

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO: 1:21-cv-2112

SMITH SPORT OPTICS, INC., a Delaware company; and
KOROYD SARL, a Monaco company,

Plaintiffs,

v.

THE BURTON CORPORATION, a Vermont company,

Defendant.

REPORTER'S TRANSCRIPT
(Motions Hearing)

Proceedings before the HONORABLE CHRISTINE M.
ARGUELLO, Judge, United States District Court, for the
District of Colorado, commencing at 8:56 a.m. on the 21st
day of October, 2021, Alfred A. Arraj United States
Courthouse, Denver, Colorado.

A P P E A R A N C E S

FOR THE PLAINTIFF:

MARK A. MILLER, Dorsey & Whitney, LLP, 111 South Main
Street, Suite 2100, Salt Lake City, UT 84111-2176
GREGORY SCOT TAMKIN, Dorsey & Whitney LLP, 1400 Wewatta
Street, Suite 400, Denver, CO 80202-5549

FOR THE DEFENDANT:

SCOTT ROBERT BIALECKI, Sheridan Ross, P.C., 1560 Broadway,
Suite 1200, Denver, CO 80202-5141
MICHAEL A. ALBERT, MARIE A. MCKIERNAN, and JOHN L. STRAND,
Wolf Greenfield & Sacks PC, 600 Atlantic Avenue, Boston,
MA 02210-2206

DARLENE M. MARTINEZ, RMK, CRR
United States District Court
For the District of Colorado

IPR2022-00354
Burton v. Smith Sports Optics
Smith Sport's Exhibit 2006, page 1

1 The parties have stipulated that the exhibits they
2 submitted with their briefing of this motion are
3 authentic, admissible, and appropriate for this Court's
4 consideration and its ruling.

5 I will tell you, I have read the briefs and I have
6 reviewed the exhibits that were provided by the parties,
7 so I am familiar with the facts of this patent
8 infringement case.

9 I will just briefly summarize. In short,
10 plaintiffs' claims revolve around U.S. Patent No.
11 100736373, and will be referred to by me, and I guess by
12 the parties, as they did in the briefing, as the 373
13 patent.

14 That patent was entitled "helmet with
15 shock-absorbing inserts" which it obtained in 2020. In
16 2021, Burton introduced two new ski helmets which use
17 WaveCel technology, a type of shock-absorbing foam
18 produced by WaveCel, an Oregon-based company. WaveCel is
19 somewhat similar in appearance to Koroyd, in that it uses
20 bonded sheets of shock-absorbing material that gives
21 WaveCel a somewhat honeycomb like appearance.

22 Plaintiffs allege that Burton's Anon helmets
23 infringe on its patent, both with respect to Claim 1 in
24 six ways, Claim 2, Claim 3, and Claim 7 of the 373 patent.

25 Plaintiffs are seeking a preliminary injunction

1 against Burton that, one, would prohibit Burton from
2 "making, using, offering to sell, selling, or importing
3 the Anon Merak and Logan helmets" and, second, "orders
4 Burton to give written notice and a copy of the injunction
5 to its distribution and retail partners."

6 Burton, for its part, denies any infringement and
7 opposes plaintiffs' request for an injunction. In short,
8 Burton argues that the 373 patent is invalid, and even if
9 the 373 patent were valid, Smith and Koroyd have failed to
10 show that the Anon helmets infringe on the patent. Third,
11 plaintiffs have failed to demonstrate irreparable harm.
12 And, fourth, an injunction would be adverse to the public
13 interest.

14 Burton further argues that plaintiffs are seeking a
15 disfavored injunction and that their motion for
16 preliminary injunction is subject to the heightened
17 standard of review.

18 So, the first thing is, for purposes of argument,
19 you can assume that I am familiar with the law that
20 applies to preliminary injunctions. I noted that
21 plaintiffs did not address defendant's argument that this
22 was a disfavored injunction and, as such, I am assuming
23 that plaintiffs concede that this injunction is disfavored
24 because, one, it would disturb the status quo by requiring
25 Burton to remove its Anon helmets from the market. It is

1 requiring mandatory relief forcing Burton to take
2 affirmative action. And, third, it provides substantially
3 all of the relief plaintiffs could obtain at trial.

4 So, we start from the premise that plaintiffs'
5 request for an injunction is subject to the heightened
6 standard of review.

7 Now, in order to persuade this Court that a
8 preliminary injunction is necessary, plaintiffs are going
9 to have to demonstrate a substantial likelihood of success
10 on the merits.

11 Second, that the movement would be irreparably
12 harmed if the injunction was denied. And it is well
13 established that this element, the irreparable harm, is
14 the single most important prerequisite for the issuance of
15 a preliminary injunction.

16 Third, that the threatened injury to the movant
17 outweighs the injury to the party opposing the injunction.

18 And, fourth, that the injunction would not be
19 adverse to the public interest.

20 With respect to your arguments, I don't think I
21 need more than 30 minutes of argument from each side, so
22 that is what I am expecting. Before we get started,
23 though, I have a number of questions that I want counsel
24 to address in their argument.

25 Questions for the plaintiffs, and because the

1 burden is on the plaintiffs, I have more questions for
2 them. With respect to irreparable harm, why wouldn't
3 monetary damages be sufficient to remedy the alleged harm
4 in this case? It appears to me that that essentially,
5 although there is some argument as to reputational damage,
6 essentially the claim is that you are losing sales to
7 Burton.

8 Did plaintiffs offer to license the 373 patent to
9 Burton? And, if so, doesn't that show that money damages
10 would be sufficient?

11 And, third, what evidence do you have that your
12 goodwill and reputation have been damaged? In the
13 materials all that were submitted were conclusory
14 declarations of Smith officers and directors that are not
15 sufficient to meet the burden.

16 With respect to the balance of harms, how does the
17 balance of harms favor your client or clients? And isn't
18 it more harmful to Burton to have to pull this entire
19 product line from the shelves than for Smith to simply
20 compete with one more product in a multi-player market?

21 Third, with regard to public interest, how does an
22 injunction serve the public interest in this case?

23 With respect to the likelihood of success on the
24 merits, Burton has raised a question as to the veracity of
25 the 373 patent. I need you to address whether that is a

1 substantial question as to the validity and, if so,
2 wouldn't that end the Court's inquiry under *Amazon.com,*
3 *Inc., v. Barnes & Noble.com, Inc.*, 239 F.3d 1343, at 1351,
4 which says that if a defendant raises a substantial
5 question concerning either infringement or validity, that
6 a preliminary injunction should not issue.

7 Now, it appears that Burton designed the Anon
8 helmet before the 373 patent was issued. How does that
9 affect the plaintiffs' claims, if at all? On page 6 of
10 plaintiffs' motion, you argue that Burton is infringing on
11 the 373 patent by using "a copycat impact protection
12 material called WaveCel." What evidence is there that
13 WaveCel is a copycat material? And even if WaveCel does
14 copy Koroyd, why does that matter, because it appears to
15 me that -- and maybe I am wrong, but my view of the patent
16 is that the Koroyd form, itself, is not the patented
17 invention. It appears to me that the patented invention
18 is a helmet design comprised of an ostensibly novel
19 combination of shell-stye, vent placement, and a seamless
20 shock-absorbing insert. And if I am wrong in that
21 conclusion, then I need to have that explained to me.

22 And, then finally, plaintiffs spends a substantial
23 portion of their motion arguing that Burton "appropriated
24 the aesthetic marketing scheme used by plaintiffs." But
25 what does that matter to this preliminary injunction,

1 because the marketing scheme does not seem to have any
2 bearing on the issues to be heard here today.

3 With respect to defendant's arguments, your
4 client's helmet advertisement does look remarkably similar
5 to Smith's advertisements. Doesn't that support
6 plaintiffs' argument that you are selling a copycat
7 product?

8 I would like to know specifically when were the
9 Anon helmets developed. Were they based on the Smith
10 design? Was Burton aware of Smith's patent application at
11 the time the Anon helmets were being designed?

12 Plaintiffs state that at least one of their retail
13 partners has declined to promote Smith Koroyd helmets
14 because they are already promoting the Anon WaveCel
15 helmets. Isn't that sufficient to show reputational
16 damage and, thus, irreparable harm?

17 With respect to public interest, isn't the public
18 interest served by discouraging patent infringement and,
19 if so, isn't that a reason to grant the preliminary
20 injunction in this case?

21 All right. With that being said, I am ready to
22 hear argument. Do plaintiffs wish to reserve any time for
23 rebuttal?

24 MR. MILLER: Yes, I will, Your Honor.

25 THE COURT: How much time do you want to reserve?

1 MR. MILLER: So you are doing a half hour oral
2 argument?

3 THE COURT: Yes.

4 MR. MILLER: I will reserve 10 minutes.

5 THE COURT: All right. You may speak from there or
6 you may approach the podium, whichever you are more
7 comfortable with.

8 MR. MILLER: I will approach the podium. Thank
9 you, Your Honor. I have a lot here, but I will do my best
10 to just get through what the Court just asked.

11 First of all, on irreparable harm, and why wouldn't
12 money damages be sufficient, let me skip to that area
13 where I can give some illustrations. Okay. So, the first
14 point is, we have two plaintiffs here, so you have got to
15 look at the harm to both, because this is a co-owned
16 patent, and they both have different harms.

17 Koroyd, their entire business is being a premium
18 ingredient brand. Their entire business revolves around
19 their reputation for having an exclusive premium
20 ingredient that other companies can use in their products.
21 And if the infringing products are out there, showing the
22 world that, hey, this doesn't have to come from Koroyd
23 then their reputation is diminished and their ability to
24 expand into other areas is harmed.

25 You can see from Mr. Lloyd's declaration, the type

1 of reputation and public exposure they get from these
2 helmets is critical to develop new business partners.
3 They even market -- in Exhibit 5, they market themselves
4 as an ingredient brand.

5 And what is happening in the marketplace is this,
6 Exhibit 10 is an article -- these are articles that are
7 written about these products in the marketplace. "One
8 journalist has even dubbed this new 'holy-grail'
9 technology" -- they are actually talking about the
10 infringing WaveCel technology, one dubbed it "Koroyd 2.0,"
11 which would be a fitting title, this writer said.

12 THE COURT: Let me ask you this, though. Are you
13 arguing here that the insert is actually patented under
14 the 373 patent?

15 MR. MILLER: No. The patent doesn't cover the
16 insert alone. The patent covers the novel combination of
17 how the insert is used in a helmet, in cavities that span
18 at least two vents.

19 THE COURT: But you are claiming that it does --
20 that that patent actually covers the insert, too? I am
21 just trying to figure out, does Koroyd have a patent on
22 its insert, on its material?

23 MR. MILLER: Koroyd does have patents covering just
24 their materials, and there are proceedings, for example,
25 in Germany against WaveCel and some other things that are

1 not a part of this case. So this isn't the only case.

2 But this patent does -- the Koroyd insert is a
3 component of our patent claims, but to infringe you have
4 to have the helmet and the insert in the way that the
5 claims describe, arranged as described, to infringe.

6 But what this shows is while they are infringing in
7 this marketplace, in the snow helmet marketplace, it is
8 creating a negative reputational harm to Koroyd's business
9 as a premium ingredient brand. And, as the Court already
10 mentioned, Mr. Lloyd explained that they have already lost
11 a potential partner that pointed to these helmets, WaveCel
12 in the infringing helmets, as the reason -- as one of the
13 reasons that they didn't want to partner with them.

14 Down here, Exhibit 39, there is a consumer making a
15 comment. The comment says, "What's the difference between
16 Smith's Koroyd material" -- so that is referring to the
17 Smith Koroyd helmets, and also says "what's the difference
18 between that and the Bontrager Koroyd?" Now, that is the
19 Trek bike helmets that have WaveCel in them, but this
20 consumer said "Koroyd" instead of "WaveCel."

21 So there is a lot of blurring of the lines that
22 people believe this technology is not really exclusive to
23 Smith and Koroyd, it is available other places.

24 Smith also has a reputation, especially in the snow
25 sports industry, which is their critical industry, as a

1 provider of premium winter sports' products, including
2 helmets, that provide premium protection. They are
3 entitled to rely on this patent with these helmets and
4 this novel arrangement of products to build and maintain
5 that reputation.

6 That reputation is independent of financial
7 damages. It is independent of lost sales and lost
8 profits, which we will seek in this case. It is their
9 ability to grow their market position with their
10 reputation. Mr. Sours testified on that, and you've read
11 that, so I don't need to review that.

12 But, here is a case from the federal circuit, the
13 *Douglas Dynamics* case, and the federal circuit said simply
14 because a patentee manages to maintain a profit in the
15 face of infringing competition does not automatically
16 rebut a case for irreparable injury.

17 Irreparable injury encompasses different types of
18 losses that are often difficult to quantify, including
19 lost sales and erosion and reputation and brand
20 distinction. And here is the key, "where two companies
21 are in competition one against another, the patentee
22 suffers the harm, often irreparable, of being forced to
23 compete against products that incorporate and infringe its
24 own patented invention."

25 What is happening here is Smith is being forced to

1 compete against its own technology in the marketplace.
2 And this is what has happened; you have got -- you have
3 got magazine articles that talk about Koroyd entering the
4 market, mentioning the Merak and Logan helmets and
5 comparing them to the Smith Koroyd helmets as, you know,
6 this is changing the status quo of helmet technology,
7 recognizing that WaveCel's approach is similar to Koroyd
8 and talking about helmets from Smith with Koroyd in them.
9 So that is what is happening.

10 And then this is a critical exhibit here, this is
11 an email from one of Smith's retailers, and this is what
12 the retailer said. "I don't see an opportunity to
13 highlight Koroyd at this time in either snow or bike in
14 our stores with POP." POP is point of purchase marketing.
15 What this means is this retailer decided, you know what,
16 we are actually going to be highlighting WaveCel helmets
17 in both biking and snow sports; that would mean Burton.
18 We are going to be giving them the POP marketing. When
19 you walk into this store, there is going to be bigger
20 banners and a bigger focus on those products, and Smith
21 isn't getting that advantage in the marketplace to build
22 its reputation, so they're losing a marketplace position.
23 And that is an email that mentions not just biking but the
24 snow industry.

25 THE COURT: Now, just because one company chooses

1 to promote other products, how is that infringement?

2 MR. MILLER: Well, the products infringe -- this is
3 showing the irreparable harm caused by infringement. If
4 they were not infringing, this retailer would not be
5 saying, "you have probably noticed we are highlighting
6 WaveCel, and I am not inclined to shift away from that"
7 because there would be no infringing helmets, so they
8 wouldn't be losing this market position. And that is not
9 something that is just quantifiable by money damages, that
10 is a reputational image thing.

11 And when that happens, as the federal circuit
12 recognizes, that is irreparable harm. And you don't need
13 to wait until it is actually happening en masse, the whole
14 point is likelihood of irreparable harm. That is the
15 point.

16 This email shows there is a very real likelihood of
17 irreparable harm that is already started. And that is
18 what we are trying to stop.

19 There is another aspect here that the WaveCel
20 helmets in the biking industry were subject to a class
21 action lawsuit because of some of the overreaching claims
22 they were making on safety, and that has spilled over into
23 the industry that is at issue in this case. Burton has
24 actually had to make a statement about this because
25 they're also partnering with WaveCel, and talk about this

1 class action suit.

2 So the impact of the infringing products in the
3 marketplace has caused Koroyd to already lose a potential
4 partner because of this infringing product in the
5 marketplace and how it is being received.

6 So, this is not a case where money damages is
7 enough. My clients decided to bring this claim because
8 there is significant market position, reputational, and
9 ongoing business opportunity harm that is likely to occur
10 that is not something that you can just calculate and put
11 a number on.

12 Reputations can last for years and years and can
13 open doors up in the future. And we will certainly be
14 asking for lost profits damages at the end of this case
15 and reasonable royalties, but this is the harm we are
16 trying to prevent now.

17 When it comes to -- the Court asked about a
18 license. There was never an offer to license the WaveCel
19 helmets. This is an excerpt from the first letter that
20 was sent from Koroyd's attorney, and this is the
21 attachment to that letter where it says, this is what we
22 are demanding that you do: You stop making and selling
23 these products. All of the infringing helmets you have to
24 deliver to us. So it was injunction mandated.

25 The one email that they point to is this one, where

1 there is a reference to right here, a "global license."
2 But you have to read the context. It says, "We have
3 considered a settlement that allows to you dispose of your
4 current stock." In other words if we can compromise here
5 and avoid court intervention and avoid expensive
6 litigation, we will let you sell off your current
7 inventory, but then you have to stop. So that is what
8 that license is, is disposal of your current stock. It is
9 not an offer for you to continue to sell in the
10 marketplace under a license.

11 And the most important thing about the license
12 issue to understand, Your Honor, is Koroyd did not and
13 never would offer to license Burton to sell WaveCel
14 helmets. Now, if they chose at some point to license
15 Burton to sell helmets with Koroyd, well then Burton would
16 be selling helmets licensed using the patent owner's
17 product, and there is a difference in that license that
18 goes to irreparable harm.

19 If you look here, if there was a license to Koroyd
20 helmets, yeah, they would get royalty revenue, but guess
21 what else Koroyd would be getting, exposure as a premium
22 ingredient brand in the market and enhanced reputation and
23 goodwill, opening doors to new partnerships.

24 If they just offered a naked license and said you
25 can keep selling WaveCel helmets and pay us a royalty,

1 they are not going to get all of those non-tangible
2 benefits, it is just royalty revenue. So Koroyd never
3 offered to license WaveCel helmets.

4 If there was ever a suggestion of a license it was
5 buy our inserts, use Koroyd, then we get all this stuff we
6 are trying to maintain through a preliminary injunction.
7 We can get a reputation enhancement. We can open doors to
8 new partnerships. That is why a license to Burton helmets
9 with WaveCel is not equal to a license that Koroyd might
10 consider if Burton was using Koroyd material in their
11 helmets.

12 THE COURT: All right. Let me ask you this, then,
13 because I am a little confused, because based on that
14 argument, then, you have no problem with the actual helmet
15 design other than the insert that they put into it, is
16 that what I am hearing?

17 MR. MILLER: Well, we have a problem with the
18 helmet design.

19 THE COURT: But what you said is, "if there was
20 ever a suggestion of a license, it was buy our inserts,
21 use Koroyd, then we get all this stuff we are trying to
22 maintain through a preliminary injunction." But it seems
23 there was no problem with their helmets other than the
24 inserts; is that correct? Is that what is bringing this
25 to this Court is the insert in the helmet?

1 MR. MILLER: No, I don't want to you misunderstand.
2 I am not saying Koroyd actually offered to license them to
3 use Koroyd, I am not saying that.

4 THE COURT: No, but your argument, essentially, is
5 focusing on the insert, not the helmet. So I am just
6 trying to clarify, is there an issue with respect to the
7 design of the helmet being a violation, other than the
8 insert?

9 MR. MILLER: If the helmet infringes the patent
10 claims, then that is a violation of the patent.

11 THE COURT: Okay. How does the helmet infringe the
12 patent claim?

13 MR. MILLER: That is great point, Your Honor, and
14 let me go back to -- this is how you infringe the patent.
15 There is kind of a simple formula with regard to the
16 way -- the main claim element in this case that's talked
17 about a lot.

18 Up here at the top is claim language. You have "a
19 shock-absorbing insert" that is Koroyd, "positioned in and
20 substantially filling the cavity." So you have one insert
21 in one cavity. And that insert "has to be visible and
22 span across each of the plurality of vents." So somewhere
23 in the helmet, you have to have -- you can have more than
24 one cavity, you can have more than one insert, but
25 somewhere you have got to have this combination of one

1 plus one plus two.

2 You have got to have one insert in one cavity, and
3 the insert is visible and spans across at least two vents.
4 And that is what you have in these images that comes
5 straight from our patent, you can see this patent -- the
6 example in the patent actually has three cavities and three
7 inserts. But to infringe the claim, as long as you have
8 one plus one plus two, you are going to be within the
9 scope of the claims.

10 And you can see that here, this green insert goes
11 into this cavity that I have blue, and that spans these
12 two vents. Now, there are other vents with other
13 cavities. They've tried to argue that you have got to
14 have a single insert spanning every vent in the helmet,
15 which is not true.

16 If that were true, then they would be excluding --
17 the interpretation they are proposing in their
18 non-infringement defense would actually exclude the
19 example given in our patent. And the federal circuit has
20 said very clearly, if you are going to propose a claim
21 construction that excludes the preferred embodiment
22 depicted in the patent, and this is the only embodiment
23 depicted in the patent, that is rarely, if ever, correct.
24 There is a strong presumption it doesn't work.

25 And that is what they are relying on to try and

1 argue non-infringement, is something that the federal
2 circuit has said, that is almost never correct. And at
3 this stage we are talking about likelihoods.

4 So, that simple formula, somewhere in the helmet
5 you need one cavity that has at least two vents in it and
6 at least one insert that spans those two vents; one plus
7 one plus two. And you don't find that in prior art, but
8 you do find that in the infringing helmet. They have this
9 insert, and it substantially fills the cavity. It is not
10 super thin, it fills this cavity, and it spans at least
11 two vents, and that is all you need. That is how you
12 infringe.

13 In our helmet, this is the Smith helmet with
14 Koroyd, we have more than one cavity, but all you need is
15 one cavity that can be filled with an insert and spans at
16 least two vents. This one has four in it. That is the
17 formula.

18 And so they do infringe. And the fact that you
19 have got to have a combination of all of those things in
20 the claims, as we show in Smith's claim charts, Exhibits 2
21 and 3, they meet every element to the claim, so they are
22 infringing.

23 Now, if there is an infringing product in the
24 market, our complaint is it is infringing. They can't do
25 it unless they have a license. And the injunction is

1 necessary to prevent the irreparable harm of the
2 reputational harm, the ingredient branding.

3 If Koroyd chose to license them that they could use
4 Koroyd so that it could get the benefit of that
5 reputational benefit, that is Koroyd's choice, but that
6 doesn't mean that there is not a problem with the helmet
7 in general, it just means you have got to work with the
8 patent owners and have permission to do what you are
9 doing. And this isn't just about money, the permission
10 you would need is something that would benefit us from a
11 reputational and future business opportunity standpoint.
12 There is a difference.

13 I do need to point out, Your Honor, when you said
14 that you think that we don't dispute that the heightened
15 standard applies, we do speak --

16 THE COURT: Well, you didn't address it, so I
17 always assume if you don't address it, you are conceding
18 it.

19 MR. MILLER: We did address it in a section of our
20 reply brief based on the status quo issue. This is not
21 something that disrupts the status quo that applies in
22 preliminary injunctions in the Tenth Circuit.

23 Sorry about this, I am jumping around. The status
24 quo, the balance of harm issue, and even the enhanced
25 standard here, the status quo is the last uncontested

1 status between the parties. So that status is Anon
2 WaveCel helmets are not in the marketplace. That is the
3 status quo that applies in the analysis.

4 The Tenth Circuit, in this *Dominion Video* case,
5 explained, if you look, it says "adopting EchoStar's
6 position would imply that any party opposing a preliminary
7 injunction could create a new status quo immediately
8 preceding the litigation merely by changing its conduct
9 towards the adverse party."

10 So the status quo is not the status quo today as
11 the Court considers the motion, it is the status quo that
12 was the last uncontested. It goes back to when we first
13 sent them a demand letter and said stop infringing. That
14 was within a week of us learning that they were planning
15 to launch these helmets; we took immediate action.

16 THE COURT: But it says it is "the last uncontested
17 status."

18 MR. MILLER: Right.

19 THE COURT: So when you sent the demand, that made
20 it contested, did it not? The last uncontested is you
21 were both selling these.

22 MR. MILLER: No, they were not selling them before
23 we sent them a demand letter. We learned that they were
24 planning to sell, and we wanted to stop it from entering
25 the market. So the last uncontested status is they

1 don't -- they are not selling Anon WaveCel helmets through
2 these retailers and in the marketplace in the snow
3 industry.

4 My understanding, and I don't think they've said
5 anything to the contrary, is they launched these helmets
6 in mid-January, but that was after our letter. So the
7 last uncontested status is what existed before we
8 challenged them with our letter.

9 THE COURT: But aren't you seeking mandatory relief
10 -- affirmative relief on them -- your demand essentially
11 is, "ordered Burton to give written notice and copy of the
12 injunction to its distribution retail partners." That
13 requires affirmative action.

14 MR. MILLER: Your Honor, on that one, that part of
15 our injunction, we don't care about. And the Court --
16 what we want is to stop selling.

17 THE COURT: Okay.

18 MR. MILLER: So the injunction we really care about
19 is a prohibitory injunction only, and we would concede the
20 Court doesn't need to enjoin them or force them to give
21 notice of the injunction to anybody.

22 And the injunction wouldn't require them to reach
23 out and do a recall. You know, whatever they have sold,
24 they have sold to date. It just says, "stop making,
25 using, and selling." That is the injunction we really

1 need.

2 THE COURT: All right. But wouldn't that provide
3 you, then, with substantially all of the relief that you
4 could obtain other than the money damages?

5 MR. MILLER: Yes, but I don't think you can just
6 ignore the money damages in this context, or else there
7 would be no -- you would almost never be able to get a
8 preliminary injunction in a patent case, because the
9 injunctive relief is one component of the relief you can
10 get in a patent case, the other component is the damages.

11 And in this case from the Tenth Circuit, when the
12 Court disagreed that the heightened standard applied, the
13 Court said, you would not be getting substantially all of
14 the relief, and noted that the injunction does not address
15 Dominion's claims of exclusive programming and monetary
16 damages.

17 So you can't just ignore that the monetary damages
18 are part of the relief we can get at trial, according to
19 the Tenth Circuit law.

20 THE COURT: All right. You have used up more than
21 20 minutes.

22 MR. MILLER: Okay. By the way, these helmets, Your
23 Honor, are exhibits. They are on our list. They are
24 stipulated exhibits with exhibit numbers on them. So any
25 physical exhibits on our list we can leave in the court

1 after the hearing.

2 THE COURT: Yes, because I would like to review
3 them. You can hand them to Ms. West.

4 MR. MILLER: Okay.

5 MR. ALBERT: Good morning, Your Honor. Again, I am
6 Michael Albert, for Burton.

7 Your Honor, I will skip through the introductory
8 slides fairly quickly because Your Honor has already
9 pointed these issues out in your opening remarks this
10 morning. But, as this Court has recognized, a preliminary
11 injunction is among the most extraordinary and drastic
12 remedies that a court can award.

13 And if the movement requests an injunction that
14 disturbs the status quo or is mandatory or its
15 substantially all the relief -- it is "or," "or," "or," so
16 it is any of those, and in this case we believe it is all
17 three -- then the heightened burden applies.

18 Let me just briefly rebut a point that Mr. Miller
19 made. He argued, I believe, just now that the status quo,
20 he said was, you know, that they thought they got their
21 claim in a few days before we launched our product, or
22 something to that effect. That is not an accurate
23 statement of the order of events, because getting that
24 product to the market is about a 2-year process. The
25 development began in 2019, and deals were already in

1 place.

2 The status quo was that Burton had deals with
3 stores, with brokers, with upstream suppliers and with
4 downstream vendors. That was the status quo.

5 As Your Honor has already noted, the federal
6 circuit makes very clear in *Amazon v. Barnesandnoble*, that
7 the substantial question test applies. What it is saying
8 is if there is even a substantial question as to patent
9 infringement or patent validity -- and here there is more
10 than a substantial question as to both, then a preliminary
11 injunction should be denied for that reason alone.

12 So, what I was going to do here is go through the
13 standard, the background, the non-infringement argument,
14 the invalidity argument, and then get to irreparable harm.
15 I think in interest of time I might vary the order there a
16 little bit just to get to some of the issues Your Honor is
17 asking about.

18 THE COURT: All right.

19 MR. ALBERT: Not much to say about the preliminary
20 injunction factors because Your Honor has articulated
21 them: Likelihood of success, irreparable harm, balance of
22 hardships, and public interest. And we've already talked
23 about the substantial question test.

24 With regard to irreparable harm, this Court,
25 actually, has noted that "speculation or unsubstantiated

1 fear of harm that may occur in the future cannot provide
2 the basis for a preliminary injunction."

3 With regard to the balance of hardships, the
4 federal circuit has noted that "the hardship on a
5 preliminarily-enjoined manufacturer who must withdraw its
6 product from the market before trial can be devastating."
7 And I will get into that more later, but that is exactly
8 what we have here. There is relatively little burden on
9 Smith; this is a crowded market, there are about a dozen
10 other companies in it, whereas the impact on Burton and
11 its customers, its vendors, its upstream and downstream
12 suppliers, would be devastating.

13 That is all set forth in the declaration of
14 Mr. Mark Wakeling, which the Court has, and that
15 declaration has never been rebutted by Smith. They have
16 never denied the facts that are in there.

17 And, lastly, the public interest factor, the public
18 has a very strong interest in guaranteeing that innovative
19 products are available in the market. And one of the
20 things about WaveCel is that it has been recognized in
21 certain studies to prevent traumatic brain injuries
22 through protecting against what are called "rotational
23 forces," which is different than the direct impact
24 protection provided by a pre-existing older product.

25 So there is an innovative aspect to WaveCel which

1 is not covered by the patent. Let me make that very
2 clear, they are alleging that there is an infringement,
3 with which, of course, we strongly disagree, but they
4 don't even allege that the feature of WaveCel that makes
5 it innovative, which is protecting against this rotational
6 injury, is covered by their patent. It is not. There is
7 nothing about that in their patent.

8 Now, at this point, I was going to turn it over to
9 Mr. Strand to walk the Court through the argument of
10 non-infringement and invalidity. I think what I will do
11 instead is skip to the irreparable harm factors.

12 Let me just say a couple of very brief things,
13 though, about non-infringement. Mr. Miller argued that
14 they have met each of the elements to show infringement.
15 But, respectfully, they haven't. Their expert overlooks
16 two of the elements.

17 So, for example, one of the elements is that the
18 WaveCel material, the material that they are alleging is
19 covered by their patent, has to cover each of the vents in
20 the helmet. And the federal circuit has repeatedly made
21 clear, you can't go part way to infringing the patent. To
22 infringe the patent, you have to infringe every element of
23 a claim.

24 And the claim that they are alleging, Claim 1, and
25 then 2, 3, and 7, which are dependent claims, meaning they

1 have all of the same limitations as Claim 1, and then some
2 other ones, those claims all require that the material has
3 to cover every vent, each vent. The Anon helmets do not
4 do that, they just don't. And their expert, in his
5 opening declaration, ignores that issue. He then never
6 came back with any subsequent declaration to rebut that.

7 So, if time is permitting, Mr. Strand will walk the
8 Court through the non-infringement argument, but that one,
9 I think, is very clear. And, at the very least, it is a
10 substantial question, and the burden is on the plaintiffs
11 to show that it isn't.

12 Secondly, with regard to invalidity, we have
13 identified already, in the very limited time that we have
14 had, there has been no discovery, but we have already
15 identified numerous prior art products that invalidates
16 Smith's patent. And, again, we have an expert,
17 Mr. Copeland, with about 40 years of helmet design
18 experience, who has put into the record two declarations
19 that explain that to the Court.

20 And what is particularly notable, I think, with
21 regard to validity, is that there is a complete failure of
22 proof by Smith on that issue. So, what happened here is
23 that they came forward with allegations of infringement,
24 and they said, we will reserve our right to talk about
25 validity at a later time, in response to whatever Burton

1 says.

2 Burton came forward with a declaration, a sworn
3 statement from an expert, showing that the patent was
4 invalid for a host of reasons. Smith never rebutted that.
5 They never took advantage of the opportunity that they
6 said that they were reserving to come back and put in a
7 counter-declaration from an expert to say the opposite.
8 So, not only do we have a substantial question, we
9 actually have an unrebutted one.

10 But, I said I would turn first to the irreparable
11 harm issue. If you can go to slide 60, please. So why is
12 there no irreparable harm? First of all, there is the
13 issue, and Your Honor asked about this earlier, which is
14 the plaintiffs' willingness to license. But, let me just
15 pause for a moment on the relevant federal circuit case,
16 which is *High Tech Medical Instrumentation, Inc., v. New*
17 *Image Industries, Inc.*, because what the federal circuit
18 actually said here is interesting. They said plaintiff's
19 apparent willingness to grant the license, that is enough
20 to say that there is no compelling need for an injunction.

21 You don't have to have a written license. It
22 doesn't have to have all of the terms fleshed out. They
23 don't have to have said how much money they want or how
24 many products they are allowed to sell or anything like
25 that. If they even appear to be willing to grant us a

1 license, the federal circuit says that is enough to deny
2 an injunction.

3 Now, what are the facts? I believe Mr. Miller
4 said -- I think I wrote this down word for word, said
5 "there was never an offer to license the WaveCel helmets."
6 Well, here, Your Honor, we have the January 8th letter, in
7 which the plaintiffs said that "they cannot allow the
8 launch of the infringing helmet to take place without a
9 license to use its patented technology." The clear import
10 of that letter is they were saying, take a license from us
11 and we will allow you to use our technology.

12 Three days later they sent another letter, "Burton
13 may only carry out acts restricted by the patent in
14 relation to the infringing helmets after receiving
15 appropriate license from Koroyd." Any reader, and
16 certainly Burton, reading that letter says to themselves,
17 well, the plaintiffs are asking us to take a license.
18 They are certainly showing at least an apparent
19 willingness to do that.

20 Again, February 15th, another letter, they said
21 "let's explore a viable commercial settlement option."
22 Well, what is a commercial settlement option? It's money.
23 It's an exchange of money for certain rights to do certain
24 things.

25 And, lastly, we have the language that was quoted

1 earlier, "Koroyd would consider a settlement that allows
2 for disposal of current stock under a global license."

3 The word "license" appears four times.

4 There was also a phone call, but we don't need to
5 get into that because I think there is a dispute, and we
6 will stick to the undisputed facts in each of these
7 letters.

8 Now, let me turn to the issue of delay, because in
9 *Apple v. Samsung*, the federal circuit said, "delay in
10 bringing an infringement action and seeking a preliminary
11 injunction are factors that can suggest that the patentee
12 is not irreparably harmed."

13 Well, here they delayed for about 6 months. These
14 letters go back to January. They knew Burton was selling
15 these products, but they waited 6 months to even bring a
16 lawsuit. And I didn't cite all of the cases here, but
17 there is a long list of them on pages 17 and 18 of
18 Burton's opposition, Your Honor, that say, you know, a few
19 weeks can be enough of a delay to deny a preliminary
20 injunction, a couple of months can be enough, so certainly
21 6 months.

22 And what do they say in response? They said, well,
23 we were negotiating a settlement. Well, not exactly.
24 There was some negotiations in the sense that they sent
25 those four letters that we talked about and there were a

1 couple phone calls, but an interesting parallel to this
2 case, shown at the bottom of slide 65 here, where the
3 Court said, "although settlement discussions might entail
4 some delay in seeking injunctive relief, it is difficult
5 to see how they would support plaintiffs' delay of over 6
6 months."

7 Now, another thing that the federal circuit has
8 said in *Polymer Technologies*, is if you fail to bring suit
9 against other potential infringers, that can also be
10 relevant to analyzing whether you are irreparably harmed.

11 Well, that is exactly what happened here. Smith
12 alleges that Trek Bicycle Company, which is a completely
13 unrelated corporation, having nothing to do with Burton,
14 Trek Bicycle Company, they say, infringes their patent.
15 They said that in their motion at page 22.

16 Well, if that is true, then that is a company that
17 they haven't gone after for over a year. Their patent
18 issued in August of 2020. Here we are in October of 2021,
19 they haven't sued them. That is a delay of a year and 3
20 months.

21 And in this case, actually the Court said, we are a
22 larger competitor -- Trek is much larger than Burton.
23 "Where a larger competitor remains free to violate the
24 patent, the Court concludes that these actions weaken
25 plaintiffs' irreparable harm argument."

1 THE COURT: Now, with respect to Trek, the patent
2 hadn't yet issued at that time when those helmets came
3 out? Doesn't that matter.

4 MR. ALBERT: So, I am glad you asked that, Your
5 Honor, because there was something in plaintiffs' reply,
6 at page 12, that I wanted to correct the record on, which
7 they said "Burton's argument that the failure to bring an
8 action against Trek in 2016 defeats irreparable harm."
9 Respectfully, that is not what we argued.

10 Of course they couldn't have pursued it in 2016,
11 their patent didn't issue until 2020. That is not what we
12 said. What we said is the language shown at the bottom.
13 "They failed to take any action against Trek since the 373
14 patent issued in August of 2020," a one-year delay. That
15 is what we did say. And that is this is one-year delay
16 since the patent issued in August. They could have filed
17 that suit the day the patent issued or the next day, and
18 they didn't, and still haven't to this day, as far as I
19 know.

20 Yet another factor in looking at irreparable harm
21 is whether it is a crowded market. This is a very crowded
22 market. There are about a dozen other companies out
23 there. And this is undisputed, that these companies are
24 out there selling competing products. They compete in a
25 very crowded multi-player market.

1 And, I think most fundamentally, what it comes
2 right down to, is the plaintiffs have not put in any
3 evidence before this Court so far evidencing even a single
4 lost sale to Burton.

5 Now, this is just more evidence of the crowded
6 market. The companies listed on the right actually appear
7 in Mr. Sours' declaration, that is the gentleman sitting
8 here.

9 So, what do they argue? Well, I am going to walk
10 through a couple of their statements in a moment.
11 Essentially, they argue that someone else's actions, Trek,
12 has caused them harm. But, again, Trek and Burton are
13 unrelated companies.

14 They present no evidence that the entry of Burton's
15 Anon helmets prevented them from getting any marketing
16 opportunities. No evidence that Burton's helmets are
17 involved in any lawsuits. No evidence that Burton's
18 helmets have received any bad press resulting from that
19 lawsuit.

20 So this is the quote from the customer. They said,
21 one major retail -- sorry, this isn't a quote, this is a
22 paraphrase. They said one major retailer has already told
23 Smith there is no opportunity to highlight Koroyd in
24 either snow or bike helmets as long as the infringing
25 WaveCel helmets are available. But, what they didn't say

1 this morning is that this was from 2019. This is 2 years
2 before Burton put those products on the market. This
3 customer was not talking about Burton's Anon helmets that
4 are the subject of this case. That wasn't the issue.
5 They were talking about other helmets that were in the
6 market at that time, and that is not something Burton is
7 responsible for. In fact, they were talking about the
8 Trek helmets.

9 And, again, in this quote they say "plaintiffs'
10 reputation stands at risk of irreparable tarnishment
11 because there is a spillover effect because of this
12 highly-publicized class action lawsuit." But that is not
13 a lawsuit against Burton, that is a lawsuit against Trek,
14 a different company.

15 And, again, they say "Koroyd has already lost one
16 potential partner who was scared off by the pad PR."
17 Again, that is about Trek's case, not Burton.

18 Again, they say, "as long as the Trek helmet with
19 the WaveCel technology remains in the store, plaintiffs'
20 products will not be sold." Burton has no responsibility
21 for the Trek helmet. That is not irreparable harm arising
22 out of this case.

23 I want to briefly address some of the other issues
24 that they raised, and I think they are distractions. The
25 Court pointed out this morning, this is a patent case;

1 that is the only issue before the Court. We are not
2 talking about trade dress or similar advertising. They
3 make allegations about those, and I do feel some
4 responsibility to point out some of the errors in those,
5 but that is not the issue before the Court.

6 But, you know, they claim that we took their term,
7 "crumple zone." The term "crumple zone" has been in use
8 for 70 years. I think it began in the automobile market
9 in Germany.

10 You know, they say, well, our helmets are black and
11 green. As you can see on the left, Your Honor, there is a
12 wide variety of helmets out there in the snow sports
13 industry that are black and green; it just happens to be a
14 very popular color combination right now.

15 They claim that Burton is using the same
16 manufacturer in China and the same animation artist that
17 Smith is using. Now, I will say that is a true statement,
18 but the reason it is, is because Burton was using both of
19 them first, and it was Smith who came along and started
20 doing it afterwards.

21 The evidence, and the only evidence on this issue,
22 is in Mr. Wakeling's declaration, which stands unrebutted,
23 in which he says, "Burton has been using this factory" --
24 and we are talking the factory in China -- "to manufacture
25 Burton helmets since 2012." Almost a decade they have

1 been using them. It has nothing to do with these helmets
2 that just came out. They are just continuing to use the
3 factory they have been using for a decade.

4 And, as to an animation artist by the name of Mark
5 Cernosia, he was, until recently, a Burton employee. He
6 worked for Burton before he did the work that Smith hired
7 him to do. So this is not Burton taking their factory or
8 animation artist, it is actually the other way around.
9 But, again, none of this relevant.

10 Another thing that they have to prove to show
11 irreparable harm is that they need to show that there is a
12 causal nexus between the harm and the alleged
13 infringement. Now, what does that mean? Well, what it
14 means that the harm, whatever it is that they have
15 alleged, and I don't think they have shown any, but even
16 if they have, they would have to show that that harm
17 didn't come from just the fact that Burton put these
18 helmets on the market, it would have to come from a
19 specific similarity between the Burton helmets and what is
20 in their patent.

21 Now, what we have seen, though, is that the benefit
22 of the market, what the market is interested in with
23 regard to WaveCel in helmets, is its ability to reduce
24 rotational force. That is shown in the middle highlighted
25 line in this quotation. That is not in their patent.

1 What is driving interest in WaveCel in the marketplace is
2 that rotational force reduction. And so there is no nexus
3 between any harm that they might have pointed to, if they
4 pointed to any, and anything in their patent.

5 I am going to skip over inequitable conduct, it is
6 discussed kind of down in the weeds, it is in our papers,
7 and let me just get to a couple of final points on
8 irreparable harm.

9 They say, well, they are entitled to show evidence
10 of price erosion, loss of goodwill, damage to business
11 reputation, or loss of business opportunities. Well, we
12 don't dispute that they are entitled to show that, but
13 they haven't.

14 So, for example, let's take price erosion. Their
15 own declarations, their own statements, the two quotes at
16 the bottom here are from their motion and their witness,
17 both show that prices in this market have actually gone up
18 since Burton came in, not down. No price erosion.

19 What about loss of goodwill? Again, they haven't
20 shown that. They have only shown losses relating -- they
21 claim that they have shown losses relating to Trek; that
22 Trek is somehow interfering with them, but they didn't sue
23 Trek.

24 You know, they've made these allegations that we've
25 talked about earlier about similar marketing schemes.

1 First of all, the Anon helmets are actually sold in a wide
2 range of colors, they are not just black and green.

3 Okay, what about business reputation? Again, we
4 have talked about this. This is with regard to the
5 lawsuit against Trek, not against Burton. And that
6 quotation you have seen relating to the customer also
7 relates to Trek.

8 And let me just say that in terms of the balance of
9 harms, we have put in extensive evidence, Mr. Wakeling's
10 declaration, in particular, that catalogs it, of the
11 impact that a preliminary injunction would have on Burton.
12 Loss of jobs to employees, not just at Burton, itself,
13 although that would be substantial, but at customers, at
14 upstream suppliers, at vendors, at brokers, at ski resorts
15 all across the country, where their products are getting
16 ready to be sold. Reputational harm. And all of that
17 balanced against what, some speculation by the plaintiffs
18 that perhaps harm might occur, with no evidence that it
19 has, in a very private market.

20 Your Honor asked a couple of questions, and I want
21 to make sure I touch on them, but let me say just one more
22 thing. Public interest. The public interest -- and,
23 again, I talked about this earlier. The consumers are
24 interested in WaveCel because it reduces this head
25 acceleration and rotational force injuries resulting in

1 trauma brain injuries. And what the federal circuit has
2 said in cases like *Celgard*, is the public has a very
3 strong interest in guaranteeing that innovative products
4 are available in the market.

5 I would just like to answer two questions that the
6 Court asked, and then with any remaining time, I would
7 turn it over to Mr. Strand.

8 The question was, is our design based on Smith's
9 design? Absolutely not. We don't believe there is any
10 evidence in the record of that, and we don't believe it is
11 true. Burton is an innovator. I believe Burton is
12 actually the company that introduced snowboarding to the
13 United States. There is some slides on that, I think, in
14 Mr. Strand's presentation. So, they have no interest in
15 copying anyone else, and we don't believe there is any
16 evidence that they did.

17 Again, we cited the fact that no customer is
18 refusing to sell products because of the Burton helmets.
19 The only quote they have is from 2019, two years before
20 these products were on the market.

21 And I think there was another question as to
22 timing. Yes, so Burton partnered with WaveCel in 2019.
23 And my understanding is at that time they did not have any
24 knowledge -- I don't think there is anything one way or
25 another in the record, but Your Honor asked the question.

1 So, to the best of my knowledge, they had no knowledge of
2 the patent, it certainly hadn't issued yet.

3 Unless the Court has other questions with regard to
4 irreparable harm, I would like to allow Mr. Strand a few
5 minutes to talk about the infringement and validity
6 issues.

7 THE COURT: All right. I do not. Thank you very
8 much.

9 MR. ALBERT: Thank you.

10 THE COURT: You have about 10 minutes left.

11 MR. STRAND: Thank you, Your Honor.

12 Good morning, Your Honor. When we are looking at
13 infringement here, obviously it is the plaintiffs' burden
14 to show infringement, and they have simply failed to do so
15 on a couple elements that are within the claim.

16 First of all, we have to look at who the parties
17 are and who is putting forth the evidence of infringement
18 here. Copeland is our declarant and our expert talking
19 about infringement, and he talks about invalidity, as
20 well. He is an extremely experienced helmet designer who
21 has been in the industry for over 40 years designing
22 helmets for a wide variety of snow sports and utility and
23 construction and everything, including even rodeos.

24 And the declarant for plaintiffs is David Smith,
25 who is a mechanical engineer, who has no evidence of any

1 experience whatsoever with helmet design or these patents
2 before him.

3 There are two limitations that the plaintiffs
4 overlook on infringement, and they are highlighted here.
5 There is the yellow set and then the kind of greenish-blue
6 set. The first set I will talk about is the plurality of
7 vents and what that means here and what has to be applied.

8 The key here is that every word in a claim is very
9 important to the claim, and the federal circuit says you
10 can't just dismiss them because they are there, you have
11 to actually give a meaning, in fact, to all terms in the
12 claim.

13 This is a graphic from Smith's -- excuse me,
14 plaintiffs' declarant, Mr. Smith, the expert, his claim
15 chart, and you will see that he highlights throughout his
16 claim chart the word he wishes to analyze. Here, the
17 shell in red and then the other remaining first vent,
18 second vent in yellow. What he doesn't analyze is the
19 black vents, which is a comprising of a plurality of vents
20 including, and that language becomes very important as it
21 goes through because the plurality of vents is referenced
22 throughout the claim and has certain elements.

23 So, basically what -- the way the plaintiffs want
24 you to read the patent is eliminating the plurality of
25 vents. They basically want to say that as long as there

1 is a first and second vent, and then that is enough. You
2 can have more, but they are not part of this, and if you
3 have the first and second, that is it throughout the
4 claim. But that would totally dismiss the idea of having
5 a plurality of vents, including in the first part of the
6 claim.

7 And you will see this if you go throughout. It
8 says "a plurality of vents," and then it refers later in
9 the claim to "the plurality of vents." And then later on
10 "to each of the plurality of vents." And, as Mr. Copeland
11 testified in his declaration, our expert, they are
12 ignoring the other vents that are on the Anon helmets,
13 including the third and fourth vents that are circled in
14 green here that are not covered with the WaveCel material.

15 And this interpretation is consistent with how
16 other courts have interpreted similar type of phrases,
17 such as "each" and "every" including the *Mangosoft* case,
18 talking about how in the same type of structure you have a
19 something with a plurality of something and then there are
20 smaller definitions of that.

21 The same thing in the *Constructive Designs* case,
22 that looking at even general English dictionaries of what
23 "every" and "each" mean, that when you say "each of
24 plurality of users," it has to be every one of the
25 plurality of users. Here, when it says, "each of the

1 plurality of vents," it has to be every one of the
2 plurality of vents. And WaveCel does not cover these
3 other vents that are on the helmet, towards the back and
4 the bottom of the Anon helmets.

5 And they knew how to -- they were very specific
6 throughout their claim drafting. Remember, the
7 Smith drafter -- excuse me, plaintiffs drafted these
8 claims, and they could draft them anyway they wanted.

9 Here, when they wanted to refer specifically to the
10 first opening and the second, either the first vent or the
11 second vent, they do so. As you see here in green, later
12 in the claim, they do actually refer back to those. They
13 could have used that same language at the bottom here,
14 instead of "each of the first and second of vents," but
15 they don't, they refer back to "each of the plurality of
16 vents," which is a broader, bigger circle than the smaller
17 subsets of the first and second vents.

18 The second element that the plaintiffs overlook on
19 the limitation of infringement is the longitudinal ends
20 within a perimeter, again saying, here is Smith's
21 declaration from the plaintiffs, and the black words are
22 the ones he doesn't address in his expert report, he just
23 talks about the green and the orange lettering. He is
24 ignoring the first longitudinal ends and what these means,
25 as being the longitudinal ends positioned within the

1 perimeter.

2 What they want to do is read in the words basically
3 wherein the portion of the first longitudinal end is
4 visible within these vents, as opposed to saying that the
5 entire longitudinal end needs to be visible within these
6 vents, instead of just a portion of. They want you to
7 read in those. And there is no basis for reading in a
8 portion of based on the spec. If you look at spec and the
9 images, all of them show complete ends through the vents.

10 And if they wanted -- again, it is same thing.
11 They have referred to portions of the things throughout
12 the claim. They know how to talk about less than the
13 complete end or less than the complete substance within
14 the claim; they use it when referring to the
15 shock-absorbing liner, and they say "wherein at least a
16 portion of the shock-absorbing liner is positioned."
17 Here, they could have said, "wherein a portion of the
18 first longitudinal end," but they don't do so.

19 And here this is Smith's helmet, you see that the
20 claim does cover their product here by showing a complete
21 longitudinal end in the vents here, unlike our helmet.

22 Now, this is a piece of WaveCel pictured here
23 outside of the helmet, as counsel removed it from the
24 helmet, and you can see all these wavy triangles. And in
25 ours you see in the picture, you don't see the complete

1 ends, you just see portions of it. Yes, you do see the
2 WaveCel material through the vents, but you do not see the
3 complete longitudinal ends of any one or even multiple --
4 it requires a plurality of the ends, actually, and it
5 doesn't have even one complete end shown through the
6 vents.

7 There also are substantial questions of validity on
8 this patent, as well. As Mr. Albert referred to already,
9 there are several pieces of prior art that have been
10 raised as potential invalidity arguments here by
11 Mr. Copeland in the short time he was given to prepare his
12 declaration and analyze the validity of this patent.

13 The first one is the Striker helmet, which, as you
14 see at the bottom there, the material is sticking through
15 the bottom, and a series of other patents that
16 Mr. Copeland analyzed in-depth to show how they either
17 anticipate the claims or make it obvious and invalid.

18 And, again, Mr. Copeland has 40 years of experience
19 as an industrial designer and has five patents on helmets
20 and has been designing helmets throughout the industry and
21 has actually served on boards to figure out what the head
22 protection standards are for particular helmets.

23 And, again, as Mr. Albert said, it is their burden
24 to present any contrary evidence on this issue. We raised
25 a substantial question of invalidity in our opening

1 opposition paper with Mr. Copeland's declaration. They
2 responded to that lengthy declaration, his analysis, only
3 with attorney argument.

4 Even though Mr. Smith said he reserved his right to
5 supplement or amend or come back with additional opinions,
6 they didn't bring forth another opinion of Mr. Smith nor
7 any other expert as it goes to invalidity, all they have
8 is attorney argument, trying to poke holes in
9 Mr. Copeland's detailed expert analysis.

10 The first piece of prior art that Mr. Copeland
11 relies on is the Striker helmet. Their main arguments on
12 the Striker helmet is that the shock-absorbing inserts --
13 they say there is multiple of them. But, as we showed in
14 our reply brief and the second Copeland declaration, that
15 the piece that is the shock-absorbing insert actually is
16 one piece. You will see in the bottom left-hand image
17 there, there are two little pieces of plastic coming
18 across. And then in the top image with red background, it
19 is actually one piece of plastic that spans across the
20 cavity and the vents.

21 And, again, the structure of this patent -- of this
22 Striker helmet is exactly the same as it presents in the
23 patent. You have an outer shell, and then you have foam,
24 and you have a honeycomb structure with the foam in
25 between them. And that is exactly the same structure you

1 have in the claim asserted here.

2 Muskovitz also renders the patent obvious. Here --
3 forgive the glaring colors here, it is a little bright.
4 But the blue -- these colors match what we used throughout
5 the briefing. The blue is the shell of the helmet. The
6 red is the EPS foam or the more tradition foam that one
7 would use in a helmet that you see on a daily basis. The
8 green is the insert that Mr. Copeland talked about and
9 that the patent talked about, being inserted into the
10 cavity, highlighted in the purple here. And then the
11 orange piece that is highlighted here is just a lever to
12 slide up and down on the vent so one could open and close
13 the vent. As you will see on the image in figure 1 on the
14 left, it is the same orange triangle piece that can slide
15 up and down with a closed -- an ability to close and open
16 the vents.

17 Now, they make two arguments, basically, as to why
18 they think Muskovitz doesn't raise a substantial question.
19 First, they argue it's cumulative of other art that was
20 before the patent office during the prosecution. And,
21 second of all, they say that it doesn't disclose
22 spanning -- the insert spanning across a portion of a
23 plurality of vents; in other words, more than one vent.

24 Now, again, both of these are attorney arguments.
25 These are not supported by any expert testimony. And, as

1 you are well aware, Your Honor, the patents need to be
2 analyzed from the view of one of skill in the art.
3 Obviousness, anticipation, and infringement, are all
4 supposed to viewed from one of skill in the art, and all
5 we have here is attorney testimony about it, not expert
6 declarations, such as Mr. Copeland.

7 THE COURT: All right. Your time is up.

8 MR. STRAND: Thank you, Your Honor.

9 MR. MILLER: I will do my best here, Your Honor,
10 with the 10 minutes I have.

11 So, with regard to their invalidity defenses on the
12 Striker helmet and things, you know, Mr. Copeland is the
13 expert they put forward, but he didn't -- what he
14 represented was contrary to the prior art, itself. We
15 don't need an expert, we have the prior art -- this isn't
16 complex prior art -- and we have the patent claim.
17 Remember, the patent claims require the insert to fill the
18 cavity -- substantially fill the cavity.

19 These are the things from our patent, the examples
20 of filling the cavity. You can see the inserts with the
21 hash lines fill the cavity within the foam liner. This is
22 the accused infringing product. You have got like a 15
23 millimeter cutout cavity there in the foam liner, and it
24 is filled with the insert.

25 What you have in Striker is this cavity in blue,

1 that is what Mr. Copeland calls the cavity. 80, 90
2 percent of this cavity is empty. Whatever they call this
3 insert, we think at trial this idea of this being a
4 shock-absorbing insert is going to fail. But even if you
5 accept it here, that is not filling the cavity. The
6 cavity is almost all empty.

7 So, Striker does not anticipate, because to
8 anticipate, you basically have to be something that would
9 infringe the patent if it came after the patent. This
10 doesn't come close. And our briefing talks about all
11 kinds of other reasons Striker fails the claims.

12 Interestingly, there is not a single explanation
13 from Copeland or Burton in their briefing about how it
14 fills the cavity other than they just say, here is the
15 insert, and it fills the cavity. They don't explain how
16 this is supposed to be filling that cavity, when it
17 doesn't.

18 Muskovitz. The big problem with Mr. Copeland and
19 Muskovitz is he puts all this coloring on here, and the
20 coloring is directed by what our patent claims say. It
21 contradicts the language and the written description of
22 Muskovitz.

23 What does Muskovitz actually say about Figure 10
24 when it is not color coded? It says that "the insert
25 piece fits within the recess in a matching relationship."

1 So this insert, No. 26, fits in there in a matching
2 relationship. And it also says it's not sized to fill the
3 recess because you want to maintain the creation of vent
4 space.

5 Notice, there is this dotted fill-in part here and
6 here, but in the middle of item 26, there is a void, it is
7 empty, and it aligns with the vents, which means the
8 insert material, itself, is not going to be visible
9 through that vent and fill and span across that vent as
10 the claims allow.

11 But, what Mr. Copeland does, is he just
12 gratuitously highlights the whole thing green and makes it
13 look like it is one solid thing. If you followed the
14 language in the patent, the purple outline would actually
15 be the entire cavity, like it is on the right, and there
16 would be a void in that insert that aligns with that vent;
17 so you don't have an insert filling the cavity, and you
18 don't have an insert that is visible through and spans
19 across the vents.

20 Copeland and Burton never explained, they don't
21 cite to the actual language of Muskovitz to justify their
22 color coding. This is the right color coding, and it is
23 based on the actual language. They like to cite this word
24 "fits" in that paragraph, and they ignore the part that
25 says it does not fill the cavity. Fit is different. It

1 can be small enough to fit in there. It doesn't mean it
2 substantially fills it, and it doesn't mean it spans
3 across the vents.

4 So there is reason to say that just because you
5 have an expert doesn't mean you meet your burden, and it
6 doesn't mean we don't meet our burden, because the federal
7 circuit has made it very clear right here, the federal
8 circuit has rejected obviousness determinations based on
9 conclusory and unsupported expert testimony. And when the
10 expert is using the patent as a roadmap -- which is what
11 Copeland did. He used our patent claim as a roadmap as to
12 how he should highlight the prior art figures. He wasn't
13 using the disclosure in Muskovitz to drive his
14 highlighting, it contradicted the prior art.

15 When you are doing hindsight bias and using the
16 patent as a roadmap, it doesn't matter if you have an
17 expert saying this stuff, it doesn't support an
18 obviousness defense.

19 The evidence that they presented with Mr. Copeland
20 includes this Caserta research about motorcycle helmets.
21 What they don't identify and highlight here is in that
22 research, he actually tested some honeycombs in a
23 motorcycle helmet. One of the results in one of the
24 locations says there was worsening of protection, and says
25 that was probably caused by contact between the rear

1 ventilation area and the honeycombs.

2 So, what they are -- the evidence they presented is
3 something that discourages the use of a honeycomb in the
4 location of a vent; it says that is problematic. And if
5 your invention is going against the accepted wisdom in the
6 industry, that is not obviousness. So their own prior art
7 evidence actually teaches away from our patent claim, and
8 that is carving out a cavity, putting in the honeycomb or
9 insert that spans across the vents. Nothing in the prior
10 art suggests that. Muskovitz teaches away from it. The
11 Caserta research teaches away from it.

12 On the balance of harms, I haven't said anything
13 about that yet, but I do want to point out that the
14 balance of harms is like this. Smith and Koroyd have been
15 building their reputations with this patented technology
16 since 2013 and '14. So they have been in the market
17 highlighting this since then. Our patent didn't come out
18 until 2020, but we filed it back in 2013. The Patent
19 Office sometimes takes a long time. But that is what we
20 are protecting.

21 They barely launched it mid-season in January this
22 year, the infringing products, and they haven't yet gotten
23 into the hot season yet of the pre-snow season, which is
24 upon us right now. So the relative burdens, there is a
25 huge difference. Burton -- as they said, Burton started

1 the snowboarding industry. That is great. In fact, they
2 sell snowboards. They sell tons of snowboard equipment.

3 These two helmets are just a small portion of their
4 entire business. In fact, it is not even all of their
5 helmets. They sell all kind of snowboard helmets that
6 don't have the infringing technology. So the burden on
7 them of just stopping cannot be that big. Mr. Wakeling's
8 declaration is not support by any objective documents, it
9 is just his conclusory statements.

10 On the other side, Mr. Sours and Mr. Lloyd, on
11 their reputational harm, have emails, have written
12 magazine articles, and they can't say that what happened
13 in the bike industry with Trek is irrelevant, it
14 foreshadows what is going to happen in the snow industry
15 if we don't get an injunction.

16 And these two parties -- the law is very clear, you
17 are not required to sue every infringer at the same time.
18 That is an onerous burden on companies of this size.
19 Smith's core market is not the biking industry. They
20 started in the snow industry. These patented helmets were
21 the first time they launched helmets in the biking
22 industry.

23 Now, they care about that biking market, but
24 because our patent hadn't issued, it is almost like the
25 cat was out of the bag in that market. In this market,

1 their critical snow market, where they have the biggest
2 reputation, they are entitled to choose to protect this
3 one first if they can't sue everybody at the same time.
4 And the law says that does not negate the idea of
5 irreparable harm.

6 But, what happened in the bike industry is very
7 good evidence foreshadowing what is likely to happen here,
8 especially when that retailer didn't just say, we are
9 going to not let you have just POP marketing in biking,
10 they said, or snow. And the Trek helmet is not a snow
11 helmet. So they are clearly knowing that we are going to
12 promote WaveCel in the snow helmet market, as well, at
13 some point.

14 THE COURT: All right. Thank you very much.

15 MR. MILLER: Thank you.

16 THE COURT: All right. The Court is going to take
17 a brief recess to go over a lot of what I've heard today,
18 and to allow Ms. Martinez to rest her fingers.

19 We will be in recess until approximately 10:30.

20 (A break is taken from 10:13 a.m. to 10:40 a.m.)

21 THE COURT: You may be seated.

22 All right. I need to correct, I stated the wrong
23 case name at the very beginning. It is actually
24 21-cv-2112. I apologize for that.

25 Before I get to my ruling, I just want to thank

1 counsel. I will tell you that this is probably the best
2 presentation that I have had on one of these cases that
3 was thorough, addressed my questions, and I know I cut
4 your feet out from under you, or your legs out from under
5 you when I said "half an hour," because I think you all
6 had anticipated much longer. But I had reviewed the
7 materials very closely. And I just want to say it was
8 expert lawyering, some of the best lawyering I have seen
9 in my 15 years on the bench, and I just want to
10 congratulate you on that.

11 All right. With respect to my ruling here, first,
12 the standard of scrutiny, the Tenth Circuit has identified
13 three types of preliminary injunctions that are
14 specifically disfavored. Those are injunctions that alter
15 the status quo, injunctions that require the non-moving
16 party to take affirmative action, and injunctions
17 affording the movement all of the relief that it could
18 recover at the conclusion of a full trial on the merits.
19 That is from *Schrier v. University Colorado*, 427 F.3d
20 1253, a Tenth Circuit, 2005 case.

21 Where a movant seeks one of these three types of
22 disfavored injunctions, its motion must be more closely
23 scrutinized to assure that the exigencies of the case
24 support the granting of a remedy that is extraordinary
25 even in the normal course. And that is from *O Centro*

1 *Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389
2 F.3d 973, Tenth Circuit, 2004.

3 As an initial matter, this Court finds that
4 plaintiffs are seeking a specifically disfavored
5 injunction, and this injunction is subject to a heightened
6 standard of review. The injunction plaintiffs seek would
7 require mandatory relief by forcing Burton to take
8 affirmative action to back out of deals that it has
9 already made with retailers, and it would provide
10 substantially all of the relief plaintiffs could obtain
11 after trial. Therefore, the motion is subject to
12 heightened scrutiny.

13 Now I will turn to the four-factor test for
14 issuance of a preliminary injunction, and I am going to
15 begin with the second factor, irreparable harm, because it
16 is well established that a showing of irreparable harm is
17 the single most important prerequisite for the issuance of
18 a preliminary injunction.

19 If plaintiff fails to meet the burden of
20 establishing irreparable harm, the Court need not address
21 the remaining preliminary injunction factors. That is
22 from *New Mexico Department of Game and Fish v. U.S.*
23 *Department of the Interior*, 854 F.3d 1236, Tenth Circuit,
24 2017.

25 In this case, plaintiffs contend that "if Burton is

1 allowed to continue advertising and selling the infringing
2 Anon WaveCel helmets, plaintiffs' reputation for providing
3 industry-changing innovation will be diluted and the
4 market strength of their product lines will be
5 diminished." In short, their argument is that if an
6 injunction does not issue, they will suffer irreparable
7 harm in the form of reputational damage and damage to
8 business relationships.

9 Burton counters that any harm to plaintiffs is
10 easily re-quantifiable in the form of money damages, and
11 that plaintiffs' irreparable harm argument is undermined
12 by the fact that after learning about the Burton Anon
13 WaveCel helmets, plaintiffs waited more than 6 months to
14 seek an injunction and plaintiffs cannot show a causal
15 nexus between the alleged infringement and the alleged
16 harm.

17 The Court agrees with Burton. A plaintiff suffers
18 irreparable harm when the Court would be unable to grant
19 an effective monetary remedy after a full trial because
20 such damages would be inadequate or difficult to
21 ascertain. That is from *Awad v. Ziriax*, 670 F.3d 1111,
22 Tenth Circuit, 2012.

23 The parties seeking injunctive relief must show
24 that the harm is certain as opposed to theoretical, great,
25 and "of such imminence that there is clear and present

1 need for equitable relief." Again, *Schrier v. University*
2 *of Colorado*.

3 In the context of patent infringement, price
4 erosion, loss of goodwill, damage to reputation, and loss
5 of business opportunities, are all valid grounds for
6 finding irreparable harm. That is from *Celsis in Virto,*
7 *Inc., v. CellzDirect, Inc.*, 664 F.3d 922, Federal Circuit,
8 2012. The Court finds that the plaintiffs have failed to
9 meet this standard.

10 Plaintiffs have presented -- have not presented,
11 rather, sufficient evidence of the reputational damage
12 such as price dilution and loss of market share or
13 negative customer feedback. Although they have provided
14 declarations from Smith Koroyd officers, the Court finds
15 that these declarations are speculative.

16 Further, the Court finds that plaintiffs have not
17 provided sufficient evidence of damage to business
18 relationships with retail partners. Although Smith argues
19 that one of Smith's retailer partners "rejected Smith's
20 pitch to get more high-profile in-store marketing presence
21 to promote Smith Koroyd helmets," plaintiffs did not offer
22 anything but unsupported opinions to suggest that the
23 alleged patent infringement is to blame for this
24 rejection. Furthermore, Burton provided evidence that
25 these assertions related to Trek helmets, not the helmets

1 at issue in this case.

2 "A conclusory declaration is not enough to
3 demonstrate irreparable harm. Courts require more than an
4 unsupported factual conclusions to support such a
5 finding." *Voile Manufacturing Corp v. Dandurand*, 551
6 F.Supp. 2d 1301, District of Utah, 2008.

7 Further, plaintiffs have failed to demonstrate a
8 causal nexus between the alleged infringement and the
9 alleged harm. Although plaintiffs allege that Burton "has
10 been able to dramatically increase its helmet prices
11 compared to its non-WaveCel helmets," they fail to
12 demonstrate that the alleged infringement has any effect
13 on the price, reputation, or sale of the Smith Koroyd
14 helmets, they simply state conclusorily, "there can be no
15 question that all competitive harms caused by the
16 infringing Anon-WaveCel helmets are intimately linked to
17 Burton's unauthorized use of plaintiffs' patented
18 inventions claimed in 373 patent."

19 The Court disagrees and finds that there is, at the
20 very least, a substantial question as to what effect, if
21 any, the Anon helmets have had on the reputation of Smith
22 Koroyd brand helmets. For these reasons, the Court finds
23 that plaintiffs have failed to demonstrate that they will
24 suffer irreparable harm if an injunction is not issued.

25 With respect to -- well, even assuming arguendo,

1 that the plaintiffs could demonstrate an imminent risk of
2 irreparable harm, a preliminary injunction request would
3 still fail on the next preliminary injunction factor,
4 which is the balance of the harms.

5 This factor "is simply a comparison between the
6 injury plaintiff would suffer should no preliminary
7 injunction enter versus the injury defendant and the
8 public would suffer if the preliminary injunction does not
9 enter." *Haggard v. Spine*, 2009 Westlaw 1655030. It was
10 one of my cases, District of Colorado, 2009.

11 The Court finds that this factor would favor
12 Burton. Plaintiffs have not demonstrated that they will
13 suffer a significant adverse impact if an injunction is
14 not granted. If an injunction is not granted, Smith will
15 simply have to compete with one more helmet -- plaintiffs
16 will have to compete with one more helmet in an already
17 crowded market. Burton, by contrast, has shown that an
18 injunction would cause a significant disruption to its
19 business, effectively requiring them to pull out of
20 pre-existing contracts with retailers.

21 Finally, even if I had found differently on the
22 irreparable damages, with respect to the third factor,
23 whether an injunction would adversely affect the public
24 interest, the Court finds that this factor also favors the
25 defendant. The public benefits from having access to a

1 robust competitive market for ski and bike helmets, and
2 such interests would be disserved by awarding an
3 injunction in this case.

4 The defendant makes a strong case that WaveCel
5 provides different or additional protection from lateral
6 forces not provided by Koroyd. Although there is also a
7 public benefit to preventing patent infringement, the
8 Court finds that such interests would be adequately served
9 by an award of monetary damages against the infringing
10 party should that be found at the conclusion of this case.

11 With respect to the likelihood of success on the
12 merits, Burton has raised a substantial question
13 concerning the validity of the 373 patent. Burton makes
14 compelling arguments that the patented invention was
15 contained in the prior art and was obvious in light of
16 other patents. That will need be dissected further at
17 trial.

18 If a defendant "raises a substantial question
19 concerning either infringement or validity; in other
20 words, they assert an infringement or invalidity defenses
21 that the patentee cannot prove 'lacks substantial merit,'
22 that preliminary injunction should not issue." That is
23 from *Amazon.com, Inc. v. Barnsandnoble.com, Inc.*, 239 F.3d
24 1343, Federal Circuit, 2001.

25 This Court's denial, however, of the preliminary

1 injunction in no way diminishes or proposes the
2 possibility that plaintiffs could succeed on the merits at
3 trial.

4 For the reasons just stated, plaintiffs' motion for
5 preliminary injunction is denied. Defendants' motion
6 for leave to file a surreply in opposition to the motion
7 for preliminary injunction is denied as moot.

8 Do you all want to put this on an expedited track,
9 or do you want to just work that through with the
10 magistrate judge in terms of discovery? I assume you are
11 going to want a claims construction hearing, things like
12 that.

13 MR. MILLER: Yes, we would, Your Honor. An
14 expedited track in the trial date would be great.

15 THE COURT: All right. So, what I am going to do
16 -- have you all met at all with the magistrate judge in
17 this case?

18 MR. MILLER: Not yet, no.

19 THE COURT: So my order on this for the minutes,
20 Ms. West, should reflect that the magistrate judge should
21 put this case on an expedited track for the hearings and
22 the trial that will be necessary.

23 COURTROOM DEPUTY: Yes, Your Honor.

24 THE COURT: All right. Is there anything further
25 that you all need to bring up to me?

1 MR. MILLER: Not from plaintiffs.

2 MR. ALBERT: No, Your Honor.

3 THE COURT: All right. Again, thank you very much.

4 It was an enjoyable, actually, experience to watch you

5 all, so spry on your feet, and you did a great job.

6 MR. MILLER: Thank you, Your Honor.

7 MR. ALBERT: Thank you, Your Honor.

8 THE COURT: Court will be in recess.

9 (Proceedings conclude at 10:52 a.m.)

10

11 **R E P O R T E R ' S C E R T I F I C A T E**

12

13 I, Darlene M. Martinez, Official Certified
14 Shorthand Reporter for the United States District Court,
15 District of Colorado, do hereby certify that the foregoing
16 is a true and accurate transcript of the proceedings had
17 as taken stenographically by me at the time and place
18 aforementioned.

19

20 Dated this 4th day of November, 2021.

21

22

23 _____
s/Darlene M. Martinez

24 RMR, CRR

25

*DARLENE M. MARTINEZ, RMR, CRR
United States District Court
For the District of Colorado*