

RECORD OF ORAL HEARING
U.S. PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ANDERSEN CORPORATION,
Petitioner,

v.

GED INTEGRATED SOLUTIONS, INC.,
Respondent.

Case DER2017-00007
Petitioner Application 15/058,862
Respondent Patent 9,428,953 B2

Oral Hearing Held: November 14, 2018

Before JONI Y. CHANG, JOSIAH C. COCKS, JUSTIN T. ARBES,
Administrative Patent Judges.

Case DER2017-00007
Petitioner Application 15/058,862
Respondent Patent 9,428,953 B2

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The above-entitled matter came on for hearing on Wednesday, November 14, 2018, commencing at 10:00 a.m. at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

1 P-R-O-C-E-E-D-I-N-G-S

2 10:01 a.m.

3 JUDGE COCKS: Good morning and welcome to the Board.

4 We're here today for oral argument in a derivation case. DER2017-00007.

5 This proceeding involves petitioner's application 15/058,862 and
6 respondent's patent 9,428,953. Let's start with introductions of counsel.

7 Will counsel for petitioner please introduce themselves?

8 MR. MORTON: Yes, Your Honor. I'm Cy Morton for petitioner.

9 With me is also Shui Li. In the gallery I have our lead scientist Shelley
10 Gilliss as well as from the Andersen Corporation Andrea Noraune, our IP
11 counsel, and Kate Graham who's our glass -- lead.

12 JUDGE COCKS: Thank you, Mr. Morton. Would counsel for the
13 respondent please state their appearance as well?

14 MR. SHUNK: Good morning, Your Honor. My name is Tom
15 Shunk. I represent GED Integrated Solutions. I'm backup counsel in this
16 case. Primary or lead counsel in this case is Mr. John Yirga here with me
17 as well Mr. George Pinchak and Ms. Samantha Smart.

18 JUDGE COCKS: Thank you, Mr. Shunk. Now as we set forth in
19 the trial hearing order each side has 60 minutes of argument time.

20 Petitioner will go first and present their case and may reserve rebuttal time.

1 The respondent will then argue their opposition and if petitioner did reserve
2 rebuttal time the respondent may also reserve brief surrebuttal time.

3 The petitioner will then use their rebuttal time and we will conclude
4 with the respondent using any time they have reserved for surrebuttal.

5 So that being said Mr. Morton you may approach the podium and
6 begin when you're ready.

7 MR. MORTON: Thank you, Your Honor. I'm going to shoot to
8 reserve 20 minutes of rebuttal time approximately.

9 So again, may it please the Board my name is Cy Morton. I
10 represent the petitioner Andersen Corporation.

11 Now, it is undisputed that Andersen employee Samuel Oquendo had
12 the idea we're talking about here first and communicated it to GED's alleged
13 inventor Bill Briese and that communication led directly to the '953 patent.

14 Specifically, it's undisputed that it was Mr. Oquendo's idea to solve
15 the problem of leakage at the fourth corner of an intercept insulating glass
16 unit, a window frame, by moving the seam off the fourth corner to make all
17 four corners identical.

18 Mr. Briese eventually took that idea from Mr. Oquendo, put it in his
19 own inventor notebook, handed the CAD drawing showing that idea to his
20 engineers to make GED's new corner plus product and patented the idea in
21 the '953 patent.

1 And in the words of Mr. Briese and others at GED it was the best
2 thing to happen to intercept since intercept.

3 The only reason there's still an alleged dispute about derivation here
4 today is that GED says Oquendo didn't conceive of a stop and didn't
5 communicate a stop and that's it. And we'll be talking about that today.

6 But that's really as you'll see just an attempt to feign ignorance about
7 what was going on.

8 According to GED Mr. Briese just didn't understand based on what
9 Mr. Oquendo told him that in the new design you would not leave a corner
10 notch along the side wall. And he did not understanding the stiffening
11 flanges that were already there would come together to form a stop.

12 As we'll see this is simply not true. That feature already existed in
13 intercept and was the only natural outcome of the design Mr. Oquendo
14 disclosed to Mr. Briese.

15 So my plan this morning is to talk a little bit about the original
16 intercept design and then go straight to conception, then disclosure, and then
17 a little deeper dive on the disclosure of a stiffening flange stop which again
18 is the primary --

19 JUDGE COCKS: Just a question as a backdrop as you go forward.
20 Do we have the right construction of stop in this case? Is there any

1 disagreement between the parties, the construction that was offered in the
2 institution?

3 MR. MORTON: There's no disagreement. There's no
4 disagreement. I think the only thing that came up on that was just the
5 location of the stop. So the stop is what it is. There's other claim
6 language that indicates the stop needs to be away from the corner, spaced
7 apart from the corner. So no, I don't think there's a dispute.

8 So we did bring the physicals as we said that we would in our calls
9 with the Board. This is the original intercept spacer frame. And the
10 Board can certainly take a look at this later.

11 What you have here though is -- a little stuck together. But if you
12 can picture how this all works it starts with a flat strip of metal and I've laid
13 it out here so you can see it.

14 Then that metal is punched. You punch 45 degree notches at the
15 corners, punch, punch, punch. That punching is controlled by software, the
16 location, timing of the punches. Of course the punch itself is controlled by
17 just the shape of a piece of metal that does it.

18 And you punch the tab and tail so the posts can go together. And
19 the whole point is to create an airtight spacer frame to go inside a dual paned
20 window and everybody knows that.

1 Once you've punched it you do what's called roll forming and that's
2 where you bend it up so it's no longer flat. You create the U shaped
3 channel and you create stiffening flanges all the way along.

4 I have pictures of this. The product basically, slide 4 showing the
5 stiffening flanges. And those extend everywhere where you don't punch it
6 out, everywhere where there's enough material left the process is going to
7 create stiffening flanges. And that's to give structural integrity to the entire
8 spacer frame.

9 JUDGE COCKS: Counsel, I do have one question. Just for the
10 record we're looking at the prototype you have in your hands but that
11 prototype is not in the record as of yet. If it becomes necessary for it to be
12 in the record we will consider that at a later time.

13 MR. MORTON: Sure. This is just to be clear, this is the original
14 intercept frame prior to the invention. It's exhibit 1051. And you can see
15 what happens as you fold the tab --

16 JUDGE COCKS: Just for clarity there are images that are exhibit
17 1051, is that correct?

18 MR. MORTON: That's correct. Yes, we have not submitted this
19 physical. So as you can see what you did originally was insert the tab into
20 the tail and the side walls and stiffening flanges meet at the corner in the
21 original intercept.

1 JUDGE ARBES: So Counsel, as I understand it, it was a problem
2 because the seam was at the corner and there was difficulty putting the
3 sealant around the outside. That was a problem.

4 It was also a problem, right, that the holes need to line up exactly.
5 Right?

6 MR. MORTON: Yes, and you'll see that they do. You hit the
7 corner the holes are lined up. That's to put in the argon gas between the
8 panes. And again that's something that everybody knows you have to have.
9 On the original intercept they have to line up and you do -- you have to have
10 those holes so you can put in the gas.

11 JUDGE ARBES: Okay. So when we're talking about moving the
12 seam away from the corner, you have the same issues, right? We have to
13 account for that seam being there and ensuring that the seal is proper and the
14 holes still need to line up, right?

15 MR. MORTON: Right. So if you look at the other corners
16 obviously there's no seam on the outside of the other three corners. The
17 fourth corner the way it was there's a seam right at the corner where the tail
18 overlaps. And this area was identified as the main failure problem for
19 leakage.

20 JUDGE ARBES: And whatever the stop is and wherever it is that
21 helps to align the two holes in the proper position, right?

1 MR. MORTON: It does. Certainly. So on the points that I've
2 said, I mean we have certainly here at slide 5 a description again showing
3 the stiffening flanges and Mr. Briese conceding that there will be stiffening
4 flanges everywhere except for where you remove material to create a notch
5 or to create the tail.

6 Of course Mr. Oquendo testified to the same thing. He explained
7 that anywhere where one side came into contact with another would serve as
8 a stop. The stiffening flanges were already there as part of the original
9 design of the GED or PPG intercept system and were already acting as a
10 stop.

11 And you see from their own finished quality specifications exhibit
12 2009 showing the fourth corner, good fold tab, no air gap. And you can see
13 that it just comes together, the side walls touch and the stiffening flanges,
14 they're going to be right up there, are going to touch at that fourth corner.

15 Mr. Briese further admissions on this saying that something is going
16 to stop it at the fourth corner, the side walls, or the abutting flange. That's
17 the stiffening flange to meet in the fourth corner. That's always been the
18 design of the original intercept. Yes, says Mr. Briese. So that's what we
19 have.

1 JUDGE COCKS: Just for the record this is slide 8 in the slide
2 deck. I didn't say this before. If you could try for the clarity of the record
3 reference the slide.

4 MR. MORTON: Right. And I do know that rule. It's always
5 hard to call it out every time.

6 JUDGE COCKS: Right, I understand.

7 MR. MORTON: So yes, that's slide 8 conceding that the stiffening
8 flanges abut in the original intercept. So Oquendo and Briese agree that
9 that was there and everybody that was involved in the conversations we'll
10 get to already knew that.

11 JUDGE ARBES: Counsel, can you clarify, if you could go back to
12 the previous slide. When we have the situation where the seam is at the
13 corner, what is touching what? You say the side walls or the abutting
14 flange. So it's the side walls or the flange at the top. They're both
15 touching the other piece at the corner?

16 MR. MORTON: Yes. If it's lined up correctly you're going to
17 have the entire 45 degree side wall touching right up to the stiffening flanges
18 which are at the top of the side wall.

19 JUDGE ARBES: So what's preventing it from going any farther
20 than -- it's both I guess, the side walls and the stiffening flange?

1 MR. MORTON: Right. I think that's right. So then I'm going to
2 move ahead to our conception period, show conception. I'm up to slide 10
3 now.

4 I'm going to focus on claim 1 which has the basic invention in it and
5 claim 5 where the stop specifically has to be stiffening flanges. We
6 covered all the claims in the briefing and really all the arguments come
7 down to is there a stop space in the corner that's created by stiffening
8 flanges.

9 So our conception looking at really claim 1, really the substantial
10 linear channel, the connecting structure, the stop, none of these things are
11 disputed. It's really just where the lateral connection forms a union point
12 by said stop. So that's got to be lateral from the corner. That's really the
13 only issue.

14 So what happened here. Looking up to slide 12. It's again
15 undisputed that Mr. Oquendo came up with a prototype in March of 2009 or
16 spring of 2009. I have the prototype here again. It's been labeled 2017.
17 So we have pictures to that effect.

18 And what he did was take two existing intercept frames and he'll cut
19 one of them and put them together to demonstrate what he wanted to show
20 which was to move the seam off the corner which he did by something

1 called reversing the swedge and splay. It's just changing whether the nose
2 points into the corner or points out of the corner.

3 So this is the -- holding up the prototype. Seams had to kind of
4 tape it together here. But you now have the nose heading into the corner
5 and you create this seam right here away from the corner. Now you can
6 seal that much better than you could at the corner. That was the basics of
7 his idea.

8 And you still have this corner notch that's right here that's still in the
9 prototype. And I just want to make sure we all understand where that came
10 from.

11 It's because he had two original intercepts which was all he had to
12 work with. So you took the fourth side here and cut it off at the corner.
13 That's what's taped here in the prototype. Straightened out the tail and then
14 used this as the fourth wall so he could insert this and demonstrate getting
15 the seam off the corner.

16 That's why there's still a corner notch in the prototype because he
17 was using -- it's a vestigial notch if you will left over from, it's an artifact
18 from using original intercept to create the reversal swedge and splay and
19 move the seam off the corner which is what he was trying to demonstrate.

20 Okay. It's also undisputed that he made CAD drawings
21 demonstrating this. Of course when he made the CAD drawing he didn't

1 leave a corner notch along the side wall. He made a CAD drawing like
2 this. Creates a butt joint. The stiffening flanges would meet in that butt
3 joint. And this is his CAD drawing from June 2009.

4 JUDGE COCKS: Mr. Morton, in the slide 13 there because the
5 issue of a stop seems to be front and center can you point to a stop in that
6 image at the top of slide 13?

7 MR. MORTON: Well, I can't because this is intercept. I've been
8 showing you the original intercept. This is a modification of intercept.
9 And that's why I spent some time earlier saying the stiffening flanges run all
10 the way around. So if you don't cut away material there will be stiffening
11 flanges.

12 So the entire length of what you're seeing here in the CAD drawing
13 has stiffening flanges. Right where I'm trying to point there if I can hold
14 still is the butt joint where those come together. And the stiffening flanges
15 have to be there, have to meet at that point. So that's where the stop is, is
16 right where that line is pointing to the top of the part of the butt joint right
17 there that would have a stiffening flange.

18 JUDGE ARBES: Do they have to meet exactly so that they stop
19 when they contact, or can the one on the left insert within the one on the
20 right and go farther?

1 MR. MORTON: Well, the stiffening flanges curl in like this. So
2 they're not going to allow you to go in further. They're going to meet.
3 The side walls are going to meet, the stiffening flanges are going to meet.
4 So that insertion is going to be stopped at that point.

5 And that's just a consequence of just squaring that off at 90 degrees
6 instead of cutting a 45 degree corner notch which you would not do along
7 the side wall.

8 We have evidence that it wasn't just Mr. Oquendo. He shared his
9 idea with others within Andersen again talking about moving the seam off
10 the corner, shared his CAD drawings.

11 We have his direct testimony answering the question that you just
12 asked. He says the stiffening flange abutment is a consequence of a butt
13 joint seam at the offset seam location. So that's what we were just talking
14 about. You make a butt joint offset. You get a stiffening flange
15 abutment.

16 JUDGE ARBES: One question I have. On page 35 of your
17 petition when we're talking about the stop limitation in particular you say
18 about one-third of the way down “when assembled the insert tab naturally
19 stops at the corner on the opposite frame end, placing the insert tab in its
20 proper position.”

1 You seem to be saying there that the stop is at the corner because it
2 goes all the way to the end and stops.

3 MR. MORTON: So I think going back to our petition we just went
4 through the claim language as it comes. And when you hit the element of a
5 stop we gave like every kind of stop that there can be in the system.

6 So if you do have the nose going into the corner that can form a stop.
7 The stiffening flange abutment is a different form of a stop. So we were
8 listing all the possibilities.

9 When you get into the stop being by the union point offset from the
10 corner that's where we've had to focus on the one that we also have in our
11 petition which is the stiffening flange stop right there.

12 JUDGE ARBES: So do you agree that there cannot according to
13 these claims be a stop at the corner? It cannot be what you refer to on page
14 35. It has to be if anything the contact of the stiffening flanges away from
15 the corner.

16 MR. MORTON: Right. I think it has to be by the union point is
17 the way the claim language is.

18 JUDGE ARBES: So that's the only stop you are relying on now
19 then?

20 MR. MORTON: Correct.

21 JUDGE ARBES: Okay.

1 MR. MORTON: Okay, so just finishing out the conception piece
2 we also of course have the January 2011 drawing which was drawn for Mr.
3 Oquendo by Mr. Briese which shows a software change to move the seam
4 over to here in between A and B off of the corner.

5 What happened here, what the testimony is, is Mr. Oquendo asked
6 Mr. Briese for this. An hour later he had this sketch. The next day had a
7 quote for the software change to create this.

8 Mr. Briese has repeatedly admitted that this drawing came from Mr.
9 Oquendo, was what he thought Mr. Oquendo was asking for not just in 2011
10 but in 2009.

11 JUDGE ARBES: Counsel, that drawing does have the V notch
12 still.

13 MR. MORTON: It does, it does, because again this is to reflect the
14 software change. As I mentioned you control the timing and location of the
15 punches with software, you control the shape of whatever is going to be
16 punched by the shape of the punches.

17 So this is not addressing that. This is just addressing the software.
18 And obviously when you punch this nose piece you're going to have a punch
19 that doesn't also punch a corner notch in the side wall.

20 So this is the first step is get the software changed. And we'll
21 certainly discuss this a lot more that you would not leave that corner on the

1 side wall when you design the punch to create a product in accordance with
2 this idea.

3 JUDGE ARBES: How do you respond, I believe Mr. Oquendo
4 confirmed that this did accurately show his idea. And if this still shows the
5 punch, then the stiffening flanges cannot contact, right?

6 MR. MORTON: Well, if you look at all of Mr. Oquendo's
7 testimony he says yes, this accurately shows what I wanted from Mr. Briese
8 which was the software change because GED controls the software. The
9 hardware is at Andersen. He could experiment with that. That's also the
10 testimony. Create the punch and test the product himself. So that's what's
11 going on.

12 And we're going to see, believe me, we're going to see testimony
13 from both Oquendo and Briese that you would never leave a corner on a side
14 wall. And Mr. Briese concedes that repeatedly.

15 JUDGE ARBES: Okay, so this really does not fully show Mr.
16 Oquendo's idea in your view because it does not show the stiffening flanges
17 touching each other.

18 MR. MORTON: It does show where the stiffening flanges would
19 be. They'd be right along here and right along here. I had Mr. Briese
20 draw those on this drawing. I think we have it in a future slide.

1 And it's quite clear just from looking at it if you don't punch a corner
2 along the side wall those stiffening flanges will meet in the middle and abut
3 at the butt joint just like in Mr. Oquendo's CAD drawing, just like in the
4 corner product, just like in the '953 patent.

5 So to go from there to address some of GED's arguments on
6 conception they have commented even in the surreply to question the dating
7 of Mr. Oquendo's CAD drawings so I want to address that briefly.

8 Here we have a PDF of the CAD drawing that's attached to a June 5
9 email internal to Andersen. And that shows the date. At least by June 5
10 of 2009 he had the CAD drawing. It has all the structural aspects that
11 we've been talking about for conception. So that is really not an issue.

12 The reason why it's become supposedly an issue is because later in
13 these pictures on the left in slide 18 were added. They're added December
14 2, 2010. It doesn't change the fact that everything else was there, all the
15 structure was there back in 2009.

16 And the timing of these is interesting I think just because -- so he
17 added pictures to the CAD in December 2010. This was just before going
18 to Mr. Briese in January 2011 and asking for the 2011 CAD drawing to
19 move the seam off the corner. So he's obviously just working on this
20 project again and getting ready to go see Mr. Briese.

21 JUDGE COCKS: Counsel, could you go back one slide?

1 MR. MORTON: Yes.

2 JUDGE COCKS: So, I think there's an exhibit 1012 and an exhibit
3 1013. I don't see exhibit 1012. That bottom illustration 9 exhibit 1012.

4 The reason I'm getting at is because there is some dispute about what
5 is the June CAD drawing. I'm trying to see if we can resolve that a little
6 bit.

7 So go to the next slide then. So this resembles the June CAD
8 drawing but is not itself the June CAD drawing, is that accurate?

9 MR. MORTON: So when you do CAD drawings like this it can be
10 the same underlying document and you just add to it like you add to any
11 document.

12 So there were some dimensional things that were added at some
13 point and these pictures are obviously dated December 2010.

14 JUDGE COCKS: I guess I should be more specific. The June
15 2009 CAD drawings. Similar to that is what you're saying but it's not --
16 what we're seeing in slide 18 is not the June 2009 CAD drawing. Or if I'm
17 wrong tell me why I'm wrong.

18 MR. MORTON: It's an edited version of the same document.
19 And to be clear again all the lines, all the diagrams that you're seeing is the
20 same.

21 JUDGE COCKS: It's just the pictures on the left.

1 MR. MORTON: Right. But the basic spacer frame, the offset
2 seam, depictions of how the nose would look, that stuff is all the same.

3 JUDGE ARBES: Counsel, I think one of the concerns I had was
4 that Mr. Oquendo did testify that exhibit 1013 is the drawing he showed Mr.
5 McGlinchy, but that's not true, right? He did not show exhibit 1013. It
6 was the CAD drawings itself without the pictures.

7 MR. MORTON: Right. I don't have that exact testimony, but
8 these -- I'm not going to pretend that these December 2010 pictures were in
9 what he showed to Mr. McGlinchy. His testimony was that it was on his
10 computer so it's a live document and he showed -- so to him it's the same
11 document.

12 JUDGE COCKS: So is, and I think it's exhibit 1012 which is just
13 the CAD version. So is that the document that was shown or potentially
14 shown?

15 MR. MORTON: Yes. If that's this CAD drawing without the
16 pictures then I think the answer is yes.

17 One other word about this whole dating issue that I think is kind of a
18 little odd is that whether it was in June of 2009 or later 2009 or 2010 all of
19 that was long before Mr. Briese claims to have done anything or figured out
20 anything. So it's all prior. Everything that he did is prior to the January
21 2011 drawing that Briese made at Mr. Oquendo's behest.

1 JUDGE ARBES: Counsel, I think we have to be accurate. We're
2 talking about alleged communication of the conceived idea. It's not
3 accurate to say that exhibit 1013 was shown to them, right? I believe
4 you've acknowledged that has photographs that occurred in December of
5 that year. So it could not be exhibit 1013 at least.

6 MR. MORTON: It can't be -- no. It's the same underlying CAD
7 drawing. The CAD drawing is never -- it's in CAD. It's a live document.
8 It's never changed. It's had things added to it. It's had the figures added to
9 it later.

10 So that was one issue of GED's. The other issue we've discussed a
11 lot and we'll discuss more is whether Mr. Oquendo conceived of a stop.
12 We've already discussed that the stop is right there at the seam. It's the
13 only thing that can happen when you create a butt joint in intercept.

14 And this is what Mr. Oquendo testified as well. He said talking
15 about whether or not he thought about that he says it has to be stopped at a
16 certain point so the holes align. That's part of the design. I didn't
17 specifically envision a new kind of stop. The stops, the abutment, all that
18 stuff was in the system. It just happened to come together after he
19 modified the punch and dies. So again it's just a natural outcome of
20 moving the seam off the corner to create a punching. The last thing that
21 GED has argued on conception is that Mr. Oquendo did not have a lateral

1 connection which they argued as the overlap, the nose overlaps with the
2 other side of the wall, that entire overlap as having to be away from the
3 corner, not just where the stop is.

4 So this, they never showed a construction of lateral connection.
5 GED modified to add this red on slide 20 to define the lateral connection
6 that's not in the patent.

7 And in fact if you look at figure 7 of the patent both the lateral
8 connection is 60, duty point is 58 and they both just point to where that butt
9 joint would be right there. They do not denote the entire length of the
10 overlap. So that argument which is in the reply or I should say their
11 opposition is just not correct.

12 Even if it was correct the 2011 drawing which is Mr. Oquendo's idea
13 does show the entire overlap if that's the lateral connection spaced from the
14 corner. We have Mr. Briese again confirming that that drawing that he
15 made for Oquendo is based on my understanding of what Mr. Oquendo
16 wanted and what I thought Mr. Oquendo was talking about all the way back
17 in 2009.

18 So it's an admission. This is what he thought he was talking about
19 the whole time basically.

20 So from there I'll move to disclosure which we certainly covered to
21 some degree but I want to cover it specifically for this derivation.

1 So I'm up to slide 25. And in the petition of course we talked about
2 a meeting between Mr. Oquendo and Mr. Briese and Mr. McGlinchy where
3 he showed the prototype.

4 And GED in the trial has denied ever seeing the prototype. So I
5 submit that the evidence still shows that it's more likely than not that they
6 did. I don't need to win that point because we have other evidence of
7 disclosure and we can win based on the other evidence and not on whether
8 they saw the prototype, but I submit that the correct finding of fact is that it's
9 more likely than not that they did see the prototype.

10 And the reason is as we show on slide 25 it's undisputed that they
11 were at a larger meeting with Mr. Oquendo at Andersen where the topic of
12 the day was the fourth corner problem, the leakage problem. And GED
13 proposed an automated patch at that meeting.

14 So they were all there to discuss the very problem that Mr. Oquendo
15 was trying to solve with his prototype.

16 It's also undisputed that he had a prototype. No one's denying that.
17 It was there. It was available. Slide 26, he testifies that he showed it to
18 Mr. Briese and Mr. McGlinchy.

19 Then going to slide 27 --

20 JUDGE ARBES: Just one question if you can go back to the
21 previous slide.

1 MR. MORTON: Yes.

2 JUDGE ARBES: There was no one else there I take it when he
3 showed it to them?

4 MR. MORTON: That is correct. The meeting was just the three
5 of them. It was a side meeting at the larger meeting to discuss the overall
6 issue.

7 JUDGE ARBES: But that's denied by Mr. Briese and Mr.
8 McGlinchy?

9 MR. MORTON: They deny it. They deny it. So clearly I'm
10 arguing based on the surrounding circumstantial evidence that Mr.
11 Oquendo's testimony is more credible.

12 So following that it's undisputed that at some point they started
13 talking about this. You have an email from Mr. Oquendo to Briese in slide
14 27 that says have you had a chance to look at the reversal of the swedge and
15 splay which is of course exactly what's demonstrated in the prototype.

16 And we have Mr. Briese responding. He understands what's going
17 on. This is in May. Changing the tab insertion to a butt joint instead of a
18 corner joint does not seem feasible. But he knows what it is that we're
19 talking about. We're creating a butt joint off of the corner. So that's
20 undisputed.

1 You may recall, we've been talking about this idea of a butt joint a
2 lot this morning. And it goes back to what I explained earlier for why we
3 know this is conceived and disclosed.

4 This is what you have here in the conception in the CAD drawing is
5 a butt joint where the stiffening flanges come together. That's in slide 15.

6 We go back to slide 27 Mr. Briese knows we're talking about a butt
7 joint, not a corner joint. So he knows exactly what's going on.

8 But of course still they say they didn't see the prototype but have no
9 recollection, Mr. Briese has no recollection of how this all started, where it
10 all came from. He said well, maybe it was on a call. So he has basically
11 no story. He has to admit that it happened because it was in these emails.
12 Where Mr. Oquendo has a much more plausible story. I showed you
13 reversal of swedge and splay at a meeting to discuss the fourth corner
14 problem. We followed up. We had emails over it. You knew what I
15 was talking about. You said you tested it in the next sentence. So that's
16 what we believe happened.

17 But in any event we know he disclosed reversal of swedge and splay.
18 We know it was a disclosure of a butt joint instead of a corner joint which is
19 really all you need to know. Once you know what intercept is you make
20 those changes, you get to the invention.

1 Further on the disclosure obviously we've already discussed Mr.
2 Oquendo asking for the 2011 drawing. I have here in slide 28. Again this
3 is what Briese thought Oquendo was talking about even going back to 2009.
4 And this is a quote for software change. That's what we have here is
5 \$3,200 in slide 28 to make this software change, remove the seam off the
6 corner.

7 One more thing I wanted to discuss on this particular area is this
8 issue of reversal of swedge and splay versus the 2011 drawing which is
9 really just about does the nose go toward the corner or does it come away
10 from the corner.

11 And if you look at this 2011 drawing on the left in slide 30 you see
12 the dimensional inputs. This is all in the testimony. A, B, H and W.
13 Those are adjustable. The user can make them be whatever length they
14 want to create the size window that they're creating.

15 And so if you just extend B to be longer and A to be shorter the nose
16 moves right down into this upper left corner. And you end up with exactly
17 -- this is Mr. Oquendo's drawing on the right rotated 180 degrees to be the
18 same orientation. But you get the same thing.

19 So reversal of swedge and splay versus an offset seam. It's the
20 exact same thing. It just depends on whether you do it at the end of B, if

1 you make B longer into this corner or not. They are the same result.
2 They both result in an offset seam and a butt joint.

3 Just on the point that this was a software change again. I think the
4 testimony from Mr. Briese that he generated this sketch. This is what it
5 would take to make intercept comply with what Mr. Oquendo wanted.
6 That's slide 31.

7 And followed up again. The quote is for a software change.
8 That's on slide 32. It's not a quote or a request for new punches that you
9 would need to make in order to not punch a corner notch along the side wall.

10 JUDGE ARBES: Counsel, just to follow up on that point one more
11 time. You say in the reply on page 22 that Mr. Briese must have known in
12 2011 that Oquendo's idea would not include a notch in the seam. Therefore
13 the stiffening flanges would abut and create a stop. What proof is there of
14 that, that he must have known that that notch would not be there?

15 MR. MORTON: He said that you would never -- he testified that
16 you would never include a corner notch on the side wall. And he testified
17 that almost anyone would come to that conclusion.

18 JUDGE ARBES: Well, why include it in the drawing?

19 MR. MORTON: Because this is the original intercept. It's the
20 original intercept software and all he's done is make the change. To get

1 more technical and geeky on it they made a five sided rectangle, one, two,
2 three, four, five. So you'll see testimony about adding a strike.

3 So what you really are doing is adding a fourth strike to create a
4 fourth equal corner so all four corners are the same. And then you've
5 moved the strike that's going to create the nose or the tail, tab and tail, that
6 strike has got to be the fifth strike. And then you have to change the
7 hardware in order to make that strike so that you don't punch a corner notch
8 in the side wall.

9 So one, two, three, four strikes that are all the same and then this has
10 to be adjusted in the hardware.

11 So all you do is do this thing that Briese did given the constraints of
12 the existing software you make it five sides, punch four times and the fifth is
13 -- you have to create the right punch for the tail.

14 So he knows that he wouldn't leave it there. So this whole issue is
15 either -- it's either him trying to play dumb, or them trying to think that Mr.
16 Oquendo is dumb and would think that you would leave a corner notch
17 which we know is not true. We've seen his CAD drawing. You actually
18 do it. You wouldn't leave that.

19 JUDGE ARBES: No one ever said -- Mr. Oquendo never said no,
20 this drawing is not accurate? The notch might be there in my design?

1 MR. MORTON: We don't have that evidence. He said that this
2 reflects the software change that I wanted and go from there.

3 JUDGE COCKS: But to be clear you're asking us to infer from that
4 that that means it's limited to the software change and is not the next stage if
5 that's the right phrase.

6 MR. MORTON: Well, as I will go into that in more detail I'm
7 asking you to rely on the admissions of Mr. Briese that you would never
8 leave a corner notch on a side wall. And that if you don't leave a corner
9 notch you get a stiffening flange stop.

10 So again this is slide 33 again confirming from Mr. Briese. This
11 was done to demonstrate a software change. Right? Yes. So he's
12 conceding that that's all that this was attempting to depict was to depict the
13 software change to move the seam.

14 So from that I want to move into really derivation, the rest of the
15 story, what happened. And we have here in slide 34 mention of Cliff
16 Weber who is the other inventor listed on the '953 patent.

17 And what did Mr. Weber contribute? What did he say? That
18 testimony is down here on the left. His suggestion to me was that if we
19 move the seam off the corner that was it. Mr. Weber said move the seam
20 off the corner. He didn't say anything else. That was his contribution.

1 And Briese at that point thought okay, I guess I'll try that. And he
2 made his inventor notebook here on slide 35. And the things I want to
3 point out on this inventor notebook are -- start at the bottom.

4 The new design is a butt joint versus a corner joint. That's the new
5 thing. Butt joint instead of corner. If you remember all the way back to
6 slide 27 that's what he understood. This is what Briese wrote to Mr.
7 Oquendo all the way back in May of 2009 making a butt joint instead of a
8 corner joint.

9 Now in 2014 in his inventor notebook he's saying that's the
10 invention. Butt joint versus corner joint.

11 JUDGE ARBES: Counsel, there was a piece of prior art that
12 respondent referred to dated May of 2008, the cardinal frame. Do you
13 agree that that had the seam located on the side rather than at the corner?
14 That that prior art had that?

15 MR. MORTON: Sure. This is the cardinal art.

16 JUDGE ARBES: Yes.

17 MR. MORTON: It shows a box spring. It's a completely different
18 type of window frame from an intercept frame because you just have -- you
19 have the same box that goes all the way around the outside. You just bend
20 it at the corner as it comes together.

1 You have an insert that goes partly into one side, partly into the other
2 and then you seal that whole thing up. So it's a totally different approach
3 than having a single piece where you insert one end into the other, you have
4 the nose, you have to add a stop, all that stuff.

5 So I think it's completely different. And I certainly think just from
6 a legal standpoint it's irrelevant today because we're just trying to decide was
7 this derived. Should these '953 claims be canceled because they were
8 derived.

9 If that's the result and the claims are canceled Andersen will be back
10 in front of the examiner on its own patent and will make its own arguments
11 over the prior art.

12 So back to the inventor notebook. The other thing that's key to look
13 at here is that he notes preliminary work was done on this project.

14 JUDGE COCKS: Counsel, I have to interrupt. You're through
15 your 40 minutes. You can continue on but it will impact your rebuttal time.

16 MR. MORTON: Understand. I'm fine. I'm fine. I definitely
17 want to finish this part up.

18 So the preliminary work was done January 2011, never disclosed
19 publicly or prototype. Well, that's a direct reference to the drawing that he
20 drew for Mr. Oquendo.

21 How do we know that? He took the drawing that he made for Mr.
22 Oquendo depicting the software change and pasted it into his notebook.

1 So this -- I've never seen anything that's quite as clear, quite as much
2 of a frankly a smoking gun piece of evidence as taking the drawing that
3 came straight from our inventor, putting it in your inventor notebook and
4 calling that your invention.

5 From there he admitted further and I am now in slide 37 that what
6 happened was he used that drawing that he got from Oquendo and used that
7 as a template and gave that to his engineers to create tooling drawings.
8 That's in the testimony here on the left in 37.

9 So it went straight from Mr. Oquendo, this is what he wanted, gave
10 that to create tooling drawings.

11 Well, of course they're going to remove the notch. And I had him
12 draw on here, you can see it in blue on slide 37 where the stiffening flanges
13 are on either side of the notch. He confirmed that you take the notch out
14 the stiffening flanges abut.

15 So in any event this went straight from Oquendo to the inventor
16 notebook to the engineers to create tooling drawings and became corner
17 plus, the best thing to happen to intercept since intercept. It is a direct line
18 from Mr. Oquendo to their product and their patent.

19 So we just covered this abutting of stiffening flanges quite a bit
20 today but since that's the issue I have a couple of more slides on it. I want
21 to make sure we've looked at what the evidence actually is on that.

1 Of course we have Mr. Oquendo pressed on this in cross
2 examination about the notch and he testified it would be totally ludicrous to
3 leave it in place. He said it's understood that the moisture and vapor path
4 has to be consistent.

5 He's saying what everybody knows. The whole point is to create an
6 airtight seal. You don't put a huge corner notch in the side wall if you're
7 trying to create an airtight seal. So that's how he saw it.

8 Mr. Briese, this looks a little bit blurry but slide 41 we've got the
9 same kind of testimony. I asked and you would never include a notch like
10 that around the side wall in a spacer frame, would you. You wouldn't. It's
11 clear.

12 You knew, talking again about that drawing with the software
13 change 2011, you knew you can't leave the notch there along the side wall
14 and have a workable spacer frame, right? Well, most anybody would come
15 to that conclusion. Clear admissions from Mr. Briese.

16 And again about the stiffening flanges he concedes because this is
17 intercept I know where the stiffening flanges are. Remove the notch, you
18 get the stop.

19 And I said and you didn't have to create a stiffening flange. You
20 just cut it off at 90 degrees. This is slide 42. Cut it off and the stiffening
21 flanges would be there at the end. Yes. That's where the stop would be.

1 And if you remove, change the punch to remove the notch the
2 stiffening flange on the left would abut the stiffening flange on the right.
3 Answer, it would. It would. This is Mr. Briese just conceding the story
4 that I've been telling all day.

5 And finally he was asked about this on redirect. Counsel for GED
6 trying to get him to say that based on different metal thicknesses maybe the
7 stiffening flanges wouldn't meet. Isn't it possible that they wouldn't meet.

8 And he first says I would say the stiffening flanges would contact
9 each other. Same hypothetical. This is slide 44 if I didn't say that.

10 Asked again, wouldn't it suggest to you that they would not touch
11 each other because of the different metal thicknesses. He explains how
12 intercept actually works. He says inherent in the shape of intercept the
13 nose is formed a certain way so the stiffening flanges are in communication
14 with each other. That's his testimony on redirect.

15 JUDGE ARBES: Counsel, isn't that testimony talking about the
16 corner plus product, not necessarily what exactly Mr. Oquendo conceived
17 and communicated to them?

18 MR. MORTON: Well, all of this testimony that I've just played
19 through in these slides is all under the hypothetical of that 2011 drawing and
20 what would you do. You would remove the notch, the stiffening flanges
21 are there, they come together to form a stop. That's what this testimony is
22 about.

1 JUDGE ARBES: I guess I'm having some difficulty with posing a
2 hypothetical to him rather than looking at exactly what he communicated.
3 If he communicated a design that's shown in the 2011 drawing that does not
4 have it, making this inference based on a hypothetical -- is that proper?

5 MR. MORTON: So let me go back to what's actually
6 communicated. What's actually communicated is you start with intercept.
7 From the beginning of my talk here today you start with intercept and you
8 know what you have in intercept. You know you have stiffening flanges
9 and you know that they abut at the corner. And that's where the seam is.

10 He's communicating make all four corners the same, move the seam
11 off the corner. You'd have to still have intercept. Intercept has
12 contiguous side walls to form an airtight seal. It has stiffening flanges.
13 So when you move the seam off the corner that's what you're going to have.

14 All this stuff about the notch is, it's just the wrong way of thinking
15 about it. What we're doing is modifying the original intercept which Briesse
16 knows, Oquendo knows that's what we're talking about to move the seam off
17 the corner.

18 It's not about not having a corner notch. Of course you don't have
19 that. That's just as obvious as it gets.

20 But that's what's communicated is take intercept, move the seam off
21 the corner, create a butt joint. With a notch there that's not a butt joint.

1 Mr. Briese knew in his email in May of 2009 what we're doing is creating a
2 butt joint.

3 So you take his 2011 drawing and create a butt joint. That is what
4 was communicated absolutely. Butt joint, stiffening flanges meet and form
5 a stop. I'll reserve the rest of my time.

6 JUDGE COCKS: Okay. We asked a few questions. You'll have
7 15 minutes. Mr. Shunk, whenever you're ready. Whenever you're ready
8 and would you like to reserve surrebuttal time?

9 MR. SHUNK: May it please the Board, I would like to reserve 10
10 minutes of my time. Let's see if I can do it.

11 JUDGE COCKS: I ask so I can put something into my time device.

12 MR. SHUNK: Thank you very much. There are many disputed
13 facts in this case and I look forward to spending most of my time talking
14 about that dispute and showing you why many of the things that counsel told
15 you are not really supported by the facts at all, in fact are contrary.

16 For example, you heard a lot about how abutment of the stiffening
17 flanges was already in the intercept product. In fact the testimony and the
18 exhibits in this case show that the original intercept concept was to not have
19 the stiffening flanges abut each other but to maintain a gap.

20 And I'll show you where that is in the testimony as well as in the
21 prior art Leopold patent and in the actual GED specifications for the spacer.

1 JUDGE ARBES: That gap would be at the corner, right? In the
2 original intercept product.

3 MR. SHUNK: There would be no contact even at the corner.
4 And if that's of interest to you let me go to that right away and demonstrate
5 that to you.

6 Mr. Briese was asked about this by counsel during his testimony in
7 his deposition and he said no, you don't want the stiffening flanges to abut
8 each other in the corner because when they do they will bow out. It will
9 press against each other and bow out.

10 In fact this is from a GED quality specification prior art. It's slide --
11 or demonstrative exhibit 2044 and it comes from exhibit -- I think that's
12 1049 if I can read it correctly.

13 He pointed to this and this actually teaches the manufacturers of the
14 GED frame that the corner gap is a result of incorrect punching depth in the
15 corner dies. If the corner dies are not punched deep enough the corner gap
16 will be too narrow.

17 So a corner gap is meant to have a 0.023 inch minimum just as
18 shown in this diagram. That's actually consistent with the original GED
19 Leopold -- Edmund Leopold is the founder of GED -- the original Leopold
20 patent again shows that the stiffening flanges do not abut right here in the
21 fourth corner.

1 You can see that one piece slides into another but the side walls and
2 therefore the stiffening flanges are spaced apart from each other.

3 And the reason was as Mr. Briese explained in his testimony that if
4 the stiffening flanges hit each other in this situation it will cause them to
5 bow out because the metal is pretty thin and having an irregular outer
6 surface means that the pieces of glass will not fuse together properly and you
7 won't get insulation.

8 So in the GED intercept prior art it was specifically not intended for
9 the side walls and the stiffening flanges to meet and that was Mr. Briese's
10 testimony.

11 JUDGE ARBES: This is actually a question I had. So if the side
12 walls and stiffening flanges don't meet at the corner, what causes the piece
13 not to go any farther? Is it just the top shown in that drawing that hits the
14 other side? Is it only that top piece?

15 MR. SHUNK: The answer is that it is the worker who is doing the
16 assembly that causes that to happen. In other words the worker is trained to
17 leave the gap so that there is a precise 90 degree on each corner alignment.

18 The worker doesn't simply slam the -- in the old GED system simply
19 doesn't slam it up. The worker actually visually aligns the holes and
20 maintains the gap. And then goes to the next process.

21 That's one of the advantages -- see, what really happened here, Your
22 Honor, is that in 2014 GED was trying to get this last piece of the assembly

1 automated. Because they knew that aligning the two gas holes, there's one
2 on both the insert tab and on the trailing end, getting those gas holes to line
3 up was key.

4 And they wanted to automate that because it takes a lot of dexterity
5 for a human being to do that kind of alignment particularly because you can't
6 just slam the tab into the side wall until it can't go any further and just
7 assemble the piece.

8 JUDGE ARBES: So in this original design there really was no stop
9 at all.

10 MR. SHUNK: There was no stop at all. That's exactly right.
11 That's exactly right. And we point out in our brief where Mr. Briese made
12 that clear.

13 The concept of stiffening flanges acting as a stop is not part of the
14 prior art and has never been shown to be. Counsel would like it to be
15 because that helps him to fill in a missing blank in his proof of conception
16 and communication but it's not there.

17 So that's just an example of the kind of dispute on the facts that I'd
18 like to talk about today. But if I may I'd like to begin as Mr. Morton tried
19 to do with looking at what is not in dispute because GED is of the view that
20 if you look at what isn't in dispute you can stop right there and it causes you
21 to find for the respondent in this case.

1 What are those things that aren't in dispute? Well, clearly all claims
2 of the '953 patent require a stop spaced from the corner. Note that that's not
3 just a stop, not just any stop, not a stop at the corner, not a swedge slipping
4 into a splay, an interference type stop, but a stop as the Board has defined it
5 spaced from the corner.

6 Now, number two on the undisputed facts is the primary examiner
7 during the prosecution of this case in her reasons for allowance found that
8 that stop space from the corner was the key element that defined this
9 invention over the prior art.

10 And if I may I want to read just a couple of sentences from the
11 reasons for allowance. And this is located in exhibit 2028 at page 182.
12 Primary examiner Quast's reasons for allowance.

13 She said in Leopold -- that's that patent right there, slide 2024 -- in
14 Leopold the only part acting as a stop is the corner itself, the back wall of the
15 next part of the frame. There is no stop that is spaced from the corners.

16 It is further noted that there would be no motivation or suggestion to
17 add such a stop to Leopold without the use of impermissible hindsight.

18 The feature of having the lateral connection be formed by the stop
19 and spaced from the corner in combination with the rest of the limitations of
20 each independent claim respectively is novel and unobvious.

1 So when the primary examiner was looking at it, it was exactly the
2 stop spaced from the corner that differentiated the '953 patent from the prior
3 art.

4 JUDGE COCKS: Counsel, not to belabor this but just for
5 completeness. So the construction of stop in the institution decision, there's
6 no dispute that that's --

7 MR. SHUNK: There is no dispute, Your Honor.

8 JUDGE ARBES: And counsel, when the examiner was referring to
9 the only part acting as a stop is the corner itself, that's slamming them
10 together, right?

11 MR. SHUNK: That would be slamming it together. And I would
12 agree. What I believe if I can interpret the primary examiner and I'm not
13 her, but as I read this the only thing that would ultimately act as a stop is that
14 the one would slam into the other.

15 However, clearly it's not shown in that fashion in the drawings of
16 that patent. In fact, whenever you saw Mr. Morton quoting from Mr.
17 Briese saying well yes, the stiffening flanges ultimately would act as a stop
18 what Mr. Briese was actually saying was yes eventually the stiffening
19 flanges would ultimately slam against each other, but then he went on to say
20 that there would be a lot of difficulty with that.

1 In fact, I pulled out slides 7 and 8 from Mr. Morton's presentation
2 because when you read between the yellow highlights you actually hear that
3 in Mr. Briese's testimony.

4 He says, Mr. Briese saying the stiffening flanges abutting each other
5 are interfering with each other at the corner. They hit it at a 45 degree
6 angle. And that was what was highlighted.

7 But then he says right after that they would tend to diverge in. If I
8 push the tab into the tail the lip or the stiffening flange would distort
9 accordingly.

10 So he was actually telling Mr. Morton, although Mr. Morton didn't
11 highlight it, that when you have the stiffening flanges act as a stop in the
12 prior art they tend to diverge in and that's not a good thing.

13 Mr. Morton says so I get that. The first thing that would happen is
14 they'd touch, yes. Question, but when you insert it what's going to stop it
15 creating any gap. And so he said to Mr. Briese well if what you're saying is
16 true then what really does act as the stop in the prior art and Mr. Briese says
17 well, that's been the design of intercept since the beginning of intercept.

18 In other words that's just been the way we've done it. And in fact
19 that's what Mr. Briese was trying to fix in 2014 when he invented what we
20 see in the '953 patent.

21 JUDGE ARBES: So counsel, just to make sure I understand the
22 state of things in 2009 with the existing product that everyone was working

1 off of, the side that is pushed in, it's designed so that there is a gap and that
2 you have the holes lined up. But it could go all the way to the edge if you
3 push it all the way to the edge?

4 MR. SHUNK: It would but the corners would no longer be 90, 90,
5 90, 90. Because it would slide in too far.

6 JUDGE ARBES: So it was not designed to do that, but physically
7 it could if you slammed them against each other?

8 MR. SHUNK: You could, but then you would defeat the purpose
9 because now you would have a non-rectangular spacer frame being used for
10 a rectangular window and that creates more gaps.

11 In other words it would become non-functional. That is a defect in
12 the prior art. So the idea of Mr. Briese was to have an actual stop as the
13 Board has defined it, a stop that is to a predetermined stop but located away
14 from the corner.

15 So it would not just slam into each other at the corner as this did but
16 it would stop but in a way that would allow there to be 90 degrees on each
17 corner. That was his real invention.

18 JUDGE ARBES: Is there any evidence you can point us to in the
19 record other than the Leopold patent that would say that's how the existing
20 intercept product in 2009 was meant to work, was meant to be created?

21 MR. SHUNK: Yes, there's the Briese testimony on that fact. And
22 then this that I showed you earlier, this is actually what GED gives its

1 customers as -- to be used to do quality analysis of the workers' work as they
2 assemble these corners.

3 So this actually specifies the 0.023 inch gap to customers. That's
4 clearly how the -- I should say this is the quality specification from the prior
5 art GED frame. So this is not the corner plus specification, this is the old
6 Leopold patent specification to customers.

7 JUDGE COCKS: Just for the record that's exhibit 2044.

8 MR. SHUNK: Yes. It's demonstrative slide 2044 but it is from --
9 I think that says exhibit 1049, page 11.

10 So, getting back to my list of undisputed facts you have the stop
11 spaced away from the corner is in every claim. The examiner thought that
12 was the key thing that differentiated this from prior art.

13 The Board has given us a definition that is undisputed of what a stop
14 means. And then you get to the fact that Mr. Oquendo admitted that he
15 never conceived of the specific mechanism of a stop to be used with his
16 ideas.

17 You have this testimony are you telling the Board that the type of
18 stop is not part of what you considered to be your invention. That is
19 correct he says. Okay. And he says that existed already as part of the
20 intercept system.

1 So what he's saying here is I didn't suggest anything to anybody.
2 There were stops already existing. I figured they'd put one of those stops
3 in.

4 Well, we know that using the stiffening flanges was not part of the
5 intercept system. So whatever it is that Mr. Oquendo had in mind when he
6 gave his testimony, it clearly wasn't using stiffening flanges as a stop.

7 JUDGE ARBES: I thought we had established that the original
8 intercept product really had no stops.

9 MR. SHUNK: That's right.

10 JUDGE ARBES: So what is being referred to there?

11 MR. SHUNK: Hard to say what Mr. Oquendo meant by that. I'm
12 not really sure what he's talking about, but I do know he says that he didn't
13 think about the stops. He didn't care about the stops.

14 And you see what he says later. Did you ever discuss the types of
15 stops that your spacer frame concept would have with Mr. Briese. He says
16 no, I never talked about the stops with him.

17 Did you ever discuss it with Mr. McGlinchy who is the other GED
18 employee that he had interactions with. He says no.

19 It's part of the original design. They're experts in the design of the
20 intercept system, all these things that existed are there and they know them.

21 And members of the Board that's what this case is all about. Mr.
22 Oquendo may have had the idea of let's switch the swedge and splay and

1 move the seam away from the corner. But he had no idea how he was
2 actually going to do it.

3 He simply said well, why don't we try doing that. Let's get that
4 seam moved away from the corner. You figure out how to make the stop.
5 You figure out how to get all these pieces working together. You're the
6 experts, not me.

7 Well, giving somebody the idea of a place that they can go do more
8 research and more development and come up with a new idea, that is not
9 conception. That is not having a precise and determined concept in your
10 mind of the final commercial version of your invention. That's just further
11 area for research and it's clear from the cases that that is not sufficient to
12 show either conception or communication.

13 So if Mr. Oquendo has admitted these pieces. There's actually one
14 more piece and that is keep in mind the chronology and I'm going to talk
15 about this a little bit more if I'm permitted.

16 The very last drawing, very last one that was ever exchanged
17 between these two companies was the Briese drawing, the one in January of
18 2011, which remember Mr. Briese did, not Mr. Oquendo. Mr. Briese says
19 he did it to try to depict what Mr. Oquendo had told him and to put it in front
20 of Mr. Oquendo and say look, is this what you want because this is what I'm
21 going to give you a quote on.

1 But that drawing, the Briese drawing, exhibit 1024 by both sides'
2 admissions has no stop in it. It's got the notches instead. There is no stop
3 in that last drawing.

4 So whatever other drawings and things may have been said it is clear
5 that the very last communication between them was a drawing with no stop,
6 Mr. Briese saying well, here it is, this is what I think you're doing. We
7 don't think you ought to make things like this, but if you want to go mess
8 around with it you can. Go ahead.

9 And Mr. Oquendo saying yes, that's what I had in mind. Thanks.
10 Thanks very much. And then that was it. And then three years go by and
11 we hear nothing more from Mr. Oquendo or from Andersen about this idea.

12 No one says well, you've got to give us a new drawing. Why are
13 the notches still there. Let's do some more experimentation. Nothing
14 happens.

15 Mr. Briese separately comes up with the idea of the stop. He
16 commercializes the idea. They introduce it and all of a sudden Andersen
17 comes to the commercial debut of the introduced new system and someone
18 says you know, that kind of looked like what Sammy Oquendo was talking
19 about. Hey, let's look into this further.

20 And then they filed their provisional application. Now, of course
21 they hadn't seen our application yet so their provisional application just like
22 Mr. Oquendo said he never thought about a stop the provisional application

1 which is in evidence in this case, the provisional application doesn't ever use
2 the word stop. It's not in there.

3 Why? Because Mr. Oquendo didn't care about the stop. He was
4 all about having a seam that wasn't located at the corner. He didn't
5 understand that the real advance here was having a precise predetermined
6 stop.

7 So the provisional application says nothing about stop. Then our
8 application publishes. They see it. They file their utility based on their
9 provisional. All of a sudden utility is talking about all kinds of different
10 stops.

11 Now they still don't get it because in their utility application which is
12 also in evidence you'll see that they talk about well, you could have lots of
13 different stops. You could have, for example, a stop at the corner. You
14 could have an interference type stop where you just keep shoving until it
15 feels right and that's where things stop.

16 You could use a bump. You could use a notch. You could do all
17 kinds of things like that. They still don't understand after all this time that
18 no, it's about having a stop spaced away from the corner. That's what the
19 secret is here.

20 And it was only after they saw our claims that actually issued and
21 they wanted to provoke this derivation that they copied our claims. And
22 I'm not saying it's improper to copy claims, but that's where the word stop --

1 that's where they finally start claiming that the stop is what the real invention
2 is here. And we get this derivation today.

3 But all of those facts add up to the clear conclusion that Mr.
4 Oquendo was being honest when he gave this testimony. He didn't know
5 about a stop. He didn't conceive of a stop. And he didn't care about the
6 stop because the experts at GED would figure out how to make this idea
7 work. That's what really held.

8 And if all of those things are true and I don't think that anything of
9 what I've said up to now is really in dispute. Mr. Morton I guess disagrees
10 with me about whether or not the stiffening flanges abutted each other in the
11 Leopold prior art GED design.

12 If these things are all true then that's the end of the inquiry because
13 there is a key element, the element that made this novel over the prior art.
14 It is admitted by the petitioner that that element is not in his conception, that
15 it wasn't communicated to GED. There's no basis to find derivation in this
16 case.

17 Now, it's clear from Mr. Morton's presentation that they realize that
18 this is the weakness of their case. So they have come up in their reply brief
19 with a new argument, something that we really didn't see in the original
20 petition and this Board didn't have an opportunity to consider when it issued
21 its order instituting the derivation proceeding.

1 They now say that well, okay, maybe there aren't any stops in that
2 Briese drawing. Okay. Maybe Briese never saw those mechanical
3 drawings. Okay, fair enough. But there were stiffening flanges in the old
4 GED system that might act as a stop so that's already there and so it would
5 be obvious to do some more research or some more commercialization and
6 ultimately you'd end up with what is shown in the '953 patent.

7 We disagree even with those statements. This proceeding is not an
8 IPR. It's a derivation proceeding. If at some later date in the context of
9 some other litigation and some other jurisdiction Andersen wants to argue
10 that the '953 patent claims are obvious in light of the prior art '761 Leopold
11 patent or something like that because it would be obvious to move -- or
12 maybe in light of the cardinal structure because there's a seam that isn't
13 located at the corner and so doing it our way is obvious in light of the
14 cardinal prior art. Well, they can try to argue that, but that isn't something
15 for this Board to take up.

16 This Board is concerned with whether or not Mr. Oquendo actually
17 conceived of the stop spaced away from the corner and whether he
18 communicated it to us.

19 So, let me now turn to some of these key disputes if I may. In my
20 view Andersen's presentation is confusing because Andersen really doesn't
21 stop to ask the one question that you haven't heard anything about yet today
22 and that is corroboration.

1 What of this evidence has actually been corroborated and therefore is
2 appropriate to review and what evidence is simply the oral testimony of the
3 inventor which the cases tell us clearly is not appropriate to base a finding of
4 derivation on.

5 To help get at that I've put together in slide 2038, demonstrative
6 exhibit 2038 a timeline that takes the key pieces of communication between
7 the two companies, puts them into a historical order, and then separates them
8 out between what is actually recognized by both parties to have been
9 something exchanged between them and what hasn't been.

10 So to review them we have the Oquendo prototype. We have the
11 Oquendo drawing. We have the email between Mr. Briese and Mr.
12 Oquendo. We have the undated maybe late 2009 Oquendo meeting with
13 Mr. McGlinchy that neither of them have been able to put a date on and
14 there's no documentation of.

15 Then we have that January '11 Briese drawing that he showed to Mr.
16 Oquendo. And then three years later of course there's the actual Briese
17 invention.

18 So let's start first with the two things in blue and that is the two
19 things that both sides agree were exchanged between the parties.

20 There's the email between them in May and then there is the Briese
21 drawing in '11. The email only talks about reversal of swedge and splay

1 and that is basically switching the male and female attributes of the two
2 things that are inserted into each other as Mr. Morton demonstrated.

3 There is no reference at all to a stop in this and in fact there's no
4 reference to the prototype, there is no reference to any prior communication
5 between the parties.

6 Mr. Morton says well, it would be reasonable to think that this
7 suggests that Mr. Oquendo showed the prototype to Mr. Briese at some
8 earlier date.

9 I don't get that. I don't see how that's true. Mr. Briese's testimony
10 was Mr. Oquendo called him all the time. He was a customer of GED's.
11 And he would frequently ask him questions about how to improve the
12 quality and ask questions about the machinery because Andersen owned
13 GED assembly machinery. And so Mr. Oquendo would call him with lots
14 of questions to Mr. Briese.

15 JUDGE ARBES: Counsel, I think petitioner was referring to the
16 follow-up email, to that email that you're showing where Mr. Briese says
17 changing the tab insertion to a butt joint instead of a corner joint does not
18 seem feasible.

19 MR. SHUNK: Yes.

20 JUDGE ARBES: That that refers to the Oquendo prototype and
21 what Mr. Oquendo allegedly showed him.

1 MR. SHUNK: Okay, well, of course yes, that's the argument he
2 makes. But -- and I'm glad you asked me that because I think that there is a
3 lot of confusion about what the phrase butt joint means.

4 If you look at the original Oquendo declaration submitted in this case
5 and you look at the original Briese declaration submitted in this case both of
6 those gentlemen say butt joint meant a seam moved away from the corner.
7 A seam moved away from the corner. That's exactly how Mr. Oquendo
8 defines it.

9 And Mr. Briese says in his declaration yes, I agree with that. Butt
10 joint to me meant having the seam moved away from the corner.

11 Mr. Morton would like you to reread that as an abutment of two
12 undefined aspects of something or other that occur somewhere not along the
13 -- not at the corner. But that's not what the two people using the word butt
14 joint meant. They've both given you a declaration saying butt joint simply
15 means a seam that is located away from the corner.

16 And if you then look at the prototype, and I think this is important,
17 the prototype demonstrates -- and may I have the prototype. It's easier to
18 see this I think than to talk about it.

19 This prototype is proof that moving the seam away from the corner
20 does not inherently imply a union point located or a stop located away from
21 the corner. Because in this particular prototype because the side is inserted

1 into the tab rather than the other way around the seam is located away from
2 the corner.

3 But clearly the only thing that stops the insertion is the tip hitting the
4 opposite edge as it's slid in. So here you have an example in the
5 prototype which itself is exhibit 2017 of a device that has a seam moved
6 away from the corner but a stop that is not located -- that is located at the
7 corner.

8 Now, if indeed Mr. Morton is right that the two gentlemen in this
9 email exchange were talking about this prototype then it's clear that butt
10 joint meant seam located away from the corner, not a stop located away
11 from the corner.

12 JUDGE ARBES: Counsel, maybe petitioner can clarify this in their
13 presentation, but I didn't understand petitioner to be arguing that when Mr.
14 Briese was saying butt joint instead of a corner joint there that he was
15 referring to a stop. Just that a stop at that point would be the natural result
16 if you didn't have the notch there.

17 MR. SHUNK: That may have been what he was arguing. I would
18 disagree with that. Again this demonstrates -- here's an example of a seam
19 located away from the corner where there is no stop located away from the
20 corner.

21 Yet both Mr. Oquendo and Mr. Briese would call this a butt joint
22 because the seam is located along the side, not at the corner.

1 JUDGE ARBES: What if the notch did not exist there in that
2 prototype?

3 MR. SHUNK: Well, Mr. Briese was asked about that and he said
4 that there are a number of possibilities for how you would get rid of the
5 notch. And he testified at length about all of the different design changes
6 that he went through to ultimately end up at the '953 patent.

7 To just say well, we're not going to have the notch anymore. Well,
8 what does that mean. Are we just going to completely remove this notch
9 and make this square here? If that's what you're going to do then you
10 simply have the one end sliding into the other. What's going to stop it other
11 than the tip hitting the corner.

12 JUDGE ARBES: So the stiffening flanges would not touch then?
13 If all you did was take away the notch so that it extended.

14 MR. SHUNK: If all you did was take away both notches one
15 would slide into the other and the tip would ultimately hit the opposite side
16 because there wouldn't be any place for stiffening flanges.

17 You have to have some kind of a notch to break -- to cause a gap in
18 the stiffening flanges so that the stiffening flanges can present a surface to
19 hit against each other.

20 If you simply take the notch away then there's -- then the end of the
21 stiffening flange is up here at the tip of the -- in other words if the whole
22 notch is gone then the stiffening flange is complete all the way up to the end.

1 JUDGE ARBES: So the stiffening flanges on the piece you're
2 holding in your right hand would not abut the stiffening flanges in the small
3 piece you're holding in your left hand.

4 MR. SHUNK: Yes. If I may approach the Board that's why I
5 asked for this to be brought in today. The stiffening flange is this inner
6 flange here, right. And so if you never made this notch the stiffening
7 flange would then continue on to some point. If you completely removed
8 all of the swedging as well it would go all the way to the end.

9 If you didn't then it would stop somewhere, not clear where, but at
10 least it would go through the area of the notch presumably. It's not clear
11 where it would end.

12 But in any event when you placed it back in then where are the
13 stiffening flanges going to hit. It's not clear where that's going to be.

14 JUDGE ARBES: Where does the stiffening flange end on the
15 existing intercept product in 2009?

16 MR. SHUNK: Okay, so the existing intercept product, this piece
17 would be the tab, right, and there would be a wall like that. In fact, if I may
18 rather than bending this too much.

19 So, the stiffening flange would end here before the notch. And
20 since the stiffening flanges don't actually touch but the worker sets them like
21 that there is no abutment of the stiffening flanges. There's a gap there as I
22 showed you before. That's the old 2009 design.

1 JUDGE ARBES: So the stiffening flange ends before the notch.
2 So if you took away the notch, it's maybe unclear where the stiffening flange
3 would --

4 MR. SHUNK: Yes. Would you continue it. In other words Mr.
5 Morton is saying well, okay, so we bring the stiffening flange. If the
6 stiffening flange has ended the notch then simply at filling in the notch --
7 filling in the notch is not going to do anything for you because -- it looks as
8 though the projector has turned itself off.

9 Well, in any event it's not clear. I agree with you it is not clear if
10 you take the Briese drawing where would you fill -- how far would the
11 stiffening flange go. If the stiffening flange only goes up to the beginning
12 of the notch then it wouldn't interact with the stiffening flange from the other
13 side. So they wouldn't act as an abutment.

14 You would have to decide that no, I'm going to now create a new
15 device where the stiffening flange goes halfway through the notch so that it
16 can meet the stiffening flange that is added on to go halfway through the
17 notch on the other side and suddenly create an abutment there.

18 Well, just from my difficulty in explaining how that would happen
19 you can see that this isn't just something that's obvious or apparent. You've
20 got to do some design work to come up with this design.

21 And that's what Mr. Briese did in 2014. That's why this is an
22 invention and not just an obvious version of what we had seen in the past.

1 JUDGE COCKS: Counsel, do you need technical assistance to try
2 and get the projector?

3 MR. SHUNK: Yes.

4 JUDGE COCKS: We're going to go off the record.

5 (Whereupon, the above-entitled matter went off the record at 11:26
6 a.m. and resumed at 11:33 a.m.)

7 JUDGE COCKS: We are going to go back on the record. Mr.
8 Shunk, whenever you are ready.

9 MR. SHUNK: Thank you very much. So if the Board please,
10 what I was saying was if you take the Briese drawing and you're going to
11 simply fill in the notches it is not at all clear what is going to happen and
12 that's in fact what Mr. Briese said. There are a lot of different ways that
13 you might try to solve this problem.

14 What Mr. Morton says is we'll fill in half of this notch up to here and
15 then we'll fill in half of this notch up to here, retain the stiffening flange as
16 we extend it here, then have some sort of bridge to this piece here.

17 That's all nice to say but that's hindsight reconstruction. If you
18 simply fill in the notches what do you get? Well, you just get a full -- you
19 simply bring this up somehow. It's not at all clear where the stiffening
20 flange is going to be continued to before you continue filling in that notch.

21 So it is not at all clear how you would solve the problem of
22 removing the notch and in fact when Mr. Briese was testifying about the fact

1 that it's obvious that you wouldn't want the notch there what he was really
2 saying is yes, it's obvious. This is an attempt to create an insulating glass
3 window. You don't want to have holes in your insulating glass window
4 sealing apparatus. So it's clear that that's going to be a problem. And
5 that's in fact what he said when he sent the email with this drawing to Mr.
6 Oquendo. We don't really recommend doing this.

7 It's obvious he would have to fix it. He was not, however, and he
8 never said that it's obvious how you would fix it. That's what he came up
9 with in 2014. He figured out what the ultimate way of doing this would be
10 to assist them in the automation stuff.

11 Notice that this drawing does not show fill holes so you don't know
12 whether or not Mr. Oquendo was planning on having two fill holes here that
13 overlapped or just one fill hole here, or a fill hole down here. The whole
14 issue about aligning fill holes doesn't even appear in this drawing and wasn't
15 part of the discussion between these two gentlemen.

16 So I hope that answered your question about what does it mean to
17 quote fill in the notches. It's not clear what it means.

18 JUDGE ARBES: Do you agree with petitioner though that when
19 they were having his discussion and created the 2011 drawing, they were
20 talking about modifying the existing intercept device and that had the holes
21 and had the metal piece shaped in that way, right?

1 MR. SHUNK: Yes, they were talking specifically -- and Mr.
2 Morton has I think characterized this pretty accurately. They were
3 specifically talking about altering the GED machinery which computer
4 controlled at that time the use of a corner stamp and a swedge stamp.

5 And the swedge stamp had a corner built in as part of the swedging.
6 So the only way to create the moving of the seam from the corner that Mr.
7 Oquendo wanted was to create what amounts to a five-sided rectangle and
8 that is what you would get if you moved the seam from the corner.

9 So when Mr. Oquendo was talking about reversing the swedge and
10 splay that's what happens when you use the GED machinery to try to do that.
11 That's what the Briese drawing shows.

12 And clearly the Briese drawing demonstrates that simply taking the
13 existing machinery and reversing the swedge and splay -- I'm sorry, that
14 doesn't reverse the swedge and splay. What it does demonstrate is moving
15 the seam away from the corner.

16 It shows that using the existing GED machinery to move the seam
17 away from the corner results in a non-commercial product that does not have
18 an accurate way to stop the insertion of the tab into the final wall. That's
19 why the invention was not realized in these drawings, was not
20 communicated to Mr. Briese, was not conceived by Mr. Oquendo.

1 JUDGE ARBES: So just to make sure I understand the 2011
2 drawing. The tab, the shorter portion inserts into the tail, the longer portion
3 so there's really potentially no stop at all. It could just keep going.

4 MR. SHUNK: In the Briese drawing there is no stop at all. No
5 question about that. I don't think Mr. Morton would disagree.

6 Now, if I can turn briefly to the pieces of evidence that have not been
7 corroborated let me talk about them.

8 First of all, the Oquendo prototype which you see in the middle of
9 the page, Mr. Morton said that there was no doubt that the Oquendo
10 prototype exists.

11 Well, it's true there's no doubt that the Oquendo prototype exists, but
12 there is nothing that corroborates the date of the creation of that prototype
13 and there's nothing that corroborates its being shown to Mr. Briese or to Mr.
14 McGlinchy or anyone at GED.

15 So that piece of evidence might as well not exist in this proceeding.
16 It is completely uncorroborated. In fact, given the fact that Mr. Oquendo
17 made this supposed breakthrough it's very peculiar that he did nothing to
18 document the date of this prototype. And even more importantly at the
19 glass symposium in March of 2009 that Mr. Morton points to even though
20 they were talking about so-called fourth corner problems if Mr. Oquendo
21 had had this great breakthrough and everybody at Andersen thought this was

1 a great idea why wasn't it listed as one of the agenda items. Why were they
2 even bothering to talk about GED's idea about doing automated patching.

3 And yet this is a two-page agenda for that meeting. It never
4 mentions Mr. Oquendo's prototype. It never mentions a meeting between
5 Oquendo and Briese.

6 Mr. Briese and Mr. McGlinchy say it never happened. The only
7 testimony that you have about this prototype is Mr. Oquendo saying I made
8 it sometime early in 2009. Even he can't put a date on it. And I claim I
9 showed it to GED but nobody else saw it.

10 The May or June or whatever you want to call it Oquendo drawings,
11 very briefly I want to touch on them. You can throw this in the trash basket
12 too because Mr. Oquendo himself admitted to me in cross examination that
13 he never showed any mechanical drawing to Mr. Briese.

14 His sole claim about communication of these mechanical drawings is
15 that there was some version of the mechanical drawing, clearly not exhibit
16 1013 because we all know that that was done in December of 2010, but
17 something that may have been more than the May drawing that he claims he
18 showed to Mr. McGlinchy at some meeting that happened on a date that he
19 can't tell us what it was and he can't document.

20 Mr. McGlinchy said it never happened. Mr. Oquendo has no
21 witnesses to it. He has no other way to prove it. And he says not that he
22 gave a copy to Mr. McGlinchy but that he showed it to him and then in order

1 to try to make their point you have to believe that Mr. McGlinchy saw it,
2 memorized all the details of it, then went back to GED and at some point sat
3 down with Mr. Briese, disclosed the whole thing to Mr. Briese and then Mr.
4 Briese put it into his invention.

5 That is not only uncorroborated, it is unbelievable. That just
6 couldn't have happened.

7 JUDGE ARBES: There is exhibit 1015 which is the email from
8 June 5, 2009 that has as a PDF the CAD drawings. Not the photographs
9 that occurred later but the CAD drawings itself. Isn't that some
10 corroboration at least that these CAD drawings existed in June 2009?

11 MR. SHUNK: I do not doubt, Your Honor, that some version
12 existed at that time, but that doesn't show communication to GED. That
13 email doesn't include any GED personnel.

14 And I simply want to hold up exhibits 1012 and 1013 to you.
15 These two drawings are drawings from the same CAD file. One is earlier,
16 one is later. Mr. Morton keeps talking about oh, well all we did was add
17 the pictures to the one on the left, the later drawing.

18 Simple inspection of the drawing by the Board reveals there's a lot of
19 differences. For example, this detail that shows a lock tab, it doesn't even
20 appear anymore on the later drawing. That somehow disappeared from the
21 drawing.

1 This detail in the later drawing that shows detail B now has been
2 added into the drawing. There is no detail at all regarding the end of the
3 swedging area in the earlier drawing. Suddenly there are dimensions in the
4 later drawing.

5 We have no idea when these artifacts were added into the drawing.
6 We do know though that there is absolutely no way to believe that exhibit
7 1013 as it exists could possibly have been shown to Mr. McGlinchy because
8 it is dated after the time that even Mr. Oquendo claims he showed something
9 to Mr. McGlinchy.

10 So even though there might hypothetically be some drawing out
11 there that might have been shown to Mr. McGlinchy he denies it and there's
12 no corroboration of it. It's clearly not exhibit 1013 and I submit that the
13 petitioner has at least the burden to give this panel the actual drawing that
14 they claim is the communication.

15 They can't say well, there was a drawing. We used to have it. Our
16 dog ate it. We can't bring it in, but you ought to rely on it anyway. That
17 doesn't cut it.

18 JUDGE COCKS: Is there any suggestion on the record that it's
19 exhibit 1012 that might have been -- was that created in June of 2009?

20 MR. SHUNK: It was created June 4 I believe of 2009. And so,
21 Your Honor, I think I want at last at this point to turn to an exhibit that hasn't
22 been talked about yet today, what was really going on. Exhibit 1016.

1 This is an internal Andersen email where Mr. Oquendo sent a drawing, the
2 mechanical drawing to Mr. Bredemas who appears to have been his boss or
3 at least higher up in the hierarchy.

4 And he said here's this great idea I came up with. And Mr.
5 Bredemas wrote back to him Sam, be careful not to tell GED too much about
6 your experiments and results. If this proves to be very successful we will
7 want to hold the rights to the design and not have GED spread this across the
8 country.

9 I suggest to the Board that this is why the mechanical drawings were
10 never shared with GED because Mr. Oquendo was instructed by his
11 company not to reveal the details of whatever he came up with.

12 Now, I've shown you why we believe Mr. Oquendo never even
13 conceived of the idea of the '953 invention, but I've now given you evidence
14 of why it is unlikely that Mr. Oquendo's story is true that he somehow
15 communicated all of the details his counsel now claims he communicated to
16 GED.

17 He was instructed by his company not to because they wanted to
18 hold this for their own purposes.

19 Let me mention two other things because I want to leave myself a
20 little bit more time.

21 JUDGE COCKS: You have about three minutes left of the initial
22 50 minutes.

1 MR. SHUNK: Thank you. Let me see if I can use that last three
2 minutes.

3 So, lateral connection we believe is not just a point but it is an area
4 and we specifically refer to the fact that in the specifications when the lateral
5 connection is talked about it is discussed as having a length. And I can
6 give you the sights on that if you're interested.

7 In the Briese drawing the lateral connection does not form a union
8 point by the stop. Counsel for Andersen said that the lateral connection
9 spaced from the corner is shown in the Briese drawing. There may be a
10 lateral connection shown but it is not a lateral connection that forms a union
11 point by the stop. So the Briese drawing doesn't meet that element either of
12 the claims.

13 Finally, Your Honor, I would like to raise a point that I believe is
14 addressed at page 30 of our surreply. But I want to be sure it's referenced
15 today and that is the standard of proof.

16 We believe that the standard of proof in this case is clear and
17 convincing evidence for the reasons that we put into footnote 8 I believe or
18 something like that. It's that footnote at the end of our surreply.

19 In addition to the cases that we cited there we found a very recent
20 case from Judge Stark in the district of Delaware talking once again about a
21 derivation proceeding, Johns Hopkins v. Life Sciences, 230 F. Supp. 3d 357
22 at 381.

1 He reaffirms the idea that when the derivation argument is made
2 against an existing patent rather than two co-pending applications the
3 standard of proof that is required of the petitioner is clear and convincing.

4 We believe that that is the standard that the Board ought to apply and
5 that because this is the very first derivation proceeding that the Board has
6 considered we would urge the Board to address that specific point in its
7 ultimate --

8 JUDGE COCKS: Is that a point of dispute between the parties in
9 this proceeding?

10 MR. SHUNK: I don't know, Your Honor, because we raised it in
11 the surreply. I haven't heard Mr. Morton address it, but maybe he will tell
12 you that he agrees with this.

13 JUDGE COCKS: I'm going to ask Mr. Morton that when he's up.

14 JUDGE CHANG: Would that be a new argument since this is the
15 first time you raised it in a surreply?

16 MR. SHUNK: I'm sorry?

17 JUDGE CHANG: Wouldn't that be a new argument? This is the
18 first time you raised this argument.

19 MR. SHUNK: Your Honor, I don't believe so because I think it's a
20 pure question of law. In other words it's not a new argument about whether
21 or not there is or isn't an element that has been derived. It is simply a
22 statement of the appropriate standard to be considered in this case.

1 And so I would argue that it necessarily must be addressed by the
2 Board. Even if the parties had never addressed it in their briefing the Board
3 still has to consider the burden that it will use to evaluate the evidence in this
4 case.

5 JUDGE CHANG: Well, it's one thing as we address the standard
6 we apply. It's another we consider your argument.

7 MR. SHUNK: Your Honor, I would reserve my remaining time.

8 JUDGE COCKS: Okay, you'll have 10 minutes.

9 MR. SHUNK: Thank you.

10 JUDGE COCKS: Mr. Morton, you will have 15 minutes whenever
11 you are ready.

12 MR. MORTON: Yes, Your Honor. The first thing I want to
13 address --

14 JUDGE COCKS: Before you start your time unless you're going to
15 get to this, I'm curious. Is the standard that we should apply here, the
16 evidence standard, is that an issue that we need to resolve in this proceeding
17 and is there a dispute?

18 MR. MORTON: Well, it was raised for the first time on surreply,
19 so we haven't briefed it. Those cases are interpreting -- those are in court,
20 102f is at issue. This is a derivation here in the Patent Office. So our
21 entire proceeding so far has been under the more likely than not standard of
22 proof for this and we think that's the correct standard.

1 JUDGE COCKS: Okay. So there is potentially a dispute and this
2 panel will decide to what extent we address or get into that. Now you may
3 proceed.

4 MR. MORTON: Thank you. The first thing I want to address is
5 just a mischaracterization on the record from the beginning of the
6 presentation about there being a designed gap in the corner of the original
7 intercept. I'm going to use that.

8 MR. SHUNK: Oh, I'm sorry.

9 MR. MORTON: So this was the issue, right, that exhibit 1009 talks
10 about a minimum corner gap in the original intercept product. So the
11 stiffening flanges would not come together.

12 Well, that 1009 exhibit, those are talking about the three other
13 corners. You can see that that's just folded. It's the three other corners,
14 not the fourth corner where you have the swedge.

15 So the fourth corner, exhibit 1009 page 9 of 15 has a section on the
16 tab swedge and fold. That's talking about, swedge and fold, that's the
17 fourth corner.

18 And in there that's where we have shown in our -- I won't flip back
19 and forth, but it's our slide 7. I'll just hold up. That's the picture we've
20 shown that shows good tab fold, no air gap.

21 And you can see the coming together at a 45 degree angle and the
22 stiffening flanges coming together. And that's the testimony that I put in

1 that's in those slides, slide 7, slide 6, slide 7 from Mr. Briese that there's
2 nothing to stop an original intercept until those side walls come together at a
3 45 degree angle and the stiffening flanges come together. The first thing
4 that would happen is they would touch, the stiffening flanges.

5 JUDGE ARBES: Counsel, I think respondent said that if you did
6 that and you slammed it up to the edge, that the holes might not necessarily
7 align and it might not be a perfect rectangle. And so the person assembling
8 it might have to move it so the holes align. Do you agree with that?

9 MR. MORTON: That certainly is possible. There's been a lot of
10 talk here about slamming it in here and I don't know -- that's not how you do
11 it. You insert it still it stops. If you insert it till it stops it's designed so
12 that the holes will align. If you insert till it stops it's going to hit at a 45
13 degree angle and the stiffening flanges will hit.

14 So there's no designed minimum corner gap in the fourth corner in
15 intercept. And their own quality finished specifications shows that.

16 JUDGE ARBES: What about Mr. Briese's testimony that if you did
17 that, the stiffening flanges would distort somehow?

18 MR. MORTON: Yes, I think this is an attempt to try to evade the
19 reality here. He's saying if you push too hard, if you squish it together you
20 could bend it, you could fold it.

21 It doesn't change the fact that when you insert the two he testified the
22 first thing that happens is they touch. So this is what you've got.

1 Obviously if you have an operator or somebody that's putting it
2 together that's violent with the material they can wreck it.

3 JUDGE COCKS: Are you saying Mr. Briese -- your belief I guess
4 is he understood that to be a stop. Is that the same with Mr. Oquendo that
5 he understood that to be a stop?

6 MR. MORTON: Yes, and I think this word, I want to address some
7 discussion about the word stop and whether it was in our application.
8 That's just a word. What we're talking about is the actual structure.

9 And I think he absolutely understood that when you insert the fourth
10 corner in the original intercept the first thing that's going to happen, the first
11 thing that's going to touch is the side walls at a 45 degree angle and the
12 stiffening flanges are going to touch in the corner.

13 So whether you call that a stop or not that's the structural reality.
14 It's the structural reality when you go to the invention and create a butt joint
15 off the corner the same thing happens. The side walls hit. The stiffening
16 flanges hit. If you want to call it a stop that's what it is in the patent so
17 that's the term we've been using.

18 JUDGE ARBES: What about the Leopold 761 patent which,
19 correct me if I'm wrong, but the original intercept device was based off of
20 that? And that does seem to show a gap even in the fourth corner.

21 MR. MORTON: It does and my pretty simple answer to that is
22 that's not what Mr. Oquendo was talking about. That's not what Mr. Briese

1 was talking about. They were talking about modifying intercept, not
2 modifying the Leopold patent.

3 JUDGE ARBES: So the intercept device is different from the
4 Leopold patent in that respect?

5 MR. MORTON: That's why I spent some time demonstrating how
6 it actually works and why I spent time with Mr. Briese asking him what
7 actually happens in the actual intercept product.

8 If you really look at that Leopold figure, that 45 degree angle is
9 actually cut. It's kind of a two-step cut to it. So I don't know why that's
10 like that in the patent. If you look at it it's not a straight 45 degree line.
11 But that's the patent and that's not -- Mr. Oquendo is not looking at the
12 patent. They're not talking about modifying the patent. They're
13 modifying the original intercept.

14 JUDGE ARBES: How does it play into the analysis? Let's say --
15 the original device that we're talking about, if you push it to the edge and it
16 contacts the edge, it necessarily will stop there. It won't go any farther.

17 But the device is not designed necessarily to be there, it's designed so
18 that the holes have to line up. Whatever movement you need to do back
19 and forth, the holes need to line up. That's the case, right?

20 MR. MORTON: You do want the holes to line up for sure. So
21 I'm not sure what the question is.

1 JUDGE ARBES: So sometimes it might be a stop, a physical stop.
2 Sometimes it might not be. If you move it all the way to the edge but then
3 you see that the holes don't line up and you have to move it back a little bit,
4 then it wouldn't be a stop, right?

5 MR. MORTON: Well, it's still a stop. I think you're just pointing
6 out that there is some engineering play in the system. So if you don't -- if
7 you somehow don't fold it right. All this at some level depends on the
8 operator.

9 So if you don't do it right, don't fold it right might there be a little
10 play in the system. That's certainly possible.

11 JUDGE ARBES: I guess my question is -- if the existing device
12 sometimes operates as a stop, sometimes doesn't, it seems to me that what
13 you're saying Mr. Oquendo came up with was assuming that it is always a
14 stop. But it's not always going to operate that way, right?

15 MR. MORTON: Well, what he came up with to be clear again is to
16 make all four corners equal and move the seam off the corner. And the
17 outcome of doing that is maybe you want to say that it's a better stop than
18 the stop that already existed because now that it's along the side wall the two
19 things just come together.

20 But it is the only natural logical outcome of what happens
21 structurally when you move the seam is that you have side walls, you have
22 stiffening flanges, they come together.

1 The other thing I wanted to address was this idea that there was all
2 this design work. However would we design based on the 2011 drawing.

3 There's no design work. The only testimony of what's ever
4 happened was don't punch a corner in the side wall. That's all Oquendo
5 was talking about and you can see that in his CAD drawings and that's all
6 Briese ever said he did.

7 Yes, he tried to testify well, there's maybe something else you could
8 do, but you'll find nothing in the record of anything else. What you will
9 find is his testimony that says talking about 2011, this is our slide 43, you
10 change the punch to remove the notch. Don't punch a corner in the side
11 wall. The stiffening flange on the left will abut the stiffening flange or the
12 side wall on the right. His answer, it would.

13 So all that discussion about what do you do in the gap and how far
14 do you extend the stiffening flange, that's all frankly nonsense. Stiffening
15 flanges as I said from the beginning as I explained with the original intercept
16 are everywhere along intercept except for if you cut it away. If you cut
17 away to form a corner notch, if you cut away to form a swedge then there's
18 no stiffening flange. There's no stiffening flange that extends into the
19 corner where the swedge is.

20 When you cut away there's no material available when you roll
21 forward to make it a U and create the stiffening flanges.

1 JUDGE ARBES: So the stiffening flange always extends to the
2 swedge?

3 MR. MORTON: Right. To wherever you use a punch.
4 Remember you start with a flat sheet, you punch it, then you roll it into a U
5 and into the stiffening flanges and it's everywhere that you haven't punched.
6 And that's the testimony.

7 Again I had him draw in blue as I showed earlier the stiffening
8 flanges extend except for where the notch is cut out. The only design work
9 --

10 JUDGE CHANG: Can you show us on your slide 16? Because
11 respondent seems to make an issue of if you extend beyond that notch you
12 have a problem.

13 MR. MORTON: So our slide 16. I can certainly just talk about it.

14 JUDGE CHANG: Even on this drawing here. If there's no notch
15 there. So where is the stiffening flange on this drawing.

16 MR. MORTON: So if you look along this edge stiffening flanges
17 all the way along.

18 JUDGE CHANG: Yes.

19 MR. MORTON: And on this side stiffening flanges.

20 JUDGE CHANG: Yes, but -- well, your conception in your
21 drawing slide 16 you have a notch. And you get rid of the notch then
22 where would the stiffening flange stop?

1 MR. MORTON: So the slide 16 you're talking about the 2011,
2 right? This is not -- I just think we're looking at this the wrong way. This
3 isn't Mr. Oquendo saying punch a notch here. It's a vestigial notch. It's an
4 artifact from what you're doing.

5 JUDGE CHANG: From what respondent said if you don't have a
6 notch there it's not obvious where the stiffening flange is going to stop.

7 MR. MORTON: That's what he said but that's not what Mr. Briese
8 admitted in his testimony. And that's what I just read, and this is Briese, if
9 you look at Briese 133 to 134 we talk about this. And he said all you do is
10 don't punch that corner, what's going to happen. And he said -- this is what
11 I was just reading. Stiffening flange on the left will meet the stiffening
12 flange on the right. That's what happens if you just square this off.

13 JUDGE CHANG: So there won't be any problem. Why would it
14 be obvious to do that?

15 MR. MORTON: Well, I don't even think it's a matter of
16 obviousness. Every intercept has solid side walls. No intercept prior or
17 whatever is going to have a notch that is only for folding a corner. That's
18 what that's for. For folding and creating a corner. That's not in the
19 original intercept. It's nowhere.

20 So it's not even a matter of obviousness. It's just the only thing you
21 can do. You won't see anything in the record of any other idea other than
22 just don't punch a corner on the side wall. I'm not sure how else to say it.

1 And if you don't do that Mr. Briese testified very clearly the
2 stiffening flanges will abut. If you want to say abut in the middle,
3 whatever it is, that's what will create your butt joint.

4 JUDGE ARBES: In the drawing on the bottom there, the May
5 2009 CAD drawing, can you point to where the stiffening flanges end?

6 MR. MORTON: Sure. And I'll sound like a broken record but on
7 the right here there's going to be stiffening flanges all the way up to the end.
8 And on the left there's going to be stiffening flanges all the way up to where
9 we have a punch for the swedge that cuts away some of the material. So in
10 its roll form there's nothing to roll into the stiffening flange because it's been
11 cut away to form that swedge.

12 So it goes to right there. That's how far the stiffening flanges go.
13 So when you insert this, this spot right here is going to meet this spot right
14 there. That's going to form your butt joint and that's the invention.

15 JUDGE ARBES: That's the stop in your view.

16 MR. MORTON: That's the stop.

17 JUDGE ARBES: It can't go any farther.

18 MR. MORTON: Can't go any farther. And that's again, Briese
19 testified. That's the only thing that's going to happen. There's no other
20 outcome to simply not punching a corner notch on a side wall than stiffening
21 flanges abut to form a stop.

1 So I guess just to wrap up our conception, we clearly have a
2 conception. All you need for a conception is to look at the CAD drawing.
3 The CAD drawing has everything. Whether you call it the May or the
4 June, the one attached to the June email exhibit 2012 has everything. It
5 shows a butt joint. You know that there's stiffening flanges there because
6 it's intercept. So we have conception.

7 Disclosure. We know that in May of 2009 he disclosed making
8 four corners equal and moving the seam off the corner to create a butt joint.
9 And there was some discussion about well, maybe a butt joint is just where
10 the seam is, but a butt joint is something that abuts. It is a natural word.

11 And when you move the seam off the corner assuming you don't do
12 what no one would ever do which is punch a corner notch in a side wall you
13 get a butt joint and you get the stiffening flanges.

14 And we further have of course Mr. Briese's testimony on the 2011
15 drawing which makes that clear and his testimony that when he actually did
16 this in 2014 he didn't do anything different.

17 You look at his lab notebook. He took that notebook with the CAD
18 drawing showing the software change, gave it to his guys to make the
19 tooling change, remove the punch from the corner on the side wall and that
20 was it. That was corner plus.

21 JUDGE ARBES: Do you agree with respondent's position that
22 when these individuals were talking about the word "butt joint," that they

1 were talking about the seam, and the stop may be a necessary result of that
2 in your view, but when they were using the word "butt joint," they were just
3 talking about the seam. Is that right?

4 MR. MORTON: Well, I know that's what counsel was trying to
5 insinuate or whatever. I don't think that that's right. I think a butt joint
6 has to abut. The seam is just along the outside side wall and so there's no --
7 if all you're looking at is the seam on the outside it doesn't abut anything.

8 JUDGE ARBES: Well, the top abuts the bottom right when we
9 insert one into the other?

10 MR. MORTON: Well, but there's no -- without the side walls and
11 the stiffening flanges it's -- I think it's more than that. I think when he says
12 butt joint and when he says it in his inventor notebook he says the same
13 thing, butt joint instead of corner joint. So that butt joint assumes that
14 you're going to have the side walls abutting. Stiffening flanges abutting at
15 an offset seam location.

16 And you kind of see this in the patent where they talk about where's
17 the seam, where's the lateral connection, where's the union point, all these
18 things. It's all basically the same thing. Once you move the seam off the
19 corner this is the result. You get a butt joint. You get a seam off the
20 corner. You get stiffening flanges that abut each other.

21 JUDGE ARBES: Again, in the original device, the fourth corner,
22 the seam may or may not have abutment of the two stiffening flanges, right?

1 MR. MORTON: Depending on what the operator does. But the
2 structure is the same. The structure is exactly there for that. And with
3 that I think obviously we believe GED's claim should be canceled. Thank
4 you for your time.

5 JUDGE COCKS: Thank you, counsel. Mr. Shunk, you'll have 10
6 minutes.

7 MR. SHUNK: Thank you. Briefly in response to Mr. Morton's
8 remarks on rebuttal let me turn first to the butt joint. While Mr. Morton
9 was speaking I did have an opportunity to find the place in Mr. Oquendo's
10 declaration exhibit 1001 where he defines butt joint for the Board.

11 It's paragraph 53. And specifically referring to Mr. Brieese's use of
12 the phrase butt joint Mr. Oquendo says this, quote, "When Mr. Brieese
13 mentions a change of the tab insertion from a corner joint to a butt joint he is
14 referring to a change from the fourth corner seam location to an offset seam
15 location."

16 So that's what Mr. Oquendo has testified that people of ordinary skill
17 in the art understand the phrase butt joint to mean. It is a shift -- it is a
18 seam that is located not at the corner but is located away from the corner.
19 For example, like in the cardinal piece of prior art.

20 Mr. Morton's desire to change the definition of the phrase butt joint
21 to some sort of joint where the stiffening flanges are abutting based on the
22 normal meaning of the word abutment is an interesting exercise in

1 lexicography, but it is contrary to his own witness's testimony at paragraph
2 53 of his declaration.

3 JUDGE COCKS: Does that paragraph, that testimony, does that
4 suggest that a butt joint might not have components that abut one another?

5 MR. SHUNK: I think it simply -- yes. It is not specifying how
6 the word abutment or butt joint is being used. It's simply -- it is what it is.
7 Mr. Oquendo says it means the seam moving from the corner to away from
8 the corner.

9 It doesn't say and therefore the stiffening flanges will abut each
10 other, or the side walls will abut each other. It's not at all clear how the
11 phrase came to be used in the industry. Maybe it came into use as a result
12 of the cardinal spacer frame which was a commercial product. But it
13 doesn't mean what Mr. Morton wants it to mean.

14 Secondly, this issue about the gap that Mr. Morton addressed. He
15 really wants you to believe that the testimony in this case is that in the prior
16 art GED product which is identical by the way with the Leopold patent.
17 Edmund Leopold was the founder of GED and that patent is the patent that
18 the old GED intercept spacers were based upon.

19 Nevertheless in the patent itself there clearly is a gap between the
20 stiffening flanges and side walls. In the material -- essentially the user
21 manual that's given to the customer there's a gap.

1 JUDGE ARBES: Is that the fourth corner or just the other three
2 corners?

3 MR. SHUNK: That's not the fourth corner. But Mr. Morton
4 asked Mr. Briese about the fourth corner at page 54 of Mr. Briese's
5 testimony which is of evidence in this case. Page 54 beginning at line 4.
6 The question from Mr. Morton was so is it your testimony that operators are
7 supposed to insert the tab just up to the point where they've got 0.023 gap
8 left. Operators can do that by hand? Question.

9 Answer. That's how intercept has been since the beginning of
10 intercept.

11 Mr. Briese made it clear that this applies to the fourth corner as well
12 because Mr. Morton was doubtful about that. Mr. Briese cleared it up.
13 Now, Mr. Morton may not believe Mr. Briese, but there's no testimony to
14 the contrary because there's no witness who says that that's not the way it
15 was done.

16 JUDGE ARBES: Is there any documentation to support that, that
17 maybe for an operator, when you are constructing this you are supposed to
18 have that amount of gap, that that's the ideal?

19 MR. SHUNK: It doesn't say that specifically in the user manual
20 other than what you see here although again the '761 patent is evidence that
21 that's how it was understood. I realize it doesn't specifically refer to the
22 fourth corner in the main.

1 JUDGE ARBES: The problem I think you can see is that we're
2 working -- the parties were working off of a particular device that existed at
3 the time in 2009 that, while physically may be able to hit the edge, may not
4 have been designed that way according to Mr. Briese. But is there any
5 other documentation to say that's the case, or is it meant to hit the edge?

6 MR. SHUNK: Other than the testimony I'm not aware of any
7 documentation that's in evidence in the case. But you remember in my
8 initial presentation I did read some of the testimony that appeared between
9 Mr. Morton's highlighting for example when Mr. Briese said something is
10 going to stop it, for instance, the side walls or the abutting flange or the
11 distortion in the folding process or other things. And then he went on to
12 say that when the stiffening flanges abut each other they would tend to
13 diverge in.

14 So he was explaining why it is that it's undesirable for the stiffening
15 flanges to abut each other in the preexisting intercept configuration.

16 Also, with regard to the mechanical drawings Mr. Morton seems to
17 think it's obvious that there is an abutment of stiffening flanges in those
18 drawings. Whether you look at the so-called May or the June drawing or
19 whatever version you're looking at.

20 But in Mr. Oquendo's testimony at pages 66 through 68, and we've
21 cited this in our briefs, I specifically ask him about those drawings. And I
22 pointed to the vertical line, pointed to this line right here. I pointed to this

1 vertical line in the drawings that is the end of the swedged area of the insert
2 portion. And I said Mr. Oquendo, I'm going to point to a vertical line that
3 appears right above the call out we discussed earlier, 0.015. It's a vertical
4 line on the side of the spacer.

5 I said what does that line represent. He says it represents the end of
6 the swedging. The end of the swedging. I said so when the piece with the
7 swedge on it is inserted into the piece to the right is it the tip of the swedge,
8 the end of the swedge, or the sealant that actually stops finally the insertion
9 of the piece.

10 He says well, there will be resistance. The abuttal he says is warm
11 and soft so the sealant itself would not stop it. What would stop it would
12 be the change in dimension at the end of the swedge.

13 I said okay, so where exactly would the insertion of the swedge
14 piece, right at the line or slightly before it. He said wherever the resistance
15 of one side hitting up against the other side, any point where one -- the
16 opposite side physically hits another solid surface.

17 Would the operator be able to insert the swedge further if he pushed
18 harder during the insertion process? Answer, it would hit that notch where
19 the return flanges are and it would hit -- the nose would hit the corner.
20 They wouldn't be able to go beyond that.

1 Okay, I mean these things are -- they're not extremely strong. You
2 could flex them pretty easily. And then he says, answer, it depends on
3 how hard they push.

4 So Mr. Oquendo's testimony was that this is essentially the
5 mechanical drawings in exhibit 1012 and 1013 are showing an interference
6 between the swedge and the piece it's being inserted into. And the insertion
7 would stop wherever the force of inserting the swedge by that particular
8 operator would cause it to stop.

9 Given the opportunity pointing right at it to say no, there would be
10 an abutment right at that line Mr. Oquendo said well, hard to say. It might
11 stop somewhere along here. Maybe if you pushed really hard the tip would
12 hit there or these flanges might hit up against each other.

13 But even at the time of his deposition Mr. Oquendo was not thinking
14 of abutment of the stiffening flanges as being a stop in his own drawing.
15 He was still thinking of this as an interference fit between the swedge and
16 the piece being inserted into that would have a variable stop depending on
17 how hard the insertion force was.

18 And this Board has made it clear that a stop must be a stop to a
19 predetermined location. An interference fit is not a stop because it is
20 dependent on the force of the insertion by the worker.

21 The alignment of the holes for this particular operation is critical as
22 the Board has noted in its original order. And so even Mr. Oquendo's

1 drawing which there's no proof it was ever shown to us, even Mr. Oquendo's
2 drawing doesn't really show a stop unless in hindsight you say oh, well, I'm
3 looking at that. Yes, there must have been stiffening flanges there. Yes,
4 it must be that you're going to swedge that piece A enough so that it will
5 slide up to the stiffening flanges and then that would ultimately be the stop.

6 That's hindsight reconstruction of this drawing. But Mr. Oquendo
7 made it clear that in his mind this was not a stiffening flange abutment.
8 This was an interference fit between a swedge piece and an insertion piece
9 and it would not have a predetermined stop to it.

10 So for all those reasons we would respectfully ask that the Board
11 deny the petition and find the claims patentable and appropriately issued
12 naming William Briese and Clifford Weber as the inventors. Thank you
13 very much.

14 JUDGE COCKS: Thank you, Mr. Shunk. Well, we thank both
15 sides for their time today. It has been informative and useful. The case is
16 submitted and we are adjourned. Thank you.

17 (Whereupon, the above-entitled matter went off the record at 12:19
18 p.m.)

Case DER2017-00007
Petitioner Application 15/058,862
Respondent Patent 9,428,953 B2

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