example, and it's clearly not limited to that. We know 22 that because Throne talks about oblong shapes with corners, rounded 23 corners.

JUDGE TARTAL: Just to make clear on the record, the reason we're talking about Throne, it's not a reference that's being asserted as prior

art and grounds, but something that's been raised as indicative of the
 knowledge of a person with ordinary skill in the art as background.

MR. FISHER: That's exactly right, Your Honor. Throne is not being asserted as prior art. It's being used to rebut a specific technical argument that Patent Owner made, that these kinds of techniques just simply wouldn't work and they're impossible. So they don't -- we don't have to show -- well Throne, of course, is well before the priority date. But even if it weren't, we wouldn't have to show that because it's just used to rebut a specific technical argument.

10

JUDGE TARTAL: Thank you.

MR. FLANNERY: That's -- let me just check something. I think I've addressed the points that I wanted for *Long*, so in the interest of time I'll let Mr. Fisher continue with the other points.

MR. FISHER: Okay. So I would like to address some of the points 14 raised by Mr. Farco just very briefly. He referred to this Nelson patent, 15 which purportedly said that no one could roll the rim of a rectangular article. 16 Inventors make statements like that all the time to sort of talk up their own 17 invention. We don't know what level of knowledge Nelson had. Clearly, he 18 didn't know about OMV. He didn't know about Alto. He didn't know about 19 Dexter. There's clearly a lot of things he didn't know about; otherwise, he 20 never would have said that. So that's just factually incorrect. 21

JUDGE TARTAL: Can I just interrupt counsel? What about Patent Owner's argument that some of these examples or some of these practices may have just been confidential business information and not publicly disclosed? So the mere fact that a company's making a tray that has some

particular feature using technology that no one else knows about doesn't
support the idea that a particular reference discloses a teaching that's
enabled, because one doesn't know how to do the undisclosed technique a
particular company is using?

MR. FISHER: Well, I understand your point, Your Honor. The 5 mere fact that there were some details of the Alto process that might have 6 been disclosed under NDA does not mean that a person skilled in the art 7 wouldn't know how to do the simple stretching and cutting process described 8 by Throne. As our expert, Mr. May said, this is just something called a 9 matched metal die. It is something that is extremely well known. It's 10 something that people of ordinary skill in the art in thermoforming work 11 with all the time. 12

13 So even though there might have been some tweaks that Alto might 14 have come up with to improve its process, that does not mean that the simple 15 action of stretching and cutting a thermoform, a thermoformed precursor to 16 form a tray with that undercut, with that sharp edge away from the 17 periphery, that it does not mean that a POSITA wouldn't have been able to 18 use the basic very simple tooling that is used frequently to accomplish those 19 kinds of operations.

By the way, we also know from -- right. It's been pointed out that Mr. Clements even admitted that the kinds of tooling described, that would be used to make an article such as *Long*, would have been within the capability of a POSITA, and not only that. We know that it's possible to -we know that Patent Owner's technical argument is incorrect, their technical argument that you can't get things with an undercut off the mold is wrong.

We even have passages of the -- of the textbooks that specifically 1 show examples of parts with an undercut, for example in the Throne 2 reference being pulled off the mold. So it's -- again, it's not only the Alto 3 trays. Even if you accept Patent Owner's argument that you should ignore 4 the evidence that those were being made in 2012, and even if you accept 5 Patent Owner's argument that there's no way anyone could have found out 6 how Alto was doing it, despite that the basic technical argument that you 7 can't get articles with an undercut off the mold is just dead wrong, because 8 it's in the textbooks. 9

Patent Owner also has repeated its argument about *Long* talking about puckers and distortions in methods like *Portelli*. I would just reiterate that *Long* by no means stated that the puckers and distortion would always occur. They might often occur. That does not mean that all processes such as *Portelli* are inoperable, as Patent Owner claims.

Patent Owner also claims that *Portelli* doesn't show the step by step 15 process, only the end result. Well I need only direct you to the very figures 16 we've been talking about in *Portelli*, Figure 7 and 8. For example those are 17 shown on Slide 39 as just one example. It shows the step by step process. 18 You have the heated die and it's advancing toward the edge, and it impacts 19 the edge. It engages with the edge and rolls it down. There is your step by 20 step process, which is at least as detailed as Patent Owner's step by step 21 process. 22

And again I would also refer you once again to the passage of the patent itself, Exhibit 1001 in the '216 case, the '281 patent, in which it specifically says it doesn't even matter how you do it. They've left it all up

to the discretion of the POSITA, because they know that POSITAs know
how to do this kind of thing. It's very routine stuff.

With respect to Mr. Clements' simulations, his alleged simulation of 3 the temperature in the whole plant, you know, I already addressed the fact 4 that he left out all the other things that the flange would touch that would 5 provide cooling, and it just wouldn't, first of all wouldn't be as hot as he says 6 it would get, and second of all he did not simulate the thing that really 7 matters, which is the mechanical behavior of that rim. His theory that it 8 would just collapse and fold down on itself is pure speculation. Just to be 9 clear, there is no simulation of that. It's the specificity in how fine the mesh 10 is that he used to do his thermomapping is really a distraction from the thing 11 that really matters. What would the rim actually do? 12

In terms of their counsel's argument that the only thing shown in 13 Throne's examples is the fourth embodiment, I would direct your attention to 14 Slide 38, which I think Patent Owner itself referred to, which also talks --15 also shows the fact that using hot air to heat an object for thermoforming 16 was also well-known. I probably have a better cite from that anyway. But 17 in any case, we have cited in a couple of places examples from the textbooks 18 which refer to the other method described in Portelli, which uses hot air to 19 heat up an article for thermoforming. So that was also well-known and well 20 within the capability of a POSITA. 21

Patent Owner refers to one specific paragraph that they asked our expert Mr. May about during his deposition, and they isolated one paragraph from *Portelli* and asked him hey, in this paragraph, do you see any statement that you're supposed to combine Figures 8 and 13. They cherry-picked that

one passage and he just answered a question about that one passage. When
he read *Portelli* as a whole, it was his opinion that not only would a POSITA
find it obvious to combine the very simple features for Figures 8 and 13, but
for instance, even for anticipation purposes, a POSITA would immediately
envisage combining those specific features.

Patent Owner says that the patents show the shape of the mold. So 6 does Portelli. We saw that in Figures 7 and 8. They cite Turbo Fan case, in 7 which the material to make the turbo fan was not available, and so that's 8 according to Patent Owner science fiction. Heating up a piece of plastic to 9 bend it is a far cry from making a turbo fan, okay. We're not talking very 10 sophisticated technology, not to mention the fact that the methods that we're 11 talking were well-established decades before Patent Owner filed its 12 application. 13

14 (Pause.)

MR. FISHER: Patent Owner also seems to be making the allegation 15 that if something's said by a marketing person, by Dexter's marketing 16 person, it is mere marketing puffery, and we have to toss out all the evidence 17 in the case. Everything else apparently is unreliable. I would submit to you 18 that there's a very big difference between an advertising statement made by 19 someone in Dexter's marketing department for some advertisement, 20 compared to an authoritative textbook. So you know, you can't just say one 21 statement is unreliable; therefore we have to throw out all the evidence in the 22 case. I just don't follow that argument. 23

Patent Owner has also focused on this string of emails between
Dexter and Clearly Clean, in which purportedly Dexter was saying that they

couldn't make the specific shape that Clearly Clean was requesting without
forming puckers. Well we know that there was something unusual about
Clearly Clean's, the shape that Clearly Clean was requesting. For one thing,
if you actually look at the drawings, you can see that the specific shape that
Clearly Clean was requesting was sort of an unusual exotic heart-shaped rim
which had two different, two different radii. There was like a larger radii on
top, a radius on top and a smaller radius on the bottom.

So this was very different from the normal trays that Dexter might 8 have, might have been accustomed to making. This does not mean that the 9 general concept of rolling a rim over a rectangular tray was difficult. Mr. 10 Jones from Dexter was talking about the specific shape that Clearly Clean 11 was requesting, and there's no evidence that that has -- that that relates to a 12 rim such as disclosed in Portelli. We know that as of the date 2018 that 13 those emails occurred, Dexter was already routinely making rounded 14 rectangular trays with rolled rims because they had the -- we actually have 15 trays that they had made from two years prior in 2016. 16

17 So for Patent Owner to take a comment about a specific, exotic 18 shape that Clearly Clean was suggesting and extrapolate to the proposition 19 that all rolled rim trays require undue experimentation is just belied by the 20 evidence and the actual physical proof of actual trays that existed even 21 before that email was sent.

Counsel also says that the Dexter process was principally for cups. Well, you know, we have the trade show examples which show both a cup and a rectangular tray, and you can see that right on Slide 49. Yeah, we're not saying that Dexter's process was never used for cups. It was used for

both. There's the photograph right there with those samples from 2016, a
cup and a tray.

And I think -- oh right. Let me address Patent Owner's arguments about, about *Meadors*. They contend that our contention that *Meadors* discloses something other than paper is silly. I would submit to you that the cross-hatching that Patent Owner is citing within the drawings of *Meadors* doesn't really look all that similar to the patent drafting guide or the draftperson's guidelines provided by the Patent Office in the first place.

But even if you did accept that the specific examples in the drawings 9 of *Meadors* were paper, those are just examples. It would be impractical for 10 a patentee to take the entire list of materials and draw fresh drawings for 11 every single exemplary material. You just show one example and then you 12 complete the list by saying hey, it can also be -- in addition to paper, it can 13 also be thermoplastic. There's just no doubt that Meadors discloses 14 thermoplastic, and it's difficult to understand why Patent Owner keeps 15 insisting that *Meadors* doesn't disclose forming a thermoplastic article. 16

In terms of the rounded rectangular shape of *Meadors*' object, as our expert Mr. May testified, there's no doubt that *Meadors* talks about a rectangular blank. You form a rectangular blank, you get a rectangular object as Mr. May explained, and due to the nature of thermoforming, it's difficult to form extremely sharp corners, so that article is going to have rounded corners just as in the claims.

So as Mr. May testified that rectangular blank explicitly disclosed in
 *Meadors* would result in a rounded rectangular article. In terms of plastic
 behaving very different from paper, all *Meadors* is talking about is heating

up a blank and forming it. This is what POSITAs in thermoforming, in the
art of thermoforming do every day. It is not -- *and Meadors* actually takes
the next step and actually shows the details of the press with the heating
coils used to heat up that blank, and form it into the desired shape.

5

6

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So again, this is as our expert Mr. May testified, this is exactly the kind of thing that practitioners in the art of thermoforming do every day. It is not beyond that. There's no reason to think that *Meadors* is not enabling.

Patent Owner would also have you believe that because Meadors 8 doesn't say anything about pigment or stacking logs, you have to assume that 9 pigment is there. We have to apply a little bit of common sense here. 10 There's no dispute that the natural color of ABS, the material disclosed in 11 Meadors, is clear. So the fact that it doesn't come out and specifically say 12 "oh by the way, there's no pigment," does not mean that a person of ordinary 13 skill in the art or an expert like Mr. May would interpret the disclosure of 14 Meadors as being anything but clear plastic. That's what Meadors said. 15 That's a reasonable interpretation of the fact that Meadors doesn't say that 16 any pigment is added. 17

18 You look at the natural color of the material. There's no pigment 19 discussed. You conclude reasonably that they must be talking about a clear 20 material. The absence of stacking logs, I mean the fact is if you look at the 21 shape in *Meadors*, there just aren't any stacking logs. Patent Owner would 22 have you assume that unless you specifically say there are no stacking logs 23 that you have to assume there are stacking logs, but that's just unreasonable.

In terms of claim construction, I would say that Patent Owner actually has to win the argument on claim construction; otherwise, they lose

their whole case because their whole premise of non-enablement and
missing elements hinges on the concept that if there's even a single defect
anywhere in that article, that it can't meet the claims. It not only can't meet
the claims, but it's not enabled.

Now we don't agree with that premise in the first place. We don't
agree that there would necessarily be the defects that Patent Owner claims
would exist, but that's why they want to narrow the scope of what a smooth
periphery means. The fact is there's nothing in the challenged patents
suggesting that smooth periphery means that it has to be smooth around the
entire article. Patent Owner cites no evidence at all. They do cite --

JUDGE TARTAL: Just to remind you, I think you're getting astray of what was argued in Patent Owner's response. Did they get into the meaning of "smooth" in there?

MR. FISHER: I believe they did. I believe counsel did specifically argue the claim construction point that they want smooth periphery to mean smooth periphery about the entire article.

17

JUDGE TARTAL: Okay.

MR. FISHER: Okay. They cite no evidence for it. They cite this *Inteman* (phonetic) case, which wasn't construing anything remotely similar. They were construing the term "length" in a patent on a magnetic braking system --

JUDGE TARTAL: But I'm -- I'm referring to the oral argument part of their --

- 24 MR. FISHER: I am, yes.
- 25 JUDGE TARTAL: Okay.

1	MR. FISHER: Yes, yes. So I'm responding to Patent Owner's oral
2	argument. So Mr. Farco is referring right. So has this argument that the
3	smooth periphery should be about the entire argument, and in their slides
4	anyway they cite the Inteman case, which construes length in a patent
5	relating to again a magnetic breaking system for an amusement park ride.
6	These things are fact-specific. Just because you find one case in which a
7	specific claim term was interpreted to require like an entire length does not
8	mean that it applies to a thermoformed plastic meat tray or food tray.
9	I think that's all I have for now. I guess we'll turn it over we'll
10	reserve the rest of our time for rebuttal on the motion to exclude. But I
11	would like to offer Your Honors an opportunity to ask any further questions
12	that you might have on the substance. All right, thank you.
13	JUDGE ROSS: I don't have any questions.
14	MR. REILLY: Good afternoon Your Honors. My name is Luke
15	Reilly with counsel for Petitioner Tekni-Plex, and I'm here participating
16	under the LEAP Program. I'm here to address Patent Owner's motion to
17	exclude, which he did discuss a bit during the oral argument, and he
18	discussed a couple of salient points that I think are worth, are worth
19	revisiting.
20	First of all Your Honor, if I could turn to Slide 3 of the motion to
21	exclude slides, which we did file as a separate slide deck, and this is what
22	we're really talking about here for the most part, Your Honor, is Federal
23	Rule of Evidence 703, which Patent Owner didn't talk about at all in its
24	original motion to exclude. But Rule 703 allows the Board or the jury, or
25	excuse me, it allows an expert witness to rely on otherwise inadmissible

evidence including hearsay evidence and, in certain circumstances, allows
 the fact finder, the Board or the jury, to also see that evidence that the expert
 did rely on.

This is not something that's new to the Board. The Board many times has used Rule 703 to deny motions to exclude and to see evidence that experts have relied upon in the course of the formation of their opinion. And indeed, as the Board said in the *LP Chemical* case, "Because the Board isn't a lay jury and it does have significant experience in evaluating expert testimony," it's what the Board does nearly every day, "that the danger of prejudice is lower than it might be in a conventional district court case."

Now Patent Owner focused quite a bit during his oral argument on 11 some sort of alleged standard for liability that he says that Mr. May 12 established during his deposition, and the surreply from Patent Owner cites 13 to one portion of Mr. May's deposition. But if you look at that portion of the 14 deposition, and this is Exhibit 2070, Mr. May's deposition, and Patent 15 Owner cites the portions on pages 172 and 173 in their surreply, and I think 16 this is what counsel was referring to, at line 10 on 172, this is Mr. May being 17 questioned about two of Patent Owner's exhibit, 2061 and 2062, and he 18 discusses one of the drawings. 19

So to orient yourselves, Your Honor, Exhibit 2062 from Patent Owner is an email and attached to the email is an image, and this is Mr. May discussing that image. He says quote at line 11: "Nothing in here to tell me what material or even what process, what dimensions, whether it's rounded or round or rounded rectangular. It's a very high" -- excuse me -- "there's a

very high level sketch. At best of what this article might be, but nothing on
 more than a side view, no planned view, no isometric views.

Now what Mr. May is doing here is not establishing a level of reliability. He's merely looking at this document. He's not saying that the image is unreliable. He's just saying that the image doesn't have sufficient detail to tell him certain features of the article that it purports to show. It doesn't show the process, the dimensions, the roundedness, etcetera.

But that's not establishing some sort of mythic platonic standard of reliability as Patent Owner would have you believe. We submit rather that all of the evidence that Patent Owner moves to exclude here is reliable evidence that Mr. May, in his capacity as an expert witness in this case, a learned expert witness in this case, a learned expert witness in this case would be entitled to rely upon and did in fact rely upon in the formation of his opinion.

Now Patent Owner, if you can actually move to Slide 4, these are -these are for the exhibits that Patent Owner objects to, Exhibits 1037 to
1040. These are all photographs of various plastic trays or cuts of them, and
during his oral presentation, Patent Owner's counsel stated that there was -that all of this move to exclude evidence was hearsay, that Mr. Naughton
didn't actually observe any of this particular evidence.

But that's not quite right. In fact Mr. Naughton in his declaration, and this is Exhibit 1045, is the Naughton declaration, Mr. Naughton does say in paragraph 15 that he visited the Alto facility in New Zealand in February 2017, and that he has images that showed rounded, rectangular meat trays with rolled rims and smooth peripheries produced by Alto, and that he is the

one who provided these trays to Mr. May for use in these proceedings. 1 That's the source. 2 JUDGE OBERMANN: Who took the photographs? 3 MR. REILLY: I'm sorry, Mr. May I believe took each of these 4 photographs. The physical tray was provided by Mr. Naughton, but Mr. 5 May is the taker of the photograph. 6 JUDGE OBERMANN: So there's really no dispute that these trays 7 were made some time after the date of the invention, but to your point this 8 shows that it was possible? 9 MR. REILLY: Yes. These -- I guess I'm sorry. I'm not quite sure 10 what the -- I'm not quite sure what the question is. 11 JUDGE OBERMANN: We have heard his friend Mr. Farco saying 12 that there's a question about the authenticity of these photographs. 13 MR. REILLY: That's what I understood that he said, yes. 14 JUDGE OBERMANN: And what you're telling me is that Mr. May 15 took the photographs himself, and he was made available for cross-16 examination about that, and that he got these from Australia from Mr. 17 Naughton? 18 MR. REILLY: Well, he got them from Mr. Naughton. I don't think 19 he was in Australia when he got them. 20 JUDGE OBERMANN: Okay, but he got them --21 (Simultaneous speaking.) 22 MR. REILLY: But he got them from Mr. Naughton, who got them 23 from the factory in New Zealand. 24

1	JUDGE OBERMANN: Yeah, okay. And he was produced for
2	cross-examination during the depostition, and Mr. Farco had every
3	opportunity to question him about the authenticity of these photographs?
4	MR. REILLY: That's correct, Your Honor.
5	JUDGE OBERMANN: Okay, thank you.
6	MR. REILLY: So moving on from and again, just to emphasize
7	that none of these are hearsay in any way. These are simply photographs of
8	trays that Mr. Naughton personally observed and personally provided to Mr.
9	May.
10	And one last point actually on these photographs, Your Honors,
11	which is that and I think Mr. Farco during the argument today also
12	emphasized that in his mind Patent Owner objected to these photographs
13	during deposition at the time that they were first introduced, and again that's
14	just not right. If you go back and look at, and I'm happy to go through each
15	and every citation that they provide in their surreply again, those are
16	objections to the questions that were being asked. They never objected to
17	the actual exhibits or the actual documents that were being offered.
18	JUDGE OBERMANN: So they didn't preserve any objections
19	anywhere?
20	MR. REILLY: That's our position, yes Your Honor. So now if we
21	could if we could turn actually Your Honor then to Slide 7, and one of the
22	things in addition that Patent Owner moves to exclude are portions of Mr.
23	May's, the expert's declaration. And again Your Honor, and these include to
24	be clear portions of Mr. May's deposition, excuse me, Mr. May's declaration

rather, that rely on certain Dexter and OMV trays, photographs, documents,
 general written content from these parties.

But Patent Owner really has no argument that these aren't the kinds of facts or data that an expert in this field would rely upon to understand, and it's important to keep in mind what the purpose of these documents is. All of the documents that Patent Owner moves to exclude, or the portions of the declarations that Patent Owner moves to exclude, go to this question of the enablement of the prior art references.

9 These are all documents relied upon by Mr. May to help form his 10 opinion as he explained in his declaration, that these prior art references, 11 *Portelli* and *Long*, were enabled and that the evidence that they were enabled 12 was not only his scientific analysis of those references themselves, but also 13 this external evidence that demonstrated that these trays actually existed, 14 were actually made, both before and after the priority date of the patents at 15 issue here, the challenged patents at issue here, excuse me.

Patent Owner's only argument as to why these wouldn't be the type 16 of evidence on which an expert would rely, is their purported belief that Mr. 17 May himself established some sort of reliability standard during this 18 deposition. But again, if you go back and look at that portion of the 19 deposition transcript, Mr. May wasn't establishing anything about reliability. 20 He was just saying I am looking at a picture and this in my expert opinion is 21 the evidence for the information that I can derive from the picture and the 22 evidence that I cannot. 23

That's not a reliability determination. That's a question of what the expert in their -- an expert of skill in the art, a person in -- excuse me, a

person of skill in the art, an expert using their expertise can determine based
on an image. It's not reliability; it's just about the formation of an opinion.
So we would submit that none of the paragraphs that Patent Owner moves to
exclude are really -- are excludable, particularly under Rule 703, which
again Patent Owner never even brought up in its original motion to exclude.

Now in addition, Patent Owner, and if you could move now to Slide
8, Patent Owner moves to exclude certain paragraphs of the Naughton
declaration. So the first thing to say that many of the paragraphs, not all of
the paragraphs that Patent Owner moves to exclude don't actually involve
hearsay. Many of them involved personal observations from Mr. Naughton
visiting packaging facilities or based on his knowledge in the industry about
these trays.

But even the ones that rely -- even the portions of the Naughton 13 declaration that involve discussions that he had with other people, this is all 14 information that Mr. May relies on in the formation of his opinion, and 15 therefore we would say that under Rule 703 and under this Board's 16 precedent, it is not really something that should be excluded. It should be 17 analyzed based on the way in which Mr. May analyzed it in the formation of 18 his opinion, and should be analyzed using the Board's sound technical 19 judgment as to what that evidence actually demonstrates and actually proves. 20

Now if we could go on to Slide -- jumping ahead to Slide 12, again this is the question of -- this is Exhibit 1058. This is the OMV presentation that I think you've heard a little bit about today, that discloses OMV's trays and what those trays are. Exhibit 1048, 1058 excuse me, again this is something that Mr. May uses in his opinion. He analyzes the images that

were taken from that presentation, provided by OMV and again this is a
presentation from 2004, and he uses that to determine in his expert opinion
whether or not this would have been feasible prior to the priority date.

Now Your Honors did have questions for Patent Owner about to 4 what extent this might go to the weight of the evidence, as opposed to the 5 actual whether or not it should be excluded. We actually submit that this 6 evidence carries significant weight, because this is the -- this is exactly the 7 type of evidence that somebody looking to determine whether or not these 8 trays were made and whether or not the techniques described in Portelli and 9 Long, and the products described in Portelli and Long were capable of being 10 made. 11

Patent Owner has made no real argument that these are not the type of evidence that somebody would look to to solve this question. Instead, Patent Owner goes on and on about how because it's hearsay it must be inherently unreliable. But Mr. May in his capacity as an expert is able to evaluate the extent to which hearsay is reliable, and the Board is able to evaluate the extent to which hearsay is reliable in the way that Mr. May formed his opinions.

So none of this is a real reason to exclude any of this evidence. It's a
reason that Mr. May used this evidence as a way to underline his opinion
that the prior art references were enabled, that these trays were capable of
being made because they were made. They were made both before and after
the relevant dates.

JUDGE TARTAL: Counsel, if I could interrupt for a minute.
MR. REILLY: Yes.

1	JUDGE TARTAL: Is there any limit to the extent to which a party
2	can use an expert to circumvent the limitations on hearsay and other
3	evidence that would otherwise be excluded?
4	MR. REILLY: Certainly, Your Honor.
5	JUDGE TARTAL: Especially evidence that, you know, the expert
6	purports to rely upon and now it's introduced, even though it otherwise
7	wouldn't have been available outside of the expert's testimony.
8	MR. REILLY: Certainly Your Honor, and if you could actually turn
9	to Slide 2, which recreates Rule 703, there are a couple of limits on that.
10	The first is of course that it has to be the type of evidence that experts in the
11	particular field would rely upon to establish this. The second is this the
12	third bullet point, which Rule 703 is one block text. It's broken out in bullet
13	points for convenience, which is that "The facts or data would otherwise be -
14	- if the facts or data would otherwise be inadmissible," excuse me, "the
15	proponent of the opinion may disclose them to the jury," the rule is written
16	as if it was a jury, "only if their probative value in helping the jury evaluate
17	the opinion substantially outweighs their prejudicial effect."
18	We would submit that that's true of all of the evidence here, and I'm
19	not sure that Patent Owner has made a serious argument regarding the
20	potential prejudicial effect of this evidence versus its probative value in
21	demonstrating the enablement of the prior art references. Oh, I'm sorry.
22	JUDGE OBERMANN: Well, as you've already mentioned,
23	prejudicial effect really doesn't have a lot of impact here at the Board
24	because we've said many times that we're not a jury, you know, that we
25	know when to it's a different kind of thing than you have in district court.

We also in the context of applying the suitable weight or the appropriate weight to be given to an expert opinion, and all of our -- a lot of our cases will say that, you know, we're not going to allow an expert to have a bare opinion. So what happens is the expert will form an opinion and then we look for some sort of objective proof that will back it up.

Isn't that really what Mr. May did here? He had formed this opinion 6 that this was a possible, you know, that it would have been well known, it 7 would have been understood, and you've come forward with things like the 8 Throne textbook and you've come forward with these photographs. These 9 10 are the objective support that, you know, we will look for so that it's not a bare opinion. So I guess what I'm really getting at is when we look at Rule 11 of Evidence 703, they're trying to throw this out on the -- what I'm hearing 12 you say is that they're attacking the evidence not for its, you know, 13 authenticity or even as reliability the photographs, but more for, you know, 14 like you said, what its shows versus what it doesn't show. Is that fair? 15

MR. REILLY: Yeah. I want to -- I mean they do refer to
 authenticity, and they do extensively refer to the hearsay objections. I guess
 the point I'm trying to make --

JUDGE OBERMANN: But they didn't make those objections at thetime.

MR. REILLY: They didn't make those objections at the time. No, that's correct Your Honor. But in their briefing they do, and it's not -- it's not clear what their basis is for saying either that this would not be something that an expert would use to support their opinion, their independent opinion, in this case that the references are enabled, or why this evidence -- that the

probative, why the probative value of this evidence wouldn't outweigh its
 prejudicial effect. I'm not sure if I'm answering your question exactly.
 You're not --

JUDGE OBERMANN: I think my question is really going to be for Mr. Farco, because the way that this is being presented to us, I'm a little confused about first of all, you know, it says "in forming an opinion," and that's a little bit contrary to what we do. I mean we usually have an expert who states his opinion and then we're looking for the expert to direct us to some objective support, so that it's not a bare opinion. Whether that is different, I don't know. I'm sorry.

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MR. REILLY: I guess if -- just I'm short on time. If I could say --

JUDGE OBERMANN: We'll, we'll let you go over a bit. MR. REILLY: --that independent of all the evidence that Patent

Owner challenges, Mr. May has formed the opinion and has established and demonstrated in his opinion that these references are enabled. All of this evidence further supports and independently establishes that the references were enabled, because the references actually were made. I mean the products described in *Portelli* and *Long* were made, and that's --

JUDGE OBERMANN: And that's really what he was looking at,
the photographs for us just to simply say well, if it was made, it was
possible.

MR. REILLY: Correct, Your Honor. And to be clear, he had -- he had the physical tray. I mean he took the photographs, but he also made the cross section of the tray and put that into his declaration, and proffered that as part of his opinion.

1	JUDGE OBERMANN: Okay, and we, we don't need to is it your
2	view that we don't need to have evidence that these were sort of makeable at
3	the time of the invention, but that it's okay that it might have been makeable
4	after the time of the invention?
5	MR. REILLY: Yes. I would defer more thoroughly to Mr. Fisher,
6	but yes, that's certainly the evidence of making of the trays post-invention
7	would still serve as evidence that the Portelli and Long references were
8	enabled at the time.
9	JUDGE OBERMANN: Okay, thank you.
10	MR. REILLY: Thank you, Your Honor.
11	JUDGE ROSS: Mr. Farco.
12	JUDGE OBERMANN: I will set your clocks at 30 minutes, and
13	when you're ready Mr. Farco, I'll start the clock.
14	MR. FARCO: Thank you, Your Honor. I need to get myself
15	situated here.
16	JUDGE OBERMANN: Sure.
17	(Pause.)
18	MR. FARCO: I need a dolly for all the paper in this case.
19	(Pause.)
20	MR. FARCO: Is this presenting? Let's see. Okay.
21	JUDGE OBERMANN: Ready?
22	MR. FARCO: Is it showing up on the screen?
23	JUDGE OBERMANN: Well, we have all of the
24	MR. FARCO: You have all of it? Okay, fine. Okay, I'll proceed
25	then. Sorry for the delay.

IPR2021-00916 (Patent 9,908,281 B1)
IPR2021-00918 (Patent 10,189,624 B2)
IPR2021-00919 (Patent 10,562,680 B2)

1	JUDGE OBERMANN: Okay.
2	MR. FARCO: Okay.
3	JUDGE OBERMANN: You want me to start the clock?
4	MR. FARCO: Yes.
5	JUDGE OBERMANN: Okay.
6	MR. FARCO: Thank you, Your Honor. So I want to just address I
7	think the point that Your Honor were getting to go over just before Mr.
8	Reilly concluded. The actual motion to exclude on Exhibits 1037 and 1040
9	were based on lack of foundation that were raised at the deposition at which
10	it was offered. Actually those exhibits were offered with Mr. Clements, so I
11	objected them at the time.
12	JUDGE OBERMANN: You objected on what grounds?
13	MR. FARCO: Lack of foundation.
14	JUDGE OBERMANN: Okay.
15	MR. FARCO: And they never cured Petitioner never cured those
16	objections, either at that deposition or within the time period that's allotted to
17	serve supplemental evidence. They rely now on the declarations that came
18	weeks later on June 7th, to say that okay, well Mr. Naughton was the person
19	who actually took those photos, or one of the photos I think was Mr. May,
20	who sent the photo to Mr. Naughton.
21	So we learned only outside of the scope of the supplemental rule that
22	those were actually photos from Mr. Naughton. We didn't know that until
23	after the fact. So that it was our objection is limited on the
24	JUDGE OBERMANN: Was this during Dr. Mays' deposition?
25	MR. FARCO: During Mr. Clements' deposition.

JUDGE OBERMANN: But they were presented by Dr. May during
 his --

MR. FARCO: No. Those were the first time that any party ever saw them or the first time they ever submitted to Patent Owner. Patent Owner was served with them the first time at Mr. Clements' deposition. That's why I objected for lack of foundation. They did not cure that objection at that time, nor any time within the ten day, business day period thereafter.

What they're trying to argue now is that they served their -- they 9 served their declarations with the Petitioner's reply. But that's outside the 10 ten day rule, and so that was the reason we say that they waived the 11 objection. They didn't serve supplemental evidence in time. Their position 12 is that I didn't object to the exhibit, but counsel could have marked the 13 exhibit and then withdrawn it. What was I supposed to do? It wasn't 14 objectionable until he started asking his witness, who has no idea what it 15 was, about it. We didn't know what those photos were, Your Honor, until 16 weeks later. 17

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JUDGE OBERMANN: I see.

MR. FARCO: So that's, that's just to give you the context. As far as Rule 703, well I understand Petitioner is suggesting, I don't want to tread old ground, I think there is some limit to 703. Otherwise, it's going to be a gateway for basically any reference however speculative, inauthentic, to just come into the record. I'm not sure whether it's your decision-making. Of course appropriate weight could be afforded it, but I don't -- I think here

these -- in this case, in these documents that are being discussed, I'm looking
at Slide 22, Slides 22 and 23 of the Patent Owner demonstratives.

This is the reason why I think 703 should give way. Mr. May is saying, for instance, Figure 8 has all these anomalies, all these pixelations for which you really don't know which part to believe or not to believe. That he says is reliable, but as I show to the right, those detailed drawings from a CAD from Patent Owner, those are unreliable. If you go to Slide 23, he could -- Mr. May testified how heat is flowing in this OMV presentation for which we have no idea where it came.

He somehow knows how heat is being transferred in this OMV 10 presentation, which we only have four slides for. I'm not even sure if we 11 even have the full one or from what date is. But yet when we talk about heat 12 transfer using SOLIDWORKS, which by the way Mr. Naughton said was 13 the best in the world. SOLIDWORKS is the best in the world at 14 thermoforming simulation. He says that's unreliable. All Patent Owner asks 15 the Board is that when ruling on these objections, is to critically see how this 16 witness is using these exhibits to try and further testimony, which when they 17 talk about being belied by the record, it's interesting that whenever there's a 18 bad fact, it's always puffery or that we don't know what the -- we don't know 19 what that person was thinking, you know. 20

You know, *Nelson* said, you know, you could never roll a rimmed article unless it was circular in Exhibit 1009 paragraph three. That of course was -- he couldn't, he must be mistaken. Dexter was mistaken in 2016 when they said it was impossible to form it. *Long* was mistaken, I guess, when he said that *Portelli* resulted in distortions. The problem with the Petitioner's

argument, it always ends up with selective, selective adherence to record
 evidence.

In other words, when it comes to *Portelli*, if you don't like Figure 8, 3 let's use pieces of Figure 13. If you don't like what figure -- by the way, if 4 Portelli says Figure 16 is a cross-section of Figures 14 and 15, but you know 5 if you don't like that, slough in Figure 13. And why, what's the reason for it? 6 I don't need a reason. Kennametal says it, or there's a -- in the passage by 7 the way that I asked -- you know, counsel got up and said I focused a 8 passage. I wouldn't know to focus on that passage unless it was in the 9 petition. 10

When this petition was filed, they said look at page 14 of *Portelli* and that will tell you where the person of skill in the art would get the inspiration to interchange these things. And yes, that's right, when Mr. May gave the anonymous box, I assumed that Petitioner would probably have to rest its case because that's what they originally said. Now they're saying *Kennametal* is supposed to come in there to save them.

You can't use Kennametal when it references the disparate portions 17 or the references can't be one. There's no teaching of the interchange and we 18 don't know how. I frankly, going back to Slide 22, with all these anomalies 19 and problems in Figure 8, I'm not even sure how does a person with skill in 20 the art know which one is proper to use? I mean let's -- I'm going to dial 21 back to page 18 and 19. Your Honors, look. When they talk about Portelli 22 and what it shows, this is -- these pictures on pages 18 and 19 of Patent 23 Owner's demonstratives, these came from their expert. They left these 24

pictures in. This gentleman had full creative license to draw these figures
 however he wanted.

But if you go to page 19 of the demonstrative, this is what Mr. May 3 drew. He drew -- the annotation "S" was added by Mr. Clements just to 4 allow all of us to see what's going on. This is what they drew. This is what 5 they say comes from *Portelli*, and in fact this is what *Long* says happens 6 with Portelli with puckers and distortions. So to the extent they say well, 7 you know, you could believe some of this stuff some of the time, the point of 8 the matter is even their own expert drew these drawings and he showed --9 and he shows a failure, a failure operation. 10

And I want to just cure what I believe has been a drastic misstatement. They say that Mr. Clements admitted that the tooling for *Long* exists. First of all, the fact is while he essentially had to speculate because it doesn't show it, he says that this would be a possible mold. That mold ends up in failure. So to the extent they say Mr. Clements knew how to make it, yeah he knew how to make it fail, because that's all that the *Long* reference shows.

But let's go to paragraph 202, I'm sorry. We'll go to paragraph 159 18 and 160 in Exhibit 2007, which is in all of the IPR petitions. Mr. Clements 19 says clear as day, just so that Petitioner does not lead you all astray. I'm 20 sorry. I'm looking at 159, right. Sorry. Okay, 159. "In my more than 20 21 years of thermoforming design experience, I cannot think of a readily 22 available mechanism before the earliest effective filing date of the 23 challenged patent that could be used as a 'second tooling assembly' and that 24 could take a precursor from having a flanged periphery, Figure 5A in Long, 25

and turning it into a precursor with a periphery like Figure 5B using pulling
 or stretching operations."

Don't let Petitioner misguide you. Mr. Clements tried in earnest to
try and make this thing figure out what it was saying, but now we know the
reason why he couldn't. His testimony's been corroborated by Mr.
Naughton. No one could have known, because it was all secret. They didn't
want to tell anybody. It was against their NDA they put it in the document.
Now they're trying to say look, the rolling, all these other references, which
by the way I will submit to you that there is not one textbook --

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(Interruption.)

MR. FARCO: My apologies. There is not one textbook that was 11 cited by the Petitioner's expert that he actually applied it to any of these 12 references. So in other words, while yes they can show you textbooks and 13 quotes all day long, they never actually apply them. They mention Teflon, 14 about Portelli. They don't, there's no testimony by Mr. May about how to 15 solve the problems with Portelli with Teflon. They don't have an 16 obviousness argument directed to it, but moreover they don't explain how it's 17 even used. 18

So yes, it's true. Mr. May is very good at citing textbooks, but he does not explain to -- he won't explain to any of you and it's not in any of their papers, of Petitioner's papers, that explains to you how it is to be used to resolve the problems that are in *Portelli* itself. *Portelli* discloses that, in the Figure 7 and 8, the fourth embodiment, that plastic will adhere to the die. That's -- I'm not making that up. That came from the reference, and I guess Petitioner will tell you well don't look at that part. That was puffery.

No, that's what *Portelli* says. *Portelli* says puckers, tapers form on the outside of the article and then subsequently our expert looked at it and said tapers could turn into puckers. In fact *Long* and Alto said in 2015, weeks before the priority date, that those were distortions in the rim. Please stay clear of them. They should be avoided. That is in *Portelli*. That was not something -- the tapers in *Portelli* were there. That's what the reference discloses.

And again, if we're going to start opining about what authors meant. 8 I don't know what *Portelli* meant. I don't know what any of these people 9 10 meant. All I know is what they say, and they don't say much, and what they say results in defects. A person of skill in the art should be guided on what 11 to do, and there are limitations on a person of skill in the art. According to 12 Mr. May, the POSITA can literally do anything. There on a mission. That 13 hint -- to the extent that that, and we -- the Patent Owner does not disagree 14 with the level of time. It's just how this expert appears to be interpreting 15 what a person knows two years at a college in this field. 16

I mean to me, it strains credulity to think that that person to have the level of skills overcome every single problem just because there's textbooks. Textbooks don't tell you the answer to every problem, especially the problem with these references. These textbooks were written before these references -- well except for the Throne reference was written during, after *Portelli* was written. But the problem is the methods that Petitioner alludes us to have nothing to do with what *Portelli* is doing at all.
Which goes to the overwhelming point that none of these post critical date methodologies are showing what these references are purported
 to show, particularly *Portelli's* fourth embodiment.

I wanted to say something else, since the asserted patent's been
talked about, and I appreciate the Board's courtesy in letting me locate this.
But you know, Petitioner says that the asserted patent doesn't show anything
about tooling. I mean Your Honors, I didn't think -- I mean it goes through
every figure that's shown, and it goes through step by step tooling, how to
make the product.

And by the way, the tooling's not just hypothetical. The tooling's not line drawings. The tooling doesn't have anomalies in it. You're seeing pieces of the actual real mold. Figure 10B, Figure 10C, Figure 10A. Those are actually the molds that are used to make these products, and how do you know they're made? Let's look at figures, Figure 9F, Figure 9A. Oh in case you're wondering, again in a mold process, you look at Figures 8D(ii), 8D(i).

And then you go to Figure 6E, and if you have -- if you have -- and again, we want to make sure because Mr. May needs to see the whole perimeter. Figure 6D shows a whole tray actually made. Figure 6C. These are all actual articles. Oh of course I wanted to talk about Mr. Fisher had brought up about the curling in the rim. Yeah, you could see in Figures --

JUDGE TARTAL: Counsel, just so I understand. Are you suggesting that the tooling that's shown in the '281 patent, for example, is novel and unique tooling that, setting aside it wasn't claimed or it is claimed or it's not claimed. But is the idea that this is -- the tooling that's depicted is

missing, what's unique about the disclosure that enables the '281 patent that's
missing from all of the other certain references?

MR. FARCO: So Your Honor, I want to answer your question. But my client does have claims to the tooling, so those -- and I believe he even has patents to that tooling. To the extent that your question is does the tooling need to be novel to make the product? I mean in my view, the question of novelty, whether or not it somehow came after a particular priority is the question.

I think the question here is do we disclose how you're make and use
the products that are shown? It's illustrated, described and photographed in
this, in the challenged patents, and the answer is yes. This tooling shows it.
I mean to your -- I'm just saying, Your Honor, I can't answer without --

JUDGE TARTAL: Right.

MR. FARCO: I don't know what prior art's being asserted or what have you.

JUDGE TARTAL: Well I don't want to get into an issue that is not raised. I guess my question is your argument is that the other references are not enabling, right?

19 MR. FA

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MR. FARCO: Yes, by and large.

JUDGE TARTAL: And is it -- I'm just trying to understand. Is it your position that those references are not enabled because they fail to disclose the tooling that would achieve the profiles that they disclose, and that the '281 is enabled because it shows tooling that is however you want to put it, but unique, special, different, not already disclosed that enables this

1	configuration to be made in the '281 patent, because of the disclosure of the
2	'281 patent not using standard methods already well known in the art?
3	MR. FARCO: I will I will submit that well, I don't this
4	novelty speaks of the invention.
5	JUDGE TARTAL: So you set aside the
6	(Simultaneous speaking.)
7	MR. FARCO: So it's both the methods to make and use. So to
8	make it, you need a particular type of tooling; use it, you have to give some
9	sort of process to enable you to figure out how it's done. So it's actually two
10	things. So the tooling is one aspect of it, but how you use it is equally as
11	important. So the fact that, for instance and I'm actually, if you don't
12	mind, I'm going to go back to Petitioner's Slide 44, and I'm going to show
13	you.
14	This by the way this is a clear improper argument. This was never
15	raised by Petitioner at any point in this litigation, but I'll also show why it's
16	wrong for a number of reasons.
17	JUDGE OBERMANN: They say it was brought forward in the
18	reply at 21 and 23. You're saying it wasn't?
19	MR. FARCO: No, and moreover those paragraphs of Mr. May, they
20	don't show it either.
21	JUDGE OBERMANN: Okay.
22	MR. FARCO: This what they've done, this is a very by the way,
23	what's interesting is the In re Gordon case addresses this same issue. Also,
24	this is not an argument. If I could if I may be permitted just to have a little
25	bit more time, because this argument was not raised? So what they did was,

what you don't realize, they took the what they call *Portelli*, Exhibit 1000,
Figure 7 and 8, they took it and they flipped it upside down. They say oh
look, now we can make it look like -- again, more of the same, more
superficial comparisons to what's shown in Figures 8A through 8C of the
patent.

But Your Honors, the kicker of this is *Portelli* Figure 7-8 required 6 gravity, meaning they require an ejector to enable, to remove that tray that 7 gets stuck to the die, to remove it from the art, from the die after it's been 8 heated. So in other words, what Petitioner has done improperly is they 9 flipped the Portelli reference around in a way that it was never meant to be 10 done. In the In re Gordon case is directly on point. That doesn't render it 11 anticipated or obvious. You took the reference in a way that was never 12 meant to be operated. 13

In fact, this is part of the problem with their Teflon argument and any other remediation effect, is that they're not taking a reference as written. You can't just flip -- they never flip *Portelli* upside down, but even if they did now, it's improper because the ejector, this Item 27 that exists in Figure 7-8, is meant to hit the tray, because the tray actually does adhere to the die, which by the way Mr. May says will result in an article that needs to be discarded.

Again, I didn't make up the ejector. I didn't say that *Portelli* has to have adhesion to the die. *Portelli* says that itself, and I submit the record has that. I just want, in the interest of time, I'm not going to belabor what I could if you wish. I could find you the citations. But the point of the matter is the tooling and the methodology that's shown in the challenged patents

differs greatly from what is shown and what's not shown by the asserted
references.

Just for example, *Portelli* says that it has to be the sequential heating 3 by these formers. Now putting aside that the clapper box that's needed to 4 work with this thing does not exist, so that's a fantasy. We're talking about a 5 fantasy world. That is true fantasy. Secondarily, that process form creates 6 the tapers that become the puckers, because it goes sequentially. The 7 straight side is first, corners second, and what happens is the excess plastic 8 has to go somewhere, so it bleeds out into the corners and becomes sharp 9 pieces. 10

For the fourth embodiment for *Portelli* well, I just went through it. 11 It gets stuck to the top of the die, has to get pushed off and according to Mr. 12 May's testimony, that makes it a failure. I'm going to go back to my 13 presentation while I speak further on this. Now when we talk about *Long*, 14 for example, Long is an interesting one because Long doesn't even tell you. 15 You have to speculate what it's talking about. But even assuming, as Mr. 16 Clements tried, the problem is it does not tell you how to do it, and the 17 methodology that it teaches, which is very distinct. 18

Long, this distinction's important for the panel to understand. Long
 says that its precursor is shaped first, trimmed second. In the disclosed -- in
 the patent, the article is trimmed first and then it's shaped. So you're shaping
 the flange after it's trimmed. Long, it's the other way around. You shape it
 first and then somehow, which they obviously chose not to disclose, it's
 trimmed.

And then if we want to talk -- I wanted to also jump to the Meadors 1 reference, where I understand counsel to say well yeah, they disclosed the 2 paper as one of several alternatives. The problem with this, the problem 3 with this record is if we go to, you know, Mr. Clements in Exhibit 2007, 4 paragraphs 202 to 204, Petitioner's never rebutted the fact that a person with 5 skill in the art could not get *Meadors* to work with a plastic substrate, 6 because of the way that they're showing the dies, which were meant to work 7 on paper. 8

It's disclosed in those paragraphs, 202 to 204. Petitioner doesn't 9 address that a person with ordinary skill in the art, even if they were to put 10 paper in there, into those dies, it still wouldn't work. What I -- what I think 11 is also important to understand about the *Wands* factors, which I think they 12 might have stepped a little bit away from, is that there -- these textbooks that 13 we've heard a lot about, they say a lot of things that, you know, Petitioner 14 can't dispute, you know. They say things, and as you can see on Slide 14, 15 you see some of the items that are discussed, and in fact, you know, some of 16 these statements that are in paragraph -- on page 14, that's a statement by 17 Mr. May about how rim or flange shapes can vary considerably. 18

If we go back to page 13 of Patent Owner's demonstratives, and this
is the quantity of experimentation, these are statements by -- this Exhibit
2024, again Petitioner's attempt to get rid of it is to say that well, they're
talking about something irrelevant. The problem is that that, these
documentary evidence state that again, "it's the most, the thermoformed
flange is the most frustratingly inconsistent feature." They go on to say that

cutting it is an exact science. It's a calculation based on experience and trial
 and error.

Their Throne document says there appears to be no science in 3 determining the dimensions of a rim, and a rim roll design. If you go even 4 to the email, the present sense impression from the gentleman from Dexter, 5 who apparently Mr. May heard, who by the way told Mr. May all these 6 things about what RRIM technology could do. But when this -- when he 7 actually saw the words of this man, when he found out something different, 8 he said that they can't even guarantee the shape of a rim using RRIM without 9 optimizations, an extensive series of tests. 10

In Slide 16, he goes on to say that "We need to work in partially 11 unexplored territory. We need to do more testing." They say there's 12 unknowns that are present in the process now. I mean Your Honors, this is -13 - this gentleman wrote this email in 2018. They're trying to convince 14 everybody that this was old hat in 2015 when all the documented evidence 15 that's out there, their best argument is they disagree with it. It was marketing 16 puffery or we think they got it wrong. Well unfortunately for Petitioner, 17 while that's a convenient theory, it's not -- it's just attorney argument. 18

Oh, let's talk about the computer modeling. I just want to say right
at the outset, all of their arguments about Mr. Clements' modeling
techniques should really be afforded no weight. Mr. May had just as ample
access to distinguish what Mr. Clements did. He chose not to do so. He said
he didn't need to. In fact, if you go to Slide 25, after seeing SOLIDWORKS'
analyses, after seeing -- and look, he could have pointed -- he could have
pointed out how his purported flaws would have been realized.

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1	But he said "I did not perform nor need to perform, because the
2	solution was already provided in not only prior art patents, but also in
3	textbook references, and in my own experience, which I've stated
4	previously." Well that that that kind of ends it. They have, they had what
5	they believe is prior art. They think these textbooks say the same thing and
6	in his own experience, that's it. He doesn't need to do any testing.
7	That stream, that argument permeates through all of their arguments
8	against Mr. Clements' analyses. They don't apply these they don't apply
9	any of the methodologies or analyses or formula that are in these textbooks.
10	They'll cite to them. Petitioner will cite to them where they actually cite to it
11	in their reply brief. But they won't actually show you how their expert uses
12	them.
13	Instead, what we have when you go to Slides 28, 26 and 27, you see
14	the meticulous nature with which Mr. Clements took what, you know, these
15	are those measurements came from Patent Owner, I mean from Petitioner.
16	But the simulations that he built on, I mean that was the best, he used the
17	best everything. He used the other expert's measurements, and they're
18	saying it's unreliable.
19	Well they did the measurements first and they relied on those
20	measurements in fact, and you could see step by step. You don't see any of
21	that type of analysis done by Mr. May in this case. Never once do you see
22	them say well you know, I think the heat flow will be different if you
23	actually consider this, this the die that the plastic is sitting upon. But Your
24	Honor, with respect to that one particular point, Mr. Clements already had
25	testified that it wouldn't have made a difference, because the amount of heat

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that was being put into that rim right at the outset was so uncontrollable that
the thing would melt or bead up, and beading meaning it would turn into a
ball of plastic.

I mean Your Honor, the fact is Petitioner, you know again 4 Petitioner's testifying as an expert saying no, you just control the heat. Well 5 the problem is I have this *Portelli* reference says that apparently they don't 6 tell you how to heat it, but they tell you that heat it enough so it gets stuck to 7 the die. So at this point, the direction and guidance from the reference itself 8 is minimal, but then if you have any question about where else you go with 9 this Portelli reference, you need only look to Long, which said that you've 10 got to stay away from this thing, and it has to be avoided because it results in 11 puckers and distortions. 12

JUDGE TARTAL: Counsel, does the '281 patent teach how to heat
it so it doesn't suffer from the same problems that you're talking about?

MR. FARCO: Well, it says you can control the heating after you go ahead and -- if you move the -- part of the problem, Your Honor, to that point is what *Portelli* does it's working against gravity, and that's actually part of what was not actually inventions, which is important, is that in each of the *Portelli* embodiments, the article is pushed into the ram from below. So that if there's -- if the flange gets too hot, the plastic falls down due to gravity. It falls under its own weight.

In '281 patent, what was done is that the article starts out where you lower it into -- you'd be seeing each of the -- if you could -- I'll direct you to the '281 patent, and in fact I think -- actually I think Petitioner might have shown you some of these drawings. But they're actually directed into the

die. So you're not worried about the gravity effects from overheating or
even from the classic melting or wilting against its own weight. What patent
owner discovered is that you push this -- you push this periphery of the
precursor flange into this channel, you can roll it and depending on the
amount of heat you apply to it, you can either get it to become more rolled,
less rolled, less curled.

But again, the problem with *Portelli* is it doesn't tell you in response 7 -- how does it overcome the gravity effects. We know from Portelli, the 8 evidence in the record is *Portelli* says they get stuck. The flange gets stuck 9 to the die in the Figure 8 embodiment. So you know, that wasn't something 10 that Patent Owner experienced, because its process worked. Portelli's 11 process does not work, and as far as, you know, Petitioner wants us to show 12 how it failed, I mean Mr. Clements does show how it fails. He depicts how 13 it forms and he shows a simulation of why it will deform. 14

And furthermore, you need only look to the *Long* reference, which is their other reference they rely on, saying that it does result in puckers and distortions of the lift or the flange. This is not -- this is a third party, a third party who at some points I guess Petitioner wants to believe that the trays that they got after the critical date. But now when they have a document that's negative about this *Portelli* reference, we're supposed to say well they weren't, we don't know what they were talking about.

They say it only often, it only results often. Well according to Mr. May, something that in a thermoforming operation, that's something that often occurs. He understands it to be more often than not. The point of the matter is both -- and this is also interesting. Both *Portelli* and *Long* talk

about processes for large-scale manufacturing. They're both talking about
 mass production in their own disclosures.

So it's interesting for -- and by the way this -- the person with skill in the art would read that and say oh, I see what they're trying to do. They're trying to get something that could be mass produced. But once you start digging into the details, if you stay away from the superficial comparison that Petitioner's petition really engages in, you start realizing there's not much there. When you really dig into it, there is not much disclosed in these references, and frankly what is disclosed is failures.

And for *Long*, they don't tell you. They don't tell you the secret sauce of how you make this thing. They just give you -- they give you an idea, a flavor of what you want, but they don't tell you how to achieve it.

JUDGE TARTAL: Counsel, you're down to just under three
minutes.

MR. FARCO: Thank you, Your Honor. I want to -- I want to talk 15 about also this issue with, you know, Petitioner's handling of the whole case. 16 So -- and this comes up, I think this is most clear where you have it in the 17 handling of Long. So you can turn to Slide 80 of Patent Owner's 18 demonstratives, this is for all the IPRs. Petitioner says that, you know, the 19 problem was Petitioner saw the Long reference, said oh my gosh, we don't 20 have the elbow limitation of the claims, so let's figure out a way to make that 21 happen. 22

23 So Mr. May testified that an elbow will necessarily form all about 24 the periphery of the *Long* article, and they said that that's going to result --

the Petitioner quibbles over whether or not he admitted that it's all around.

2 We would direct Your Honors to the cited testimony, he said as much.

(Simultaneous speaking.)

3

4

MR. FARCO: So now --

5 JUDGE TARTAL: And counsel, please stick to the arguments that 6 were made in the previous presentation.

MR. FARCO: Okay. But Your Honor, ultimately what happens 7 here is that they said that Mr. Clements didn't do any sort of experimentation 8 showing how it would fail. If you'd just turn to Slides 83-84, you will see 9 10 there that Mister -- these were Mister -- these are from Mr. Clements' expert report and they were cited in the panel response at the pages cited. These 11 are using the alleged arguments or opinions of Mr. May and saying look, if I 12 try to get this thing to evade, to try to be releasing it from the precursor, 13 from the mold, to try and actually get it off the mold, you run into all these 14 other problems. 15

And you see the most grand example of that is Slide 84 of the Patent Owner demonstratives, where you can see the -- again, Mr. Clements tried to figure out a way that if you have a *Long* article that has this elbow that Petitioner says has to be formed, you can't move it out of the way in order to get it off the precursor without also causing it to cut right into the overwrap path. So he tried that, and he showed in his -- and we cite to it in our brief that this was just not -- they couldn't do it.

And then finally Your Honor, we talked about the tooling. It's just clear again that the Alto tooling that was discussed is nowhere present in the *Long* reference. There's no tooling in *Long*, and again Mr. Naughton

1	testified that he and his folks could even make the article. So again Your
2	Honor, this all supports the basis that Patent Owner was the first and only to
3	do it, and that's why they have the commercial success that they had today,
4	and that evidence stands unrebutted. Thank you for your time.
5	JUDGE ROSS: Judge Obermann, Judge Tartal, do you have any
6	further questions?
7	JUDGE TARTAL: I do not.
8	JUDGE OBERMANN: I just wondered if we had an objection for
9	the record.
10	MR. FLANNERY: Well, I was just objecting if he went beyond the
11	scope when he stated the word "elbow."
12	JUDGE OBERMANN: Got it. Okay, thank you. Nothing else from
13	me.
14	JUDGE ROSS: Okay. All right. Well if that's all, I'd like to thank
15	you both for your arguments today. We appreciate your thoroughness and
16	your attentiveness to our questions. If the parties could just stay around for a
17	few minutes after we adjourn to make sure the court reporter doesn't have
18	any questions, we'd appreciate that as well. So with that, the case is under
19	submission and we will enter our final decisions in these cases in due course,
20	and we are adjourned. Thank you.
21	(Whereupon, at 1:40 p.m., the above-entitled matter went off
22	the record.)

## **PETITIONER:**

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